

BRYAN CAVE



Doing Business in the United Kingdom



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The information contained in this guide is correct as of 1 January 2012. The information is general in nature and is intended to provide an overview of the relevant law and legal issues. It does not constitute legal advice with respect to any matter or set of facts. Professional advice should always be obtained before applying any information to particular facts and circumstances.

1. Introduction

About this Guide

This guide provides a general overview of the law applicable to businesses operating in the United Kingdom and in particular, guidance on legal matters to any non UK entity which wants to do business in the UK.

Whether trading in the UK for the first time, expanding an existing UK business or seeking a trading relationship with an existing UK business, Bryan Cave can advise and assist.

Contact Us

We welcome the opportunity to discuss any of the issues raised in this guide or any other questions you might have. If you would like to know more, please get in touch with your usual Bryan Cave contact or any of the Bryan Cave London lawyers listed on the final pages of this guide.

About Bryan Cave

Bryan Cave LLP is a leading business and litigation firm with global reach, a strong reputation and over 135 years of success. We have more than 1,100 lawyers and consulting professionals in 24 offices worldwide. We advise clients at each step of their business cycle and work for a wide variety of business, financial, institutional and individual clients, including publicly held multinational corporations, large and mid-sized privately held companies, partnerships and emerging companies. We pride ourselves on proactive, solution-oriented work.

Bryan Cave has decades of experience representing individual and corporate clients in their activities in Europe, as well as representing European clients in the Americas, Africa, Middle East and Asia. Bryan Cave's London office works closely with the Bryan Cave offices in Germany (Frankfurt and Hamburg), in France (Paris) and with an affiliate in Italy (Milan). The Firm has strong relationships with law firms across the rest of Europe; this enables Bryan Cave to provide a full service to clients on a wide range of multi-jurisdictional issues across Europe.

In addition to its European offices, Bryan Cave has lawyers located in the US and China who have worked and lived in Europe and have broad training and experience with European law. A number of Bryan Cave lawyers located outside Europe practice in a number of European languages and have close personal connections to the cultures of many European countries. In accordance with Bryan Cave's 'one firm' culture these lawyers (and other Bryan Cave lawyers across the firm) work closely and seamlessly with their European colleagues in producing services to clients on all matters relating to Europe.

The United Kingdom

The United Kingdom consists of England, Wales, Scotland and Northern Ireland. There are three separate legal jurisdictions: (i) England and Wales; (ii) Scotland; and (iii) Northern Ireland. The Republic of Ireland (Eire) is not a part of the UK. The laws of England and Wales are essentially the same; for the sake of simplicity we refer only to 'England' in this guide when referring to both. The Channel Islands (which include Jersey and Guernsey) and the Isle of Man form part of the British Isles, but are not part of the United Kingdom; they have their own body of law and tax systems.

The currency of the UK is the pound sterling (£).

The UK is governed by a parliamentary system with central government based in London. The UK parliament consists of a lower house (the House of Commons, made up of elected Members of Parliament) and a higher appointed house (the House of Lords). Legislation is required to be passed by both Houses of Parliament. The Government is formed, after each election, by the party (or parties) which can command an overall majority in the House of Commons.

Devolution has led to the transfer of powers in certain areas of government from central government to separately established Parliaments or Assemblies in Scotland, Wales and Northern Ireland. The extent of devolution is greatest in Scotland. Local government is effected through city and area councils, linked to county boundaries.

English law consists of both common judge made law and statute, with an overlay of certain EU legislation. As explained below, some EU laws will be automatically applicable in any EU Member State. Other EU laws are required to be implemented into local law by the legislative authority in the EU Member State.

The European Union

The European Economic Community, subsequently known as the European Community (the “**EC**”) and now known as the European Union (the “**EU**”), was established in 1957 by the Treaty of Rome. The Treaty of Rome, as amended and supplemented by subsequent treaties, is now known (subsequent to the Treaty of Lisbon 2009) as the Treaty on the Functioning of the European Union (“**TFEU**”) and provides the organisational and functional details of the EU as well as most of the substantive provisions of EU primary law. There remains in effect the Treaty on European Union (the Maastricht Treaty), as amended and supplemented by subsequent Treaties, which essentially sets out the objectives and principles of the EU and provides for the Common Foreign and Security Policy.

The EU is now a union of 27 independent countries, each a “**Member State**”. The European Economic Area (the “**EEA**”) was established on 1 January 1994 among the Member States of the EU, Iceland, Lichtenstein and Norway. Membership of the EEA allows Iceland, Lichtenstein and Norway to participate in the European single market and the free movement of goods and services, subject to certain requirements. Switzerland is not a member of either the EU or the EEA.

The Euro (€) is currently the currency of 17 of the 27 Member States of the European Union.

The EU decision making process involves three main institutions:

- the European Parliament, which is directly elected by EU citizens;
- the Council of the European Union, which represents the individual Member States; and
- the European Commission, which is composed of 27 commissioners, each appointed for five years and representing each Member State.

In principle, the Commission proposes new laws but the Parliament and Council adopt them. The Commission and the Member States then implement them. The Commission also has broad regulatory and administrative powers. The fourth institution, the Court of

Justice, (which comprises the Court of Justice, the General Court and the Civil Service Tribunal) upholds the rule of European Law and the Court of Auditors checks the financing of EU activities. The Court;

- reviews the legality of the acts promulgated by the other EU institutions;
- ensures that each Member State complies with the obligations set out in the Treaties; and
- interprets EU law when requested by a national court of a Member State, so to do.

In addition to the Treaties, EU legislation consists of Regulations, Directives, Decisions and Recommendations/ Opinions.

- A Regulation is a legislative act which is directly applicable in all Member States simultaneously (subject only to certain derogations sometimes granted to new Member States for a transitional period). No further action or legislation is required by the individual Member State, save in certain cases, for sanctions and penalties for non compliance.
- A Directive is a legislative act which requires Member States to achieve a particular result without dictating how they are to achieve that result. Each Member State implements the Directive through national legislation within a specified timetable. Whilst a Directive indicates the terms that should apply, the implementing national legislation may contain differences among Member States.
- A Decision applies only to the particular addressee of the decision (be it one or more Member States, companies or individuals), e.g. in competition law.
- A Recommendation or Opinion is a non-binding declaration.

2. Business Organisations

Any overseas business intending to do business in the UK will need to consider the manner in which it will effect its business in the UK. It may decide to establish a separate UK business entity; the various legal entities which may be used in the UK are summarised below.

If it decides not to create a legal entity in the UK through which to carry on its UK business, it may still be subject to certain requirements under English law; overseas entities selling goods or providing services to customers in the UK (or contemplating such activity) need to consider whether their activities establish a “presence” in the UK giving rise to a liability for UK taxes and or to an obligation to make public filings.

The profits attributable to any branch operation or to any subsidiary or other legal entity carrying on business in the UK will generally be subject to taxation in the UK.

UK establishment of an overseas entity

The fact that an overseas company is carrying on business in the UK does not mean that it has to effect any formal registration; registration of an overseas company is only required where there is some degree of physical presence in the UK (such as a place of business or branch) through which it carries on business. Therefore, the simple export of goods to the UK, where customers in the UK have been sourced through independent sales representatives or independent distributors, will not generally result in a “presence” of an overseas entity for tax or company law purposes. However, the establishment of a fixed or permanent base from which to conduct business in the UK (including engaging a dependent agent with authority to conclude contracts) will constitute a taxable presence or so-called “permanent establishment”. Whether or not an overseas entity has established a permanent establishment (for UK tax and other purposes) is a question of fact in each case.

If an overseas entity has not set up a legal entity in the UK, but has a “permanent establishment”; it will be required to comply with certain registration requirements under the Companies Act 2006 (the “**2006 Act**”) and may be subject to UK tax in connection with the profits of such permanent establishment. Details of the registration procedures and ongoing requirements are outside the scope of this guide. However, an overseas entity with a permanent establishment in the UK will be required to file at the UK Companies

House any accounts of the entity required to be filed under the laws of the country in which it is incorporated and other general information about the overseas entity, including its constitutional documents. Any such documents filed will be a matter of public record. If the overseas entity is not required to file accounts in the country in which it is incorporated, then (i) if it is incorporated in an EEA State, it will not have to file accounts in the UK; or (ii) if it is not incorporated in an EEA State it will have to file accounts based on the 2006 Act, the laws of the country in which it is incorporated or International Accounting Standards.

Establishing a Company

Company law in England and Wales is governed by the 2006 Act. This replaced and substantially amended the provisions of the Companies Act 1985.

In the UK, four main types of companies can be created:

- **private company limited by shares** – the members' liability is limited to the amount, if any, unpaid on the shares allotted to them ("**Limited**");
- **private company limited by guarantee** – the company does not have a share capital. The members' liability is limited to the amount that they have agreed to contribute to the company's assets if it is wound up (normally a nominal amount). This type of company is used principally for charitable organisations and clubs;
- **private unlimited company** – there is no limit to the members' liability; and
- **public limited company** – the members' liability is limited to the amount, if any, unpaid on the shares held by them ("**PLC**"). Only the shares of a PLC can be offered for sale to the general public.

Of the four types of companies referred to above, the most common trading entities established by overseas entities are private companies limited by shares ("**Limited**"), wholly owned by the overseas entity. However, in certain circumstances it may be appropriate for the overseas entity to establish a public limited company ("**PLC**"). Alternatively an overseas entity may seek to acquire all or part of the shares in an existing Limited or PLC.

Certain key differences between a Limited and a PLC are as follows:

	Limited	PLC
Minimum share capital?	£1	£50,000 A PLC must have at least a quarter of the nominal value of each share paid up before it can start trading.
Share currency restrictions?	No A Limited may have different classes of shares denominated in different currencies.	No A PLC must have a minimum of £50,000 issued share capital or the Euro equivalent. It may also have other classes of shares denominated in other currencies.
Minimum number of shareholders?	1	1
Minimum number of directors?	1 (and at least one must be a natural person).	2 (and at least one must be a natural person).
Requirement for a company secretary?	No	Yes
What information must be disclosed?	An Annual Return (giving details of directors and shareholders) must be filed with UK Companies House. Subject to exemptions for companies with lower turnovers, audited annual accounts must be filed with UK Companies House.	In addition to the filing requirements for a Limited, if a PLC is listed on an securities exchange, price sensitive information must be promptly disclosed.
Dividends / Distributions	A Limited can only make distributions (e.g. dividends) out of distributable reserves.	A PLC can also only make distributions (e.g. dividends) out of distributable reserves and a PLC can only pay a dividend if its net assets do not fall below an amount calculated by reference to its share capital and reserves.
Requirement to hold Annual meetings?	No, unless required under its documents of incorporation.	Yes

The following are common characteristics of a Limited and a PLC:

- To form both a Limited and a PLC it is necessary to have a Memorandum of Association setting out the subscriber's intention to form a company and Articles of Association setting out the rules that govern the arrangements between the shareholders and the management of the company by its directors. An application form sets out certain information that must be filed with UK Companies House. Formation of a new company typically takes three to five days, but a premium same day service is available.
- There are no residency or nationality requirements for directors of UK companies.
- Both Limiteds and PLCs have a separate legal personality; the shareholders are not liable for any acts or omissions of the company. Generally the directors are not liable, but see section 3 (Directors' Duties) below.
- Certain actions of the company are subject to shareholder approval. This is either by ordinary resolution (more than 50% of those entitled to vote) or special resolution (requiring a vote in favour of no less than 75% of those entitled to vote). Written resolutions signed by the requisite number of shareholders can be used to avoid convening a meeting, but certain requirements regarding notice and timing must be met.

It is currently possible for a Limited, but not a PLC, to receive flow-through treatment for US tax purposes, by election under the so-called "check the box" rule.

Establishing a Partnership

Another form of trading entity to consider (as an alternative to a company) is a partnership. There are three types of partnership available under English law:

- **General Partnerships ("GP")** – these are unincorporated partnerships in which the partners have unlimited liability for the debts of the partnership. Partners may agree to indemnify each other in respect of liabilities but this has no impact on outside parties who deal with the partnership. GPs are governed by the Partnership Act 1890.
- **Limited Liability Partnerships ("LLP")** – these are incorporated partnerships in which each partner's liability is, in general, limited to his agreed contribution. In the event of the insolvency of an LLP, special claw-back provisions may apply to

the partners in connection with amounts withdrawn in the two years before the commencement of a winding-up and a partner may be liable if guilty of fraudulent or wrongful trading. LLPs are governed by the Limited Liability Partnership Act 2000.

- **Limited Partnerships (“LP”)** – these are unincorporated partnerships in which certain partners have limited liability (‘limited partners’) and at least one ‘general partner’ has unlimited liability (but the general partner may be a limited liability company). Limited partners may lose their limited liability status if they become involved in management of the partnership. LPs are governed by the Limited Partnership Act 1907.

Certain key differences between GPs, LLPs and LPs are as follows:

	GP	LLP	LP
Requirements for establishment?	No formal requirements – partnership formed whenever persons carry on business with a view to profit.	Detailed information must be registered with UK Companies House.	More basic information must be registered with UK Companies House.
Separate legal personality?	No	Yes. The partnership itself can own property and employ individuals.	No
What information must be disclosed?	None	The details of the partnership must be kept updated and accounts must be filed each year.	Only basic details.
Can the partnership be bound by the partners?	Yes	Yes	General partners - yes, but limited partners - no.

The following are common characteristics of GPs, LLPs and LPs:

- There is no minimum capital requirement for English partnerships.
- There are generally no restrictions on who can become a partner, although governing bodies of certain professions may impose their own requirements. Companies can act as partners.

- It is highly desirable for a partnership to be governed by a written partnership agreement. If there is no agreement, provisions in the relevant governing Act will apply; these are often unsatisfactory.
- UK partnerships are treated as transparent for the purposes of taxation of income and gains in the UK. Accordingly, the relevant share of a partner's income and gains will be treated as accruing to, and will be taxed on, each of the individual partners directly. Overseas partnerships will in many cases also be treated as transparent for such tax purposes (or the UK tax authority will be prepared to treat them in such manner), but this should be considered in light of the particular contractual or constitutional arrangements under which the partnership is constituted or operates.

A European Public Company (Societas Europaea ("SE"))

The entities referred to above are subject to English law principles. A relatively new concept, common to Member States of the EU, was introduced in the UK in 2004, namely the "SE". So far, the SE has not been widely used.

An SE is a European public limited company and may be created on registration in any one of the Member States of the EU. Member States must treat an SE as if it is a public limited company formed in accordance with the law of that Member State in which it has its registered office. SEs are subject to certain EU-wide laws, wherever formed, including those relating to share capital, internal regulation, accounts and worker participation. They are subject to national corporate laws in many other respects, for example, in relationship to formation, issue and purchase of shares, taxation and insolvency. SEs must have a minimum share capital of €120,000. Only pre-existing companies with a two-year operating history in different Member States are able to incorporate an SE.

There are several ways of forming an SE:

- Formation by Merger - Two or more public limited companies or existing SEs may merge to form an SE provided at least two of them are governed by the laws of different Member States. The merger may be conducted by acquisition (with the acquiring company becoming an SE) or by the formation of a new company (with the merging companies ceasing to exist).
- Formation of a Holding SE - Two or more private or public limited companies (including existing SEs) formed under the law of a Member State and with a registered office in a Member State may form an SE by promoting the formation of a holding SE.

- Subsidiary SE formed by an existing SE - An existing SE may itself form another SE as a subsidiary company, in which it may be the sole shareholder.
- Formation by transformation of a PLC - A PLC registered in the UK may transform into an SE registered in the UK provided the PLC has (for two years) had a subsidiary governed by the laws of another Member State. The PLC cannot simultaneously transform to an SE and move its registered office to another Member State.

Proposal for a European Private Company

There is currently a consultation paper in the UK which proposes a new European private company called *Societas Privata Europaea* ("SPE"). The proposal is part of a number of measures under the Small Business Act for Europe. The new European private company would offer an alternative form of incorporation for companies, in the hope that SPEs will become more competitive within the EU. An SPE would be a limited liability private company formed by one or more natural persons or legal entities. Where a matter is not governed by regulation or company articles, the national law of the Member State where the SPE has its registered office would apply.

3. Directors' Duties

The role of a company director under English law carries with it very serious responsibilities in the form of duties owed by a director to the company and its shareholders. Directors' duties are governed by a variety of sources including case law, the 2006 Act, a company's constitutional documents and other rules specific to PLCs.

The duties

The general duties of directors, of either public or private companies, have been codified in the 2006 Act. The duties are owed by all executive and non-executive directors and also by those who are not registered as directors, but who act as directors in all but name; that is, shadow directors.

The seven general duties can be summarised as follows:

- 1.** To act in accordance with the company's constitution and only exercise powers for the purpose conferred.
- 2.** To act in a way most likely to promote the success of the company for the benefit of shareholders as a whole.
- 3.** To exercise independent judgement.
- 4.** To exercise reasonable care, skill and diligence.
- 5.** To avoid a situation in which the director has, or could have, a direct or indirect interest that conflicts or possibly may conflict with the interests of the company.
- 6.** Not to accept benefits from a third party.
- 7.** To declare a direct or indirect interest in a proposed transaction or arrangement with the company or in a transaction or arrangement which has already been entered into by the company.

The above duties are not comprehensive; the 2006 Act only codifies the so-called "general duties". They do not cover many other obligations of directors, for example, to prepare accounts and to comply with the rules regarding directors' loans, long-term service contracts and transactions with the company (which must be approved by the company's

shareholders). Furthermore, the 2006 Act does not address directors' duties under competition, criminal, health and safety, environmental and insolvency law. Directors of a quoted PLC are also subject to more stringent duties.

Enforcement, remedies and ratification

The duties of a director are owed to the company and only the company is able to enforce them, although in certain circumstances, the shareholders may be able to bring an action on the company's behalf.

Directors in breach of a duty may find themselves under an obligation to pay damages, to restore property or to account for profits as appropriate and, in certain circumstances, they may have their employment terminated and be disqualified from acting as a director.

It is possible for the company's shareholders to ratify the breach after the event has taken place by passing a resolution. However, the votes of the director concerned and persons connected with him, will not be counted in determining whether or not such a resolution has been passed.

Personal Liability

A director is not generally liable for the acts of a company, but may have personal liability if he has:

- given a personal guarantee;
- acted whilst disqualified as a director;
- traded fraudulently or wrongfully (that is, directors of a company have continued to trade a company past the point where (i) they knew, or ought to have concluded that there was no reasonable prospect of avoiding insolvent liquidation; and (ii) they did not take every step with a view to minimising the potential loss to the company's creditors);
- acted beyond his personal capacity.

4. Investment and Security

Working capital for any UK business can be provided in a number of forms. An equity investment may be made in the capital of the UK company, whereby shares in the entity are allotted in return for the investment made. Alternatively sums can be advanced to the UK entity by way of loans, either secured on the assets of the business or unsecured. Investment or loans may be made by the overseas entity or by a third party, either overseas or located in the UK.

Foreign Investment

The United Kingdom has historically maintained a liberal investment policy and is one of the largest recipients of inbound foreign investment in the world. It has no legal framework designed to monitor direct foreign investments for national security or other public interest reasons. However, the government has the authority, under several laws, to block specific transactions determined to be against national interests.

The Enterprise Act 2002 provides authority to intervene in cases of public interest or special public interest, principally involving mergers or acquisitions in the areas of national security, the media and water industries – even if the thresholds for a relevant merger are not met. Where the European Commission has jurisdiction over a merger under the EU Merger Regulations, Member States can intervene in cases involving the defence industry. For further information on mergers, please refer to Section 13 (Competition Law) below.

Equity Investment

Investment in a UK company can be effected by the allotment of shares in return for capital invested. Shares can not be allotted for less than their par value and are commonly allotted at a premium. There are restrictions on the ability of a company to effect distributions to its shareholders and the ability of a company to repay capital invested in equity is severely limited. In the event of the insolvency of the company, any return to the shareholders will rank after all creditors and payment of all liabilities.

Loans and Granting of Security

Generally, under English law, loans may be advanced on such terms as may be agreed between the Lender and the Borrower.

Loans may be made on a secured or an unsecured basis. As with any secured lending, under English law, it provides a lender with a higher likelihood of recovery of its money, particularly in the event of the company's insolvency and may be secured over all or part of the assets of the Borrower.

Depending on the transaction, the assets over which security is proposed, the company's credit rating and many other factors, security interests may take a number of forms. There are three basic types of security that can be granted under English law: a possessory pledge, a charge or a legal or equitable mortgage. Mortgages of *choses in action*, such as debts or rights under contracts, are generally taken by assignment by way of security, which may be either legal or equitable. In addition, a fourth type of security is a lien, which arises by operation of law in certain circumstances, rather than being created.

The charge is a commonly used form of security for assets other than real property. Under English law, charges will fall into two categories:

- fixed charges; and
- floating charges.

A fixed charge attaches to particular assets and the chargor is not able to deal with those assets free of the charge, without the consent of the chargee. A fixed charge cannot relate to future assets.

In contrast, a floating charge generally (i) relates to assets which are identified by class rather than itemized; (ii) the class comprises both present and future assets; (iii) the components of the class are ordinarily changing from time to time; and (iv) the chargor is free to deal with the charged assets in the ordinary course of business, until the floating charge crystallizes into a fixed charge.

Recent case law has established that the key characteristic which differentiates a floating charge from a fixed charge is the freedom enjoyed by the chargor to deal with the relevant "charged assets" free from the security, without the consent of the chargee, irrespective of what label may be given in the security document. Courts take a 'substance over form' approach to determining whether a charge is fixed or floating.

Fixed charges are a more robust form of security. They will generally rank ahead of floating charges and subsequent fixed charges and ahead of unsecured creditors. They will give the Lender a right to step in and take control of the charged assets. A floating charge can be vulnerable to a later fixed charge granted prior to crystallisation. In addition, a

floating charge will rank after a liquidator's costs and expenses, an administrator's costs and expenses and after the claims of preferential creditors, now largely restricted to claims by employees. In addition, the proceeds of the floating charge assets can be used to pay expenses of the insolvency, which can be an important disadvantage of a floating charge over a fixed charge. Further, a percentage of the realizations of a floating charge will be set aside for payment to unsecured creditors; currently 50% of the first £10,000 and 20% of realisations thereafter, subject to a cap of £600,000.

Key to the validity of many charges and their perfection and enforcement is registration. Under English law a company is required to register certain charges created by it (which include most charges of key assets) with the UK Registrar of Companies, within 21 days of its creation (or date of deemed receipt in the UK, if the charge is created outside the UK). Failure to register a charge in accordance with the 2006 Act is an offence by the company and its officers and the charge will be void against a creditor of the company or any insolvency practitioner appointed to the company. A court order is required to permit registration after the expiry of the 21 day period. The details to be registered (which are publicly available) will include the date of creation, the amount secured by the charge, short particulars of the property charged and the persons entitled to the charge (i.e. the Lender). A certificate of registration will be issued to the company. There is also a requirement to register a charge of real property at the UK Land Registry and a charge of registered intellectual property rights at the UK Intellectual Property Office.

5. Capital Market Fundraising in the UK

There are two principal markets in the UK operated by the London Stock Exchange (“**LSE**”); the main market of the London Stock Exchange (the “**Main Market**”) and the AIM Market (“**AIM**”). A decision to list on either of these markets requires careful planning - choosing the appropriate market being a critical part of the process.

Which Market?

The four primary deciding factors for a company considering an initial public offering (“**IPO**”) on one of the UK capital markets are as follows:

- **Size.** AIM is targeted at smaller companies wanting to raise up to £50 million. The Main Market is only suitable for larger companies.
- **Track record.** To obtain a premium listing on the Main Market a company needs to have been trading for at least three years. It is easier for start-up companies to obtain a listing on AIM, subject to certain exceptions.
- **Cost.** The cost of an initial flotation on any of the markets, including lost management time, needs to be taken into account. Generally, the larger the market the more onerous the ongoing disclosure obligations and the higher the professional fees and costs, both on admission to the market and post admission.
- **Business Objectives.** The differing needs of the business and its shareholders will need to be taken into account.

Further details of the Main Market and AIM are set out below.

AIM

AIM is run by the LSE and is intended to be accessible by relatively young companies with market capitalisations from £1 million to £100 million. Since its conception, approximately 3,300 companies have listed on AIM, of which approximately 570 have been non-UK companies. AIM is currently home to over 1,140 companies of which over 220 are non-UK companies.

AIM companies are not bound by the full Listing Rules of the UK Listing Authority (“**UKLA**”) applicable to the Main Market and are governed by their own set of rules, known as the AIM Rules. The entry requirements for AIM and continuing obligations after admission are generally less stringent than those for the Main Market.

Unlike shares traded on the Main Market, shares traded on AIM are unquoted for tax purposes. This can have tax advantages for investors.

Application process

To join AIM, a company must appoint a nominated adviser (“**Nomad**”) which will assess whether the company is appropriate for the market. The Nomad will be expected to guide the company through the application process. Briefly, a Nomad will be a firm or company (never an individual) with at least two years’ corporate finance expertise, having acted on a number of relevant transactions in a prescribed period and employing a sufficient number of “qualified executives”.

A company’s Nomad is obliged to confirm to the LSE that a company is appropriate for AIM. It will co-ordinate extensive due diligence to ensure that this is the case and will help the company to produce its admission document. The admission document is the key document that must be produced in accordance with the AIM listing and must contain all the information prescribed by the AIM Rules. The directors are ultimately responsible for the accuracy of the admission document and so it is of paramount importance that its contents are accurate and have been verified by the company’s directors, with the help of the company’s lawyers.

Fast-track to AIM for overseas companies

Companies already listed on one of nine overseas exchanges (Australian Stock Exchange, Euronext, Deutsche Börse, JSE Securities Exchange (South Africa), NASDAQ, NYSE, Stockholmsbörsen, Swiss Exchange and Toronto Stock Exchange) for at least 18 months can use their existing annual report and accounts (along with certain other prescribed information to be released by way of a public announcement) as a basis for a complementary quotation on AIM.

Continuing obligations

Companies admitted to AIM must comply with the AIM Rules which include on-going disclosure requirements (although these are generally not as onerous as the equivalent requirements for a company with a listing on the Main Market).

The directors of a company are ultimately responsible for a company's compliance with the AIM Rules. The Nomad, in conjunction with the company's other professional advisers, will assist in advising the directors on their specific responsibilities and obligations to ensure compliance with the AIM Rules. The Nomad also owes a duty to the LSE to notify it of any breaches of the AIM Rules or if the company is no longer appropriate for AIM.

Breaches of the AIM Rules can result in a number of sanctions, imposed by the LSE, which can ultimately result in the cancellation of trading in a company's shares.

It should be noted that, as a general rule, the Disclosure and Transparency Rules (referred to in more detail below) do not apply to companies listed on AIM (save in relation to the dissemination of information relating to the acquisition or disposal of major holdings in shares).

The Main Market of the London Stock Exchange

The costs associated with obtaining a full listing will, almost always, be greater than those for a listing on AIM and the process for gaining such a listing on the Main Market is generally more detailed and involved. For this, and other reasons, it is usually only appropriate for large well-established companies to list on the Main Market.

Application process

In order to gain admission to the Main Market, a company will need to comply with the Listing and Prospectus Rules which are issued by the UKLA along with the admission standards of the LSE.

There are two elements to a listing on the Main Market: (i) shares must first be admitted to the Official List by the UKLA; and (ii) the shares then need to be admitted to trading by the LSE. Generally, both admissions will happen concurrently.

A company proposing to list on the Main Market must appoint a sponsor (usually an investment bank, stockbroker or other financial adviser), who will assist with the listing process, help the company prepare its prospectus and liaise with the UKLA to confirm that the company has complied with all the relevant Listing and Prospectus Rules.

The most important part of the process will be the preparation of a prospectus. This is the principal information document in connection with the listing and must comply with the Prospectus Rules and the Listing Rules. The prospectus must contain information

regarding the assets, liabilities, financial position, profits, losses and prospects of the company so as to enable a potential investor to make an informed decision as to whether it wishes to acquire shares in the company. It will also assist the UKLA in assessing whether a company is suitable to be admitted to the Official List. The prospectus has to be approved by the UKLA.

Standard and Premium listings

The Main Market is split into two tiers; 'premium' and 'standard' listing. A premium listing means the company is required to meet the UK's 'super-equivalent' standards of regulation. A standard listing allows issuers to access the Main Market by meeting EU harmonised standards only. Companies are able to migrate between the premium and standard segments without first cancelling their listings.

The admission requirements for a premium listing to the Main Market include:

- an obligation for 25% of the shares to be held in public hands;
- a three year trading record (subject to certain exceptions);
- a minimum market capitalisation of £700,000 (for equity issues); and
- the admission document to be approved by the UKLA.

Continuing obligations

A company that is admitted to the Main Market must observe the continuing obligations under the Listing Rules and Disclosure and Transparency Rules. Whilst there are some differences between the obligations (depending on whether a premium or standard listing is sought) the underlying principle behind the continuing obligations is the same as for the other markets – fair and timely disclosure of all relevant information and company developments likely to affect the share price of a company, so as to ensure an orderly and fair market.

6. Taxation

Basic Rules and Rates of UK Taxation

Setting up a business in the UK

Companies looking to set up an operation in the UK can do so in a number of ways. The two most common ways are either to establish a subsidiary or a permanent establishment. Alternatively, an individual or overseas entity may look to acquire an established business in the UK or it may set up a joint venture company or enter into a partnership agreement or, simply appoint an agent or a distributor.

Buying a company; Tax Considerations

Stamp duty is a transfer tax levied on documents. The purchaser of shares in a company incorporated in the UK will pay stamp duty on the value of the shares transferred at 0.5%.

Where shares are acquired, the purchaser is not able to cherry-pick the desired assets, which he may require for the business, and will also assume the historic liabilities of the business. Typically a purchaser will require protection for such liabilities and, in general, tax warranties together with a tax indemnity will be provided by the vendor in favour of the purchaser. The warranties are designed to flush out information about the target company. The tax indemnity apportions tax liabilities between the purchaser and the vendor such that, broadly, the purchaser will be responsible for post-completion tax liabilities and the vendor will be responsible for pre-completion tax liabilities (together with any specific "post-completion" liabilities suffered by the target company for which the vendor will accept financial responsibility).

Tax Implications of a UK presence

Corporation Tax

Companies resident in the UK, and non-UK resident companies carrying on a trade in the UK through a "permanent establishment", will in general be liable to corporation tax on the profits (i.e. "income") of their business. Capital gains (referred to as chargeable gains for corporation tax purposes) are computed separately from income but are included within the total profits chargeable to corporation tax. A UK subsidiary of an overseas company

(like any other UK resident company) will pay corporation tax on its worldwide profits (subject to double tax relief for foreign taxes). The basic rule is that all companies that are incorporated in the UK and all companies whose central management and control is exercised in the UK are resident in the UK for tax purposes.

A non-UK resident company will only be subject to UK corporation tax if it carries on a trade in the UK through a UK permanent establishment. In certain instances and with careful consideration of the facts, it may be possible to create a presence in the UK without creating a permanent establishment. In this manner, there would be no requirement to pay corporation tax on such activities. This is possible when the activities carried out in the UK are of a preparatory and auxiliary nature or if there is no fixed place of business, provided that certain additional criteria are satisfied. UK domestic rules do not provide for permanent establishments to benefit from the lower rate of corporation tax. This, however, is subject to any non-discrimination articles contained in an applicable double tax treaty, and to the concessions afforded by HM Revenue & Customs ("**HMRC**") who, in general, accept that a permanent establishment can claim the small companies rate (subject to all other criteria being satisfied).

The main rate of corporation tax is chargeable on income and chargeable gains and is currently charged at 24% when profits exceed £1,500,000 for the current financial year which runs from 1 April 2012 to 31 March 2013. A lower rate of 20% applies when the company's annual profits do not exceed £300,000. Marginal relief is available on profits up to £1,500,000. A reduction of 1% per annum in the rate of corporation tax has been proposed for each year until 2014 when it is expected that the rate of corporation tax will be reduced to 22%. If the company has associated companies, the threshold figures are reduced according to the relevant number of associated companies. These threshold rules can sometimes encourage the establishment of a UK branch operation, rather than a separate UK subsidiary company.

Taxation of Dividends

Dividends declared and paid by a UK resident company are not subject to withholding tax. Withholding tax is a tax on a payment that is collected by a payer and that represents the payee's tax liability on that payment. Withholding taxes are imposed for many reasons e.g. to save the taxing authorities time and money and to target tax evasion.

Where profits are repatriated by the UK subsidiary, by way of dividend to a company or to an individual resident outside the UK, the applicable tax laws in the jurisdiction of the recipient will determine how the recipient is taxed on receipt of the dividend.

A foreign parent company may benefit from a participation exemption that will exempt dividends received from the UK subsidiary from tax in the foreign jurisdiction. Under the terms of most double tax treaties, where dividends are taxable, the underlying corporation tax will normally be allowed as a foreign tax credit.

The dividend will carry a tax credit of an amount equal to one-ninth of the amount of the dividend. It is possible, depending on the provisions of the relevant double tax treaty, that the recipient may be able to reclaim a very small proportion of the tax credit. If there is no double tax treaty or there is no such provision within the treaty, no tax credit will be available to a non-resident shareholder.

Where the double tax treaties that the UK has entered into provide credit for the underlying tax paid by a UK company, a corporate recipient of a dividend paid by a UK company will benefit from a foreign tax credit currently at 24%. To the extent that the rate of tax payable in the foreign jurisdiction exceeds 24% a further amount of tax will be payable. If the rate of tax payable in the foreign jurisdiction is lower than 24% no further tax is payable.

Dividends received by a UK resident company from both resident and non UK resident subsidiaries (or indeed from portfolio investments) should generally be exempt from corporation tax, unless they fall within certain anti-avoidance rules.

Tax on interest

The basic rule is that any company resident in the UK that makes yearly payments of interest to a non UK resident must withhold tax on interest at a rate of 20%. Where interest is paid to a company resident in a country that has a double tax treaty with the UK, such interest payments may be exempt from withholding tax or the tax may be reduced.

Research and Development ("R&D") Incentives

In general, companies are able to deduct all expenditure that is not capital in nature and which is wholly and exclusively paid for the purposes of the trade.

R&D is defined for tax purposes as occurring when a project is undertaken to achieve an advance in science or technology. The R&D tax credit is claimed as a deduction (from the company's taxable income) at a rate of 225% of the qualifying R&D expenditure incurred on or after 1 April 2012 for small and medium sized enterprises (**SMEs**). Expenditure incurred prior to 1 April 2012 will benefit from a deduction of 200%. If the company does

not make a profit it can surrender the R&D credit in return for a cash payment which is equivalent to 24.75 pence for every £1 spent on qualifying expenditure for the year ended 31 March 2013. Large companies are entitled to a tax credit of 130%, but cannot claim a cash payment if the company is loss making.

The Patent Box

The UK Government has confirmed its intention to introduce the “Patent Box” and has published draft clauses for the Finance Bill 2012. The new legislation, once enacted, will introduce a 10% rate of corporation tax in respect of income generated from patents. It will apply to patents commercialised after 29 November 2010 but only to income generated from those patents from 2013 onwards.

Incentives to invest in Small Companies

There are two schemes that are designed to encourage investment in unquoted small and medium-size enterprises in the UK. These are as follows:

- **Enterprise Investment Scheme (“EIS”)**: The EIS provides relief from capital gains tax for qualifying shareholders on a disposal of shares provided that the shares have been held for three years and all other conditions are satisfied. Relief is also available against income tax for funds used to subscribe for new shares. EIS provides for a 30% reduction in the income tax liability on an annual investment limit of £1 million from 6 April 2012.
- **Venture Capital Trusts (“VCT”)**: The VCT scheme allows individuals to invest in a special type of quoted investment vehicle. The VCT invests, in turn, in unquoted trading companies that satisfy certain criteria. The individual investors in the VCT are entitled to income tax relief at a rate of 30% where funds are used to subscribe for new shares. There is an annual investment limit of £200,000. Relief is also provided from income tax on dividends received in respect of the shares held (up to the limit of £200,000) and against capital gains tax on the disposal of shares.

A new form of venture capital scheme, the **Seed Enterprise Investment Scheme (“SEIS”)** has been introduced with effect from April 2012. The SEIS is designed to help start-up companies attract initial investment. Investors in the new qualifying companies will receive upfront income tax relief at 50% on their investment and capital gains relief on the disposal of shares. This relief is limited to very small businesses and it has low financial limits; the annual investment limit is £100,000.

Tax Implications when selling a business

Any gain made by a UK company on the disposal of a business (shares or assets) will be chargeable to corporation tax. Where the selling company is resident outside the UK the tax treatment of the sale will be governed by the rules of the country in which the selling company is resident.

Capital gains tax (**CGT**) on asset disposals is, broadly, payable by individuals who are UK resident in the year of disposal of the relevant asset and is charged at a rate of 28%, for those paying income tax at the higher and additional rates and 18%, for all other tax payers, of the taxable gain.

Disposals of substantial shareholdings

A company's net realised chargeable gains are subject to corporation tax at the relevant corporation tax rate. There is an exemption from the charge to tax on the disposal by a company subject to UK corporation tax of a "substantial shareholding" (i.e a 10% holding of the ordinary shares) in a trading company or a holding company of a trading group. To qualify for the relief the disposing company must have held the shares in the target company for at least one year and must continue to be a trading company (or the holding company of a trading group) immediately after the disposal.

Entrepreneurs' Relief

Disposals of a limited category of asset may qualify for "Entrepreneurs' Relief", which can reduce the CGT rate to an effective 10% on £10 million of qualifying gains (this is a lifetime limit). This relief applies to various qualifying disposals (for example, shares or securities in a trading company, of the whole or part of a business) provided that certain other criteria are satisfied.

Individuals

Individuals who are resident in the UK are generally liable to UK taxation on their worldwide income and gains. "Residence" is a question of fact and there is detailed guidance published by HMRC, describing the basis on which they will regard an individual as being resident in the UK for a tax year or for a part of a tax year. Special rules apply to resident but non-UK domiciled individuals – see below.

Non-resident individuals will generally only incur UK taxation on income and gains relating to a trade carried on in the UK, or, in the case of income from employment, to the extent such income is attributable to duties of the employment performed in the UK. As regards income from investments, tax will normally only be charged (if at all) to the extent that tax is collected via deductions or withholdings made from payments of such income.

Income tax is charged on bands of income, principally at 20% and then at 40%, on taxable income for the tax year in excess of £34,370 for the tax year 2012-2013. The top rate of income tax of 50% is payable on taxable income in a tax year in excess of £150,000.

Employees and employers also pay social security charges, known as “national insurance contributions”. The employee’s contributions are deducted from salary along with the income tax due. The employer’s contributions are currently charged at the rate of 13.8% on, broadly, the employee’s gross pay.

The UK also has an Inheritance Tax regime, whereby most gifts of assets during lifetime (unless the donor survives 7 years from the date of gift) or on death are subject to inheritance tax at rates up to 40%. Where chargeable gifts (or cumulative chargeable gifts if more than one, including those made on death) do not exceed a threshold figure, currently £325,000, tax is charged at a nil rate, only the excess above that threshold being charged at 40%. Gifts of assets between spouses or civil partners are, in most cases, exempt from inheritance tax. In addition, certain business assets, including shares in many trading companies, can enjoy 100% relief from inheritance tax in certain circumstances.

For individuals who are not “domiciled” in the UK (domicile being a different concept from residence, concerned with where your true or ultimate home is or will be), the UK offers an attractive tax regime. Non-UK domiciled individuals are, generally, only liable to income tax and capital gains tax on their income and gains from overseas investments and assets to the extent such income or gains are “remitted” to (i.e. brought back into, or otherwise enjoyed in) the UK. However, for non-UK domiciled individuals who are long-term residents of the UK (resident for at least seven out of the nine previous tax years) this remittance basis of taxation, in the case of overseas assets, is now only available for any tax year if the individual elects to pay, for that year, a £30,000 additional tax charge.

With effect from April 2012 the remittance basis charge is £50,000 for individuals who have been UK resident for 12 years or more. Initially there was doubt as to whether US taxpayers resident in the UK could claim a credit for the remittance basis charge; fortunately, the IRS ruled in August 2011, that US citizens resident in the UK would be able to claim such a credit.

Non-UK domiciled individuals are only liable to UK inheritance tax on gifts of assets which are situated in the UK. However, there is a rule, for inheritance tax purposes only, that a non-UK domiciled individual who has been resident for at least 17 out of the last 20 tax years, will thereafter be deemed to be UK domiciled (and hence subject to inheritance tax on his worldwide assets).

Partnerships

Partnerships (whether a general partnership, a limited partnership or a limited liability partnership) are generally treated as transparent for UK tax purposes. Accordingly, where the member of a partnership is a company or an individual, he will be taxed on his share of the profits as if they accrued to him directly. In the event that a non-resident company is a partner or a member in a partnership, that carries on a trade in the UK, the non-resident company will be considered to have a permanent establishment in the UK such that that partner/member's profits will be subject to UK corporation tax at 24%, unless an alternative arrangement has been agreed with HMRC.

Double Tax Treaties

It is important to consider the impact of any applicable Double Tax Treaty. Such a treaty may cut across the basic rules above, for example, to enable a resident of another country coming to the UK on a short term work assignment not exceeding six months, to be exempt from UK employment taxes.

Where a person (whether a company or an individual) is resident in the UK (under UK rules) and in his home country (under local rules), and there is a Double Tax Treaty between the two countries, that treaty will normally have a residence "tie-breaker" provision. This will determine in which country the person is to be treated as resident for the purposes of allocating taxing rights between the two countries under the treaty.

Whilst, as mentioned above, the UK regards a LLC as opaque, the UK/US Double Tax Treaty does contain provision to allow US resident members of a LLC to access treaty benefits with respect to UK source income of the LLC, in certain circumstances.

Some specific matters

Employment Income

In certain circumstances, individuals who come to live and work in the UK for a period of time, but not to settle permanently:

- may be able, notwithstanding technically “resident” in the UK, to avoid UK income tax on that part of their earnings from employment (if any) which are attributable to duties of the employment performed outside the UK;
- may be able to avoid being drawn into the UK’s social security regime, under which the employee contributes, by deduction out of salary, national insurance contributions and the employer pays separate employer’s national insurance contributions.

Companies subject to Corporation Tax

There is a degree of competition between corporate tax regimes in Europe, and one of the pressures on Governments is to enhance their own country’s competitive position. Historically, tax factors which have been regarded as “positive”, so far as the UK is concerned, include:

- a relatively competitive top rate of corporation tax, currently 24%;
- generous rules as to deductibility of interest expenses (although some restrictions have been introduced - see below);
- no withholding tax on dividends paid out to shareholders;
- an exemption from tax on capital gains on the disposal of trading subsidiaries and certain minority interests in trading companies (known as the “Substantial Shareholdings Exemption”);
- an extensive network of double tax treaties and a comprehensive tax exemption regime, to avoid double taxation of profits earned overseas and brought back to the UK;
- an attractive tax regime for non-UK individuals (i.e. not UK domiciled) coming to base themselves in the UK.

The UK's interest deduction rules have been amended to introduce a "worldwide debt cap" for international groups of companies. This is designed to restrict the tax relief available to UK members of a worldwide group on their finance expense by reference to the external consolidated finance costs incurred by the group as a whole. There is, however, an important exemption for the financial services sector.

This new regime for corporates sits alongside both the UK's existing transfer pricing/thin capitalisation regime and the Controlled Foreign Companies ("CFC") legislation which itself is currently under further review.

Value Added Tax

The UK, as a member of the EU, operates the Value Added Tax system ("VAT"). In broad terms, a sale of goods or a supply of services by a business, for a consideration, may be – and where vendor and purchaser are UK businesses normally will be – subject to VAT. In certain industries, including financial services, insurance, gaming and healthcare, such sales or supplies are normally "exempt" from VAT. Some goods and services, including certain categories of foods, books and clothing, are "zero-rated".

The current "standard rate" of VAT is 20%. It is the responsibility of the vendor or of the person supplying the services (at least where he or she is UK-based) to account to the tax authority for VAT which arises on a transaction. Accordingly, a vendor or supplier must ensure his sale price reflects this, or is expressed to be "exclusive of VAT".

A business is obliged to register for VAT, and then charge VAT on its sales, if the value of its taxable turnover in the last twelve months has exceeded the registration threshold, currently £73,000, or if the expected value of its VAT taxable turnover (this only includes the goods and services that are sold on which VAT is charged) in the subsequent 30 days will exceed such threshold. Businesses may register for VAT on a voluntary basis, if their turnover is below the threshold, and it may often be advantageous to do so.

VAT is essentially a consumer tax; the idea behind the imposition of VAT is that it should be borne economically by the ultimate consumer of any goods and services supplied. A business that is trading in the UK will account to HMRC for the VAT that it charges on supplies (less an amount in respect of the VAT on supplies made to it). However, in those industries (see above) where sales to customers are "exempt" from VAT, the right to recover VAT incurred on purchases is restricted or prohibited.

In a cross-border context, UK VAT:

- is charged on most imports of goods into the UK (and for imports of goods from outside the EU, VAT, together with other Customs or Excise duties or tariffs, is generally paid at the point of import);
- is charged on the purchase of certain services by a UK business from businesses either in other EU countries or outside the EU – it is the UK business which has to account for such VAT under a special “reverse charge” rule;
- is normally “zero rated” on the export of goods to business (but not private) customers in the EU, or to any customer in a destination outside the EU;
- is not charged on the supply of certain services by UK businesses to business customers in other EU countries or to customers generally who are outside the EU.

7. Employment

The main employment law considerations for a company entering the UK market are set out below.

Written contracts of employment

It is market practice in the UK to provide all employees with a written contract of employment/offer letter, or alternatively a written statement of particulars of employment (see below).

There is no legal requirement to provide an employee with a written contract of employment, however an employer is obliged to provide each of its employees with at least a “written statement of particulars of employment” within two months of the employee’s start date. The statement must include certain information, such as terms regarding notice, pay, pension provision, sick pay and holiday. Such a statement is not of itself a contract of employment but, in the absence of any other documentation, it will be taken as reflecting the contractual terms and conditions.

An employer must also provide the employee with a written statement of any change in the particulars within one month of that change.

If a statement or a statement of changes is not provided, the employee may apply to an Employment Tribunal for an order requiring the employer to produce one. If such an order is made, the Employment Tribunal will also award a sum equal to between two and four weeks of pay, to the employee, as compensation.

Dismissing an employee

UK employment law does not allow for termination of an employee’s contract of employment “at will” by the employer, in the sense that concept is used in US jurisdictions.

It is almost always the case in the UK that an employee must be provided with advance notice of termination or possibly a payment in lieu thereof (see below).

An employer who terminates an employee for the wrong reason, in the wrong manner or otherwise unfairly is at risk of, amongst other things, the following potential claims:

- unfair dismissal;
- failure to make a statutory redundancy payment; or
- wrongful dismissal, for breach of the employee's contract of employment.

Unfair dismissal

An employee with one year's service has the right not to be unfairly dismissed. From 6 April 2012, planned changes to UK law, will require an employee to have two year's service to bring an unfair dismissal claim.

A dismissal will be unfair unless the employer can show:

- that the dismissal was for one of the five potentially fair reasons, which include reasons relating to conduct, capability and redundancy; and
- that the employer acted reasonably in dismissing the employee for that reason in the circumstances, having regard to the size and administrative resources of the employer's business.

Unfair dismissal claims are heard by a specialist tribunal called the Employment Tribunal. Employment Tribunal panels are chaired by employment judges.

In evaluating the fairness of a dismissal, an Employment Tribunal will have regard to written guidance published by ACAS (the Advisory, Conciliation and Arbitration Service), a quasi-governmental body. Where an employer does not comply with the provisions of an ACAS code, an Employment Tribunal is more likely to find that a dismissal is unfair. As well, in such circumstances, an Employment Tribunal is entitled to increase the compensation payable to the employee by up to 25%. Where an employee fails to follow an ACAS code, the Employment Tribunal has the power to reduce compensation by up to 25%.

Automatic unfair dismissal

In a number of circumstances a dismissal will be considered automatically unfair. These include:

- where a dismissal is found to be discriminatory under any of the heads of discrimination under English law (age, disability, sex, gender reassignment, marriage and civil partnership, pregnancy and maternity, sexual orientation, religion or belief and race);

- dismissal in relation to lawful trade union activities;
- dismissal for asserting a statutory right, such as a claim for a written statement of terms of employment;
- dismissal of an employee who asserted his or her rights under health and safety legislation; and
- certain dismissals related to the transfer of a business, which cannot be justified based on an economic, technical or organisational reason.

It should be noted that, in relation to the automatically unfair reasons listed above, an employee does not have to have one year's service in order to claim unfair dismissal (except in the cases of dismissal relating to the transfer of a business).

Remedies for unfair dismissal

If an employee is successful in a claim for unfair dismissal, the Employment Tribunal may order reinstatement or reengagement of the employee, although these are rarely ordered. The Employment Tribunal usually awards financial compensation instead: this consists of:

- a **basic** award, which is calculated based on the employee's age, length of service and weekly pay and is (from February 2012) capped at £12,900; and
- a **compensatory** award, which is designed to compensate the employee for losses flowing from the dismissal, (from February 2012) capped at £72,300. These upper limits are reviewed annually. In practice, most employees receive a compensatory award of around 6 months' total compensation (subject to the cap).

Redundancy

As noted above, redundancy is a potentially fair reason for dismissal. A redundancy occurs where an employer proposes to cease carrying on a business activity, or to reduce the number of employees carrying out that activity, in a particular area or altogether.

A redundancy dismissal will be unfair unless a genuine redundancy situation, as described above, exists. As well, the employer must: (i) act reasonably in determining which employees fall within the pool from which redundant employees will be selected; (ii) employ fair and reasonable criteria in selecting employees for redundancy; and (iii) follow a fair procedure before terminating an employee's employment on grounds of redundancy.

Employers also have a duty to search for alternative employment and to consult with the employee for at least two weeks prior to dismissal. Enhanced information and consultation requirements must be observed by employers wishing to make 20 or more redundancies in a period of 90 days or less.

An employee with two or more years' service who is made redundant is entitled to a statutory redundancy payment, calculated by reference to that employee's length of service, age and weekly pay (subject to a statutory cap of £12,900 from February 2012).

Wrongful dismissal

Wrongful dismissal is a common law claim, which may be pursued either in the civil courts or in an Employment Tribunal. Wrongful dismissal is a claim for damages against an employer where the employee has been dismissed in breach of contract.

A claim for wrongful dismissal typically arises where an employer has dismissed an employee, either expressly or constructively, in breach of that employee's notice provisions, or before the expiry of that employee's fixed term contract.

Minimum notice periods

Employment legislation sets out the minimum notice requirements to which an employee is entitled. An employee who has been employed for less than two years is entitled to one week's notice. An employee who has been employed for two years or more is entitled to one week's notice for each year of continuous service, up to a maximum of 12 weeks.

Alternatively, the employee's contract of employment may offer more generous notice provisions. It is common to find UK employees with contractual notice periods of 1-3 months (for low-level/middle management) and 6-12 months (for executives), subject at all times to the statutory minimum period.

The employer is normally required to provide advance notice of a termination (or, in some cases, a payment in lieu of actual notice) in all cases except for gross misconduct (which consists of a gross dereliction of duty, such as in the case of criminal activity, gross negligence, or gross insubordination). In US terminology, "gross misconduct" is essentially a severe form of "cause".

Discrimination

Discrimination in employment is prohibited in English law on the basis of the following protected characteristics: age, disability, sex, gender reassignment, marriage and civil partnership, pregnancy and maternity, sexual orientation, religion or belief and race. Protection against discrimination also covers discrimination on the basis of perception of an employee's protected characteristics, or association with people who have a protected characteristic, and limit the enforceability of clauses which prohibit employees from discussing their pay.

It is also unlawful to harass individuals on the basis of any of these protected characteristics.

As well, it is unlawful for an employer to subject any employee to detrimental treatment as a result of that employee having asserted his or her rights under discrimination legislation: this is known as "victimisation" and is essentially the same concept as "retaliation" in other jurisdictions.

Discrimination rights extend not only to employees, but to workers, a broader category which includes freelancers and contractors - essentially any worker who is not providing services on his or her own account.

Any business which contracts with a public body should be aware that public bodies, such as local councils, are under a legal duty to promote equality and eliminate discrimination. This duty has been invoked by public bodies as grounds for refusing to contract with private sector employers who discriminate against their workers.

It should be noted that in addition to discrimination, there is also slightly more limited prohibition on less favourable treatment of part-time workers, workers on fixed-term contracts and temp agency workers. In each of these cases, the workers need to be treated no less favourably than their full-time/permanent colleagues (in the case of agency workers, this right arises once the worker has been in the same post for 12 weeks or more).

Business sales and outsourcing

As a result of EU directives, commercial transactions involving outsourcing or asset sales are subject to significant employment protection for any employees involved.

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (“**TUPE**”) operate to protect employees where there is an acquisition of a business, an outsourcing of an economic activity or a change in the provider of outsourced services.

TUPE provide that when a business transfer, outsourcing or change in service provider occurs, the employees assigned to that business or economic activity transfer as well and their terms and conditions of employment remain unchanged following the transfer. The buyer of a business or third party contractor assuming outsourced work therefore also assumes liability for the employees working in that business.

Any dismissal in connection with the transfer or outsourcing is deemed automatically to be unfair, unless it is for an economic, technical or organisational reason.

Before the transfer or outsourcing, there is a duty on the seller or outsourcing entity to inform and consult with elected representatives of all affected employees about the transfer and the effect it would have on the employees. Failure to inform and consult in the manner prescribed in TUPE can result in an order against both employers jointly to pay up to 13 weeks’ pay to each affected employee.

Buyers of a business should protect themselves by carrying out the appropriate due diligence and by including indemnities in the asset sale contract. The seller of any business will also need to consider what indemnification it requires, as TUPE can create ongoing liabilities for the transferor of the business or outsourced activity.

It should be noted that TUPE has broad application - it can apply to outsourcings overseas, for example, as well as to business transfers within subsidiaries of the same holding company.

Restrictive covenants

English employment contracts often contain provisions restricting the employee’s activities after employment. Such clauses typically take the form of one or more of the following restrictions:

- non-poaching or non-solicitation clauses, which prevent the employee from enticing clients, suppliers or employees from the employer following termination;
- non-dealing clauses, which prevent the employee from doing business with the employer’s customers; and

- non-competition clauses, which prevent the employee from engaging in business which competes with the employer's business.

Although restrictive covenants such as these are often contained in UK employment contracts, they are notoriously difficult to enforce in the English courts.

Restraint of trade is only permitted where there is a legitimate interest which the employer is seeking to protect and where the clause goes no further than what is deemed necessary to protect that interest. Further, courts in England will not rewrite a clause so as to turn an unenforceable clause into an enforceable one.

8. Business Immigration

The UK government is constantly revising its policies and procedures relating to immigration, and in particular to economic migration. It is not unusual for UK immigration rules to change several times during the course of one year.

Separate, up-to-date advice should be sought from Bryan Cave before making any application or decision relating to business immigration; however, the following is a general overview of how the system works as at 1 January 2012.

Citizens of most EEA countries and Switzerland and their spouses/partners, children and dependent family members may live and work in the UK.

For all non-EEA/Swiss nationals (“**foreign nationals**”), it is illegal to work in the UK unless some form of authorisation to do so has been obtained from the UK Border Agency. Working as, or employing, a foreign national who does not have authorisation to work is a criminal offence.

One (very limited) class of migrants, known as Tier 1 high-value migrants, may come to the UK to seek employment freely (i.e. without a sponsor - see below).

There are certain classes of migrants that may enter the UK under the Tier 1 category. Under the Tier 1 (Entrepreneur) subcategory, a candidate will be required to prove that he or she has access to £200,000 (not necessarily his or her own funds) held in a regulated financial institution, and that those funds are disposable in the UK. Under the Tier 1 (Investors) subcategory, candidates will be required either to have funds of their own amounting to at least £1 million, held in a regulated financial institution, and disposable in the UK, or have funds in this amount by way of a loan from an FSA-regulated institution, as well as net personal assets worth at least £2 million. Investors who wish to remain in the UK for more than the initial period of leave (three years) will also need to show they have invested £750,000 in appropriate investments in the UK within three months of first gaining permission to enter, and will also need to show that they have maintained their investment for the full initial period of leave.

Under Tier 2, an employer may register as a sponsor and obtain a certificate for a foreign national to work for that employer for a particular amount of time. This system replaced the previous work permit regime. An employer must prove that it has carried out a search within the UK labour market before it may obtain a certificate of sponsorship for a foreign national. There is no need to carry out any search, however, if the post is on a government

list of shortage occupations or, in certain circumstances, works for an overseas branch of the same employer. An employer which is registered as a sponsor needs to have strict monitoring systems in place, which may create a significant administrative burden. For the year from 6 April 2011 to 5 April 2012, a maximum of 20,700 skilled workers can come to the UK under Tier 2 (General) to do jobs with an annual salary of below £150,000 (there is no restriction on the number of foreign nationals able to be sponsored with an annual salary of £150,000 or more).

Separate immigration categories exist in respect of low-skilled workers, students and youth mobility and temporary workers; these are known as Tiers 3, 4 and 5 respectively.

For short-term, temporary business visits, it may be appropriate to obtain a business visitor visa. A person may enter the UK as a business visitor if they are permanently living and working outside the UK and if they have come to the UK to transact business (such as attending meetings and briefings, fact finding or negotiating or making contracts with UK businesses to buy or sell goods or services). This category of visa carries strict limitations on the activities the visa-holder may undertake. A person seeking leave to enter the UK as a business visitor may be admitted for a period of up to six months, subject to a condition prohibiting employment. At present, applicants from certain countries, including the United States, do not need to apply for a business visitor visa in advance: they may travel to the UK and request such a visa from the immigration officer on arrival.

An employee who enters on a business visitor visa but who is, in reality, required to have authorisation to work, faces exclusion from the UK for up to ten years. Such an exclusion may also be imposed for other breaches of the Immigration Rules by migrants.

Penalties for employers' non-compliance range from written warnings, sponsorship licence revocation or on-the-spot fines to criminal sanctions, which may include more substantial fines and imprisonment.

9. Pensions and Employee Benefits

The general availability and extent of employee benefits provided by UK companies will vary according to the industry sector and the seniority or role of the employees concerned. Therefore it should not be assumed that each of the following benefits is generally available to all employees in the UK. Some are only likely to be provided to senior employees or be prevalent in particular industries.

Life Insurance

In general life cover is provided to employees of UK companies. This will usually take the form of a multiple of salary or wage payable in the event of death. The level of cover for senior employees is often higher than for junior employees: typical multiples range between two to four times pensionable salary.

Most companies will pay an annual premium to insure the benefits. Occasionally larger companies will self-fund cover.

The terms and cost of providing life cover can vary between insurers and companies may wish to employ a consultancy or broker to negotiate premium and policy terms. The ultimate level of benefit is often subject to HM Revenue & Customs (**HMRC**) limits. Insurers will operate a "free cover" limit which means that if the level of benefit payable in the event of a senior employee's death exceeds a given value, medical evidence of good health is required in advance and/or an additional premium is payable in respect of the individual concerned.

Permanent Health Insurance (PHI)

PHI is provided by companies to cover employees who are absent from work for long periods due to illness. The benefit usually takes the form of a percentage of pay being provided by an insurer. A typical level of cover is 100% of pay during the first 12 weeks of absence, reduced to 75% thereafter, when state benefits may become available. Lower rates of cover can be provided for junior employees.

Although PHI is an employee benefit it can be regarded as an insurance to cover the employer who has lost an employee due to illness, but is still contracted to pay that employee during their illness.

As with life cover, consultants will often arrange to broker terms and premium levels for companies seeking to provide PHI.

Private Medical Insurance (PMI)

Foreign companies entering the UK market are often initially concerned with the potential cost of medical cover for employees. However, the provision of medical cover by UK companies is very different to some other countries, including the US, primarily because of the UK's National Health Service (NHS) which provides almost universal medical cover funded in part by compulsory employer and employee National Insurance Contributions (NICs).

Given that NHS cover is available, PMI is not generally provided by UK companies to all their employees, although senior staff and employees in certain industry sectors will find that this benefit is available to them.

On payment of premiums, normally by the company, various recognised insurers will provide medical cover which will allow relevant employees to undergo private medical treatment. As such they will not be required to rely on the NHS. The perceived advantage is that treatment, including access to specialist medical advice, will be more readily available and at a time convenient to the employer/employee. The extent of cover provided can range widely and will normally exclude pre-existing medical conditions or long-term treatments.

As with life cover and PHI, consultants will often negotiate the level of benefits provided and premium costs.

Pension Plans

There is currently no obligation for UK employers to provide a pension plan for their employees, although in certain circumstances the employer must facilitate access to a pension plan known as a stakeholder scheme. A stakeholder scheme does not require any employer contributions.

From October 2012, employers with 50 or more employees who are not already in a good quality workplace plan will have to automatically enrol eligible employees into a new arrangement known as The National Employment Savings Trust (NEST) scheme. These will

require both employees and employers to contribute a minimum proportion of an eligible employee's qualifying earnings into a workplace pension scheme.

In the first four years (i.e. from Oct 2012 – Sep 2016) the total minimum contribution is 2% of an employee's qualifying earnings (with at least 1% from the employer), in the fifth year (Oct 2016 – Sep 2017), the total minimum contribution is 5% (with at least 2% from the employer) and in the sixth year onwards (from Oct 2017) the total minimum contribution is 8% (with at least 3% from the employer). Employers may choose to pay more than the minimum and in such circumstances the employee's contribution will be lower providing the maximum combined contribution is satisfied. An employee's qualifying earnings is currently capped at £33,540 per annum.

In general, UK companies do provide some form of pension arrangement for their employees depending on the industry and on employees' levels of seniority.

Plan design is generally a Defined Benefit (DB) or a Defined Contribution (DC) arrangement. These will require employer and employee contributions and are normally registered for tax approval purposes.

There are a significant number of DB plans in the UK market, particularly in certain industry sectors such as insurance, banking, engineering, de-nationalised industries etc. Over the past decade 70% of companies have sought to contain their potential costs in this area by stopping any new joiners to their DB plans. Some have even ceased future accrual of benefits for existing employees who are plan members.

It should be noted that UK DC plans are often less flexible than US 401(k) arrangements. UK DC plans are more focused on providing a pension at retirement date than a broad based savings plan.

These developments have arisen due to the escalating costs associated with DB plans. Companies have been required to address investment and longevity risks along with increasing regulation and disclosure requirements that restrict the capacity to smooth or defer costs. As such most UK DB plans are in deficit and are regarded as problematic from a company perspective. DB plans can also present significant issues in the context of M&A or restructuring projects requiring adequate consideration of the liabilities involved – see Corporate Transactions below.

Employee Share Schemes

There are several forms of employee share schemes operated in the UK. These range from those where the employee pays the full value for the shares to those where shares are free.

In general however share schemes can be regarded as either being appropriate for senior executives or for all employees. Schemes designed for the former are normally unapproved by HMRC and so provide no tax incentives. Schemes designed to cover all employees involve limited values of shares, but include tax advantages. US companies seeking to set up business in the UK should recognise that there is less reliance on employee share schemes to remunerate employees than in the US.

Schemes for Senior Directors

Discretionary share option schemes, referred to as Company Stock Option Plans (CSOPs), are often provided for senior executives. These provide a right to purchase shares at the market price at the date of grant, provided the executive remains employed with the company. Individuals who are leaving on good terms will usually be allowed to purchase shares for a limited period after leaving. A right to exercise an option is also usually triggered by take-over or reconstruction.

Because of the tax incentives which arise in relation to HMRC-approved share schemes, discretionary schemes are often provided in two parts: (i) an approved part which attracts tax and NIC relief but restricts the level of options available up to a value of £30k for the participant; and (ii) an unapproved part which provides options in excess of that value, but which is subject to income tax and NIC charges on exercise. US companies with pre-existing US based stock option plans can often seek to attach a UK sub-plan for UK employees that provides options on an approved basis up to the £30k limit and then unapproved grants from the main US plan thereafter.

There are other recognised forms of share schemes for senior employees. These include Long Term Incentive Plans (LTIPs) which are popular as discretionary schemes for larger companies. LTIPs can be used to provide performance share awards which involve free shares that vest on achieving performance targets after three or more years; deferred shares usually awarded after three years, provided the employee has not left; matching shares involving award of free shares often if deferred shares are held for a specific time; restricted shares providing a beneficial interest in shares subject to risk of forfeiture or

some other factor that might reduce initial market value; and convertible shares providing a beneficial interest which is convertible to more valuable shares.

Share arrangements for senior employees also include Enterprise Management Incentives (EMIs) in certain circumstances. These are designed to give tax incentives for share options worth up to £120K when granted to executives of high risk companies with potentially high levels of growth.

Share Schemes for all employees

There are a variety of other share schemes that may be provided to the general workforce. These include Share Incentive Plans (SIPs) which must be made available to all UK resident employees and directors. Grants of free shares worth up to £3k per tax year with income tax relief can be given if retained in trust for three years.

SIPs can also be used to provide partnership shares and matching shares that can be bought or awarded respectively and which are subject to tax relief.

Provision of a Save As You Earn (SAYE) share option scheme may also be provided to the general workforce. As such, if a company decides to introduce a savings scheme then all UK resident employees and directors must be invited to participate. These schemes are popular and provide participants with a plan to save from £5 to £250 per month, with a recognised financial institution.

Savings can then be used to provide cash plus a tax free bonus, or used to exercise share options discounted by up to 20% on the share market value at the date of grant.

Corporate Transactions, Restructuring

Employment rights are protected on the occasion of an asset sale under TUPE – see the Employment section. However, the notable exception to this protection involves occupational pension scheme rights, which are not presumed to transfer unchanged to a new employer. Instead only those transferring employees who were active members of an occupational pension scheme, or eligible to become so, must be provided with membership of a pension scheme by their new employer. However, the new receiving pension scheme does not need to replicate the transferring employee's previous pension scheme. A range of options are available including DC or stakeholder schemes with matching employer/employee contributions up to 6% of basic pay. Significantly this means that a new

employer would not have to replicate a much higher cost DB pension plan if transferring employees had previously been members of such an arrangement prior to transfer.

Share purchases of UK companies, and re-structuring exercises that involve companies which sponsor a DB pension scheme, require careful consideration. If the DB plan is in deficit, as most are, the purchaser will acquire the company and DB plan subject to that deficit.

During the course of the transaction it may become necessary to include the DB plan trustees and the UK Pension Regulator in negotiations on the financial strength of the new owner and future funding arrangements. Regulatory clearance may be necessary. Because of these and related complications, DB pension plans have caused certain proposed high profile acquisitions in the UK to fail.

Consideration also needs to be given to acquisitions or restructuring exercises where a participating employer in a multi-employer DB plan ceases to participate in the plan due to new ownership. The same considerations also need to be applied when the active plan members of a participating company cease active membership, for example during an internal restructuring exercise.

These circumstances can trigger an exit debt which attaches to the participating company and represents the portion of any deficit attributable to that company. Importantly the amount of debt is calculated as the full buy-out cost of the liabilities. This is often considerably greater than the ongoing deficit as it represents the amount necessary to secure liabilities with an insurance company.

For these and related reasons any company seeking to do business in the UK which involves a UK DB pension plan should carefully assess the immediate and longer term consequences that any such involvement will entail.

10. Intellectual Property

In the EU, protection is granted generally for registered and unregistered intellectual property rights, including patents, trademarks and copyright, in a similar manner to the US. However there are key differences both as to nature of the intellectual property rights obtained and as to the manner in which they may properly be protected in the EU.

In the UK, intellectual property matters are dealt with by the UK Intellectual Property Office ("**UK IPO**"), which includes the trade mark, registered design and patent registries. Useful information can be obtained from its website at www.ipo.gov.uk.

In Europe, patents may be prosecuted through the European Patent Office in Munich, Germany and community trade marks and registered community designs in the European Union are administered by the Office for Harmonisation of the Internal Market ("**OHIM**") in Alicante, Spain.

Patents

Whilst patents may be granted via the European Patent Office under the European Patent Convention ("**EPC**"), there is no pan European patent; patents are granted in respect of each jurisdiction and then enforced under the relevant law of that jurisdiction. UK law (contained primarily in the Patents Act 1977) generally follows the requirements of the EPC; it is therefore similar to the law in each jurisdiction which is a signatory to the EPC. Discussions/negotiations within the European Union are ongoing in connection with a pan EU patent and a central patent court, intended to reduce the costs of obtaining, protecting or enforcing a patent in the EU.

In Europe a patent may be granted for any invention which is new, involves an inventive step and is capable of industrial application. Priority is obtained on a 'first to file' basis. Unless any prior invention has been published, 'first to invent' will not be relevant.

Patents are granted for a period of twenty years from the date of the filing of the application, but may be extended (by a supplemental protection certificate linked to the marketing authorisation) in connection with agro chemical and pharmaceutical products.

Trade Marks

In the EU, each Member State is required to have in place national laws implementing the requirements of an EU Directive (89/104/EEC) to approximate the laws of the Member States relating to trade marks. Thus, the law relating to trade marks (what is capable of protection, acts of infringement etc.) is essentially similar across the EU, but trade marks are obtained in each national jurisdiction and governed by the national law. In the UK, the law is contained in the Trade Marks Act 1994.

Under the EU Directive, a trade mark is any sign, capable of being represented graphically, which is capable of distinguishing goods and services of one undertaking from those of another. It may include words (including personal names), designs, letters, numerals or the shape of goods or their packaging and may include a smell or sound, if capable of being described in writing.

In addition, by EU Regulation (44/94/ EEC), the EU established a Community Trade Mark allowing a trade mark to be obtained for the entire EU with one registration at the OHIM. Whilst this is a cheaper alternative to registering in each national registry, it will not take precedence over earlier registered marks in a national registry and a single indivisible trademark may not be appropriate if separate businesses use the trade mark across the EU.

Trade marks are registered for an initial term of ten years, but may be renewed for subsequent ten year terms, with no limit on the number of renewals.

In the UK, the common law of 'passing off' can provide protection for rights in an unregistered trade mark, trade name or logo where a third party is taking advantage of the goodwill generated in such an unregistered mark and causing confusion in the market place.

Designs

The UK Registered Designs Act 1949 permits the registration of a design, which is new and has individual character. A design means the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture or materials of the product or its ornamentation. Registration is obtained at the UK IPO. By an EU Regulation (6/2002/EC) a Community Design may be registered at the OHIM, which provides protection for a registered design across all EU Member States.

Registration in the UK and at the OHIM is for a term of five years and may be renewed for successive five year periods up to a total of twenty five years.

In the UK rights in respect of a Registered Design should be distinguished from 'design right' which is an unregistered right under copyright protection, with up to fifteen years protection.

Copyright

The EU has, through a number of Directives, sought to harmonise the national law of Member States concerning copyright. Thus, on material issues (nature of protection, duration, protection of computer programs, rental and lending rights and issues relating to satellite broadcasting and cable transmission) national law in each Member State is similar. In the UK provisions relating to copyright are contained primarily in the Copyright, Designs and Patents Act 1988.

Copyright exists in original literary (which will include a table or compilation or a computer program), dramatic, musical or artistic works, sound recordings and films (or broadcasts) and the typographical arrangement of published editions. Generally, for literary, dramatic, musical or artistic work the duration of copyright protection is for the life of the author plus 70 years. Sound recordings have copyright protection for a shorter period of fifty years from first publication.

UK law also recognises an unregistered design right in an original design (being any aspect of the shape or configuration (whether internal or external) of the whole or part of an article), which expires 15 years from the end of the calendar year in which the design was first recorded in a design document or if earlier, an article was first made to the design.

By the Copyright and Rights in Databases Regulation, implementing the terms of an EU Directive, UK law created and recognised a separate intellectual property right ("Database Right"), where there has been a substantial investment in obtaining, verifying or presenting the contents of a database. Database Right subsists for a period of 15 years from the end of the calendar year in which the database was completed.

Ownership and evidence of IP rights

Generally under UK law, where IP rights are produced by an employee in the course of his employment, those rights automatically belong to the employer without the need either

for any express term in his contract of employment or any assignment document. An employee has limited rights to claim compensation where he is the inventor of a patented invention of outstanding benefit to the employer; these rights are rarely used and many companies will have internal policies in place to compensate employee inventors.

Generally, where copyright work is produced by an independent third party, copyright will belong to the author. Therefore, any contract should contain express terms as to the ownership of any copyright material to be produced in the performance of the contract. A reference to 'work for hire' has no legal consequence in the UK.

No registration of copyright is available in the UK and therefore registration is not required to evidence any copyright work. Copyright exists in a work whether or not any copyright symbol © is used. However, it is good practice to sign and date original work and insert a copyright notice on any publication of the work.

Similarly it is not necessary to use any symbol ® in connection with a registered trade mark in order to protect the rights in that trade mark. Infringement will occur whether or not the infringer is aware of the registration of the mark.

Confidential Information

In the UK, it is possible to protect confidential information provided that the information is truly confidential, has been disclosed in circumstances where the recipient is aware of its confidential nature and the recipient has used it for his own benefit to the detriment of the owner. It is usual for a non disclosure or confidentiality agreement to be entered into before disclosure, to assist in showing the elements necessary to bring a claim to protect any such confidential information and such that a breach of contract claim can be brought instead of (or in addition to) the more complex breach of confidentiality claim.

11. Data Protection

The EU Data Protection Directive (95/46/EC) required Member States of the EU to put in place national legislation providing protection as to the manner in which information about individuals is obtained, held or used. The UK Data Protection Act 1998 ("**DPA**") imposes obligations and potential criminal liabilities on companies that do not comply with its provisions.

The Act applies to data about a living individual – *a data subject* – from which an individual can be identified. Information which is *processed* by automatic means or that forms a part of a non-automated system organised by reference to individuals or to some criteria that relates to individuals, falls within the definition of data to which the Act applies.

A *data controller* is a person who determines the purpose for which and the manner in which any *personal data* is, or is to be, processed. Compliance is primarily the responsibility of a data controller. A *data processor* is a person who simply processes data on behalf of a data controller and generally has no obligations under the Act, but owes obligations to the data controller.

Each data controller is required to *notify* the UK *Information Commissioner* (who oversees and enforces the provisions of the DPA) of the processing of personal data.

The DPA sets out eight principles that govern the processing of personal data:

- personal data must be processed fairly and lawfully.
- personal data must be obtained only for specified and lawful purposes and may not be processed in a manner incompatible with those purposes.
- personal data must be adequate, relevant and not excessive in relation to the purposes for which it is processed.
- personal data must be accurate and, where necessary, kept up to date.
- personal data must be kept for no longer than is necessary for the purposes for which it is processed.
- personal data must be processed in accordance with the rights of the data subjects.

- personal data must be subject to appropriate technical and organisation measures to protect against unauthorised or unlawful processing and accidental loss, destruction or damage.
- personal data must not be transferred to a country or territory outside the EEA unless that country or territory ensures an adequate level of data protection.

It should be noted that currently the US is not recognised by the European Commission as having an adequate level of data protection.

There are additional restrictions on the processing of *sensitive personal data*, which would include data on ethnic or racial origin, political opinions, religious beliefs, trade union membership, physical or mental health, sex life or the commission of any criminal offence.

Data subjects have a right of access to their personal information, the right to require that processing cease where it is likely to cause substantial unwarranted damage or distress to them and the right to call for information to be removed if it is inaccurate.

Any entity processing personal data within the UK (or elsewhere in the EU) is required to comply with relevant national laws implementing the Data Protection Directive. In particular a Data Controller needs to consider carefully and, if appropriate, put in place contractual arrangements, to the extent to which it intends transferring any personal data (whether for data processing or otherwise) outside the EEA to any country that has not been recognised by the European Commission as having in place adequate arrangements for the protection of personal data.

12. Imports, Export Controls and Sanctions

Imports

There is a unified Customs law in the EU, which is a single trading area where all goods (subject to very narrow exceptions such as certain limited health and safety exceptions and military items) circulate freely, whether made in an EU Member State or imported from outside. Internal customs duties, fees and barriers are removed within the EU, although Member State customs authorities retain the right to check goods at the border. There is a common external customs tariff for products imported from outside the EU. That tariff is levied on an *ad valorem* basis and is intended to be applied and interpreted uniformly by all the Member States, although there can be differences in interpretation and administration.

The EU has adopted a Community Customs Code, which sets out the general rules and all the customs procedures applicable to goods traded between the EU and non-EU countries, including in respect of import relief in the form of dumping and countervailing duties and quotas. In addition, the EU has adopted a more detailed implementing regulation. As an EU regulation, the Customs Code and the Customs Regulation are directly applicable in the Member States and are administered and enforced by Member State customs authorities. In the UK, the national customs authority is HM Revenue & Customs (**HMRC**). The UK also has its own legislation that deals with certain aspects of importing and that impose penalties for violations of EU and national law.

In some cases, imports may require a national license or an EU license. These can include Common Agricultural Policy licenses for certain foodstuffs, licenses for the importation of certain other foodstuffs, livestock, blood, plant life, and other items subject to health and safety controls.

Export Controls and Sanctions

Exports of dual-use goods, technology and software from the EU, and certain intra-EU transfers of such items, are controlled under an EU Regulation, which is directly applicable in the EU Member States. Individual Member States have implemented legislation to exercise options under the EU Regulation, and to establish administrative procedures and penalties with respect to violations, details of which legislation may vary from state to state. In general, the competent authority of the Member State in which the exporter is established is the relevant licensing and enforcement authority with respect

to the EU Regulation, even though the items to be exported may be located in another Member State. In addition, Member States are also permitted under the EU Regulation to establish national licensing requirements for reasons of public security or human rights considerations for dual-use items not controlled under the EU Regulation.

The EU Regulation imposes licensing requirements for exports to destinations outside the EU of items listed on the EU Dual-Use List. The EU Dual-Use List and the UK's national control list is available at the following website:

<http://www.bis.gov.uk/assets/biscore/eco/docs/control-lists/uk-consolidated-list.pdf>

In addition, the EU Regulation imposes licensing or notification requirements if the exporter is informed, is aware or (where countries, such as the UK, have elected, has grounds for suspecting) that items may be intended for use in connection with certain nuclear, chemical or biological weapons or missile activities ("weapons of mass destruction" or "**WMD**" activities) or for certain military end-uses.

Exports of military items are controlled by each individual Member State.

In the UK, export licensing of dual-use and military items is administered by the Export Control Organisation ("**ECO**") of the UK's Department for Business Innovation & Skills ("**UK BIS**"). Where licenses are required, in addition to individual licenses, the UK has also established general licenses for exports of certain items to certain destinations. In addition, the EU Regulation establishes a Community General Export Authorisation ("**CGEA**") for exports of many EU Control List items to certain "friendly" nations. Member States are permitted to establish registration requirements as prerequisites for the use of the CGEA and other general licenses, and the UK has done so.

It should be noted that exports may be subject to controls under legislation other than that relating to dual-use items that may be administered by different agencies. For example, in the UK, there are separate controls relating to precursor chemicals and reagents used in drug manufacture and certain dangerous drugs. In addition, certain chemicals (mainly pesticides) may require consent before exportation, and prescription drugs and medicines may be subject to separate controls.

Enforcement of export controls is handled by HMRC.

The EU and its Member States also participate in various economic sanctions and arms embargo regimes pursuant to UN, EU and OSCE (Organisation for Security and Cooperation in Europe) initiatives. These include financial sanctions relating to terrorists, the Taliban,

Al Qaeda, Iran and other persons and destinations. They may also affect the ability to export. In the UK, HM Treasury administers and enforces financial sanctions and maintains a consolidated list of persons subject to financial sanctions designated by the UN, the EU and the UK.

13. Competition Law

Both UK and EU competition law are potentially applicable to persons and entities doing business in the UK. In general, where anti-competitive behaviour would have an “appreciable” effect on trade between EU Member States, Article 101 or 102 of the Treaty on the Functioning of the European Union (“**TFEU**”) would apply. Similarly, where anti-competitive behaviour would have an “appreciable” effect within the UK, Chapter I or II of the UK’s Competition Act 1998, would apply.

The European Commission shares the competence to apply Articles 101 and 102 with UK competition authorities and UK courts, which also have responsibility for domestic UK competition law.

The UK and EU competition authorities have very broad powers of investigation, including the power to enter, search and take copies of documents from professional and private premises and effect “dawn raids.” EU and US competition authorities also cooperate with each other on competition matters.

Anti-competitive agreements and concerted practices

Article 101 of the TFEU and Chapter I of the UK Competition Act 1998 prohibit agreements between undertakings (that is, companies, partnerships, sole traders and self-employed professionals that carry out economic or commercial activities), decisions by associations of undertakings and concerted practices that may appreciably affect trade within a relevant market and have the object or effect of preventing, restricting or distorting competition in this market.

These prohibitions can affect agreements and concerted practices between competitors (horizontal transactions) as well as between undertakings or groups of undertakings acting at different levels of a market (vertical transactions). An agreement or concerted practice that falls within Article 101 or Chapter I is not necessarily illegal if it meets certain exemption criteria. Both EU and UK legislation provide for certain exemptions from the prohibition with respect to certain categories of restrictive agreements and concerted practices. The EU has established “block exemptions” for certain categories of agreements. Although the UK authorities may adopt their own block exemptions, for the most part that has not happened and the UK Competition Act 1998 only currently provides for mirror block exemptions for agreements covered by an EU block exemption.

Where an agreement does not come under a block exemption, it may still be individually exempted provided the requirements for exemption are met. However, hard-core restraints in agreements such as those involving price fixing (both horizontal and vertical) and export bans partitioning national markets, which are contrary to the goal of single market integration in the EU, will generally not be exemptible and may attract heavy penalties.

The parties must (except in rare circumstances) self-assess whether an agreement meets the requirements for an exemption (which assessment is subject, of course, to the ultimate determination of the courts).

The UK has introduced two provisions specifically targeted at individuals to ensure compliance with competition law. First, there is a criminal cartel offence for individuals who dishonestly agree with one or more other persons that undertakings will engage in horizontal cartel activities, including price fixing, limitation of supply or production, market-sharing or bid-rigging. In addition, UK law provides for disqualification of company directors who knew or ought to have known that their company was guilty of an infringement of EU or UK competition law.

Abuse of a dominant position

Article 102 of the TFEU and Chapter II of the UK Competition Act 1998 are aimed at unilateral conduct of dominant firms which abuse their dominant position within a relevant market in the EU or the UK. To have a dominant position is not prohibited; its abuse is. A dominant position is generally one in which an undertaking (or a group of undertakings) has the economic strength to prevent effective competition being maintained on a relevant market such that the dominant firm has the power to behave independently of its competitors, customer and consumers. Whilst there is no level of market share that is conclusive to determining dominance, generally a market share of 50% or more will give rise to a presumption of dominance, although, depending on the circumstances, undertakings with a lower market share may have sufficient market power to be viewed as dominant.

Issues under Article 102 and Chapter II have arisen in the context of single branding arrangements (such as exclusive purchasing, requirement contracts, non-compete obligations), tying arrangements and refusals to supply involving dominant firms. In addition, certain pricing practices by dominant firms can raise issues, such as loyalty rebates, bundling, predatory and excessive pricing, and price discrimination.

Merger Control

Concentrations (whether in the form of an acquisition of shares or assets, certain joint ventures or similar transactions) where certain turnover thresholds are met, such that the concentration has a “Community dimension,” are subject to the exclusive jurisdiction of the European Commission under the EU Merger Regulation (subject to certain “referral back” provisions). The EU Merger Regulation imposes mandatory pre-merger filing requirements in respect of such transactions and generally requires suspension of the transaction until approval is received. The exclusive jurisdiction of the European Commission operates as a “one stop shop” and approvals obtained in this manner are valid with regard to all EU Member States.

Where the EU Merger Regulation does not apply, concentrations will qualify for investigation in Member States if certain local merger control tests are met. In the UK, a relevant merger situation will arise under the Enterprise Act 2002 if two or more enterprises have ceased to be or will cease to be distinct enterprises (i.e., are brought under common ownership or common control) and either:

- the UK turnover of the business to be acquired exceeds £70 million (the “turnover” test); or
- the enterprises involved supply or acquire goods or services of any description and, as a result of the transaction, together will supply or acquire at least 25% of all those particular goods or services of that kind supplied in the UK or a substantial part of it (the “share of supply” test).

Currently, unlike under the EU Merger Regulation and pre-merger filing requirements in many other jurisdictions, pre-merger filing in the UK is voluntary. Where parties identify significant competition concerns as part of their pre-merger self assessment, they will often decide to notify. In the absence of a notification, the UK’s Office of Fair Trading (“**OFT**”) can start an investigation on its own if a transaction meets the jurisdictional thresholds and make a referral to the UK’s Competition Commission up to four months after the transaction is completed or becomes public, whichever is later. In this regard the OFT has an obligation to make a referral to the UK Competition Commission for detailed investigation if it has a reasonable belief, objectively justified by relevant facts, that there is a realistic prospect that the merger will result in a “substantial lessening of competition”. The OFT may accept undertakings for the purpose of remedying or preventing adverse effects that would otherwise require a referral.

Notification to the OFT does not prevent the merger from being completed during a preliminary investigation phase, although the OFT can impose “hold separate” orders or accept undertakings in lieu of an order. If a merger is then referred to the UK Competition Commission, the purchaser is no longer permitted to acquire further shares; and if the merger is already completed, the purchaser must obtain consent before integrating the businesses further. Special rules apply to concentrations and mergers involving listed companies.

In the case of a referral, the UK Competition Commission undertakes a full investigation and must determine whether the merger is expected to result in a “substantial lessening of competition”. Depending on the circumstances, the Competition Commission may clear a referred merger, clear it with undertakings or prohibit it.

Depending on the method of notification, the time for decision can range from 20 to 40 working days (although the OFT has certain “stop the clock” powers, which it can exercise if information is not forthcoming). A range of fees, depending on UK turnover, is payable to the OFT in connection with merger reviews.

Certain public interest cases may arise in which the Secretary of State also may have a right to intervene. See Section 4 (Investment & Security) above.

14. Real Estate

Any entity expanding its business into the UK, will almost certainly need premises from which to conduct its operations. Depending on the operational needs and level of commitment, it will wish either to acquire a freehold or long leasehold interest in the property, or else to take a new lease (or the transfer of an existing lease) of suitable premises. In relation to these options, any such entity will need to be aware of the following issues under UK law:

Freehold

This is a perpetual title which will be registered at the Land Registry and thus guaranteed by the UK Government. There is no need for insurance of the title. The title may be subject to restrictions on use or to rights in favour of other property owners and may carry with it rights over other land. Freehold property which is free of mortgage (security) can be disposed of without any third party consent. In acquiring freehold specialist legal advice will be required.

Long Leasehold

It is not uncommon in the UK for freehold owners to create leases of 99 years or more in return for capital payments. These leases change hands in a similar manner to freeholds and can usually be transferred without landlord's consent. The title to the lease will be registered at the Land Registry and so guaranteed but it will be subject to rights and restrictions contained in the lease or affecting the freehold title. The rent will normally be very low. Specialist legal advice will be needed in connection with the negotiation of a new long lease or the acquisition of an existing one.

Short Leasehold

Most office and retail operations in the UK are run from premises in which the person conducting business has a lease of between five and twenty five years. Such leases may or may not be registered at the Land Registry but title insurance is usually unnecessary, even if there is not a registered title. In addition:

- If the tenant is to be a newly formed UK subsidiary, the landlord may require a parent corporation guarantee to be given or a rent security deposit to be provided.

- It is usual (though not in Scotland) for leases to be capable of transfer with the landlord's prior written consent, which cannot be unreasonably withheld.
- Full market rent is payable in advance at quarterly intervals. If the lease runs for more than five years, it is standard practice for the rent to be subject to "review" to current open market level (if higher than the existing rent) at five-yearly intervals.
- The landlord's consent is usually required for any works to be carried out by the tenant and while normally this cannot be unreasonably withheld, the consent tends to be conditional upon an obligation by the tenant to reinstate the premises at the end of the lease, if required.
- It is usual for the landlord to insure the property against fire and other risks and to recover the premium cost from the tenant.
- Where the premises form part of a building or mall, the landlord will be responsible for structural maintenance and the provision of services, the cost of which will be recovered proportionately from the tenant by way of service charge.
- Unless the landlord and tenant have agreed otherwise, tenants of commercial premises have the right at the end of the lease term to apply to the Court for an order requiring the landlord to give them a new lease on similar terms at a market rent, to be settled by the Court if there is no agreement. Most renewals are achieved by negotiation rather than Court action. If the premises form part of a larger building, it is usual for the renewal right to be excluded. (However the right of renewal does not apply in Scotland.)
- It is standard practice for all repair liabilities to be passed on to the tenant, so before signing the lease (or taking a transfer of an existing lease) the tenant will wish to ensure that the premises are in satisfactory condition. It is likely to require the services of a chartered surveyor.

Costs

In addition to legal and surveying costs, transfers of property can incur additional charges. The most significant of these charges is Stamp Duty Land Tax (SDLT), which is payable for freehold and leasehold, residential and commercial properties:

- Commercial property purchases over £150,000 attract SDLT payable at 1% of the purchase price. This increases incrementally and at £250,000 the SDLT payable

increases to 3% and at £500,000 the SDLT payable is 4% of the whole of the purchase price.

- If the property is leasehold the SDLT payable is calculated in accordance with the purchase price premium, the rent payable and the duration of the lease. If the calculated value for commercial properties is over £150,000, 1% of the calculated value is charged as SDLT.
- If the purchase is made of a company owning a property (rather than the property itself) the stamp duty chargeable is 0.5% of the value of the shares.

The following charges can also be incurred when transferring property:

- **Land registry fees.** When a registered property is transferred the ownership register must be updated to reflect the change in ownership. There is a fee payable for this which increases incrementally in accordance with the value of the property and ranges from £50 to £920.
- **Local searches and enquiries.** When investigating title to the property, searches will be carried out with the local authority to ascertain if there are any issues which may affect the property. These attract a fee of around £300.

15. Commercial Dispute Resolution

This section of the guide relates to commercial dispute resolution in England and Wales only. Different regimes may apply in Scotland and Northern Ireland. London is one of the leading centres for dispute resolution whether by arbitration or in court and English law is frequently chosen in international commercial contracts.

The English legal system has two important features which should be borne in mind. Firstly, although much English law is now contained in statutes and EU legislation, the law is still to a significant extent judge made in accordance with common law principles of precedent. Second, the English legal profession is split between solicitors and barristers; in significant commercial disputes, it is still largely the practice that both a solicitor and a barrister will be instructed.

It is important to take legal advice as early as possible as a case can be shaped and the merits of the case materially affected by the manner in which the parties act in the initial stages of the dispute. A party to a potential dispute will need to consider:

- communications with the adverse party;
- internal communications which relate to the potential dispute;
- preserving evidence;
- whether urgent Court intervention is necessary;
- whether a speedy resolution can be achieved, before damage or loss is sustained or materially increased;
- whether delay could lead to a claim/defence not being available; and
- the effect the potential dispute may have on its continuing business.

In common with most jurisdictions there are three main types of commercial dispute resolution available within England.

- Litigation, using the English court system;
- Arbitration; and
- Alternative Dispute Resolution (ADR)

A number of factors will be relevant in deciding which method of dispute resolution is appropriate for any dispute, including:

- the 'value' of the dispute;
- the costs which may be incurred in taking action;
- the relationship between the parties to the dispute;
- any dispute resolution clauses contained in any relevant contract;
- whether privacy is an issue in connection with the dispute or the parties;
- whether immediate action is required to protect assets (including intellectual property and confidential information), business or reputation or to preserve evidence; and
- the time which may be taken in seeking resolution of the dispute.

Litigation

Litigation, that is legal proceedings in the English court system, is the most widely recognised dispute resolution procedure. In England and Wales, the court system, for civil actions includes:

- County Courts, based around the country, primarily for small claims, where the value of the dispute is below certain thresholds. There is also a specialist Patent County Court for smaller intellectual property claims.
- The High Court, based primarily in London, but with sittings also in other major cities, which is divided into specialist divisions – Chancery, Family and Queen's Bench. Major commercial disputes are generally dealt with by the Commercial Court, which has its own specialist judges and procedures.

There is an appeal procedure from the High Court to the Court of Appeal and ultimately to the Supreme Court. The UK courts may also refer matters to the European Court of Justice for determination of relevant issues under EU law.

As in any jurisdiction, there are prescribed time limits in which any court proceedings must be commenced; for contractual claims this is generally six years from the date of any breach.

Although litigation is by its nature an expensive and time consuming solution, it can often be the most effective way of resolving a dispute. Advantages of litigation include:

- The availability of swift court procedures (sometimes without notice to the adverse party) to obtain orders to preserve assets or evidence or injunctions (or other equitable relief) to prevent any continuing breach or other action by the adverse party;
- If a Claimant or Defendant is confident of success on the merits of the case, a summary judgement order of the Court can be obtained on the basis that a claim / defence has no prospect of success.
- If a dispute concerns a point of law, a ruling of the Court may be necessary.

There are two key issues in English litigation, which may differ from other jurisdictions:

- The English Court has in place protocols, that seek to encourage each party to adopt a realistic view of its prospects of success and to seek to resolve the dispute before proceeding to court action, with litigation being seen as a last resort. Each Party is required to follow the protocols and will be liable to sanctions if it does not do so. Thus in the English Courts, generally, a party cannot rush to Court and must follow the protocols, which require each party to set out its case and exchange information at an early stage. As a result, the most expensive part of litigation is often the initial stages, when the parties are each preparing their case and assessing the merits etc.
- Regardless of any contract provisions, the general rule in English litigation is that the loser pays the winner's costs (in addition to the loser's own costs and any damages which may be awarded in the case). However, in practice, by reason of the assessment of recoverable costs under the English system, the 'winner' will usually recover only 60-75% of its actual costs incurred.

Arbitration

The globalisation of business has made arbitration an increasingly popular choice of dispute resolution in commercial contracts. This trend has been encouraged by the establishment of numerous national and international institutions, conventions and rules relating to international arbitration.

Arbitration is an alternative to litigation and allows parties to resolve disputes without a recourse to litigation in national courts. An arbitration agreement is a written contract (ordinarily a clause in a larger contract) in which two or more parties agree to settle a dispute outside the court system, by a chosen arbitration procedure. It is important in drafting any contract to consider the terms of the dispute resolution clause.

Advantages of arbitration include:

- the ability to appoint a specialist arbitrator(s) experienced in the particular industry or profession or matters key to the dispute.
- privacy: no public filings are required for any claim in arbitration, arbitration proceedings are conducted in private and the subject matter and outcome of the arbitration (including any orders or award of damages) is confidential.
- flexibility: the parties can seek to agree the identity of the arbitrator(s) and the location, timetable and procedure for the arbitration.

Detailed arbitration rules are prescribed by various bodies including the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and The United Nations Commission on International Trade Law (UNCITRAL). A contract can stipulate that a particular set of rules will apply in the event of a dispute or the parties can choose to adopt a set of rules when arbitration is commenced. Alternatively, the parties can agree their own (ad-hoc) rules.

Generally the decision of the arbitrator(s) is binding on the parties and can subsequently be enforced by national courts.

Alternative Dispute Resolution (ADR)

ADR is the collective term used to describe the various dispute resolution mechanisms whereby an independent third party is engaged by the parties to help them reach a solution, that is mutually acceptable to both parties. Types of ADR include:

- Mediation;
- Med-arb;
- Expert appraisal;

- Judicial Appraisal;
- Expert determination; and
- Adjudication.

The most common and popular form of ADR is mediation, where an independent third party chairs discussions between the parties (or initially has separate discussions with each party) with a view to reaching a mutually acceptable solution. Mediation can be carried out in face-to-face meetings or on a written and/or telephone basis.

ADR can be an effective way of resolving a dispute quickly and in a cost-effective manner that avoids unnecessary antagonism and allows the parties to reach a commercial decision that may allow the business relationship to be maintained.

However, disadvantages of ADR include:

- ADR is not binding (unless a contract is entered into as a result of the ADR) and a party can withdraw at any stage.
- If no resolution is achieved by ADR, it can add to the length and cost of the dispute resolution.
- Parties can also find themselves negotiating “blind” since there are no formal disclosure obligations which might assist in seeing the strength or weakness of the other party’s case.
- ADR will not be appropriate where there is a risk that money or information will be lost, intellectual property rights may be diminished or lost or where the dispute requires the Court to rule on a point of law.

The English court protocols encourage parties to explore ADR in the first instance.

16. Contacts¹

The information contained in this guide is correct as of 1 January 2012. The information is general in nature and is intended to provide an overview of the relevant law and legal issues. It does not constitute legal advice with respect to any matter or set of facts. Professional advice should always be obtained before applying any information to particular facts and circumstances.

We welcome the opportunity to discuss any of the issues raised in this guide or any other questions you might have. If you would like to know more, please get in touch with your usual Bryan Cave contact or any of the Bryan Cave lawyers in London listed below.

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