

FOREIGN TRADE AND INTERNATIONAL COMMERCIAL LAW

FACT SHEET

ESTABLISHING A BUSINESS IN THE UNITED KINGDOM

This Fact Sheet explains the essential features and requirements for establishing a business in the United Kingdom. The materials are grouped in four topics as follows:

- I. Types of Business Vehicle
- II. Employment Considerations
- III. Intellectual Property Protection
- IV. Business Tenancies

I Types of Business Vehicle

1. General

There are a number of ways in which an overseas entity can establish a business, or acquire business interests, in the United Kingdom. The principal methods are:

- (a) the incorporation of a company in the UK;
- (b) the establishment of a branch or place of business here;
- (c) the establishment of a business here by means of joint venture (including a partnership);
- (d) the acquisition of an existing UK company or business or any interest therein; and
- (e) the appointment of an independent agent or distributor.

The decision as to the most suitable type of business vehicle will depend upon a number of factors, including the nature of the intended activities in the United Kingdom, taxation and

employment issues, and financing and funding considerations.

These notes focus principally on the first two methods: the incorporation of a UK company or the establishment of a branch or place of business here. The other three methods raise different considerations on which further detailed advice should be sought.

2. Key differences between a UK company and a branch or place of business

The main differences between the establishment of a branch or place of business and the incorporation of a UK company are:

- (a) *Legal personality.* A UK company has a separate legal personality, distinct from that of its members. It can therefore contract and sue, or be sued, in its own right. By contrast, a branch or place of business remains in law part of the establishing overseas entity;
- (b) *Liabilities:* If a UK company with a limited liability were established, an overseas entity would not normally incur liability for the debts and other obligations of that UK company. An overseas entity establishing a branch or place of business here would, however, be liable in law for all the debts and obligations of the other branch;
- (c) *Tax - General:* A UK company is subject to UK corporation tax on all its profits and gains and these profits and gains will not normally be liable to tax in the parent company's hands. If a branch amounting to a "permanent establishment" is used to carry on a UK

trade the overseas company is liable to UK tax on the UK trading profits and on certain other profits and gains. Potentially, the overseas company is also liable to tax on these profits and gains in its own jurisdiction. However, if there is a double tax treaty with the UK this will usually provide for a credit for the UK tax against the overseas tax;

- (d) *Tax - Profit extraction:* Profits of a UK subsidiary will normally be remitted to the overseas parent by way of dividends. Losses, which a UK subsidiary makes, cannot be surrendered to the overseas parent. With a permanent establishment there is no question of paying dividends and its after-tax profits can normally be remitted to the overseas parent without any UK tax consequences. If the UK branch makes a loss, this loss will normally be available to the overseas parent in its own jurisdiction.

3. Establishment and operation of branch or place of business

An overseas company which establishes business activities in Great Britain (other than through a subsidiary company, an agent or distributor) will be required to register its establishment either as a place of business or as a branch in accordance with the Companies Act 1985 and applicable regulations (the "Regulations") which implement the EC Company Law Directive. However, a new set of rules will soon be used under the new Companies Act 2006.

The nature of the proposed business activities of the overseas company will determine whether the "place of business" regime or the "branch" regime is applicable in any particular case. Separate provisions dealing with the registration of branches of credit and financial institutions are not dealt with here.

3.1 Registration of a place of business

An overseas company is, generally, required to register under the place of business regime if it establishes a place of business in Great Britain and the overseas company's presence in Great Britain is not sufficient to fall under the branch registration regime.

A company required to register under the place of business registration regime must, within one month of establishing a place of business in Great Britain, deliver to the relevant Registrar of Companies on Form 691.

The company must also deliver to the relevant Registrar a copy of the company's constitutional documents certified by an authorised person. If any of these documents is not in English, a translation certified by an authorised person must also be provided.

There is a continuing obligation to notify the relevant Registrar of changes in particulars, which have been registered.

Within 9 months of establishing a place of business, the company must notify to the relevant Registrar the company's accounting reference date.

Companies which register places of business must deliver to the relevant Registrar within 13 months of the end of each financial year, copies of their report and accounts, accompanied (if necessary) by a certified translation. These accounts must comply with applicable UK regulations but do not need to be as detailed as those required if the company were incorporated in Great Britain, nor do they need to be audited. Directors' reports are not required nor are disclosure of details of directors' remuneration, loans or similar transactions.

Companies with a place of business in England or Wales must deliver all required documents to the Registrar of Companies in England and Wales and those with a place of business in Scotland to the Registrar of Companies for Scotland.

3.2 Registration of a branch

The branch registration regime applies to limited companies incorporated outside the United Kingdom, which have a branch in Great Britain. A company with more than one establishment in Great Britain must, if each establishment has a separate management structure and a separate line of reporting to the company, register each establishment as a branch.

A Company must, within one month of having opened the branch, deliver the relevant Registrar of Companies the information about the company and the branch. There are modified filing requirements for companies with more than one branch.

There is a continuing obligation to notify the relevant Registrar of changes in particulars, which have been registered.

A Company also has a continuing obligation to file copies of its accounts with the Registrar of Companies. If, under its parent law, the company is required to prepare, have audited and publicly disclose its accounts, then it is obliged to file these within 3 months of publication. If, under its parent law, the company is permitted to publish a modified form of its audited accounts, then these modified accounts may be filed instead. In other circumstances, the rules governing the form of accounts to be published are those applicable to an overseas company with an established place of business.

3.3 Regulation of overseas companies in respect of their names

The Secretary of State is entitled to regulate the names under which overseas companies can carry on business in Great Britain. Broadly, if the overseas company's name contains certain restricted words, is offensive, or is the same as or too similar to the name with which an existing company is registered, the company can be required by the Secretary of State to cease using the name in the UK. It is therefore essential to check the index of company registrations before starting business operations under a particular name. A company would never, of course, be obliged to change its corporate name in its country of registration. A company is not required to carry on business under its corporate name provided that the corporate name appears on all official documentation of the branch or place of business.

3.4 Publicity

Every overseas company, which has registered a branch or established a place of business must comply with rules requiring specified information about the company and the branch to be exhibited at every place where the company carries on business in Great Britain and on invoices, letter paper, notices and other official publications ("official papers") of the company.

4. A UK Company

4.1 General

The corporate structure normally adopted for a UK company is that of a company limited by shares incorporated under the CA 1985. Again, a new set of rules will soon be applied under Companies Act 2006. The new rule will simplify the setting up process.

Formation of companies limited by shares involves registration of the constitutional documents of the company (memorandum and articles of association), together with particulars of the first directors, secretary and registered office, with the relevant Registrar of Companies.

An overseas person wishing to establish a UK company can either establish a new company or buy an existing company "off the shelf" and change its name and, if necessary, its constitutional documents to suit the overseas person's requirements.

4.2 Ongoing registration requirements

Under the CA 1985, UK companies are obliged to notify the relevant Registrar of Companies of certain events and, in most instances, failure to do so within the prescribed time limits exposes the company and its officers to fines. The events, which must be notified, include a change in the company's registered office, the appointment of and any changes in its directors and secretary, any increase in the authorised or issued share capital, the passing of certain shareholders' resolutions and any alteration to the company's constitutional documents.

The company must also file with the relevant Registrar each year a copy of its audited annual accounts and an annual return in the prescribed form within the time limits set out in the CA 1985. Failure to do so exposes the company and its officers to fines. A private company may elect by unanimous resolution of all its members, amongst other things, to dispense with the requirements to lay accounts and reports before general meeting, to hold an AGM, and to appoint auditors annually.

4.3 Memorandum and articles of association

A company incorporated in Great Britain is governed by two constitutional documents: its memorandum of association and its articles of association. The memorandum of association deals with, among other things, the objects and powers of the company. The articles of association contain the detailed administrative provisions for the operation of the company, including provisions in respect of the issue and transfer of shares, the holding of general meetings of the members, the appointment and powers of the directors, the holding of meetings of the board of directors and the giving of notices. It is possible to amend the provisions of the articles of association by special resolution of the shareholders.

4.4 Share capital

Under English law, a company has two kinds of share capital, namely its *authorised* share capital and its *issued* share capital. The authorised share capital of the company is the maximum amount of share capital, which the company is authorised to issue. Shareholders can vote to increase the amount of authorised share capital. The issued share capital of a company is the nominal amount of share capital, which has been issued and allotted to shareholders. The power to issue further shares is usually vested in the directors by the articles of association but can be reserved to shareholders.

A nominal value is attributed to each share whether authorised or issued. This can be any amount and the only relation it bears to the actual price at which shares are issued is that a share cannot be issued at a price lower than its nominal value.

4.5 Members

A private company must have one or more shareholders (who need not be United Kingdom nationals or even residents). Members may be individuals or corporations or any other legal entity and may hold their shares for their own benefit or as nominees for other persons. However, the company's records will only show the registered legal owners but beneficial ownership by directors must be disclosed in the annual report and accounts. Decisions on certain matters are reserved to the shareholders, for example, the approval of annual accounts, any alteration of the memorandum and articles of association, the appointment of auditors and a change in the company's name. It is not necessary for meetings to be held in the United Kingdom although records must be kept at a place in the United Kingdom.

4.6 Directors

A private company must have one or more directors, who may be individuals or corporations. It is desirable, however, that there should be at least two directors to ensure continuity if one of them resigns or is otherwise unable to act. The articles of association may provide for the appointment of alternate directors to enable directors who are not present at board meetings to appoint representatives to attend in their place. The articles of association usually provide that the business of the company should be managed by the directors and that the directors may

exercise all the powers of the company which are not required to be exercised by the members in general meeting.

4.7 Secretary

A company must also have a secretary, who may also be a director, provided he or she is not the company's sole director. The secretary has an administrative function and has duties imposed on him or her by law. The secretary may be an individual or a corporation, which provides secretarial services.

4.8 Auditors

A company must periodically appoint a firm of UK accountants to be the auditors of a company. The auditors are normally appointed to hold office from one annual general meeting to the next. Exemption from the requirement to appoint auditors and to file audited accounts is available for certain small companies where turnover falls below designated thresholds.

4.9 Registered office

A company must have a registered office in Great Britain. This is the official address of the company to which all official correspondence can be sent. A company registered in England and Wales must have its registered office there.

4.10 Company name

A company may adopt any name it chooses provided that it does not infringe certain prohibitions of the 1985 Act. Broadly, a company name will not be registered if:

- (a) it is the same as a name already appearing on the index of company names;
- (b) it would, in the opinion of the Secretary of State, be likely to give the impression of a connection with central or local government;
- (c) it contains a word or expression, which can only be used at the discretion of the Secretary of State (for instance, there are limitations on the use of the words "bank" or "holdings").

The word "limited" must in almost all cases appear at the end of the name of every private limited company.

II. Employment Considerations

1. General

This section concentrates on the relationship between employers and their employees. The employment relationship is governed by both contractual and statutory rights. Even where an employer is a non-UK company, the contract of employment of an employee who works in England may be governed by English law, and the employee may also have the benefit of English statutory protection. Even where a different jurisdiction is specified in the contract, certain mandatory rights cannot be excluded.

2. The Contract of Employment/ Service Agreement

A contract of employment can be oral or in writing. A Company's contract of employment for its directors needs to be tailored to reflect a director's dual role of employee and officeholder. These contracts of employment are commonly known as "Service Agreements". Service Agreements are also commonly used for other senior or key employees. Directors may not have service contracts for more than five years without the agreement of the shareholders of the company at a general meeting.

It is essential that all your employees have a written contract of employment and that all your directors have a written service agreement. The main reasons are:

(a) Certainty

Without a written document, disputes can arise as to the terms.

(b) Protection of the Company after termination of employment

This is particularly necessary for senior or key employees. For example, if such an employee left and set up in competition, unlimited damage could be inflicted upon your company from loss of business. You can seek to reduce those potential losses by having a written contract containing carefully drafted clauses protecting confidential information and restricting certain activities after the employment has terminated, for example, preventing the employee dealing with or soliciting customers and/or competing with the employer's business. Carefully drafted restrictive covenants will normally be enforceable whereas covenants that are not specifically tailored for the company and its

different categories of employees are highly likely to be unenforceable.

(c) Statutory requirement

In addition, there are statutory provisions, which require some information to be in writing. In particular, the Employment Rights Act 1996 requires that all employees should be given a written statement of some specific terms of their employment within 2 months of commencing employment.

2.1 *Clauses to protect the company*

The following are clauses, which should be included in Service Agreements and in the Contracts of Employment for your key staff.

- restrictive covenants - these are the only method of restricting employees from certain activities, for example, competing with the company, once their employment has ended.
- "garden leave" clause - this clause can be used in conjunction with or as an alternative to restrictive covenants and enables you to require the employee to remain at home during all or part of his/her notice period. It is useful in preventing an employee working for a competitor during the notice period.
- pay in lieu of notice clause - this clause is essential when seeking to rely upon post-termination clauses such as restrictive covenants/confidentiality clauses - it also has significant tax and other consequences.
- confidentiality clause - this is important for all employees in order to protect the use of confidential information after the termination of employment.
- intellectual property clauses - this is important for all employees who are likely to invent, design or create technology or make discoveries.

2.2 *Staff Handbook*

An employer will always have a number of practices and procedures that it will want to apply to its employees. Generally, it is advisable for these to be contained in one document, which should be issued to all employees at the commencement of their employment. Employees should be asked to

confirm that they have read and understood the Staff Handbook.

However, it is also important for the employer to retain the ability to amend the practices and procedures in the Staff Handbook, and therefore the statement, 'the Staff Handbook, as amended from time to time, applies to all employees' should be put in the introduction. The Staff Handbook should also be referred to in the contract.

The Staff Handbook may contain a variety of procedures and will vary from employer to employer, but the following rules and policies should be included.

- Disciplinary procedure - this sets out how the company deals with issues such as performance, conduct, capability and attendance of employees. The procedure we recommend is based on the ACAS Code of Practice, which is used by Employment Tribunals when assessing whether an employer has treated an employee fairly.
- Equal opportunities, including a harassment policy - this policy set out the company's position in that it aims to treat all staff and job applicants equally regardless of, for example, their age, sex, race, religion or disabilities.
- Health & Safety - it is important to have such a policy so that all employees are aware of their health & safety obligations.
- maternity/paternity/parental leave – explaining employees' rights concerning maternity/paternity and parental leave.
- family friendly policies - there are a number of flexible working arrangements that you may wish to introduce, for example job share, and it is important that you have a written policy explaining the terms and conditions of that arrangement.
- data protection - employees have certain rights concerning the data kept about them on record and how this data are handled should be included.
- whistleblowing - a policy dealing with the situation for disclosure of confidential information by employees.
- internet/email - there has been a rise in the number of employees who abuse their right

to use email/the internet at work. It is important to have a policy dealing with this.

- company rules - this document suggests various rules and regulations that employees should follow. This should be tailored to the needs of the company.

3. Employees' statutory rights

An employee's statutory rights are diverse, but significant ones include:

- a right not to be unfairly dismissed - this is generally subject to an employee satisfying a qualifying service requirement of 1 year's continuous employment (subject to certain exceptions).
- a right to a redundancy payment - (subject to certain requirements) - this is generally subject to an employee satisfying a qualifying service requirement of 2 year's continuous employment.
- a right not to be discriminated against on the grounds of sex, age, race, disability, religion or belief and sexual orientation. Importantly there is no qualifying service criterion for bringing discrimination claims and no cap on the compensation, which can be awarded.
- a right to receive equal pay for work of equal value;
- a right to receive itemized pay statements;
- women have certain rights in relation to maternity pay and maternity leave; men have certain rights in relation to paternity pay and parental leave; and both men and women have certain rights in relation to parental leave;
- a right to a minimum wage;
- a requirement not to work over an average of 48 hours a week;
- an entitlement to minimum daily and weekly rest periods;
- an entitlement to a minimum annual amount of paid holiday;
- protection of employment in particular circumstances, for example, potentially on a sale of a business;
- statutory regulations governing health and safety at work and sick pay;

- a right to request changes in working arrangements.

III. Intellectual Property

Under UK law, protection is given to the following types of intellectual property:

- Copyright and database rights
- Designs
- Patents
- Trade marks - brands and logos
- Confidential information or "know-how"

The UK is a member of most of the major international treaties relating to intellectual property. Therefore generally speaking, intellectual property, which has been created abroad, may receive protection in the UK. Of course much will depend on the circumstances and professional advice in this area is particularly important.

Copyright and database rights

Copyright protection is given in the UK to original literary, artistic, dramatic and musical works as well as to sound recordings, films and television programmes. Computer software and compilations are protected as literary works.

Copyright arises automatically on creation of a work. There is neither registration procedure nor any legal requirement to use a copyright notice, although the latter is desirable.

Copyright generally lasts for the life of the author plus 70 years. It enables the owner to prevent third parties copying the work or otherwise exploiting it, for instance by importing or selling infringing copies.

Database rights offer protection to a database where there has been a 'substantial investment' in obtaining, verifying or presenting its contents.

Designs

There are two types of design protection in the UK.

Registered designs protect the appearance of a product resulting from features of shape, colour, ornamentation, lines, contours, texture and materials. Such protection lasts for 25 years and requires formal registration.

Unregistered design rights protect the 3D aspects of industrial articles. It does not require registration and is subject to many

exceptions, which, for example, allow spare parts for industrial articles to be made by competitors. It is a relatively short-lived intellectual property right - it lasts for a maximum of 15 years.

Patents

A patent, giving the holder a monopoly right to use and exploit a particular product or process, is generally available for novel inventions capable of industrial application. The requirement of novelty means it is crucial that a potentially patentable invention is kept secret until an application is filed.

Applications for UK patents may be made to the UK Patent Office or to the European Patent Office in Munich under the European Patent Convention, designating the United Kingdom.

Trademarks

Trademark registration is available for words and/or devices (which include smells, shapes and sounds) provided these are distinctive or capable of distinguishing the owner's goods or services and are not confusingly similar to existing marks.

Unlike many other intellectual property rights, registered trademarks are potentially perpetual provided their distinctiveness is maintained and renewal fees paid.

Even if a mark is not acceptable for registration, protection may be available under the common law doctrine of "passing off. Basically this gives protection to names and logos etc, which have acquired a reputation through use in a business.

Confidential information

Generally speaking where information has been disclosed to a party in circumstances where he knew or should have known that it was to be treated in confidence, he will be prevented from disclosing such information or be held liable in damages if he does so. In theory this is so even if there is no contract between the owner of the information and the discloser. However from a commercial point of view an express written confidentiality agreement is usually vital to determine more precisely the obligations of the parties concerned.

Selling and Exploiting Intellectual Property

In the UK many businesses are based on the exploitation of intellectual property, for example software licensing, pharmaceutical developments etc. There are many different ways of selling and/or licensing such rights and again it is important to take advice on the

various local issues involved. This is particularly the case because many aspects of UK licensing laws are governed by EC and also local UK Competition Law.

IV Business Tenancies

Where a business rents a showroom, shop, office or warehouse that will be used for their business, then that lease is called a business tenancy. This section gives a brief explanation of the essential ingredients of a business tenancy.

Business tenancies are subject to statutory protection under the Landlord and Tenant Act 1954. The protection starts from the moment that you enter into occupation of the property, whether or not you have a written tenancy agreement. Once you start to occupy the property for your business, the Act specifies certain things that the landlord has to do before he can remove you from the property. There are certain exceptions and you should seek specific advice to see whether you fall within one of the exceptions.

You should always make sure that you have a written lease before you start to occupy the property and should get legal advice on the terms of the lease.

The lease will say when it starts and when it finishes (known as the contractual term).

It will also specify how much rent and service charge you have to pay and how often you have to pay it (usually you have to pay your rent in advance and on the Quarter Days (March, June, September and December). It will also say who has to insure the property and who pays the premiums.

If the lease is for more than 3 years, it is likely that the landlord will have the right to increase the rent to bring it up to date (known as rent review).

It is crucial that you pay the rent on time. If you miss a rent payment, the landlord will be able to send in the bailiffs who will take your stock and sell it to meet the rent. The landlord might also be able to take the property back off you without giving you any notice (this is known as forfeiture).

Your lease will also contain repairing obligations which will set out what you have to repair and what the landlord has to repair. When your lease comes to an end, it is likely

that you will be required to leave the property in good repair, even if it was in a worse condition when you moved in. If you fail to put it into repair before the end of your lease, your landlord will send you a schedule setting out what is wrong and how much it will cost to put it right. This process is called dilapidations.

At the end of the contractual term, you can leave without having to serve any notices but if you stay one day longer, you will have to give 3 months notice of your intention to leave, and pay 3 months additional rent. It is important that you check with a surveyor or solicitor when your lease comes to an end.

Unless you fall within one of the exceptions, you will be entitled to a new lease at the end of your contractual term (this is called renewal). You can negotiate the terms of the new lease with your landlord and you should make an application to court to protect your right to renew. If you can't agree terms with your landlord, then the court will decide whether you get a new lease and if so, what the terms of the lease will be.

You can agree that you won't have this right to renew (this is called contracting out). If you do this, then the landlord will serve a notice on you and you will sign a declaration confirming that you understand what you are giving up. All of this will happen before you move into the property and before the lease is finalised.

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Further information is available from:

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The information contained in this fact sheet is only intended to be a synopsis. Before acting on it, detailed professional advice should be sought.