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A GUIDE TO DOING BUSINESS

IN THE UNITED KINGDOM

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01 PREFACE

Sherrards Solicitors LLP is a leading commercial law firm providing comprehensive international and cross-border support to clients across the globe.

Based in London and St Albans, we are a long established and highly respected commercial law firm that offers clients first class legal services delivered by lawyers with sound business skills. We are always thinking ahead adopting a business focused approach in order to provide pragmatic and commercially driven solutions to our clients' legal issues.

Our client base ranges from multinational corporations to family-run businesses. We have a reputation for being approachable and supportive while retaining the commercial edge that clients typically require. We are committed to long term relationships with our clients, working together to help them build their businesses.

We have excellent links with strategic partners throughout the world. Sherrards LLP is a member of Alliott Group, a leading international alliance of independent accounting, law and consulting firms.

02 INTRODUCTION

The purpose of this guide is to provide foreign businesses and investors with guidance on carrying on a business in the United Kingdom.

The guide provides an overview of the legal structures, the process of setting up a business and the legal basics of operation.

While this sets out the basic requirements imposed on companies in England and Wales by the current legislation, this is only intended to provide a brief explanation of the law. Any business interested in setting up in England and Wales is advised to first consult legal and accounting professionals for specific advice and not rely on the contents of this guide.

January 2014

This guide was published in January 2014 and was based on the information and law in force at the time. Whilst every care has been taken in preparing the contents of this guidance, it is not intended to be comprehensive and you should not act upon the information contained within without first seeking professional legal and financial advice. Sherrards Solicitors LLP makes no representation as to the accuracy or completeness of the guide and under no circumstances shall they be liable for any loss caused by reliance made on any statement. Professional advice should always be taken before applying any information to facts and circumstances.

CONTENTS

03 COUNTRY OVERVIEW

The United Kingdom is renowned as being one of the leading business locations in the world. Offering a wide market for an abundance of industries, the UK proves to be an attractive location for all types of businesses with easy access to customers, innovators, suppliers and business partners.

The UK's internationally focused economy is one of the most advanced in the world and is seen as a safe place to invest. The UK is a major trading nation able to capitalize on the single market throughout the European Union; IMF confirmed in 2012 that the country is a gateway to the US$17 trillion EU market.[1]

Recent favorable tax amendments in the UK have resulted in a surge of corporate interest relocating to the UK.[2] Ernest & Young has revealed that there has been a 50% rise in businesses wanting to re-locate to the UK as a result of corporation tax being reduced to 20% from April 2015. According to independent assessment by the World Bank in their "Doing Business Survey", the UK is ranked as one of the top ten locations to set up and run a commercial enterprise. The survey considered a range of commercial factors, such as developing and operating a business, local employment regulations and raising finance. The UK's geographical factors have a strong influence on the country's success; the central location and central time zone between East and West as well as being considered "socially close" in terms of culture and language.

Finally, the UK is one of the most cosmopolitan countries to work and live. Such is evidenced by its leading health service, successful schooling system (the University of Oxford, the University of Cambridge and Imperial College London all appear in the top 10 universities of the world[3]), and a sporting heritage which has exponentially grown since hosting the 2012 World Olympics.

Capital City	London
Language	English
Currency	Sterling
Population	Over 63.23 million[4] (London population – 8.3million[5])
Business Hours	Generally 9 - 5.30pm Monday to Friday (excluding National Holidays as detailed below)

National Holidays – 2014
1 January – New Year's Day
18 April - Good Friday
21 April -Easter Monday
5 May - Early May bank holiday
26 May -Spring bank holiday
25 August - Summer bank holiday
25 December - Christmas Day
26 December - Boxing Day

National Holidays – 2015
1 January - New Year's Day
3 April - Good Friday
6 April - Easter Monday
4 May - Early May bank holiday
25 May - Spring bank holiday
31 August - Summer bank holiday
25 December - Christmas Day
28 December - Boxing Day (substitute day)

[1] IMF, 2012
[2] http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/10472446/EY-Cutting-UK-tax-draws-in-more-multinationals.html
[3] http://www.timeshighereducation.co.uk/world-university-rankings/2013-14/world-ranking
[4] http://data.worldbank.org/indicator/SP.POP.TOTL (2012)
[5] Office for National Statistics

04 LEGAL STRUCTURES

Anyone wishing to establish a business in England and Wales (as opposed to doing business through a local agent or on the basis of occasional visits by its officers) will need to consider the appropriate form of structure by which to conduct such business and the registration formalities of English company law.

Company law in England and Wales underwent significant change following the passing of a new Companies Act in 2006 which came into full force in October 2009. It should no longer be necessary to refer to the 1985 or 1989 Companies Acts, therefore generally within this guide any reference to the Act is to "the 2006 Act" being the Companies Act 2006, as in force at the time of publishing, but where still relevant a reference to the "1985 Act", being the Companies Act 1985 may remain.

The United Kingdom consists of England, Wales, Scotland and Northern Ireland. Although relatively similar, each of these regions is subject to separate legal jurisdictions. The position of companies formed in Scotland or Northern Ireland is outside the scope of this guide (but it should be noted the 2006 Act applies to companies incorporated after October 1, 2008 in all jurisdictions comprising the UK.) Although partnerships are referred to in section 03, the prime focus is in relation to companies.

05 BUSINESS ENTITIES

[A] Types of Company

A company is a "body corporate" that has a separate legal identity under English law. The significance of this is that it is a distinct "legal person" from its directors and members (also known as shareholders) and can do such things as a legal person can in its own right, such as:

(1) own property;
(2) be liable for its own debts and be sued by its creditors;
(3) sue its debtors; and
(4) has "perpetual succession" – meaning the company continues to exist even if members or directors do not.

The members are said to "own" the company and the directors have responsibility to the members for the day-to-day running of the company. All companies, and some partnerships, must be registered with the Registrar of Companies at Companies House (the UK's official regulatory body).

[B] Limited and Unlimited Companies

A company is "limited" if the liability of its members is limited by its constitution that may be by shares or by guarantee.

"Unlimited" companies, by contrast, have no limit on the liability of its members and they must be private companies. Members of an unlimited company are not directly liable to creditors of the company but both past and present members can be liable to contribute to its assets to the extent sufficient for the payment of its debts and liabilities if the creditors petition to wind up the company. There is no limit on the liability of present members, although the liability of past members can be limited.

The names of private limited companies (both limited by shares and guarantee) must end with "Limited" or "Ltd," whereas unlimited companies do not have a suffix. A private limited company that is a charity is exempt from this requirement.[6]

[C] Private Company Limited by Guarantee

These types of private company are considered more appropriate for charitable or "not-for-profit" activities. It does not have a share capital but instead the shareholders of the company provide a Statement of Guarantee (an undertaking) to contribute to the assets of the company up to a specified amount (normally £1) in the event of its becoming insolvent.

[D] Private Company Limited by Shares

The liability of the members is limited to the amount they have subscribed for the shares. Therefore, if the company becomes insolvent and cannot pay its debts, the only money the members lose is the amount they paid for their shares. They are not personally liable for the company's debts. If they had not paid for their shares in full, however, they would still be liable to the company for the rest of that money. (Shares can be "fully paid," "part-paid" or "unpaid".)

The 2006 Act removed the requirement for a company limited by shares to have an authorised share capital. Under the 1985 Act a company was required to state the amount of its authorised share capital in its memorandum of association. However, for companies that had authorised share capital provisions in its memorandum of association immediately prior to 1 October 2009, such provisions will after this date be treated as provisions in the company's articles. Such provisions may be amended or revoked by the company by ordinary resolution[7], and it is common to insert into the articles of association provisions to restrict the directors' powers.

[E] Public Limited Company

Public companies are companies whose liability is limited by shares with an issued share capital of not less than £50,000 sterling[8] or the prescribed euro equivalent (but it cannot be partly in sterling and partly in Euros). Its certificate of incorporation must state that it is a public company. Being a public company simply means that it is

[6] s.60(1)(a) of the 2006 Act
[7] Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 5, Sch 2 para 42(1), (2)
[8] s.763 of the 2006 Act

able to offer its shares to the public and it has the option to apply to trade its shares on a stock exchange. There are more stringent filing and accounting requirements on public companies than private companies.

Public companies should be distinguished as such from private limited companies by the addition of "public limited company" or "PLC" to their name. Welsh companies should have "*Cwmni Cyfyngedig Cyhoeddus*" (or "CCC") after their name.[9]

[F] Comparison of Private and Public Companies

Advantages of private companies:
There are several advantages of setting up a private company over a public company. For example:

(1) only one person is needed to form a company[10] (as sole director and shareholder, a company secretary is optional) whereas public companies need a minimum of two directors plus a company secretary[11] (who can be the directors and/or company secretary);

(2) passing resolutions in writing (meetings do not need to be held for ordinary resolutions or special resolutions to be passed if up to 50% plus 1 vote and 75% of those shareholders eligible to vote in writing in favor of ordinary resolutions or special resolutions respectively);

(3) not required to lay the accounts and reports before the members in general meeting;

(4) not required to hold annual general meetings, unless one is requisitioned;

(5) 90% of shareholders can authorise short notice of a meeting and notice of a resolution;

(6) not required to appoint auditors annually;

(7) fewer provisions regulating directors' dealings and no ban on making loans to directors;

(8) (up to a certain size) can file abbreviated accounts and may be exempt from filing audited accounts, and a private company has longer to file its accounts than a public company;

(9) just one director required (a company secretary is no longer required but optional, and needs no special qualifications);

(10) (subject to certain conditions) share buy-back provisions exercisable by ordinary resolution[12] (not available to public companies without court sanction);

(11) a private company can provide financial assistance to the purchaser of its shares;

(12) it is easier for a private company to pay dividends to its shareholders than a public company;

(13) it is easier for a private company to issue shares as its articles of association can disable pre-emption rights; and

(14) the rules of the City Code on Takeovers and Mergers does not generally apply to private companies. Rule 9 of the City Code obliges anyone who alone, or in concert with others, acquires 30% of the voting rights of a public company to make a bid for all the issued share capital of that company.

Advantages of public companies:
Public companies bring their own advantages, depending on the business' requirements. For example:

(1) shares and debentures may be offered to the public (there is a criminal penalty for a private company that does this);

(2) prestige, as public companies need to have an issued share capital of £50,000 or the prescribed euro equivalent (with at least 25% of the share capital fully paid to the nominal value and the whole of any premium), whereas there is no such requirement for private companies; and

(3) a public company can apply to list its securities on a stock exchange.

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[9] s.58 of the 2006 Act
[10] s.7 of the 2006 Act
[11] ss.154 and 271 of the 2006 Act
[12] Buyback Regulations 2013

[G] Other Business Entities and Designations

There are a number of other types of entities by which businesses can function in the UK, brief particulars of which are set out below.

Partnerships

There are three principal types of partnerships, being summarised as set out below.

A *common law partnership* is defined as the relationship that subsists between persons carrying on a business in common with a view of profit. Common law partnerships can arise, sometimes unintentionally, where the requirements under the Partnership Act[13] are met. Sharing of profits, debts, property ownership, and contracts are all factors that will be used to determine whether a partnership exists at common law. For this reason, many English law contracts contain a "no partnership" clause – specifically prohibiting the relationship from becoming one. The partners are usually jointly and severally liable for the debts and obligations of the business which means a creditor can seek full repayment of a debt from any one partner. The partners must be individuals (not corporate bodies) and there is no requirement for registration at Companies House.

A *limited partnership*[14] is a partnership where the liability is limited in some way, like limited companies. A limited partnership, however, consists of general partners and limited partners. The general partners are liable for all debts and obligations of the firm whereas the limited partners are only responsible for contributing a sum as capital or property to the firm and are not liable for the debts or obligations of the firm beyond the amount they contributed. A partner in this sense may be a corporate body, such as a limited company, and the partnership must be registered at Companies House.

A *partnership with limited liability*[15] was devised to incorporate some of the benefits of limited companies (in terms of liability and separate legal status) and some of the benefits of partnerships (in terms of how much of their business' information they must publish). The members of a limited liability partnership have such liability to contribute to its assets in the event of its being wound up. The mutual rights and duties of the members, and as between the partnership and its members, are governed by agreement between the members, or between the limited liability partnership and its members. The partnership does not have directors or partners, only members, who act as agents for the partnership. Designated members can also be appointed to perform certain duties in relation to the legal administration of the LLP that would, for a company, be performed by the secretary or directors. If there are no designated members, all members are deemed to be designated members. Accordingly, except as far as otherwise provided by the Limited Partnerships Act 2000, the law relating to partnerships does not apply to a limited liability partnership. Like limited companies, partnerships with limited liability must have "limited liability" after their partnership name, or alternatively "LLP." Many English law firms and accountants have chosen to adopt this business style.

Limited Partnerships (LP)	**Limited Liability Partnerships (LLP)**
• LP's have "General Partners" who are liable for all the debts and obligations of the partnership.	• It is a separate legal entity.
• LP's also have "Limited Partners" who have limited liability. The Limited Partners lose their protected status if they: - remove their fixed contribution sums; - seek to take part in managing the partnership; or - seek to bind the partnership.	• It provides limited liability for all its members meaning the LLP as a separate legal entity is liable for debts and obligations and not the members.
• A Limited Partnership is restricted to 20 members.	• It can have unlimited membership.

[13] The Partnership Act 1890
[14] formed under the Limited Partnerships Act 1907
[15] formed under the Limited Partnerships Act 2000

• It is subject to Partnership Law.	• It is *not* subject to Partnership Law. LLP's are governed by the Limited Liability Partnerships Act 2000.
• There are no filing requirements	• The accounting and filing requirements are similar to those of a company.
	• It has the organisational flexibility of a partnership.
	• It is taxed as a partnership.

Sole Traders

A sole trader is a person who is engaged in his own business or profession. He makes all decisions affecting the business and owns all the assets of the business personally.

Small businesses often operate as sole traders because of the lack of legal of formality and the low administration costs involved in setting up and running the business. There is no legal or taxation requirements and a sole trader's accounts do not need to be audited or disclosed to the public. The main disadvantage is that there is no legal distinction between the sole trader and his business. In this way, the sole trader is personally liable for all liabilities incurred during the course of business.

Overseas Companies

If a company with a shareholding transacts business in a country or territory listed below, it may keep at its place of business a branch register of members who are resident in that country (and the register of members or a duplicate must also be kept at the place in England or Wales where the company's main register is kept). This is known as an "overseas branch register" and must be kept in the same manner as the main register in England or Wales.

Any part of Her Majesty's dominions outside the United Kingdom, the Channel Islands and the Isle of Man; Bangladesh; Cyprus; Dominica; The Gambia; Ghana; Guyana; The Hong Kong Special Administrative Region of the People's Republic of China; India; Kenya; Kiribati; Lesotho; Malawi; Malaysia; Malta; Nigeria; Pakistan; Republic of Ireland; Seychelles; Sierra Leone; Singapore; South Africa; Sri Lanka; Swaziland; Trinidad and Tobago; Uganda; Zimbabwe.

The company must then give notice to the Registrar within 14 days of opening its overseas office or of the change or discontinuance of its overseas branch register otherwise it becomes liable to a fine.

06 FORMATION OF COMPANIES

Prior to formation, the "Promoters" (usually the first shareholders/directors of the company) need to consider what the company will be called, who will take shares in it, who the officers will be and where it will be registered. The Companies Act provides rules about all of these factors.

[A] Company Name

Generally the Promoters have the freedom to choose any name for the company, but will naturally wish to distinguish it from other companies. However, It must be noted that the Registrar will not register a company name that:

(1) in the opinion of the Registrar, would constitute an offence to use it or is itself offensive;

(2) conveys that the company is connected with the government, local or public authorities (unless approval has been given by the Secretary of State);

(3) omits the word limited or plc; or

(4) identical to that of a company already registered.[16].

Undertaking a search of the Companies House Register to review existing company names is therefore essential.[17] It is also important to conduct a general search into existing business names, domain names and perhaps trade marks (not just registered company names). If the company name that is chosen is so similar to another "business name" in use in the UK that the public might be misled into thinking they were the same, the other business could have a claim of "passing-off" against the company, no matter how innocently it was chosen.

Names should not include a registered trademark of another business as this may result in an action against the company of infringement of that trade mark. A search of the trademark register should therefore also be undertaken when considering potential company names. In addition, the new company may wish to consider registering a trademark of its own logo or any other branding it wishes to use to distinguish it from its competition.

The name must not give such a misleading indication as to the nature of the company's activities so as to cause harm to the public. If such a situation arose the Secretary of State has the power to direct the company to change its name. If it does not comply within the time required the company and its officers are liable to a fine on summary conviction.[18]

The shareholders of a company may by a special resolution (see paragraph below) change its name after incorporation, subject to the limitations listed above. Each new company is given a unique "registered number" by which its details are recorded on the Register at Companies House and a certificate on change of name is issued by the Registrar.[19] It is possible to change an existing company name to a dissolved company's name as long as the Registrar finds no objection; but, because this could lead to confusion, it may be prudent to quote the company's current name and its registered number on documentation as the number will always remain the same.

[B] Shareholders

The details of those who subscribe to the shares must be available to the public and kept up-to-date. Shareholders can be natural persons or corporate bodies. This is achieved by registering all issues of new shares at Companies House within 21 days of issue. A company must also maintain a register of members at the company's registered office. Such registers hold the full name and address of the member(s), the number of shares they have subscribed to, their value and the types of shares they own. New shares cannot be issued for less than their nominal value.

[C] Directors

Private companies are required to have at least one director while public companies must have at least two. At least one director must be a "natural person" who is at least 16 years of age (i.e. not a corporate body). As with

[16] ss.53-55 of the 2006 Act
[17] s.66 of the 2006 Act
[18] s.76 of the 2006 Act
[19] s.80 of the 2006 Act

the members, an up-to-date register of directors should kept at the company's registered office and this should reflect the information registered at Companies House. The register should include for each director his full name (and any former names); his usual residential address; nationality; business occupation; his date of birth and any other directorships he has. A register of directors' interests, such as number of shares or debentures held in the company and those of the director's spouse or children, should also be kept.

Directors can be companies and, in such cases, the address given should be the company's registered office. In the case of a director that is a company it is therefore not possible to provide the business occupation, nationality and date of birth but its registered details (such as name and office address) will suffice.

[D] Company Secretary

Under the previous legislation, there was a requirement that all companies, public and private, appointed a company secretary who was responsible for filing any documents required by the Act with the Registrar at Companies House and for receiving documents addressed to the company. Since the 2006 Act, there is now no requirement for a private company to have a secretary and, therefore, anything a secretary is authorised to do by the Act may be done by a director instead, and mail addressed to the company secretary is treated as addressed to the company. A private company may, therefore, choose whether or not to appoint a company secretary or alternatively, they may appoint another person to carry out the requisite functions.

Public companies, however, *must* have a company secretary. In addition to the person appearing to have the requisite knowledge and experience to act as the secretary, he must also be qualified to act as such. The qualifications set out by the Act include:

(1) holding the office of company secretary of a public company for at least three out of five years immediately preceding his/her appointment;
(2) being a member of one of seven professional chartered associations;
(3) being a barrister, advocate or solicitor; or
(4) a person who appears to be capable of performing the functions of a secretary by virtue of his/her having held any other position or being a member of any other body. Company secretarial roles may be joint roles and may also be carried out by corporate bodies.

A register of the company secretaries of the company must also be kept up to date at the company's registered office and be filed at Companies House. The person's full name and any former names must be included in the register, along with their usual residential address. As before, this address may be the registered office and in the case of a corporate body the details of legal form of corporate entity, name, office address will be sufficient for registration.

[E] Registered Office and Statutory Books

A company must at all times have an office, the postal address of which is registered at Companies House, to which all communications and notices regarding the company may be addressed. The address must be in England or Wales. Often this will be the company's trading address or the address of their solicitors or accountant.

At the Registered Office must be kept the Register of Members, the Register of Directors, the Register of Company Secretaries (if applicable), the Register of Debenture Holders (if applicable) and a Register of Charges (if applicable). Records of all the resolutions passed by the members and minutes of all proceedings at general meetings and meetings of the board should be kept at the Registered Office for ten years from the date of the resolution/meeting. Although some of these registers are available for viewing at the registered office by the members only, copies of any documents delivered to the Registrar are available to the public upon payment of the relevant fee.

Public companies may give notice[20] to anyone or any corporate body it believes is interested in its shares or has been interested in its shares in the three years immediately preceding the date of the notice. The notice requires them to confirm whether or not they have or have held such an interest and requires them to give their details to the company. These are then entered on a register that must be kept pursuant to this section of the Act.

As a matter of good practice, the registers should also include the dates of entry onto the registers and cessation of office or membership. This is advisable as, for example, it helps to sort out any problems that may arise in future regarding whether resolutions have been validly passed at the relevant time.

The registered name of the company should also be on constant and prominent display at the registered office,

[20] under s.793 of the 2006 Act

any place of inspection and any other place it carries on business.

[F] Auditors

An auditor is a person who makes an independent report to a company's members as to whether its financial statements have been properly prepared. The report must also say if a company's accounts give a true and fair view of its affairs.

Not all companies are required to have their accounts audited, and an exemption applies in certain circumstances for small companies that may produce abbreviated accounts.

To be a small company, *at least two* of the following conditions must be met:

(1) annual turnover must be £6.5 million or less;

(2) the balance sheet total must be £3.26 million or less;

(3) the average number of employees in a year must be 50 or fewer.

The audit exemption for small companies applies to small companies (as defined above) that only need produce unaudited abbreviated accounts where they have a turnover of not more than £6.5 million *and* have a balance sheet total of not more than £3.26 million. Therefore, a company with 12 employees, an annual turnover of £3.1 million, and a balance sheet total of £4 million would be a small company, but not entitled to the exemption.

The small company audit exemption is not available to a company if:

(1) it is a public company;

(2) an audit is required by a member or members holding at least 10% of the nominal value of issued share capital, or holding 10% of any class of share;

(3) it is an authorised insurance company, a banking company, an e-money issuer, an MiFID investment firm or UCITS management company or a company that carries on an insurance market activity;

(4) it is a special register body or employers' association;[21]

(5) certain parent and subsidiary undertakings.[22]

[G] Documents

There is normally a provision in the company's articles that sets out how the company may execute documents. As companies no longer require a common seal, the 2006 Act provides that, instead of the whole board of directors having to sign documents (including deeds), only two authorised signatories are needed. Either two directors or a director and the company secretary or a single director in the presence of a witness can sign on behalf of the company. If any signing authority is given under a power of attorney to sign on behalf of the company then a copy of any such power must also be provided to the other party to the document. If the directors choose to use a company seal, however, it must have the company's name engraved in legible characters on it.

The company's name, registered number, and the address of the registered office must appear on the Company's headed paper, order forms and websites and any other company literature. The company name should also be printed on notices, bills of exchange, checks, promissory notes, invoices and other demands for payment, receipts and letters of credit, etc.

[H] Communication with Shareholders

A member may communicate with the company by electronic means where the company has given an electronic address in a notice calling a meeting or in an instrument of proxy or proxy invitation. The company may also send or supply documents and information to members in electronic form and by a website (subject to shareholder approval). This means a company may provide all its documents to its members this way, unless

[21] under the Trade Union and Labour Relations (Consolidation) Act 1992
[22] under section 479 of the 2006 Act

the member indicates they still wish to receive paper copies. “By electronic means” includes e-mail, fax and sending a disk by mail.

In order to determine the author of an electronically submitted document, it is deemed sufficiently authenticated if either the identity of the sender is confirmed in a manner specified by the company or, where no such manner is specified, if the communication contains or is accompanied by a statement of the identity of the sender and the company has no reason to doubt the truth of the statement (e.g., in the context of written resolutions and requests for meetings).

[I] Process for Formation of a Company

[1] Role of Companies House

All companies in England, Wales, Northern Ireland and Scotland are registered at Companies House, an Executive Agency of the UK’s government agency, the Department for Business, Innovation and Skills (BIS). There are more than 3 million limited companies registered in the UK, and more than 400,000 new companies are incorporated each year.

The role of Companies House is threefold:

(a) it incorporates and dissolves companies. On incorporation of a company, the Registrar will review the initial documentation, and subject to approval, issue a certificate of incorporation. This allows the company to conduct its business as a company, that provides it with a separate legal identity, limited liability for its members and the ability to conduct numerous fund raising schemes;

(b) it registers documents that must be filed under company, insolvency and related legislation; and

(c) it provides the public with company information. Documentation submitted to Companies House are filed as public records. This, in turn, allows third parties, such as investors, to see who is behind the company and its financial position.

[2] Incorporation

Every company has to be properly registered at the Companies Registry by the delivery of appropriate forms and other documents. The principal location of the Companies Registry is in Cardiff but documents can be lodged by post or electronically.

The process of incorporation for a private company (whether limited by shares or guarantees) or for a public company is essentially the same. In order to register a company, the following documents need to be prepared and delivered to Companies House:

An Application to Register a Company (Form IN01) that sets out the names, residential addresses and other details of the first directors (and secretary, if so required), the address of the intended registered office, statement of capital and is signed by each director, secretary and subscriber. It also includes a Statement of Compliance that sets out a declaration given by either the subscribers of the company or an agent on behalf of all the subscribers that they have complied with all the statutory requirements of the Act.

The Memorandum will state that the subscribers wish to form a company under the 2006 Act, have agreed to become members and, in the case of a company that is to have a share capital, to take at least one share each. It must also be authenticated by each subscriber, with the name and address of each subscriber contained in the statement of capital and initial shareholdings and in any statement of guarantee. It is now possible for both a private and public company to be formed by a single person.

Where the application is delivered by an agent for the subscribers to the memorandum, the name and address of the agent is also required.

The Articles of association set out the regulations by which the company will be “governed”. Usually, the model articles, (as set out in the Act) are adopted and apply to all new companies incorporated under the 2006 Act on or after 1 October 2009. There are model articles for the three most commonly used types of company: private companies limited by shares, private companies limited by guarantee and public companies. Companies can choose to modify the model articles, with or without modification, from model articles of other types of company. The articles must be contained in a single document and be divided into consecutively numbered paragraphs.

Companies incorporated under the 1985 Act will still be governed by model articles set out in the 1985 Act Tables A to F, more commonly known as “Table A,” unless the 2006 model articles are adopted by special resolution.

Note that it is not a requirement to use the model articles but they are a basic guide.

The company is brought into existence when the Registrar issues the certificate of incorporation. This normally takes seven days if the application for registration is made using the normal hard copy service for which the fee is currently £40, or £15 if the Companies House web incorporation facility is used.
Following incorporation there are ongoing responsibilities for lodging documents at Companies House: e.g., annual returns; directors' appointments and resignations; changes in the constitution.

[3] Purchase of Companies "Off the Shelf"

An alternative to preparing bespoke documents for your own company (a "tailor-made" company) is to buy a company that has already been incorporated but has not yet traded. This is called a "shelf company." Law stationers and company formation agents register shelf companies with standard provisions which can be bought for between £150 and £300 and the buyer must then make the necessary amendments to the company's constitution to meet their requirements.

The agents will have incorporated the company with a name of their choice and will almost certainly have used one of the forms of Model Articles. They will also have promoted individuals to act as the initial director and possibly company secretary. Therefore, when acquiring a company "off the shelf," the buyer will need to instruct the agent to change the company name, the location of the company's registered office and appoint new directors and/or company secretaries.

It is normal that such changes are recommended by the directors at a board meeting and approved by shareholders at a general meeting held by the registration agents before the transfer of ownership of the company. The minutes of these meetings along with copies of the resolutions passed will be sent to the intended owners of the company along with the other documents. It is also important to get a Certificate of Non-Trading from the agents. This confirms that the company has not traded since incorporation and has no outstanding debts or liabilities.

It can be advantageous to use company formation agents as this is a quick and convenient method of setting up a company and is particularly useful where the initial shareholders and/or directors are not available to sign the required incorporation documentation. However, it may not necessarily always prove to be the quickest route if all shareholders or signatories on their behalf are available together at the outset as Companies House now has an electronic filing procedure that can prove to be quicker.

[4] Ongoing Filing Requirements

As already mentioned above, the registers of the company need to be regularly maintained to reflect all allotments, transfers, mortgages and charges, share certificates issued and updated members' and officers' details. Act imposes penalties for not filing the required documents. At worst, the company could be struck off the register or potentially the directors could be disqualified, and/or the company would be fined.

In addition, accounts must be filed once a year (audited by the company's auditors and signed off by the directors) as well as a Form AR01(otherwise known as an annual return) that contains general details of the company such as registered office, any registered charges, details of its officers and members, and the authorised and issued share capital.

For some items to be filed at Companies House there is a fee to pay. If documents sent with the annual return are in paper format the fee is £40.00; but, if submitted electronically, it is £13.00. This can be done through the on-line service offered by Companies House that allows for the electronic filing of forms and documents, and a monitoring service. The monitoring service contacts you when any changes are made to the file at Companies House. Often, Companies within the UK appoint agents, such as solicitors or accountants to handle the company secretarial work on their behalf.

07 RELATIONSHIP BETWEEN THE MEMBERS AND THE COMPANY

[A] The Company's Constitution

The constitution of an English company is contained in the Articles of Association. These set out the regulations by which the company will be governed including but not limited to:

- the level of the directors' power and authorisation to act on behalf of the company
- when the members must make decisions instead of the directors and the procedures to be used to achieve those decisions.
- resolving internal disputes, provided the dispute that arises has been considered when preparing the Articles.

The company can either adopt the Model articles prescribed within the provisions of the 2006 Act and amend as required, or bespoke articles can be prepared, depending on the company's needs. The members may amend the articles at any time after incorporation by special resolution unless they have been entrenched on formation that means they can only be amended in certain, prescribed circumstances. Alternatively, they can be amended if all the members agree. Any amendments need to be notified to the Registrar and a copy of the new articles will need to be submitted to Companies House following adoption.

The effect of the articles is to bind the company and its members to the same extent as if there were covenants given by each of them to the other to observe those provisions.

Matters generally covered in the articles of association are as follows in the paragraphs below.

[B] Shareholders' Agreements

Where there are a small number of members (but more than one) who are forming the company in order to seek to achieve a common purpose. It is wise to have a shareholders' agreement. The aim of using a contract separate from the articles is to make sure the terms of the articles are enforceable against each other (and/or the company, if it is joined to the agreement).

The advantages of a shareholders' agreement are that it is a private document, it can protect some of the shareholders' interests in ways that cannot otherwise be easily achieved (for example, where there are different classes of shares), it is easier for one person to enforce than reliance on the articles, and can provide veto powers for certain proposals. Other likely terms may relate to the appointment and removal of directors, approving policy decisions, the issue of shares, protection of voting rights, withdrawing from the company and restrictive covenants.

[C] Joint Venture Agreements

In English law there is no specific meaning for the term "joint venture." It is usually used to describe a commercial arrangement between two or more economically independent entities. The relationships between the parties involved will be subject, depending on the structure chosen, to an amalgam of the general common-law rules, the substantive provisions of company and partnership law as well as tax law, competition law (at both the European and national levels) and the law governing intellectual property as well as the provisions of the joint venture and related agreements.

In practice, the legal form of a joint venture is likely to be determined by: the nature and size of the enterprise, the identity and location of the participants, and the commercial and financial objectives of the participants. There is a difference between a conventional business joint venture and a joint venture formed to carry out a single purpose project. In any complex business venture, particularly a cross-border venture, tax and competition law considerations are likely to be key factors in deciding the structure. In almost all joint ventures, the first choice to be made is whether or not a separate legal entity will be established as a vehicle for the joint venture and therefore, the four basic legal forms a joint venture vehicle may take are: a limited liability company, a limited liability partnership (LLP), a partnership (or limited partnership), or a purely contractual co-operation agreement.

[D] Decisions of Shareholders and Shareholding Significance

The number of shares held by each member will have significance as each of the shares (depending on the terms of the articles) carries voting rights. Certain decisions for running the company can only be made by a resolution passed by the members. At a meeting of the company, the votes of those who are entitled to attend and vote on a particular resolution are counted by a show of hands.

To pass an ordinary resolution, a simple majority (i.e., over 50%)[23] is needed. In order to pass a Special Resolution a two-thirds majority (i.e., over 75%)[24] is necessary. Only the votes of those entitled to attend the meeting and vote on a particular decision are counted. If a member is unable to attend they may appoint a proxy to vote on their behalf at that meeting.[25] If a meeting is not practical to arrange, a written resolution may be passed by sending it around to each of the members and both an ordinary and a special resolution may be passed this way, but the same number of respective majorities are needed and the written resolution itself must specify whether it is an ordinary or special resolution.[26] Only resolutions to remove directors or auditors may not be passed by written resolution.[27] Written resolutions can be initiated by the board or demanded by the members.[28]

A company will usually start by issuing ordinary shares. It may decide it wants to set up different types of shares that have different voting rights or other rights. For example, preference shares are generally shares that rank ahead of other shares either as to dividends or capital or both, and are normally fixed-income shares; and, because of this, they carry limited voting rights.

The following table shows a percentage of votes and what that percentage enables the member to do with them:

Percentage of shares with voting rights	Rights they provide/Consequences of ownership
5% and over	Right to circulate a written resolution;[29] Right to call for a general meeting (where more than 12 months has passed since the last one)[30] Right to call for circulation of a statement[31] In a public company only, the right to require circulation of resolutions proposed for annual general meeting (AGM)[32]
10% and over	Right to demand a poll vote[33] Right to call a general meeting (where the last general meeting took place in the preceding 12 months).[34]
10% and under	Risk of being bought out by an offeror.[35] (see 90% below).
25% and over	Can block a special resolution.[36]
30% and over	In a public company only and subject to the Rules and Regulations of the Take-Over Panel as set out in the City Code for Take-Overs and Mergers ("the City Code") a shareholder, or group of shareholders acting together, must make an offer to acquire all of the issued shares under the City Code
over 50%	Ability to block an ordinary resolution and therefore represents control of a company, except in relation to specified matters which require a special resolution
75% and over	Can pass a special resolution[37] and therefore represents real control of the company (although protections do exist for minority shareholders).

[23] s.282 of the 2006 Act
[24] s.283 of the 2006 Act
[25] s.324 of the 2006 Act
[26] s.288 of the 2006 Act
[27] s.288(2) of the 2006 Act
[28] s.291 and s.293 of the 2006 Act
[29] s.292 of the 2006 Act
[30] s.303 of the 2006 Act
[31] s.314 of the 2006 Act
[32] s.338 of the 2006 Act
s.303 of the 2006 Act
s.314 of the 2006 Act
s.338 of the 2006 Act
[33] s.321 of the 2006 Act
[34] s. 303 of the 2006 Act
[35] s.983 of the 2006 Act
[36] s.283 of the 2006 Act
[37] s.283 of the 2006 Act

90% and over	Where a company acquires such a percentage the offeror will have the right to buy out minority shareholders.[38]

[E] Relationship Between the Directors and the Company

It is common for the executive directors, such as the managing director, to enter into service contracts with the company.[39] This is distinct from the act of being appointed to the office of director because once a director is appointed, their conduct is primarily defined by the articles and the Companies Act, and the company usually provides the directors with remuneration for their role, as decided by the members. A service contract is similar to an employment contract (though it must not be confused as such) that defines a specific director's rights and obligations that he has negotiated with the company. It also sets out the salary the director shall receive in return for carrying out those obligations. The distinction is of particular importance when the time comes for the director to leave the company and step down from his/her role, catering for circumstances where the director has left on good terms with the company and where they have been forced to leave. In such situations it is crucial to have in place restrictive covenants regarding what they cannot do on leaving the company and provisions as to what happens where a director also owns a shareholding.

The promoters owe certain duties to the company that they are seeking to create and they therefore may have potential personal liability for any contracts that they enter into on behalf of the company before it is formed (called "pre-incorporation contracts") of which they should therefore be wary.[40]

[38] s.979 of the 2006 Act
[39] s.277 of the 2006 Act – see also s.228 of the 2006 Act which requires copies of all service contracts to be made available for inspection
[40] s.51of the 2006 Act

08 SHARE CAPITAL

[A] Introduction

The shares are said to form part of the "capital" of the company. The 2006 act abolished the requirement that a company should have a maximum number of shares at any one time (the authorised or nominal share capital) from which it may allot or issue shares to its shareholders (the issued share capital). Companies that were incorporated before October 2009 will continue to have the authorised share capital referred to in the articles, however, this can be changed by an ordinary resolution[41]. Each share is given a nominal value that is effectively the company's liability to the shareholder (i.e., the amount the shareholder will receive in the event of the company being wound up). However, the shares can be bought from the company for more than this amount, but only shares transferred from an existing shareholder can be bought for an amount that is lower than the nominal value.

There is no minimum share capital for a private company but a public company must have £50,000 or the prescribed euro equivalent. The only maximum is that which is set by the articles on incorporation or, subsequently, by the shareholders. The directors can increase, consolidate or subdivide the share capital but they must first obtain authorisation from the shareholders.

[B] Types/Classes of Shares

Share capital can be made up of different classes of shares that have different rights attached to them. The types of shares that comprise a company's share capital can include ordinary shares, preference shares, treasury shares and other classes of shares.

[C] Ordinary Shares

These are the basic shares that the company will usually issue on incorporation and are therefore the most common. They entitle the shareholder to dividends (if and when declared), the right to receive notice of, attend and vote at meetings, and in the event of a winding up the right to receive their capital back.

[D] Preference Shares

These are more sophisticated and may provide preferences over the other classes of shares. Most commonly, they carry automatic rights to a fixed annual dividend calculated as a percentage of the nominal value – that can be cumulative so that if there are not sufficient funds one year to pay a dividend, it will be rolled over into the next year and paid then. The second way is that they make take preference over other shares if the company is wound up so that the holders of the preference shares receive their money ahead of the others.

Preference shares do not usually carry voting rights, although some might carry "rights of participation" that effectively mean they have all their preferential rights as well as the rights of the ordinary shares.

[E] Other Classes of Shares

A company may have as many classes of shares as it wishes that carry different rights or as a way of distinguishing one class of share from another for any reason, for example, attributing the costs of raising and investing new money by another issue of shares. This avoids dilution of the net asset value attributable to the existing ordinary shareholders.

Redeemable shares may be redeemed at the option of the company or the shareholder and must be fully paid up in order to be redeemed. The articles should contain the circumstances whereby (such as the date on or by which) the shares must be redeemed, the price and any other terms and conditions necessary. These can only be redeemed out of distributable profits or the proceeds from a fresh issue of shares, although private companies can redeem out of capital as long as the articles permit it.

Convertible shares can be converted into ordinary shares either at a specific time or upon the triggering of a pre-determined event.

Bonus or scrip shares are used where a company's articles permit it to transfer profits into a "capital redemption reserve" fund, and proportional payments are then made to those shareholders (although this dilutes the pool available for the other dividends).

Where new classes of rights are created that are not provided for by the articles, the rights may be varied by the

[41] Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860, art 5, Sch 2 para 42(1), (2)

written consent of holders of 75% of the nominal value of the issued shares.

[F] Allotment and Issue of Shares

Under the 2006 Act the directors of a private company that has only one class of shares can allot shares unless this right is prohibited in the articles.[42] This rule only applies to an existing or transitional company if the members of the company have since the introduction of the 2006 Act resolved that the directors should have powers under that section[43]. For all other situations, the directors must have prior authority from the company's shareholders (given by way of an ordinary resolution in a general meeting) for an allotment of shares, unless such authority is provided for in the Articles.[44] The authority must state the maximum amount of shares (or right to subscribe to shares) that may be allotted under it and the date on which it will expire. There is a maximum period for such authority, being five years from the date on incorporation (if the authority is provided for in the company's articles) or from the date the resolution is passed. This authority can be revoked or varied by a further resolution. If the period is extended (by a further period of up to five years) by a resolution, the resolution should state the maximum amount of shares (or right to subscribe) which may be allotted or remain to be allotted and the date the authority expires.

Once authorised, any further allotment of shares must be notified to the Registrar using a Form SH01(Return of Allotments) within one month of the allotment[45]. If relevant, the resolution must also be notified to the Registrar but within 15 days of the resolution being passed.[46]

Any offers in a private company to allot shares must be made on a pre-emptive basis to the existing shareholders.[47] Offers are to be made in either hard copy or electronic form.

It is possible to exclude these pre-emption requirements in a private company by putting an express provision in the articles.[48]

Alternatively, it is possible to dis-apply the pre-emption rights by way of a special resolution of the shareholders[49] or, when the authorisation to allot under s. 551 is general, by the articles as well[50], either by stating that section 561 does not apply to a specified amount of shares or that it shall apply but with specified modifications. This can apply to both private and public companies, but in such a case, the dis-application will expire at the same time as the authority to allot shares to which it relates. This means that public companies must effectively re-confirm the dis-application every five years in a general meeting of the shareholders.

[G] Transfer of Shares

Once shares have been issued they may normally be transferred to anyone, subject to the terms of any shareholders' agreement and pre-emption rights, or other rights contained in the articles. The articles will also usually contain a provision allowing the directors to refuse to register the transfer of any shares that are not fully paid up or to a person of whom they do not approve.

On a transfer of shares, the register of members must be updated, new certificates should be issued and the old ones destroyed. The transferor will have to complete a stock transfer form which shows the amount of consideration paid, the number of shares, what class of shares and details of the transferor and transferee. This form must be sent to HM Revenue & Customs within 30 days of the transfer taking place, to be "stamped" (i.e., evidence that Stamp Duty has been paid) and then sent to Companies House as evidence that the transfer has taken place. Stamp Duty is a tax that is payable on the consideration (currently at rate of 0.5%). Stamp Duty does not apply to consideration of less than £1,000.

[H] Reduction of Share Capital

It is a fundamental principle of English company law that share capital must be maintained because it is really a liability of a company to its shareholders, since the company will one day be liable to repay the shareholders' investments (though this is actually only when the company is wound up), as well as for the protection of people dealing with the company. Out of this principle come two significant consequences: dividends can only be paid out of profit; and capital invested cannot be returned to the members, unless: the company has the approval of

[42] s.550 of the 2006 Act
[43] Commencement (transitional provisions): Sch 2 para 43 to the Companies Act 2006 (Commencement No. 8, Transitional Provisions and Savings) Order 2008, SI 2008/2860
[44] s.551 of the 2006Act
[45] s.555 of the 2006 Act
[46] ss. 551, 29 and 30 of the 2006 Act
[47] s.561 of the 2006 Act
[48] s.567 of the 2006 Act
[49] s.571 of the 2006 Act
[50] ss. 569 and 570 of the 2006 Act

the court; or the company redeems or purchases its own shares.

In order to obtain the court's approval, a company can reduce its share capital in circumstances where creditors will not be adversely affected, provided that the company complies with certain procedural requirements. Provided that enough share capital remains to meet the minimum requirements, shares can be cancelled entirely (or at the least, where the company has issued partly paid shares it can cancel the amount which is not yet paid) and the shareholders can be repaid the whole amount for which they originally subscribed.

[I] Position under the 2006 Act

Since the 2006 Act came into force, there is no requirement for a specific authorisation in a company's articles (subject to anything that specifically prohibits it). The special resolution will be required and should be supported by a solvency statement made by all of the directors not more than 15 days before the resolution is passed or, in any case, by special resolution which has been confirmed by the court. The special resolution may also have to deal with amending the memorandum, depending on when the company was incorporated.

The only way to reduce the share capital to zero is to use the court procedure but using the special resolution procedure there must be at least one member holding at least one share (that cannot be a redeemable share) after the capital reduction. A creditor may object to a proposed reduction of capital if he can show that there is a real likelihood that the proposed reduction will put at risk the due discharge of the creditor's debt or claim.

Along with the special resolution (and amended memorandum) and the solvency statement (together with a statement by the directors that it was made not more than 15 days before the resolution was passed), a statement of capital setting out the details of the share capital as reduced must be sent to the Registrar.

There are various accounting consequences of a reduction in capital, the subject of which is more complex than this chapter allows for. Certain issues are very technical by their nature and in some cases legislation has yet to be enacted to deal with all of them.

09 THE PROTECTION OF MINORITY SHAREHOLDERS

Minority shareholders are afforded some statutory protection in England and Wales. As it is likely that the majority shareholders control the board of directors, minority shareholders would have little say in the management of the company, without some statutory protection. Therefore, certain decisions are not within the control of the board and must be referred back to the members by way of an ordinary resolution (e.g., to increase the authorised share capital of the company) or special resolution (e.g., to change the articles or to change the name of the company).

To strengthen the rights of minority shareholders, the adoption of a shareholders' agreement is recommended with restrictions on share transfers, so that permitted transferees of an outgoing majority shareholder agree to be bound by that the agreement (e.g., by means of a deed of adherence – compare the position of the memorandum and articles of association – when registered binds the company and its members as if signed and sealed by them). The shareholders' agreement is a private document and is not filed with the Registrar of Companies. It also requires unanimous (i.e., 100%) consent of its parties to vary its terms (so helps entrench minority shareholder rights). Contrast the position with the articles that can be changed (subject to fraud on the minority/unfair prejudice restrictions) by a 75% majority.

In addition, the 2006 Act also provides statutory entrenching provisions so that a majority greater than 75% may be required to vary certain rights.[51]

[51] s.22 of the 2006 Act

10 RIGHTS AND DUTIES OF DIRECTORS

[A] Qualification for Directors

The 2006 Act does not define the term "director" stating only that, in companies' legislation, "director" includes any person occupying the position of director, by whatever name called.

[B] Executive Directors

In addition to their duties as board members, executive directors carry out executive functions of the company, usually under contracts of employment, and will have rights and duties as employees of the company that are completely separate from those arising from their position as a director.

[C] Non-Executive Directors

Non-executive directors have the same duties and responsibilities as executive directors, but non-executive directors are not employees of the company and may not have the same involvement in the company's day-to-day affairs. The number and role of non-executives on the board of a company is usually influenced by the corporate governance considerations. However, there is no distinction drawn under the 2006 Act between an Executive and Non-Executive Director.

[D] Shadow Directors

Shadow directors are defined in the 2006 Act as someone: "in accordance with whose directions or instructions the directors of a company are accustomed to act."[52] Many of the statutory responsibilities and liabilities that apply to directors apply equally to shadow directors. However, in certain circumstances, a holding company will not be treated as a shadow director of its subsidiaries by reason only that the directors of those subsidiaries are accustomed to act in accordance with its directions and/or instructions.[53]

A private company must have at least one director and a public company must have at least two directors.[54] At least one director of a company must be a natural person. The first directors are appointed by the subscribers to the memorandum. Subsequent appointments are made in accordance with a company's articles of association, normally by the members at a general meeting. The board is usually able to appoint further directors to fill casual vacancies in the board, or to make additional appointments up to the maximum number of directors permitted by the articles of association. However, directors appointed in this way are typically required by the articles of association to stand for re-election at the next general meeting of the company.

The only restrictions that prevent anyone from becoming a director are:
(1) they must not have been disqualified from acting as a company director (unless the court has given them permission to act for a particular company[55]);
(2) they must not be an un-discharged bankrupt[56] (unless they have been given permission by the court to act for a particular company); and
(3) they must not be under the age of 16[57];

[E] Powers of Directors

Individual directors must have the authority of the board (as a whole) to bind the company. The authority of the directors is often set out in the articles (e.g., regulation 70 of Table A). The articles can provide general powers or delegate more specific powers. Specific authority can also be given way of a members' resolution, for example for a one-off occurrence, rather than having to change the articles regularly. Where there are a number of directors on the board, committees may also be set up that confer particular authority on certain of the directors acting together.

[F] Liability of Directors

The general rule is that directors are not personally liable for the actions and debts of the company, although there are some exceptions to this rule.

[52] s.251
[53] As set out in s.251(3) of the 2006 Act
[54] s.154 of the 2006 Act
[55] s.1 Company Directors Disqualification Act 1986
[56] s.11 Company Directors Disqualification Act 1986
[57] s.157 of the 2006 Act

(1) Acting while disqualified - this could result in personal liability for the debts incurred during this period, as well as a fine or imprisonment;

(2) Providing personal guarantees on behalf of the company;

(3) Wrongful trading - at some time before winding up, the director must have known, or ought to have known, that there was no reasonable prospect that the company would avoid insolvent liquidation;

(4) Fraudulent trading – the business of the company was carried on with an intent to defraud creditors (the company does not have to be insolvent);

(5) Filing irregularities – penalties range from a fine to imprisonment, depending on the severity of the irregularity; and

(6) Breach of warranty of authority - the director enters into contractual relations with a third party when he does not, in fact, have the authority to do so.

There are, however, defences a director could use to some of the above situations. For example, where wrongful trading is considered to have occurred, a director may have a defence if he can show he took every possible step available to him in order to minimise the loss to the creditors. A court has the power to grant relief to a director where in proceedings brought for negligence, default, breach of duty or trust, the court considers the director to have acted honestly and reasonably and as such that he ought to be fairly excused.

[G] Fiduciary Duties

Because of the wide-ranging powers of directors in relation to the day-to-day management of a company, a director is in a position of trust, and will therefore owe the company duties, not unlike trustees. As these duties are owed by all directors, including shadow directors and in some cases former directors, to the company, it is therefore only the company who can enforce them. These duties are referred to as "fiduciary duties."

Historically, fiduciary duties have evolved through common law and equity, however with the introduction of the Companies Act 2006, directors' duties have now been codified and given a statutory footing. This does not mean that its historical roots are completely redundant; indeed, each statutory duty will be interpreted in accordance with its common law and equity origin.

Directors' duties as codified by Companies Act 2006:

To act within powers meaning that the director must act in accordance with the company's constitution (i.e., articles of association) and must only exercise their powers for their proper purpose.[58]

To promote the success of the company for the benefit of its members[59]. A director must take into account a number of factors that are together known as the principal of "enlightened shareholder value," such as the following, that is not an exhaustive list:

(1) the long-term consequences of any decision;

(2) the interests of the company's employees;

(3) the need to foster the company's business relationships with suppliers, customers, etc;

(4) the impact of the company's operations on the community and the environment;

(5) the desirability of the company maintaining a reputation for high standards of business conduct; and

(6) the need to act fairly as between the members of the company.

To exercise independent judgment[60] It is the exercise of his judgment that must be independent.

To exercise reasonable care, skill and diligence[61] this will be assessed on a subjective basis taking into account the general knowledge, skills and experience that may be reasonably expected of a director carrying out those functions as well as the knowledge, skills and experience of that particular director.

[58] s.171 of the 2006 Act
[59] s.172 of the 2006 Act
[60] s.173 of the 2006 Act
[61] s.174 of the 2006 Act

To avoid conflicts of interest[62] that may arise, directly or indirectly, with the company's interests. This duty applies to the exploitation of property, information or opportunity, and whether or not the company can take advantage of it.

To not to accept benefits from third parties[63] such as a bribe because of the director's position of power, but also includes non-financial benefits. This is a long-standing principle that prohibits the exploitation of the fiduciary position of director for personal benefit.

To declare an interest in a proposed transaction or arrangement.[64] If the director has an interest, either directly or indirectly, he is bound to declare the nature and extent of that interest to the other directors. Failure to do so, will amount to an offence and the director may be subject to a fine.

The codified duties effectively replace the corresponding existing duties established by common law, with the exception of the conflict of interest procedures. Of course, a company's articles can impose greater duties on its directors, as long as they do not dilute those provided for by the 2006 Act. The common-law duties should really be used to aid application of the codified duties. Certain duties, such as the duty of confidentiality and the duty to consider interests of creditors in insolvency situations, are not codified here but remain important considerations.

Directors of public companies are subject to further restrictions, for instance, in regards to insider trading, or, as it is more loosely referred to, "rigging the market".

The remedies for breach of fiduciary duties are still based on common law and equitable principles. Remedies such as injunctions; setting aside transactions; restitution; accounting for profits; restoration of company property and damages are all used as methods to ensure compliance or to remedy a breach.

[H] Restrictions on Directors

To ensure that a company's directors do not exceed or abuse their powers, statutory restrictions are imposed upon them to ensure transparency and allow the shareholders some measure of control.

The following is a non-exhaustive list of events that require factual disclosure to shareholders and their subsequent approval before the directors can act or a transaction can be executed:

"Substantial property transactions."[65] This relates to situations where a director is buying, or selling, to the company (private or public) an asset that is either valued at more than 10% of the company's asset value and is more than £5,000; or exceeds £100,000 as at the time the transaction was entered into.

Enter into directors' service contracts for terms of over 2 years.[66] If such contracts are not approved, the fixed term is not effective and the service contract is terminable on reasonable notice;

Provide gratuitous compensation on leaving office.[67] This is more commonly referred to as a "golden handshake" and relates to any payments made over £200.[68]. If payment is made without the requisite approval, the payment to the recipient is held to be on trust for the company and the directors who made the payment are held joint and severally liable for loss to the company;

Prohibition on loans to directors[69]*,* subject to a *de minimis* and other exceptions. If a director is lent money, he and whoever authorised the loan will be held to account for any profit made or losses suffered by the company. In instances of large companies (mainly public companies), a breach of this prohibition can result in criminal penalties.

Further disclosure obligations relate to the maintenance of the directors' register[70] and the register of directors' interests.[71]

In order that the company is transparent not only to its members but the general public as well, the directors are under a duty to disclose company information, such as annual accounts[72] and returns.[73]

[62] s.175 of the 2006 Act
[63] s.176 of the 2006 Act
[64] s.177 of the 2006 Act
[65] s.190 of the 2006 Act
[66] s.188 of the 2006 Act
[67] s.215 of the 2006 Act
[68] s.221 of the 2006 Act
[69] s.197 and s.198 of the 2006 Act
[70] s.162 of the 2006 Act (and s.113 regarding members)
[71] s.182 of the 2006 Act
[72] s.386, 394-5 and 399 of the 2006 Act

To escape penalty for conduct that amounts to negligence, default, breach of duty or trust it may be ratified by the members. The members will pass a resolution on the matter; however, if the director himself, or any connected person, is a member, that member will not be eligible to vote on the matter.

If the matter proceeds to court action, a court is entitled to ratify the director's act if two conditions are fulfilled, that the court believes that the director acted honestly and reasonably; and the court believes that all circumstances considered, the director should be excused.

Where a contract (not entered into in the ordinary course of business) between the company and a sole member, who is also a director, is not set out in writing, its terms must be set out in a written memorandum or recorded in the minutes of the first board meeting after the contract was entered into.[74]

[I] Removal of Directors

Directors can be removed from office by retirement (or "rotation") at each AGM. In many private companies, however, the requirement to retire by rotation is precluded from the articles, which means that in order to remove a director (or to remove him before the expiration of his office where the AGM is too far off), the members must pass an ordinary resolution passed at a general meeting with special notice.[75] This is one resolution of a private company that cannot be passed by written resolution as the director has a right to protest against his removal and be heard on the resolution at a duly convened meeting.

Where special notice[76] of a resolution is required, the notice of the intention to move it must be given to the company at least 28 days before the meeting at which it is moved, otherwise it will not be effective. Ideally the company should give notice of this to its members (and the director concerned) at the same time as the notice of the meeting but if that is not possible, the company must advertise the meeting in an appropriate newspaper (or in any other way permitted by the articles) at least 14 days before the meeting.

[J] Corporate Governance Issues for Public Companies

Following the large number of privatizations of state owned industries in the 1980s, the demutualization of building societies in 1990s, the growth of private pensions, and the creation of PEPs, TESSAs and then ISAs, the number of shareholders in the UK increased significantly.

These, coupled with a number of high profile scandals in the 1990s (e.g., Polly Peck, BCCI and Maxwell), meant that a greater number of people were affected by, and were aware of, corporate governance issues.

In response to the concerns of shareholders and the UK Government, a number of committees reported on how to improve corporate governance. One such report was the Combined Code on Corporate Governance produced by the Financial Reporting Council (the "Combined Code"), as amended. All companies incorporated in the UK and listed on the Main Market of the London Stock Exchange are required under the listing rules to report on how they have applied the Combined Code in their annual report and accounts. Overseas companies listed on the Main Market are required to disclose the significant ways in which their corporate governance practices differ from those set out in the Combined Code. In the case of the AIM and PLUS Markets in the UK, the Combined Code is considered best practice taking into account the size of the company, and is partly reflected in those markets' rules for issuers.

[K] Directors and the Board

Every company should be headed by an effective board that is collectively responsible for the success of the company.

There should be a clear division of responsibilities at the head of the company between the running of the board and the executive responsibility for the running of the company's business. No one individual should have unfettered powers of decision.

The board should include a balance of executive and non-executive directors (and, in particular, independent non-executives) such that no individual or small group of individuals can dominate the board's decision making. There should be a formal, rigorous and transparent procedure for appointment of new directors.

The board should be supplied, in a timely manner, with information in a form and of a quality appropriate to

[73] s.854 of the 2006 Act
[74] s.231 of the 2006 Act
[75] s.168 of the 2006 Act
[76] s.312 of the 2006 Act

enable it to discharge its duties. All directors should receive induction on joining the board and should regularly update and refresh their skills and knowledge.

The board should undertake a formal and rigorous annual evaluation of its own performance and that of its committees and individual directors.

All directors should be submitted for re-election at regular intervals, subject to continued satisfactory performance. The board should ensure planned and progressive refreshing of the board.

[L] Directors' Remuneration

Levels of remuneration should be sufficient to attract, retain and motivate directors of the quality required to run the company successfully, but companies should avoid paying more than is necessary for this purpose. A significant proportion of executive directors' remuneration should be structured so as to link rewards to corporate and individual performance.

There should be a formal and transparent procedure for developing policy on executive remuneration and for fixing the remuneration packages of individual directors. No director should be involved in deciding his own remuneration.

[M] Accountability and Audit

The board should present a balanced and understandable assessment of the company's position and prospects. It should also maintain a sound system of internal control to safeguard shareholders' investment and the company's assets.

The board should establish formal and transparent arrangements for considering how they should apply the financial reporting and internal control principles and for maintaining an appropriate relationship with the company's auditors.

[N] Shareholders

There should be a dialogue with shareholders based on the mutual understanding of objectives. The board as a whole has responsibility for ensuring that a satisfactory dialogue with shareholders takes place. The board should use the annual general meeting to communicate with investors and encourage their participation.

[O] Model Code for Dealings

The Financial Services Authority in the UK requires all listed companies to adopt a code regulating directors' dealings in shares of the company in terms no less exacting than those set out in the Model Code in Annex 1 to Chapter 9 of the Listing Rules. Directors of AIM or PLUS Quoted companies are not bound by the Model Code, but should consider its provisions because they represent best practice.

The Model Code provisions are designed to ensure that "persons discharging managerial responsibilities" (that includes directors) and persons connected with them do not abuse, and do not place themselves under suspicion of abusing, price sensitive information that they may have or be thought to have, especially in periods leading up to an announcement of results or of any other matter involving the company or any member of its group.

11 EMPLOYMENT

Workers engaged in the UK benefit from supportive employment legislation. The list appears below summarises ta selection of the Employer's most onerous duties:

[A] Written Particulars

There is no legal right or requirement to have a contract of employment between an employer and an employee, although the majority of employees will have one.

However, Section 1 of the Employment Rights Act 1996 stipulates that employers are obliged to provide employees whose employment is to continue for more than one month with a written statement of certain prescribed terms of their contract of employment. This is often referred to as a "Section 1 Statement" and must be given to employees no later than two months after their employment begins.

The statement must contain particulars of the following:

- name of Employer and Employee;
- date when employment began;

- date when continuous employment began;
- scale of rate of remuneration or method of calculating remuneration;
- intervals at which remuneration is paid;
- hours of work (including normal working hours);
- entitlement to holidays (including public holidays) and holiday pay;
- incapacity due to sickness or injury and sick pay;
- pensions and pension schemes;
- notice periods;
- job title or job description;
- where employment is not intended to be permanent, the period for which it is expected to continue or date of expiry of fixed term;
- place of work;
- disciplinary rules and grievance procedures;
- where there is a contracting out-certificate in force;
- collective agreements that directly affect terms and conditions of employment; and
- where the employee is required to work outside the UK for a period of more than one month: the period of work that is outside the UK; currency in which remuneration is to be paid; additional remuneration or benefits recoverable; and terms relating to the return to the UK.

Some of these do not necessarily have to be set out in the Section 1 Statement and can instead be referred to in another document (e.g., pension provisions). The majority of points need to be dealt with in the Section 1 Statement, however, even if only to confirm that a particular provision does not exist or is not applicable.

[B] Minimum Wage

In the UK, there exists a National Minimum Wage determined by the age of the worker and whether the worker is in training[77]. The Standard adult rate, which applies to workers aged 21 or over is £6.31[78] For those aged between 16 and under 21 (and not undertaking an apprenticeship or training) the national minimum wage is £3.72. It must also be noted that an Employer cannot make deductions from wages (subject to statutory exemptions) that are owed to a worker without that worker's consent.

[C] The Working Day

There are restrictions on how long and how much a worker can be required to work in the UK. As a result of the Working Time Regulations 1998, workers cannot be made to work more than 48 hours in one week, unless they provide their written consent to "opt out"[79] It has now become common to make provision for this "opt out" in an employment contract. In relation to night work, it is prohibited under any circumstances for a worker to work more than 8 hours night work in any 24 hour period.[80] Finally, if a worker works for longer than a six hour day, that employee must be given at least one rest break of 20 minutes.

Workers are entitled to a statutory minimum of 5.6 weeks annual leave, which equates to 28 days for a full time employee. It is the Employer's decision as to whether the workers' annual leave should include or exclude public holidays. Notwithstanding statutory requirements, it is common practice in the UK for Employer's to offer workers 25 days' annual leave in additional the recognised public holidays.

There is no requirement for the Employer to pay its workers their salary if they are unable to work due to sickness. However, most Employers do for a limited number of days. Statutory sick pay only becomes payable on the fourth consecutive day which the worker is absent. From this point onwards the Employer is required to pay the absent worker £86.70 per week up to a maximum of 28 weeks. An Employer may be able to recoup all or some of these costs from the state.

[B] Health and Safety Issues

Employers have extensive legal obligations[81] in order to ensure the health, safety and welfare of all of their employees, some of which are only applicable to employers who have five or more employees. These duties include, but are by no means limited to, the following:

- Ensuring, as far as is reasonably practicable, the health, safety and welfare of all employees;

[77] National Minimum Wage Act 1998
[78] http://uk.practicallaw.com/4-200-2038#a407555
[79] Regulation 4 and 5 Working Time Regulations 1998
[80] Regulation 7 Working Time Regulations 1998
[81] Such as the Health and Safety At Work, etc. Act 1974 which is the primary piece of legislation covering occupational health and safety in the UK

- Providing information, instructions, training and supervision to ensure the health, safety and welfare of all employees;
- Providing and maintaining a safe working environment and place of work;
- Preparing a written health and safety policy for all employees and revising this as and when necessary;
- Appointing health and safety representatives among the employees; and
- Owing a duty of care to visitors to the employer's premises.

Employers should also bear in mind that employers may be vicariously liable for accidents caused by their employees who are acting in the course of their employment. In addition, all accidents, injuries, diseases and dangerous occurrences should be reported and employers should ensure that there is always insurance in place against liability for bodily injury or disease that an employee may suffer during the course of his or her employment. Ensuring that employees fully comprehend and follow the employer's health and safety policy therefore is of great importance to the employer.

[C] Pensions

Every individual who has paid sufficient National Insurance contributions during their working life will be entitled to receive the state pension in the UK. In addition to the state pension, there are a number of private pension schemes offered by Employers including, for example, personal pension schemes, registered or unregistered schemes, occupational pension schemes and stakeholder pension schemes.

Under the Pensions Act 2008, the main provisions which came into force on 30 June 2012, an Employer is required to auto-enroll all its eligible workers into a pension scheme and make mandatory minimum contributions, if the company does not already offer its employees a good quality pension plan. A month by month staging timetable for all UK Employers started on 1 October 2012 and will continue until 1 February 2018. Larger Employers will be enrolled first followed by small and newer Employers. Alternatively, the employer can enroll eligible jobholders in National Employment Savings Trust (NEST), a central scheme set up by the government.

However, Employers will be able to use their existing occupational pension scheme or personal pension scheme provided it meets certain statutory requirements. Once auto-enrolled, a worker will be free to opt out of the scheme. But while he remains an active member, his employer will be required to pay a minimum level of pension contributions.

As mentioned above, pensions and pension schemes must be referenced in the written particulars relating to an employee's employment, although the details relating to pensions are normally found in an employee handbook produced by the employer.

Pension entitlement is an important part of an employee's employment and therefore, in order to avoid any potential claims for loss of pension (for example, in wrongful or unfair dismissal cases) or for discrimination claims in relation to an employee's pension entitlement, it is essential that employers give this aspect of the employment relationship due consideration.

[D] PAYE and NIC

PAYE ("Pay-As-You-Earn") is a withholding tax deducted by an employer from an employee's wage or salary, based on the employees expected tax allowances, exemptions and reliefs, and paid directly to H.M. Revenue & Customs. PAYE is used to collect an employee's income tax and national insurance contributions ("NICs").

Usually the tax collected by the employer during each tax year is sufficient to discharge the employees' tax liability; however, the employees' affairs may be more complicated, and the individual will need to submit a tax return to determine the amount of additional tax payable or to be refunded.

[E] Work Permits and Visas

It is unlawful to employ someone who is not legally entitled to work in the UK and this is now governed by The Immigration, Asylum and Nationality Act 2006. The UK Border Agency (UKBA) is the government entity which controls and manages UK immigration.

Employers must ensure that they ask every single one of their prospective employees to provide certain specified documentation in order to establish their legal entitlement to work in the UK. Employers must be aware of the importance of keeping records and submitting accurate immigration applications when sponsoring a migrant. If an employer fails to do so, fails to check the documentation or fails to undertake checks, the employer will have committed either a civil or a criminal offence under The Immigration, Asylum and Nationality Act 2006:

The civil offence: An employer who negligently hires an illegal worker will be liable to a fine of up to £10,000 per employee. However, the employer will have a defence if it obtained certain specified documents from the employee before employing them.[82]

The criminal offence: An employer who knowingly hires an illegal worker could be liable to a custodial sentence of up to two years and/or an unlimited fine.[83]

Certain people have an automatic right to work in the UK, for example:

- **British Citizens** (citizens from British Dependent Territories and Brutish Overseas citizens do require permission).
- **European Economic Area ("EEA") nationals**
  - Nationals from eight of the countries that joined the EEA in May 2004 (known as the A8 countries) include Czech Republic; Estonia; Latvia; Lithuania; Hungary; Poland; Slovenia; and the Slovak Republic may now freely work in the UK.
  - Previously, Bulgarians and Romanians wishing to work in the UK had to comply with temporary restrictions for example, the type of jobs they could take. Employers had to apply for work permits and migrants for an "accession worker card". However, as of 1 January 2014, Bulgarians and Romanians have gained the same rights to work in the UK as other EU citizens.
  - Citizens of Croatia (which joined the EU on 1 July 2013) have the right to enter and remain in the UK without permission for a period of 3 months, but not to work
- **Swiss citizens**
- **Unmarried nationals of British citizens, EEA nations and Swiss Nationals and their dependents**
- **Commonwealth nationals with UK ancestry**

Migrants outside of the European Economic Area will have to comply with immigration and visa requirements. There exists a tiered points-based system based on the migrant's ability experience and age. All those catergorised outside of Tier 1 (investors, entrepreneurs and exceptionally talented migrants) need to be sponsored before they can apply to enter the UK. The UK employer will need to apply for and obtain a sponsor licence from the UK Bored Agency before they can employ migrants under Tier 2 (skilled workers) and Tier 5 (temporary and youth mobility scheme migrants).

The UK does accommodate business visitors allowing foreign nationals to visit the UK for a period of up to six months to do business on their own beheld or on behalf of their overseas employer, provided that their activities do not amount to employment within the UK

In order to avoid a potential discrimination claim, it is essential to ensure that employers carry out checks on every single individual, regardless of an individual's perceived race, ethnic origin or nationality.

[F] Restrictive Covenants

These are negative covenants that restrict what an employee can do once their employment with the employer has ended. Such covenants are used in employment contracts to protect the employer's business and are of particular importance for a business employing senior employees who have, or may have, confidential information about the business, or who have built up relationships with its clients, employees and, where relevant, suppliers, in the course of their employment.

Restraints may include the following:
- Non-solicitation of customers;
- Non-dealing with customers;
- Non-enticement of employees;
- Non-employment of employees;
- Non-competition;
- Non-interference with suppliers to the business.

It is important to note that the courts will only enforce restrictions that do no more than is reasonably necessary and proportionate to protect the legitimate business interests of the employer and that do not operate unduly against the public policy.

Therefore, any restrictive covenants must be drafted very carefully and tailored to the particular employee and the particular business interests that the employer is seeking to protect, before being included in the contract of

[82] s.15 of The Immigration, Asylum and Nationality Act 2006
[83] s.21 of The Immigration, Asylum and Nationality Act 2006

employment. They must not be unreasonable as they will not be upheld and will, therefore, not afford the employer any protection.

Employers should consider the following elements when drafting restrictive covenants:

- The duration that any restrictions will be applicable for, and the geographical area concerned, if this is relevant;
- The seniority of the employee;
- Who the employee is not permitted to deal with or solicit. For example, this should usually be limited to those with whom he has had fairly recent direct contact in the course of his employment and should not include clients with whom he does not have any real relationship, or about whom, he does not have any confidential information;
- If the employee is prohibited from enticing away fellow employees it should be limited to those employees with whom he had some sort of personal relationship and whose departure would cause damage to the business (i.e., those employees who are senior or who have particular relationships with clients).

12 TAX

This section contains a brief reference to the types of taxation potentially relevant to companies setting up business in the United Kingdom but does NOT attempt to provide in depth advice on tax structures or other specialist tax matters.

[A] Corporation Tax

Companies that are incorporated, or whose central management and control is exercised, in the United Kingdom are subject to annual corporation tax on their profits (essentially income plus gains) arising in an accounting period (a period of 12 months or less). There are two rates, depending on the level of profits made.

The main level of Corporation tax is payable by companies when profits are at a rate exceeding £1,500,000, or where there is no claim to another rate, or where another rate does not apply. As discussed in the introduction, the government has announced new corporation tax rates to be introduced. The UK's current corporation tax rate is at 23% and will reduce to 21% from April 2014 and to 20% from April 2015

For smaller companies, whose annual profits do not exceed £300,000, the current rate of corporation tax is 20%.

Non-resident companies may be subject to corporation tax where they trade in the UK through a permanent establishment.

[B] Value Added Tax (VAT)

Value Added Tax[84] is a sales tax levied on the sale of goods and services. It is levied on the added value that results from each exchange. VAT is an indirect tax, in that the tax is collected from someone other than the person who actually bears the cost of the tax (i.e., the seller rather than the consumer). The current rate of VAT is 20%.

Personal end-consumers of products and services cannot recover VAT on purchases, but businesses are able to recover VAT on the materials and services that they buy to make further supplies or services directly or indirectly sold to end-users.

[C] Withholding Tax

Withholding tax is an amount withheld by the party making payment to another (the payee) and paid directly to the taxation authorities. The amount the payer deducts may vary, depending on the nature of the product or service being paid for.

The payee is assessed on the gross amount, and the tax to be withheld (the withholding tax) is computed on that assessment. The purpose of withholding tax is to counteract tax evasion, tax avoidance, and to facilitate collection of taxes.

Withholding taxes apply to employees and interest on savings in the United Kingdom. However, regardless of where in the world a shareholder may reside, there is no withholding tax on the distribution of dividends to shareholders or parent companies by UK companies.

[D] Stamp Duty

In the United Kingdom, stamp duty is a form of tax charged on instruments (written documents), and requires a physical stamp to be impressed upon the instrument in question as evidence that the duty has been paid.[85] The duty is payable to HM Revenue & Customs, to whom the stock transfer forms that evidence the transfer are sent for stamping and certain documents cannot be registered until they are validly stamped, as unstamped documents cannot be relied upon.[86] Stamp duty must be paid within 30 days of execution otherwise interest and penalties apply. This also applies to documents executed abroad although it is 30 days from receipt in England.

Stamp duty was largely abolished in the UK from December 1. 2003, except for transfers of shares and securities, the issue of bearer instruments, certain transactions involving partnerships, and the new stamp duties (SDRT and SDLT) set out below.

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[84] Value Added Tax Act 1994
[85] s.2 of the Stamp Act 1891
[86] s.14(4) of the Stamp Act 1891

Stamp duty is an ad valorem duty, that is, the duty is worked out as a percentage of the amount of chargeable consideration, with the amount payable rounded up to the nearest £5. The rate of stamp duty payable on sales of stock (including shares) or marketable securities is currently 0.5%. Where the consideration is less than £1,000, the transfer is exempt from stamp duty and nothing is payable.

Where the consideration is wholly or partly unascertainable at the date of execution, for example, where part of the consideration may depend on some future event, such as an earn-out provision, the duty is charged on the maximum amounts that might become payable in respect of the unascertainable element (the "contingency principle"). If the consideration is partly unascertained at the date of execution but is ascertainable at a future date, for example, deferred consideration dependent on calculation of the completion accounts, the duty is charged on the amount known at the date of the transfer and any further tax is payable once the remaining consideration has been ascertained (the "wait and see" principle). Interest is also payable on any amounts outstanding past the 30 day time period.[87] Alternatively, documents can be sent to the Stamp Office for adjudication, whereby HMRC gives an opinion as to the liability to duty.[88]

Stamp Duty Reserve Tax (SDRT) was introduced on agreements to transfer certain shares and other securities in 1986[89], and Stamp Duty Land Tax (SDLT) was introduced for land transactions from December 1, 2003. SDRT applies in place of stamp duty in cases where the agreement is not completed by a duly stamped instrument of transfer. The rate is also 0.5% of the consideration but it is not fixed or rounded up. SDLT is charged at varying rates, from nil rate to 4%. Neither SDRT nor SDLT require physical stamp but time limits for submission do apply.

For further details on SDLT, please refer to Property at chapter 13.

[E] National Insurance Contributions[90]

Companies are required to pay contributions towards National Insurance for each employee, in addition to the employee's own contribution paid from their earnings by the employer.

[F] PAYE

Pay As You Earn (PAYE) is a scheme for collecting income tax for employees (together with contributions for National Insurance, student loans and pensions).

[G] Business Rates

Payable on premises such as shops, offices, pubs, warehouses and factories. These are based on the previous valuation of the market rent and must be revalued every five years. Business rates are payable not only for occupied properties, but also for vacant properties, subject to certain exemptions.

[H] Capital Gains Tax and Capital Allowances

These are respectively: a tax payable on business disposals and a relief on expenditure on equipment. This is quite a complex area but basically the idea is that the cost of expensive items is written off against the profits over a number of years.

[87] s.15A of the Stamp Act 1891
[88] s. 12(1) of the Stamp Act 1891
[89] s.87 and s.99 of the Finance Act 1986
[90] See also 08[D]

13 PROPERTY

For most businesses in the UK, real estate forms an essential part, whether it is an office to work, a warehouse to manufacture or a shop to sell. Unfortunately, locating a property can be a highly time consuming process and property agents are often instructed to locate commercial premises and recommend on value. Agents are also useful when negotiating the Heads of Terms of a lease or the terms of a purchase as these can be fairly complicated. Finally, using an agent with local knowledge and connections of the area can prove invaluable. With regards to the physical state of the property, in most cases a chartered surveyor will need to inspect the property to ensure that the building is solid and at no risk of damage.

There are two options to occupy a property; either buying the property and legal title outright (freehold property) or occupying the property for a specified period of time under a lease or tenancy (leasehold property).

Leasehold

Most businesses in the UK opt to rent their commercial premises as less capital is tied up the property and can instead be invested into the business. Although, the tenant may be required to pay a premium for the lease or deposit monies with the landlord, normally around 3 to 12 months of the annual rent. Subject to the terms of your lease, it is unlikely that you will be required to maintain all of the building and external maintenance.

Leases can be of any length as agreed between tenant and landlord, however, in the current climate leases of 10 years with a break and rent review at 5 years are most common. Rent is normally paid quarterly in advance, but it is possible to negotiate monthly payments with the Landlord. In addition to the rent, it is common for the tenant to pay service charges to the landlord which contributes to the insurance and maintenance costs of the building. The advantage of commercial leases is that out the end of the term of the lease (except where the lease has been contracted out of), the tenant has a statutory right to a renewal lease on similar terms, save for rent.

For smaller businesses looking for slightly more flexibility and a shorter term, a licence could be of benefit. Licences normally last up to one year and can usually be terminated at short notice by either the licensor (the landlord) or the licencee (the occupier). However, at the end of the term, there is no automatic right to renew a licence, as compared with a lease.

Freehold

Buying a property in the UK comprises a two stage process; exchange of contracts and completion. The instructed solicitor will investigate the title to the property, which is the seller's right to sell and any rights or restrictions that affect the same. A solicitor will also undertake a variety of searches of the property, such as environmental and local authority, usually costing around £600 in total. There are standard sale contracts used depending upon whether the sale concerns commercial property or residential property. Upon exchange of contracts, the buyer will usually 10% of the purchase price as a deposit. If the buyer fails to complete the purchase on the agree completion date, then the seller has the right to retain the deposit monies from the buyer and the buyer will not be refunded. Such is to act as a deterrent to avoid the purchaser from not completing. At completion, the balance of the purchase monies is paid and ownership is transferred to the buyer.

Tax

It is important to note some basic tax issues at this point. Stamp duty land tax ("SDLT") is applicable on nearly all land transactions: on a purchase of a property or on the grant of a lease, the Buyer/ Tenant is required to pay SDLT in the following amounts based on the market value of the property of lease premium:

Purchase price/lease premium or transfer value (non-residential or mixed use)	SDLT rate
Up to £150,000 - annual rent is under £1,000	Zero
Up to £150,000 - annual rent is £1,000 or more	1%
Over £150,000 to £250,000	1%
Over £250,000 to £500,000	3%
Over £500,000	4%

Business rates (also known as non-domestic rates) need to be paid by the entity occupying the property. This in effect is tax payable to the local council to help pay for local services. Business rates are applicable to all commercial premises, including but not limited to; shops, offices, warehouses, pubs and factories.

Generally, no VAT is payable when purchasing commercial property, however some sellers elect to charge VAT on the sale.

14 COMPETITION

The UK's attaches great importance to the right of free competition between businesses. Such right effectively encourages innovation, efficiency and competitive pricing.

There are two main competition enforcement authorities within the UK; the Office of Fair Trading (OFT) and the Competition Commission (CC). However, structural institutional plans are in process, and it is intended by the current movement that these two bodies shall be united to form one single Competition and Markets Authority (CMA) to which the functions of the Competition Commission and the competition functions of the OFT will be transferred.

The Competition Act 1998 introduced two prohibitions which are closely based to the corresponding prohibitions under Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), with controls monopolies and mergers:

- The Chapter I prohibition – this prohibits agreements between undertakings which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK. Such agreements which would be caught by this provision, including those which directly or indirect fix purchases or selling prices or any other trading condition, and limit or control of production for example by refusing to supply.

- The Chapter II prohibition - prohibits the abuse of a dominant market position which has or is capable of having an effect on trade within the UK. Two competing companies who wish to merge with each other can have the effect of reducing the effectiveness of competition. Therefore prior to such mergers, clearance from the governing bodies is required.

Failure to comply with the above anti-competitive regulations could result in heavy sanctions, including fines based on turnover and custodial sentences.

15 INTELLECTUAL PROPERTY

Generally, a company's assets can be divided into tangible assets, such as stock, property, machinery or intangible assets, such as know-how, innovative ideas and branding. More often than not, the importance of a businesses' intellectual property is overlooked despite it sometimes being the most valuable asset of the business.

Normally it is the creator of the intellectual property that is the owner. However, if intellectual property rights arise during the course of employment, generally under UK law these rights will automatically belong to the employer (rather than the employee who would technically be the creator) without the need for any express term in the employment contract or assignment documents.[91]

Some intellectual property rights in the UK, such as copyright do not require registration for protection, but for rights that do, there exists a reliable system of registering, maintaining and protecting such rights. All intellectual property matters are dealt with by the Intellectual Property Office ("IPO") based in Newport, Wales.

There are four principal means of protecting your intellectual property rights in the UK. These are:

A. Patents
B. Trade Marks
C. Registered designs.
D. Copyright

[A] Patents

The advantage of registering a patent is that the right holder can prevent the unlicensed manufacture, use, importation, or sale of the patented product, or use of a patented process. In other words, a patent gives the right holder to take legal action to try to stop others from abusing their invention without their permission.

By registering the patent, the right holder can sell the invention, licence the invention to someone else (whilst retaining all the IP rights) or discuss the invention with others in order to set up a business without being concerned that someone else might jeopardize the right-holder's invention.

To be patentable, the invention must fulfil the following four requirements:

- Be new and not known by anyone else in the world prior to filing;
- Involve and inventive step;
- Be capable of industrial application; and
- Not specifically be excluded by statute[92].

Protection of the patent is completed by registration at the UK Intellectual Property office. Any European patent applications must be made to the European Patent office. An application for a patent should include a full description of the invention (including any drawings), a set of claims defining the invention, and a short abstract summarising the technical features of the invention. If there is more than one inventor or an application is made on behalf of a company, a statement of inventorship must also be submitted along with the registration application.

The registration process is very lengthy and a typical patent application takes 3 to 4 years to grant, however the procedure may be accelerated for an additional fee. The basic fee for registering a patent is £230[93]. If the patent is granted, the right-holder must pay an annual renewal fee every year after the 5th year for up to 20 years protection. Renewal fees start at £70 for the 5th year and rise to £600 for the 20th year. Enforcement of the patent protection is conditional upon payment of these annual fees.

[B] **Trade Marks**

Trade Marks are a popular means of protecting a company's brand within the UK. Their purpose is to serve as a marketing tool so that customers can easily recognise a business's products and/or services distinguish a business from those of its competitors. A trade mark can take the form of words can be for example words, logos

[91] the Patents Act 1977 (PA 1977), the Copyright, Designs and Patents Act 1988 (CDPA), the Registered Designs Act 1949 (RDA) and the Copyright and Rights in Databases Regulations 1997 (SI 1997/3032) (Database Regulations) give an employer automatic ownership of patents, copyright, database rights, unregistered designs and registered designs in works created by its employees in certain circumstances.

[92] It is not possible to patent any of the following: a scientific or mathematical discovery, theory or method; a literary, dramatic, musical or artistic work; a way of performing a mental act, playing a game or doing business; the presentation of information, or some computer programs; a method of medical treatment or diagnosis; anything against public policy or morality.

[93] This includes £30 for the application fee, £150 for the search fee and £100 for the substantive examination fee.

or a combination of both.[94]

There exists stringent restrictions as to what trade mark can be registered; the trade mark must be distinctive and not describe the goods or services or any characteristics of them, for example by describing the quality, quantity, purpose, value or geographical origin of the goods and/or services. As expected, it is not possible to register a trade mark which is offensive, against the law, registered as protective emblem or is deceptive.

Whilst a company name may be successfully registered at Companies House, this does not guarantee that the same name can be registered with the IPO as a trade mark, if the Trade Mark pre-requisites detailed above, are not met.

Registration of a trade mark is at the IPO is much simpler in comparison to Patents. However, before proceeding it is advisable to carry out a search on the IPO website of all the trade marks currently registered to uncover whether there are any similar trademarks already in use. The trade mark registration fee is £170[95] and the process takes about 3 months, if there are no third party objections. In order to keep the trade mark in force, it must be renewed every 10 years and there is no limit on the number of times the trade mark can be renewed.

[C] Registered Designs

A Registered Design is a legal right which offers the holder the protection of infringement from the overall visual appearance of a product. In order to register a design right, the design must 1) be new and 2) have individual character. A design is considered to be 'new' if no identical or very similar design has been published or publicly disclosed in the UK or EEA. Registration fees for designs are only cost £60, and actioned quickly with certificates issued within one month following receipt of successful applications.

[D] Copyright

The aim of copyright is to protect creative works. Copyright is used to protect the following:

• literary works including novels, instruction manuals, lyrics, newspaper articles, computer programs and some types of database	• dramatic works • musical works
• artistic works, including paintings, photographs, sculptures, architecture, technical drawings, diagrams, maps and logos	• layouts used to publish a work
• recordings of sound and film	• broadcasts of a work

The uniqueness of copyright is that as soon as the works are created, the author is protected from copyright.[96] There is no requirement to register as owner the copyright at the IPO. However, works can only be copyrighted if it is considered to be an “original” i.e. the result of independent creative effort. There is also an element of substantiality to consider. It is good practice to sign and date all original work and insert the following copyright notice ©.

As there is no formal registration system for copyright, the length of protection which is exists is calculated in a different way. Protection of copyright depends upon the type of copyright work. For the majority of works (such as literary, theatrical musical or artistic work) copyright protection lasts for the life of the creator plus another 70 years from the year of the creator’s death.

An author’s copyright will be infringed if someone re-produces the whole or a substantial part of copyrighted work without the permission, in such a case, the author is entitled to take legal action.

[94] http://www.ipo.gov.uk/types/tm/t-about/t-whatis.htm
[95] http://www.ipo.gov.uk/types/tm/t-os/t-os-forms/tm3-introduction.htm
[96] http://www.ipo.gov.uk/types/copy/c-about/c-auto.htm

16 DATA PROTECTION

The purpose of the Data Protection Act 1998 (DPA) is to protect of individuals with regard to the processing of personal data. The DPA does not apply necessary however, if you collect or hold information about an identifiable living individual, or if you use, disclose, retain or destroy that information you are likely to be processing personal data. It is important to balance an organisation's needs to collect and process personal data against the individual's right to privacy.

17 BUYING OR SELLING AN ENGLISH COMPANY OR BUSINESS

The following section applies to matters affecting the purchase or sale of private companies only. The laws and procedures for taking control of public companies comprise a specialist area in relation to which specialist legal advice should be taken at the outset.

There are two main ways in which a business can be acquired – either by purchasing the entire issued share capital from its shareholders (known as a "Share Purchase") or purchasing all or some of its assets and liabilities (known as an "Asset Purchase"). The chosen route will normally be driven by the tax considerations of the buyer.

For the purposes of this section, we have concentrated on share (rather than asset) purchases, although much of the documentation and steps will be the same with an asset purchase.

Regardless of the size of the deal, most transactions follow a similar format. Set out below are the various steps the parties will have to undertake in order to achieve a successful sale and purchase. Please note, however, that this outline is not exhaustive and much depends on the terms of the transaction.

[A] Due Diligence

Due diligence is the preliminary stage of any sale and purchase. It is the process by which a buyer investigates the target company. It is common for the buyer's accountants or lawyers to assist with the due diligence process, each then preparing a report on their areas of specialization (although the due diligence can be undertaken in-house by the buyer if it has personnel who are able to undertake such a task). If the target company specializes or practices in a particular industry or field, input may be required from other professionals (i.e., health and safety experts, patent agents, etc).

The due diligence process usually commences with the directors of the target company answering a series of questions provided to them by the lawyers and accountants of the buyer (known as a "due diligence questionnaire").

Areas that will be covered by the questionnaire will include (but may not be limited to):

- corporate structure and whether the target is part of a group of companies;
- the identity of the target's shareholders;
- accounts and tax issues;
- property and environmental matters;
- intellectual property;
- customers and clients (and contracts in respect thereof);
- employees/consultants/directors; and
- health and safety.

[B] Heads of Agreement

The heads of agreement (also known as heads of term, letters of intent, memorandum of understanding or term sheet) is a document entered into by the selling shareholders (or the company in the case of an asset purchase) and the buyer at the outset of a proposed transaction. It sets out the principle terms of the acquisition and provides evidence that each party is making a serious commitment to proceed (although they do not legally compel the parties to conclude the deal on those terms or even at all!) The heads usually include details of any deadlines. In the event that negotiations are prolonged, the heads may need to be revised or revisited.

[C] Considering Some Basic Issues

The following fundamental issues should be considered from the outset of the transaction (this list is not exhaustive):

[D] The Target

The buyer should inspect the target company's register of members and check its latest annual return to ensure it is aware of the identity of all of the sellers (including the minority shareholders). It should also establish whether the registered holders of the shares are also the beneficial owners or whether they hold the shares in some other capacity (for example, as nominees or trustees).

[E] Deal Structure

Consideration should be given as to how the deal is going to be structured in order to maximize the benefits (particularly in relation to tax) of each party.

[F] Rules and Procedures

Review of any relevant rules and procedures if one or more of the parties is listed on a stock exchange.

[G] Parties

Thought should be given as to who else should be party to the agreement (e.g., what other persons, or class of persons, are to have rights and obligations contained in the transactional documents such as guarantors (see below)).

[H] Guarantees

Consideration should be given as to whether any of the obligations are to be guaranteed by a third party such as a bank or parent company.

Below we have summarised the principle documents that will be required in order to complete an acquisition:

[I] Share Purchase Agreement

This is the main document that will set out the terms of the sale and purchase. It will be entered into by each of the shareholders and the buyer (and any other persons who have rights and obligations thereunder). The length of the agreement will depend on the complexity of the issues although some agreements can run on to many pages. The initial draft is most commonly prepared by the buyer's lawyers.

Some of the provisions to be contained in the sale and purchase agreement require specific mention:

[1] Exchange and Completion

Exchange of contracts (when the document is signed) and completion (when funds are transferred) may, or may not, occur at the same time. Completion will usually take place at a later date if there are "conditions" that need to be met before the deal can proceed (e.g., funding requirements, European Community approval or shareholder approval). Any conditions must be clearly defined and set out in the agreement.

[2] Purchase Price

Careful thought should be given as to how the purchase price (also referred to as "Consideration") will be structured. For example, will it all be payable on completion; will some be paid at a later date linked to certain targets (commonly referred to as an "earn out"); or will some be paid by way of shares in the buyer; or any combination thereof?

A variety of factors will influence this decision. It is also possible for the consideration to be adjusted (up or down) by reference to completion accounts. Completion accounts are drawn up at, or shortly after, completion and can form the basis for determining the final amount of consideration payable under the agreement. The form of such accounts will vary and in order to minimize possible disputes, a schedule should be added to the agreement detailing the principles on which the accounts are to be drawn up including who will be preparing them, who should bear the cost of their preparation and how to resolve any disputes.

[3] Warranties

The provisions in relation to the warranties are likely to be among the most heavily negotiated aspects of the documentation.

The starting point in relation to any purchase is the underlying English contract law principle of "*caveat emptor"* (let the buyer beware). Warranties are assurances from the seller(s) as to the condition of the target company and, in particular, any liabilities. They are included for two principle reasons: a) to compel disclosure from the sellers in relation to the particular warranties to enable the buyer to adjust the price or withdraw from the transaction and b) to provide legal recourse if the warranties are breached, are untrue or not adequately disclosed against by the sellers. Please see below in relation to "Limitations of Claims."

Warranties, for ease, are usually contained in a separate schedule to the agreement. General warranties (i.e., those in relation to ownership of the shares/assets, etc.) will be included in such schedule as will specific warranties (i.e., in relation to certain aspects of the business). Tax warranties will also be included.

[4] Indemnities

These should be distinguished from the warranties. A warranty is a statement by the seller about a particular state of affairs. A breach of warranty will only give rise to a successful claim in damages if the buyer can show that a warranty was breached and that the effect of the breach caused loss to the buyer. The onus is therefore on the *buyer* to show a) there was a breach of warranty and b) quantifiable loss was suffered by the buyer. An indemnity is a promise by the sellers to reimburse the buyer in respect of a particular type of liability, should it arise. The purpose of an indemnity is to provide a guaranteed remedy that might not otherwise be available. The subject matter of an indemnity will depend of the outcome of the due diligence and disclosure and may cover areas such as insufficient payment of national insurance contributions, a particular matter of litigation, etc.

[5] Restrictive Covenants

It is common for sale and purchase agreements to contain restrictions on what the sellers (usually limited to those sellers who work for the company and/or have contact with clients and employees) can and cannot do following completion of the transaction. The restrictions will usually prevent such persons from competing with the business, soliciting customers and/or employees and restricting the use of information obtained about the company.

[6] Limitations on Claims

An important provision for the sellers will be the ability to limit the warranty and indemnity claims a buyer will be able to make. Usual limitations will include a time frame in which claims must be made, the sums that can be claimed and which of the sellers will be liable (i.e., those sellers who have little involvement in the company may not be asked to give any warranties other than the fundamental warranties in relation to ownership of shares and the ability to enter into the agreement). There are no precise guidelines as to what limitations are appropriate and these will be negotiated between the parties.

[7] Governing Law and Jurisdiction Clause

The governing law clause enables the parties to specify which system of law will apply to the interpretation of the sale and purchase agreement. This is an important consideration and should be considered carefully ahead of any substantive work being undertaken since only lawyers with the requisite knowledge in the chosen jurisdiction should be involved in the drafting of the documents. The heads of terms will normally specify this so it is clear from the outset. Similarly, a jurisdiction clause will dictate which country's courts are to have jurisdiction to hear disputes arising from the terms of agreement.

[J] Disclosure Letter

The disclosure letter is an important part of the documentation in any sale and purchase. It is prepared by the sellers in order for them to make general and specific disclosures against the warranties. If a seller fails to disclose a relevant matter in respect of the warranties, and loss results to the buyer, he may be sued by the buyer for breach of warranty. A disclosure letter will be addressed to the buyer and will usually have attached to it a bundle of documents (known as the “Disclosure Bundle”) to support the disclosures being made.

[K] Tax Deed

The tax deed (that can also be referred to as the tax covenant) may either be included as part of the sale and purchase agreement or take the form of a stand-alone deed. There is no right or wrong way it should be done, although the effect of the tax deed being inserted as a schedule to the share purchase agreement is that some provisions in the agreement will automatically apply to the tax covenant (and the need for repetition of definitions, etc, can be avoided). The basic principle underlying the tax deed is that it should ensure that the sellers are responsible for all the tax liabilities of the target company arising before completion (with the buyer being liable thereafter).

The drafting of the tax deed will depend on the background of the specific deal in which it is required. Tax indemnities are usually drafted in the form of a covenant by the sellers to pay the buyer an amount equal to the liability for taxation that has arisen in the target.

[L] Stock Transfer Forms and Other Company Documents

As part of the completion documentation, each seller (regardless of the size of their shareholding) will be required to sign and deliver to the buyer an executed stock transfer form in respect of all of the shares owned by him. The form will attract stamp duty at 0.5% on the value of the transfer that will be payable by the buyer within 30 days of completion of the transaction. The company books must also be updated to reflect the transfers.

Each seller will be required to produce his share certificate at the time of completion so that it may be cancelled (the buyer then being issued with a new share certificate in respect of all of the shares it has purchased).

[M] Service Agreements

It is quite common for a buyer to want to alter the terms of employment of the directors or senior employees of the company (if they are to remain) so that the terms of their appointment are consistent with those of the buyer's directors or other directors within the buyer's group of companies. Accordingly, consideration should be given as to whether new service contracts will be required (the terms of which will need to be negotiated with each director individually).

[N] TUPE

The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") were enacted to protect employees from automatically losing their jobs when a business is taken over by another person and, in complying with the regulations, the new employer (or transferee) may also protect itself from common law claims by its employees for wrongful dismissal, redundancy or unfair dismissal. Effectively the employee enjoys continuity of employment with their employment contract continued along the same terms and conditions as before.

Although TUPE do not apply where there is a sale of assets only, or where a purchaser buys a majority shareholding in a company thereby gaining control, they will apply where there is a transfer from one person to another, and therefore a transfer between two companies belonging to the same group will be caught by the regulations.

Recently, TUPE was substantially updated as a result of the government's desire to align the Regulations with the Acquired Rights Directive. These changes, as detailed below, will come into effect on 31 January 2013.

In order for TUPE to apply there must be a "relevant transfer";[97]

"a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity",

The regulations will continue to apply to service provision changes but will only where the post-transfer activities are "fundamentally the same as the activities carried out by the person who has ceased to carry them out". [98]

The dismissal of an employee will be automatically unfair, and give rise to a claim if the sole or principal reason for the dismissal is the transfer.[99] A dismissal which takes place for an "economic, technical or organisational reason" ("an ETO reason") will potentially be unfair on grounds of redundancy or some other substantial reason. Under the recent legislative updates, provision has been made for "changes in the location of the workforce" following a transfer, which will now expressly be included as an ETO reason thereby preventing genuine place of work redundancies from being automatically unfair.[100]

Inform and Consult

The new employer must consult the employees about the transfer, either through trade union officials (if applicable) or employee representatives – usually elected by the workforce. The consultation must consist of:

- when and why a transfer of business is happening;
- what the impact on employees will be; and
- whether any measures like re-organisation will be taken, and how they will affect the employees.

As effect from 31 July 2014, there will no longer be a duty to inform and consult employees of micro-businesses (employing fewer than 10 employees) via an employee representative. [101]It is considered in such circumstances more appropriate for the employer to engage directly with the employees.

The information must be given in good time and the consultation must be carried out with the aim of coming to an agreement. If there is a failure to inform and consult, a complaint can be made to the Employment Tribunal. If

[97] Regulation 3(1)(a) TUPE
[98] Regulation 3(2A) TUPE
[99] Regulation 7(1) TUPE
[100] Regulation 7(1A) TUPE
[101] Regulation 13A TUPE

successful, the Tribunal can award whatever compensation it considers just and equitable having regard to the seriousness of the employer's failure – up to a maximum of 13 weeks' pay per affected employee. Information and consultation failures can now result in joint and several liability between the old and new employers, unless the contract governing the transfer clearly caters for apportionment of liability here.

Employee Disclosure
The old employer has had a duty to provide the new employer with written details of the transferring employees (including identity, age, particulars of employment, disciplinary and grievance records, employee claims and collective agreements) together with all associated rights and liabilities that will transfer. This information must be passed not less than 14 days before the transfer[102], however under the recent amendments, this time period will increase to 28 days, effective from 1 May 2014.

Failure by the old employer to comply with this duty can result in the new employer applying to the Tribunal for compensation that will be assessed with regard to the losses suffered with a minimum award of £500 per employee. The complaint should succeed unless there were exceptional circumstances preventing the employer from informing and consulting (for example, events outside their control).

Varying contract terms
'The Transferee is not permitted to vary the terms of the employees' contracts of employment if the reason for the changes derive from the transfer itself, even if the employee agreed to the change and the less favourable terms are offset by other benefits so that the contract as a whole is no less favourable. However changes to an employees' contract are permitted where the sole or principal reason for the variation is unconnected to the transfer or connected to the transfer but qualifies as an ETO reason.[103] As a general rule, TUPE does not accommodate harmonisation of terms of employment with the transferees' existing employees, although transferees will be able to change terms derived from collective agreements one year after the transfer, provided such changes are no less favourable to the employee.[104]

Strictly speaking, obligations relating to provisions about benefits for old age, invalidity or survivors in employees' occupational pension schemes do not transfer under TUPE, but the provisions of the Pensions Act 2004 do apply. In effect, this means that, if the previous employer provided a pension scheme, then the new employer has to provide some form of pension arrangement for employees who were eligible for, or members of, the old employer's scheme. It will not have to be the same as the arrangement provided by the previous employer but will have to be of a certain minimum standard specified under the Pensions Act.

A failure to comply with TUPE could therefore expose employers to claims large enough to undermine the entire transaction.

[O] Compromise Agreements

A compromise agreement is a legally binding agreement entered into by the employer and the employee following termination of the employee's job that is intended to be a full and final settlement. It usually contains:

(1) a provision for a severance payment, in return for which the employee warrants not to pursue any claim they may have to an employment tribunal, including any rights they may have under the Race Discrimination Act, Sex Discrimination Act and the Employment Rights Act;

(2) a provision dealing with the notice element in the employment contract and may provide for a "payment in lieu;"

(3) a confidentiality clause both in terms of the employer's trade secrets and business affairs and the terms of the agreement (plus a small additional sum for agreeing to this);

(4) a requirement not to make any derogatory comments against the employer (that is sometimes made mutual); and

(5) a provision confirming the existing post-termination restrictive covenants that the employee is already bound by under their contract of employment but, in some cases, these covenants are new.

The compromise agreement will state the full breakdown of the payments the employee will receive and the extent to which the sums will be paid free of tax. Usually, up to £30,000 compensation can be paid without deduction, but the employee will have to give a tax indemnity to the employer within the agreement.

[102] Regulation 11(6)(a) TUPE
[103] Regulation 4(5) TUPE
[104] Regulation 4(5B) TUPE

It is a legal requirement that the employee get independent professional advice on what the agreement means (and to them in particular) and that the adviser signs the agreement to confirm that advice has been given. Such advice can only be given by a qualified lawyer, a qualified trade union official, or a qualified advice centre worker, all of whom must be covered by an appropriate certificate of indemnity insurance. It is usual for the employer to pay for the cost of the drafting of the agreement and the independent legal advice.

[P] Other Documents

The terms of the transaction will dictate precisely what documentation is needed; however, the following may also be required (in addition to those documents outlined above):

(1) any financial assistance documentation that may be required;

(2) board minutes;

(3) resignation letters – for directors, company secretary and auditors;

(4) powers of attorney;

(5) escrow letter in the event any monies are to be held in an escrow (retention) account following completion;

(6) loan note instrument(s); and

(7) Companies House forms reflecting the changes that have been made.

18 USEFUL WEBSITES

Companies House	http://www.companieshouse.gov.uk/
Department for Work and Pensions (DWP)	http://www.dwp.gov.uk/
H M Revenue & Customs (HMRC)	http://www.hmrc.gov.uk/
Health and Safety Executive (HSE)	http://www.hse.gov.uk/
Institute of Chartered Secretaries and Administrators (ICSA)	http://www.icsa.org.uk/
Insolvency Service	http://www.insolvency.gov.uk/
Financial Conduct Authority	www.fca.org.uk
Prudential Regulation Authority	www.bankofengland.co.uk.
The Takeover Panel	http://www.thetakeoverpanel.org.uk/

19 GLOSSARY

Acting in concert: (also known as "concert parties") a group of investors acting together to achieve the same goal, often the takeover of a company. Such actions are subject to the City Code.

Authorised share capital: (also known as Nominal share capital) the total value of the shares that a registered company was (until the 2006 Act came into effect) allowed to issue in order to raise capital.

City Code: the City Code on Take-Overs and Mergers.

Issued share capital: the value of the shares which have been subscribed for by members and that have been issued out of the nominal/authorised capital.

Member: a shareholder.

Officers: officers of a company are the directors, often this includes shadow directors and company secretaries, where they are in place.

Official Receiver: a civil servant in The Insolvency Service and an Officer of the Court, whose role is to administer the initial stages of an insolvency case, collecting, protecting and investigating the assets and causes of the insolvency.

Parent Company: (otherwise known as a holding company) a body corporate which holds the majority of the voting rights in another (a "subsidiary"), or it is a member of the subsidiary and has the right to appoint or remove a majority of its board of directors or it has the right to exercise a dominant influence over the subsidiary.

Registered Charity: various Charities Acts and specific requirements to register a charity (and be eligible for certain tax concessions), for example, special provisions of its articles of association.

Shadow Director: a person in accordance with whose instructions or directions the directors of the company are accustomed to act, although where a person gives advice to the directors in a professional capacity upon which they act cannot be said to be a shadow director on this basis alone. Shadow directors have the same duties and obligations as directors.

Subsidiary: a company is a subsidiary of another company, (its holding company) if the other company holds a majority of the voting rights in it or is a shareholder of it and has a right to appoint or remove a majority of its directors.

Summary Conviction: A summary offence is one that can only be tried in the magistrates' court.

UK: The UK is an abbreviation of the United Kingdom of Great Britain and Northern Ireland that consists of England, Wales, Scotland (collectively known as Great Britain), and Northern Ireland.

Undertaking: a body corporate or partnership, or an unincorporated association carrying on a trade or business with or without a view to a profit.

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