

**ESTABLISHING A BUSINESS
IN THE UNITED KINGDOM**

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A Collyer Bristow Guide

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INTRODUCTION

Collyer Bristow's company and commercial team is delighted to offer this very basic outline of the legislation related to doing business in UK. It regards only England and Wales. Different considerations apply to Scotland.

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1.1 The Structure

A foreign investor is free to carry on business in the UK through a number of entities. However, in practice, one of the following is the most common:-

- Company
- Branch
- Partnership and Limited Liability Partnership
- Joint Venture
- Sole Trader

Each has its own advantages and disadvantages depending on the type of business to be carried on.

1.2 Non-UK Owned Limited Liability Company

The normal vehicle for establishing business operations in the UK is a private limited company. The most obvious benefit is that the liability of the non-UK owners is limited to the amount unpaid on their shares in the company. If all the shares are fully paid they will not normally be liable to contribute further amounts in the event of the company becoming insolvent (although the initial investment would be lost).

The principal distinction between a company and other forms of business organisation is that, normally, only a company can confer limited liability on its members. As a result the law requires more extensive formalities regarding registration, accounting and auditing, and public disclosure of information. However, often the directors or shareholders may be asked to give personal guarantees or other security for any debts or liabilities of the company.

Private and Public Companies

Statute distinguishes between private and public companies limited by shares, the principal restriction on the former being a prohibition on offering their shares for public subscription. A public company is not necessarily a publicly quoted company, as there are certain public companies which are not listed.

Constitution

The company's constitutional document is called the Articles of Association ("Articles"). The company's Articles provide for the company's objects and liabilities, in addition to defining the powers of the company in its relations with outsiders. The Articles deal with the company's internal regulations governing such matters as the rights of the shareholders, the appointment, removal, powers and functions of its directors and the conduct of board and shareholder meetings. There is considerable flexibility in the manner in which the Articles can be structured.

The Name

Subject to certain limitations, a company may adopt any name. Every private company's name must end with the word "Limited". A company cannot be registered with a name which is the same as an existing company name and there are certain words that require formal approval to be included in a name. There is also a discretion to reject names considered to be unsuitable.

Registration of the company name will not necessarily entitle the company to exclusive use of that name. Any other business carrying on business under that name may be able to continue trading under that name or even restrain the company from using the name if there is likelihood that confusion will arise between the two. In addition, if someone else has registered the company name as a trademark in relation to the class of goods or services that the company will supply, it can require the company to change its name. A name clearance search is recommended in most cases.

The company can trade under a name other than its corporate name, but the corporate name must itself be shown on correspondence and business documents.

Share Capital

Every company limited by shares must have a share capital which can be as small (save in respect of public companies) or as high as required. A substantial proportion of the company's financing requirements would usually be satisfied by way of loans rather than subscription of share capital. This is due to UK insolvency law.

Shares may be of any amount or denomination. Shares of no par value are not permitted. Both bearer and registered shares are allowed. Shares may be of different classes having different voting, dividend and other rights. Redeemable shares of any class are permitted.

Private companies often restrict the right to transfer shares, usually at the discretion of the directors. Sometimes shareholders have pre-emption rights that give them a prior right to be offered shares that are intended to be sold. Otherwise ownership is transferred on the submission of a completed share transfer form together with the share certificate of the company.

Shareholders

The company must have a minimum of one shareholder. It is not necessary for a shareholder to be a UK resident or national. A corporate shareholder can appoint a representative to exercise its rights at general meetings.

Directors

A private company must have at least one director, but will normally have at least two. A public company must have two directors. There is no maximum limit and there is no requirement for the directors to be UK nationals or residents.

All companies, whether private or public must on formation have at least one director who is a natural person i.e. an individual (individuals must not be under the age of 16).

There are some specific areas of law which render the directors personally liable if the company has acted illegally. The punishment may be in the form of a fine or jail sentence.

Secretary

The company may need to appoint a Company Secretary who is an officer of the company and is responsible for a number of largely administrative duties. If the company has only one director, then he or she cannot also be the Company Secretary to a private company. Private companies do not have to appoint a company secretary unless the company's Articles expressly requires the company to have one. A public company must have at least 2 directors and 1 secretary who must be formally qualified.

There are no UK nationality or residence requirements.

Auditors

Most companies must have auditors who are UK accountants (or have UK recognised qualifications), but there is an exception for small companies with low turnover.

Registered Office

The company must have a “registered office” in England and Wales. This is the address to which notices and communications can be sent but it does not need to be the address from which the company conducts business.

Business Stationery

Limited companies must state on their business letters and other stationery (including electronic communications and websites) either the full names of all the directors or none of their names. In addition, details of the place of registration, the registration number, the address of the registered office and the corporate name must appear.

Administration

The company must maintain a number of Registers including a Register of Members, a Register of Directors and Secretaries, a Register of Directors’ Service Contracts and a Register of Charges created by the company.

Public companies need to hold an Annual General Meeting in every calendar year at which the accounts for the previous year are approved, any dividend is approved and the auditors are appointed for the next year. Private Companies are not required to hold an Annual General Meeting, unless they opt to do so.

All documents filed with the Registrar of Companies are open to public inspection.

Meetings

In addition to the Annual General Meeting referred to above, other meetings of shareholders may be called by the company as necessary for specific purposes, and the law provides that shareholders holding not less than one-tenth (reduced to one-fifth where it has been more than 12 months since last meeting) of the voting power may demand a General Meeting. Directors’ meetings are held as necessary in accordance with the procedure set out in the company’s Articles. Meetings of shareholders and directors may be held anywhere, subject to the specific requirements of the company’s Articles. It is possible for shareholders of a private company to pass written resolutions without holding a meeting.

1.3 Foreign Owned Branch or Place of Business

In the case of a “branch” organised to conduct business through local representatives, there is no need for a separate legal entity to be established and there are no formalities for the setting up of the branch office. The following particulars of the foreign company must be registered with the Registrar of Companies within one month after the establishment of the branch:-

- A certified copy of its constitutional documents and a copy of the latest audited accounts required to be published by its place of incorporation, and a certified translation if they are not in English
- Form BR1 which includes details of the foreign company’s name and form, its directors and secretary (including addresses, nationalities and business occupations), the branch, and the name and address of a person who is authorised to accept service of process or any other notice

required to be served on it

A foreign company may have insufficient activities in the UK to constitute a branch, but still have to register with the Registrar of Companies as a “place of business” e.g. a representative office. In this case, within one month the foreign company must register similar information to that for a branch.

Name

The name under which a foreign company may carry on business may be disapproved by the Secretary of State. It may be necessary to carry on business under a name other than the corporate name of the company.

This may occur if the name is too similar to the name of an existing registered company or contains a word that is proscribed or requires special approval.

Administration

The overseas company must file with the Registrar of Companies each year a copy of any accounts it is required to make public in its place of incorporation. Where publication is not required, the foreign company must file a balance sheet and profit and loss account in the same form as would be required of an English company. If the accounts are not in English then they must be accompanied by a certified translation.

All mortgages and charges created by it over property must be registered with the Registrar of Companies. Particulars of any alteration in information initially given to the Registrar must be given to the Registrar.

The company will be issued with a registration number and a file incorporating the information provided to the Registrar will be available for public inspection.

There is no minimum or maximum level of capitalisation.

Business Stationery

A foreign company must exhibit at every place of business the name of the company and its place of incorporation.

All business letters and other stationery must state the company’s name, country of incorporation and (if the case) that the liability of the members is limited. If it has registered a branch it must also show the place of registration and registration number. Any company from outside the EEA must also show the place of registration and registration number in its parent state, the legal form of the company and location of its head office.

1.4 Joint Ventures

Joint ventures are not regarded as separate legal entities. In the UK a joint undertaking is usually organised as a partnership or through a jointly owned company.

1.5 Sole Traders

A sole trader is an individual engaged in a business or profession on his own account and is subject to the registration requirements common to all forms of business organisation, the most important of which is in relation to VAT. There is no legal or taxation requirement for a sole trader to keep books of account in any particular form, although certain minimum records are required for VAT and Income Tax purposes. The accounts of a sole trader need to be neither audited nor publicly disclosed.

However, a sole trader is totally responsible for any liabilities incurred during the course of carrying on the business with the result that personal as well as business assets may be at risk.

2. EMPLOYMENT

2.1 The Employment Contract

Legislation provides considerable safeguards for the employee in his terms of employment as well as working conditions. It also provides machinery for enforcing the observance of the relevant terms and conditions of employment.

An employer is required to give an employee written information as to his terms and conditions of employment, the disciplinary rules applicable (if any) and the procedure available where there is a grievance about the employment or dissatisfaction with any disciplinary decision; it should also set out the rights of both employer and employee to the periods of notice when employment is to be terminated.

In addition, *an* employer may wish to impose further terms and conditions on the employee and these will often depend on the seniority of the employee.

These may include:-

- Restrictions on competition after the employee leaves (the extent to which the courts will uphold covenants restricting an employee's scope of work is limited to what is reasonable and strictly necessary for the protection of the employer and each case will turn upon the facts).
- An agreement to opt-out of the maximum 48 hour working week
- Commission and bonus payments
- Incentives (including share option schemes)
- Index-linking salary to the rate of inflation
- Provision of a car
- Expenses
- Private health plans
- Pensions

3. FOREIGN PERSONNEL

Nationals of states which are parties to the European Economic Area Agreement, do not require leave to enter or remain in the UK to work or carry on a business. Such nationals can apply to the Home Office for a residence permit after entering the UK.

Until November 2008, nationals of states outside the European Economic Area had to obtain a work permit before coming to work in the UK. The work permit has now been replaced by a points based system and (except in limited circumstances) the need for a certificate of sponsorship.

Migrants are now categorised into 5 tiers of workers: Tier 1 – highly skilled workers, Tier 2 – skilled workers, Tier 3 – low skilled workers, Tier 4 – students and Tier 5 – temporary or exchange workers.

For each category a migrant has to earn a certain level of points in order to work in the UK.

A migrant falling into Tiers 2 – 5 will have to be sponsored by an employer before they can come to work in the UK. This is evidenced by a certificate of sponsorship.

Once the certificate of sponsorship has been issued the migrant must still obtain entry clearance before entering the UK.

A sponsor has to comply with onerous record keeping and reporting obligations.

Special Arrangements or Concessions

Foreign workers contribute to and are entitled to social security benefits and health care on largely the same basis as UK nationals. There are no other special arrangements or concessions.

Restrictions on Employment

There are no formal restrictions on the number of foreign employees on payroll.

4. IMMIGRATION

Individuals who wish to come to the UK to set up in business will have to meet UK immigration requirements. These can be complex, but the main points are as follows:-

- Nationals of states which are parties to the European Economic Area Agreement do not need leave to enter or remain in the UK to work or carry on a business. Such nationals can apply to the Home Office for a residence permit after entering the UK
- A visitor to the UK for less than six months is permitted to transact business (such as attending meetings, fact-finding and negotiating) but will normally be prohibited from taking employment
- A person intending to take employment in the UK will, in most cases, need a certificate of sponsorship and have to meet the minimum point requirements (see above).
- The sole representative of an overseas firm wishing to establish in the UK, can obtain leave to enter the UK by obtaining a sole representative visa
- Otherwise, a person seeking leave to enter the UK to establish himself or herself in business will need to meet a number of fairly stringent requirements, including that he or she has not less than £200,000 of his or her own money to invest in the business in the UK. There are less stringent requirements for nationals of certain Central and Eastern European countries
- Alternatively, a person may apply for leave to enter the UK as an investor. In this case, he or she will need to show that he or she has money of his or her own of not less than £1 million of disposable funds that are in a regulated financial institution or £2million in personal assets and have £1 million that is in the form of a loan from an authorised financial institution.

5. PROPERTY

Introduction

Property in the UK can be acquired either freehold or leasehold.

Acquisition

No permission is needed for buying or leasing property in the UK, but a foreign corporation may be asked to show that its incorporation documents give it power to acquire and dispose of land wherever it may be located.

It is usual for the basic terms of a property transaction to be negotiated on a “subject to contract” basis, meaning that no legal commitment is entered into until formal contracts are signed in duplicate and exchanged between the parties, normally through solicitors. It is important that any correspondence relating to a property transaction should be clearly marked “subject to contract”, to avoid a legal commitment being entered into prematurely.

In the absence of any guarantees or warranties, insurance covering potential structural defects has to be specifically negotiated with the developer. In the absence of any guarantees, warranties or insurance, the buyer or tenant of commercial property may find himself having to pay for the cost of necessary repairs or remedial work. For this reason, prospective buyers or tenants should engage a Chartered Surveyor to carry out a survey of the property before committing themselves to acquire the property.

Each party will usually have to pay the fees of its own solicitors, except that many leases are granted on the understanding that the tenant will pay the landlord’s solicitors’ fees as well as his or her own solicitors’ fees.

Title Investigation and “Searches”

A solicitor will carry out a “search” by submitting forms to the offices of the Local Council for the district in which the property is located, in order to obtain information from the Council and will raise “enquiries” with the solicitors acting for the proposed seller or landlord. In addition, specific searches and enquiries may be instigated to cover other matters that are considered to be potential problems for the particular property.

The solicitor will also check the seller’s or landlord’s title documents to ensure that he has a good title to the property and to ascertain the existence of any restrictions or adverse rights which might affect the use of the property.

Exchange of Contracts

The purchase of a property (whether buying the freehold or taking over an existing lease) is usually carried out in two stages. The first stage, which establishes the legal commitment on both parties, is called “exchange of contracts” because it involves each party signing and then exchanging identical copies of the purchase contract. It is usual for the buyer, on exchange of contracts, to pay to the seller’s solicitors a deposit equal to 10% of the purchase price. If the buyer fails to complete the transaction, without justification, the seller will keep the deposit.

Where a new lease is being granted, it is common to omit the contract stage of the transaction and proceed directly to the grant of the lease once its text has been agreed. However, in certain cases it is desirable to enter into a contract (an “agreement for lease”) first. This is where completion of the grant of the lease is to be delayed (e.g. while building works are carried out) but both parties wish to be legally bound to enter into the lease at the appropriate time.

Completion

The second stage of the transaction is known as “completion”. At this stage, the balance of any purchase price is paid, the ownership of the property is transferred to the buyer or the new lease granted, and possession of the property is handed over to the buyer.

Mortgages

If the buyer has to borrow funds towards the purchase price, the lender will normally request that repayment of the loan, and payment of interest and other charges, are to be secured on the property. The security document is known as a “mortgage” or “charge”. Sometimes the lender will instruct the buyer’s solicitors to deal with the security documentation on the lender’s behalf, although occasionally lenders insist that their own solicitors perform this function, in which case they will require the buyer to pay the fees of those solicitors.

Leases

Where the property is leasehold (either taking over an existing lease or being granted a new one), the terms of the lease must be carefully considered. Leases of commercial premises are often lengthy documents containing complicated provisions.

6. COMPLIANCE AND TRADING AGREEMENTS

Whichever form the establishment in the UK takes it will be necessary for the UK operation to comply with its obligations under UK and EU legislation and to have certain trading agreements.

Data Protection

If personal data about individuals is held on computer, the details of the type of information held and the purposes for which such information is used must generally be registered. Examples of such information are details of employees kept for payroll and for sickness benefit purposes, lists of the names of the directors of customers for mailing purposes or of data about individuals as part of competitor analysis or market forecasting. Failure to comply with the law can result in prosecution. The ultimate sanction for failure to comply with any notices issued by the Data Protection Registrar is prohibition of the use of the computer system. A criminal offence is also committed.

Marketing Material

In addition to the British Code of Advertising Practice, customer brochures must comply with the Advertising Standards Codes of Practice. In addition it is important that they contain no statements which may lead to claims for damages as a result of misrepresentation, negligent mis-statement or defamation.

Equipment - Acquisition and Maintenance

It is likely that equipment will be required to enable the trading to be carried on including office equipment and vehicles. If so, prior to entry into any sale, leasing, credit, servicing or maintenance contracts these should be reviewed to ensure that any onerous terms such as penalty clauses on early termination, or exclusion clauses which may exclude liability for negligence or equipment failure are identified to enable an informed decision to be made whether to accept such terms or negotiate more preferential ones.

Protecting Trade Marks

If the business has its own distinctive name, logo or design consideration should be given as to whether any names or logos used by or in connection with the business and its goods or services can be protected from use by third parties. Names, brands and logos can be protected by registration at the Trade Marks Registry.

Terms and Conditions of Supply and Terms and Conditions of Purchase

It is important that the terms under which goods and services are supplied and bought are clearly set out and it is recommended that these are drafted and sent to potential suppliers and customers at an early stage. They should, of course, not contain any anti-competitive provisions.

The benefits of having standard terms and conditions of business include:-

- Having a framework setting out how the transaction will be dealt with and brought to a conclusion (thereby avoiding the likelihood of disputes) without the time and cost involved in drawing up conditions for each individual transaction
- Enabling the parties trading with each other to know where they stand in relation to other transactions between them

- Limiting the seller's liability (in the case of sale conditions) or extending the seller's remedies (in the case of purchase conditions) since the absence of agreed terms, the law will provide for terms of trading which may not be appropriate or adequate
- Setting out the conditions to be satisfied before property in goods supplied can pass to the buyer. If there are no standard terms and conditions, the law will provide that where specific identifiable goods are to be sold, property in them will pass to the buyer, whether or not he pays for them. Where goods are part of a larger quantity and are not initially identifiable, rules apply in the absence of standard terms and conditions

Conclusion

We trust that you have found the information contained in this booklet helpful.

Collyer Bristow has the experience to enable advice to be given on all aspects of establishment in the UK.

For help with these or any related matters please contact Silvia Fazio on telephone number +44 (0)20 7470 4430 or e-mail: silvia.fazio@collyerbristow.com or Paul Sillis on +44 (0)20 7468 7278 or email: paul.sillis@collyerbristow.com.

This booklet is based on information currently available as at July 2009 but should not be treated as a substitute for detailed advice in individual situations. It is published without responsibility on our part for loss occasioned to any person or organisation acting or refraining from acting as a result of any information contained herein.

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