

**ESTABLISHING A BUSINESS
IN THE UNITED KINGDOM**

A Collyer Bristow Guide

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.

INDEX	PAGE
1. Establishing a Business	
1.1 Structure	2
1.2 Non UK owned Limited Liability Company	2
1.3 UK establishment	4
1.4 Joint Ventures	4
1.5 Sole Trader	4
2. Employment	
2.1 The Employment Contract	5
2.2 Pensions	5
3. Foreign Personnel	6
4. Immigration	7
5. Property	8
6. Compliance and Trading Agreements	10
Conclusion	12

1. ESTABLISHING A BUSINESS

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
- UK establishment
- 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 most other forms of business organisation is that, normally, a company (along with a limited liability partnership – please see below) 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 most important constitutional document is the Articles of Association.

The Articles contain 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" or "Ltd". 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, though 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. In most circumstances 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

The company must have at least one director, or two if one of those is a corporate director. There is no maximum limit and there is no requirement for the directors to be UK nationals or residents.

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

A public company must have a Company Secretary, who is an officer of the company and is responsible for a number of largely administrative duties. A private company need not have a secretary. There are no UK nationality or residence requirements.

Auditors

Many 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 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.

A public company needs 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. However, unless the shareholders request it, a private company need not hold an Annual General Meeting. 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 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 of Association. Meetings of shareholders and directors may be held anywhere, subject to the specific requirements of the company’s Articles of Association. In most instances it is possible for shareholders of a private company to pass written resolutions without holding a meeting.

1.3 UK establishment

Where an overseas company has some degree of physical presence in the UK (such as a branch or a place of business), through which it carries on a business, the company must register the opening of a UK establishment. In addition to various procedural forms, the company is also required to register its constitutional documents and latest accounts with Companies House.

1.4 Joint Ventures

Joint ventures are not regarded as separate legal entities, though one may be created depending on how it is structured. For example, in the UK a joint undertaking is often organised 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

An employer is required to give an employee written information as to certain key terms and conditions of employment. These include salary, notice period, holiday and sick pay entitlement, working hours, place of work, and the applicable disciplinary and grievance rules. A written statement must be provided within 2 months of the beginning of employment, and a further statement must be provided if any of these terms and conditions change.

In addition, an employer may wish to enter into further terms and conditions with the employee and these will often depend on the employee's level of seniority.

These may include:

- Restrictions on the employee for a limited period after the termination of employment, such as an obligation not to work for a competitor or set up a business in competition, not to deal with the employer's clients/suppliers and not to poach key members of the employer's staff. These restrictions must be limited to what is reasonable and strictly necessary for the protection of the employer's interests, or they will not be enforceable.
- An agreement that the employee opts out of the maximum 48 hour working week
- Commission and bonus payments
- Incentives (including share option schemes)
- Provision for an annual salary review
- Provision of a company car or car allowance
- Payment of expenses
- Private health care, life assurance and PHI cover
- Pensions (see below).

2.2 Pensions

If you employ five or more employees, then you must offer the employees access to a stakeholder pension scheme. This means that there must be the ability for employees to pay their own contributions into a stakeholder pension scheme directly through your payroll system.

From 1 October 2012, the law has changed to give employees additional protection. There is now a new requirement on employers to (1) automatically enrol eligible employees in a workplace pension scheme that meets certain criteria and (2) to pay a mandatory "employer's contribution" into eligible employees' pension schemes. As at 1 October 2012, only the very largest employers will need to comply, but depending on the size of the organization all employers will need to comply by 2017 at the latest. Employers should make sure they are aware of the date on which these new rules become binding on them.

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, and their spouses and certain dependent relatives can accompany them (N.B. Special conditions apply to Bulgarians and Romanians). Such nationals can apply to the Home Office for a residence permit after entering the UK.

Nationals of states outside the European Economic Area or Switzerland coming to the UK to seek or take employment must hold a visa which permits them to carry out the employment in question. There can be severe penalties for employers if they employ someone who does not have permission to work in the UK.

The UK immigration system is complex, there are a number of unrelated visa categories and the types of visa and conditions change on a regular basis. The various visa categories are in the process of being consolidated into a points-based system with a number of Tiers. Tier 1 is for "high value migrants" such as investors, entrepreneurs and leading figures in the arts and sciences and is considered in the next section. Tier 2 is for skilled workers, Tier 3 is for low skilled workers (but is not currently in use), Tier 4 is for students and Tier 5 is for temporary workers in certain specific sectors.

The categories of visa which are most often required for long-term employees fall within Tier 2. These visas can only be issued if the employer is a registered sponsor of migrant workers. Registering as a sponsor can take time and it is advisable for an employer who anticipates wishing to employ foreign workers to complete this process before the need to employ such a worker arises.

A sponsored employer must assign a certificate of sponsorship to an individual in order to bring them to the UK under Tier 2, which they may only do if relevant conditions are met. Tier 2 includes Tier 2 (General) and Tier 2 (Intra company transfer) as well as Tier 2 (Minister of religion) and Tier 2 (Sportsperson)

For both Tier 2 (General) and Tier 2 (Intra Company transfer) it is vital that the level of skill required for the work in question meets certain prescribed standards.

For Tier 2 (General) it will normally be necessary to show, by advertising the vacancy through certain prescribed means, that no suitable resident worker is available in the UK or EEA and the employer has made adequate efforts to find such a worker. The main cases where this is not necessary are where the gross annual salary for the job is at least £150,000 or the job is on the shortage occupation list.

Tier 2 (Intra company transfers) allows a visa to be issued to existing overseas employees to the UK branch of the same organization provided certain conditions are met. If these conditions are met it is not necessary to advertise the role.

Special Arrangements or Concessions

Foreign workers contribute to and are entitled to social security benefits and healthcare on largely the same basis as UK nationals. There are no other special arrangements or concessions. However, Tier 2 visa holders are normally admitted to the UK on condition that they will not have recourse to public funds. Thus claiming some state benefits might prejudice the worker's right to remain in the UK. Someone working in the UK will generally be resident in the UK for tax purposes and their salary will be subject to UK income tax even if they also remain tax resident in their home country (the provisions of any double tax treaty will be relevant in this situation).

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 also 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 (N.B. Special rules apply for Bulgarians and Romanians). 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 need a visa (see previous section for more detail)
- The sole representative of an overseas firm wishing to establish in the UK, can obtain leave to enter the UK for that purpose
- 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 under Tier 1 (Entrepreneur) of the points-based system, 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 and that the business will create full-time paid employment for at least two persons already settled in the UK. For historic reasons Turkish citizens may apply for a similar visa with less stringent requirements.
- Alternatively, a person may apply for leave to enter the UK under Tier 1 (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 and that he or she intends to invest not less than £750,000 of his or her capital in the UK by way of UK Government bonds, share capital or loan capital in active and trading UK registered companies (excluding property investment companies)
- Commonwealth citizens with UK ancestry may be able to apply to live and work in the UK.

5. PROPERTY

Introduction

Property in the UK can be acquired either freehold (outright ownership) or leasehold (a right to occupy for a specified period).

Different systems apply in England and Wales, in Scotland and in Northern Ireland. This note deals with the system in England and Wales.

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. An opinion letter from a local lawyer may be required for these purposes.

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.

An owner or tenant is usually responsible for the condition of the property. Prospective buyers or tenants should engage a Chartered Surveyor to carry out a survey of the property before committing themselves to acquire the property. Guarantees, warranties and / or insurance may be available to offset this responsibility.

Each party will usually have to pay their own solicitors' fees, sometimes leases are granted on the understanding that the tenant will pay the landlord's solicitors' fees as well.

Title Investigation and “Searches”

A solicitor will carry out a “search” by submitting forms to the offices of the local council for the area in which the property is located in order to obtain information about the property from the council. The solicitor will raise “enquiries” with the solicitors acting for the proposed seller or landlord. In addition, specific searches and enquiries may be made in relation 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 if he has a good title to the property and to ascertain the existence of any restrictions or rights of third parties which might affect the property.

Exchange of Contracts

The purchase of a property (whether buying the freehold, accepting the grant of a lease or taking over an existing lease) is frequently 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 for safe keeping a deposit equal to 10% of the purchase price. If the buyer fails to complete the transaction without justification the seller may 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 detail has been agreed. However, in certain cases it is desirable to enter into a contract (an “agreement for lease”) first. This might be because completion of the grant of the lease is to be delayed (e.g. while building works are carried out) but each party wishes to ensure the other is 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. Following completion it may be necessary to pay stamp duty land tax and / or apply for registration of the transaction at the land registry.

Mortgages

If the buyer borrows funds towards the purchase price, the lender will normally require 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 of your business 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 in place certain trading agreements.

Data Protection

If personal data about individuals is handled by your business or held on computer, you will have a number of legal obligations to protect that data and the details of the type of information held and the purposes for which such information is used must generally be notified to the Information Commissioner's Office ("ICO"). 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. Failure to comply with any notices issued by the ICO can result in prohibition of the use of the computer system. There are strict principles governing the processing and use of personal data and substantial fines and a criminal sentence may be imposed for serious breaches of data protection legislation.

If you are operating your business or part of your business online from the UK you should consider protection of the relevant domain names as well as compliance with legislation in respect of cookies and various other commercial and intellectual property issues that will arise

Marketing Material

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

There are various regulations that apply to unsolicited marketing (whether by post, telephone or email) and you should be fully aware of your responsibilities in this regard.

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 Intellectual Property

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 infringing use by third parties. Names, brands and logos can be protected by registration at the UK Trade Marks Registry.

You should consider also other forms of intellectual property rights that the business owns, such as copyrighted works, patents, designs and even confidential information. These rights are valuable to your business and should be protected and enforced in the UK and likely in the EU.

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 so as to ensure it is your terms that transactions are concluded under. 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
- Setting out the arrangement between the parties and the process of transacting, to include details in respect of pricing, payment, delivery and returns and rights of cancellation
- 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 in 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
- Compliance with regulations that protect consumer rights
- Compliance with regulations that govern your relationships with consumers when trading or interacting online

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 Stephen Rosen on telephone number +44 (0)20 7468 7208 or e-mail: stephen.rosen@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 October 2012 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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