Establishing and Managing a Business in the UK

2021 Edition

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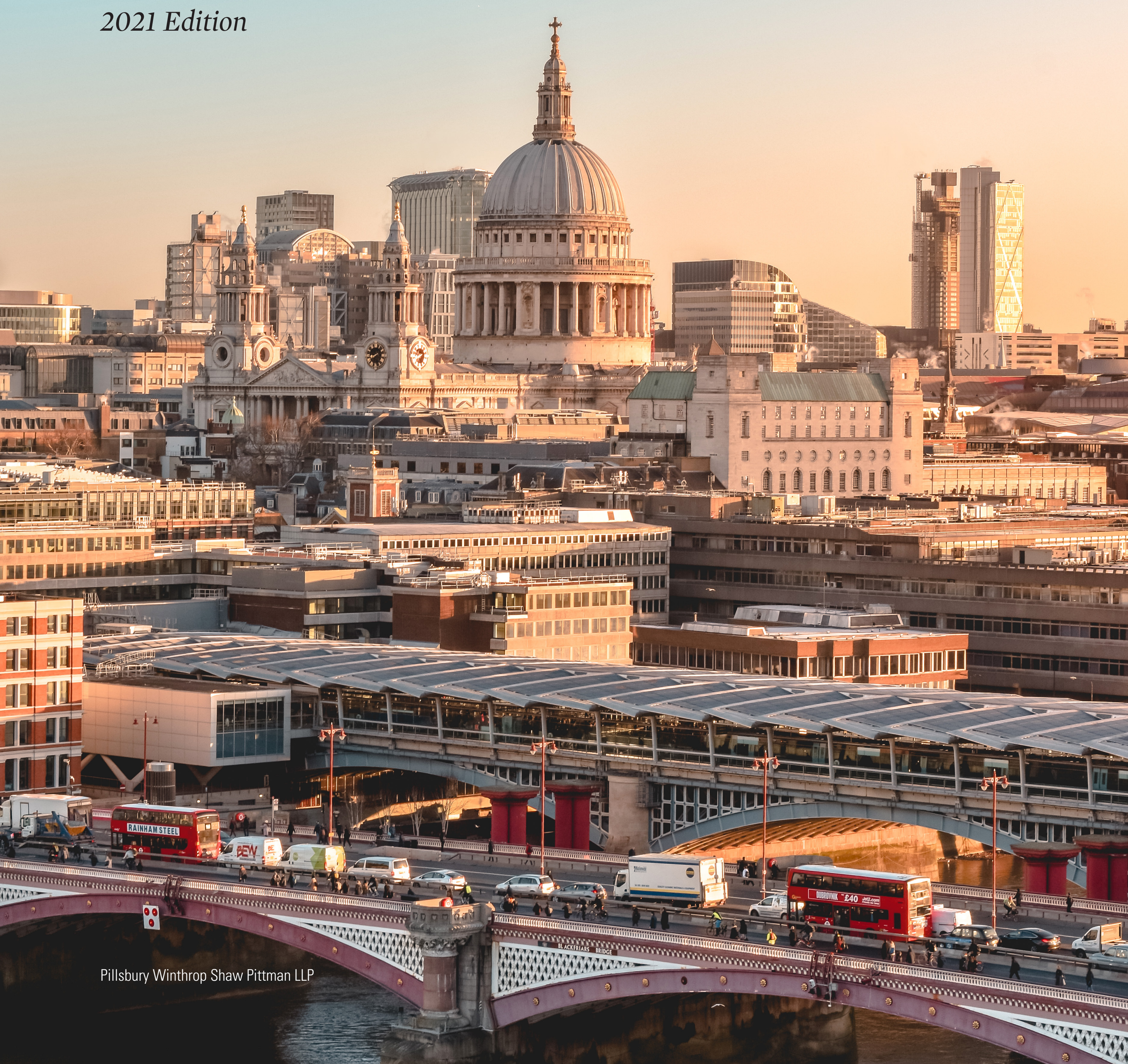

Pillsbury Winthrop Shaw Pittman LLP

This guide is issued to clients of Pillsbury Winthrop Shaw Pittman LLP and other interested parties to inform them of legal developments that may affect or be of interest to them.

This guide is not intended to be an exhaustive checklist of all issues which will need to be considered but aims to provide a framework of some of the key issues and information required for non-UK persons setting up business in the UK.

The sections included in this guide are of necessity brief summaries only.

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Establishing and Managing a Business in the UK

Foreword

This guide has been compiled to give an overview of the rudimentary legal aspects that should be considered by anyone thinking of establishing a business in the UK. It is aimed at businesses that may already be established in the US or other countries and includes references to the regulatory and government bodies that shape and govern the business sector in the UK.

Each section has been prepared by the respective specialising attorney from our Pillsbury London office. Pillsbury and its lawyers are highly regarded for their forward-thinking approach, their enthusiasm for collaborating across disciplines and their unsurpassed commercial awareness.

At the time of publication (March 2021), the UK has left the European Union and has agreed future relationship agreements with the European Union that have applied on a provisional basis since the end of the transition period (being 31 December 2020). Our attorneys will endeavour to update this publication as more information becomes available. We recommend that our readers visit the Pillsbury website to download the most current version of this guide.

We hope this guide will encourage you to consider the opportunities that the UK offers businesses and to reach out to your appropriate Pillsbury partner for an introduction to our services.

If we can be of assistance, please contact us directly:

James Campbell, Partner
Corporate & Securities
james.campbell@pillsburylaw.com
+44.20.7847.9504

Steven Farmer, Partner
Intellectual Property & Data Protection
steven.farmer@pillsburylaw.com
+44.20.7847.9526

Victoria Judd, Counsel
Finance
victoria.judd@pillsburylaw.com
+44.20.7847.9713

Robert Davies, Consultant
Employment
robert.davies@pillsburylaw.com
+44.20.7847.9500

Sukhi Walia, Consultant
Property
sukhi.walia@pillsburylaw.com
+44.20.7847.9563

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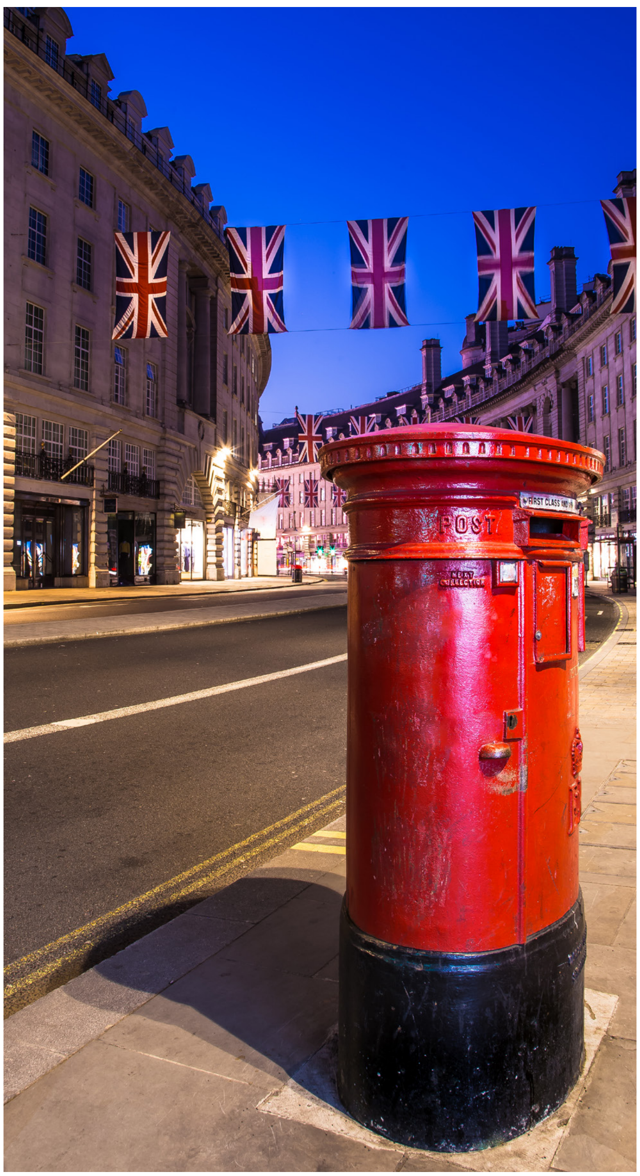
1. Introduction to Establishing and Managing a Business in the UK

Overseas investors are welcome in the UK. There are no specific laws governing foreign investment in the UK nor are there any business requirements for UK participation in the ownership or management of any business established by foreign investors. Whilst there are also currently very limited restrictions on foreign investment in the UK, in November 2020, the Government introduced proposals for extensive new rules and review powers governing foreign direct investment across certain specified sensitive sectors. The Government is currently consulting on the scope of these restrictions and legislation will likely come into force in 2021 (although they will apply retrospectively to investments from 12 November 2020). Bank accounts may be held in Pounds Sterling (£) or any foreign currency.



A person resident outside the UK wishing to establish a business operation in the UK must first decide the structure that such operation should take. The next section will consider some of the legal factors involved when establishing the two most commonly selected forms of UK businesses.

These are:

A UK Registered Company
This has a separate legal identity from its shareholder(s). It can be wholly-owned or partly owned.

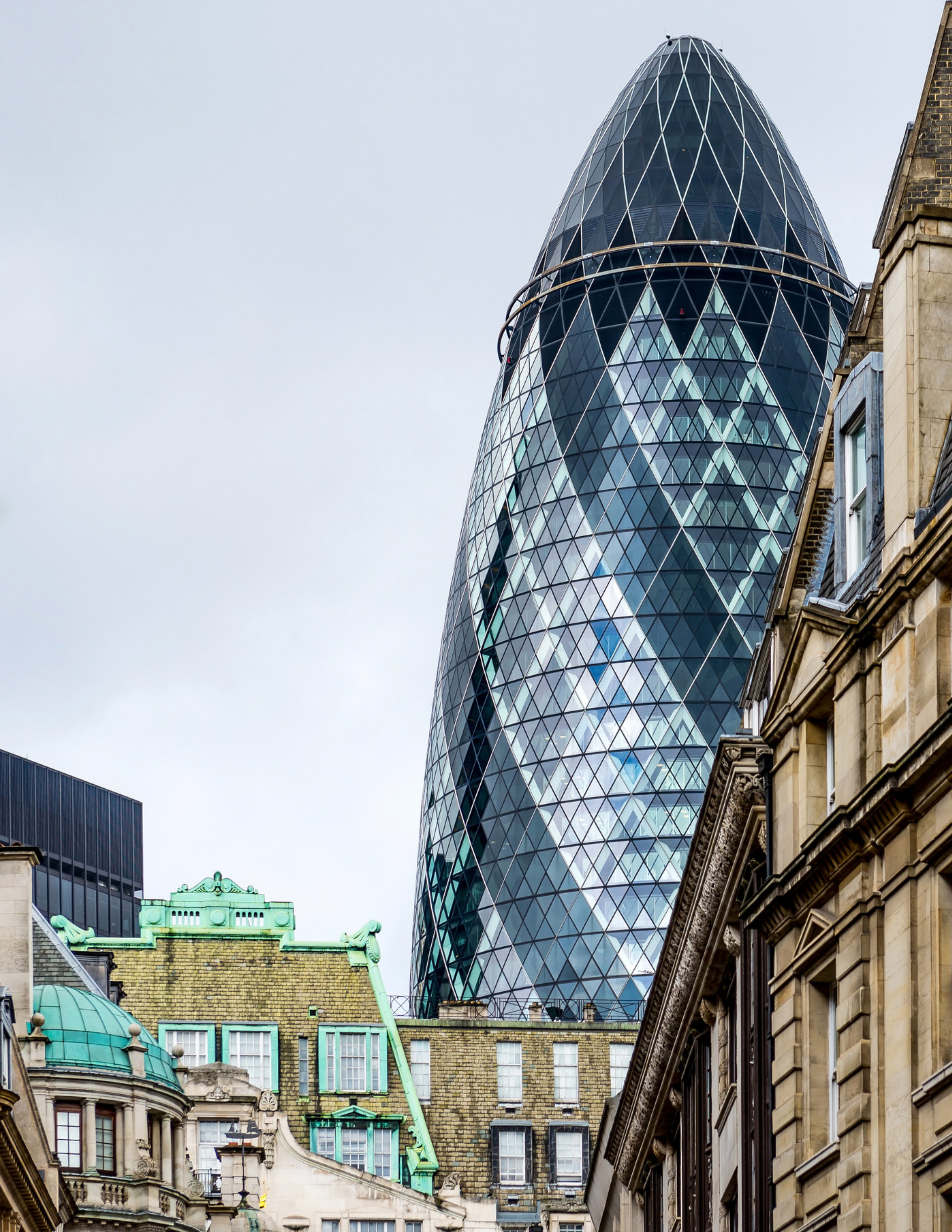
A UK Establishment
This is considered an extension of a non-UK company, and does not have a separate legal personality. The ability to register a UK establishment does not extend to overseas partnerships or other unincorporated bodies.

It is also possible to establish limited liability partnerships in the UK, although the details relating to such entities are generally very bespoke and, as such, we have not covered them here.

Alternatively, it may be appropriate to do business "with" the UK rather than to establish a business "in" the UK. This may involve one or more of the following agreements:

- franchise agreement to appoint a franchisee in the UK
- agency or distribution agreement
- contract of employment to appoint a sales employee in the UK
- licence of intellectual property rights to a UK licensee.

Legally, the term UK includes the countries England, Scotland, Wales and Northern Ireland. This guide deals solely with the formalities that must be complied with when establishing a business in England and Wales. The required formalities for setting up a business in Scotland and Northern Ireland vary in certain respects and there are material differences in the applicable rules.



2. Factors in making the choice between a UK Company and a UK Establishment

Corporation Tax - UK Companies
Charged on the worldwide profits of a UK company at a rate of 19% (reduced to 17% from 1 April 2020).
The calculation of taxable profits is based upon a company's trading profits and as adjusted for tax purposes.
Trading losses made by a UK company can be set-off against a company's total profits.

Financing - UK Companies
Interest paid on loan financing may be deductible from a UK company's taxable profits calculation to the extent that it does not exceed the higher of £2 million and 30% of EBITDA.

Start-up Costs - UK Companies
Start-up losses can generally be carried forward and deducted from future profits.

Repatriation of Profit - UK Companies
Repatriates profits by declaring a dividend. Dividends paid will not reduce the company's taxable profits.
No withholding tax on dividends.
Interest or royalty payments are other ways a UK company's profits may be made available to a parent.

Filing Obligations - UK Companies
Details of the company's directors, secretary (if any), registered office, any person(s) with significant control over the company and a copy of the current articles of association (the document governing how the company is run) must be filed and regularly updated with the Registrar of Companies.
Minutes of meetings of shareholders and directors, and registers of mortgages and charges held by or over the company must be retained (althought not publicly).
Accounting records must be kept and annual accounts prepared and a copy submitted to the Registrar of Companies, meaning they are available for public inspection.
Must appoint UK qualified accountants to audit the company's accounts (if necessary).
An annual confirmation statement must be filed confirming that publicly held information is up to date and correct.

Liability of Shareholders and Directors - UK Companies
Companies are recognised as having a legal personality separate from the person(s) who form the company, its directors and its shareholders. Shareholder liability is restricted to paying in full the agreed price for their shares in that company although there are some exceptions. Directors owe certain statutory duties to the Company.

Persons of Significant Control Register – UK Companies
Required to keep its PSC register up to date.
Legal entities may be noted on another company's PSC register if they are both relevant and registrable in relation to the company in operation. This will generally be where they are a UK company or their shares are trading on regulated markets e.g. the LSE, AIM, the NYSE and NASDAQ), etc.

Corporation Tax - UK Establishments
Taxed in the UK only on profits which are attributable to the UK establishment.
Rules on calculation of profits, use of losses, filing of returns and transfer pricing apply in the same way as UK Companies.
A diverted profits tax charge of 25% can apply where HMRC considers that profits have been artificially diverted from the UK.

Financing - UK Establishments
Interest paid on a loan from the head office is not tax deductible unless the funds derive from a third party lender advanced for the purposes of the UK business.

Start-up Costs - UK Establishments
Not applicable

Repatriation of Profit - UK Establishments
No profits tax for establishments of overseas companies, other than the corporation tax.

Filing Obligations - UK Establishment
The setting-up registration require details of the non-UK company's directors / officers and the extent of their authority.
Not required to file a confirmation statement each year, but must notify the Registrar of Companies of any changes to its details.
All details (other than directors' residential addresses) are available for public inspection.
The accounting and reporting requirements for a UK establishment depend upon the company's filing requirements in its country or state of origin.
Not required to maintain a publicly available register of people who have "significant control" over them.

Liability of Shareholders and Directors - UK Establishments
The liability of directors and shareholders will be determined by the constitution and jurisdiction of the non UK company personality.

Persons of Significant Control Register – UK Establishment
Non-UK companies operating in the UK might be subject to similar requirements in their home country but are not subject to the requirements to hold and maintain a PSC Register. The UK Government is proposing to enact legislation to create a register of beneficial ownership information (similar to the PSC register for UK Companies) for overseas entities that own or buy property in the UK. It is anticipated that such legislation will be implemented in 2021.

Requirement to follow UK law
Although the UK Establishment will not be subject to UK company law, it will still need to ensure it complies with various other laws, including (for example) in relation to anti bribery and anti money laundering, data protection, modern slavery and health and safety laws.

Tax

UK tax is levied on income and capital gains—income tax and capital gains tax being payable by individuals and corporation tax by companies. The potential exposure of both UK registered companies and UK establishments to taxation upon profits is summarised below.

Taxes equally applicable to UK Companies and UK Establishments:

Capital Gains – Tax must be paid at a company's or establishment's corporation tax rate on any capital gains made on the disposal of chargeable assets.

VAT – The standard rate of VAT in the UK is currently 20% and is chargeable on supplies of most goods and services. UK businesses register and charge VAT when the value of their chargeable supplies reaches a threshold, currently £85,000. It is possible to voluntarily register before the threshold is reached in order to be able to reclaim VAT paid on purchases.

VAT is largely neutral for most businesses. VAT charged to customers and collected by the business is paid to HMRC. Businesses that have registered for VAT can reclaim or set off any VAT that they themselves are charged on purchases of goods and services. Where VAT incurred on purchases exceeds VAT charged on supplies, the business will receive a repayment from HMRC.

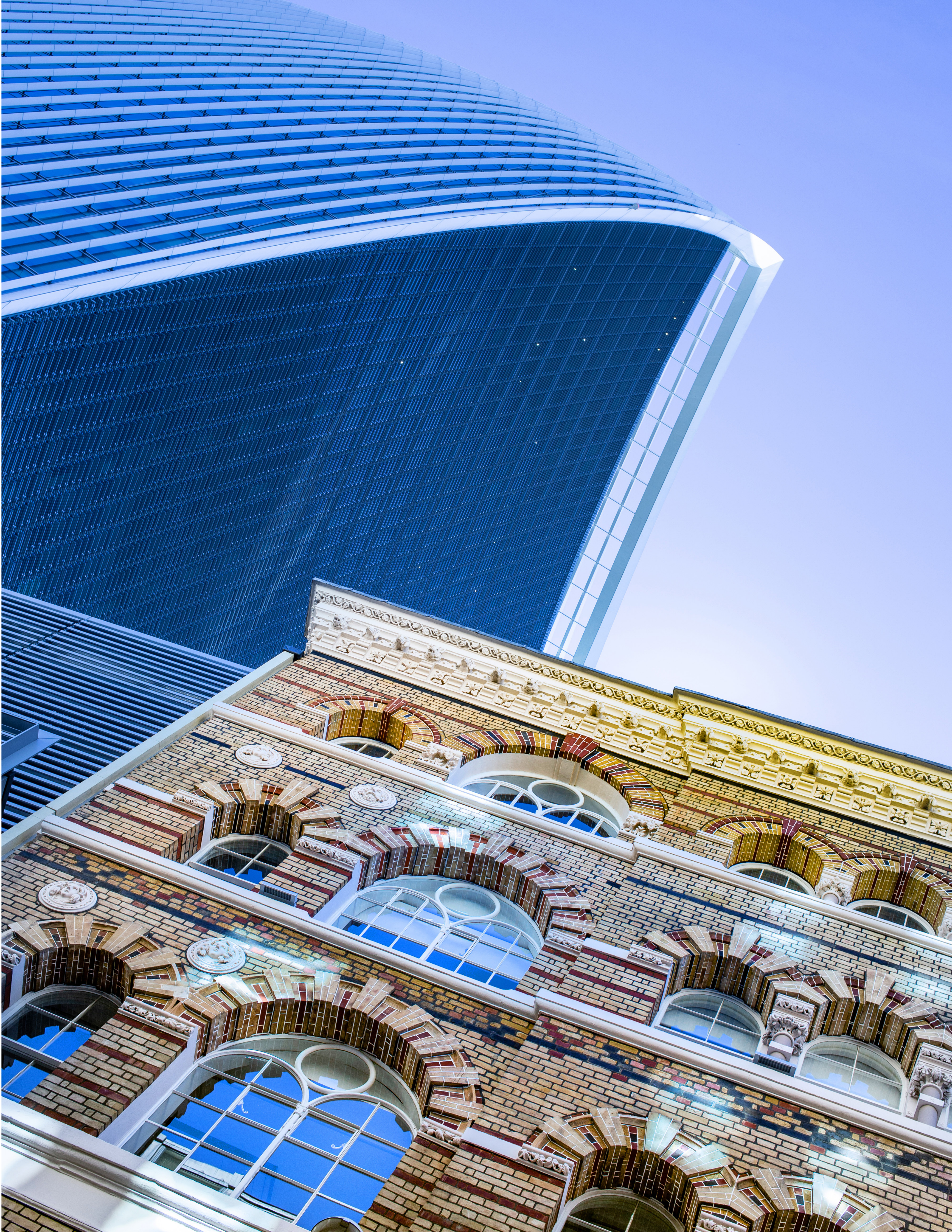
Import Duties – Import duties will be applied to any goods imported into the UK from countries outside the EU or other free trade groupings. The rate at which duty is charged varies according to how HMRC classifies the goods concerned.

Excise Duties – Excise duties will be imposed on the supply of certain products (e.g. tobacco, liquor and petroleum products).

Stamp Duty Land Tax – This is a tax on transactions relating to the transfer of real estate or interests in real estate, details of which are set out in Chapter 6 (Acquiring or Leasing Business and Residential Premises).

BREXIT

After the Brexit vote, the UK government launched a review of corporate governance with the purpose of improving confidence and trust in UK businesses both domestically and from foreign participants. A final version of the revised UK Corporate Governance Code was published July 2018 by the Financial Reporting Council (FRC). www.frc.org.uk. Foreign companies looking to do business in the UK are recommended to watch this space for developments that may impact their internal corporate governance policies and procedures.



3. Formalities required to set up a Company and register a UK Establishment

There are two main types of UK limited company: private limited companies (LTD) and public limited companies (PLC).

Public limited companies may, but need not, effect a listing of their shares for trading on an exchange such as the London Stock Exchange or AIM. There are strict regulatory standards applying to public companies relating to matters such as disclosure of information and prohibiting certain transactions. Private limited companies are not allowed to make such listing. This guide concentrates on issues relating to UK private limited companies.

Share Capital – At least one share must be issued in a private limited company on its incorporation to one "subscriber". This can be increased after incorporation as the company requires. Shares may be denominated in any currency and different classes of shares in a company may be denominated in different currencies.

Certificate of Incorporation – A company is not deemed to exist until the Registrar of Companies has issued it with a certificate of incorporation. The Registrar will issue this when it has received the company's articles of association, together with certain forms and a fee.

Memorandum of Association – The memorandum is provided by the Registrar of Companies on incorporation and sets out the names of the subscribing shareholders and their shareholdings in the company; simply put, it is a snapshot of information about the company on incorporation. The memorandum cannot be amended and is not generally required after incorporation. A copy of the memorandum must be kept with the statutory registers of the company.

Articles of Association – This is the constitution of the company. It forms a contract between the company and all of the shareholders (also known as members) and details certain rights and entitlements which the company binds itself to grant its shareholders. These entitlements might include the right to vote, the right to attend general meetings and the right to a dividend if one is declared.

Statutory Forms – In order to incorporate a new company, certain documents must be completed and lodged with the Registrar of Companies. Incorporation occurs when the Registrar of Companies issues the certificate of incorporation which usually takes about one week, although it is normally possible to effect an incorporation on a same-day basis by way of paper filing for a fee of £100 (this service has been suspended during the COVID-19 pandemic). Electronic incorporation costs £12 and incorporation by hard copy forms costs £40. Alternatively, various company incorporation agents will have "off the shelf" companies which are already incorporated. The shareholders, directors, registered address and other corporate details will be amended when the off the shelf company is transferred to the new shareholder. There are also small charges for other filings the company may have to make during the course of its existence.

Shareholder – Any individual, firm or corporation may be appointed as a shareholder (or "member") whether they are resident in the UK or otherwise. Every UK company must have at least one shareholder. A register of the names, addresses and the number of shares held by each of the company's shareholders must be maintained by the company (but not publicly, although it must be available for inspection on request). UK company law reserves certain company decisions to shareholders, e.g. amending the articles of association of the company and, in certain circumstances, removing a director. Shareholders exercise their powers by passing resolutions in general meetings or, in some circumstances, passing a written resolution signed by all shareholders.

Director – The company must have one or more directors and at least one director must be an individual. The company's articles of association will set out details of the maximum and minimum number of directors and will also vest in the directors the power to run the company. The directors will generally make the day-to-day decisions of the company.

Company Secretary – Either an individual or a company may act as the company secretary, although it is not mandatory for a private company to appoint a company secretary. The secretary may also be a director of the company. If a secretary is appointed, they are responsible for the administrative requirements to which the company is subject and therefore ideally should be present in the UK.

Persons with Significant Control Register ("PSC Register") – Since 6 April 2016 UK companies have been required to keep a register of individuals or legal entities that have control over them. The PSC Register is part of a wider movement to increase transparency around ultimate ownership and control of companies incorporated in the UK. The UK provisions are similar to those introduced by the EU and its respective member states.

Choice of Company Name

The Registrar of Companies will not incorporate a new company which proposes to use the same or a materially similar name to one which is already in use by an existing company. It is necessary to search the index of names at Companies House to establish whether a desired name is available for use.

Before selecting a name it is also sensible to conduct a trade mark search and domain name search against the desired name. The Registrar will not accept applications for incorporation if a company name is offensive or suggests a criminal activity or attempts to use certain restricted words. The grant of a certificate of incorporation registering a particular name does not guarantee that there will be no issues in future, e.g. if a company's name is deemed to provide a misleading indication of its business activities, then the Registrar can order the company to change its name.

Although a company must always have a registered name, it may decide to trade under a different business name. The directors of a company have the power to decide on the use of a business name. The business name need not contain the word "limited". If a different business name is used then the company's incorporated name must also appear on all of its stationery.

After incorporation, a company can change its name (subject to the above) at any time as long as 75% of the shareholders approve the name change by a special resolution. A fee between £8 and £30 is payable to the Registrar, depending on speed of service and whether the application is made by paper or electronically. Please note that there are continuing obligations (see below) with regard to how and when the company's name must be displayed.

Immediate actions of the company upon incorporation

Any or all of the following may be necessary:

- The company must write up and amend as appropriate its statutory books.
- Where appropriate, the company should be registered for VAT with HMRC.
- The directors must ensure that all company stationery, publicity and the company's website bears the following information:
  - the company name and business trading name, if different to the company name
  - its place of registration (England and Wales, Scotland or Northern Ireland)
  - its registered number (which is granted on incorporation)
  - the address of the registered office
  - the names of either all the directors or none of them
  - the fact that the company is a limited company (this is normally shown by spelling out the company's full name including 'Limited' or 'Ltd').

If the company is to have employees working for it, the local tax inspector should be contacted to arrange for the necessary income tax and national insurance provisions to be set up for those employees.

All UK employees must be provided with a written statement of their terms and conditions of employment within two months of the commencement of their employment.

The company may wish to open a bank account and arrange for appropriate bank mandates to be established.

The company may have to change its financial year and date (known as the "accounting reference date") to fit with the wider corporate group. Newly formed companies are automatically given an accounting reference date of the last day of the month of incorporation.

Standard terms and conditions of trade or other contracts to be used by the company which are enforceable under UK law will be required.

Continuing obligations for UK companies – In addition to the continuing filing requirements, UK companies must comply with rules relating to information which must be included on an ongoing basis, as set out in the section on immediate actions of the company upon incorporation.

Formalities required to establish a UK Establishment

In order to register a UK establishment, a detailed form must be completed and filed with the Registrar of Companies, along with a filing fee. In the form the applicant overseas company must set out the following details:

In relation to the overseas company:

- Its corporate name and any alternative name under which it proposes to carry on business (please note that the same restrictions in relation to sensitive names apply to overseas companies registering in the UK – see 3.1 above).
- Whether particulars have been delivered previously in respect of another UK establishment, together with the registration number.
- Its governing law and accounting requirements.
- Whether it is a credit or financial institution.
- Its legal form.

- The country of incorporation, the name of the register on which it is registered within the country of incorporation and its registration number.
- A certified copy of the company's constitution or, if it is written in any language other than English, a certified translation thereof.
- If it is required to prepare, disclose and deliver accounts under parent law, a copy of the company's latest set of accounts.
- A list of officers and the secretary and certain information about each of them (including name, address, date of birth and the extent of their powers to represent the overseas company together with a statement as to whether they may act alone or must act jointly).The company may wish to take out insurance in its name.

4. Finance

Once a company has been established and is operational there will generally be a need for some form of outside finance for working capital or to acquire assets. In the initial stages of a company's life, funds for activities such as these will often be contributed by the shareholders in the form of equity; as the business develops bank finance often becomes necessary.

Types of Finance

Typical forms of finance provided by banks include overdrafts and loans. Clearly, any bank that is approached for any form of finance will undertake credit checks and "know your customer" checks. Depending upon the amount of finance required and the financial standing of the company, a bank may require personal guarantees from the company's shareholders or parent company, and security.

Overdrafts: These provide a short term form of revolving finance for companies for general working capital purposes and are made available via the company's current account. An arrangement fee will usually be charged by the bank offering the overdraft and interest on the overdraft will generally be linked to the bank's base rate (a margin in addition to the base rate will be charged by the bank). In view of this being short term finance, the company will be able to borrow up to the agreed overdraft limit and any receipts of the company in its current account will reduce the overdraft outstanding automatically. At the end of the agreed overdraft period, unless the overdraft is extended, the company will be required to repay any outstanding borrowing. Typically, overdrafts are repayable on demand.

Loans – Term & Revolving Credit facilities: Longer term finance is required by companies not only to fund working capital but also in order that the company can fund expansion and the acquisition of assets such as premises, plant and machinery and other fixed assets. Banks are willing, subject to the usual credit checks etc. as outlined above, to provide loans by which an agreed amount will be lent to the companies with longer repayment period than would be available under an overdraft. Loans can be made available either on a term or revolving credit basis.

Term loans, where the loan is made for a given period, may have an amortised repayment profile whereby a certain amount of the loan principal is repaid at regular intervals (monthly, quarterly etc.), or where the whole principal amount advanced is repayable at the end of the term of the loan in one amount (a bullet repayment). In all cases, interest at a fixed rate, which will comprise of either a floating or fixed base rate and a margin (as agreed with the bank) will be paid at regular intervals (monthly, quarterly etc.) throughout the term of the loan. The bank will charge an arrangement fee for setting up the loan for the company and may charge a commitment fee until the loan is drawn down by the company.

Revolving credit facilities provide the company with a committed finance line for a given period as the need arises for items such as working capital. The company is able to access funds (within the agreed amount of the loan) as and when required (subject to minimum drawdowns and drawdown periods), but, unlike a term loan, the company is able to repay the loan whenever it wants and redraw the loan again later on (hence the revolving nature of the loan). Interest will accrue on the loan in the same way as a term loan but will only be charged when the revolving loan facility is being utilised; a commitment fee will be charged by the bank to the extent that the loan is available to be drawn but is not utilised. The bank will also charge an arrangement fee for setting up the loan for the company.

More complex financing solutions: Banks are able to provide more complex financing solutions to companies depending on the needs of the company. For example, the company may need to import goods from overseas and thereby set up documentary letters of credit with the foreign exporter. In order to do this, the company's bank (the issuing bank) will require proof that the company has adequate funding in place to make payment to the exporter; this may be undertaken by a loan being provided by the bank which will enable the importing company to settle any liabilities which arise under the documentary letter of credit (the issuing bank will require a counter indemnity from the company in order to issue the documentary letter of credit) which can be repaid by the company upon the subsequent sale of the goods by the company.

In larger loan transactions, banks will often use market standard documentation drafted by the Loan Market Association (LMA).

Common Documentary Requirements

- **Constitutional Documents** – The lender will require these to check that the company is properly established and to ensure that the internal regulations of the company are complied with when the loan is made.
- **Board Minutes** – It is important from a lender's perspective to ensure that the company has properly approved the loan in accordance with the company's constitutional documents so as to ensure that the company is empowered to enter into the loan agreement (and other related documents such as guarantees and security) and therefore be fully liable for the obligations created thereunder.

- **Parent Company Board Minutes** – These will sometimes be required (especially in the case of a loan being made to a special purpose vehicle that has been established solely for the purposes of the transaction) in order to ensure that the company's parent is fully aware of the terms of the transaction and supportive of the transaction as shareholder of the borrowing company.
- **Officers' Certificates** – these will provide the lender with specimen signatures of the officers of the company that are signing the loan documentation, and will certify any board minutes, constitutional documents and other documents that are delivered to the lender as being complete and up to date.
- **Legal Opinions** – these will be required by lenders in larger value loans in order for the lender's legal counsel to confirm that the company (and any other obligor companies) is properly empowered to enter into the loan documentation, and that the loan documentation (such as the loan agreement, and any guarantees and security) is legally binding and enforceable. Other matters such as registrations, filings and tax may also be covered by legal opinions giving the lender confirmation of the legal position with regard to the status of the loan.
- **Financial Statements** – these will be required by the lenders prior to the start of the loan facility (where historic audited profit and loss accounts, balance sheets etc. will be required) and throughout the term of the loan (these may include audited accounts and monthly, quarterly and semi-annual financial statements and management accounts). Forming the basis of the credit analysis undertaken by the bank in order to make the loan available to the company may prove a vital tool in the monitoring of the company's financial performance both on a historic basis and looking forward. During the term of the loan, they may be required to be accompanied by a compliance certificate by which the directors of the company will certify compliance with any financial covenants set by the lenders.
- **Know Your Customer (KYC)** – in order to combat fraud and money laundering issues, all lenders are required to seek information on the owners of the company with whom they are seeking to do business.

Security & Guarantees

Guarantees: Guarantees are required by lenders to support overdrafts and loans which they provide particularly where the company has a limited history, assets or track record, or where the company is part of a larger corporate group. In the case of a start-up business, where the sole owner shareholder / director is often the main person running the business, the financial standing of the company is significantly dependent upon that individual. It is common in such circumstances for the lender to require a guarantee to be provided by the owner of the company (which itself may be supported by other security also provided by the owner).

A guarantee is a third party obligation which provides the lender with recourse against the guarantor when the overdraft or loan goes into default and the company fails to pay or perform other obligations. Where multiple facilities (such as overdrafts and loans) are granted to the company the lender may require the owner to provide an all monies guarantee to guarantee all of the liabilities of the company.

In cases where the company forms subsidiaries or is part of a corporate group of companies, guarantees are also helpful in that they allow one company to provide financial support to other members of the group. Where one member of the group seeks finance the lender will therefore often seek a guarantee from other members of the group. In all cases where guarantees are provided by parent companies, sister companies or subsidiary companies, it is important that each guarantor company receives a corporate benefit for doing so. This may take the form of a monetary payment, or more usually is evidenced by the board of the guarantee company acknowledging the benefit to the company and the group as a whole in the board minutes under which the guarantee is approved.

Where a guarantee is provided by a company, the lender will undertake a thorough credit analysis of the guarantor company in the same way as if it were a borrower; similarly the lender will require many of the deliverables it would require if the guarantor company was the borrower (i.e. board minutes, financial statements etc.) and may require additional security to be provided by the guarantor to support the guarantee obligations.

Security: Lenders will often require security to be provided not only by the borrower company, but often in the case of small companies, by the shareholders/owners. The type of security taken will depend upon what assets the company or guarantor is able to provide, and the lender will need to assess the value of such security. Common types of security include the following:

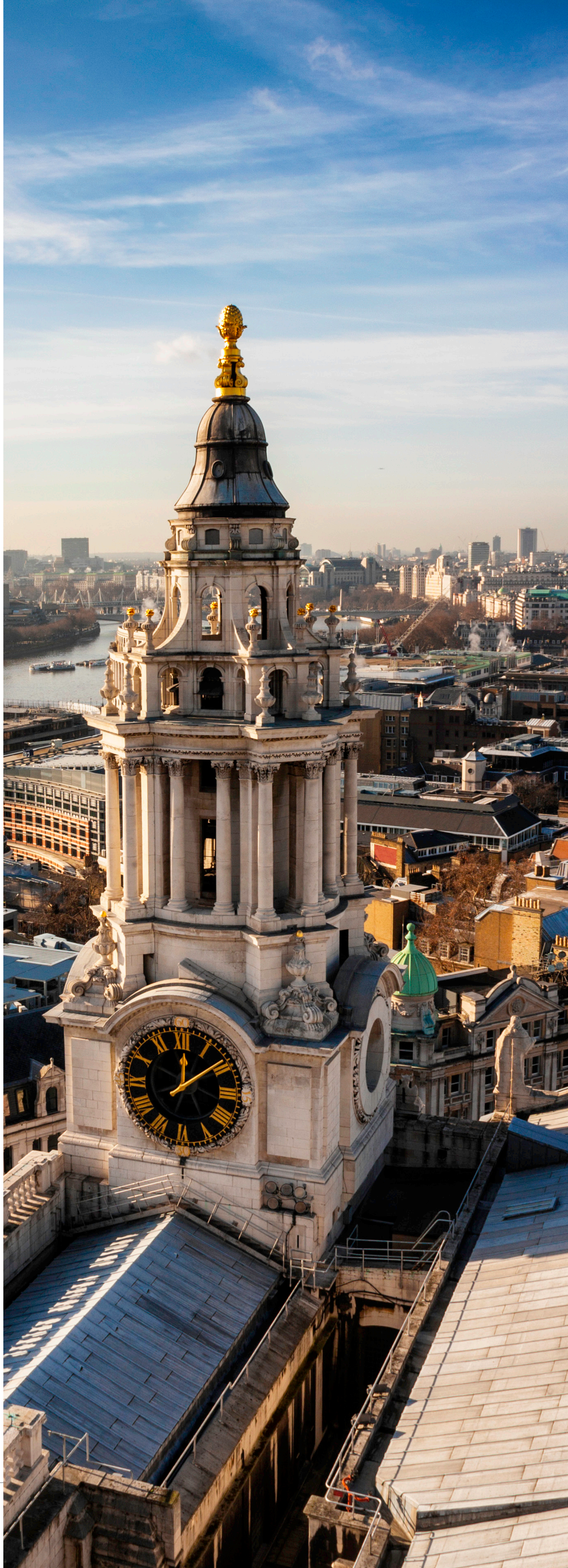
- **Mortgages of land** – a form of security which will allow the lender to foreclose over the land. This form of security must be registered at the Land Registry and elsewhere.
- **Assignment of Rights** – e.g. financial benefits under contracts including monies owing to the security provider, i.e. receivables or bank accounts. In order to perfect the assignment, it will be necessary for notice to be given to the counterparty of debtor under the contract.
- **Charges** – charges can be taken in respect of a wide variety of assets including, land, bank accounts, company shares etc.

- **Debentures** – Fixed and Floating Charges – A debenture allows the lender to take a fixed and floating charge over the assets of a company. The debenture itself may include mortgages, assignments and fixed charges as noted above. In addition to this, companies are able to create a floating charge over any remaining assets which they may have. A floating charge creates a security interest in those assets which, until a crystalisation event occurs, will allow the company to deal and dispose of those assets. Once a crystalisation event does occur (such as the insolvency of the company, or receipt of notice from the lender that it wants to take action to protect the assets), the floating charge is converted into a fixed charge thereby freezing the assets and preventing the company from dealing or disposing of the assets thereafter.

Registration: Under the Companies Act 2006, security created by a UK-registered company is generally registrable at Companies House within 21 days of creation. Failure to deliver particulars to the Registrar will mean that the security will be void against a liquidator, administrator or creditor of the company and the money secured by the charge will become immediately payable.

LIBOR

In many credit facility agreements, interest is calculated by reference to LIBOR (the London Interbank Offered Rate). In July 2017, the Financial Conduct Authority (FCA) announced that LIBOR would no longer be supported after 2021. Since the FCA announcement, market participants and working groups have been actively developing alternative risk free rates (RFRs) which the loan market can transition to. Whereas new RFRs have been selected (for example, in the case of the UK, the Sterling Overnight Index Average – SONIA; in the case of the US, Secured Overnight Funding Rate – SOFR etc.), significant issues currently remain in their operation – for example, currently the RFRs are determined on a backward looking overnight rate rather than a forward looking rate for a given period (of say, one, three or six months duration). Work is continuing to iron out these issues, in preparation for the phase-out of LIBOR at the end of this year.



5. Employment in the UK

Where a business employs staff who work in or are based out of the UK, the employer will have obligations under the law applicable in the relevant part of the UK. It will need to consider employment law, immigration issues and tax issues.

These issues arise irrespective of whether the employer is a UK entity or not – the key issue is where the employee actually works. Specific advice should be sought as to the applicability of the UK employment and tax laws where the employee is peripatetic, an expatriate or otherwise works out of a number of jurisdictions.

All employees have an employment contract with their employer, even if this is not set out in writing.

Employees and workers in the UK have a number of protections set out in the applicable legislation, covering, amongst other things, working time and paid leave, minimum wage, pension contributions, discrimination, "whistleblowing" and protection against unfair dismissal. Key points are:

- Vacation entitlement is 28 days per annum (pro-rated for part-time workers).
- Under the auto-enrolment regime, employers may need to make provision for, and contribute to, a pension benefit for their employees. Employers should seek specific advice as to their obligations in this respect.
- There is no employment-at-will in the UK. All employees are entitled to be given, and are required to give, notice of termination of employment of at least the statutory minimum (basically, one week per year of service from an employer and a minimum of one week from an employee).

Employer's Liability Insurance – Employers must take out insurance against disease or injury sustained by an employee during the course of his or her employment and against damage caused by its employees to third parties.

Immigration issues – If an employer wishes to employ a worker in the UK who comes from outside the UK including as from 1 January 2021 those from the EEA or Switzerland, permission for that individual to work in the UK is likely to be required and specific advice should be sought.

UK legislation requires all employers to check whether all employees who start work with them in the UK are entitled to work in the UK. Employers need to check the appropriate original documents of each employee and keep a record to show that they have carried out the appropriate 'right to work' checks. Where an employer employs an illegal migrant worker, it could face a civil penalty of up to £20,000, unless it can establish that it carried out the appropriate 'right to work' checks. Employing an illegal migrant knowingly or where an employer reasonably believes that the migrant does not have the right to work, are criminal offences which could render an employer liable for an unlimited fine and/or a prison sentence of up to five years.

Employment tax: Taxation and Social Security Contributions (National Insurance) – Employers are likely to need to withhold income tax from their employees' pay in accordance with the PAYE system. Employers must also pay National Insurance contributions in respect of every employee, dependent on the employee's earnings and National Insurance category.

BREXIT

Employment law and HR implications

Employers face an extended period of uncertainty as the precise impact of Brexit on free movement of workers and existing UK employment legislation and case law has yet to be determined. Many of the established employment laws in the UK originated in the EU. While it is very unlikely for there to be a large-scale repeal of these laws not least because of the commitment to "retained EU law" in the short term, there will inevitably be calls for some of the stringent requirements on businesses in these areas to be modified as part of a general move towards a more UK-centric form of regulation of the UK labour market post-Brexit.

Employment law is constantly evolving and the rules applying to permanent and temporary workers, part-timers and the self-employed can be a legal minefield. The consequences of Brexit will need careful consideration by employers when assessing and implementing both strategic and day-to-day HR decision-making.

6. Property - Acquiring or Leasing Business and Residential Premises

Where a business employs staff who work in or are based out of the UK, the employer will have obligations under the law applicable in the relevant part of the UK. It will need to consider employment law, immigration issues and tax issues.

These issues arise irrespective of whether the employer is a UK entity or not – the key issue is where the employee actually works. Specific advice should be sought as to the applicability of the UK employment and tax laws where the employee is peripatetic, an expatriate or otherwise works out of a number of jurisdictions.

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- Vacation entitlement is 28 days per annum (pro-rated for part-time workers).
- Under the auto-enrolment regime, employers may need to make provision for, and contribute to, a pension benefit for their employees. Employers should seek specific advice as to their obligations in this respect.
- There is no employment-at-will in the UK. All employees are entitled to be given, and are required to give, notice of termination of employment of at least the statutory minimum (basically, one week per year of service).

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Finding suitable Business Premises

This is normally undertaken by commercial property agents, usually chartered surveyors whose knowledge of the market for the area you wish to locate to will be important. In England and Wales, chartered surveyors deal with the buying, selling and leasing of property together with connected professional matters such as building surveying, planning issues and business rating. In advising on buying, selling or leasing property they will:

- give advice on levels of purchase price and rent;
- negotiate the main terms of the deal to ensure it reflects the local market at the time; and
- if asked to do so, advise on the state and condition of the building.
- although not presently considered market standard the appointed commercial property agent could seek to negotiate the inclusion of a 'pandemic' rent suspension and/or break clause.
- for retail premises it is anticipated that as a result of the Covid-19 pandemic we will see a greater move in retail leases towards a lower base rent plus further rent linked to turnover. A commercial property agent will likely advise.

Once the main terms are agreed the parties' lawyers will discuss the legal documentation to give effect to the agreement. Any issues arising from the documentation and the legal due diligence exercise in respect of the property, including land use restrictions, planning issues, the terms of an existing lease affecting whether or not the company can lawfully use the premises for its business, and any other questions will be discussed and dealt with. Information about the property generally will be sought from the relevant authorities and the seller or landlord. Environmental (as well as sometimes structural) surveys are also a wise precaution.

Likely costs when obtaining Business Premises

In addition to the purchase price or rent payable for the premises, the chartered surveyor's fees, fees of any building surveyor and legal costs, the following costs should also be anticipated when acquiring new premises:

Stamp duty land tax ("SDLT") will be payable to HMRC where a commercial property (freehold or leasehold) is being purchased. SDLT is payable on the consideration paid for the property at the following rates:

SDLT is also payable on the net present value (NPV) of the rental element on the grant of new leases. If VAT is payable on the rent then this should be included on the rent in the NPV calculation at a rate of 20%. As a 'rule of thumb', the longer the lease and the higher the rent, the greater the SDLT liability will be. It should be noted that there will be no SDLT part-refund should a tenant exercise a break option, say, midway through the contractual term of the new lease.

Specific rules deal with further issues such as any premium paid, rent reviews (in the first five years of the lease term) and surrender and re-grants of the same or enhanced premises.

VAT – May in certain circumstances be charged by the landlord on rent payable under a lease. It may also be charged on the purchase price of freehold property or the premium paid on the purchase of a lease. It may be possible to recover the VAT if the company is registered for VAT purposes.

Land Registry fees – Fees range from £40 up to £910 and is payable on any purchase consideration; on the registration of leased land where the lease granted for a term of seven years or more; or, where an existing unregistered lease is acquired with more than seven years still left to run.

Rent – Fees are usually payable quarterly in advance on leasehold property, exclusive of utilities such as electricity, telephone and gas charges. Services provided by the landlord to the property, rates payable to the relevant authorities, and insurance fees are likely additional costs.

Service charges – Charges may be payable on leasehold property for facilities provided by the landlord, such as repairing and maintaining the building and the decoration and repair of common parts (including external areas) and provision of security and reception services where the property is part of an office block, or an industrial or retail estate. When negotiating the terms for a new lease, consider whether a capped service charge can be agreed. This is especially important on shorter term leases especially if unusual or capital expenditure is contemplated by the landlord which would cause the service charge to increase dramatically.

Other cost considerations – Take into account for freehold, leasehold and serviced offices the cost of equipping and fitting-out to the required standard and specification, the cost of insurance for tenants' own fixtures, fittings and equipment and third-party liability and public liability insurances. Thought should also be given to ensuring that premises have sufficient IT capability to meet modern business requirements and, in relation to leased premises or serviced offices, that requisite rights have been granted to allow data communication equipment and cabling to be installed to facilitate such IT capability.

Serviced Office Accommodation

When initially setting up a business a company may not have a large staff and may not wish to spend time looking for offices. A suitable alternative may be serviced office accommodation, which is widely available.

Leasehold Premises

The acquisition of leasehold premises usually takes longer to finalise than the acquisition of a freehold due to the relative complexity of the transaction. Prospective tenants will be required to furnish references, which will include the provision of annual reports and company accounts.

Once in new premises there are a number of considerations that tenants should be aware of:

Rent Review – Commercial leases that are for longer than five years will almost always contain provisions allowing the landlord to increase the rent in line with current market rates at different intervals in the life of the lease (or alternatively may specify pre-agreed stepped increased which may provide the tenant with greater budgeting certainty). The rent review cycles are usually at the end of every fifth year of the lease.

If the parties are unable to agree a reviewed rent at any stage they have the ability to refer the matter to an independent third party to decide on the reviewed rent.

Sub-letting and Selling – A commercial lease will usually allow a tenant to rent out the whole (and sometimes a part) of its space to another company, subject to obtaining the landlord's prior consent. Sharing of the space with "group companies" is often permitted without the need for the landlord's consent. If a move to alternative premises is subsequently required during the term of an existing lease, the lease will also usually allow the tenant to transfer (assign) its lease to a third party. The landlord's consent will usually be required before an assignment can take place. A tenant may remain liable for payment of rent and other sums under the lease in the event that the new tenant defaults on payments, but this will depend on the provisions in the commercial lease.

Repairs – Most commercial leases will require the tenant to keep the premises in a good and substantial state of repair, condition and decoration. This applies regardless of the state of the premises when acquired. Prior to committing to the lease, having a survey of the premises carried out is a prudent course of action if the tenant wishes to limit its repairing obligation in the lease, as the surveyor will produce the "baseline" schedule of condition and the tenant can seek to incorporate in a new lease qualified repairing, decorating and 'handback' provisions by reference to the schedule of condition. Tenant repairing obligations often extend to any equipment serving the premises (e.g. air-conditioning) and it is advisable to carry out or procure from the landlord specialist surveys and maintenance records.

Alterations – A tenant may wish to carry out alterations to the premises to suit its business needs. Most leases do not allow external or structural alterations but do allow internal non-structural alterations provided the landlord's prior consent is obtained. A tenant is required to reinstate any alterations and/or additions it makes at the end of the term of the lease.

Landlord's professional fees (legal and surveyors) are invariably payable for the review and approval of the proposed works and formally documenting consent to works save where such approval (for initial fitting-out works) is obtained at the time the new lease is entered into in which case landlords will generally bear their own professional costs.

Use – The lease will specify how the property may be used, which must also accord with the permitted use under planning law. If a change of use is required there may be a need to obtain both the landlord's consent as well as any required planning permission from the planning authorities.

Residential Premises

If a company is moving staff to England and Wales to start up the UK company, residential accommodation may be taken by the company for the staff members rather than the staff buying freehold houses or purchasing long leases of flats. If a company proposes to enter into a short term lease arrangement in its name for a staff member the company should be aware it has no rights of occupation in the property at the end of the tenancy and no right to renew the tenancy.

7. Intellectual Property Rights

The term Intellectual Property Rights ("IPRs") may cover a wide range of registered and unregistered proprietary rights such as patents, trade marks, service marks, design rights, topography rights, semi-conductor rights, moral rights, rights of confidentiality, utility models, copyrights, database rights or rights in domain names, and includes any rights granted by any existing registrations of or applications for the above.

Most IPRs are territorial and whilst international treaties can provide some cross-border protection, not all rights and protection afforded in one country will necessarily extend to other countries. Many aspects of the UK intellectual property regime will be familiar to non-UK businesses, particularly those with experience in jurisdictions which are co-signatories to relevant international conventions on IPRs.

After establishing a UK operation, the non-UK entity (whether parent company or head office) should ensure that it has protected its own IPRs in respect of use in the UK and that it is not infringing or about to infringe a third party's IPRs. All licences needed to use any IPRs which the company does not exclusively own should also be obtained.

It is advisable for the non-UK company to carry out an audit of the IPRs it uses in its home territory. It should establish whether it owns or licences the rights it uses and whether these rights are transferable to the UK business without additional licences.

Registration of IPRs - The non-UK company should ensure that all necessary steps are taken to obtain or establish its ownership of its IPRs in the UK. Some IPRs (e.g. patents) must be registered to be enforceable, some (e.g. copyright) subsist without any registration and some (e.g. trade marks, design rights) can be registered or unregistered, although registration makes enforcement easier. The company should therefore assess whether it is able to register such protection and, if it is, make the relevant application(s) at the earliest opportunity.

The registers applicable to a company's IPRs should be searched prior to use/registration in the UK to establish (i) whether the company's IPRs are likely to infringe those of a third party and/or (ii) the likelihood of obtaining registration. In relation to patent and registered design rights, an application should be made before the subject matter of the application becomes available to the public anywhere in the world.

The UK is a member of the Madrid Protocol which means it can be designated for the purposes of an application to register an international trade mark. Under the Madrid Protocol, the "international registration" is not a unified registration, however. Instead, it provides for a series of national registrations in the countries designated. This is in contrast to an EU-wide trade mark ("EUTM") which is a single unitary right covering the 27 member states of the European Union. Following the UK's exit from the European Union, an EUTM will no longer cover the UK. Companies looking to protect their trade marks in the UK and EU must therefore file both a UK trade mark and an EUTM (or individual trade mark registrations in the national registers of those EU countries where it operates, e.g. Germany, Italy, France, etc.).

Following the end of the Brexit transition period, owners of existing registered EUTMs as of January 1, 2021, were automatically granted an equivalent UK registered trade mark, at no cost. The new UK trade mark has the same filing date as the EUTM. Companies with existing registered EUTMs should ensure that records are updated to log these new UK registered trade marks and renewal deadlines. Companies with an EUTM application which was pending on 1 January 2021, have 9 months to apply for an equivalent UK application, on payment of a filing fee. The UK application will be examined as though it had been filed directly at the UK IPO, and any filing priority will be recognised.

Unregistered IPRs

With regard to unregistered IPRs (which includes IPRs that cannot be registered in the UK such as copyright and confidential information and IPRs that can be registered or unregistered such as design rights and trade marks) steps should be taken with regard to each IPR to strengthen the company's evidence that it owns that right (and, where applicable the company should consider registering any unregistered IPR).

Licence Limitations

The terms of the licences which grant the company use of IPRs should be inspected to ensure that they do not contain any restrictions that will prevent the UK company's use of those IPRs. It may also be necessary to establish whether or not the licensor has granted or is able to grant licences to third parties for use in the UK of the IPR in question.

IPRs and Employees/Consultants

Contracts entered into with the UK operation's employees or consultants should make specific provision for the retention of the ownership of IPRs in creations, developments and copyright material or software made by the new UK operation. The default position in the UK is that, if an employee generates IPRs in the ordinary course of their employment, their employer will own that IPR. However, it is prudent to make sure that this is the case through employment contracts. Also, in the UK a company would not, generally, automatically own IPR created by contractors while providing their services—this must be specifically dealt with by contract, therefore.

Domain Names

If the company wishes to have a UK website it might want to register and use the company name as its domain name. The company cannot register a domain name if that name has already been registered by a third party. It can find out if the relevant domain name is available by performing a "whois" search (e.g. at http://www.whois.net/). This search reveals whether anyone owns the name rather than whether there is a website at the domain name address.

A domain name must be registered with the relevant domain name registrar (in the UK this is Nominet UK, at http://www.nominet.org.uk/). There are various restrictions regarding the length and format of the domain name. The company should register a domain name online through an accredited registration agent who will deal with the registrar and the registration requirements on behalf of the company.

Traditionally domain names are registered on a 'first come, first served' basis. However, this has meant that some companies have discovered that they have been too late to register their own name as a domain name. While there are 45 classes for use of trade marks, there is no such restriction over domain names. Therefore, where a domain name has been registered and is being used in good faith a business is generally unlikely to be able to force a transfer of that name. The company may be able to buy the name from the prior registrant. Alternatively, if the company has enforceable trade mark rights which pre-date the registration of a domain name similar or identical to the company's trade mark it may be able to compel the prior registrant to transfer the domain.

UK Patent Box

The UK Patent Box allows companies to elect to apply a 10 percent rate of corporation tax to profits attributable to qualifying patents, whether received as a royalty or embedded in the sales price of products. The regime also applies to other qualifying intellectual property rights such as regulatory data protection (also called 'data exclusivity'), supplementary protection certificates and plant variety rights. Other non-qualifying profits in these companies will continue to be taxed at the main rate.

The aim of the Patent Box is to provide an additional incentive for companies to retain and commercialise existing patents and to develop new innovative patented products. It encourages companies to locate the high-value jobs associated with the development, manufacture and exploitation of patents in the UK and maintain the UK's position as a world leader in patented technologies.

8. Data Protection

The law governing the collection and use of personal data in the UK was significant updated by the EU General Data Protection Regulation ("EU GDPR"), which came into force on 25 May 2018. Although the UK left the EU on 31 January 2020 (and the transition period ended on 31 December 2020), the EU GDPR continues to apply in the UK (the "UK GDPR") subject to amendments made by The Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 ("DP Brexit Regulations"). The DP Brexit Regulations introduce only minor edits at this point to the EU GDPR with the aim of ensuring that the UK data protection legal framework functions correctly following the end of the transition period. The legal principles and obligations contained in the UK GDPR do not materially diverge from those contained in the EU GDPR at this point. The UK GDPR is supplemented by the Data Protection Act 2018 ("DPA 2018").

The UK GDPR applies to the processing of personal data by organisations established in the UK. It also applies to non-UK organisations that offer goods and services to the UK market or who monitor activities of individuals based in the UK, as far as their behaviour takes place within the UK.

Those conducting business in the UK and/or the the EU, should look closely at the requirements of the UK GDPR and EU GDPR, to ensure their systems, policies and contractual arrangements are compliant. UK data protection law sets out principles that govern the processing of personal data as follows:

- Personal data shall be processed fairly and lawfully
- Personal data shall be obtained only for a specified and lawful purpose, and shall not be further processed in a manner that is incompatible with the original purpose
- Personal data shall be adequate, relevant and not excessive in relation to the purpose for which it is being processed
- Personal data shall be accurate and, where necessary, kept up to date
- Personal data processed for any purpose shall not be kept for longer than is necessary for that particular purpose
- Personal data shall be processed in accordance with the rights of data subjects
- Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of the personal data
- Personal data shall not be transferred to a country or territory outside the EEA unless an adequate level of protection for the rights and freedoms of the data subject is in place in relation to the processing of that personal data

The Information Commissioner's Office ("ICO")

The ICO is the UK's supervisory authority set up to uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals.

Under the Data Protection (Charges and Information) Regulations 2018, any business which processes personal data as a "data controller", meaning they own the data and can decide how it is processed, must pay a "data protection fee" to the ICO. The fee will vary depending on the size of the company and turnover. Failure to do so is a criminal offence.

What are the obligations of the UK GDPR?

Key requirements under the UK GDPR include:

- **Data Protection Officers ("DPOs"**) - In many circumstances, those caught by the UK GDPR will need to appoint a DPO and so thought will need to be given as to whether this applies and, if so, who that person or persons might be.
- **Appointment of Representatives** - Where UK data protection law applies to a business established outside the EU, it may need to appoint a representative in the EU. This does not apply in certain circumstances. Also, where the EU GDPR applies to a business established in the UK, it may need to appoint a representative in the EU.
- **Accountability** - Those caught by the UK GDPR are required to demonstrate compliance though certain internal documents, maintaining written records of all data handling activities and by carrying out Privacy Impact Assessments, where required.
- **Legal Basis for Processing** - Personal data can only be processed where the data controller has a legal basis for that processing (e.g., consent, legitimate interests, contract necessity, etc.).
- **Privacy Policies** – Businesses are required to provide certain information to data subjects where personal data is received from the data subjects or a third party, often contained in a privacy notice (i.e. identity of "data controller", how the personal data is used, etc.). Policies will need updating therefore.
- **New and Extended Individuals Rights** – Businesses must comply (in most circumstances) with new and extended data subject rights (e.g. right of access, right of rectification,

right to be forgotten, right to restrict processing, right to data portability, right to object and right not to be subject to automated processing, etc.). The GDPR gives data subjects much more control over their personal data and how it is handled.

- **Data Protection "By Design" and "By Default"** – Businesses must ensure that, in the planning phase of processing activities and implementation phase of any new product or service, data protection principles and appropriate safeguards are addressed/implemented.
- **Breach Notification** – Businesses must report a data breach to the ICO within 72 hours of their becoming aware of that breach, except where the data breach is unlikely to result in any harm to data subjects. Where there is a high degree of risk to data subjects, the business must notify the affected data subjects without undue delay.

Appointment of Data Processors

Where a business that is acting as a "data controller" appoints a vendor to provide services which will require that vendor (or "data processor") to process or otherwise have access to UK personal data, the vendor must be appointed under a binding written agreement, which states that the processor must:

- only act on the data controller's documented instructions
- impose confidentiality obligations on all personnel who process the relevant data
- ensure the security of the personal data that it processes
- abide by the rules regarding appointment of sub-processors
- implement measures to assist the data controller in complying with the rights of data subjects
- assist the data controller in obtaining approval from data protection authorities, where required
- at the data controller's election either return or destroy the personal data at the end of the relationship
- provide the data controller with all information necessary to demonstrate compliance with the UK GDPR.

Compliance Checklists

The following checklists will be helpful for assessing your compliance with UK/EU data protection law.

Lawfulness, fairness and transparency

- ☐ Your business has conducted an information audit to map data flows.
- ☐ Your business has documented what personal data you hold, where it came from, who you share it with and what you do with it.
- ☐ Your business has identified your lawful bases for processing personal data and documented them.
- ☐ Your business has reviewed how you ask for and record consent.
- ☐ Your business has systems to record and manage ongoing consent.
- ☐ If your business relies on consent to offer online services directly to children, you have systems in place to manage it.
- ☐ Your business is currently registered with the Information Commissioner's Office.

Individual Rights

- ☐ Your business has provided privacy notices to individuals.
- ☐ If your business offers online services directly to children, you communicate privacy information in a way that a child will understand.
- ☐ Your business has a process to recognise and respond to individuals' requests to access their personal data.
- ☐ Your business has processes to ensure that the personal data you hold remains accurate and up to date.
- ☐ Your business has a process to securely dispose of personal data that is no longer required or where an individual has asked you to erase it.
- ☐ Your business has procedures to respond to an individual's request to restrict the processing of their personal data.
- ☐ Your business has processes to allow individuals to move, copy or transfer their personal data from one IT environment to another in a safe and secure way, without hindrance to usability.
- ☐ Your business has procedures to handle an individual's objection to the processing of their personal data.
- ☐ Your business has identified whether any of your processing operations constitute automated decision making and have procedures in place to deal with the requirements.

Accountability & Governance

- ☐ Your business has an appropriate data protection policy.
- ☐ Your business monitors your own compliance with data protection policies and regularly reviews the effectiveness of data handling and security controls.
- ☐ Your business provides data protection awareness training for all staff.
- ☐ Your business has a written contract with any data processors you use.
- ☐ Your business manages information risks in a structured way so that management understands the business impact of personal data related risks and manages them effectively.
- ☐ Your business has implemented appropriate technical and organisational measures to integrate data protection into your processing activities.
- ☐ Your business understands when you must conduct a DPIA and has processes in place to action this.
- ☐ Your business has a DPIA framework which links to your existing risk management and project management processes.
- ☐ Your business has nominated a data protection lead or Data Protection Officer (DPO).
- ☐ Decision makers and key people in your business demonstrate support for data protection legislation and promote a positive culture of data protection compliance across the business.
- ☐ Data security, international transfers and breaches
- ☐ Your business has an information security policy supported by appropriate security measures.
- ☐ Your business ensures an adequate level of protection for any personal data processed by others on your behalf that is transferred outside the United Kingdom.
- ☐ Your business has effective processes to identify, report, manage and resolve any personal data breaches.

Processing Checklist

- ☐ We have reviewed the purposes of our processing activities, and selected the most appropriate lawful basis (or bases) for each activity.
- ☐ We have checked that the processing is necessary for the relevant purpose, and are satisfied that there is no other reasonable way to achieve that purpose.
- ☐ We have documented our decision on which lawful basis applies to help us demonstrate compliance.
- ☐ We have included information about both the purposes of the processing and the lawful basis for the processing in our privacy notice.
- ☐ Where we process special category data, we have also identified a condition for processing special category data, and have documented this.
- ☐ Where we process criminal offence data, we have also identified a condition for processing this data, and have documented this.

Transfers of personal data from the UK/Europe to a third country

If a company business transfers data outside of the United Kingdom then fairly complex rules apply under the UK GDPR and EU GDPR, respectively. In summary, care must be taken to ensure the transfer is "adequately safeguarded" and only done if necessary. Some countries are automatically deemed "adequate" from a UK andn EU perspective (e.g. Canada), however, if this is not the case (the U.S. is not deemed adequate) then data exporters in the UK/EU need to consider other mechanisms to safeguard the transfer (such as Binding Corporate Rules or Standard Contractual Clauses).

Many US based organisations previously relied on self-certification under the Privacy Shield framework to safeguard the transfer of UK/EU data to the US. However, on July 16, 2020, Europe's highest court invalidated the Privacy Shield framework and cast doubt on the validity of another transfer mechanism, namely Standard Contractual Clauses.

In response, on November 11, 2020, the European Data Protection Board (the "EDPB"), which represents EU supervisory authorities, published draft guidance on international transfers which were subject to public consultation (which has now closed). As at the time of writing, the final guidance has not yet been published. This will impact international transfers of personal data from the EU (and likely the UK) to a third country (including the US) once the guidance becomes final.

In addition, on November 12, 2020, the EU Commission published new draft Standard Contractual Clauses which are also subject to public consultation (again, the consultation period has now closed).

Transfers of personal data between the UK and EU

On Christmas Eve 2020, the EU and the UK concluded the long-awaited Trade and Cooperation Agreement ("Trade Agreement") relating to the UK's separation from the EU as of 1 January 2021. The Trade Agreement provides an interim solution for transfers of personal data from the EEA to the UK. Pursuant to the Trade Agreement, transfers of personal data to the UK will not be regarded as transfers to a third country under the EU GDPR (requiring safeguards to be put in place such as Binding Corporate Rules or Standard Contractual Clauses), until the earlier of the following:

- the European Commission has reached a decision on the adequacy of UK data protection legislation; or
- six (6) months have passed since the entry into force of the Trade Agreement (comprised of a four-month fixed period plus a two-month extension if not objected to by either of the parties).

The net result is that this interim period ensures that organisations transferring personal data from the EEA to the UK are not required to take any immediate action due to Brexit.

Furthermore, in accordance with an earlier stance adopted by the UK, transfers of personal data from the UK to the EEA will continue to be permitted on a transitional basis by the UK without requiring additional measures from 1 January 2021 onwards.

Breaches of the GDPR

The consequences of breaching data protection laws in the UK are serious. For example, UK GDPR fines are up to £17.5 million or 4% of a company's total annual worldwide turnover, whichever is higher. The number of successful class actions brought (e.g. where a data controller loses a large amount of data) are also expected to rise following recent case law.

In summary, data protection is an important consideration for any business looking to establish itself in the UK (or Europe for that matter) and those establishing themselves here should look to implement practices, processes and policies which are compliant with recent changes. If this area is not taken seriously then it could expose the company to fines comparable to those levied in antitrust cases.

9. Corporate Insolvency and Debt Collection

The UK insolvency regime has its origins in laws aimed at protecting creditors from defaulting debtors. While many of the principles of creditor protection remain, there have been substantial revisions so as to promote a rescue culture aimed at increasing rates of business rescue, saving jobs and improving returns to creditors. New insolvency legislation in 2020 is aimed at assisting struggling businesses and avoiding insolvency.

In the UK, under section 123 of the Insolvency Act 1986, a company is deemed to be insolvent when it can no longer meet its financial obligations.

There are two tests for corporate insolvency:

- is the company currently, or will it in the future, be unable to pay its debts as and when they fall due for payment?
- is the value of the company's assets less than the amount of its liabilities, taking into account as-yet uncertain and future liabilities?
- Furthermore a company is deemed unable to pay its debts, and therefore insolvent, if:
- a creditor who is owed more than £750 has served a formal demand for an undisputed sum at the company's registered office and the debt has not been paid for three weeks; or
- a judgement or other court order has not yet been satisfied.

Where a company is insolvent, the duties of its directors move from the interests of the shareholders to those of the creditors.

The UK regime includes a range of options when a company faces insolvency including administration; administrative receivership; corporate voluntary arrangement (now rarely used); creditors' voluntary liquidation; compulsory liquidation. In June 2020, the UK enacted the Corporate Insolvency and Governance Act which introduced a moratorium and a new "restructuring plan" as additional legislative tools.

The question of which of the procedures is the most appropriate depends upon all the circumstances; however, the following brief summaries are intended to provide an overview of the various procedures.

Administration – A key feature of an administration application is that it brings into force a statutory moratorium in relation to claims against the company. Either the directors of the company or the holder of a qualifying floating charge may apply for an administration order and the appointment of an administrator, who is an accredited insolvency practitioner. An administrator can also be appointed by a court order, following an administration application, provided that the court is satisfied the company is deemed "unable to pay its debts", as above.

The focus of the administration procedure is to rescue the company itself as a going concern so as to achieve a better result for the creditors of the company as a whole than would be likely in an immediate winding up, and/or to return monies to secured or preferential creditors by way of realising the company's assets for their benefit.

Corporate Voluntary Arrangement ("CVA") – If a limited company is insolvent, it can use a CVA to pay creditors over a fixed period. The directors of a company can obtain a CVA by engaging and paying an accredited insolvency practitioner to administer it.

The insolvency practitioner will work out an 'arrangement' covering the amount of reduced debt the company can manage and a payment schedule. They will write to creditors about the arrangement and invite them to vote on it. The arrangement must be approved by creditors who are owed at least 75% of the debt.

Scheduled payments are made to the creditors through the insolvency practitioner until the debt is paid off. If payments are late or missed, any of the creditors can apply to wind up the business.

Creditors' Voluntary Liquidation ("CVL") – A CVL is a terminal procedure, not a rescue option; a last resort where no other option is available, whereby the assets of the company that is in financial difficulties are realized and distributed to creditors in the order of priority under the Insolvency Act 1986. It is commenced by the members passing a special resolution to the effect that the company cannot continue its business by reason of its liabilities and therefore it is advisable to the company to wind up.

Under a CVL, a liquidator is appointed to wind up the company's affairs. The liquidator does this by calling in all the company's assets and distributing them to its creditors. Any remaining assets will be distributed to the company's members. A CVL enables an insolvent company to be wound up without a court order and the creditors are given more control over the liquidation process, including control over the choice of the liquidator.

Compulsory Liquidation – A creditor may petition the court on the grounds that the company is insolvent or unable to pay its debts, for the compulsory winding up of a corporate debtor in certain specified circumstances. A judge then decides at a court hearing whether it is appropriate to make a winding up order. If granted, the procedure allows the assets of a company to be realized and distributed to the company's creditors. Though uncommon, a company's directors may present a winding up petition against their own company.

Moratorium – The new moratorium on enforcement actions gives a company breathing space to attempt rescue or restructure. Companies seeking to rely on the moratorium must apply to the court. They will be able to continue trading whilst the moratorium is in place, whilst creditors will be prevented from initiating insolvency proceedings for the duration of the moratorium.

Restructuring Plan – This is intended to provide an alternative to insolvency. Either the company or its creditors may apply to court to propose that a restructuring plan is put in place. A court will sanction a restructuring plan which has been approved by at least 75% of creditors.

The restructuring plan is largely similar to a scheme of arrangement, but with the important distinction that it can be imposed on dissenting creditors in certain circumstances (cross-class cram down). Given that this is a new procedure in the UK, it remains to be seen how its usage will evolve.

Debt Collection – If a foreign company is owed a debt by an English company, the foreign company will usually have the option of suing for payment in England provided that the contract with the English party does not require that claims be brought in a different jurisdiction. Alternatively, the foreign company may have the option of pursuing proceedings in its home courts and then seeking to enforce a judgment through the English courts.

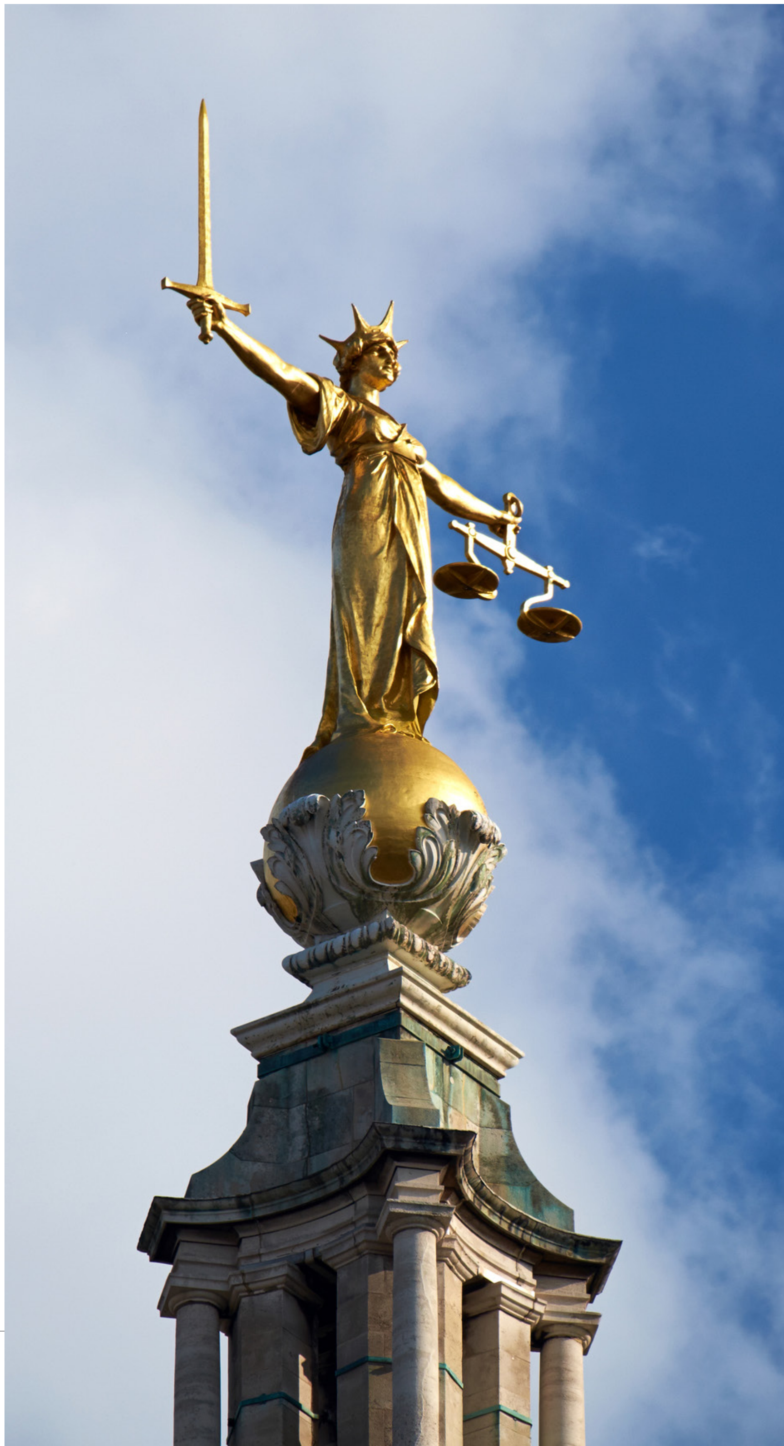
English Court Proceedings – The English courts provide litigants with a broad range of options for enforcing a debt. Fast track procedures are available, in particular for lower value claims, as are specialist courts for complex matters:

- County Courts (generally for claims under £100,000)
- High Court (generally for complex claims and those exceeding £100,000)
- Commercial Court
- Technology and Construction Court
- Banking Court
- Admiralty Court.

The English courts offer range of mechanisms for the enforcement of a judgment, including:

- Warrant for execution: for the seizure and sale of a judgment debtor's assets
- Third party debt order: requiring the debtor's bank to make payment from the debtor's bank account (known in some jurisdictions as a 'garnishment order')
- Charging order: to protect against the disposal of a debtor's assets
- Attachment of earnings: requiring payment by a debtor's employer from their wages

Enforcement of foreign judgments in the UK – In order to enforce a foreign judgment against assets of a debtor in England or Wales, the enforcing party must seek to have the foreign judgment recognised by the English courts. In order to be enforceable, a foreign money judgment must be final and conclusive, and must not be for the enforcement of taxes, fines or penalties. The English courts will apply their conflict of laws rules to be satisfied that the foreign court had jurisdiction to determine the subject matter of the dispute underlying the judgment. Once jurisdiction is established, the foreign judgment can be challenged only on limited grounds—for example, that it was obtained by fraud, is contrary to public policy, or that the proceedings contravened principles of natural justice.



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31 West 52nd Street | New York, NY 10019

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