fladgate

Doing business in the UK

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Foreword

The attractiveness of the United Kingdom as a business location is unabated. There are many advantages to doing business in the UK. Investors can draw on a skilled workforce and access a large market; costs of labour and production are lower compared with many other western European countries; investors benefit from a business friendly environment as well as a high degree of legal certainty and political stability; and its capital, London, is a world leading commercial and financial centre.

These features make the UK an attractive place to do business, not just for large corporations but also for small and medium-sized businesses. Many foreign companies use the UK as a first stepping stone for expansion into continental Europe.

Investing in a foreign country requires awareness of the pitfalls, and prospective investors will have many questions. It is important to have advisers who are familiar with both the legal and the practical issues.

This brochure offers an overview of legal aspects of conducting business in the UK. It is meant as an introduction to the UK market place and does not offer specific legal advice.

Fladgate LLP accepts no liability for anything contained in this brochure or for any reader who relies on its content. Before concrete actions or decisions are taken by you or your business, you should seek specific legal advice. We remain at your disposal in relation to questions regarding this brochure and in relation to your current or planned commercial activity in the UK and look forward to assisting you.

This brochure describes the law in force in England and Wales as at October 2021, but please bear in mind that statutes, regulations and rules are subject to change.

1. Introduction

1.1 The United Kingdom

The UK comprises England, Wales, Scotland and Northern Ireland. Great Britain comprises England, Wales and Scotland.

Within the UK there are three distinct legal jurisdictions, namely England and Wales, Scotland and Northern Ireland. Each has its own laws, courts and lawyers. In most commercial areas, e.g. company law and tax, the law is the same or very similar but in some, such as real property, it is very different. We are able to identify areas which need input from lawyers in Scotland or Northern Ireland and to arrange appropriate advice.

1.2 Channel Islands and Isle of Man

The Channel Islands (Jersey, Guernsey, etc.) and the Isle of Man are not part of the UK for legal and tax purposes, and are regarded as "tax havens". We can arrange for advice and assistance in these areas.

1.3 European Union and European Economic Area

The UK left the European Union (**EU**) on 31 January 2020 and the transition period ended at 11.00 p.m. on 31 December 2020. The relationship between the UK and the EU is governed by the UK-EU withdrawal agreement and, currently, three future relationship agreements (covering trade and co-operation, security of classified information and nuclear co-operation). The UK-EU relationship continues to evolve and new developments can arise in various ways, e.g. a new UK-EU relationship agreement may be entered into.

The EU consists of Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden. Its structures and laws are binding on all member states. The EU also develops co-ordination between its members in matters of foreign policy and common external defence, and furthers co-operation between them in internal affairs such as their criminal justice systems, policing, immigration and rights of asylum.

At the moment in 19 of the EU member states the euro is the common currency. The UK currency is pound sterling, but businesses in the UK are accustomed to using the euro in transactions involving Eurozone countries.

Many of the benefits of economic free movement between EU member states are also extended to Iceland, Liechtenstein, Norway and Switzerland who are the four members of the European Free Trade Association (**EFTA**), although these countries are not members of the EU. All the EU member states and EFTA countries other than Switzerland are members of the European Economic Area (**EEA**). Switzerland, while outside the EEA, has similar arrangements with the EU.

Fladgate LLP has an extensive range of contacts with lawyers throughout the EU, the EEA and the rest of continental Europe, through whom we are able to provide advice on local law and practice.

2. Investment climate

2.1 Economic development

Subsidies may be available to investors. In particular, the state encourages job creation and research and development through various national and regional economic development schemes. These take the form of either development aid, for smaller companies in particular, or tax concessions and additional capital allowances.

2.2 Payroll costs

Labour costs in the UK are still perceptibly lower than in many continental European countries. Employer's contributions to pension, sickness and unemployment insurance are also lower.

Further, compared with many EU countries employers possess a far greater freedom to make corporate decisions largely independently of trade union influence. Employee representation and co-determination in business and industry are less visible in the UK than in continental Europe.

3. Setting up a business in the UK

Setting up a business in the UK is quite straightforward. A foreign investor is in exactly the same position as his or her British counterpart. Essentially, the legal basis for establishing an incorporated business is the Companies Act 2006 (as amended).

There are various ways for an overseas investor or entrepreneur to set up a business in the UK:

- by forming a private limited company (Limited) or a public limited company (Plc);
- by establishing a branch (a so called "UK establishment");
- by forming a partnership (limited partnership, limited liability partnership or general partnership);
- by entering into a joint venture; or
- by buying or acquiring an interest in a company.

In addition to the above possibilities, commercial agents can be engaged or distributors appointed.

The decision as to which structure to use depends on a whole range of taxation, company law and other legal considerations.

3.1 Forming a limited company as a subsidiary

This section sets out the requirements for incorporating a UK private limited company (**company**) (as the wholly owned subsidiary of a foreign company). The public limited company form (mainly used for a company quoted on a stock exchange) is chosen only for a small number of companies and will not be considered further in this brochure. Fladgate LLP will, however, be pleased to assist with the formation or buying of such a company, if required.

- *Formation of a company*

There are two ways of doing this: either by forming a new company or by buying a company that has already been formed, known as a "shelf company".

- *Articles of association*

A company has to have articles of association (**articles**), which represent its constitution. UK legislation provides model articles for use where a newly formed company has not drawn up its own articles.

- *Share capital*

Usually a company will have a share capital. The share capital is made up of shares that have been issued and allotted to its shareholders (also called "members"). Each share will have a nominal value. As no minimum nominal value is laid down by law it can be as little

as £0.01 (or smaller). Frequently the nominal value of each share is £1. The share capital can be in any currency, for example euros, or it may be made up of various currencies.

A company formed under the Companies Act 2006 is not required to state its authorised share capital in its articles. All it has to do, when applying for registration with Companies House, is to notify the initial capital and to send in a notification each time new shares are issued.

Furthermore, there is no tax payable by reference to the level of capitalisation. As such, it is possible to incorporate a subsidiary with a substantial capitalisation, in order to enable it to stand alone without the support of parent guarantees, and to avoid the need for subsequent share issues, without incurring any tax liability.

A company needs only one shareholder. The shareholder may be an individual or a company and does not need to be UK resident or incorporated in the UK.

- *Company name*

The name of a company must end with the word “Limited” or the abbreviation “Ltd”, unless a special exemption, available for non-commercial purposes only, has been granted.

The proposed company name must not be the same as any existing company name. There are also restrictions on names likely to mislead or cause offence, criminal names, names that may suggest a connection with the government or a local authority, and names containing certain specified “sensitive” words, such as Insurance or Trust.

We can run a check of your chosen company name for you, to ensure that it is available and capable of being approved.

- *Directors and company secretary*

A company must have at least one director who is an individual. There are a few restrictions on the choice of directors, for example, a director must be at least 16 years old, may not be disqualified from acting as a company director and may not be a bankrupt individual. Directors may be of any nationality.

There is no longer any legal obligation for a company to appoint a company secretary, although one may be appointed. The company secretary keeps the company’s records and ensures that the company complies with the main provisions of company law. Where a company has foreign owners, it may be advisable to appoint a company secretary.

- *Registered office*

A company must have a registered office in the UK for delivery of official documents and correspondence, for instance from Companies House or HM Revenue & Customs. This address does not have to be the same as the business address.

- *Accounting reference period*

The accounting reference period is normally a period of 12 months. It is calculated from the date of incorporation to the last day in the calendar month, one year from the date of incorporation (**accounting reference date**). This can be changed, subject to certain provisos. Accounting reference periods commonly selected are either the calendar year or the year from 1 April to 31 March, which is slightly in advance of the UK tax year (ending on 5 April).

- *Auditors*

Auditors to a company must be UK-qualified or have UK-recognised overseas qualifications.

A company is entirely exempt from the audit requirement if it qualifies as a “small company”, i.e. at least two of the following conditions are met: annual turnover must be not

more than £10,200,000; the balance sheet total must be not more than £5,100,000; or the average numbers of employees must be not more than 50, and it is not excluded from the "small companies regime".

- *Management of a subsidiary*

Under UK company law, a company is required to file certain documents with and provide certain information to Companies House, for example to deliver annual financial statements and the annual return, and to notify any changes affecting the directors, secretary, persons with significant control, registered office and mortgages and charges.

Under the Companies Act 2006, only public companies are required to hold an annual general meeting. Nonetheless, many companies will hold such a meeting annually. The management of a company is also simplified in that most resolutions can be passed in writing.

- *Special approval requirements for a company*

It should be noted that running the business of a subsidiary or branch in the UK may require certain trading licences or other approvals. For example, the formation and the operation of a financial services business will usually require authorisation from the Financial Conduct Authority. Fladgate LLP can advise you if authorisation requirements apply to your business.

3.2 Establishing and operating a branch (UK establishment)

A branch should be regarded as an extension of the foreign company. An authorised person appointed to run the branch can enter into transactions with third parties in the foreign company's name. The branch may be of the foreign company itself or one of its subsidiaries. In any case, under the UK system, the branch is not a legal entity in its own right and therefore the foreign company remains fully liable.

There are some registration requirements relating to both the foreign company and the branch that have to be completed within one month from opening the UK establishment.

- *Approvals*

Few businesses require approval, which is different from the position in much of continental Europe. There is, for example, no such thing in the UK as a general licence to operate a business.

- *Company name*

Similar restrictions apply to registration of the branch name as to registering the name of a subsidiary (see paragraph 3.1 under the heading "Company name").

3.3 Limited liability partnership

It is possible to form a limited liability partnership (**LLP**) in the UK. LLPs have the advantage of being taxed as a partnership but at the same time having limited liability. The result is something of a hybrid between a company and a partnership.

LLPs are particularly popular with professional service providers (e.g. lawyers and accountants) and in the fund and asset management sector. Whereas a company is already quite user-friendly by international standards, an LLP is even more flexible from a company law and internal structure point of view. However, it has not yet caught on as a legal form for new business start-ups outside these areas.

3.4 Partnerships and limited partnerships

It is also possible to establish a partnership (**general partnership**) in the UK, although the partners will have unlimited liability.

Another possibility is to form a limited partnership (**LP**). In contrast to the LLP (see above), in England and Wales the LP has no legal personality of its own. Its partners, provided they are not involved in managing the LP, will be protected by limited liability, but it must have at least one general partner, whose liability is unlimited. The general partner can be a limited company. LPs are especially preferred by investment funds. They are neutral for tax purposes and are not taxed separately.

A Scottish LP does have a separate legal personality.

3.5 Using commercial agents

As an alternative to forming a company or establishing a branch, a foreign company may also decide to work in the UK market through a commercial agent.

Relations between a commercial agent and his or her principal are governed by the Commercial Agents Regulations 1993. These regulations contain a series of mandatory provisions designed to give the commercial agent greater protection. It should be emphasised that compensation is nearly always payable if the contract is terminated. If agreed in the agency contract, an indemnity is payable. If nothing is agreed in the agency contract, compensation is payable based on the notional value of the agency at the date of the termination.

3.6 Joint ventures

A foreign company can also form a joint venture with a UK or another foreign corporation or an individual. Most commonly, the vehicle used will be a company, but it may simply be a contractual joint venture.

3.7 Buying or acquiring an interest in a company (M&A)

As an alternative to forming a new company, the foreign business can buy an established company or purchase shares in it. M&A is an entire topic in itself, on which we can advise if required.

4. Administration requirements

4.1 Subsidiary

- *Public filing requirements*

The subsidiary will be subject to UK company law relating to the filing of information that is available for public inspection with the Registrar of Companies at Companies House. Failure to comply with these requirements is a criminal and/or civil offence.

- *Annual accounts and reports*

The subsidiary must keep proper accounting records which are sufficient to show and explain its transactions, to disclose with reasonable accuracy the subsidiary's current financial position and to enable the directors to ensure that the balance sheet and profit and loss account comply with the statutory requirements.

The accounts must be prepared in accordance with a detailed format and contents specified by the Companies Act 2006.

In general, all accounts filed with the Registrar of Companies must be audited, although please refer to paragraph 3.1 under the heading "Auditors" for exemptions available to small companies.

- *Registers*

In addition to the filing of the information referred to above with the Registrar of Companies, UK company law requires the subsidiary itself to maintain a number of registers, such as a register of members (or shareholders), register of directors etc.

Private companies have the option of keeping certain information on the public register at Companies House, instead of separately maintaining their own registers. This applies to the PSC register (see below) as well as other statutory registers such as the register of members.

- *PSC register*

Both companies and limited liability partnerships are also required to keep a register of people with significant control (**PSC register**), recording details of anyone who has significant control over the company. For these purposes, "significant control" includes holding (directly or indirectly) more than 25% of the shares or voting rights in a company, having the right (directly or indirectly) to appoint or remove a majority of the board of directors or otherwise having the right to exercise "significant influence or control" over a company. A company's PSC register will be open to public inspection in the same way as the register of members. Any change in the person with significant control of the company must be recorded in the company's PSC register within 14 days of such change and confirmed with the Registrar of Companies within 14 days of the change being entered into the company's PSC register.

- *Confirmation statement*

The subsidiary must deliver a confirmation statement to the Registrar of Companies each year.

- *Registration of charges*

Particulars of most charges or other securities created by the subsidiary must be notified to the Registrar of Companies within 21 days beginning with the day after the date of their creation.

4.2 Other matters requiring registration

The Registrar of Companies must also be notified within 14 days of any changes in the details and particulars of the subsidiary's directors, secretary and registered office and, if a new director or secretary is appointed, confirmation of his or her consent to act must be given by the company.

Certain resolutions passed by the subsidiary, for example, a resolution amending its articles of association, also have to be filed with the Registrar.

4.3 Company name and stationery

The subsidiary's name, place of registration, registered number and registered office, including the word "Limited" or "Plc", must be set out legibly on all its business letters, notices, cheques, bills of exchange, letters of credit and other financial instruments and on all order forms, invoices and receipts etc. The subsidiary's VAT number should be shown on all accounting forms such as invoices, orders and estimates.

The subsidiary must paint or affix its name on the outside of each place of business in easily legible characters and in a conspicuous position.

4.4 Branch (UK establishment)

- *Registration of security*

Particulars of most charges or other security created over property or assets in the UK owned by an overseas company with a branch in the UK must be notified to the Registrar

of Companies within 21 days beginning with the day after the date of their creation. Existing charges relating to such property will have to be registered when a branch is set up or charged assets are brought into the UK.

- *Accounts*

Once a branch has been opened in the UK, the overseas company is subject to continuing obligations to make disclosures of its accounting documents.

If the overseas company is required by its local law to prepare, have audited and disclose accounts, the overseas company must deliver to the Registrar of Companies copies of all the accounting documents prepared, audited and disclosed in accordance with its local law within three months from the date on which the accounting documents are first disclosed as required by the company's local law. English translations, where appropriate, are required.

If the overseas company is not required to prepare, have audited and publicly disclose accounts, it is still required to file accounts as if it were subject to UK law, subject to extensive modifications in that the accounts do not need to be audited, directors' reports are not required and details of directors' remuneration and loans do not have to be disclosed (as would be the case if the overseas company were incorporated in the UK). Such accounts generally have to be filed within 13 months of the end of the relevant financial period.

These rules are slightly modified in relation to branches of credit and financial institutions and banks.

- *Company name and stationery*

An overseas company which carries on business in the UK is required to state its name and country of incorporation and, if it has limited liability, notice of that fact, on all business letters, notices and official publications and to exhibit such information at every place where it carries on business in the UK.

- *Notification of changes*

The Registrar of Companies must be notified of any changes to the registered particulars of the branch. This must be done within 21 days of the event, if the change relates to the person(s) authorised to accept service, or otherwise within 21 days of the date on which notice of the event could have been received in the UK, if dispatched with due diligence.

5. Competition rules and restrictions

5.1 Behavioural rules

Failure to comply with UK or EU competition law can have serious consequences for businesses operating in the UK. Since 1 April 2014, the Competition and Markets Authority (**CMA**) has assumed primary responsibility for the enforcement of the UK competition law rules (previously, it exercised these rules in conjunction with the now defunct Office of Fair Trading). The pooling of resources into a single authority has coincided with more robust and active enforcement of the competition law rules.

In the UK, two sets of competition law rules apply in parallel. Anti-competitive behaviour which may affect trade within the UK is prohibited by Chapters I and II of the Competition Act 1998 and the Enterprise Act 2002. Where the impact of the anti-competitive behaviour extends beyond the UK and affects trade between EU Member States, it is prohibited by Articles 101 and 102 of the EU Treaty (which mirror the Chapter I and Chapter II prohibitions). These prohibitions are, after Brexit, the sole preserve of the European Commission in terms of their enforcement. In practice, however, the UK rules are interpreted consistently with their EU counterparts and so it makes little difference which of them are applicable to a particular situation.

UK and EU competition law prohibit two main types of anti-competitive activity:

- restrictive agreements or arrangements between enterprises which have an appreciable impact on competition (as set out under the Chapter I/Article 101 prohibitions); and
- conduct which amounts to an abuse of a dominant market position (as set out under the Chapter II/Article 102 prohibitions).

The penalties for breaching these rules are significant. Parties can be liable for fines of up to 10% of global turnover, whilst provisions in agreements that breach Chapter I or Article 101 are void and unenforceable. Companies can also be subject to actions for damages from competitors and/or customers who are able to demonstrate that they have suffered loss(es) as a consequence of the competition law breach. The most serious infringements of Chapter I/Article 101 can result in individuals being subject to criminal sanctions and directors facing disqualification orders.

As well as the CMA, various "sectoral" regulators have powers to apply the UK competition law rules in particular industries, for example Ofcom within the communications sector and Ofgem in the gas and electricity sector. These authorities (in common with the CMA) have significant powers to investigate suspected anti-competitive activity, including entering and searching business and private premises without any prior warning. Competition law cases are also increasingly being prosecuted through the UK courts and via the specialist Competition Appeal Tribunal (**CAT**).

5.2 Merger control

Mergers in the UK are governed by the Enterprise Act 2002. A qualifying transaction for UK merger control purposes is one which involves (at least) the acquisition of material influence by one enterprise over another and where either:

- the UK turnover of the target enterprise is more than £70 million; or
- the merging parties' combined share of supply of goods/services of a particular description in the UK/a substantial part of the UK is 25% or more.

The UK has a "voluntary" system of merger control which means that parties to a qualifying merger are not under an obligation to notify and seek approval from the CMA prior to completing their transaction. However, where they fail to do so, the parties run the risk that the CMA decides to intervene and carry out an investigation into the competitive impact of the deal, which it is entitled to do at any point up to 4 months from completion or from when it first becomes aware of the transaction (whichever is later). In those circumstances, the CMA has powers to impose "hold separate" obligations on the parties forcing them to keep the merging businesses running as separate entities pending completion of any investigation. Ultimately, if the CMA decides there are competition issues, it can demand concessions from the parties or even force the buyer to sell the acquired firm/assets.

Whilst the UK government operates a largely "merger friendly" regime which encourages corporate activity, does not include any specific governmental oversight of transactions and leaves the analysis of the competitive impact to the CMA, the government does reserve the power to act where a transaction engages the "public interest". Recently, these powers have been extended to include transactions which involve national security concerns, notably those covering military/dual-use products, computing hardware and quantum technology.

Larger transactions may fall under the jurisdiction of the EU Commission under the EU Merger Control Regulation. These require compulsory notification and therefore that completion is suspended pending competition clearance. Following Brexit, it is now possible for a transaction to fall to be notified to both the UK and EU competition authorities (assuming it meets both sets of thresholds).

Given the implications, it is advisable always to obtain specialist competition law input at an early stage in relation to any proposed transaction.

6. Overview of Intellectual Property Rights in the UK

6.1 The importance of protecting intellectual property

Intellectual property rights (**IP rights**) are undoubtedly valuable rights which can:

- set a business apart from its competitors;
- be sold or licensed, providing an important revenue stream;
- offer customers something new and different;
- form an essential part of a company's marketing or branding; and
- be used as security for loans.

In order to exploit IP fully it makes business sense to secure your rights so that they can be protected against infringement. While UK IP law automatically safeguards some IP rights, other forms of IP require the person seeking to rely on them to apply for legal protection. We discuss some of the UK's key IP rights below.

6.2 Trade Marks

A trade mark distinguishes the goods and services of one trader from another. Trade marks can take many forms including:

- words (e.g. Mercedes for cars);
- slogans (e.g. Just Do IT for Nike sportswear);
- names (e.g. McDonalds);
- logos (e.g. a harp for Guinness stout); and
- letters (e.g. RBS),

as well as other distinguishing factors such as sounds, colours and shapes.

- *Registered Trade Marks*

Registration

Registration of trade marks is voluntary but strongly advisable. A registered trade mark gives its owner the right to the exclusive use of the mark in connection with the goods or services for which it is registered, and is:

- a valuable commercial asset;
- commercially exploitable (see Exploitation below);
- relatively easy to protect and enforce (see Infringement below);
- a deterrent to infringers; and
- an indication of origin.

Unique Trade Marks can be registered with the UK Intellectual Property Office (**UK-IPO**), however such marks cannot:

- be offensive;
- describe the goods or services the trade mark relates to, for example the word 'cotton' cannot be a trade mark for a cotton textile company;

- be misleading, for example the word ‘organic’ cannot be used to describe a product that is inorganic;
- be a 3-dimensional shape associated with the trade mark, for example by using the shape of an egg for eggs;
- be too common and non-distinctive; or
- look too similar to state symbols like flags or hallmarks.

Trade marks must be registered for specific goods or services within individual subjects, known as classes. There are 45 classes to choose from: 34 goods and 11 service classes. It is prudent to make searches before adopting a mark to ensure that the mark (or one similar to it) is not already registered or in use for the same, similar or related products.

Duration

Trade Mark registrations can be continuous rights, provided that they are renewed every ten years.

Infringement

Trade mark infringement occurs where a registered trade mark is used in the ordinary course of trade or business without the registered owner’s consent. Infringement occurs in the following circumstances where:

- the sign used by the infringer is identical to the registered trade mark and used in relation to goods or services which are identical to those for which the trade mark is registered; and
- the sign used by the infringer is:
    - identical to the registered trade mark, and used in relation to goods or services which are similar to those for which the trade mark is registered; or
    - similar to the registered trade mark, and used in relation to goods or services which are identical or similar to those for which the trade mark is registered;

  and in each case there exists a likelihood of confusion on the part of the public, which includes a likelihood of association.
- the sign used by the infringer is identical or similar to the registered trade mark, the trade mark has a reputation in the UK, and the use of the sign, being without due cause, takes unfair disadvantage of, or is detrimental to, the distinctive character or repute of the trade mark.

The remedies for a successful claimant in a trade mark infringement action include:

- injunctions;
- damages or an account of profits;
- orders for erasure, removal or obliteration of offending signs from infringing goods, materials or articles; and
- orders for delivery up and destruction of infringing goods, materials or articles.

Exploitation

A trade mark owner can assign or licence its right to a third party.

Assignments must be recorded in writing and signed by or on behalf of the person assigning the right in order to be effective.

Similarly licensing must be made in writing and signed for or on behalf of the licensor. It is sensible to register a trade mark licence within six months of the date of the licence

agreement with the UK-IPO. This will allow the licensee to call on the proprietor of the trade mark to sue for infringement (if the licence agreement allows), and in certain situations allows the licensee to bring proceedings in its own name if the trade mark owner fails to do so.

- *Unregistered Trade Marks*

It is possible to stop someone using a similar trade mark on their goods and services (known as 'passing off'), even if it is not registered. However passing off actions are notoriously time-consuming and expensive.

To be successful, the proprietor must:

- produce evidence of their ownership of goodwill or reputation in the mark;
- show that use of the mark:
    - amounts to misrepresentation by the defendant to the public, leading or likely to lead the public to believe that the defendant's goods and services are those of the proprietor; and
    - results in damage to the proprietor.

Gathering evidence to demonstrate that there is a misrepresentation, usually in the form of evidence showing confusion (or likelihood of confusion) is notoriously difficult, as survey evidence is one of the only ways of showing that there is confusion. Engaging market research companies and experts to conduct these surveys is often time consuming, labour intensive and costly.

- *Effect of Brexit on EU trade marks*

The UK left the EU on 31 January 2020 and the transition period under the UK-EU withdrawal agreement (**withdrawal agreement**) ended on 31 December 2020. Therefore, as of 1 January 2021, EU trade marks (**EUTMs**) no longer protect trade marks in the UK.

The withdrawal agreement sets out the following steps, which now apply following expiry of the transition period:

- as of 1 January 2021, holders of EUTMs which were registered with the EU-IPO before the end of the transition period (i.e. before 31 December 2020) automatically became holders of comparable IP rights in the UK. Comparable trade marks have the same renewal dates and take the same filing or priority dates as the corresponding EU rights;
- comparable UK trade marks will continue to benefit in the UK from the reputation acquired in the EU by the end of the transition period;
- those whose EUTM applications were still pending at the end of the transition period were permitted a further nine-month period during which they could file UK applications for the same rights (i.e. by September 2021); and
- separate applications will now need to be made with the UK-IPO and the EU-IPO in order to obtain protection in both the UK and the EU.

6.3 Patents

Patents can be registered with the UK-IPO where an invention:

- is novel;
- involves an inventive step; and
- is capable of industrial application.

Exclusions

A patent cannot be obtained in respect of:

- scientific or mathematical discoveries, theories or methods;
- literary, dramatic, musical or artistic works (as these are protected by copyright);
- ways of conducting certain acts, like playing a game or doing business;
- animal or plant varieties;
- methods for medical treatment or diagnosis; or
- the design or presentation of information.

Duration

Patents are initially granted for a period of 5 years and can be renewed on an annual basis for up to a maximum of 20 years.

Ownership

The inventor is the first person entitled to the invention. However, the patent will belong to the employer if the patent is made by an employee in the course of his/her normal duties, provided that an invention might reasonably be expected to result from his/her duties.

The patent owner has the exclusive right to work the patent (i.e. to make, sell and offer to sell, use or import the invention).

Infringement

Patent infringement occurs where an unauthorised person does any of the acts which are the exclusive right of the patent owner.

Exploitation

Patents can be assigned or licensed to a third party.

Assignments must be recorded in writing, and signed by or on behalf of the person assigning the right in order for it to be effective.

Licences must be made in writing and signed on behalf of all of the parties. While not essential, a licensee should register the licence within six months of the date of the licence agreement to ensure that it can exercise its rights.

Effect of Brexit on patent law

Brexit has no direct impact on the application processes and registration systems for UK domestic patents administered by the IPO. Patents are not mentioned in the withdrawal agreement.

6.4 Copyright

Subsistence

Copyright arises automatically in the UK, without the need for registration. It subsists in the following descriptions of work:

- original literary (including software), dramatic, music, or artistic works;
- sound recordings, films or broadcasts; and
- typographical arrangements, such as newspapers or magazines.

Ownership

The first owner of copyright is the author of the work (i.e. the person who creates the material).

An exception to this rule is where the work is made by an employee in the course of his/her employment, in which case the employer will be the first owner of copyright in the work (subject to agreement to the contrary).

Duration

In the majority of cases, copyright lasts for 70 years from the end of the calendar year of the author's death, although other lessor periods apply for some works.

Infringement

If a person does any of the following acts, then he/she is committing a primary act of copyright infringement:

- copying a copyright work;
- issuing copies of the copyright work to the public;
- renting or lending the work to the public;
- performing, showing or playing a copyright work in public;
- communicating the work to the public; and
- making an adaptation of a copyright work or doing any of the acts listed above in relation to an adaptation,

together known as the **restricted acts**.

Infringement arises where one of the restricted acts is committed in respect of the whole or a substantial part of the work, either directly or indirectly, and it is also an infringement of copyright to authorise another to do any of the restricted acts.

Exploitation

The copyright owner can assign its rights to a third party, or grant a licence to a third party to do any of the restricted acts.

Assignments must be recorded in writing, and signed by or on behalf of the person assigning the right in order for it to be effective.

An exclusive copyright licence must be made in writing and signed by or on behalf of the licensor. A copyright licence cannot be registered.

Effect of Brexit on copyright law

UK copyright law will remain unaffected by Brexit.

6.5 Database rights

Database rights exist independently of the copyright (if any) in a database and protect the information comprising the database.

A database is a collection of independent works, data or other materials which are:

- organised in a systematic or methodical way; and
- individually accessible by electronic or other means.

Subsistence

Database rights arise where the database is "original"- i.e. where "by reason of the selection or arrangement of the contents of the database, the database constitutes that author's own intellectual creation". The right arises if the author is an European Economic Area (**EEA**) national, resident or business (however note that this will not be the case post 31 December 2020 - see the Effect of Brexit on database rights section below).

Ownership

The first owner of copyright in a database will be the author of the database (that is the person who creates it).

Duration

Copyright in a database lasts for 70 years from the end of the calendar year in which the author of the database dies.

Infringement

The principles of infringement of database copyright are the same as those for other types of copyright work.

Effect of Brexit on database rights

Under the withdrawal agreement, holders of database rights arising before the end of the transition period (i.e. before 31 December 2020) will be given an equivalent UK right after the transition period with the same protection as the EU right.

After the end of the transition period, new legislation is due to come into place which will make UK citizens, residents and businesses eligible for a UK-specific database right. The protection will no longer apply to EEA nationals, residents and businesses.

6.6 Domain names

Subsistence

Domain name rights arise when a domain name is registered through an accredited domain name registrar (i.e. an organisation which manages domain names under the rules of a particular domain name registry, e.g. ".org").

Ownership

A domain name is owned by or licensed to the person or entity who is shown as the registrant on the website "whois.net".

Infringement

Trademarked words and phrases can be included in a website's domain name. This makes it possible for the domain name of one website to infringe upon the subject matter of a trade mark. The main test in ascertaining whether a domain name is infringing on another's trade mark is whether an average person would confuse the domain name with the registered trade mark.

Exploitation

A domain name can be assigned and licensed.

Assignments must be recorded in writing, and signed by or on behalf of the person assigning the right in order for it to be effective.

Domain name licences should also be made in writing, as licensees will want to ensure that their rights to use the domain name are fully enforceable.

Effect of Brexit on EU domain names

The .eu domain registry has announced that UK residents and citizens will continue to be able to hold and register .eu domain names during the transition period, i.e. between 31 January 2020 to 31 December 2020. It will then phase out the registration and ownership of EU domain names coming up to 31 December 2020, however has not yet set out a timetable for doing so.

6.7 Design rights

Design right protect the appearance of a purely functional product. Examples of items protected by design right are functional articles with no aesthetic appeal, such as agricultural tools.

To be protected by a design right, a design must comprise a shape and configuration (i.e. how different parts of a design are arranged together) of objects. They do not protect functionality, which is covered by patent protection. A design must:

- be original, which means that they must not be commonplace in a qualifying country;
- be recorded in a design document or be the subject of an article made to the design; and
- qualify for design right protection by reference to:
    - the designer who is a qualifying person;
    - the employer of the designer who must be a qualifying person; or
    - the first marketing of the articles made to the design has been undertaken by a qualifying person in a qualifying country.

A “qualifying person” means:

- an individual habitually resident in the UK or another qualifying country; or
- a body corporate which:
    - is formed under the law of the UK or another qualifying country; and
    - has a place of business in which substantial business is carried on in a qualifying country.

A “qualifying country” covers the UK, the Channel Islands, the Isle of Man, any other EU member state; and any UK colony or any country designated by the government as qualifying for reciprocal protection. This means that designs created in many other industrialised countries, such as the US and Japan, will not usually qualify for design right protection.

- *Registered designs:*

Registration

Registration of a design right is not required but is recommended. The designer has a 12-month ‘grace period’ after disclosure of the design to the public in which to file his/ her application for a design with the UK-IPO, and the main elements of registrable design are as follows:

- a product. Registered designs can protect the whole or part of a product arising from the features of, in particular, the lines, contours, colours, shape, texture or materials of the product or its ornamentation. This includes both three-dimensional designs (such as an article/product) and two-dimensional designs (such as a surface pattern).
- the design must be new. An identical or very similar design must not have been disclosed to the public anywhere else in the world prior to the application, unless:
    - the disclosure could not reasonably have become known in the normal course of business to persons specialising in the sector concerned who carry on business in the UK;
    - the disclosure is unlawful because, for example, it was stolen or disclosed contrary to a confidentiality agreement; and
    - the disclosure was within the 'grace period' allowed to the designer.

- the design must have “individual character”. This means that it must give a different overall impression from earlier designs to the informed user who is familiar with other products within the field.

Duration

Registered designs last for up to 25 years, and must be renewed every five years.

Ownership

The person/company who is listed as the proprietor on the registration certificate is the legal owner of the design right.

The owner has the exclusive right to use the design, extending to manufacturing, dealing in, importing, exporting, stocking and using a product incorporating the design.

Infringement

Design right infringement occurs where an unauthorised third party does anything which infringes the registered proprietor’s exclusive right to use the design or any design which does not produce a different impression on the informed user.

Therefore infringement is not limited to the exact design, but also applies to similar designs, and is not limited to the original article. For example, a design originally produced on tableware could be infringed if reproduced on wallpaper.

Exploitation

Design rights can be assigned or licensed to a third party.

Assignments must be recorded in writing, and signed by or on behalf of the person assigning the right in order for it to be effective.

Licences must be made in writing and signed by or on behalf of the licensor. A licensee must register the licence otherwise it will not bind successors in title.

- *Unregistered designs*

Unregistered designs rights automatically arise in the UK on the production of original designs. A design that qualifies for protection is one that is:

- original;
- not commonplace in the UK in the design field in question; and
- recorded in a design document.

Duration

The unregistered design right lasts for 10 years after the first marketing of the design, and up to an overall maximum of 15 years from the date of its creation.

Ownership

In general, the designer or creator of the design is the first owner, subject to the following:

- where the design is created in the course of employment, the designer’s employer will be the first owner; and
- where the design was created before 1 October 2014 because a third party commissioned (and paid for) the creation of the design, the third party will be the first owner unless a contract which says otherwise is in place.

Infringement

Design right infringement occurs where an unauthorised third party does any of the acts that are the exclusive rights of the design owner (as is the case for registered designs).

- *Effect of Brexit on registered Community designs*

The withdrawal agreement sets out the following which will apply after the transition period:

- holders of Registered Community Designs (**RCDs**) which are registered with the EUIPO before the end of the transition period (i.e. before 31 December 2020) will automatically become holders of comparable registered design rights in the UK; and
- after the transition period, separate applications will need to be made with the UK-IPO and the EU-IPO in order to obtain protection in both the UK and the EU.

6.8 Confidential Information

Subsistence

Generally confidential information arises as a result of an obligation imposed by contract (e.g. through a non-disclosure agreement). It may also be implied because of the circumstances of disclosure, i.e. where a reasonable person would have realised that the information was given in confidence.

Confidential information is not registrable in the UK, however it is protected by:

- ensuring that the information is only disclosed in circumstances importing an obligation of confidence; and
- ensuring that access to information is restricted (i.e. kept away from the public domain).

Duration

Confidential information can be protected for as long as it retains its confidential nature, which in theory could be indefinitely. However it is often sensible to check the confidentiality agreement which may be limited in time.

Ownership

The owner of confidential information is usually the only party who has the authority to share it.

Infringement

An obligation of confidentiality can be breached by either disclosing the information to unauthorised recipients, or by using the information for an unauthorised purpose.

Exploitation

The right to use confidential information may be assigned or licenced.

Assignments must be recorded in writing, and signed by or on behalf of the person assigning the right in order for it to be effective.

Although there are no formal requirements for licensing confidential information, it is advisable to enter a written agreement with clear obligations of confidentiality.

A license of confidential information cannot be registered.

6.9 Company names

Company names should be registered at Companies House.

In order to register a company name the company name must:

- not be offensive;
- not imply a connection with a government organisation;
- not include a “sensitive” word (a list of these is on the Companies House website); and
- not be the same as a company name that is already registered.

7. Data protection

Any businesses with operations in the UK involving the collection and processing of personal data must ensure its activities are conducted in accordance with UK data protection legislation, namely the Data Protection Act 2018 (**DPA 2018**) and the "UK GDPR" (as defined in the Data Protection, Privacy and Electronic Communications Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations SI 2019/419).

In particular, the DPA 2018 and the GDPR imposes obligations on businesses dealing with personal data in areas such as:

- information to be given to individuals (privacy policy);
- exports of personal data outside the UK;
- using third parties to conduct data processing;
- IT and physical information security;
- security breach notifications;
- carrying out assessments before using personal data;
- record keeping obligations;
- appointment of a data protection officer (if certain criteria are met);
- rights of individuals to require information to be deleted or transferred; and
- requirements regarding appointing a UK representative (in certain circumstances where businesses are located outside of the UK).

The UK's supervisory authority, namely the Information Commissioner's Office, has the ability to impose administrative fines of up to £17,500,000, or up to 4% of the total worldwide annual turnover of that undertaking for the previous year (whichever is higher). In addition, should a breach of DPA 2018 or the UK GDPR occur, this may cause significant reputational damage and detrimental impact to the value of the business. It is therefore important that businesses have in place policies and procedures to ensure that personal data being processed by the business is compliant with such legislation.

8. Taxation

8.1 Introduction

The structure chosen for establishing a business in the UK is likely to be influenced by taxation considerations. This section gives an outline of the principal UK tax considerations relevant to trading in the UK through a subsidiary or a branch. As it is far less common to establish a UK presence by using a partnership such entities are not considered here. What follows must be seen as a general summary only and detailed advice should be taken in every individual case.

8.2 Principles of tax law

- *Corporation Tax*

A company resident in the UK is obliged to pay Corporation Tax on its worldwide profits. A company is considered resident in the UK if:

- it was registered in the UK; or
- the central management and control of the company take place in the UK.

If a company is not resident in the UK it is liable for UK Corporation Tax on any trading

profits generated by a “permanent establishment” it has in the UK (a permanent establishment is essentially a fixed place of business and certain dependent agents).

Under UK domestic law and most double tax treaties, branches in the UK are regarded as a permanent establishment. Foreign companies will therefore normally be subject to UK Corporation Tax to the extent that their profits are attributable to the operation of their UK branch.

Non-UK resident companies are subject to Corporation Tax on certain profits from property trading and development even if not conducted through a UK permanent establishment.

Non-UK resident companies are also subject to Corporation Tax on chargeable gains realised on the disposal of any UK real property. Corporation Tax may be additionally charged on non-UK resident companies in respect of UK property income.

The full rate of Corporation Tax is currently 19% for all companies on all profits (except for what are known as ring-fenced profits which apply to certain businesses).

A non-UK resident company that carries on a trade within the UK without a UK permanent establishment may be subject to Income Tax. If such a company is resident in a jurisdiction which has a double tax treaty with the UK then it is unlikely that the trading activity will give rise to an Income Tax liability.

- *Capital allowances and reliefs*

When calculating the taxable profits of a subsidiary or branch in the UK for Corporation Tax purposes, there are certain ways of reducing the liability for taxation:

- *Capital allowances (UK tax depreciation)*

Depreciation is available in respect of the acquisition of certain assets for tax purposes through the capital allowances regime. The aim is to promote the modernisation and re-equipping of businesses. In general terms a writing-down allowance (**WDA**) of 18% is given. An allowance of 6% is given for expenditure on certain assets (including long life assets and what are known as “integral features”). Businesses may also qualify for a 100% “annual investment allowance” (**AIA**) on expenditure on plant and machinery. From 1 January 2019, the AIA limit for qualifying expenditure incurred after that date until 31 December 2021 is temporarily increased to £1,000,000. From 1 January 2022 will revert to £200,000.

Two temporary first-year allowances were announced at the Spring 2021 Budget and included in the Finance Act 2021:

One is known as the “super-deduction” and the other the “SR allowance”.

The super-deduction allows companies within the charge to Corporation Tax to deduct 130% of expenditure on qualifying plant and machinery that would otherwise attract WDAs at the main pool rate of 18% a year.

The SR allowance allows companies within the charge to corporation tax to deduct 50% of the expenditure on qualifying plant and machinery that would otherwise attract WDAs at the special pool rate of 6% a year.

Expenditure incurred on plant and machinery qualifies for either the super-deduction or the SR allowance if specified conditions are met, most of which are common to both allowances.

The common conditions are that:

- the expenditure must be incurred on or after 1 April 2021 and before 1 April 2023.
- the expenditure must be incurred by a company within the charge to Corporation Tax.
- the plant or machinery must be unused and not second-hand.

- the expenditure must not be within a number of general exclusions.

There is also a “structure and buildings” allowance available for expenditure on the construction, renovation and conversion of certain non-residential property. This allowance is set at 3%.

- *Trading losses*

Trading losses can be set off against total profits (including from trading and asset disposals) during the same accounting year or against total profits from the previous accounting year.

The Finance Act 2021 extends the current 12-month carry-back to three years for losses incurred in a trade in an accounting period ending in the period 1 April 2020 and 31 March 2021 (2020 claim) and 1 April 2021 and 31 March 2022 (2021 claim), subject to a number of conditions.

While the carry-back to the previous 12 months remains unlimited, the carry-back to the second and third years is subject to a £2 million cap.

A company’s losses can also be carried forward for a certain period and set off against total profits. However, if the company’s (or if applicable, its relevant group’s) total profits exceed £5m, only 50% of the excess profits can be reduced by carried-forward losses.

Subject to certain conditions, one company’s losses can be set off against the profits of another company in its group of companies (this is called “group relief”).

- *Capital losses*

Generally, losses on the disposal of capital assets can be set off against capital gains for the current year or future gains. The ability to carry forward such losses is subject to the same restriction detailed above which relates to trading losses. There is a form of group relief as well.

8.3 Tax advantages of groups

Groups of companies can take advantage of what are called group tax provisions, affecting such matters as intra-group transfers of assets and VAT.

Such a group may include companies that are not resident in the UK, but complex rules apply as to when losses are made by non-resident companies which may be utilised by a UK resident company.

A group of companies enjoys the following major tax advantages:

- one company's trading losses can be set off against another company's income and gains from asset disposals during the same accounting year;
- capital assets can be transferred between members of the group without incurring tax liability;
- disposals by one company in a group can by election be ascribed to another group company for the purposes of Corporation Tax on capital gains; and
- investment companies’ management expenses can be set off against the profits made by another group member company in the same accounting year in certain circumstances.

8.4 Taxation of intra-group interest costs

- *Branch*

Interest on borrowings by the company for the purposes of the branch may attract relief.

- *Subsidiary*

In principle, interest payments made by a UK resident company to a foreign company are deductible in calculating taxable profits (but there are a number of specific anti-avoidance rules restricting the availability of tax relief for interest including transfer pricing – see below).

In addition, as of 1 April 2017 there are new provisions restricting the ability of a group to deduct interest expenditure on loans from its taxable profits.

These interest deductibility rules are broad and detailed. Broadly speaking, the rules allow a group to deduct up to £2m of net interest expense when calculating taxable profits.

Beyond this minimum level, the amount of interest deductible is the higher of:

- 30% of the "tax" earnings before interest, tax, depreciation and amortisation (**EBITDA**); and
- a percentage based on the group's worldwide net interest finance expense relative to its EBITDA.

Interest which is not deducted at all can be carried forward for five years and set against taxable profits. Interest which has been disallowed because it is above the threshold set out in the new rules can be carried forward indefinitely.

In relation to withholding tax on interest payments referred to above, companies making such interest payments have to retain tax at the basic rate of Income Tax (currently 20%) and account for the payments to HM Revenue & Customs. The obligation to withhold tax may not apply if there is a double tax treaty in force between the UK and the country in which the recipient is resident. The obligation may also not apply if the loan made to the company is broadly one which is listed as a security on a relevant stock exchange or is a "private placement" satisfying certain regulations.

8.5 Value Added Tax (VAT)

VAT is a value-added tax on consumer spending which is governed by standard conditions throughout the European Union. VAT is normally payable on goods purchased, on services performed in the UK and on some real estate and rent transactions, as well as on goods and services imported into the UK.

Any business whose taxable turnover for the previous 12 months exceeds £85,000 per annum, or which is anticipated to exceed that figure in the next 30 days, is obliged to register with HM Revenue & Customs. VAT at the rate of 20% is calculated on the value of the supply. Items such as some food, books, children's clothing, transport and certain exports qualify for a zero rate. Any supply which is not expressly VAT-exempt is deemed taxable. The standard rate of VAT is 20%. Other rates apply in particular circumstances.

The VAT chargeable on taxable supplies made by a business is referred to as "output tax". VAT will conversely be incurred on goods and services received from other taxable persons ("input tax"). Input tax can be set off against the output tax and the balance is then paid to HM Revenue & Customs, normally quarterly. An excess of input tax over output tax results in a repayment from HM Revenue & Customs to the business. Inputs can only be claimed if they relate to fully taxable or zero rated, but not to exempt, supplies which are exempt from VAT.

Failure to register and account for VAT in accordance with a strict regime incurs heavy penalties and it is essential that those who carry on business in the UK or conduct property transactions ensure that their VAT affairs are properly dealt with.

8.6 Distribution of profits

- *Subsidiaries*

There is generally no withholding tax on payments of dividends by a UK company

Dividends received by non-residents will be taxable in accordance with the rules in their country of residence, but will not be taxable in the UK. An overseas company may be entitled to a credit for UK taxation borne by a UK company in which it is a shareholder on profits distributed to it. Pursuant to some double tax treaties, a non-resident shareholder of a UK company may be exempt in its country of residence on UK dividends.

- *Branches*

A UK branch of an overseas company will pay Corporation Tax on its profits. Since a branch is not treated, except for limited purposes, as a separate legal entity from the foreign corporation, the branch will not pay a "dividend" to the parent. The overseas company may be entitled to relief in its own jurisdiction for tax paid in the UK.

8.7 Transfer pricing

Anti-avoidance legislation exists to prevent arrangements under which the UK operation charges artificially low prices to, or is charged artificially high prices by, foreign affiliates. The transfer pricing regime is in line with OECD guidelines. It will broadly apply where the actual provisions in a transaction differ from the provisions which would have been made at arm's length between independent enterprises as a result of which a potential advantage in relation to UK taxation is conferred. Transactions for this purpose are widely defined and include interest payments. This could lead to interest payments of thinly capitalised subsidiaries being disallowed as deductions in calculating taxable profits of the subsidiary. Careful record-keeping may be required to provide evidence on which pricing is based.

8.8 Stamp Duty

Stamp Duty is chargeable at a rate of 0.5% on instruments transferring shares, marketable securities and partnerships comprised of these assets.

Stamp Duty Land Tax (**SDLT**) is payable on transfers of real estate. Please refer to paragraph 11.6 for further details on SDLT.

9. Employment law

9.1 Employee, worker or independent contractor?

Generally, an individual working for a business in the UK may provide his or her services as (i) an employee under a contract of employment, (ii) a worker who, under a contract, provides services, or (iii) a self-employed independent contractor. These distinctions can be important and will be decided on the facts of the case and not simply on what the parties agree to call the arrangement. Some examples of these distinctions are that:

- employees are protected by all statutory rights whereas workers and independent contractors will only be protected in limited areas such as discrimination. These statutory rights are in addition to contractual rights;
- an employer may be vicariously liable for the wrongful acts of its employee but is less likely to be liable for those of a worker or independent contractor; and
- the tax implications are different depending on whether an individual is employed (or a worker) or self-employed. For medium and large companies, since April 2021, there have also been additional requirements to assess the tax status of independent contractors engaged through intermediary companies.

Due to the wording of various statutory provisions, it is important to note that an employee is a worker but a worker is not necessarily an employee.

This is an issue that has become increasingly relevant in light of the rise of the, so-called, "gig-economy" and increased use of flexible working arrangements.

9.2 Recruitment

Certain aspects of employment law operate even at the recruitment stage, before an individual becomes an employee. When deciding whom to employ, and in the arrangements made during the recruitment process, an employer must not discriminate against a job applicant on the basis of "protected characteristics" under the Equality Act 2010 (see paragraph 8.9) or trade union activities or membership. Also, employers should not take into account criminal offences which are "spent" under the Rehabilitation of Offenders Act 1974.

Employers should be able to show that they took all reasonable steps to avoid discrimination, such as ensuring that recruitment processes are carried out in accordance with any relevant recruitment or equal opportunities policy.

9.3 Written terms of employment or engagement

In general, there is no requirement that a contract of employment or engagement must be in writing although it is advisable that it is. However, legislation provides that employees and workers must be given a written statement setting out certain terms of his or her employment or engagement before they start work. Often, this written statement stands as the contract of employment.

The written statement should include, among other things, details of the job title, place of work, hours of work, holiday entitlement, sick pay entitlement, pensions, notice entitlement, date of commencement of employment, any probationary period, grievance and disciplinary procedures, salary, benefits offered by the company, required training, forms of paid leave, unpaid leave provisions and dates upon which payment is made.

The employer should be aware that it should be registered with HM Revenue & Customs, in order that tax and National Insurance Contributions on employees' salaries and workers' fees can be paid.

9.4 Notice periods

There are statutory minimum periods of notice of termination of employment which must be given to an employee. The length of the notice period is linked to the employee's length of service. Employees with between one month's and two years' continuous service are entitled to one week's statutory notice. Employees with over two years' service are entitled to one week's notice for each complete year of service, up to a maximum of 12 weeks' notice after 12 years. Employers are free to agree longer notice periods with their employees, in their contracts of employment.

9.5 Changing terms and conditions

The contract of employment cannot usually be changed by the employer without the employee's consent. If a significant change is made unilaterally in the conditions of employment (for example, to the place of work or job duties) an employee may be entitled to resign and claim constructive dismissal if he or she has not consented to the change. Legal advice should be taken before changing an employee's contract of employment.

9.6 48 hour week

Legislation regarding working time was introduced in the UK in order to implement the provisions of the European Working Time Directive. The provisions are complex but the main effect is to ensure that workers are not required to work more than 48 hours per week on average over a reference period of 17 weeks, unless the worker has signed an "opt-out"

confirming that this limit will not apply to him or her. Workers are also entitled to a minimum of 5.6 weeks' paid leave each year. Note that these rules apply to the broader category of "workers" and not just "employees".

9.7 Termination

- *Wrongful dismissal (contractual)*

An employee will usually be entitled to receive notice of the termination of his or her contract, unless, for example, they are dismissed for gross misconduct. If such notice is not given, the employee will be entitled to claim wrongful dismissal (breach of contract) against his or her employer and, if successful, can recover damages based on the salary and other benefits he or she would have received had the requisite amount of notice been given. Contracts can outline certain circumstances in which employers are entitled to:

- terminate employment immediately and pay the employee in lieu of notice; and
- terminate employment immediately without notice or payment in lieu. Such circumstances generally relate to gross misconduct by employees.

Such employees may also be able to claim unfair dismissal (see below).

- *Constructive dismissal (contractual and statutory)*

A constructive dismissal occurs where the employer commits a "repudiatory breach" of the employee's contract of employment which entitles the employee to resign and claim that he or she has been dismissed. Where an employee can show that he or she has been constructively dismissed, he or she will have both a contractual claim for breach of contract and a statutory claim for unfair dismissal.

- *Unfair dismissal (statutory*)

In general, any employee who has been employed for a continuous period of not less than two years will have the right not to be "unfairly" dismissed. Unfair dismissal will arise where:

- an employee has been dismissed for a reason which is not one of the following potentially fair reasons: conduct, capability, redundancy, inability to comply with a statutory requirement or some other substantial reason (which tribunals have accepted as including, for example, a breakdown of trust and confidence between employer and employee);
- the employer has not acted reasonably in treating that as the reason for the employee's dismissal; or
- the employer has not followed a fair procedure in effecting the employee's dismissal.

The ACAS Code of Practice on Disciplinary and Grievance Procedures (**ACAS Code**) (see 8.10) published by the Advisory, Conciliation and Arbitration Service outlines the statutory procedures which must be complied with for dismissals by reason of poor performance or conduct. Both the employer and the employee have obligations under the ACAS Code. Should an employee bring a claim for unfair dismissal and either party has not complied with the procedures of the ACAS Code, the tribunal has the discretion to increase or decrease the award made to the employee by up to 25%. The procedures in all other cases will depend on the facts. Advice should always be sought when considering whether or not to dismiss an employee.

Where employees consider that they have been unfairly dismissed, they are able to bring a claim for unfair dismissal in an Employment Tribunal. If they are successful, the Employment Tribunal can (i) order the employer to reinstate the employee to the same job, (ii) order the employer to give the employee a comparable job, or (iii) (as is most common) award compensation to the employee. The compensation award is divided into the basic

award and the compensatory award, which are currently capped (in most cases) at £16,320 and £89,493 respectively.[1]

9.8 Redundancy payments

Employees who have at least two years' continuous employment are entitled to receive a statutory redundancy payment, if dismissed by reason of redundancy. This payment is calculated as follows:

- one and a half weeks' pay for each complete year of service after reaching the age of 41;
- one week's pay for each complete year of service between the ages of 22 and 40; and
- half a week's pay for each complete year of service under the age of 22.

A week's gross pay is currently capped at £544[2] and the maximum number of years' service is capped at 20. The week's gross pay figure is usually increased annually.

9.9 Discrimination

- *Equality Act 2010*

The Equality Act 2010 is concerned with discrimination based on nine "protected characteristics": age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

Its protection extends to a range of individuals, including employees, workers, job applicants and partners in a firm. Such individuals are protected from discrimination or other unlawful conduct which takes place because of a protected characteristic, namely:

- **Direct discrimination**: less favourable treatment compared to others because of a protected characteristic.
- **Indirect discrimination**: this aspect is intended to cover acts, decisions or policies (broadly speaking) which are not intended to treat anyone less favourably, but which in practice have the effect of disadvantaging a group of people with a particular protected characteristic. Where such an action disadvantages an individual with that characteristic, it will amount to indirect discrimination unless it can be objectively justified.
- **Harassment**: where someone is subjected to unwanted conduct related to a relevant protected characteristic which has the purpose or effect of either violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.
- **Victimisation**: this aspect is intended to protect individuals who have undertaken "protected acts" such as bringing discrimination claims, complaining about harassment or getting involved in someone else's discrimination claim; protection is afforded where someone is subjected to a detriment because they have done a protected act or because the employer believes they have done or may do a protected act.

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[1] Please note these figures are accurate until 5 April 2022 when they are likely to increase.

[2] Please note these figures are accurate until 5 April 2022 when they are likely to increase.

- *When discrimination may be lawful*

There are a few exceptions or defences which may be used when facing discrimination claims:

- **Occupational requirement**: generally, this is available where the nature or context of work requires that the person performing it be of a particular sex, race, disability, religion or belief, sexual orientation or age. However, the occupational requirement must be a proportionate means of achieving a legitimate aim.
- **Objective justification**: in limited circumstances, employers can avoid liability for discriminatory acts if they can prove that such acts were to achieve a legitimate aim based on real business needs and that such acts were proportionate means of achieving that aim.

- *Why is discrimination of such concern to employers?*

Unlike unfair dismissal, there is no minimum length of service which must be accrued for one to become eligible for protection from discrimination. This benefit arises at the outset of the working relationship. Another distinction from unfair dismissal claims is that there is no limit on the amount of compensation that an Employment Tribunal can award a successful claimant in discrimination claims.

9.10 Disciplinary and grievance procedures – ACAS Code of Practice

- *Grievances*

Under the ACAS Code, employees who have a grievance should raise the issue in writing with their employer if it cannot be resolved informally. A failure to raise a grievance in writing does not prevent an employee from bringing a claim in the Employment Tribunal, although it may result in any compensation awarded being reduced.

If an employee does raise a grievance in writing, a meeting should be held to allow the employee to explain his or her grievance and how he or she thinks it should be resolved. The employee has a statutory right to be accompanied to the meeting by a colleague or trade union official. The employer should communicate its decision in writing and inform the employee that he or she has a right to appeal against the outcome by setting out the grounds of his or her appeal in writing. If an appeal is raised, the employee must be invited to a further meeting to consider it which should (if possible) be conducted by a manager who has not been previously involved. The employee should be informed in advance of the time and place of the appeal meeting and may bring a companion. The employer should communicate the final appeal decision in writing without unreasonable delay.

- *Disciplinary and poor performance issues*

When deciding whether an employee has been unfairly dismissed for misconduct or poor performance, an employment tribunal will consider whether the employer has followed a fair procedure. In doing so, it must take account of any provisions of the ACAS Code that appear to be relevant.

The ACAS Code applies only to disciplinary situations. This includes misconduct and poor performance, but explicitly excludes redundancy and termination of fixed term contracts.

Best practice under the ACAS Code can be summarised as follows:

- the employer should investigate the issue. This may involve investigatory meetings with the employee under investigation or it may simply involve the collation of other evidence. Any investigatory meeting should not result in disciplinary action without a disciplinary hearing;

- the employer should then inform the employee of the issues in writing in enough detail to allow them to respond at a disciplinary hearing. The potential consequences (including dismissal) of the alleged poor performance/misconduct should be set out;
- there should then be a disciplinary hearing. At the hearing, the employer should explain the allegations and go through the evidence. The employee should be allowed to present his or her case, ask questions, present evidence and call relevant witnesses. The employee has the right to be accompanied by a work colleague or trade union representative;
- the employer should inform the employee of the decision in writing; and
- the employee has the right of appeal. This should be exercised in writing and the appeal should be heard promptly.

Compensation may be adjusted by up to 25% where an employer has failed to follow the ACAS Code.

9.11 Duties of the employee

The employee owes the following implied duties to his or her employer:

- to be ready and willing to work;
- to use reasonable care and skill (incompetence may justify dismissal by the employer);
- to obey lawful and reasonable orders;
- to take care of his or her employer's property; and
- to give honest and faithful service.

9.12 Duties of the employer

Employers are also under certain implied duties to their employees, for example:

- to pay wages;
- (in certain cases) to provide work;
- to observe provisions relating to sick pay, holidays and hours of work;
- to insure employees in respect of injury at work; and
- to ensure, so far as is reasonably practicable, the health and safety and welfare at work of all employees.

9.13 Family-orientated rules in employment law

- *Maternity leave and pay*

The entitlements and conditions set out below apply to all pregnant employees.

Antenatal care

A pregnant employee is entitled to reasonable time off work, during working hours, for antenatal care, provided that this is on the advice of her doctor, midwife or health visitor and she provides the necessary documentation and notification to explain her attendance. The employee must continue to be paid, at her full rate of pay, during her absence.

Ordinary maternity leave

Irrespective of her length of service, a pregnant employee is entitled to 26 weeks' ordinary maternity leave (**OML**), provided that she complies with the following requirements:

- she must notify her employer in writing by the 15th week before her expected week of childbirth (**EWC**) of the fact that she is pregnant, her EWC and the date on which she wishes her OML to start;

- if she wishes to change the date on which she proposes to start her maternity leave, she must give the employer 28 days' written notice in advance;
- she must provide to her employer a certificate confirming her EWC, usually by way of form MAT B1 issued by her midwife or doctor; and
- she may start her OML at any time from the beginning of the 11th week before her EWC.

After OML, the employee is entitled to return to the job in which she was employed before her absence.

Additional maternity leave

An employee also has a right to take additional maternity leave (**AML**) for 26 weeks commencing the day after her OML ends. The employee is entitled to return from AML to the job in which she was employed before her absence or, if it is not reasonably practicable for the employer to permit her to return to that job, to a job which is both suitable for her and appropriate for her to do in the circumstances.

Terms and conditions of employment

With the exception of remuneration, in general the terms and conditions of the employee's employment will be maintained during maternity leave e.g. she will continue to accrue holiday entitlement and she will remain entitled to her contractual benefits.

Working during maternity leave – "keeping in touch days"

If the employer and employee agree, the employee will be able to work for up to ten days during the maternity leave period without losing the right to leave or statutory maternity pay. There will be no compulsion to have these days and, if the employee decides she does not wish to attend any keeping in touch days, she will be protected from any detriment suffered. An employer will also be entitled to make reasonable contact with the employee on maternity leave.

*Statutory maternity pay (**SMP**)*

An employee who has been continuously employed by her employer for at least 26 weeks by the 15th week before the EWC will be entitled to be paid SMP for a period of 39 weeks, which is to run concurrently with her OML period and then for part of the AML period. For the first six weeks, SMP is at the rate of 90% of the employee's normal weekly earnings. For the remaining 33 weeks of maternity leave, the employee will be entitled to be paid at the statutory rate, which is the lesser of (i) 90% of her average weekly earnings and (ii) the rate prescribed from time to time in statutory regulations (currently £151.97 per week[3]).

Employers' recovery of SMP

Employers may be entitled to recover some or all of the SMP from HM Revenue & Customs.

- *Additional regulations*

There are also entitlements to ordinary paternity leave (two weeks), shared parental leave (up to 50 weeks if the mother has returned to work), adoption leave (up to 52 weeks), parental leave (up to 13 weeks) and parental bereavement leave (up to two weeks).

[3] Please note these figures are accurate until 5 April 2022 when they are likely to increase.

- *Flexible working*

All employees who have at least 26 weeks' continuous service have the right to apply for flexible working. This may involve changing their hours of work, the days that they work or working from home.

Employers must consider an application in a reasonable manner, which will usually involve meeting with the employee to discuss it. A response must be given to the employee within three months. Employers may only reject applications for one or more of eight specific reasons, including the burden of additional costs or detrimental impact on performance.

9.14 Transfer of Undertakings (Protection of Employees) Regulations 2006 (TUPE)

TUPE applies to protect employees (i) on the transfer of a business as a going concern and (ii) in most outsourcing situations, and has the following effects:

- all employees of the seller (**transferor**) automatically become the employees of the buyer (**transferee**) on their existing terms of employment, without breaking their continuity of service;
- all rights, powers, duties and liabilities under the employment contract pass to the transferee;
- contract changes are only possible in limited cases;
- employees may refuse to transfer to the buyer, but the effect is to terminate their employment without any right to compensation; and
- any dismissal will be automatically unfair where the sole or principal reason for the dismissal is the transfer itself, unless there is an economic, technical or organisational reason entailing changes in the work force.

The employees or their representative must be informed and consulted about the transfer before it takes place. Failure to comply can lead to awards in the Employment Tribunal of up to 13 weeks' pay for each affected employee.

9.15 Pensions

All UK employers must automatically enrol all of their employees into a pension scheme. Employers can either use their own pension scheme or the new government established scheme, the National Employment Savings Trust. They will also be required to make minimum contributions to the pension scheme of all auto-enrolled employees. These minimum contributions are currently 3% of a jobholder's "qualifying earnings" (that is earnings between £6,240 and £50,270 inclusive of all bonuses, overtime and statutory maternity, paternity and adoption pay). Employees must contribute 5% of their earnings.

Employees may "opt out" of their employer's pension scheme if they wish, but must do so on an annual basis.

9.16 Minimum wage

All employees in the UK must be paid at least the National Minimum Wage. Currently employees who are aged 23 and over must be paid a minimum wage of £8.91 per hour and employees who are aged 21 to 22 must be paid at least £8.36 before deduction of tax and National Insurance Contributions. There are further minimum wages that must be paid to younger employees. The National Minimum Wage usually increases on 1 April each year.

9.17 Holiday entitlement

All employees and workers are entitled to 5.6 weeks' paid holiday per annum. For part time workers, this entitlement is reduced pro rata according to the number of days worked each week. Where employers allow (or even require) workers to take leave on public holidays, this may count against statutory leave. Despite this, many employers give paid holiday on

public holidays in addition to the statutory leave. It is common in the UK for employees' contracts to stipulate 20 or 25 days' holiday, plus bank holidays or time off in lieu.

Holiday entitlement accrues on a pro rata basis during the holiday year.

If an employee leaves employment before taking his or her statutory entitlement to annual leave he or she must be paid for the accrued holiday entitlement not yet taken. Equally, if an employee takes more holiday than he or she is entitled to take in the period before termination of employment an employer is entitled to deduct the overpayment from salary, provided that the employee has signed a written agreement permitting the employer to make such deductions.

10. Immigration

As a general guide, anyone coming to the UK who is not a British or Irish Citizen must ensure that they have the appropriate permission to be here. The rules depend on the individual's nationality, how long they intend to stay and what they intend to do in the UK.

Points-Based System

Since its introduction, the Home Office's Points-Based System has replaced the previous range of immigration routes (over 80 or so), for those seeking to enter the UK for employment, to invest in the UK, to set up a business or study in the UK. With a few exceptions entry under the Points-Based System leads to eligibility to apply for settlement and thereafter for UK nationality. The immigration system went through substantive changes from December 2020 due to Brexit.

The Points-Based System is comprised of five categories (of which two are still called "Tiers") which are as follows:

The investor/business category is the only part of the regime which does not require applicants to be sponsored either by an employer or an education provider. It has three subcategories: Investor, Start Up/Innovator, and Global Talent. The Investor category is for people of substantial financial means making an investment in the UK. The minimum investment requirement is £2m which must then be invested in a permitted and prescribed investment. This category allows those who enter the UK as investors to take up employment or establish business in the UK although they are not required to do so. The Start Up and Innovator categories are for those individuals wishing to establish a business in the UK, who are able to obtain endorsement from a Home Office approved endorsing body and, for Innovators, have access to £50,000 to invest in the business. Tier 1 (Global Talent) is for individuals with "exceptional talent" or "exceptional promise" in the fields of science and medicine, humanities, engineering, arts and culture, digital technology, fashion, architecture, film and television and research.

The sponsored category is for skilled workers sponsored by employers holding a sponsor licence issued by the Home Office to come to the UK either in order to fill a job for which no suitable employee is available from the resident labour market (Skilled Workers), or for people already working for a company overseas who are required to join their employer's UK office on a temporary basis (Intra Company Transfer). Additionally, sponsorship has separate subcategories for Ministers of Religion and for Creative and Sporting.

Tier 3 is currently suspended.

The student category is for those wishing to study in the UK. Student and Child Students have to be sponsored by a college or a school (in the case of Child Students) which has been granted a student sponsor licence by the Home Office.

Tier 5 has subcategories including: Tier 5 (Youth Mobility), enabling young people aged 18 to 30 from Australia, Canada, Japan, New Zealand, Monaco, Hong Kong, the Republic of

Korea and Taiwan to live and work in the UK for a period of two years, and Tier 5 (Temporary Workers), for those sponsored by licensed UK employers to come to the UK on a temporary basis.

There are some other types of visa which have remained outside the Points-Based System, such as Representative of an Overseas Business which allows overseas companies to send a senior employee, who is not a majority shareholder, to establish the company's first branch or wholly owned subsidiary in the UK. In addition, Ancestry visas are available for those who can demonstrate the required British ancestry (only from certain commonwealth nationalities) and wish to work in the UK.

Immigration law has become increasingly complex and difficult to navigate. The requirements for eligibility under each category/Tier are subject to frequent variation. Keeping abreast of the law is therefore a full-time occupation and there are many pitfalls for the unwary. Anyone making an application under the Points-Based System (or any other immigration category) is strongly advised to obtain professional legal advice.

11. Real estate law

11.1 Types of ownership

Real estate in England and Wales (the position in Scotland and Northern Ireland is different, and is not covered in this brochure) may be any of the following:

- *Freehold*

Freehold real estate is the absolute property of its owner, subject to any rights and title covenants in favour of third parties. These may affect how the real estate is used.

- *Leasehold*

Leasehold real estate is held under a lease for a fixed period of time, usually subject to the payment of rent and the performance of obligations or covenants contained in the lease. The terms of the lease will dictate whether or not the tenant is entitled to transfer its interest to a third party or whether it can sublet either the whole or part of the property.

- *Commonhold*

This is a relatively new type of real estate ownership. It allows perpetual "strata" ownership of a multi-occupied property by the individual unitholders, with joint responsibility over common areas and facilities. However, commonhold has, for various reasons, failed to gain traction in the marketplace and is rarely used. Residential apartments are, therefore, almost always owned under a long lease.

11.2 Constraints on development

- *Town planning legislation*

Development may generally not be undertaken without planning permission obtained under the Town and Country Planning Act 1990 (although there are various exceptions).

"Development" may take one of two forms:

- the making of a material change in the use of land or of an existing building; or
- the erection of new buildings or the extension or other alteration of existing buildings (and, in some cases, the demolition of an existing building).

Applications for planning permission are made to the local planning authority in the first instance and there is a right of appeal to the Planning Inspectorate against a refusal of permission.

Certain additional controls apply if development is proposed within a conservation area or if listed buildings are affected.

- *Other controls*

The development and use of buildings may be governed by other statutory controls which regulate the quality and form of construction. Building regulations cover the technical standard that building works need to meet and the procedures that need to be followed.

In the case of leasehold land, the lease may have controls on both kinds of development.

11.3 Individual stages in a real estate purchase

It is customary for real estate to be sold by a two-stage process. Firstly, the parties enter into a contract in which the seller agrees to sell the property to the buyer. This process, known as "exchange of contracts" has the effect of passing the beneficial interest in the property to the buyer. In the second stage, typically about 28 days later, the seller transfers the legal title to the buyer. This is known as "completion". It is possible, however, for the parties to proceed straight to completion and this is sometimes done when timing is critical.

- *Before signing the purchase contract*

After the buyer's offer has been accepted, but before the purchase contract is "exchanged" (i.e. becomes legally binding), the buyer's solicitors will negotiate with the solicitors acting for the seller and also conduct investigations relating to various matters, such as:

- the form of the purchase contract;
- the title documents, including any leases and other matters subject to which the real estate is being sold; and
- searches with various local authorities or statutory bodies to ascertain matters which may affect the real estate or its use, including environmental matters.

It is important to note that, during this investigatory period, the seller of the real estate as a general rule is not contractually bound to the buyer and is free to deal with other prospective buyers. It may be possible, however, to negotiate an exclusivity agreement which will prevent the seller from negotiating with a third party for a limited period of time.

A prudent buyer should always commission a structural survey of the real estate and this should be carried out prior to any exchange of contracts, as generally no warranties are given by the seller as to the state and condition of the real estate. It may also be advisable for the buyer to have soil or other technical investigations made, particularly where a development site is being acquired or where it is possible that the real estate has been used for purposes causing contamination. Environmental protection legislation may require the owner of a contaminated site to incur substantial clean-up costs in respect of waste left by a previous owner and a tenant could potentially be liable for such matters under the terms of the lease either directly or indirectly through the service charge.

- *Exchange of contracts*

Once the contract has been negotiated and agreed and the buyer's investigations have been completed, the parties will then proceed to "exchange" formal written contracts. It is usual for a buyer to pay a deposit, often but not always of 10% of the purchase price on exchange, which sum is liable to be forfeited if the buyer does not complete the purchase. Completion of the actual transfer of the real estate follows after a pre-agreed period of time following exchange of contracts, typically about 28 days.

Once contracts have been exchanged, both parties, subject to the terms of the contract, become bound to continue with the transaction and neither party can withdraw. Where the buyer is borrowing all or part of the price, it is highly advisable that the lender's financial

commitment is in place before exchange of contracts. The buyer may also need to arrange insurance as from exchange of contracts.

- *Registration of the buyer's title*

Following completion, the buyer's solicitor will pay any Stamp Duty Land Tax (**SDLT**) (or, for properties in Wales, Land Transaction Tax (**LTT**)) due on the purchase and apply to HM Land Registry to have the change of ownership and any mortgage registered. If the buyer is a company, any mortgage will also be registered at Companies House.

11.4 Lender's requirements

Each lender's requirements will vary depending on the real estate, the identity of the borrower and the nature of the transaction but, as a general rule, on investment real estate a lender will require the following:

- a satisfactory valuation from the lender's valuers;
- a satisfactory report on title from the lender's solicitors confirming that the lender will obtain a good and marketable title to the real estate;
- full information about the proposed borrower, including company accounts (where applicable); and
- where the real estate is bought as an investment, details of the occupiers of the real estate and the passing rents.

11.5 Leasing of commercial premises

Leases of commercial real estate generally fall into one of two categories:

- a building or "ground" lease at a premium for a long period, usually at least 125 years, possibly acquired as a capital investment to be sublet to occupational subtenants; or
- an occupational lease for a shorter term (say, up to 25 years but often these days mch shorter) at an open market rent.

Long-term leases of commercial real estate are not uncommon, especially where there are plant and machinery tax benefits (capital allowances) that the freeholder wishes to retain or where the freeholder will not willingly part with the freehold. Residential apartments are also owned by means of a long lease.

The liabilities of a tenant will depend on what is agreed between landlord and tenant and are subject to negotiation. Generally, however, an occupational tenant would expect to be responsible for the costs of repairs, insurance, business rates (local taxes) and outgoings. There may also be an obligation to contribute by way of service charge for services provided by the landlord. The lease is also likely to prevent the tenant from making substantial alterations. It may also prevent the tenant from subletting or disposing of the lease to a new tenant without the landlord's prior written consent.

The rent under an occupational lease generally reflects the open market letting value of the premises and, depending on the length of lease term, there may be rent reviews at predetermined intervals (typically five years). The rent under a building or ground lease, however, is usually nominal, reflecting the fact that a capital premium has been paid on the grant of the lease.

The occupying tenant of business premises often has a statutory right to renew the lease on the expiry of the contractual term. This right can be excluded by agreement between the landlord and tenant by following a prescribed procedure. Most underleases and short-term leases (e.g. five years or less) will exclude the right to renew.

Depending on the state of the market and the particular real estate, the tenant of an occupational lease should seek to negotiate:

- an initial rent-free period;
- an unconditional right to terminate the lease early (a “break right”); and
- a limit on service charge payments.

The first draft of a lease will normally be prepared by the landlord’s solicitor and the terms will be negotiated by the tenant's solicitor, who will make similar searches and enquiries to those on a freehold purchase. A landlord will frequently require security if the tenant is an overseas company or a private limited company. This may take the form of a parent company guarantee or a “rent deposit”. A rent deposit is a sum of money equal to (say) six to 12 months’ rent, held by the landlord, to be used by the landlord in the event of a default by the tenant; it will be returned at the end of the lease or in other agreed circumstances.

Underleases frequently take longer to negotiate because the landlord has to obtain the consent of the ultimate landlord, who will have to approve the terms of the proposed underlease.

A well-advised tenant will also want to commission a survey of the premises, especially where the lease requires the tenant to repair and maintain the structure.

A tenant taking a transfer of a lease from an existing tenant is unlikely to have the opportunity to renegotiate the terms of the lease, but will have to take it on its existing terms.

A tenant who takes a transfer of a lease originally granted before 1 January 1996 is likely to have to remain liable under its terms for the remainder of the lease period, even though it subsequently transfers it to a new tenant, if there is a subsequent default.

An original tenant or a tenant who takes a transfer of a lease granted on or after 1 January 1996 is likely to have to guarantee any new tenant to whom it transfers the lease for the period that that particular tenant remains the tenant, but its guarantee will cease if the new tenant later transfers the lease to another party.

11.6 Tax

This is a major consideration for investors. The taxes that need to be considered include:

- SDLT at rates that differ significantly depending on whether the real estate is commercial or residential.
    - For commercial real estate, the rate of tax is 0% on the first £150,000 of the purchase price, 2% on the next £100,000 and 5% on the remaining amount.
    - For residential real estate, the rates are 0% on the first £125,000 of the purchase price, 2% on the next £125,000, 5% on the next £675,000, 10% on the next £575,000 and 12% on the remaining amount. The relevant rates for purchasers of additional residential real estate (whether a buy-to-let property or a second home), are 3%, 5%, 8%, 13% and 15% respectively.
    - The Government announced that from 1 April 2021, a surcharge of 2% above the regular SDLT rates will be payable by non-residents upon purchases of residential real estate in England and Northern Ireland. This surcharge will apply on top of the additional 3% rate noted immediately above. This is where the purchase is of an additional residence.
    - With regard to leases, a 1% rate of SDLT will be due on the net present value of the rent, above £125,000 (residential) or £150,000 (non-residential/mixed), which is calculated using a formula that takes into account various factors, including the fact that rents to be received in the future have a lower value than

rents received immediately. For commercial leases, where the net present value exceeds £5m, the rate of SDLT for the proportion of the net present value above £5m is 2% rather than 1%.

  - A 15% SDLT rate applies when residential real estate costing more than £500,000 is acquired by certain "non-natural persons" (**NNPs**). These include companies and partnerships with a corporate partner but not trustees. Relief from the 15% charge (with the effect that the rates for purchasers of additional residential real estate noted above apply) may be claimed by NNPs carrying on real estate development or using real estate for commercial renting to third parties.

- In Wales, the land transaction tax (**LTT**) is payable instead of SDLT. The two taxes (and the reliefs that apply) are broadly similar but there are a number of differences.
- Annual Tax on Enveloped Dwellings (**ATED**) has been in effect since 1 April 2013 and is currently payable only in respect of residential properties owned by NNPs worth in excess of £500,000. It is an annual charge of up to £237,400 per year (as at tax year 2021/22), calculated by reference to real estate value bands. Rates increase in line with the Consumer Prices Index each year. Relief may be claimed by NNPs carrying on real estate development or using real estate for commercial renting to third parties, commercial trade purposes or as employee accommodation. A number of conditions apply to the claiming of this ATED relief.
- For interests in UK land (residential or commercial) owned by non-resident individual investors, Non-Resident Capital Gains Tax (**NRCGT**) may be payable at rates of either 18% or 28% (residential property) or 10% or 20% (non-residential property) (rate depends on total UK income and gains) on gains realised on a disposal of the real estate.
- Non-resident individuals are subject to Income Tax on certain profits from UK property trading and development.
- Disposals of direct and indirect interests in UK land (residential or commercial) directly owned by non-resident companies are subject to UK Corporation Tax. The current rate of corporation tax is 19%.
- Disposals of investment assets deriving at least 75% of their value from UK land (commercial or residential) by non-resident persons who have a substantial (25%) indirect interest in the land is also chargeable to NRCGT or Corporation Tax (other conditions apply). For example, disposals of shares in 'property rich' offshore companies are caught.
- Relief from this tax charge for non-residents on disposals of interests in property rich entities may be available. For example, for certain exempt investors and additionally where the real estate in question is used for a trading purpose.
- Income Tax (**IT**) is payable by individuals on rental income. Various deductions are permitted against rental income, including a reduction on an individual's final tax bill of up to 20% of mortgage interest costs.
- Companies are liable to Corporation Tax (**CT**) at 19% on rental income. For companies (or a group of companies), there is a restriction on the deductibility of interest costs which broadly exceed £2,000,000.
- Inheritance Tax (**IHT**): non-UK domiciled individuals ("domicile" in the English common law sense of the word – i.e. usually the jurisdiction in which an individual has their settled or permanent home) are liable to IHT on their UK situated assets, which includes UK real estate. Holding UK situated assets on death, or gifting them in lifetime, can give rise to IHT liabilities of 20% or 40%, based on the open market value of the

asset or, in relation to lifetime gifts, the loss in value caused to the giver's estate by the gift. Since 6 April 2017, it is no longer possible to avoid an IHT exposure by holding UK residential property through an offshore company – the company is now effectively transparent for IHT purposes if it is the equivalent of a close company and is attributable, directly or indirectly, to UK residential property. Trusts holding shares in offshore companies with UK residential property interests require review, as they can now be subject to periodic charges to IHT and give rise to IHT issues for settlors who are also beneficiaries.

- Loans made to third parties to facilitate the purchase of UK residential property can, in certain situations, cause the lender to have an IHT exposure. Certain debts, however, remain deductible when calculating the value of an asset for IHT purposes. The importance of IHT planning for foreign individuals wishing to acquire UK real estate should not be underestimated.
- Value Added Tax (**VAT**). This is applicable to commercial real estate only and is payable at the standard rate of VAT, which is currently 20%, unless it is possible to structure an acquisition as a transfer of a going concern (**TOGC**). A TOGC is generally available to a purchaser of investment real estate, but there are conditions that include the buyer registering for VAT and submitting quarterly VAT returns to the UK's revenue authorities.

The interrelationship of each of these taxes and the formalities which need to be complied with are complex and careful consideration needs to be given to their application to the acquisition of any specified real estate.

11.7 Expenses

The buyer will have to meet at least the following expenses at completion of the transaction:

- Land Registry fees ranging from £20 to £910, depending on the value of the real estate. This is significantly less than the registration or cadastral fees payable in most other European countries.
- Legal and other professional fees, which are generally agreed at levels to reflect the purchase price and professional input. These fees will bear VAT at the then current rate (currently 20%), even for overseas investors. Each party usually meets its own professional advisers' fees unless agreed otherwise. A tenant who is subletting or transferring the lease will usually be required to pay the landlord's professional fees for the consent to the subletting or transfer.
- The seller, not the buyer, pays the selling agent's fees. These typically vary from 1%-3%, depending on whether the real estate is commercial or residential, with fees for auction sales generally higher than for private treaty sales. Payment of the agent's fee is normally conditional on completion of the sale.
- Some buyers may instruct a buyer's agent to help them find a suitable property. The fee payable to the agent normally varies from 1%-3%. These "finder's fees" are common in the high end London residential market, where there may be stiff competition for prime real estate.
- Fees incurred in obtaining finance.
- Miscellaneous expenses such as search fees of approximately £1,000-£1,500 per property and bank transfer fees.

11.8 Law of building contracts

Building contracts are contracts for the design, supply and construction of building works. Because of the large sums typically involved and the complexity of many construction

projects, it is usually advisable to take legal advice on the negotiation of the detailed contractual provisions.

In the UK there is no single standard form of building contract. Clients can enter into a bespoke form of contract, or use a standard form issued by an appropriate body (e.g. the Joint Contracts Tribunal or Institution of Civil Engineers). These standard forms should be amended or supplemented to suit the particular needs of the project and redress the balance which is often weighted in favour of the contractor. In negotiating the contract it is necessary to have an understanding of the often complex contractual relationships and the local market. For example, the statutory limitation period for defects claims is usually six years from completion of the work. However, clients and funders often insist that building contracts are drawn up as deeds, so that the period is extended to 12 years. This period should not be confused with the defects rectification period, which is typically six or 12 months. During this period, the contractor's obligations are usually secured by means of a retention. A client is not prevented from bringing defects claims after the end of the defects rectification period.

Plant construction and engineering works involves different practical considerations and relationships compared with ordinary building works. Industry specific forms of contract are therefore generally used, such as the FIDIC or Institute of Chemical Engineers (IChemE) forms of contract. These are performance based contracts and are drafted to reflect sector specific market terms.

Architects, engineers and other consultants will often seek to engage on the basis of standard terms of engagement of their relevant professional bodies (e.g. the Royal Institute of British Architects (RIBA) or the Association for Consultancy and Engineering (ACE)). Many clients, however, view these terms as too favourable to the consultants. Funders are also usually reluctant to lend on such terms. It is therefore preferable to enter into bespoke contracts of appointment, which can lead to detailed negotiations. A consultant's insurers can play an important role in this context, because design consultants will need to have a professional indemnity policy to cover their liability for negligence.

While the parties are normally free to negotiate the terms of their contracts, since 1998 construction contracts in the UK have been subject to special rules contained in the Housing Grants, Construction and Regeneration Act 1998 (**Construction Act**). These rules were introduced to address concerns that unfair payment practices were contributing to a high level of insolvencies in the construction sector. Such practices included payment terms which made subcontractors' payment dependent upon the main contractor receiving payment, provisions which prevented payment of amounts 'in dispute' but then postponed the resolution of disputes to arbitration, and simple non-payment on the basis of spurious disputes. The Construction Act seeks to redress the balance by requiring all construction contracts to include mandatory provisions in relation to payment and dispute resolution.

Disputes in the construction industry are common, arising, for example, in relation to additional costs due to delay or disruption, or in respect of defects. This risk can be reduced by careful contract drafting and proper construction supervision. The Construction Act entitles parties to refer disputes to adjudication, which is a bespoke form of dispute resolution in the construction sector. In this form of dispute resolution the adjudicator to whom the dispute has been referred has 28 days to reach his or her decision. The decision can be immediately enforced in court proceedings.

Health and safety plays a critical role in the construction industry, and compliance with regulations in this sector, such as the Construction (Design and Management) Regulations 2015 (**CDM Regulations**), is mandatory and failure to comply can lead to criminal prosecution, substantial fines, and even custodial sentences.

The CDM Regulations are intended to ensure that health and safety issues are properly considered during a project's development. They include general requirements that apply to

all projects and additional duties that only apply where the construction work is likely to last longer than 30 working days and have more than 20 workers working simultaneously at any point in the project, or exceed 500 person days.

More recently, new legislation has been introduced (and further legislation will soon be introduced) to deal with building safety. This includes the Fire Safety Act 2021 (which is now in force) and the Building Safety Bill 2021 (which is likely to come into force in 2022). This new legislation makes wide reaching changes to the regulations governing fire and structural safety in multi-occupied and high rise buildings in the UK.

12. Litigation

12.1 Summary of civil court procedure in England and Wales

- *Pre-action conduct*

Unless there is a good reason to bring a claim immediately (for example if interim relief is urgently required) parties are expected to attempt to resolve their disputes through pre-action communications.

- *Alternative methods of dispute resolution*

Parties are encouraged at all appropriate stages to consider alternative methods of dispute resolution, such as without prejudice negotiations and mediation. Arbitration is strongly promoted as a means of private resolution of disputes and many commercial agreements will require disputes to be resolved through arbitration (assisted by court orders if necessary).

- *Bringing an action*

Depending on the amount concerned, an action is brought either in the High Court or a County Court. Claims for less than £100,000 (£50,000 in cases of personal injury and clinical negligence) are normally brought in the County Court.

- *Procedure*

The claim will usually be served by post. If the defendant does not respond within the 14 day period for filing a defence stating that he accepts service and intends to defend the action, the claimant can in most cases apply for judgment by default. The same applies if the defendant fails to send in a written defence within 28 days from service of the claim. This deadline is however often extended by agreement or order of the court.

- *Summary judgment*

If the defence does not have any reasonable prospect of success, the claimant may apply for a summary judgment. This is a summary procedure and the evidence which the claimant needs to produce to support the claim is limited. The court will hear the case based on limited evidence and, if it finds in favour of the claimant, it will dismiss the defence and give judgment in accordance with the claimant's application. The defendant can apply for summary judgment or strike out of an unmeritorious claim or issue on a similar basis.

- *Main proceedings*

Once the case proceeds the court will ask the parties to produce a directions questionnaire. In the directions questionnaire, the parties inform the court about the expected duration of the proceedings and the witnesses or experts they will call. They also apply in the questionnaire for the claim to be allocated to one of three possible tracks. The choice of track depends mainly on the value in dispute.

- *Value up to £10,000 (small claims track)*

The limit for small claims is £10,000. For these types of claims regard should be had to the costs relative to the demands of the case. Expert witnesses should only be employed in exceptional cases. Even if successful, the parties generally are responsible for their own costs.

- *Value in dispute over £10,000*

If the amount involved exceeds £10,000, the dispute is allocated to either the fast track or the multi-track.

- *Fast track*

This track applies if the value in dispute is between £10,000 and £25,000, as long as the trial is not expected to take more than one day. Also, under the fast track procedures, the successful party's entitlement to costs is limited, to prevent the costs spiralling out of proportion to the value in dispute.

- *Multi-track*

This track is generally used if the value in dispute exceeds £25,000.

- *Disclosure*

Parties are required to preserve all documents (which covers a wide range of media) which may be relevant to the claim.

Disclosure is an important part of English procedural law which is virtually unknown in continental legal systems. The purpose of the disclosure stage is to allow each party to form a more accurate picture of the case for each side. Generally each party is obliged to make relevant documents in its possession, on which it intends to rely or which damage its case, available to the other party for inspection. Only a small number of documents are privileged, and do not need to be disclosed, for instance correspondence between the client and lawyer. Parties are expected to co-operate in arrangements for disclosure of electronic documents.

The Business and Property Courts (which encompasses various divisions of the English High Court) has implemented a two year pilot programme to reform disclosure. Under the pilot, claimants must provide 'initial disclosure' of documents when they serve their claim. Initial disclosure must include the key documents on which the claimant relies and the key documents that are necessary to allow other parties to understand the claim. Defendants must also provide initial disclosure when serving the defence. Parties must then engage in structured discussions to agree the scope of further disclosure prior to the first procedural hearing before the court. Once the scope of further disclosure is agreed or determined by the court, the parties must give 'extended disclosure' in accordance with defined parameters.

The disclosure pilot in the Business and Property Courts runs from January 2019 to January 2021 but may then be implemented permanently.

- *Evidence of lay and expert witnesses*

Another special feature of English civil litigation is that the evidence of witnesses is taken in writing by the lawyer for the party calling the witness and delivered to the other party before the trial.

- *Trial*

The principle of oral hearings is firmly entrenched in English civil procedure and a trial can last for several days or even weeks or months in complex claims.

12.2 Settlement

It is of course possible to settle the proceedings at any stage. The Part 36 settlement mechanism rewards a party that offers a settlement that is at least as favourable to their counterparty as a subsequent decision by the court. Most cases settle by negotiation before trial. This is often by way of a "Tomlin" order, whereby the parties agree to stay the proceedings on the terms of a confidential settlement. The terms of the confidential settlement may subsequently be enforced by a simple application to the court without any requirement for the applicant to issue fresh proceedings.

12.3 Costs

The claimant will be responsible for paying the relevant court fee upon the issuing of a claim. The amount depends on the remedies sought. Where the claim is for the payment of monies the court fee depends on the amount claimed, with the maximum fee currently being £10,000. The general rule is that the unsuccessful party pays most of the other party's costs. In many cases the court will approve costs budgets for both sides which will limit the costs recoverable from the losing party.

12.4 Litigation funding

The UK has an active litigation funding market. Litigation funding is where commercial funders enter into an agreement to fund the costs of litigation in return for a share of the proceeds. Litigation funding will generally only be available for higher value cases.

The UK also has a wide range of insurers who provide specialist insurance products for claimants. The most common is ATE insurance, whereby a claimant takes out an insurance policy that will pay-out to cover an adverse cost liability if the claim fails. An ATE policy premium is generally deferred and contingent on a successful outcome in the litigation. ATE premiums are usually high relative to the insured amount.

12.5 Interim relief

English civil procedure law also provides for interim measures:

- *Interim injunction*

Temporary orders can be made to preserve the status quo until the final judgment. The court will consider on a summary basis the validity of the claim and whether the action has a good prospect of success. It will also take into account whether there is a risk of the claimant's position deteriorating as a result of the other party's conduct before trial and whether, if an injunction is not granted, damages would be an adequate remedy to compensate the claimant. An interim injunction generally takes the form of a prohibition or restraining order. Only in exceptional cases will a court grant an interim order to carry out a positive act. Injunctions can be issued without notice, if informing the other party is likely to be prejudicial.

- *Freezing order*

A freezing order (also known as a Mareva injunction) is used to freeze a debtor's assets both in and outside the UK to ensure that the assets are available at the time of enforcement of any judgment. To obtain a freezing order, the applicant must prove to the courts that there is a real risk that the debtor would otherwise place the assets beyond his or her reach. The order will prohibit any disposals by the debtor and third parties such as banks, provided the order is served on them.

- *Search order*

A search order (formerly known as an Anton Piller order) is used to secure evidence in the respondent's possession. It allows the applicant access to the respondent's premises for that purpose.

12.6 Enforcement of judgments

The court's judgment will set a deadline for compliance with its terms. Various types of enforcement are available, such as charging and sale of property and attaching wages or other payments due to the judgment debtor. Alternatively, insolvency (bankruptcy) proceedings can be commenced against the individual or company if a judgment is not satisfied. Interest accrues in judgment debts at the judgment rate, currently 8% per annum.

12.7 Enforcing foreign judgments in the UK

If the creditor has already obtained judgment in another country, that judgment can usually be enforced in the UK. The enforcement procedure is simplified in the case of a judgment from another EU member state. If the formal requirements are followed, the court must accept the application. The procedure has been retained during the transitional period following the UK's departure from the EU. It is unclear whether the current regime will be retained following the expiry of the transitional period.

The procedure for the enforcement of judgments from non-EU countries will depend on whether the relevant state is a signatory to a bi-lateral treaty with the UK or, alternatively, a signatory to an international convention on the enforcement of judgments to which the UK is also a signatory. If neither applies, as is the case in respect of the USA for example, it is still possible to enforce a judgment in the UK but the process is likely to take longer.

12.8 Enforcing arbitral awards in the UK

The UK is a signatory to The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the 'New York Convention'. The UK courts will recognise and enforce arbitral awards made in other New York Convention states, except in very limited circumstances**.**

13. Arbitration

London is a major centre for international arbitration.

The London Court of International Arbitration (**LCIA**) is the most prominent arbitral institution in England. The LCIA provides a framework set of rules for the conduct of an arbitration. Parties wishing to arbitrate in England can choose to adopt the rules of the LCIA, another arbitral institution (for example, the International Chamber of Commerce (**ICC**)) or can decide to arbitrate pursuant to their own bespoke rules (an 'ad hoc' arbitration).

The law governing arbitrations conducted in England is set out in the Arbitration Act 1996. The English courts strongly support the use of arbitration by commercial parties. The Arbitration Act grants the English courts limited powers to intervene in arbitrations for the purpose of supporting the proper conduct of the arbitration process (for example, by granting an injunction to support the process). The English courts also have power to intervene to remove an arbitrator in exceptional circumstances.

Parties elect to arbitrate by entering into an arbitration agreement, usually as part of a wider commercial contract. Parties can also agree to arbitrate after a dispute has emerged. The main perceived advantage of arbitration is that the process is confidential to the parties. Court proceedings in England are usually conducted in public.

14. Our firm

Fladgate LLP is one of central London's leading law firms, providing legal advice of the highest quality in English law for a diverse portfolio of clients. The firm's client base has a strong commercial focus, comprising multinationals, listed companies, banks and lenders.

Fundamental to the firm's philosophy is the belief that clients want a high standard of professional service and a high degree of personal attention, but at competitive rates. At Fladgate LLP, this is illustrated by the ability to have immediate access to a partner and by

the firm's readiness to take the initiative in offering advice. Our fee earners have an in-depth knowledge of the industries in which they practise and extensive experience of delivering advice that is both commercial and technically expert.

In addition to advising a substantial UK-based client base, the firm provides a proactive and efficient service for clients with international business through specialist groups which serve continental Europe (with an emphasis on the Germanic countries and France), India, Israel, the Middle East, South Africa, Asia Pacific, Russia/CIS and North America.

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October 2021