



Business in the U. K.

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When contemplating doing business in the United Kingdom, at the level of legal issues it is worth remembering that the country is made up of 3 distinct jurisdictions – England and Wales, Scotland, and Northern Ireland.

Whilst the 3 jurisdictions have certain shared legislation – much of the company law applies to both England and Wales and Scotland – significant differences do exist in other sectors such as real estate and litigation.

Scotland and Northern Ireland have their own legislative assemblies with power to legislate on matters not reserved to the UK parliament. However, at the time of writing the Northern Ireland assembly was suspended. Wales also has its own assembly with limited legislative powers.

It is also worth remembering that the Channel Islands and the Isle of Man do not form part of the United Kingdom.

Sales and Distribution

If a foreign company is to be doing business in the United Kingdom 4 main types of relationship are available to it with regard to its UK “partner”.

Appointing a commercial agent is a relationship which is frequently used to initiate expansion into the UK market. The relationship can be governed by common law alone, but a written contract to supplement the common law provisions is always advisable. Since 1994, commercial agents have enjoyed protection under the Commercial Agents (Council Directive) Regulations 1993. Those regulations implement EC Directive 86/653. One of the protections offered is that an agent is entitled to insist on having a written contract. As in other parts of the EU, the regulations give agents certain entitlements,

such as compensation on termination of the contract. The contract will usually deal with sales territories, the arrangements for payment of commission, the authority of the agent and so on.

Under a distribution agreement the relationship between the parties is different, with the distributor buying the goods and then selling them on at a profit. Distributors do not enjoy any statutory protections comparable to those enjoyed by agents. For that reason alone, a written contract is always advisable. Clients frequently confuse the two types of relationship, and care must be taken to make sure information is obtained so that the true intention of the parties can be established.

The third type of relationship is that of franchising. Many multinationals appoint a UK master franchisee to deal with development of the multinational’s business in the UK, and that master franchisee may then appoint subfranchisees with territories throughout the UK. The UK lacks any form of franchisee protection legislation. It is for the franchisee to do its own due diligence on the franchiser and the opportunity which is on offer. That must be done before any commitment is made beyond signing a

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confidentiality agreement. In theory, a franchisee might have a claim for misrepresentation if the franchise opportunity has been described negligently or fraudulently to induce the contract. However, in practice misrepresentation claims are difficult to sustain and in any event franchise agreements usually contain a waiver of such rights. As with agency and distribution contracts, care must be taken to ensure that the form of contract complies with the competition provisions in articles 81 and 82 in the EC Treaty, and the block exemptions for vertical agreements.

The fourth type of arrangement is a joint venture. This can take the form of a joint venture company, or the form of a contractual joint venture. It is likely to be most suitable for parties which have had a relationship for some time and have built up the level of trust required for the level of commitment involved in such a structure.

Contract law is not the same in England/Wales and Scotland, and whilst contracts in both jurisdictions may follow a similar structure, addressing the same issues, interpretation of them may be very different. The court systems are also quite separate. If a contract with a foreign business is to be subject to UK law, generally speaking it is advisable to specify the jurisdiction in which the UK party is located. For example, if a French company and a Scottish company are agreeing a contract, the choice should be between French and Scottish law taking into account the jurisdiction which has the closest connection – often the place of performance.

Corporate Structures

The UK legal system offers a wide variety of structures for doing business. Not all are relevant from the perspective of a foreign business operating in the UK (sole proprietorship, for example) but the main relevant ones are as follows:

- Private limited company
- Public limited company
- Limited liability partnership
- Partnership.

Amongst the other structures which are unlikely to suite foreign companies can be counted unli-

imited liability companies, companies limited by guarantee (frequently used by charities), limited partnerships, community interest companies and Scottish charitable incorporated organisations (scheduled to be introduced in 2007).

The private limited company is easily the most popular corporate structure, offering as it does (in most situations) limited liability to its directors and shareholders.

Except in very restricted circumstances, it is not able to offer its shares widely and any kind of public offering of shares has to be done through a public limited company. UK private limited companies can be incorporated very quickly – within the same day. They are also very cheap to establish, costing as little as £100 plus VAT over the internet. The minimum capital requirement is £1, and they can be incorporated with one shareholder taking one share for £1, which does not even have to be paid for at the outset.

Companies are created by being entered on the Register of Companies, maintained by Companies House (a government agency). The register for England and Wales is located in Cardiff, the one for Scotland is in Edinburgh, and the one for Northern Ireland is in Belfast. Information about companies registered in England/Wales and Scotland is readily available on the internet.

Company law is almost identical in Scotland and England/Wales, mostly being based on the same legislation, with the main exceptions being insolvency and the creation and registration of securities. Company law in Northern Ireland is similar, but under different legislation.

Employment

Employment law is largely the same throughout England/Wales and Scotland, the single biggest divergence being when it comes to the employment contract itself. As contract law is different in the two jurisdictions, what constitutes a breach will not be exactly the same, nor will the remedies available if a breach occurs. This is most likely to arise in the context of non-competition undertakings. However, the vast majority of employment issues arise from legislation and it is UK wide.

The UK has the reputation for having less restrictive laws (from an employer's perspective) than other EU member states. However, it is

still highly regulated and offers many benefits and protections for the employee. It is also a very fluid regime, with the law changing or becoming less predictable at regular intervals on the basis of decisions by employment tribunals.

These protections include:

- Prevention of discrimination in recruitment or employment on the grounds of age (being introduced in 2006), sex, race, disability and so on,
- Protection on transfer of businesses,
- The right to a written statement of particulars of employment,
- Protection from unfair dismissal,
- Right to paid maternity and paternity leave,
- The right to be paid at or above the minimum wage levels.

For those unfamiliar with UK legislation and employment practices, specialist advice should be taken before even reaching the stage of selecting potential employees for interview.

Property

The land holding systems in England/Wales, Scotland and Northern Ireland differ substantially. Even within Scotland the systems differ. Crofting tenure applies in the Western Isles and parts of the northern and western mainland. Udal tenure applies in the Shetland Islands (dating from when the islands were part of Norway).

Terminology also differs, with the England & Wales system being based on freehold. In Scotland, the equivalent to freehold property is heritable property. Leasehold interests can be created under both systems, but the legal framework for leases is different.

Fixed security over land and buildings can be created under both the English/Welsh and Scottish systems. Again the terminology is different, with the instrument being a standard security in Scotland and a mortgage in England/Wales. Fixed securities can also be created over leases in England/Wales, and in Scotland if the lease is for 21 years or more.

A foreign business looking to establish in the UK would probably lease premises initially. Great care has to be taken before entering into a lease, as the first document presented by a landlord's lawyer or letting agent is likely to be very favourable to the landlord. Advice should be taken before making a

commitment of any kind, as claims are often made by letting agents about certain arrangements being "standard" (such as a tenant paying a landlord's agents' fees) when in fact they are always a matter for negotiation and agreement.

The length of lease can vary enormously, from very short term "month to month" arrangements – often in serviced office complexes – up to 21 years. In longer leases the rent will be reviewed regularly (every 3 or 5 years is typical), but usually the rent can only increase or remain the same.

Repair and maintenance obligations must be looked at closely – most long terms leases of commercial property will put them onto the tenant. In Scottish leases it is not unusual for a landlord's draft lease to obligate the tenant to return the premises on brand new condition at the end of the lease, even if the premises were not in that condition at the outset. Onerous obligations like this should be identified by an experienced property lawyer, and if appropriate amended to safeguard the tenant's interest.

Leases of domestic property are much more regulated than is the case for commercial property.

Taxation

The main tax arrangements are unified throughout the UK, the only exception being business rates and council tax – payable by property owners and occupiers to local government.

Stamp duty is payable on share transfers, and stamp duty land tax is payable on property transfers and leases.

Corporation tax is paid by companies, but partnerships and sole traders pay income tax and capital gains tax, so the choice of vehicle for a foreign business should take into account the different tax treatments.

Payroll tax (called national insurance) is paid by employers, currently at the rate of 12% of gross salary. Employers must also offer employees a stakeholder pension, and if the employee accepts, the employer must contribute at the rate of 3% of salary.

Value added tax (called sales tax in some countries) is payable on most goods and services, usually at 17.5%. However the rate can vary – it is 5% for supplies of domestic gas and electricity, for

example. Some goods are exempt, and some are zero rated.

With the exception of the largest law firms, lawyers in the UK tend to avoid detailed tax advice which tends to be the preserve of the accountancy profession.

Investment Considerations

Corporate finance is available from a wide variety of UK commercial banks, usually involving term loans and overdraft facilities. The commercial banks do also take equity investments in larger companies with significant funding requirements.

Corporate finance is also available from private equity investors, and for the right type of business, from public sector economic development agencies. An example of this is equity funding for high growth start-up businesses, usually in the technology sector.

Investment can also be obtained by stock market flotation. For smaller companies lacking the resources for the cost and regulatory burden of a full listing, the Alternative Investment Market (AIM) may be suitable.

Flotation work is mostly undertaken by specialist lawyers in the larger commercial centres. Corporate finance more generally is undertaken by specialists within firms doing corporate law work.

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