



A guide to Doing Business in the UK

EdwinCoeLLP



An Introduction	1
Setting Up a Corporate Structure	2
Setting Up an Office	8
Working in the UK	10
Employing Staff	16
Entering into Contracts	18
Data Protection	22
Protecting Your Intellectual Property	28
Business Owner Considerations	34
Edwin Coe’s Added Value	36

AN INTRODUCTION

Edwin Coe LLP is a recognised and respected brand in the UK London market and as a mid-sized London law firm, we have significant strengths which give us many advantages over larger firms. One of the cornerstones for our success is that we build very close working relationships with our clients to develop a ‘trusted advisor’ status working with them in partnership, with a ‘solutions’ based approach. We provide quality legal services comparable to bigger law firms but with a truly partner-led service and on a more bespoke and cost-effective basis.

As a result of this level of service and approach, we are regularly asked to advise the decision makers of our clients at board or proprietor level, and are often asked to provide commercial input as well as legal advice.

Our success is built on creating long-term client relationships. Most of our work is with clients for whom we have acted for 10 years or more, or are undertaken for clients referred to us by other established clients, which reflects the value clients place on our approach.

This guide has been prepared by the Edwin Coe LLP multi-disciplinary team to provide guidance to any established overseas businesses looking to set up business in England and Wales.

The rules in Scotland (which, together with England and Wales form Great Britain) and in Northern Ireland (which together with Great Britain form the United Kingdom) will be very similar in most respects but may have some local variations which we can assist with as required.

Our team of experts are here to guide you through the process of setting up and doing business in the UK. Call us today for an initial confidential conversation – we are here to help.

Edwin Coe is a very good firm to work with. They have partners and experts to cover all major legal areas.

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SETTING UP A CORPORATE STRUCTURE

WHICH STRUCTURE FOR YOUR BUSINESS?

Depending on its objectives, there are numerous business structures available to an overseas company wishing to do business in the UK. Such business structures include a UK establishment, a UK company, acquiring an existing UK company, establishing agency, distributorship and franchise arrangements and entering into a partnership or joint venture arrangement. The most common structures for an overseas company wishing to establish a business in the UK include:

- opening a UK establishment (by way of a branch or place of business where it trades);
- incorporating a private limited company; and
- a limited liability partnership (LLP).

Further details on each of these are set out below.

UK establishment

An overseas company can open a UK establishment which includes a branch or place of business.

Advantages of opening a UK establishment:

- it is relatively inexpensive and easy to do so;
- the overseas company retains ownership and control of the branch or place of business;
- the associated registration requirements are limited for a branch or place of business; and
- there are no requirements to adopt constitutional documents.

The main disadvantage is that a UK establishment is not a separate legal entity, thus the overseas company is directly responsible for the operations, liabilities and obligations of the UK establishment. UK establishments are also subject to certain trading disclosures under the UK overseas companies regime, which imposes certain publicity obligations. Furthermore, UK establishments are required to file annual accounts with the Registrar of Companies and are also subject to UK tax.

Subsidiary company

All companies must be registered either as private or as public. Private companies can either be limited by shares, limited by guarantee or be unlimited. This guidance is only in relation to private companies limited by shares, which is most common.

Advantages of setting up a subsidiary company (limited by shares):

- it has a separate legal personality from those of its shareholders and directors, enabling it to contract directly with third parties in its own right;
- it generally offers its parent company protection from the company's liabilities as the liability of its shareholders is limited to the amount, if any, unpaid on the shares held by them;
- the incorporation process is very straight-forward and can be concluded within a day at low cost;
- the majority of the corporate governance rules of the company can be self-determined in the constitution documents that govern the company's administration;
- it can be formed with a single shareholder with no statutory limits on the number of shareholders;
- only one director is required to form the company and company secretaries are not mandatory;
- there is no minimum share capital requirement on the formation of a private limited company; and
- the overseas company has the flexibility to re-register the private company as a public company, subject to satisfying certain conditions.

Companies are required to file information with Companies House, the official registry of companies, which is available to the public. The company's filing requirements include:

- the filing of its incorporation and constitutional documents;
- particulars of directors and any company secretary;
- information regarding share capital, ownership of shares and 'persons with significant control' over the company;
- copies of security granted by the company; and
- certain shareholder resolutions.

In addition to this, the company must file a confirmation statement and accounts of the company in respect of each financial year on an annual basis.

The company has a continuing obligation to file any updates at Companies House whenever certain details change and failure to file documents on time can result in penalties on the company and its directors.



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LLP

An LLP is another business structure that provides the benefits of limited liability company and the flexibility of a partnership.

Advantages of incorporating an LLP:

- like a UK company, an LLP is a separate legal personality;
- the liability of an LLP's members can be limited to the amount of their capital investment in the LLP in most circumstances;
- there is no statutory maximum number of members for an LLP, however, there must be a minimum of two members;
- there are no capital maintenance requirements; and
- constitutional documents are not mandatory for an LLP, however, it is advisable to have an LLP agreement between the members.

COMPANY FORMATION CHECKLIST

UK establishment

Overseas companies are required to register any UK establishment it has at Companies House. Certain particulars of the overseas company and details of the UK establishment have to be registered with the Registrar of Companies using a prescribed form together with an incorporation fee. Such details include:

- the overseas company's corporate name and legal form;
- the register in which the overseas company is registered and its registration number;
- the powers of the directors or company secretary to represent the overseas company with a statement confirming whether they may act alone or jointly;
- whether the overseas company is a relevant credit or financial institution;
- a list of all of the directors and secretary of the overseas company; and
- details about each of the directors including full name, date of birth, nationality, address and occupation.

If any of the original information filed changes, an amended return must be filed.

Subsidiary Company

In order for a company to be incorporated and registered at Companies House, a prescribed form must be completed for filing with an incorporation fee. The details required to incorporate a company include:

- identifying a suitable name for the company – an existing name registered at Companies House cannot be used and there are certain rules governing the choice of name;
- details of the proposed director(s) including full name, date of birth, nationality, address and occupation;
- the official address of the company, known as the 'registered office'. The company's registered office must be in the place in which it is registered (England, Wales, Scotland or Northern Ireland);
- the names and addresses of the company's initial shareholder(s) and details of any 'person with significant control' which can be an individual or legal entity; and
- articles of association (which govern the management of the company). A company can choose a standard set of articles of association known as 'Model Articles' or it can create its own bespoke articles of association.



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LLP

An LLP must be incorporated and registered at Companies House. This is undertaken by submitting a prescribed application form for filing with an incorporation fee. The LLP must have at least two members who can be natural persons or body corporates and at least two designated members. Designated members have additional legal administrative akin to a company director, under LLP legislation.

People with Significant Control

Under the UK People with Significant Control (PSC) regime, all private companies and LLPs are required to keep a PSC register that records the identity of the ultimate beneficial ownership of the company or LLP. The purpose of this is to encourage transparency of ownership of these businesses. PSCs can be individuals or legal entities and a company or LLP can have more than one PSC. There is an obligation to notify Companies House of the particulars of the PSCs and any changes or additions to its PSC register.



HOW TO BECOME A COMPANY DIRECTOR

In order to be appointed a director of a UK company, an individual:

- must consent to act as a director of the company;
- must be 16 years old or over;
- must not be disqualified from being a director;
- must not be an undischarged bankrupt; and
- does not need to be a UK national and can be non-resident in the UK.

While it is also possible for a legal entity to become a corporate director, it is required that at least one individual is appointed a director of the company.

Directors of a UK company carry out the day-to-day management of the company. They are bound by legislation to act in the best interest of the company and its shareholders and any decisions to be made must be in order to promote the success of the company. Directors must also comply with the company's articles of association and constitution and are required to ensure that all reports and accounts are prepared and filed on time, taxes are paid when due and that all details of the company are updated as necessary. Directors can be held personally liable for the debts of the company in certain cases.

BUSINESS TAXATION – THE ESSENTIALS

In broad terms:

- UK companies are liable to pay corporation tax on any taxable profits;
- in respect of UK establishments, overseas companies are liable to pay corporation tax on the profits of a trade carried on by their UK establishment and on capital gains realised on the disposal of capital assets used or held by them for the purposes of the UK establishment; and
- LLPs are tax transparent and thus are not subject to tax. However, the members of the LLP are treated as self-employed for tax purposes and are liable to pay income tax on the portion of the profits of the LLP to which they are entitled (irrespective of whether those profits are actually distributed to the members).

Tax considerations

■ Corporation tax:

- corporation tax is paid by reference to taxable profits arising in an accounting period; and
- from April 2023, the main rate of corporation tax rose from 19% to 25%.

■ Stamp duty:

- when acquiring a UK company, it is important to note that the transfer of the shares of that UK company to the overseas company may be subject to stamp duty; and
- stamp duty is a tax on the transfer of shares and marketable securities in a company at a rate of 0.5% of the chargeable consideration for those securities. Transfers for a consideration of less than £1,000 are exempt from stamp duty.

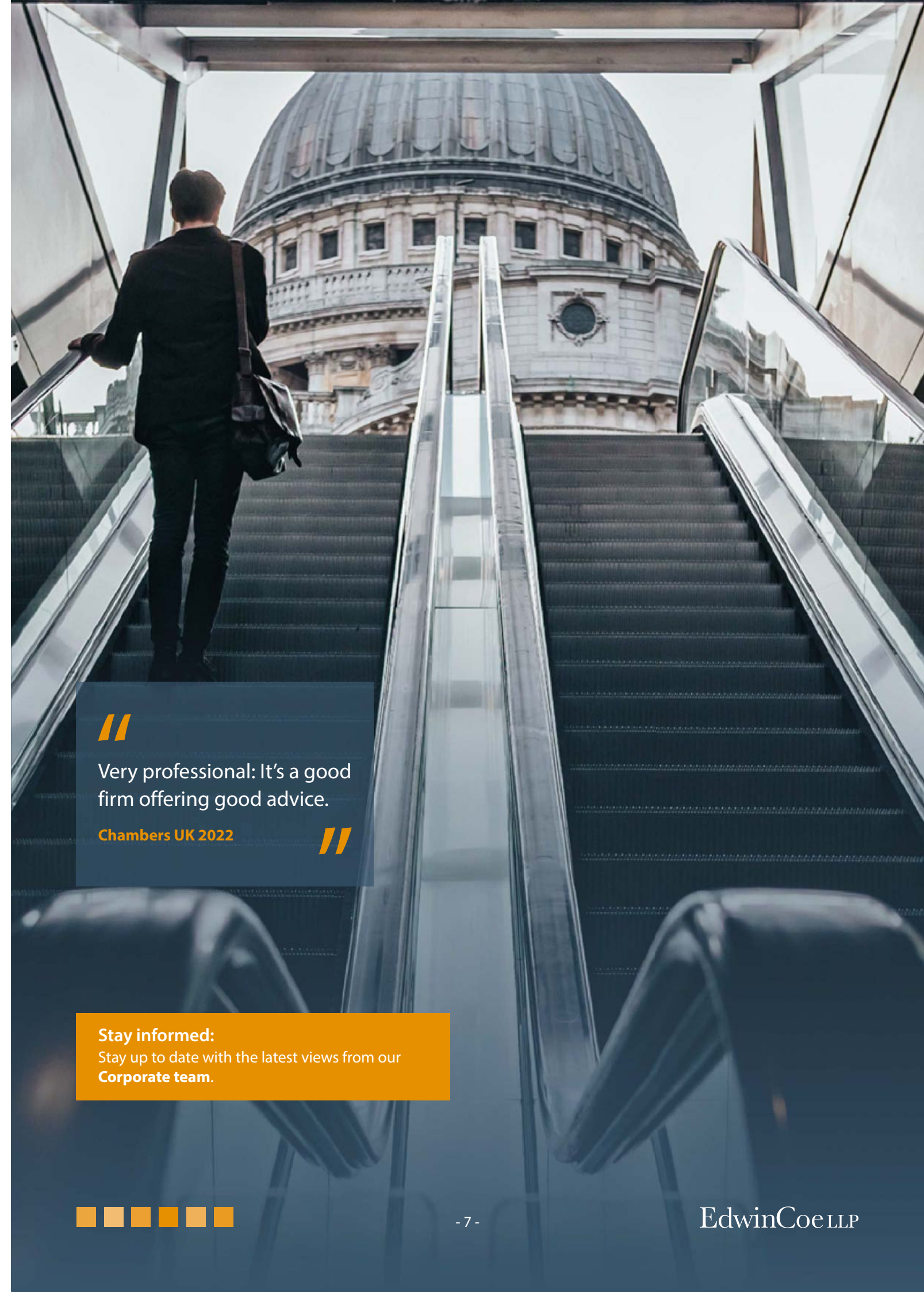
■ Value added tax (VAT):

- VAT is a form of indirect tax charged on the supply of goods and services made in the UK;
- overseas businesses will have an obligation to register for VAT if they hold stock in the UK that is for sale to UK customers; and
- for UK companies with a taxable turnover of more than £85,000, they are required to register for VAT.

■ Exemptions and reliefs:

Tax relief incentives are available for doing business in the UK such as:

- the 'substantial shareholder exemption' which offers relief from corporation tax on chargeable gains or losses accruing on the sale of shares of 10% or more of a trading company's share capital; and
- relief on corporation tax for qualifying costs on research and development.



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SETTING UP AN OFFICE

When establishing a practice in the UK, companies need to find the right premises to support their business operations. Whether this is office space for administration purposes, industrial space for manufacturing purposes, or, retail space for sales and services to consumers, there are a number of options of property ownership available depending on a business' particular need.

TYPES OF OWNERSHIP

Broadly speaking the different types of property ownership in the UK are:

- **"Freehold" ownership** – this is when the building and the land it sits on is owned outright.
- **"Leasehold" ownership** – this is when the property (and potentially the land it sits on) is owned for a specific period of time. Such ownership derives from a legal agreement known as a "lease" between the "tenant" who owns the lease and its "landlord" who either owns the freehold of the property, or, who has a superior leasehold interest.
- **Licences to Occupy** – whilst not legally classed as "ownership" of property as such agreements do not grant a proprietary right, they grant an occupier a "licence" (permission) to occupy and use the property.

FREEHOLD OWNERSHIP

A freehold owner owns a property outright in perpetuity and has full control over it. This does include full responsibility for its maintenance and upkeep though which can be expensive.

The land could be subject to rights of way (or other easements) or restrictions on use and alterations in favour of third parties, although it's generally accepted that there are fewer such restrictions when compared with leasehold ownership.

An acquisition of freehold property requires an initial injection of capital from a business to pay for the property. The level of risk is therefore often considered

higher meaning it's often necessary to instruct a number of property professionals, such as lawyers and surveyors.

Banks and funders often regard freehold interests as safer security and are more likely to lend against freehold property.

LEASEHOLD OWNERSHIP

Leasehold ownership is for a fixed period of time. Whilst you do sometimes see long commercial property leases (being in excess of 99 years and which are usually acquired for a substantial initial premium), it is much more common for lease terms to be around 5 years for small office and retail space and around 10 to 25 years for larger premises such as industrial units where a longer commitment is required, often due to larger capital expenditure on a fit out, at the time the lease is granted.

Shorter term leases are often seen as beneficial for businesses initially setting up in the UK as they allow a company to relocate in the short term if the business is expanding. Although if a tenant wants to relocate before the end of the term and there is no break provision, then a landlord's consent will be required to the tenant assigning (selling) the lease and landlord might require the company to act as a guarantor to the incoming tenant.

Ignoring fitting out costs (which are capital expenditure required in both freehold and leasehold ownership scenarios), short commercial leases do not require a capital premium payment for their acquisition unlike when acquiring a freehold. However, the rents that landlords charge under short leases are far greater than longer term leases and no rent is payable at all if a freehold interest is acquired.

Rents under short term leases are often reviewed and increase at least every 5 years and many landlords will either require a substantial rent deposit upfront or a guarantor from a parent company when the entity taking the lease is either a foreign company or a newly incorporated UK company.

LICENCES TO OCCUPY

Licences are often seen as a "weaker" form of short term lease as they offer a licensee (akin to a tenant of lease) no proprietary protection and are simply permissions from a licensor (akin to a landlord of a lease) to occupy a property.

These are often used for "co-working" and "serviced office" environments for those wanting space with the greatest amount of flexibility to end the arrangement and relocate. This works both ways though with licensors also having the ability to end the arrangement on very short notice.

A licence cannot grant exclusive possession of the space like a lease does and is also not assignable to a third party. They are therefore more commonly used by smaller businesses that require an office presence but without the overhead costs of a lease (such as service charge costs and substantial fitting out costs for furniture and equipment).

ACQUISITION

A company should seek legal advice prior to agreeing to take property space. Edwin Coe can assist with the entire process.

Advice from commercial agents might need to be sought to ensure the property has adequate space for the company's purposes and that the terms of the acquisition are fair.

Specialist building surveyors may also be required at an early stage to ensure the property is not defective and to highlight any inherent liabilities or risks a company will be taking on upon its acquisition.

OTHER POINTS TO CONSIDER AND ASSOCIATED COSTS

Whether a company is acquiring leasehold or freehold property it should be aware of the following:

- prior to acquisition, satisfactory enquiries should be made to ensure that it benefits from the necessary statutory planning consents to allow for its use as well as to ensure that there are no environmental contamination liabilities attached to the property;
- Stamp Duty Land Tax (Land Transaction Tax in Wales) may be payable on the acquisition. This is calculated by reference to the purchase price on freehold purchases and by reference to the premium (if applicable) and the amounts of rent and term length on the grant of a lease;
- Value Added Tax might be payable on either the purchase price or the rent depending on the tax treatment of the property by the seller or landlord. This tax might be recoverable, however, a company will need to seek tax advice at an early stage to ensure this is properly accounted for; and
- commercial properties are subject to business rates (a type of property tax collected by a local authority) of which the actual occupier of the property is usually liable for.

Please note that property acquisitions in Scotland and Northern Ireland are regulated differently to the rest of the UK (being England and Wales). Edwin Coe can advise separately on the legal process for Scotland as well as provide introductions to lawyers who can deal with the Northern Irish legal process.



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Arrivals



The team is good and support one another very well – language capabilities are excellent and they are very professional.

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WORKING IN THE UK

Following the UK's departure from the EU, the UK Government introduced a new points-based immigration system which launched from 1st January 2021. EU nationals (not including those who were resident in the UK prior to 31 December 2020) and non-EU nationals that wish to come live and work in the UK must ensure they have the appropriate UK visa in place prior to arriving in the UK.

We have set out below some pertinent points on the most common immigration routes for those individuals/businesses that are intending to do business in the UK.

SPONSOR LICENCE FOR UK COMPANIES

A UK company which wishes to hire both EU and non-EU nationals will first need to make an application directly to UK Visas and Immigration (part of the Home Office) for permission to become a "Sponsor Licence holder".

An online application is required to be made and various supporting corporate documentation must be submitted together with the application. The UK company will also need to demonstrate the following:

- it has at least one nominated employee who is permanently based in the UK as key personnel on the licence;
- it is a genuine organisation which is operating and trading lawfully in the UK;
- it has the necessary HR/recruitment systems and processes in place to carry out its sponsorship duties; and
- it is a responsible employer that adheres to UK immigration and employment laws and wider UK laws pertaining to illegal working and safeguarding of children.

The licence fee for small companies is **£536** and the fee for medium/large companies is **£1,476**. If the application is approved, the UK company will be granted a Sponsor Licence valid for four years.

When sponsoring foreign workers under the sponsorship framework, the UK company will also be required to pay the Immigration Skills Charge for each worker it sponsors (applies to those based outside of the UK and certain workers based inside the UK). The Immigration Skills Charge is currently set at £1,000 per person per year for large companies and £364 per person per year for small companies.

Under the sponsorship regime, there are two routes a UK company can apply for when requesting a Sponsor Licence: the Skilled Worker route; and the Global Business Mobility: Senior or Specialist Workers route.

Skilled Worker

The Skilled Worker route replaced its predecessor visa category, "Tier 2 General", which was in place prior to 1st January 2021.

To qualify for a Skilled Worker visa, a Sponsor will need to ensure the migrant worker scores **70 points** in order to qualify for the Skilled Worker visa. The following points will be awarded for successful applicants:

- must have a job offer at RQF Level 3 or above from a licenced Sponsor (50 points);
- they meet the minimum salary threshold (10 points); and
- they meet the English language requirement (10 points).

A Sponsor must ensure individuals are being paid at least **£26,200** or the "going rate" in order to qualify for a Certificate of Sponsorship. There are a number of different ways an individual can meet the minimum salary threshold – these points are tradeable depending on age, qualification, whether the role is shortage occupation etc.

Spouses, civil partners and unmarried partners may accompany the main applicant to the UK and apply for a respective "PBS dependant visa". Children under the age of 18 may also join the main applicant to the UK providing the other parent will be relocating to the UK as well. The respective application the child would need to make is "PBS dependant child visa".



There are some notable differences between the Skilled Worker and Tier 2 General: (1) the removal of the “cooling off” period after six years; and (2) indefinite extension applications under the Skilled Worker category. In addition, there is no longer a prohibition on sponsoring a worker who has 10% or more shareholding in the UK company.

Global Business Mobility: Senior or Specialist Worker

This route replaced the previous “Intra-Company Transfer” route from April 2022. This route is aimed at senior managers and specialist employees who will be undertaking a temporary work assignment in the UK.

To qualify for the visa, the individual must be working for an overseas company which is linked by common ownership or control with the UK company. The individual must be working for the overseas company for at least 12 months unless they are a “high earner” i.e. those earning at least **£73,900** or above per annum.

The individual must score a total of **60 points** – the Certificate of Sponsorship must confirm the job they will be sponsored for and the role must be eligible for sponsorship under Appendix Skilled Occupation. The individual must be paid a salary of at least **£45,800** or the going-rate for the occupation, which is higher.

The maximum time allowed in the Global Business Mobility – Senior or Specialist Worker route will be **5 years in any 6 year period**. If the individual will be paid at least **£73,900** or above per annum the maximum time allowed will be **9 years in any 10 year period**.

Individuals are not required to satisfy the English language requirement. This route does not lead to settlement however individuals may be permitted to switch to a visa category that does lead to settlement should they meet the criteria.



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GLOBAL BUSINESS MOBILITY: EXPANSION WORKER

This route replaced the previous Sole Representative of an Overseas Business Visa which closed to new applicants on 11 April 2022.

This route is aimed at senior managers or specialist employees who will be assigned to the UK on a temporary basis to undertake work related to the expansion of the overseas business in the UK. This application is a two-stage process (i) the branch/ subsidiary must first apply for a Global Business Mobility – Expansion Worker Sponsor Licence; and once granted, (ii) the individual Global Business Mobility – Expansion Worker visa must be applied for.

This route can only be used when the UK business has not yet started trading – if the business is already trading then the individual should use the ‘**Senior or Specialist Worker visa**’ (please see above).

The individual must score a total of **60 points** – the Certificate of Sponsorship must confirm the job the individual will be sponsored for and the role must be eligible for sponsorship under Appendix Skilled Occupation.

The sponsor must ensure the individual will be paid a salary of at least **£45,800** or the going-rate for the occupation, which is higher. The individual must also be working for the overseas company for at least 12 months unless they are a ‘high earner’ i.e. those earning at least **£73,900** or above per annum.

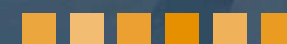
One fundamental difference to the Sole Representative of an Overseas Business visa is that this category does not lead to settlement, however, individuals may switch to other immigration categories should the specific criteria be met.

INNOVATOR FOUNDER

The Innovator visa category is for experienced business people who wish to establish a new business in the UK for the first time.

Under this route, individuals are required to demonstrate an innovative, viable and scalable business idea which is supported by one of the UK’s approved list of endorsing bodies.

As part of the eligibility criteria individuals will be required to demonstrate they have access to sufficient funds in order to maintain themselves in the UK. There is also the English language requirement to meet – Level B2 of the CEFR.



GLOBAL TALENT

The Global talent visa was introduced to attract leaders, or those with the potential to become leaders, in the fields of certain disciplines. The disciplines that are covered are:

- arts and culture (including architecture, fashion design, and film and television);
- digital technology; and
- science, engineering, humanities and medicine.

This is a highly attractive immigration category for a number of reasons. Firstly, the visa is non-sponsored which means the individual can either work for an employer in the UK or on a self-employed basis. The individual is required to be “endorsed” by an approved Home Office endorsing body – evidence of achievements/awards must be provided to the endorsed body as part of the application.

This visa category leads to Indefinite Leave to Remain (also known as settlement) after 3 years continuous residence, except those with an Exceptional Promise endorsement from either the Arts Council or Tech Nation.

Global Talent applications have two stages to them; the first application (called Stage 1) includes making an application to the endorsing body for an endorsement. Once granted, an individual then makes their application for entry clearance or leave to remain (called Stage 2).

HIGH POTENTIAL INDIVIDUAL

This visa category opened on 30 May 2022 and is designed to attract the brightest and best globally to the UK to assist with the UK’s future innovation plans.

This category is available to recent graduates of leading overseas Universities, who wish to come to the UK to work or look for work. This is an independent, non-sponsored points-based immigration route.

Individuals wishing to apply under this route will need to have been awarded an overseas degree level academic qualification (from an eligible global *non-UK university*). To qualify for a High Potential Individual Visa, an individual’s overseas degree qualification must have been awarded in the **5 years before the date** of application.

The degree must have been listed on the Global Universities List published by the Home Office on the date the degree was awarded.

Individuals will also need to ensure they meet the English language requirement as part of the relevant points to meet for this visa category.

BUSINESS VISITOR

The Business Visitor visa sits within the UK’s wide visitor visa framework. The Business visitor visa is designed to allow both EU and non-EU nationals to come to the UK for no more than 6 months and undertake specific business activities (which includes attending meetings, training, negotiating or signing contracts) however they are not allowed to undertake work/unpaid work and cannot be paid by a UK source.

The UK’s visitor rules provide for a wide range of business activities to be performed in the UK. Individuals entering the UK on a business visitor visa must ensure the activities they perform fit within the strict criteria otherwise their visa may be refused or entry denied at the border.

Nationals of non-visa countries do not require a visa prior to travel and can request permission upon arrival to the UK. Specifically, nationals of Australia, Canada, Japan, New Zealand, Singapore, South Korea, the United States of America, EEA states and Switzerland can pass through the ePassport gates when entering the UK.

CONSEQUENCES OF ILLEGAL WORKING IN THE UK

There is a legal requirement placed on UK employers to ensure all UK employees have the legal right to live and work in the UK. Failure to ensure your staff in the UK are legally permitted to carry out the work in question can lead to a civil penalty of up to £20,000 per illegal worker, and in very serious circumstances, lead to a possible criminal conviction.

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EMPLOYING STAFF

PAYROLL

Employers must register as an employer with HM Revenue and Customs before the first payday of an employee. This should be done in good time before an employer needs to pay their employee(s) as it can take some time to receive an employer Pay As You Earn (PAYE) reference number. To register as an employer, follow the steps set out on the government website: <https://www.gov.uk/register-employer>.

EMPLOYERS' LIABILITY INSURANCE

It is a legal requirement (Employers' Liability (Compulsory Insurance) Act 1969) for businesses employing one or more employees to have Employer's Liability Insurance. Employers can be fined up to £2,500 for any day which they are without suitable insurance. If they do not display the certificate of insurance or refuse to make it available to HSE inspectors when they ask, employers can be fined up to £1,000.

PENSION

Any business that employs at least one employee must meet the legal requirements of pensions auto-enrolment. A minimum of 8% of qualifying employee earnings must be contributed to a qualifying scheme, including at least 3% of that coming from the employer. Qualifying employee earnings are assessed annually by the government and for the 2022/2023 tax year those are £6,240 - £50,270. This means that 8% of any employee's earnings between these sums must be contributed into a qualifying auto-enrolment pension scheme (unless the employee expressly opts out).

Employers should look at different schemes before they decide which is suitable for them and their staff. The following are listed on The Pension Regulator's website as being open to small employers:

- Creative Pension Trust
- The Crystal Trust

- The Lewis Workplace Pension Trust
- National Employment Savings Trust (NEST)
- NOW: Pensions
- The People's Pension
- Smart Pension Master Trust
- Standard Life Workplace Pension
- True Potential Investments and
- Workers Pension Trust.

HEALTH AND SAFETY

If an employer employs five or more people, it must have a written statement setting out its general health and safety policy with respect to its employees and organisation (a health and safety policy statement), and the arrangements for carrying out the policy. An employer also has a duty to bring the written statement to the attention of all its employees.

SECTION 1 STATEMENTS OF TERMS

Employers are obligated to provide their employees with a written statement of employment particulars (referred to as 'section 1 statements') which sets out the minimum information that employees are entitled to be made aware of as a day one right of employment. It is easiest to include this information within an employee's contract of employment and a Staff Handbook.

EMPLOYMENT STATUS

UK law gives employees a range of rights and entitlements in relation to their employment. Some of these also apply to other workers, whose status might not be that of an employee. A business should always be clear on the status of the relationship they are creating; will an individual be an employee, 'worker', self-employed contractor or agency worker? Some employment rights, employer obligations and the correct tax treatment will vary according to status.

BACKGROUND CHECKS

In the employment context, this will include actions taken by a business to verify a potential employee's qualifications, employment history, criminal record (if necessary), or other characteristics bearing on suitability for employment. In the UK the usual starting point will be an 'offer letter' to employees which stipulates certain conditions of employment. The extent of checks and conditions will vary from business to business but in most circumstances will include as a minimum an employee's right to work and satisfactory references. In some circumstances, a criminal record check may be relevant and this carried out by way of a DBS check (Disclosure and Barring Service).

COMPANY POLICIES

There are few legal requirements on employers in the UK to have written policies. For the most part, policies set out in a staff handbook are there as a matter of good practice, to set out the standard expected of employees, to assist the running of the business, and to reduce legal risk by making sure employees and managers understand the legal rights and responsibilities inherent in the employment relationship.

Required by law

- disciplinary procedures and rules (if not in contract/section 1 statement);
- grievance procedures (if not in contract/section 1 statement);
- information about pensions (if not in contract/section 1 statement);
- health and safety (if 5 or more employees); and
- whistleblowing (in some cases).

Strong legal reasons for including

- bribery;
- anti-facilitation of tax evasion (in some cases);
- equal opportunities;
- data protection; and
- whistleblowing (in some cases).

WORKING HOURS

There is a limit in the UK on an employee's working hours of 48 hours a week in any rolling 17-week period. Employees can be required to opt out of that limit but it is not that usual. Employers should have some mechanism to 'monitor' working hours.

NATIONAL MINIMUM WAGE

All businesses are legally required to pay the National Minimum Wage.

Details of the current rates can be found here:

<https://www.gov.uk/national-minimum-wage-rates>.

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ENTERING INTO CONTRACTS

Any business will need to enter into contracts. Some of these have been discussed earlier – for example a contract for the lease of a property, a contract with shareholders or investors or a contract with employees. Other examples might include contracts with:

- customers whenever goods or services are supplied;
- agents or distributors who will sell your goods or services;
- affiliates who will promote your business or drive traffic to your site;
- suppliers who provide goods and services; and
- rights holders who allow the business to use their rights.

Businesses often enter into contracts without giving them much thought or consideration. Sometimes this is because they receive a set of standard terms from a supplier which they think are non-negotiable, but more often than not, it is because they are not aware of what to look out for beyond the commercial deal terms agreed by the parties.

When entering into a contract, it is important that you do not simply sign it without having first read and considered at least the main points. It is very important that all contracts are carefully considered before they are entered into as it is very unlikely you will be able to negotiate the contract once it is signed. In some scenarios it is unlikely that you will be able to negotiate some or all of the terms. In other cases it may be appropriate to have a full negotiation. However, in both scenarios the same principles apply and it is important that you know what you are signing up to.

Here are our top seven things that you should consider before entering into a contract for goods or services:

CONSUMER CONTRACTS

Whenever you are supplying goods or services to consumers (rather than to a business) then particular care needs to be taken. The law provides particular protections to consumers which do not exist when

you are dealing with another business. This includes ensuring that consumer contracts are written in clear and easy to understand language and do not contain provisions that are unfair. There are also rules which will apply if the consumer is buying remotely rather than in person (e.g. through a website or mobile app).

In practice this means that the contract you might use to supply goods and services to a business will need to look very different to the contract that you use to supply goods and services to a consumer (i.e. direct to a member of the public or you risk it not being unenforceable or being exposed to a claim by the consumer).

DOES THE CONTRACT SAY EVERYTHING YOU HAVE AGREED?

You need to ensure that what you are signing up to includes everything that you have agreed. It is therefore important that the description of the goods/services being provided is detailed enough in the contract so that if anything did go wrong (for example, the goods/services provided are not to the quality or level you were expecting), you can rely on the contract to enforce your rights. Where details of the services have been provided in a separate document, for example, a sale pitch or response to tender, it would be important to reference these documents in your contract so that you can rely on what has been said in them.

ARE YOU IN CONTROL OF THE COSTS?

The annual inflation rate in the UK has been steadily increasing. In October 2022 it reached a high of 11.1%, the highest it has been since October 1981. The increasing rate of inflation will not only impact on the cost of living, but will also have a significant impact on some commercial contracts. You should therefore identify whether the supplier can increase its prices to reflect inflation by checking whether there is an express indexation clause (or other right to vary the price) included in the contract. If this is the case, it might be necessary to restrict the supplier's right



to increase its costs no more than the rate of inflation (usually measured in line with the Consumer Prices Index or Retail Prices Index), and no more than once per year, in order to retain some control over the likely costs you will incur over the term of the contract. This is particularly important for longer term contracts where there is no express right to terminate the contract early. If your bargaining power is strong, you may be able to resist this clause altogether or request that the supplier provide fixed estimates or a cap on the fees.

WHO OWNS THE INTELLECTUAL PROPERTY?

If intellectual property rights are being created, for example in content or software being developed for you, you should check who will own these rights. If the contract is silent on who owns the intellectual property rights, then they will usually be owned by the party creating them and not you. Therefore, in order to be able to rely on and use these intellectual property rights in your business, you should ensure that the rights are either assigned to you (so that you own them), or you have a licence to be able to use them. If you are being granted a licence, you should check that the licence terms are broad enough to cover all the ways in which you intend to use and exploit the intellectual property in your business both now and in the future.

IS PERSONAL DATA BEING PROCESSED?

Will the supplier be “processing” personal data in the course of providing the services? Under the GDPR, “processing” is defined widely: it includes anyone who receives personal data, whether or not they actually do anything with that data. If personal data is being processed, data processing clauses would need to be incorporated into the contract in order to comply with data protection legislation. What set of data processing clauses you need will depend on whether UK or EU personal data is being processed. It is also very important to check where the supplier will be processing the personal data in order to ensure that no personal data leaves the UK or EU without the relevant safeguards in place.

HOW IS LIABILITY LIMITED?

There are many different ways a supplier can seek to exclude or limit its liability in a contract. The most common way is for the supplier to include a cap on its potential liability. Often this is linked to the fee or a multiple of the fee. You should ensure that the cap of liability for the supplier is not too low bearing in mind the likely consequences and impact on your business if anything goes wrong. Other clauses to watch out for include those which limit the time in which you can bring a claim against the supplier, limit the type of loss which is recoverable, and those which limit the remedies available to you, for example, in respect of defective goods, you might find that your right to recover your loss is limited to the repair or replacement of the goods. The type of limitation clauses you will encounter will very likely differ across contracts and businesses to reflect the value, risk and bargaining strength of the parties.

HOW EASILY CAN THE CONTRACT BE TERMINATED?

There may be a number of reasons why you might need the right to get out of a contract, for example, if your business needs change, if the supplier has increased its costs to a point the contract is no longer commercially viable, or if the supplier’s cap of liability has been used up, which subsequently exposes your business to greater risk. It is just as important to consider what rights the supplier has to terminate and the impact of early termination on your business, for example, the level of disruption and costs you might incur when looking for a suitable replacement supplier. You should therefore consider how easily both you and the supplier can terminate the contract and what impact this might have on your business.

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DATA PROTECTION

OVERVIEW

Data protection in the UK has been enshrined in law through two major pieces of legislation: the retained EU law version of the GDPR (UK GDPR) and the Data Protection Act 2018 (DPA 2018). The DPA 2018 sits alongside the UK GDPR and contains additional rules and regulations in relation to the processing of personal data, detailing matters such as the provision of powers of enforcement on data processing matters to the UK's Information Commissioner's Office (ICO).

The UK GDPR sets out seven key principles concerning the processing of personal data:

1. lawfulness, fairness and transparency
2. purpose limitation
3. data minimisation
4. accuracy
5. storage limitation
6. integrity and confidentiality (security) and
7. accountability.

Compliance with the seven key principles is at the heart of the UK GDPR and is fundamental to data protection practice. Failure to comply with the principles may lead to very substantial fines – **up to £17.5 million or 4% of an organisation's worldwide turnover, whichever is higher**. It is also very unattractive from a reputational point of view for a business to be faced with action for failing to comply with the data protection laws.

WHEN ARE THE DATA PROTECTION LAWS RELEVANT?

The data protection laws will apply to nearly all business and apply whenever a business **processes personal data**.

Processing or processes means broadly anything that might be done with personal data including collecting, storing, deleting, retrieving or making it available. Personal data is information that relates to an identified or identifiable living individual. If through the information an individual is distinguishable from other individuals (for example through names, numbers or IP addresses) and the information in question relates to that individual, it will be considered personal data.

In practical terms the data protection laws need to be complied with whenever a business employs individuals, interacts with customers or potential customers and deals with suppliers.

KEY DATA PROTECTION CONCEPTS AND DEFINITIONS

There are a number of key concepts and definitions that are central to the understanding of data protection laws. We have set out some of these out below:

Controllers and Processors

The UK GDPR primarily applies to the processing of personal data by controllers and processors. Different obligations will apply to controllers and processors and it is therefore important to be able to differentiate between controllers and processors to understand the UK GDPR obligations that apply.

Data Controllers

A 'data controller' is an entity which exercise overall control over the purpose and means of the processing of personal data. Controllers must comply and demonstrate compliance with all the data protection principles, as well as the other UK GDPR requirements, and ultimately be responsible for the compliance of their processors. Unless exempt, controllers in the UK must pay the data protection fee. The ICO, as well as individuals, may take action against a controller regarding a breach of its obligations under the UK GDPR.

Data Processors

A 'data processor' is the entity that acts on behalf of the data controller, undertaking data processing activities on the instructions of controllers. Data processors do

not have the same obligations as controllers under the UK GDPR, however, processors have a number of direct obligations of their own. Under Article 28 UK GDPR, both the ICO and individuals may take action against data processors regarding any breach of their obligations under the UK GDPR.

Data Subject

A data subject is the person to whom the personal data relates.

REGISTRATION WITH THE INFORMATION COMMISSIONER'S OFFICE

Under the Data Protection (Charges and Information) Regulations 2018, individuals and organisations that process personal data need to pay a data protection fee to the Information Commissioner's Office (ICO), unless they are exempt.

The ICO provides a self-assessment tool which enables individuals and organisations to determine whether a fee is payable – <https://ico.org.uk/for-organisations/data-protection-fee/self-assessment/>.

DATA PROTECTION IN PRACTICE

Businesses in the UK should ensure they have established a variety of processes and practices to make certain that they are compliant with the key principles set out under UK GDPR. These include the following:

Privacy Notices/Policies

Whenever a business collects personal data either directly from the data subject or from a third party it will need to make certain information available to that data subject. This is generally done through a privacy notice/policy. A privacy notice/policy will contain various information including why the organisation needs someone's personal data, what it plans to do with it, how long it is going to keep it, and if it will share it with anyone else.

Privacy notices should be made available to people when their personal details are first collected. This is frequently done by putting the privacy notice or policy on the organisation's website and providing a link to it. Notices should be regularly reviewed to ensure they are up-to-date and any changes should proactively be brought to people's attention.

Record of Processing Activities (ROPA)

Most organisations are required to maintain a record of their processing activities, covering areas such as processing purposes, data sharing and retention.

Contracts under Article 28

Whenever a controller uses a processor (or a processor uses a sub-processor) to process personal data on their behalf, a written contract needs to be in place between the parties.

International Data Transfers – restricted transfers

The UK GDPR contains rules on the transfer of personal data outside the UK. These rules apply to all transfers, no matter the size of transfer or how often they are carried out and for example may be engaged when personal data is being stored by a cloud service provider not based in the UK or is being shared with or transferred to offices or consultants outside of the UK.

Transfers to some countries are more straightforward than to others. Transfers to countries which the UK has decided offer a comparable level of protection for personal data as the UK offers (often referred to as having a finding of adequacy) can be made with little else in place (although as ever there is a requirement to tell people where their data is going typically through a privacy notice/policy). Such countries include the EEA, Switzerland, Canada, Japan, Argentina, New Zealand and Israel.

Where however the transfer is to a country where there is no finding of adequacy then there needs to be a “safeguard” in place before that transfer takes place. Such countries include the US, China, Australia, and India. There are a number of safeguards available but often the most convenient one is to put in place a particular kind of contract between the data exporter and the data importer. In the UK this contract is known as the International Data Transfer Agreement (IDTA) and in the EU it is referred to as the Standard Contractual Clauses (SCCs).

In addition it is necessary to carry out a ‘transfer risk assessment’ (TRA) prior to transferring personal data to a country without a finding of adequacy. It will often also be necessary to put additional safeguards in place which could take the form of security measures or further contractual precautions.

Data Protection Officers (DPO)

Some (but not all) organisations are required to appoint a DPO. A DPO advises the organisation about the UK GDPR, monitoring compliance and training staff. DPOs must report to the organisation’s highest level of management, operate independently, and have adequate resources to carry out their tasks. Even if not obliged to appoint a DPO, it is very important that an organisation has sufficient staff, skills, and appropriate reporting structures in place to meet its obligations under the UK GDPR.

Data Protection Impact Assessments (DPIAs)

DPIAs are key ways to minimise data protection risks and are a legal requirement before carrying out processing likely to result in high risk to individuals’ interests. DPIAs help assess how to comply with the requirements of the UK GDPR and act as documented evidence of the decision-making process.

Data Protection Policies

Data protection policies are not mandatory but are nevertheless important to demonstrate compliance with the UK GDPR. In fact, the UK GDPR states that where proportionate, implementing data protection policies is one of the measures an organisation can take to ensure, and demonstrate, compliance. Policies might deal with key matters such as the retention/destruction of data, the security measures in place to protect personal data and the handling of requests for access to data.

Depending on what an organisation does with personal data should inform the detail and extent of its data protection policies. For example, processing large volumes of personal data should naturally lead to comprehensive and robust policies being in place.

Organisations should also be able to show that they have implemented and adhered to their data protection policies. This can be proven in a number of ways, including but not limited to educating, raising awareness and regularly training members of staff. Additionally, internal monitoring and auditing can be conducted by the DPO to ensure practices are being adhered to.



THE RIGHTS OF DATA SUBJECTS

The UK GDPR provides the following rights for individuals:

The right to be informed

The right to be informed about the collection and use of their personal data. You must provide individuals with information including: your purposes for processing their personal data, your retention periods for that personal data, and who it will be shared with.

The right of access

The right of individuals to access and receive a copy of their personal data, and other supplementary information. This is commonly known as a ‘Subject Access Request’ (SAR) or ‘Data Subject Access Request’ (DSAR).

The right to rectification

The right for individuals to have inaccurate personal data rectified, or completed if it is incomplete.

The right to erasure

Also known as ‘the right to be forgotten’, this is a right for individuals to have personal data erased. The right is not absolute and only applies in certain circumstances.

The right to restrict processing

The right to request the restriction or suppression of the individual’s personal data. Again, this is not an absolute right and only applies in certain circumstances.

The right to data portability

Allowing individuals to obtain and reuse their personal data for their own purposes across different services, moving, copying or transferring personal data easily from one IT environment to another in a safe and secure way, without affecting its usability.

The right to object

An absolute right to object to the processing of their personal data in certain circumstances, such as stopping their data being used for direct marketing.

Rights in relation to automated decision making and profiling

Data controllers and processors must ensure that the individual rights of data subjects are adhered to and any requests are addressed in a prompt and timely manner.

DATA PROTECTION AND EMPLOYMENT

Data protection laws apply to situations where a business employs individuals. As explained above, the UK GDPR requires business to give individuals certain information about how their personal data is collected and used. This is done via a privacy notice or policy which must identify who the data controller is, explain the purposes for which personal data is collected and used, how the data are used and disclosed, how long it is kept, and the controller's legal basis for processing.

A privacy notice should be issued at the time data is collected. This means in practice that:

- a 'recruitment privacy notice' should be issued at the start of the recruitment exercise; and
- a 'worker privacy notice' should be given to employees, workers and contractors at the start of the engagement.

DATA PROTECTION AND WEBSITES/MOBILE APPS

Personal data is often collected through a businesses website or mobile app. This may through a variety of interactions with the website or mobile app including:

- customers who buy goods or services through an e-commerce website or mobile app
- customers or potential customers who contact the business with enquiries or complaints either through the website, mobile app or by social media, email or post
- customers who leave reviews on the website or mobile app about the businesses goods and services
- customers who browse a site or mobile app and details of their browsing habits or preferences are collected using cookies or by other technical means and
- customers or potential customers who sign up for newsletters, special offers or updates.

A websites privacy notice or policy will therefore need to provide information collected through each of these interactions as relevant and should be made available at the point at which the personal data is collected.

When evaluating a website's compliance with UK GDPR, operators should consider the key data protection principles. In particular, website operators should consider the following:

- whether a robust and up-to-date privacy policy has been published on the website

- whether the website provides clear and comprehensive information about the way they use cookies, ensuring that appropriate means of consenting to cookies is in place
- whether a website has appropriate technical and organisational security measures in place to comply with the key principles of integrity and confidentiality
- whether appropriate consent has been obtained in relation to any electronic marketing
- whether any personal data supplied via the website is subject to an international data transfer
- ensure compliance with any DSARs received from website users and
- notify any personal data breaches to the ICO and, where necessary, the data subject.

COOKIES

Websites and mobile apps will often set cookies or something similar to remember the settings or preferences of users of the site or mobile app. This may range from remembering a user name and password, to remember your browsing preferences so that, for example, you are taken to a particular part of a site or app, to serve you with targeted ads or to track your browsing across a site or app. Cookies may be set only for a particular browsing session or may be more permanent. Similarly, cookies may be set by the site or app owner (first party cookies) or by third parties such as analytic companies and advertisers (third party cookies).

Regardless or not of whether these cookies collect personal data (some data collected may well not be personal because it is aggregated so that it is not possible to identify an individual from it) the law requires that the user's consent is obtained before the cookies are set for all but "strictly necessary" cookies (for example cookies designed to improve security or to help a site load more quickly). The test for consent is taken from the UK GDPR which means that consent must be specific, freely given, unambiguous and informed. In practice this requires a positive act such as clicking a link or ticking a box and implied consent (for example simply continuing to browse a website) is not good enough.

There are a number of ways of obtaining this consent but the most popular way is currently to set a pop up or banner to appear when the browsing session begins which links through to a separate cookie policy describing the type of cookies, what they are collecting, who is setting them and how long they are set for. The user is then required to click to consent to the cookie policy.

ELECTRONIC MARKETING

There are a fairly complicated set of rules about when electronic marketing communications can be sent. These rules can be difficult to apply in practice.

Marketing communications via email, texts, picture messages, video messages, voicemails, direct messages via social media or any similar message that is stored electronically are all considered to be 'electronic marketing'.

The rules on electronic mail marketing mean that an organisation must not send electronic mail marketing to "individual subscribers", unless:

- they have specifically consented to receiving electronic marketing; or
- they are an existing customer who bought (or negotiated to buy) a similar product or service in the past, and the organisation gave the customer a simple way to opt out of both when it first collected their details and in every message subsequently sent.

"Individual subscribers" are individual customers (including sole traders) and other types of organisations (e.g. other types of partnerships but not LLPs). For example, people using personal email addresses such as google, hotmail or yahoo will be individual subscribers as will people using the email addresses of sole traders or unincorporated partnerships.

By contrast, these rules on electronic marketing do not apply to "corporate subscribers". A corporate subscriber will be a person who uses the email address of an LLP or a limited company, so joe.bloggs@edwincoe.com will be a corporate subscriber. When marketing to so called corporate subscribers it is still important to comply with the UK GDPR.

Organisations must not disguise or conceal their identity and must provide a valid contact address so customers can opt out or unsubscribe. Organisations must not encourage those that have opted in to forward electronic marketing messages to those who have not. Similarly, organisations must not request the contact details of others for use for electronic marketing.

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PROTECTING YOUR INTELLECTUAL PROPERTY

INTELLECTUAL PROPERTY

Intellectual Property ("IP") describes a collection of legal rights concerning various types of information and ideas. It is important that businesses be aware of the different types of IP rights, not only to protect what they create (or is created for them) but also to avoid infringing the IP rights of other businesses and individuals.

REGISTERED V UNREGISTERED RIGHTS

IP rights fall into two general categories:

■ *Registered rights*

Rights granted on application to an official body, for example the UK Intellectual Property Office (UKIPO). Registered rights are monopoly rights meaning, once registered, the owner can stop others from using the right without their permission. It is generally a good idea for a business to obtain registered IP rights if it can. These are likely to be attractive to lenders or investors and will help the business to crystallise its rights.

Examples of registered IP rights include patents, trade marks and registered designs.

■ *Unregistered rights*

Rights which exist automatically regardless of registration and give protection against copying or using the right. Some can be registered and some cannot be.

Examples of unregistered IP rights include copyright, unregistered design rights, rights in unregistered trade marks and confidential information.

Each type of registered and unregistered right will be considered further.

TRADE MARKS AND PASSING OFF

Trade marks are signs or symbols used by organisations to distinguish its products and/or services from those of others. Trade marks can be a brand name (e.g. IKEA or IBM), a company logo, a trading style or packaging. Trade marks can also consist of the shapes of products or their packaging (for example soda bottles), and colours associated with a trading style (such as purple for chocolate), as well as sounds, smells and slogans.

Trade Mark Registration

Trade mark registration must generally be applied for on a national basis, so to obtain a UK trade mark you would apply at the UKIPO. There are some exceptions to this and for example, it is possible to apply for one trade mark that covers the whole EU. It is also possible to make an application through an international treaty called the Madrid Protocol, which provides a more cost effective way of obtaining protection in multiple countries.

To be registerable as a trade mark, a mark must be:

- capable of being graphically represented;
- distinctive (not too descriptive);
- capable of distinguishing goods or services; and
- not excluded by statute.

It is also possible for the holder of earlier rights to object to the grant (and use) of a trade mark. This usually happens when a third party owns an earlier mark, which is the same or confusingly similar to the mark that is being registered. For that reason it is often a good idea to carry out searches before applying to register or beginning to use a mark.

When registered, trade marks are usually identified by the use of an ® next to the mark. It is a criminal offence to use ® if you do not have a registered trade mark. ™ can however be used for both unregistered and registered marks.

Why Register?

Registering a trade mark provides a business with a valuable commercial asset, a sign for their business which is commercially exploitable. It can also make the business more attractive to buyers, lenders or investors.

A registration confers on its proprietor the statutory right to the exclusive use of the mark in connection with the goods or services for which it is registered. For example, registration for goods in class 9 will usually allow a holder to use the mark in relation to IT equipment such as computers, headphones and monitors. Registering a trade mark gives the holder a right to take legal action against those that infringe the mark, providing the holder with remedies such as an injunction or damages.

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I value their commitment to understanding my business. They are aware of changes in our organisation as soon as information hits.

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Unregistered marks

An unregistered trade mark is a mark which has not yet been registered with a relevant IPO. Unregistered trade marks are usually accompanied by the symbol ™, which often serves as an identifier for the source of the product or service. They represent the goodwill that a business has built up in a particular mark, often over a considerable period of time, and can in themselves be tremendously valuable.

Unregistered trade marks are relatively difficult to protect in comparison to registered trade marks and holders must turn to common law for protection and rely on claims of passing off to prevent infringement.

The tort of passing off allows the holder of goodwill in an unregistered trade mark to prevent someone passing off their goods or services as those of another party. In order to establish passing off, the holder of the unregistered mark must prove a reputation attached to the goods/services and a misrepresentation by the alleged infringer that leads the public to believe that the goods/services offered are the goods or services of the business. Finally a business must provide proof of damage as a result of the misrepresentation, for example financial loss or damage to goodwill.

Passing off claims are challenging and can be expensive to bring due to the need to establish that the business owns goodwill. Whilst businesses should be cautious to claims of passing off, they should not rely on them themselves and should instead secure their rights in trade marks through registration.

COPYRIGHT

Copyright is a form of IP that protects original artistic, musical, dramatic and literary works. Works that can be copyrighted include the traditionally thought of works such as films, broadcasts, sound recordings and typographical arrangements of published works, but may also include works such as computer programs, databases or pictures and blogs on a website.

Copyright arises on the creation of the work automatically and lasts for a period of (usually) 70 years after the death of the original author in the case of artistic, musical, dramatic and literary works. In most countries (including the UK) copyright cannot be

registered and so it is important to retain evidence that proves when it was created and by whom. There is a system of registration in some countries notably the US and China.

Ownership of copyright

Ownership of copyright allows the owner to prevent unauthorised use of the work, including making copies of the work or communicating it to the public without the owners prior consent. Infringement of copyright can provide the owner with remedies including injunctions, delivery up, seizure of infringing material and damages.

The general rule is that the first owner of copyright will be the author. If however work is created by someone in the course of their employment, the employer will be the first owner in copyright.

Contractors

One important thing to realise therefore is that where a third party contractor (such as a website developer, a designer or a photographer) creates the IP then the basic legal position is that that third party will own the copyright, although there may be (often expensive) arguments that the business commissioning the work has an equitable assignment of the copyright in the work. It is therefore very important to ensure that appropriate assignment provisions are drafted into any contractor agreements to ensure there can be no dispute as to who the owner of a copyrighted work is and/or that an assignment is taken of any previously created works.

Using copyright works

It is important that a business identifies its copyright work whenever it uses it. This is usually done in the form © [name of owner][year of creation]. This puts people on notice that the work is protected by copyright and should not be copied and assists in establishing a claim to copyright.

Additionally, appropriate licenses should be obtained when a business uses any copyrighted work that is not the original work of the business to ensure the business is not susceptible to a claim of copyright infringement. Remember that copying something that appears on the internet (such as an image) is very likely to be copyright infringement.

PATENTS

Patents are a form of IP right which provide inventors with a legally protectable monopoly over their inventions and protect new and inventive technical features of products and processes. To qualify for protection, an invention must be new, involve an inventive step, be capable of industrial application and not be specifically excluded from protection.

To obtain a patent, an application must be filed at an appropriate patent office and like with trade marks, patents generally need to be obtained on a national basis (although there are treaties in place which make this process easier and can help defer the costs). The grant of a patent is not automatic and an application will be reviewed on the basis of the key criteria mentioned above. Once obtained, patents last for a limited period (usually up to 20 years) but offer a high level of protection for the patent holder. Patents are however relatively expensive to maintain and involve a degree of public disclosure of the invention.

It is important to consider whether an invention should be protected before any details are published. If a publication is made before a patent is filed, it can severely limit the scope of protection although a disclosure made under terms of confidentiality (such as under a non-disclosure agreement) will not prevent a patent being granted later on.

The owner of an invention will be the only person entitled to prosecute a patent application. The inventor is usually the owner of the invention, however in the case of employees, their employers will usually own the patent if it is made in the normal course of duties. In the case of commissioned works, in the absence of express contractual provisions to the contrary, legal title to an invention made by an independent contractor will vest in the contractor. Again, it is therefore important to ensure that appropriate assignment provisions are drafted into any employment/contractor agreements to ensure there can be no dispute as to who the owner of a patent is.

Once you have a patent it is good practice to mark the goods that are protected with not only the fact that the product is protected by patent but also with a patent number.

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DESIGNS

Designs protect the appearance of the whole or part of a product. There are two basic types of designs, registered and unregistered:

Registered designs

A registered design can protect three-dimensional (and possibly two dimensional) designs. The design is protected across all sectors and is not limited to the product to which it was originally applied. Examples of registered designs include containers, logos and vehicle designs.

To be registerable a design must have the following features:

- the design must be new - An identical or similar design must not have been disclosed anywhere in the world before the application. Once disclosed, the designer has a 12 month grace period in which to file their application for a design;
- the design must have 'individual character' - it must give a different overall impression from previous designs; and
- the design must not be excluded by statute - specific designs, such as computer programs or features that are solely dictated by the product's technical function, are excluded from registration.

Once registered, protection can last for 25 years and provides the owner with a legal monopoly over the design. Registration gives the exclusive right to make articles incorporating the design and allows the rights-holder to sue for infringement.

Unregistered designs

There are different types of unregistered designs. These will protect different things but all will be obtained automatically and do not require an application or fee. The different types of unregistered designs are:

■ UK design rights

UK design right protects the appearance of a purely functional product and is a right to prevent copying. Design rights are automatically protected for the earlier of 10 years from first sale or 15 years after creation. Owners of a design right may exploit the right through licensing.

■ Supplementary unregistered design ("SUD")

This is basically the unregistered version of the Registered Design and protects the appearance of a product. The appearance can be either 2-dimensional or 3-dimensional and includes its shape, colours,

texture, materials and ornamentation.

The appearance is protected in the UK for 3 years from the date the design is made public.

■ Continuing unregistered community design right ("continuing UCDs")

This is basically the EU equivalent of the SUD and protects designs that were protected in the EU (prior to the UK formally leaving) in the UK.

If relying on any form of unregistered design, it is imperative to retain proof of when the design was created. Adequate proof can be obtained by getting signed and dated copies of the design drawings or photos certified and kept by a solicitor or intellectual property attorney.

With both registered and unregistered designs it is good practice to mark the goods that are protected by a design. Where that design is registered it is important to mark the product that it is protected by a registered design and also to give the registered design number.

CONFIDENTIAL INFORMATION

While not technically an intellectual property right, confidential information is often used instead of or in parallel with other IP rights and can provide some very valuable protection for a business.

One important feature of confidential information is that it can last forever and will only cease to apply once the idea, invention or other confidential thing is made public. It can also be extremely useful to protect things that could otherwise not be easily protected by an IP right such as an idea or a business plan.

The best way to protect confidential information is through an express contract such as a confidentiality agreement, Non Disclosure Agreement (NDA) or by using a confidentiality clause in an agreement.

Confidentiality can however also arise without a formal contract or clause, and proving that an obligation of confidence exists in these circumstances will depend on showing that the information itself has the necessary quality of confidence and also that it was disclosed in circumstances importing a duty of confidence. In addition, to show that there has been a breach of confidence it will be necessary to prove that there has been an unauthorised use of that confidential information to the detriment of the rights holder.



BUSINESS OWNER CONSIDERATIONS

When establishing a business in the UK, the owners, directors and managers must not be forgotten as individuals. Whatever form the business takes, its owners will have economic interests in a UK asset, key staff may be spending significant periods of time in the UK, and all businesses must be prepared for the unexpected happening to key management.

The following should therefore be given serious thought:

BUSINESS CONTINUITY

Businesses must ensure that, if a key person becomes unable to perform their role through death or incapacity, the business can endure. As such, all businesses need a succession plan so the right people take on the right responsibilities.

A fundamental part of this is for all directors and managers to have Lasting Powers of Attorney in respect of business decisions. Where a key person loses mental capacity but remains living, it can sometimes be more difficult to manage than if that person had died. Lasting Powers of Attorney ensure that an appropriate person or people can step in to take business decisions when that key person cannot.

SUCCESSION

Owners must consider how they want their business interests to pass in the event of their deaths. It is often sensible to put an English-law Will in place to deal with their UK assets.

However, co-owners need to consider what would happen to the business if their fellow co-owner died. Would the business suddenly become part-owned by their business partner's spouse, who may never have participated in the business before? For some co-owners, it is worth putting life policies in trust and cross options in place to ensure that, on the death of a co-owner, the surviving co-owners have the option and funds to purchase the deceased's owner's share of the business. This releases cash for the deceased owner's heirs and retains business ownership in the hands of the remaining co-owners. Advice should be taken to ensure these arrangements do not prejudice business relief from UK inheritance tax.

PERSONAL TAXATION

Ownership of a UK-situated business interest may bring individuals formerly outside the scope of UK inheritance tax within it, particularly if the business is run in a way that might prejudice business relief. Advice should be taken to avoid this situation from arising.

In addition, anyone spending significant periods of time in the UK may become a UK tax resident. Business owners and key management should take advice on how this impacts them as early as they can, and ideally before they arrive in the UK, since certain tax planning is most effective when considered well ahead of time.



The firm is particularly good at understanding the business issues affecting private clients.

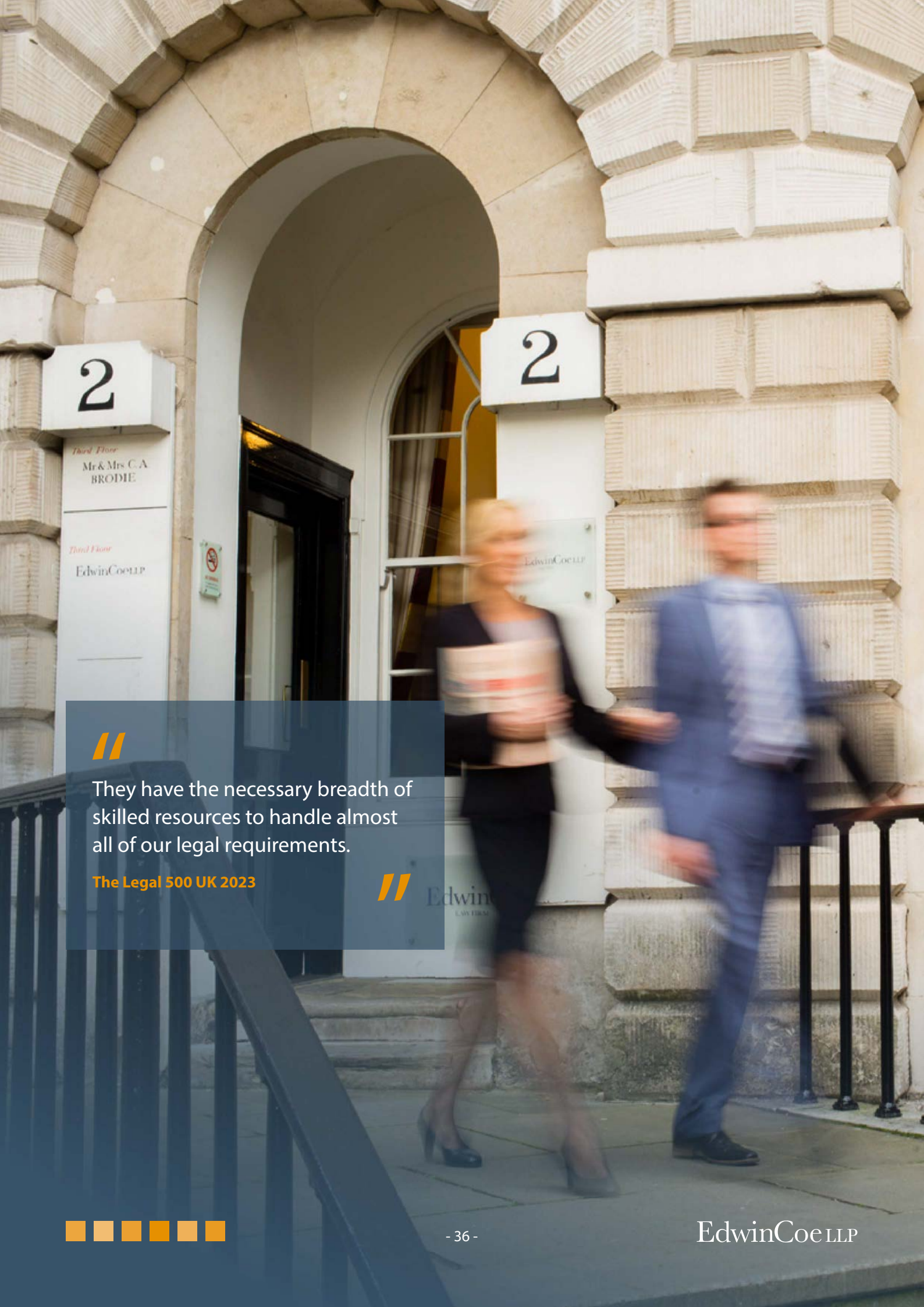
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EDWIN COE'S ADDED VALUE

We have strong links with the following disciplines and can make introductions to appropriate service providers in the following areas:

- Accountants and Insurance brokers
- Pre-Employment Screening Services
- Recruitment Personnel
- Relocation and Global Mobility Consultancies
- Health and Safety Consultants
- Payroll providers
- Occupational Health providers
- Public Relations Agencies to include press and industry journal coverage
- Media Training Agencies
- Patent attorneys.

CLIENT SERVICE IS AT THE HEART OF EVERYTHING WE DO

- Deep experience of entering full service projects in partnership with our clients.
- Our client relationships are longstanding and we are proud to act as trusted business experts and advisors.
- We add additional value by introducing clients, contacts and opportunities, often creating deals.
- We place proactive and clear communication at the heart of our client relationships.
- We are a modern and entrepreneurial business with both the appetite for and the experience of working on innovative and ambitious projects.
- We are more than simply lawyers, rather business legal experts who partner and work closely with our clients to achieve their commercial goals.

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