

Uplifting legal advice



Doing Business in the UK

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## Introduction

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The purpose of this guide is to highlight and explain in outline some aspects of English business law that may be particularly significant for US businesses operating in England, perhaps for the first time.

One of the most important differences is the jargon and technical phrases used in the UK. We have pulled together a glossary of some of the more important terms at the back of the booklet.

While there are no restrictions on foreign companies and individuals trading in England once the appropriate entry requirements are met, there are numerous legal traps and pitfalls for the unwary.

We hope that this booklet will enable you to navigate the various legal obstacles which at first can appear to be daunting and obstructive for those wishing to engage in the English market.

**PLEASE NOTE:** This booklet is intended for general guidance only and should not be relied upon without detailed legal advice on your specific circumstances which Steeles Law will be very pleased to provide.



## The United Kingdom

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Although the United Kingdom is one member state of the EU, it is a common misconception that the terms England and the United Kingdom are one and the same. From a legal perspective, the differences can be very important.

The United Kingdom means England, Wales, Scotland and Northern Ireland. Whilst broadly speaking the law relating to England and Wales is the same for legal purposes, Northern Ireland and Scotland are different territories or “jurisdictions”.

Both Northern Ireland and Scotland have their own Courts and in many respects procedures are significantly different from those applying in England and Wales.

Frequently, different Acts of Parliament apply to Northern Ireland and Scotland from those that apply to England and Wales. Scotland now has its own parliament able to make its own laws in certain areas and in Wales, the Welsh Assembly has some limited law making powers.

Therefore a reference to the law of the United Kingdom is a misnomer as in some circumstances the same subject may be dealt with differently in the three jurisdictions of Scotland, Northern Ireland or England and Wales. This guide is based only on the law so far as it relates to England and Wales.

Other terms that are often used misleadingly include the British Isles, Great Britain, GB and Britain. See the glossary for full definitions of each of these.



## England and Europe

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Broadly speaking there are two complementary legal systems that apply to businesses in England.

The first is what is colloquially called European Law. This includes laws created by, and applying throughout, the EU. In addition the ECJ will hand down judgments, which have direct effect in England.

The second and far more common legal system is that established by the British Parliament and English courts.

Rather confusingly much of English law created by the Parliament actually emanates from the EU. It is therefore a hybrid of the two systems.

The way that this hybrid works is that the EU will create new law in the form of a Directive or a Regulation. Directives usually apply to all Member States including the United Kingdom. Each Member State is required to convert a Directive into its own national domestic law within a given timetable. Much of English business law is now created in this way.

Regulations, on the other hand, have general and direct application throughout the EU when they are created. They do not require a further act on behalf of a Member State to convert them into law.



## Business Formats

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An overseas business starting to trade in England can either do so directly or by creating or acquiring an English-based business vehicle for such trade.

### **Branch and places of business**

Currently, an overseas company can trade directly in the UK either by setting up a branch or establishing a place of business in the UK. The filing requirements for these two regimes differ from each other in certain respects.

With effect from 1 October 2009, there will only be one type of registration available for overseas companies with a presence in the UK. This will replace the existing regime. The new registration will be known as a 'UK establishment'.

Where an overseas company is regularly doing business in the UK, perhaps with English employees or premises from which it was based even if it is a customer's or distributor's, then it will need to register as a UK establishment.

Overseas companies registered under the existing 'dual' regime will not be required to re-register their existing UK operation under the new regime but will need to meet the requirements of the new regime and provide some additional information to the Companies Registry by 31 March 2010.

### **Obligations of Registration**

The basic registration process of a UK establishment will require particulars of the overseas company and its establishment in the UK to be notified to the Companies Registry and various constitutional and other formal documents filed there. In addition, annual accounts and other information of the overseas company will need to be filed regularly. Certain information must also be displayed in the overseas company's offices in the UK and on certain documents.

All documents filed at the Companies Registry are publicly accessible online for a nominal fee.

Due to the requirements on public disclosure of annual accounts many US entities prefer to establish a separate English legal entity for trading in England.

# Choosing an English Business Vehicle

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## Private Limited Companies

This is the most common legal entity for conducting business in England. Shareholders own the company which in law is a separate legal person distinct from its shareholders and directors. The liability of the shareholders is limited to the nominal value of the shares for which they have subscribed for.

Shareholders can be individuals or other legal entities including foreign businesses and individuals.

Significant changes to company law take effect on 1 October 2009 with full implementation of the Companies Act 2006. We generally refer to the law after 1 October here but make some reference to the old law which you may still come across.

## Constitution

The constitution of a limited company is referred to as its Articles of Association. Companies formed prior to 1 October 2009 also had a Memorandum of Association which determines the company's authority to conduct business although recently practice has been for few restrictions to be included.

The Articles of Association comprise a number of rules which set out the formalities of how the company is managed. Prior to 1 October 2009 this was usually based on a standard statutory form known as "Table A". After this date the standard statutory form has changed and is referred to as the 'Model Articles'. Articles of Association are publicly available. A company can choose to adopt the standard forms of articles without amendments, or amend them to suit their needs or can create an entirely new or 'bespoke' set of Articles.

## Shareholders' Agreements

In addition to the above, where there is more than one shareholder it is usual to have a shareholders' agreement. Unlike the Memorandum and Articles which are on the public record this document sits as a private agreement between the shareholders usually setting out firstly how the company will be run and secondly various exit strategies for the shareholders.

## Board

The management of a company is delegated to the Board of Directors. An English company can have just one director. Directors can be of any nationality and do not need to be resident in England. The Directors generally have unlimited authority to bind the company, without recourse to the shareholders, subject to the Company's constitution.

For any directors based overseas it is useful to appoint an English representative such as a lawyer who can execute documents when the director is unable to do so personally by means of a document known as a power of attorney.

## Company Secretary

The second type of officer under English company law is called the company secretary. Recently there has been a change in the law so that a private limited company does not have to appoint a company secretary unless the Articles of Association specifically require one. A public limited company must still appoint a company secretary.

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## **Directors' Duties**

Directors must act in a way that they consider would be most likely to promote the success of the company for the benefit of its members as a whole. Each director must have regard to the consequences of any decision in the long term, the interests of the company's employees, the company's business relationships with suppliers, customers and others, the impact of the company's operations on the community and the environment, the desirability of the company maintaining a reputation for high standards of business conduct and the need to act fairly as between the members of the company.

In certain circumstances directors must consider or act in the interests of the creditors of the company. This is a very high standard of care. Directors can also be personally liable for criminal and civil penalties if they fail to comply with a whole raft of issues such as Health and Safety legislation or if they allow the company to trade whilst insolvent. Directors may wish to seek professional advice in circumstances where the interests of the company's present members conflict with those of the company as a corporate entity. Please see our Directors' Highway Code for more information.

## **Shadow Directors**

In addition to those directors who have been properly appointed it is possible for others who are actively involved in the management of a company to become what are known as 'shadow directors' and become liable in the same way as a duly appointed director. Parent companies and their officers can often become shadow directors unwittingly.

## **Annual Accounts**

Companies must file annual accounts and various other documents with the Companies Registry, all of which are publicly accessible. Failure to do so is a criminal offence. For companies with a turnover over and balance sheet value above certain thresholds it is necessary for the accounts to be independently audited by qualified auditors. Unlike a UK establishment of an overseas company, only the accounts of the English company need be filed and not those of a foreign parent company.

## **Public Limited Company (PLC)**

The major difference between a PLC and a private limited company is that a PLC can offer its shares to the public. This is therefore the form that all stock exchange listed companies take. Note however that not all PLCs are listed companies.

To qualify as a PLC a company's allotted share capital must be at least £50,000. PLCs are however subject to considerably more restrictions in the way that they conduct business as compared to private companies.

## **Partnerships**

In England partnerships are an extremely flexible way of carrying on business. There are no formalities required to create a partnership. It is extremely unwise to form a partnership without a formal written partnership agreement in place. In the absence of such agreement the fall back position is still set out in an Act which is over a hundred years old. This is rarely appropriate for modern business.

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Save for certain rules relating to business stationery and notices at businesses' premises, there are no registration or publicity requirements for partnerships. However the biggest disadvantage is that partners are jointly and severally liable for all debts and liabilities of the business.

### **Limited Liability Partnership**

This is a relatively new form of business model that has existed since 2002. The title is somewhat misleading as there are no partners in an LLP, only members. An LLP has a separate legal personality from its members and the members' liability is limited to the sum that they agree to contribute to the LLP. The members are free to agree their own Members' Agreement establishing how the business will be run. There are some limited statutory fall back provisions where there is no written agreement; again, these are best avoided. LLPs have proved popular with professionals who were traditionally involved in ordinary partnerships as flexibility is maintained and members are taxed under the same regime as partners.

The trade off for limited liability is that certain information must be filed with the Companies Registry including annual accounts which are available for public inspection.

# Employment and Labour Relations

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## Introduction

Employing people in the UK is not straightforward. Unlike in many countries outside Europe, the employment relationship is governed by a complex mixture of legal rights and obligations much of which emanates from the EU. That said the regime in the UK is generally more flexible than elsewhere within the EU.

There is substantial protection for workers and the burden of compliance on employers, both in administration and in penalties for failing to comply is high. The obligations start before a worker is engaged and continue beyond termination. Hiring and firing is something that should only be done with great care.

## Employment Tribunals

Breaches in employment law are enforced by dedicated labour courts known as Employment Tribunals. The general rule in Employment Tribunals is that each side bears its own costs irrespective of the outcome of the case.

## Workers, Employees and Self-Employed

The rights a person has at work are also governed by the capacity in which they are engaged. They may be a worker, an employee or self-employed. Broadly speaking, the self-employed have fewer rights than workers, who in turn have fewer rights than employees. For the purposes of this guide all references are to employees, but a prudent employer would be wise to note the distinction between a worker, an employee and the self-employed.



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## **Recruitment**

Even before an employee is engaged, the prospective employer is exposed to a range of serious potential liabilities, since discrimination law applies to prospective as well as existing (and in certain circumstances, former) employees. An employer who refuses to engage a prospective employee on the basis of a prohibited ground, such as the employee's sex, race or age, may be liable to compensate that person.

## **Terms of Employment**

Once employed, employees are entitled to have their main terms of employment set out in writing within two months. The list of matters to be included in such terms include rates of pay, sick pay and holiday arrangements as well as disciplinary and grievance procedures.

## **Health & Safety**

The most fundamental of all obligations to employees is to protect and maintain their health and safety at work. There are detailed laws governing an employer's obligations in this regard and directors of limited companies and partners may be criminally liable for a breach of these laws. In addition, companies and other organisations may be held liable for the criminal offence of corporate manslaughter (known as corporate homicide in Scotland).

## **Working Time**

Aligned to an employer's health and safety obligations are the Working Time Regulations, which set out, for example, minimum

holiday entitlements, rest breaks and a maximum average working week of 48 hours. Certain provisions can be opted out of or modified providing a proper form of agreement is drawn up.

All employees are entitled to a minimum of 5.6 weeks' paid holiday each year (28 days for a full time employee working five days per week). This minimum can include the 8 public holidays (Bank Holidays) although many employees are entitled to public holidays in addition to their contractual holiday entitlement.

## **Minimum Wage**

Employees are entitled to be paid a minimum wage based on their age, which is nationally set and reviewed annually. There are very few exceptions to avoid paying the minimum wage and penalties include criminal sanctions for refusing or wilfully neglecting to pay.

## **Discrimination**

It is unlawful to discriminate against employees in the workplace on the basis of their sex (including the fact that they are pregnant or have undergone gender reassignment), race, religion or belief, sexual orientation, age or because they are disabled. Additionally, disabled employees must be accommodated in the workplace by adjustments to, for example, premises or work patterns, in so far as it is reasonable to do so. Employees have the right to claim discrimination irrespective of the length of time they have been employed or even if they have been refused employment on the basis of one of the prohibited grounds. Employees have the additional right to claim equality of pay and other contractual terms to

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those of the opposite sex carrying out the same work or work of equal value.

### **Parental Rights**

In addition to the general sex-discrimination laws there is detailed specific protection for parents including up to 12 months maternity leave (9 months paid) for mothers, 2 weeks paid paternity leave for fathers and up to 13 weeks unpaid parental leave for each parent. Parents also have the right to request to work flexible working hours. There are detailed procedures for each of these rights which must be followed to avoid claims.

### **Trade Unions**

Collective labour relations are normally governed by trade unions. They are prevalent in large organisations but less active in small to medium sized businesses. All employees have an unfettered right to join a trade union and undertake related activities. Detrimental treatment or dismissal of an employee because of their trade union activities or membership will be unfair, irrespective of the employee's length of service, and will attract an award of compensation from the Employment Tribunal.

### **Unfair Dismissal**

The most basic of rights is not to be unfairly dismissed. Employees must generally have been employed continuously for a minimum of 12 months. There are some exceptions to this, where, for example, an employee is dismissed because she is pregnant. An employee who is dismissed by the employer has the right to make a claim to an Employment Tribunal who, if they are persuaded the dismissal was objectively unfair, may order the employee to be re-employed or

compensated. Employers are required to follow a fair procedure before dismissing an employee, and failure to do so will result in an uplift of any compensation payable to the employee.

The current maximum award for unfair dismissal as at 1 October 2009 is £77,600, comprising a basic award (based on length of service) and a compensatory award based on financial loss. Some claims, such as for discrimination have no limits, however, and attract compensation for non-financial losses such as injury to feelings.

### **Wrongful Dismissal**

Wrongful dismissal is a claim for breach of contract separate from unfair dismissal. Often it relates to the period of notice of the termination of employment, which an employer must give an employee.

Employees are entitled to a statutory minimum of one week's notice if they have been employed for more than a month but less than a year. After this time employees are entitled to one week's notice for each complete year of service up to a maximum of 12 weeks. Contracts can provide for longer notice periods.

### **Redundancy**

Employees who are made redundant (within the strict legal meaning) must be paid certain statutory payments based on their salary and length of service as well as their notice entitlement.

In addition where 20 or more employees are to be made redundant in a 90 day period it is also necessary to follow a consultation procedure similar to that described in the section on TUPE below before any redundancies are finally determined. In addition, formal

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notification of the redundancies must be provided to the Secretary of State in advance of the dismissals.

### **Employer's Liability Insurance**

It is a legal requirement for all employers, regardless of size, to maintain in effect at all times employer's liability insurance, so that any liabilities an employer may have to his employees are insured against at all times.

### **Contracting out of Employment Rights**

It is generally not permissible for employees to contract out of their employment rights. Contractual terms which seek to exclude an employee's right to make claims are usually void. The exception to this general rule is where the parties agree to enter into a formal 'compromise agreement', usually in return for the employer paying the employee a sum of money. Providing this is in a prescribed format and the employee is afforded independent legal advice, a compromise agreement is often a useful tool for employers wishing to dismiss employees and manage the risk of further claims.





## **Business Transfers – TUPE**

Of vital importance to anyone setting up in business in the UK who plans to acquire the assets or business (as opposed to the shareholding) of an identifiable economic entity such as a company, partnership or even a franchise, are the regulations relating to the transfer of an undertaking (known as “TUPE”). These regulations protect the employment rights of those employees engaged in the business being acquired. It is not possible to contract out of any of the obligations and the implications of TUPE can therefore be of critical impact in any business purchase.

### **Transfer of Employees**

All employees engaged in the undertaking being transferred automatically transfer with the business to the buyer. Such employees transfer on identical terms to those they have with their current employer. These terms are protected and cannot be amended by the purchaser (even with the employees’ agreement!). Any claims that an employee has against its employer also transfer to the new purchaser.

The employees are treated as though they had been employed by the buyer for as long as they were employed by their original employer.

### **Dismissal of Employees**

Any dismissal of an employee in connection with the transfer (whether before or afterwards) will automatically be unfair for the purposes of an unfair dismissal claim, provided that they have more than 12 months’ service. Even if dismissals connected to the transfer

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are made by the seller prior to the transfer of business, a claim can be made against the purchaser.

### **Information and Consultation**

Prior to a TUPE transfer, it is a requirement that the selling employer provides certain information to and consults with representatives of all affected employees (not necessarily just those transferring) about the effects of the transfer. If there are no established trade unions or other elected representatives in place it is necessary to establish elections for the roles of employee representatives. In addition, the seller must provide the employer with certain information about the transferring employees (“employee liability information”).

There is no set timetable for undertaking the information and consultation but there must be opportunity for genuine consultation, in advance of the plans being finalised. Failure to comply with the information and consultation requirements alone entitles each affected employee to claim compensation (even if there is no loss) of up to 13 weeks’ pay. Again if the seller fails to comply with his obligations in this regard the obligation to pay compensation passes to the buyer with regard to any transferring employees.

### **Contracts**

Although it is not possible to contract out of the requirements of TUPE it is essential that the requirements are carefully considered at the earliest stages of a proposed business transfer due to their potential commercial consequences. Contracts should also be carefully drawn to provide detailed indemnities in respect of the other party’s potential breaches of contracts.

## Immigration Rules

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Membership of the EU means that most nationals of the EEA have the right to work in the UK without restriction. For overseas business people entering the UK for business purposes specific consent may be required. The main methods of entering Britain for overseas business people can be summarised as follows:

### Business Visitors

There are new guidelines for this category. Business visitors of up to six months stay who are visa nationals (NB this does not include US visitors) will require prior entry clearance. US business visitors generally do not need any prior entry clearance but need to understand the limits on this status. Business visitors are only able to carry out permitted activities, which include: attending meetings, trade fairs, conferences and negotiating and concluding contracts. They are not permitted however to undertake their services or sell their goods in the UK.

### Setting up in Business

Under the current rules a non EU business may send a 'Sole Representative' to the UK to establish a new branch or subsidiary. This will be an individual who is already a senior employee of the overseas business and a person intended to establish the business inside the UK, but not a shareholder. This category may be affected by the Points Based System (see below).

Alternatively under the Points Based System, (see below) there is the sub category of Tier 1 - **Entrepreneur** which combines the two previous categories of Businessmen and Innovator and involves an investment of £200,000.



There is in addition the **Investor** visa, which is also a separate sub category of Tier 1, involving an investment of one million pounds, of which £250,000 can be made up of un-mortgaged equity in UK property.

### The Points Based System

The UK government has now implemented most of its Points Based System. This represented the biggest change in the UK's immigration regime for 45 years and has involved a complete overhaul of the current system relating to about 80 business and student categories.

The Points Based System is based on a variant of the Australian immigration system, with applicants needing to score points in one of five 'Tiers' and, with the exception of Tier 1, the requirement of a sponsor.

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The five Tiers incorporate most of the previous business and student categories (as well as that of Working Holiday Maker), in the immigration rules.

### **Tier 1 General (formerly the Highly Skilled Migrant Programme)**

One of the significant changes introduced by the Points Based System is that it incorporates the former two stage application process for Highly Skilled Migrant and applications into a single application made by the individual, namely Tier 1 General - Highly Skilled Worker.

Tier 1 General – Highly Skilled Worker allows an individual to enter the UK to look for employment or seek self-employment opportunities without the need to have an existing job offer or a business plan and as a result of recent changes, all applicants in this sub category have to have at least the equivalent of a UK masters degree in order to apply.

As is an integral feature of the Points Based System, the application is scored on a points basis, with applicants principally scoring for their academic record, previous earnings, age and UK experience. There are new strict maintenance requirements for applicants under this scheme depending upon whether the applicant is inside or outside the UK.

### **Tier 2 – Skilled Workers with a job offer**

Tier 2 of the Points Based System has replaced the Work Permit Scheme. Under Tier 2, any UK employer who wishes to extend an existing work permit for one of their employees or apply for a new work permit must now be licensed as a sponsor.

Conversely any applicant outside of the UK, seeking to apply for entry clearance under what was the work permit scheme must obtain an electronic certificate of sponsorship from a UK employer, which holds a licence as a sponsor.

The employer needs to undertake that the individual meets the requirements of the scheme before applying using a web-based system for a 'Certificate of Sponsorship'.

The applicant will then use that electronic Certificate of Sponsorship to make their application for further leave to remain or entry clearance, although the fact that the employer has issued the certificate of sponsorship does not in any way guarantee that the individual's application will be successful.

Under Tier 2, for the first time a basic English language requirement is being imposed on all applicants, with the exception of those transferring under an intra-company transfer for less than three years. There are also maintenance requirements to be met imposed upon those applying.

### **General Approach**

As the immigration rules are relatively complex and there is a substantial amount of change currently taking place in this area, those considering applying are recommended to obtain specific advice, well in advance of any planned movement of personnel, based on their circumstances and objectives.

Steeles Law are approved by the UK Border Agency to provide assessment visits for employers who want to apply to be licensed as a sponsor under Tier 2 of the Points Based System and can also carry out general immigration audits at the client's premises.

# Real Estate

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## Introduction

Commercial real estate is generally referred to simply as “commercial property” in England. The most common methods of holding interests in land are in the form of Freehold or Leasehold (otherwise known as a Business Lease). There are no restrictions on foreign individuals or businesses owning Freehold or Leasehold property in England.

## Land Registration

All land transactions are now recorded at the national Land Registry based at various regional centres. The aim is to provide a complete electronic record of title, securities and rights associated with every piece of land. Traditional title deeds and other documents of title such as Land Certificates are no longer required with the Official Copies (usually now in electronic form) being the definitive record in relation to registered land. Although registration is compulsory, there remains a significant amount of land in certain parts of the country that has not yet been registered. Transactions relating to such land are often more complex as further enquiries must be made and on completion the land must also be registered.

## Business Leases

As a general rule parties are free to include whatever terms they agree in a Business Lease and much will depend on the state of the property market at the relevant time. Business Leases tend to be very long documents and it is essential to take legal advice on these before taking a new lease or an assignment of an existing lease.



## Right to Renew a Business Lease

Most tenants of business premises have a right to renew their business leases. This “security of tenure” as it is called protects the tenant’s position even when their lease comes to an end. However, it is possible and common for landlords to seek to exclude this statutory security. To do so it is necessary for the landlord and tenant to comply with some very technical requirements.

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## **Stamp Duty Land Tax**

This specific land tax finally replaced the archaic stamp duty provisions in 2004 and with one or two exceptions is a tax that applies to all land transactions. The tax is based on a percentage of the value of the transaction ranging up to 4%. The method of calculation is complex for business leases and is based on the rent payable over the term of the lease.

## **Planning**

There are detailed and complicated planning rules in England relating to the use of all land as well as to the buildings that are put on any land. Permitted uses are split into a number of classes relating to the type of business or residential use that is allowed. It is vital to check that any property that you use for your business has the correct planning “consents”.

Local Authorities are responsible for granting planning consents in their region and for determining the local policies (called the “local plan”) although these are based on national policies and guidance.

## **Environment**

There are detailed environmental control laws requiring consents for various potentially polluting emissions. The general principle for any previous pollution is that it is the current occupier of the land that is responsible for all clean up costs. Proper environmental warranties and searches are therefore essential.

## **Disability Discrimination**

The Disability Discrimination Act 1995 requires that all service providers make reasonable adjustments to their premises to allow access by disabled people. This obligation is on the occupier of premises rather than the landlord.

# Consumer Protection/Internet Trading

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## Basic Principles

If the three fundamental constituents of an offer, an acceptance and mutual consideration passing between the parties exist, there is a binding legal contract. Most contracts, other than in relation to real estate, do not need to be in writing regardless of value.

Although the basic concept of freedom to contract has been heavily eroded over recent years with specific legislation, the basic principle remains. It is therefore easy for contracts to be made inadvertently, highlighting the need for pre-contract discussions to be clearly marked "subject to contract".

Broadly speaking business contracts fall into two categories.

## Contracts with Consumers

The first is the consumer contract which is made between business and consumer (i.e. someone not engaged in business). There is a raft of legislation, much of it emanating from the EU, to protect consumers. As well as some general obligations of fairness in all consumer contracts, there are many regulations dealing with specific fields such as financial services. If you are selling to consumers in England it is essential that these regulations are considered when preparing your standard terms and conditions of business.

## Contracts with Businesses

Although considerably less regulated there are some significant restrictions on freedom to contract even in relation to business to business transactions. The key provisions of this relate to exclusions of liability. It is never possible to exclude or limit liability for death or

personal injury arising from negligence. All other exclusions or limitations of liability are permitted only to the extent that they are reasonable. What is reasonable varies on a case by case basis, so it is not possible to give any general rules of thumb, although there is considerable guidance available on this.

Courts are however reluctant to interfere with freely negotiated contracts between parties of equal bargaining strength and seek to uphold the principle of "Buyer Beware".

## Internet Contracts

As there are no formalities to contract, it is easy to form contracts over the internet and by email. In addition, there is specific legislation providing for electronic signatures to have the same effect as ordinary signatures.

Again there is further protection for consumers buying goods or services over the internet. This is very prescriptive. As well as requirements for certain information to be provided on all websites, regulations provide consumers with a right to return goods with a full refund for a minimum of seven days following receipt. If the requirements of the regulations have not been complied with, this can be extended by a further three months.

# Intellectual Property

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## Introduction

There are two overlapping systems of intellectual property that apply in England. In addition to the English systems there are separate but complementary EU systems. In any event much of English intellectual property law has been heavily influenced by EU law in this regard.

## Copyright

There are no requirements to register copyright works with any authorities, although practical proof of the date of creation of work is vital.

## Trademarks

Trademarks can be registered under either UK or European systems. In addition, there is protection for unregistered trademarks in England.

An unregistered trademark is protected in England under what is known as the law of passing off. Such actions are difficult and complex to prove. Far greater protection can be gained for trademarks through registration.

Trademarks registered at the UK Intellectual Property Office (“IPO”) have protection throughout the UK. The IPO is efficient and the application process can usually be completed within 6 months. As an alternative, a trademark can be registered as a Community Trade Mark (“CTM”). Once registered a CTM has the same effect as a national trade mark in each Member State.

In addition, both the UK and the EU are party to the international system of trade mark registrations. It is therefore possible for a US business to name either the UK or the EU in an international trademark application made in the US. These allow one central application to be made for a number of identical trade marks around the World which when registered will have the same effect as a trademark registered in each of the nominated countries direct.

## Patents

Patents to protect inventions are granted by the UK IPO with application throughout the UK. The procedure is complex and usually requires the use of a specialist patent agent.

## Registered Designs

There are different and overlapping EU and UK systems for both Design Rights and Registered Designs although there are some differences in the protection that each affords.

# Privacy

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In Europe, privacy law is generally referred to as “Data Protection”. There are stringent European rules on the treatment of all personal data. Failure to comply can result in both civil and criminal penalties against both a company and the directors personally.

## Personal Data

“Personal Data” is any data that relates to an identifiable living individual. It can cover data held on manual records as well as computer records. All businesses will hold some form of personal data such as personnel files and customer records.

A business “processes” personal data if it does anything with personal data, including collecting, storing, using, disclosing or destroying such data.

## Data Protection Principles

There are 8 key data protection principles that must be complied with, which can be summarised as follows:

Personal Data must:

1. Be processed fairly and lawfully.
2. Only be obtained for specified and lawful purposes and must only be processed in accordance with those purposes.
3. Be adequate, relevant and not excessive in relation to the purposes for which they are processed.
4. Be accurate and kept up-to-date.
5. Not be kept for longer than necessary.
6. Be processed in accordance with the data subject’s rights.

7. Be protected with appropriate technical and organisational measures to prevent unauthorised processing, loss or damage of or to personal data.
8. Not be transferred outside the European Economic Area unless there is equivalent protection for data subjects in such country.

## Notification

Unless certain limited exceptions apply, all businesses that process personal data (which in effect is all businesses) must make a notification to the Information Commissioner who supervises compliance with data protection legislation. The process is straightforward and can be completed online, with a small annual administration fee payable. Beware, however, as there are a number of bogus agencies that send misleading warning letters and demand sums in excess of the registration fee (currently just £35). Payments should only be made to the Office of the Information Commissioner itself.

## Disclosure of Information

All individuals have the right to receive copies of all personal data that an organisation holds on them on payment of a small statutory fee. Failure to deal with such requests promptly can result in criminal penalties. Exactly what must be disclosed is a technical question and advice should be sought if there is any doubt when a request is received.

## Transfer of Data outside the EEA

Due to the self-regulatory approach in the US, the US is not deemed to have equivalent protection to that provided in the EU. The general rule is therefore that Personal Data cannot be transferred to the US.

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Regardless of the business structure most businesses will find that they do in fact transfer personal data across their operations.

There are however alternative methods to permit transfers of data to the US such as through enforceable intra group contracts or by the US organisations opting into key aspects of the EU legislation through the Safe Harbor scheme which are often more appealing to US businesses.

### **Spam**

Again, through EU legislation the UK now has anti-spamming legislation that generally requires opt in consent before unsolicited commercial emails can be sent to individuals. There are some very limited exceptions to this basic rule. There are however no such specific restrictions on emails to companies.



## Competition (“Anti-Trust”) Law

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There are two parallel regimes which police anti-competitive commercial behaviour in England. Firstly, the European Commission regulates anti-competitive trade practices between Member States of the EU of which the UK is one. Secondly, the OFT regulates trade practices in the UK. The UK system is however now very much in line with European competition law.

Under both the European and UK systems there are two main prohibitions:-

1. Anti-competitive arrangements; and
2. Abuse of a dominant position.

### **Anti-Competitive Arrangements (“Chapter 1 Prohibitions”)**

These prohibitions catch any agreements, practices or conduct between businesses that have as their aim or effect the prevention, restriction or distortion of competition. They include formal or informal agreements, which do not need to be in writing.

To be anti-competitive, the agreement or arrangement must have an “appreciable effect” on competition in “the relevant market”.

#### ***“Appreciable Effect”***

As a guide only, the competition authorities say that there will generally be no appreciable effect if the combined relevant market share of the parties involves less than 25%.

#### ***“Relevant Market”***

The definition of relevant market is extremely complex and the market itself can be surprisingly small.

Parties should take extra care in relation to arrangements that might:-

- Fix prices;
- Impose minimum resale prices; or
- Share a market

as these will generally be in breach of the competition laws, no matter how small the combined share of the relevant market may be.

Any agreements found to be in breach of these Chapter 1 Prohibitions will be void.

#### ***Exemptions and Exclusions***

There are a number of exemptions and exclusions which are outside the scope of this guide.

#### **Abuse of Dominant Position (“Chapter 2 Prohibition”)**

The authorities consider a business to be in a dominant position if it can act independently of competitive and customer pressure, simplistically called “a monopoly”.

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Again, as a guide, a market share of less than 40% is considered not to be dominant. However, small businesses may be surprised to find themselves in a dominant position where they supply or service a highly specialised or localised market.

The key is “abuse” of that dominant position. Examples include:-

- Fixing unfair prices;
- Limiting production, markets or technical developments to the detriment of consumers; and
- Placing some parties at a disadvantage by applying unfavourable conditions to them.



# Tax

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The main taxes which overseas businesses are likely to encounter in England are as follows:-

## Corporation Tax

Corporation Tax is charged on certain profits made by English companies.

## VAT

VAT is the “sales tax” levied at the point of sale of the majority of goods and services supplied in England.

## Income Tax

Income Tax is the tax paid by individuals on both earned and investment income. For employees, income Tax is deducted (i.e. collected) by the employers from the individual’s earnings through the pay as you earn system (“PAYE system”).

## National Insurance Contributions

National Insurance is a form of tax “contributed” by self-employed workers, employees and their employers depending on the level of earnings. National Insurance Contributions are (in theory) earmarked for the National Health Service.

## CGT

CGT is the tax paid by individuals on certain gains made on the sale of assets.

## SDLT

SDLT is tax paid on land (real estate) transactions.

The regime relating to each of these taxes can be extremely complicated with differing rates, reliefs, exemptions and allowances. Inward investing businesses are strongly recommended to take qualified accountants’ advice on these and other auditing/accounting issues before setting up in business in England.



## Dispute Resolution

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The English commercial courts have been radically reformed in recent years resulting in a far greater emphasis on resolving disputes outside court and using alternative dispute resolution methods. This has been backed by new court procedures to ensure that trials can be dealt with efficiently and proportionately.

### Law and Jurisdiction

The English courts recognise the right of parties to a contract to choose the law that will be used to interpret the contract and in which country any disputes will be heard. There are some restrictions on this, in particular for consumers. Without any clear contractual statement of choice, the position is left for the courts to determine and can lead to long and protracted disputes running on both sides of the Atlantic at the same time.

### Costs

The general principle in English court cases is that the loser pays the winner's legal costs and expenses in bringing or defending the claim. The process of determining how much the loser must contribute towards the winner's costs is complex. In practice it is rare for the winner to recover all the legal expenses that they have in fact incurred but a substantial contribution will usually be required. This rule adds substantial risk to any involvement in litigation whether as claimant or defendant.

## Alternative Methods of Dispute Resolution

Many commercial disputes in the UK are now settled using alternative methods to the courts, in particular arbitration and mediation.

### Arbitration

Commercial arbitration is well established in England. This is where an appointed arbitrator or arbitrators consider a case and make a binding decision, in a similar way to courts, but more flexibly and privately. Commercial contracts commonly provide for arbitration rather than the courts as the means to resolve any disputes. The UK and the US are both parties to international treaties which provide for each country's arbitration awards to be recognised and enforced in other countries that are also party to such treaties and vice versa. Arbitration has many advantages over court action although this process is often no cheaper than using the courts.

### Mediation

Mediation is also commonly used in commercial disputes. This is where an independent mediator assists the parties in reaching a negotiated settlement but has no power to make any decision. Where a contract stipulates that mediation will be undertaken, the parties are required to attempt to resolve the dispute by way of mediation before referring the matter to an arbitrator or the courts.

Even where there is no specific mediation or arbitration clause in a contract the courts will often encourage the parties to attempt to resolve the dispute using alternative methods, such as mediation, before proceeding with court proceedings. Failure to do so without good reason can result in costs penalties.

## Court Procedures

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The English court system now places a great deal of emphasis on each side providing as much information as possible to the other at the earliest stages. There are a number of so-called Pre-action Protocols that set out the steps which must be followed, even before court proceedings are commenced. These include, as a starting point in all litigation, a detailed letter of claim setting out full details of any claim. The emphasis is on promoting early settlement by putting all the relevant information on the table.

### Disclosure

Disclosure is the point in a case at which information is exchanged between the parties and is often the point at which cases are won or lost. The Civil Procedure Rules impose a duty on all parties to disclose information in their control on which they will rely, as well as any information which may be detrimental to their case or beneficial to another party's case.

Certain information attracts privilege from disclosure such as documents created in connection or contemplation of the court action.

### Courts

The main English courts are as follows:

1. Small Claims Court – actually a part of the County Court for very small civil claims.
2. County Court – generally the starting point for small or simple civil claims.
3. High Court – the court of first instance for larger or more complex civil claims.
4. Commercial Court – actually part of the High Court, providing a specialised service for business people.
5. Magistrates Court – deals with less serious criminal offences.
6. Crown Court – generally deals with the more serious criminal offences.
7. Court of Appeal – the appeal court for decisions of the County Court, High Court and Crown Court.
8. Supreme Court – from 1 October 2009, judicial authority will be transferred from the House of Lords to the Supreme Court, which will be the ultimate appeal court in the United Kingdom and will hear cases of the greatest public or constitutional importance affecting the whole population.

## Combating Money Laundering

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England now has some of the most stringent laws in the world to combat money laundering. Those conducting business in England will encounter these rules in at least two ways when dealing with professional advisors.

Firstly, banks, solicitors and accountants amongst others now have independently to verify the identity of the individuals with whom they are dealing. Furthermore, if that person is acting on behalf of a company, it will be necessary to establish the existence of the company, the identity of the directors and shareholders of the Company as well as the authority for the person to act on behalf of the board.

Secondly, professionals are now under a duty to ensure that the funds used for business in England are neither directly nor indirectly the proceeds of crime. This will mean detailed questions and requests for evidence about the source of the funds to be invested.

Professionals are no longer allowed to turn a blind eye. If there is any suspicion that funds are “dirty” the professionals are under a statutory duty, backed by draconian criminal sanctions, to report the suspicions to the relevant regulatory authority.

In addition, every organisation conducting business in England will be subject to very widely drawn anti-money laundering law. This legislation is designed to deter businesses from becoming in any way involved in the chain whereby dirty money is laundered into clean property.

These provisions apply not only to cash, but to all forms of property. There is no minimum sum involved.



## Glossary

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<b>Act (of Parliament)</b>	An Act of Parliament or Statute.	<b>British Isles</b>	the UK plus Ireland (Eire), Guernsey, Jersey and the Isle of Man.
<b>AGM</b>	Annual General Meeting - A meeting of shareholders held each year. Compulsory for PLC's and some private Companies	<b>CBI</b>	Confederation of British Industry – The United Kingdom's organisation representing businesses.
<b>AIM</b>	Alternative Investment Market - A stock exchange for smaller companies with less regulation than the main markets.	<b>CGT</b>	Capital Gains Tax.
<b>Articles of Association</b>	A Company's constitutional document governing the relationship between the shareholders and their delegation of management to the Board.	<b>Company Secretary</b>	The person responsible for keeping various records of the company such as minute books and filings at Companies House.
<b>Barrister</b>	An English lawyer who often specialises in advocacy or specific areas of law.	<b>Companies House</b>	The English company registry.
<b>BIS</b>	Department of Business, Investment & Skills (formally the Business Enterprise and Regulatory Reform (BERR and Department of Trade & Industry (DTI)) – a government department.	<b>Companies Registry</b>	The English company registry based at Companies House.
<b>Board</b>	The collective description of the Directors of a company.	<b>Council of Europe</b>	An international body consisting of 46 European countries including all members of the EU. A number of treaties or conventions have been passed including the European Convention on Human Rights.
<b>Britain</b>	Has no legal status and can be used as shorthand for any of GB, UK or the British Isles and should therefore be avoided in legal documents.	<b>Council of the European institution of the EU Union</b>	The main decision and law making consisting of a minister representing each Member State varying depending on the subject matter being discussed.
		<b>CPR</b>	Civil Procedure Rules – the rules of the English civil courts.

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<b>CTM</b>	A (European) Community Trade Mark.		obligations of membership of the EU.
<b>Deed</b>	A written contract in a special form required for certain documents. An English company executes a Deed by the signature of two Directors, Director and Company Secretary, or a single Director signing before an independent witness.	<b>EEC</b>	The European Economic Community – the original name of the EU.
<b>Designated Member</b>	Members of an LLP with additional obligations such as filing certain documents at Companies House.	<b>EFTA</b>	The European Free Trade Association consisting of Norway, Iceland, Liechtenstein and Switzerland. This is a free trade association between countries that have chosen not to join the EU. It has shrunk much over recent years as the majority of members have joined the EU and left EFTA.
<b>Directive</b>	A Directive is a form of EU law requiring each Member State to implement the terms of the directive into their national law.	<b>EU</b>	The European Union - currently consisting of Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom. Croatia, Turkey and the Former Yugoslav Republic of Macedonia are also in negotiations to join.
<b>Director</b>	Those responsible for managing the business of a company.		
<b>EC</b>	The European Communities. A previous title for the EU.		
<b>ECJ</b>	The European Court of Justice.		
<b>EEA</b>	The European Economic Area consisting of all the EU Member States plus Norway, Iceland and Liechtenstein. These countries participate in the European free market without having to meet all the	<b>Euro (€)</b>	The single European currency. This has been adopted in some but not all EU Member States as a replacement of their previous national currency. The current EU countries using the Euro are Austria, Belgium, Cyprus, Finland,

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	France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovakia Slovenia and Spain. Some other countries are also using the Euro through arrangements with the EU including San Marino, Monaco, Vatican City, Andorra, Montenegro and Kosovo. The UK and Sweden have no formal plans to join the Euro but all other EU countries are due to be joining over the next few years subject to meeting strict economic criteria.	<b>FRICS (ARICS)</b>	Fellow (Associate) of the Royal Institute of Chartered Surveyors.
<b>Europe</b>	Often used as shorthand to describe the EU (or sometimes the EU other than the UK) but the continent of Europe covers many other countries. Due to uncertainty the term is best avoided in contracts.	<b>General Meetings</b>	A meeting of a company's shareholders or members, generally of a non-routine nature (formally an extraordinary general meeting in order to distinguish them from an AGM)
<b>European Commission</b>	The administrative and executive body of the EU. The Commission initiates most EU legislation and ensures compliance with EU treaties.	<b>Great Britain ("GB")</b>	England, Scotland and Wales.
<b>European Convention</b>	A convention agreed by the Council of Europe for the protection of human rights and fundamental freedoms.	<b>HM Revenue &amp; Customs (HMRC)</b>	The government department responsible for collecting and administering taxes, VAT and licensing duties. In 2005, HMRC was formed following the merger of HM Customs and Excise and the Inland Revenue.
<b>Eurozone</b>	An unofficial phrase commonly used to describe the EU Member States that have adopted the Euro.	<b>Information Commissioner</b>	The Commissioner issues guidance and enforces compliance with data protection and freedom of information legislation in the UK.
		<b>Intellectual Property Office</b>	The government registry dealing with all UK intellectual property registrations including; patents, trademarks and registered designs
		<b>Land Registry</b>	The government registry where all land transactions are registered.
		<b>LLP</b>	Limited Liability Partnership.

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<b>Local Authority</b>	A broad term for local government bodies including local councils with a variety of powers including in relation to land planning.	<b>OFT</b>	Office of Fair Trading. Governs competition law in the UK.
<b>Ltd</b>	Abbreviation for limited at the end of a company name.	<b>Patent Attorney</b>	A professional who deals with patents including applications and disputes.
<b>Member</b>	A member of an LLP and also as an alternative to shareholder.	<b>PAYE</b>	Pay As You Earn. Income Tax collection scheme for employees.
<b>Member State</b>	A member state of the EU.	<b>PLC</b>	Public Limited Company. A special type of limited company that is able to offer its shares to the public
<b>Memorandum of Association</b>	From 1 October 2009, the memorandum will simply state that subscribers wish to form a company under the Companies Act 2006 and have agreed to become members and in the UK of a company having a share capital, of at least one each	<b>Regulation</b>	EU Regulations are a form of EU legislation that have direct effect in all Member States. English Regulations are a form of English legislation that are often used to implement further details of Acts or to implement EU Directives.
<b>Notary Public</b>	A professional (often a lawyer) qualified to notarise foreign documents.	<b>Safe Harbor</b>	A scheme administered by the US Department of Commerce to allow US businesses to comply with European data protection laws.
<b>NHS</b>	National Health Service.	<b>SDLT</b>	Stamp Duty Land Tax - A tax on land transactions.
<b>NI</b>	National Insurance. Compulsory contributions levied on employees and employers earmarked for the NHS.	<b>Shadow Director</b>	Any person in accordance with whose direction and instructions the directors of a company are accustomed to act.
<b>Official Copies</b>	Formal evidence of title to real estate as produced by the Land Registry.		

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<b>Shareholders</b>	The owners of a company.		Trades Unions.
<b>Solicitor</b>	An English lawyer.	<b>TUPE</b>	The Transfer of Undertakings (Protection of Employment) Regulations 2006. Regulations which protect employees in the event of a transfer of business.
<b>Stamp Duty</b>	A tax on documents now largely only applicable to the transfer of shares and charged at 0.5% of the value received.		
<b>Statute</b>	Primary legislation passed by the UK Parliament. Also referred to as an Act of Parliament.	<b>UK</b>	United Kingdom of Great Britain and Northern Ireland.
<b>Statutory Instrument</b>	Secondary legislation passed by the UK Parliament. Often also referred to as Regulations but not to be confused with EU Regulations.	<b>VAT</b>	Value Added Tax – a sales tax on most goods and services.
<b>Surveyor</b>	Realtor often qualified as ARICS or FRICS.		
<b>Table A</b>	A standard prescribed form of Articles of Association used with amendments by most private companies.		
<b>Trade Mark Registry</b>	A division of the Patent Office dealing with the registration of UK trademarks.		
<b>Trade Union</b>	A body representing the interests of employees often relating to specific trades or professions.		
<b>TUC</b>	The Trade Unions Congress – A body representing the majority of English		

## Useful Websites

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Companies House	<a href="http://www.companies-house.gov.uk">www.companies-house.gov.uk</a>
BIS	<a href="http://www.bis.gov.uk">www.bis.gov.uk</a>
Health & Safety Executive	<a href="http://www.hse.gov.uk">www.hse.gov.uk</a>
Information Commissioner	<a href="http://www.ico.gov.uk">www.ico.gov.uk</a>
Intellectual Property Office	<a href="http://www.ipo.gov.uk">www.ipo.gov.uk</a>
Land Registry	<a href="http://www.landregistry.gov.uk">www.landregistry.gov.uk</a>
Office of Fair Trading	<a href="http://www.offt.gov.uk">www.offt.gov.uk</a>
Steeles (Law) LLP	<a href="http://www.steeleslaw.co.uk">www.steeleslaw.co.uk</a>
Stamp Duties	<a href="http://www.hmrc.gov.uk">www.hmrc.gov.uk</a>
Trades Union Congress	<a href="http://www.tuc.org.uk">www.tuc.org.uk</a>

## Meet the Team

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Steeles Law has a dynamic team of lawyers who specialise in providing practical business solutions to overseas businesses. Mirroring the international investment landscape we have particular experience in assisting US and Commonwealth based business. The team also has strong links with Europe.

The team are experienced in dealing with the many issues facing new and established businesses in the UK and European markets. We work with businesses from small enterprises entering their first European distribution agreements through to established multi-national listed companies restructuring their European operations.

The team are used to working closely with overseas managers and Counsel to provide local advice and assistance to ensure that business objectives are met efficiently and in compliance with all local rules and regulations.

The team is flexible and will draw in the skills of the many specialist lawyers from across the firm. Where other professionals are required the team can bring in expert advice from our network of qualified contacts as necessary. Steeles Law remains strongly independent and other professionals are recommended purely on their ability to deliver to your needs.

Here are details of some of the key contacts within our inward investment team. Please feel free to contact any of these direct or if you are not sure who to contact please contact James Tarling in the first instance who will refer you to the most appropriate person.

### James Tarling



A product of Steeles Law's Graduate Recruitment programme, James successfully became a Principal of the firm in 2004. He is experienced in dealing with a range of corporate and commercial matters including corporate finance transactions and technology transfer and licensing. James focuses particularly on assisting technology companies ranging from motorsports to internet and other emerging technologies. James advises and regularly speaks on issues relating to businesses trading online, data protection and privacy issues. James is also a key figure in developing the firm's services for North American clients and is very experienced in assisting overseas businesses working with and in the UK and Europe.

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### Michael Fahy



Michael is Head of our Property Department and has over 20 years' commercial property experience gained both in private practice and in-house. Over the years, Michael has undertaken a wide range of work including development projects, portfolio acquisitions / sales, complex lease transactions and high value projects for London Boroughs.

Michael is also involved with the firm's International Practice Group, which provides advice and legal services to overseas companies investing in the UK

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## Richard Bailey



Richard is head of the Company Commercial Team and is one of Steeles Law's most experienced solicitors. He advises on large scale corporate transactions, non contentious intellectual property and director's duties. He has received national recognition for his work in the area of commercial agency and franchising. Richard represents numerous national and international trade organisations and associations

Richard is also involved with the firm's International Practice Group, which provides advice and legal services to overseas companies investing in the UK.

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## Peter Hastings



Peter is a very experienced commercial litigator, with considerable experience in the High Court, County Court, Technology and Construction Courts and also the VAT and Duties Tribunal. Peter has a particular emphasis on construction claims, large contract disputes, shareholders and directors' claims, and VAT/Excise and Duty disputes (including appeals, detentions and seizures and judicial reviews). He is also experienced in sports law, intellectual property claims and insolvency and has successfully conducted many mediations, arbitrations and adjudications.

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## Oliver Brabbins



Oliver is a very experienced solicitor who has specialised exclusively in employment law throughout his career, advising particularly employers. He is an experienced advocate representing clients at Employment Tribunals and the Employment Appeal Tribunal across the UK. Oliver also has a great deal of experience in advising on large-scale corporate restructuring exercises, TUPE issues and collective disputes and trade union matters. Oliver is a qualified personnel manager and is a member of the Employment Lawyers Association and Justice.

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## Mark Barnett



Mark has practiced for over 15 years as an immigration lawyer. He is a longstanding member of the Immigration Lawyers Practitioners Association. Mark represents numerous companies and individuals on their immigration applications and appeals against refusal decisions, work permit applications, Highly Skilled Migrant applications, advice to employers on specific documentation required from proposed employees to avoid criminal liability, Further and Indefinite Leave to Remain applications, Investor and Businessman applications, Unmarried Partner/Spouse applications, EEA applications, British nationality/passport applications and Entry clearance/visa applications.

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