

3. Structuring your company in the UK

3.1 Making sure the law is on your side – The legal framework governing company registration in the UK

The primary legislation governing the incorporation and registration of companies in the UK is the Companies Act 1985 (CA85). It should be noted, however, that CA85 is being replaced progressively by the Companies Act 2006 (CA06) between the date of publication of this book and 1st October 2009. Care should be taken to ensure that reference is made to the provisions in force at the time of reading and professional advice should be sought on the applicable provisions, in the event of any doubt.

The UK consists of three distinct jurisdictions for company law purposes:

- (i) England and Wales.
- (ii) Scotland.
- (iii) Northern Ireland.

This chapter concentrates on the rules that apply in England and Wales, although the rules for Scotland are also very similar. The rules for Northern Ireland are also similar, but they are currently contained in a separate piece of legislation (the Companies (Northern Ireland) Order 1986 and there are a number of differences and the reader is recommended to take specialist advice, if considering establishing a company there. It should be noted that, like CA85, the Companies (Northern Ireland) Order 1986 is being replaced progressively by CA06 and once the CA06 has been fully implemented, with effect from 1 October 2009, it will, except in some limited circumstances, apply to the whole of the UK.

There are several options available to overseas companies seeking to create a presence in the UK. The option that is ultimately chosen will depend upon a number of factors including, for example:

- the expected nature and scale of the business activities and the levels of risk anticipated in the start up stages;
- the intended duration of the business activities;
- accounting and taxation considerations;
- UK statutory compliance and reporting obligations; and
- commercial considerations.

Prior permission is not needed to register, although there are some restrictions on the use of certain words and expressions in corporate and business names (see 4.6 *Corporate and Business Names* below). Organisations operating in regulated fields (for example banking, defence, oil exploration) may require licenses or prior authorisation to carry on business.

There are several types of business entity recognised in English law. This chapter concentrates on the two most commonly encountered forms:

- the branch or representative office of a company incorporated outside the UK; and
- the incorporated company.

Both of these types will now be looked at in turn.

3.2 Branch or place of business of a company incorporated overseas

Overseas companies wishing to expand their business activities into new territories will often consider the establishment of a branch or representative office instead of incorporating a new company.

The main differences between “branch” and “place of business” registrations by overseas companies

Overseas limited liability companies (incorporated outside Great Britain) having established a place of business in Great Britain are required to register their presence with Companies House within thirty days. There are no provisions that allow registration of a branch or place of business in advance.

Current legislation distinguishes between foreign companies with a “place of business” (often referred to as a representative office) and those with a “branch” presence.

Place of business: Companies registering under the “place of business” regime will be those whose business activities in the UK are ancillary or incidental to the overseas company’s business as a whole. Such incidental activities may include warehouse facilities or administrative offices established for the benefit of the company, internal data processing facilities and share transfer and registration facilities.

Branch: A “branch”, by contrast, will be a part of a company, organised so as to conduct business on behalf of that company. This means that a client doing business with the company will generally be able to deal direct with the branch in this country instead of dealing with the company in its home state. A branch is not a separate corporate entity, but is typically run along lines that are similar in concept to those of a subsidiary company.

“Branch” or “place of business”?

Care should be taken to assess whether the activities being carried on are merely ancillary or incidental to those of the overseas company itself (which would permit registration under the “place of business” regime) or whether the activities are broader and will comprise those of a “branch”.

It is more common for overseas companies to register under the “branch” regime rather than the “place of business” regime, because their activities generally extend beyond those of a purely ancillary or administrative nature.

Companies with unlimited liability will always register under the “place of business” regime, even if the underlying activities are those that would evidently be those of a “branch”.

A branch is often the favoured option for overseas businesses in the early stages of international expansion. Once a solid business presence has been established, branch activities are often transferred to limited companies. The branch may also be an appropriate form for use in connection with specific business ventures or projects with a known duration, such as a building project or equipment installation project.

Registering a branch or place of business

The branch and place of business registration requirements are broadly similar. In both instances the overseas company must supply corporate information, in statutory forms, detailing the company’s activities and corporate structures. (See also Note 1 at paragraph 7 Current and Future Developments, below).

The following is an illustrative, but not exhaustive, list of the sort of information that must be supplied with the branch and place of business registration forms (forms BR1 and 691 respectively):

- the names, residential addresses and other personal details of directors and secretaries (however, see Note 3 at paragraph 7 Current and Future Developments, below);
- details about the company (including corporate name, business trading name (if different from its corporate name), official or registered number, jurisdiction, governing law, legal form, capital structure, accounting details and obligations);
- branch office address, brief explanation of branch activities and details of the UK resident representative authorised to accept service of legal notices and official correspondence on behalf of the company; and
- copies of constitutional documents (evidence of registration, articles of incorporation and charter or other equivalent management rules).

It must be stressed that copy documents must be officially certified in the country of incorporation and, if such documents are in a language other than English, accompanied by authenticated translations. The specific requirements in this regard must be closely adhered to.

There is a registration fee payable, which is currently UK£20 (or UK£50, if a same-day registration is being sought).

Once the legal requirements have been fulfilled, the Registrar then registers the branch or place of business and issues a certificate of registration evidencing the registration.

Ongoing filing requirements for a branch or place of business

1. Filing accounts with the registrar

There are annual accounts filing obligations in respect of overseas companies with a registered branch or place of business in the UK.

Place of business: the form and content of accounts that must be delivered in respect of overseas companies with a place of business registration is set out in the Overseas Companies (Accounts) (Modification and Exemptions) Order 1990. These accounts (based on UK formats) do not need to be audited, nor are they as detailed as required for companies incorporated in Great Britain. (See also note 1 under paragraph 7 Current and Future Developments, below).

Branch: for branches the precise form of the accounts and filing deadlines that apply depend upon the accounts preparation and disclosure obligations in the country of incorporation. If the company is subject to a requirement in its home country to prepare, have audited and publish accounts, then it is a copy of those accounts that must be submitted to Companies House. If there are no such requirements for the preparation, audit and public disclosure of accounts in the country of incorporation, then accounts prepared along the lines of those required under the place of business regime (described above) are required. It must be stressed that, either case, the accounts that are required to be delivered for filing are those of the overseas company itself in its entirety and not those relating only to the activities of the branch or place of business. Special rules apply if the company is a parent company and is proposing not to prepare submit consolidated accounts.

Accounts in a language other than English must be accompanied by a certified translation.

2. Notification of changes

Any changes to the information disclosed in the initial registration papers must be notified to the Registrar of Companies on the prescribed forms. Such changes generally include change of officers, address changes, corporate name changes and constitutional and statutory changes. (See also Note 1 of Paragraph 7 Current and Future Developments, below).

Care should be taken to ensure that UK filing obligations are considered and dealt with in a timely manner whenever there is a statutory change affecting an overseas company with a branch or place of business in the UK.

It is recommended that professional advice be sought in connection with the registration of a branch or place of business and with the accounts preparation and ongoing filing requirements.

3.3 The incorporated company

The incorporation of companies in England, Wales and Scotland is governed by CA85. The incorporation of companies in Northern Ireland is governed by the Companies (Northern Ireland) Order 1986. Once CA06 is fully implemented, however, with effect from 1 October 2009, it will apply to the whole of the UK. The following are the main categories of companies that can be registered under CA85:

- companies limited by shares;
- unlimited companies having a share capital; and
- companies limited by guarantee (without share capital).

This chapter concentrates on the most common form of registered company, namely the company limited by shares.

A company limited by shares will take one of two general forms:

- a private company; or
- a public company.

Overseas companies establishing a limited company in the UK may do so by setting up a wholly-owned subsidiary (a company whose shares are 100% owned by the foreign “parent” company, or may join with others in establishing a company that is jointly owned by various participants (this is often known as a “joint venture” company). It is recommended that specialist advice and assistance be sought in determining:

1. The most appropriate structure and corporate form for the setting up of a joint venture company.
2. The relationship between the parties to any joint venture.

The main differences between private and public companies limited by shares

The principal differences between public and private companies are:

- Only public companies are permitted to offer their shares to the public and to be traded on recognised exchanges, whereas private companies are prohibited from offering their shares for sale to the public.
- The ongoing statutory compliance requirements imposed on public companies are more burdensome than those for private companies. Recent legislation has tended to place additional compliance burdens and corporate governance obligations on public companies, while endeavouring to reduce the regulatory burden on private companies.

There are many other technical differences between public and private companies. These differences relate mainly to:

1. The scope and nature of disclosures that must be made to shareholders and the public.
2. The protection afforded to creditors and those having dealings with the company.

Public companies must have at least £50,000 (or the prescribed equivalent in Euro) nominal value of share capital issued and at least £12,500 (or the prescribed Euro equivalent) paid up before they can commence to trade and, if they are newly incorporated, must obtain from the Registrar of Companies a certificate of entitlement to trade and do business before commencing activity.

Private companies may have a single shareholder with only one share of a small nominal value in issue. A public company must have a minimum of two shareholders (however, see note 2 of paragraph 7 Current and Future Developments, below.). The number of shares that are actually issued will depend upon the capital requirements of the newly formed company and tax implications, in respect of which specialist advice should be obtained.

Private companies may have a simple structure with a single director. A public company must have a minimum of two directors. A public company must have a company secretary and the secretary must be seen to be suitably qualified to fill the position. A private company may have a secretary, but is not required to have one. Under CA06, with effect from 1 October 2008, every new company incorporated in the UK must have at least one director who is a natural person.

Overseas companies wishing to establish a wholly owned subsidiary company in the UK rarely need to register a public company unless there are commercial or regulatory requirements for doing so.

Registration of limited companies

The registration of public and private companies follows the same format (however, see note 2 of paragraph 7 Current and Future Developments, below). To register a company with limited liability it is necessary to submit registration documentation to Companies House for review and approval, prior to incorporation being effected. Registration documents may be submitted to Companies House in either printed (hard copy) form or in electronic form.

(i) Printed documents

The documents that must be filed (together with a statutory fee) are:

- the proposed memorandum and the articles of association (the charter of the company outlining the intended business activities and powers the company has and the manner in which it is to be administered);
- statutory Form 10 detailing the first named officers (secretary and director(s)) and the location of the registered office; and

- Form 12 (a statutory declaration) confirming compliance with the requirements of CA85 in connection with the proposed registration.

(ii) Electronic registration

A number of specialist organisations (including Deloitte) have the resources to facilitate the registration of companies electronically. The electronic incorporation of companies removes the need to obtain signatures on forms and the need to submit printed documents to Companies House. Electronic registration is a simple method of company incorporation, although some additional details relating to directors, company secretaries and shareholders are required for security purposes.

There is also a filing fee for registration, which is currently UK£20 (or UK£50, if a “same-day” registration is being sought).

Once the legal requirements have been fulfilled, the Registrar then registers the company and issues a certificate of incorporation, which is the evidence of the formation of the company.

Continuing obligations

(i) Registered office

The company must maintain a registered office located in England or Wales (or Scotland or Northern Ireland if the company is registered there).

(ii) Resident directors

There is no requirement under CA85 requiring either the directors or the secretary to be resident in the UK. However, commercial and administrative considerations will be important and there may be tax implications associated with the place from where the company is managed and controlled. It is recommended that advice be taken on this.

(iii) Audit and submission of accounts to the Registrar

All companies must submit annual accounts to Companies House and only the smallest of (private) trading companies (that are not part of a larger group) are exempt from the requirement to have their annual accounts audited (however, see note 2 of paragraph 7 Current and Future Developments, below). It is recommended that professional advice be taken on the form and content of company accounts as new Regulations under CA06 relating to entitlement to exemption from audit and to the accounts disclosure obligations of small, medium-sized and large companies are in force and apply to accounting periods beginning on or after 6 April 2008.

There are specific rules associated with the accounts filing obligations for a company’s first accounting period and in cases where changes have been made to the accounting year end date. The general principle under CA06, however, is that the accounts of private companies incorporated after 6 April 2008 must be filed with the Registrar of Companies no later than nine months after the accounting period end and the accounts of public companies incorporated after 6 April 2008 must be filed no later than six months after the accounting year end (note however, that for companies incorporated before 6 April 2008, the deadlines for submission of accounts to the Registrar of Companies are ten months (for private companies) and seven months (for public companies).

(iv) Update of statutory records and notification of changes

The directors of the company are required to maintain the company's official records in good order and to keep them fully up to date.

The records include, among others, statutory registers associated with the corporate structure (including registers of the directors, the secretary (if any) the shareholders/members and details of charges over the company assets) and copies of minutes of meetings of the directors and the shareholders. The directors are also required to maintain accounting records that enable them at all times to disclose, with reasonable accuracy, the financial position of the company.

The directors are responsible for ensuring that any changes to the statutory structure of the company are implemented in accordance with the requirements of CA85 or CA06 (whichever applies) and that the required returns and disclosures are submitted to the Registrar of Companies within specified deadlines (see also note 2 of paragraph 7 Current and Future Developments, below.). These include, but are not restricted to changes associated with:

- director and secretary appointments and resignations;
- allotment of additional shares;
- changes to the company's memorandum or articles of association;
- share transfers and share capital restructuring exercises;
- corporate name changes;
- the registration of charges and updates relating to them;
- changes to the location of the registered office; and
- changes to the accounting year end.

The directors and company secretary (if any) are also responsible for the preparation and delivery of an annual return, which provides some corporate information, details of the names and addresses of the company's directors and secretary; its capital structure and the identity of its registered shareholders.

(v) Penalties for non compliance

Automatic late filing penalties are levied on companies that file their accounts late. These late filing penalties range from £150 up to £7,500. In addition to the statutory late filing penalties (and separate from any sanction applicable in respect of corporate mismanagement or dishonesty, the Registrar of Companies has the power to take legal action against companies and their company officers for default in respect of the obligation to file accounts which may result in criminal conviction and fines against the directors as individuals of up to £5000 per offence and the possibility of imprisonment and disqualification from the right to hold office as a director.

3.4 Other business structures

Other, less common forms of registered business structure, which are not considered in detail in this chapter, include:

- Companies Limited by Guarantee.
- Unlimited companies.
- Limited Partnerships.
- Limited Liability Partnerships.

It is recommended that specialist advice be taken on the applicable rules and registration requirements relating to these corporate forms.

3.5 Corporate and business names

There are a number of restrictions on the use of corporate and business names. The Registrar will not allow a company to be incorporated with a name identical to or “too like” one already on the register.

In some cases, specific permission is required from a relevant authority and, in others, justification must be provided to the Registrar for the use of a restricted word. The following are just a few examples of such restrictions:

- words that imply connection with royalty or governmental authority (e.g. “Royal”, “Government”);
- words that imply national or international scope or pre-eminence (e.g. “National”, “British”, “International”);
- words that imply connection with certain regulated fields (e.g. “Pharmaceutical”); and
- words that imply a particular corporate structure (e.g. “Group” or “Holdings”).

These restrictions apply equally to Branches and Places of Business as to limited companies, and also apply to trading names, where the trading name is different to the corporate name.

It is recommended that advice be taken on whether a particular proposed corporate name is likely to be accepted for registration by the Registrar, before any any formal application is submitted to Companies House.

How can Deloitte help?

Deloitte is ideally placed to advise on and assist with the registration of overseas companies establishing a business presence in the UK, either with a branch, place of business or separate corporate entity. Deloitte's Company Secretarial department can provide detailed specialist advice on the progressive implementation of CA06.

The department is staffed by professionally qualified personnel dedicated to assisting with all registration and ongoing statutory compliance requirements of companies and corporate entities registered under the CA85 and CA06. It can advise on statutory aspects of establishing a business presence in this country and on compliance with ongoing statutory requirements.

In addition to these routine matters, we help our clients with complex technical project work and with corporate restructuring and conversion. Working closely with colleagues from other disciplines across the firm, we deliver an integrated and timely response.

3.6 Current and future developments

The Companies Act 2006 represents the culmination of a 10-year review of company law in the UK. The new Act received Royal Assent on 8th November 2006 and is being implemented in phases. The date for the final implementation is expected to be 1 October 2009.

Changes to UK company law that are expected to impact on the registration of branches, places of business or subsidiary companies by foreign businesses, include the following:

- (i) Draft Regulations under the CA06 have been published which, if implemented in their current form, will change the rules regarding the registration of overseas companies in the UK. These regulations relate to:
 - (a) A merging of the registration of branches and places of business into a single framework for the registration of overseas "establishments" and improvements to the overall registration process;
 - (b) The detailed rules, procedures and forms that will apply to registrations under the new framework; and
 - (c) The rules and forms relating to the registration of corporate changes that may be required to be notified to Companies House.

It is not anticipated, however, that the new Regulations will make significant changes to the existing rules and procedures.

- (ii) New provisions under the CA06 to be implemented from 1 October 2009 are expected to make significant changes to the rules and procedures relating to the incorporation and continuing obligations of companies. Current drafts of proposed Regulations under CA06 include:
 - (a) New rules regarding the form and content of the Memorandum and Articles of Association;
 - (b) Changes to the forms required for the incorporation of a UK company;
 - (c) Changes to the rules regarding the denomination of share capital;
 - (d) Public companies may be incorporated with only one shareholder;
 - (e) Changes to the form and content of returns that must be filed at Companies House to register corporate changes (various implementation dates between 1 April 2008 and 1 October 2009, depending on the relevant form).
- (iii) Although directors will still have to provide their residential addresses to Companies House, they may opt to have a service address registered on the public file and keep their residential address private. This will apply to branches, places of business and subsidiary companies (expected implementation 1 October 2009).