A magazine from irwinmitchell

Edition 4

Focus on Manufacturing

Brexit Special

Restrictive Covenants in Employment Contracts

Auto-Enrolment: What you need to know

WELCOME...

to the fourth edition of **Focus** on Manufacturing

At the end of 2016, Britain will no doubt let out a sigh when it looks back at a year in which its Olympians reached new heights in Rio whilst the England football team plummeted to new depths in France and, of course, one in which the nation went to the polls and voted to leave the European Union. In this edition, our sector experts reflect on the potential impact of the referendum vote and what Brexit might mean for your business.

In this edition, some of the fallout is already evident; we take a look at the first indicators of business confidence and M&A activity since the vote on page 6 and consider what may come next in terms of activity in the sector. As well as seeing whether Britain can continue with 'Business as Usual', we consider the implications of Brexit from an employment perspective on page 8, whilst our Restructuring & Insolvency experts discuss whether the threats posed by exiting the EU might create a glut of corporate insolvencies in the manufacturing sector on page 10.

The challenges posed by Brexit naturally take the headlines, but it isn't solely reason for caution; with it come opportunities for the UK to enter into trade agreements unfettered by the requirement for cross-European co-operation and agreement. On page 12, our Regulatory & Criminal Investigations Group experts consider some of the opportunities presented by Brexit and the regulatory environments, which could soon become increasingly relevant to the UK's importers and exporters. Our Real Estate experts, meanwhile, look at the prospect of the reshoring of business premises in the UK on page 14.

Away from Brexit, life goes on for UK companies. Our Dispute Resolution experts look at the enforceability of restrictive covenants on page 16, an issue of increasing importance in a manufacturing environment where knowledge and intellectual property is the mainstay of the industry's success. The manufacturing sector has already showcased its bounce-back-ability and, in an environment where expansion is still on the agenda of some of the country's predominant manufacturers, our Construction team considers the issues relevant to the building of new premises in the United Kingdom on page 18. In fact, Intellectual Property (IP) is an issue our experts deal with in detail on page 22 in the context of product designers claiming IP rights.

We also look at the implications for your business of one of the most significant developments in pensions law in recent years, the rollout of auto-enrolment, on page 24.

Our sector experts' contact details are available throughout this publication; please do feel free to get in touch to speak further regarding any of the issues which have been discussed.

We hope you find our insight in this latest edition of Focus on Manufacturing interesting and relevant to your business.

Dorrien Peters
Head of Manufacturing

expert hand,
human touch

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Business as Usual?

Uncertainty was always going to be a buzzword for 2016, regardless of the outcome of the referendum, but the manufacturing sector has continued to demonstrate its resilience and optimism.

The recent headlines were littered with reports that, in the aftermath of the vote, the Markit UK Manufacturing PMI dropped to a 41-month low of 48.3, signalling contraction in the sector. The pessimism was short-lived, however, and with the dust still settling the PMI recovered to 53.3 in August, indicating renewed optimism from the sector that manufacturing would prevail irrespective of the vote to leave the EU that many manufacturers feared. This record increase in the index, followed by even more positive September figures, coincided with manufacturers reporting an increase in output, new orders and solid inflows of new work. The manufacturing sector bounced back.

The automotive industry is arguably one of those most exposed to Brexit, yet the after-effects, if they are to come at all, haven't been felt yet. In August, the Society of Motor Manufacturers and Traders reported a 9.1% year-on-year rise in vehicle manufacturing output which lifted output to a 14-year high, driven up predominantly by an increase in exports of 13.3%. It is probably too early to pin this on the increased affordability of UK exports, although it certainly had a part to play. It is just as likely to be, as Mike Hawes of the Society of Motor Manufacturers and Traders commented, a function of the huge investment in UK plants such as Nissan's huge Sunderland plant, where over 500,000 cars are assembled each year.

9.1%
Year-on-year rise in vehicle manufacturing

13.3%
Year-on-year increase in automotive exports

That very plant, Britain's largest, is however under threat in a post-EU Britain and its chief executive has repeatedly stated the importance – in tandem with many other sector leaders – of not only a quick resolution to Britain's ongoing trading relationship with Europe but compensation for companies hit by tariffs which might be imposed on them. The risk of tariffed international trade reinforces how important the roles of David Davis, Philip Hammond and Theresa May will be in securing a prosperous post-EU future for Britain.

Throughout the turbulent months before and after the vote, it was encouraging to note that the sector, despite its huge reliance on import and export markets, remained more upbeat than the services sector, with consistently higher PMI figures being posted in June, July, August and September. As if further evidence is needed, those figures are indicative of a strong UK manufacturing sector which has, time and time again, prevailed in the face of adversity and demonstrated resilience unmatched either by other sectors in the UK or the manufacturing sector internationally.

There is no question that the impact of the vote has not yet unravelled and the aftershocks will be felt for at least the next three years – and possibly much longer – as the government tries to navigate its exit from the EU and its entry into any number of trade deals intended to fill the void created by tariff-free access to the world's largest single market.

Now there is at least some certainty in uncertainty: we can be sure that things will be in a state of flux for some years – experts predict as many as 10 - following the seismic decision to split from the further union with the continent.

The manufacturing sector will again be expected to rise to the challenge of weathering the storm and embrace the opportunities posed by Brexit. Early indications are encouraging.

Closer to home

It has been a time of change for Irwin Mitchell too, with 2016 seeing the completion of our merger with Thomas Eggar and the creation of our wealth management division, Irwin Mitchell Private Wealth. Both of these developments significantly enhance the full-service offering we provide to our clients, by expanding our geographical reach and your access to our sector expertise, as well as bringing you additional services to ensure that we are able to meet the every need of you and your business. We am particular proud to introduce members of the wider team to you in this and future editions of Focus on Manufacturing.

We have no doubt that, for Irwin Mitchell, it will be business as usual, and we will continue to focus on delivering expert legal services to you to support you in dealing with the opportunities and challenges posed by developments in the sector, be they Brexit related or otherwise. We'll be on hand to help.

Turbulent Times in Manufacturing M&A

Matt Ainsworth
Partner - Corporate
T: +44 (0)114 274 4656
M: +44 (0)7711 348 212
E: matt.ainsworth@irwinmitchell.com

The strong recent rebound in new orders within the manufacturing sector was a much needed boost, but the impact on M&A activity in the coming months is far from clear.

One of the most respected barometers of manufacturing activity in the UK – the Markit/CIPS UK Manufacturing PMI – found that factory activity improved to a two-year high in September, bouncing back from a 41-month low in July.

The uplift between July and August had already represented one of the biggest month-to-month jumps since the aftermath of the global financial crisis in early 2009 and the index continued to confound leading economists' expectations during September.

The survey of purchasing managers at more than 600 industrial companies showed that output recovered at one of the fastest paces on record, with new orders enjoying one of the strongest month-to-month rebounds. Companies reported solid inflows of new work from domestic and export customers, with exports said to be growing at its fastest pace for 26 months.

Whether this boost for the sector will continue is hard to say. We seem to be bombarded in the media with post Brexit data on a daily basis and although market sentiment appears more upbeat than expected, the statistics do not all point in the same direction.

As a result of this, it is difficult to predict what the impact on M&A within the sector over the coming months will be.

Our own analysis of data from Experian Corpfin points to a fall in activity during the month immediately after the referendum result. In fact, during July there were 140 manufacturing deals compared to 176 in July 2015.

Again, according to Experian Corpfin, out of the manufacturing deals involving UK based manufacturers which completed in July this year, 15% were cross-border transactions involving UK targets.

This compares to 18.5% during the same period last year. The 20% fall in July manufacturing deals is perhaps also therefore due to a reduction in interest from overseas buyers.

Having said all of the above, although there has been a reduction, it is not significant. In fact you could argue that faced with such uncertainty, the numbers have held up reasonably well. This trend also looks to be the case when you look at cross-border deals generally.

> If confidence and performance remain relatively strong in the sector, we are quietly confident that we will continue to see domestic and cross-border transaction levels remaining steady in the coming months.

Outside of the manufacturing sector, recent data from Thomson Reuters revealed that almost 60 transactions totalling $34.5 billion have been transacted by foreign companies to acquire British firms since 23 June. The figure is lower than the 79 deals completed in the month leading up to the vote, but again much higher than expected.

According to Reuters, the sectors with the highest concentration of foreign takeovers in the past four weeks were technology, consumer, media and industrial.

Despite all the uncertainty and the dangers of reading too much into just one month of economic data, it appears confidence within the manufacturing sector is reasonably robust with the sector performing better than many expected.

At Irwin Mitchell, we have seen M&A activity particularly contract in manufacturers which are part of the supply chain to the construction industries.

Anticipating the Future

When something as major as the Brexit referendum takes place, there is bound to be an impact in the workplace. Public engagement was high, and some employers issued ‘position statements’ setting out their company view on remaining or leaving.

> Reactions to the outcome are divided, and employers need to be mindful of some practical issues as well as changes to legislation.

Brexit backlash?

It is difficult to think of an event that has triggered such polarised views, and employers need to be mindful of managing how those views – from both sides – are expressed in the workplace. Employees are entitled to a private life and to hold opinions that the employer and / or colleagues may not agree with, but that does not give them an absolute right to say what they like.

Workplace policies on bullying, harassment and discrimination will all apply in the context of Brexit conversations. A workforce trained on diversity should recognise that derogatory comments about an individual or group based on their nationality, race or philosophical beliefs could fall foul of your policies and could result in disciplinary action and even dismissal.

It is also possible that a belief in either the EU or alternatively the sovereignty of the UK might be capable of being a philosophical belief, which is protected under UK discrimination law. A belief has to be more than simply an opinion, but in the past beliefs in climate change, anti-fox hunting and left wing democratic socialism have all found the protection of the law, so it is not unreasonable to assume that beliefs around Brexit may also find protection.

Liesel Whitfield
Associate Solicitor - Employment
T: +44 (0)114 274 4389
M: +44 (0)7918 608 578
E: liesel.whitfield@irwinmitchell.com

Will there be changes in the law?

Not immediately. The exit rules provide that countries have a minimum of two years to achieve this and time starts to run from the date the Government serves formal notice to exit the EU. Notice to leave the EU does not have to be issued immediately and the timing of it is a political decision for the UK Government. There are unlikely to be any legislative changes during the exit period of two years following issue of the Article 50 notice.

For now, the UK will continue to be bound by EU laws until another agreement is reached or we unilaterally withdraw from the EU (which cannot be earlier than two years from the date the exit notice is served) and businesses will have to continue to follow all existing UK laws that derive from the EU during this two year period. European directives, such as those regulating working time and holidays, TUPE, collective redundancies, discrimination and agency workers have been implemented via primary legislation in the UK and the UK Government will have to decide whether to amend or repeal these. They will not fall away automatically, simply because of Brexit. However, EU laws that have direct effect in the UK without the need for implementing legislation will fall away unless the UK Government passes new legislation transposing these into UK law. Similarly, the 5,000 statutory instruments passed by the EU may also fall away unless new legislation is introduced by the UK to replace them.

Any employment rights that have contractual effect between employer and employee will (at least for the time being) remain unaffected by Brexit, embedded as they are in our UK law. Employers will not therefore suddenly be able to insist that their staff work over 48 hours per week or take fewer holidays.

Immigration changes?

If an Australian-style points system is imposed for immigration, the borders will not automatically be closed to non-UK residents and transitional arrangements will have to be negotiated as part of a post Brexit regime. Depending on the outcome of those negotiations, there may be no automatic right for UK citizens to travel and work outside the UK, or for UK businesses to freely recruit staff from the EU, which may cause problems for some UK businesses already struggling to fill certain skills gaps. We may also see a surge in the numbers of EU workers already working in the UK applying for indefinite leave to remain in the UK so that they can avoid any immigration restrictions that are imposed. Currently, they will need to demonstrate that they have lived in the UK for at least five years, although it is possible that the UK will increase these requirements.

Will Brexit Increase in

The effects of Britain's decision to leave the EU so far are more positive than experts predicted but uncertainty still reigns in a manufacturing market which is in need of stable growth.

Pre-referendum predictions and the story so far

Before the referendum occurred, it was anticipated that manufacturers with a heavy reliance on exports could be pushed over the edge if Britain were to exit the EU.

The dust continues to settle after the outcome of the referendum was confirmed. A survey carried out by the business lobby group the CBI showed that the decrease in the value of sterling resulted in a material increase in exports of manufactured goods.

The Markit/CIPS UK Manufacturing PMI survey confirmed the increase in exports up to July, which they also put down to a decrease in the value of sterling in addition to the efforts of businesses to secure new contracts.

However, the same survey showed that UK manufacturing employment decreased in July for the seventh straight month, job loss was at its most severe for over three years, and the rise in import costs and higher metal and commodity prices is leading to material purchase price inflation. There are suggestions that large players in the steel and retail sectors are taking steps to move operations to other countries within the EU and it is very possible that this could lead to a host of businesses within the UK falling into formal insolvency processes unless these businesses can take advantage of any opportunities that arise in a post-Brexit world.

Avoiding insolvency and formal insolvency processes

There are certain practical steps which manufacturing businesses can take to minimise the risk that they fall into an insolvent position or become victim to a contractor's financial woes. Such steps include cost minimisation, implementation of formal credit control processes, periodic due diligence on

Trigger an Insolvencies?

key customers and suppliers, and implementation of express protections within supplier contracts and customer contracts. It is essential that if businesses fear that they or their key suppliers or customers may become subject to financial difficulty, they take professional advice at an early stage.

The features of the insolvency processes most commonly seen in the manufacturing industry are as follows:

Company Voluntary Arrangement (CVA): a formal, binding agreement between a debtor company and its creditors for the repayment of all or a portion of their debts over a prescribed period of time (typically no longer than five years). This arrangement is supervised by a qualified insolvency practitioner and allows the debtor company to continue to trade rather than entering into liquidation, which often results in a worse return for creditors.

Administration: a process for the benefit of all creditors, which allows the debtor company breathing space by virtue of a temporary 'moratorium' on legal proceedings being commenced or continued against it. Administrators may look to trade the insolvent business and / or they may seek to market and sell the business. Certain administrations can involve a sale of the business and assets of the company to the management team or a third party, which can preserve the business, and the position of the company's employees.

Liquidation: a process whereby a company's assets are realised by a qualified insolvency practitioner into their cash value and the realisations are distributed to creditors of the company subject to the statutory order of priority in insolvency. In liquidation, just like in administration, the liquidator will examine the directors' conduct, and take action against them if appropriate.

What will the insolvency world look like post-Brexit?

Unfortunately, it currently remains impossible for any practitioner to provide a substantive answer to this question because politicians in Whitehall and Brussels are still scratching their heads as to precisely what form Brexit will take because there is simply no precedent for this situation. Once the UK gives notice to the EU under Article 50 of the Treaty on the European Union, this triggers a two-year formal negotiation process before the UK's exit from the EU is completed unless an exit agreement is reached before the two-year period expires.

It is likely that the UK would wish to enter into a bespoke agreement with the EU regarding the recognition of insolvency proceedings between the UK and EU Member States, and this would most logically be achieved by allowing the continued application in the UK of the EC Regulation on insolvency proceedings (a regulation which provides uniform rules on, and mutual recognition of, insolvency procedures amongst member states (other than Denmark). However, such an agreement would need the consent of all EU Member States, and it is unlikely that the UK will be given an 'easy ride' in negotiations so the situation will need to be closely monitored.

James Hillman
Solicitor - Restructuring and Insolvency
T: +44 (0)114 274 4570
M: +44 (0)7702 116 309
E: james.hillman@irwinmitchell.com

New Opportunities and New Risks

Broadening the UK's horizons in international markets

John Davies
Solicitor - Regulatory & Criminal Investigations
T: +44 (0)114 274 4228
M: +44 (0)7912 293 239
E: john.davies@irwinmitchell.com

Whilst the various reported reactions to 'Brexit' demonstrate polarised views on the opportunities and threats to UK businesses, we are nevertheless left in a position of having to make it work for us.

Some reports have been extremely positive in that since deciding to leave the EU, the UK has been approached by a plethora of countries wanting to enter into new trade deals. Of course whilst the UK has been a member of the EU such freedoms to negotiate have not been available. It has been suggested that the offers have come from around 27 countries with a combined GDP of £40 trillion which when compared with the combined GDP of the EU (estimated to be at around £12 trillion), seems to be a massive opportunity and certainly deviates from the despondency and angst which was forecast.

If these trade deals come to fruition then a very different landscape may be presented to UK exporters. The list of potential trading partners is expected to grow and the distance between these more attractive friends and the UK is also going to expand considerably. It may well be the case that there is a growth in UK exporters seeking agents in far flung places to help sell their products. Exciting times are no doubt ahead, but equally there are potential risks and pitfalls for the unwary.

Transparency International is a global movement with the objective of eradicating corruption and they publish a 'Corruption Perceptions Index' showing how 175 countries rank against each other in terms of how corrupt their public sector is perceived to be.

The lower their ranking, the more corrupt the country is perceived to be. Indeed, the rankings are used by risk analyst and forecasting experts. If we consider some of the countries which are reportedly proposing to offer enhanced trading terms with the UK, there is a range of rankings from the more 'safe' nations near the top of the list such as New Zealand, Canada, Australia, Germany and Japan to others whose position

Corruption Perceptions Index (rank)

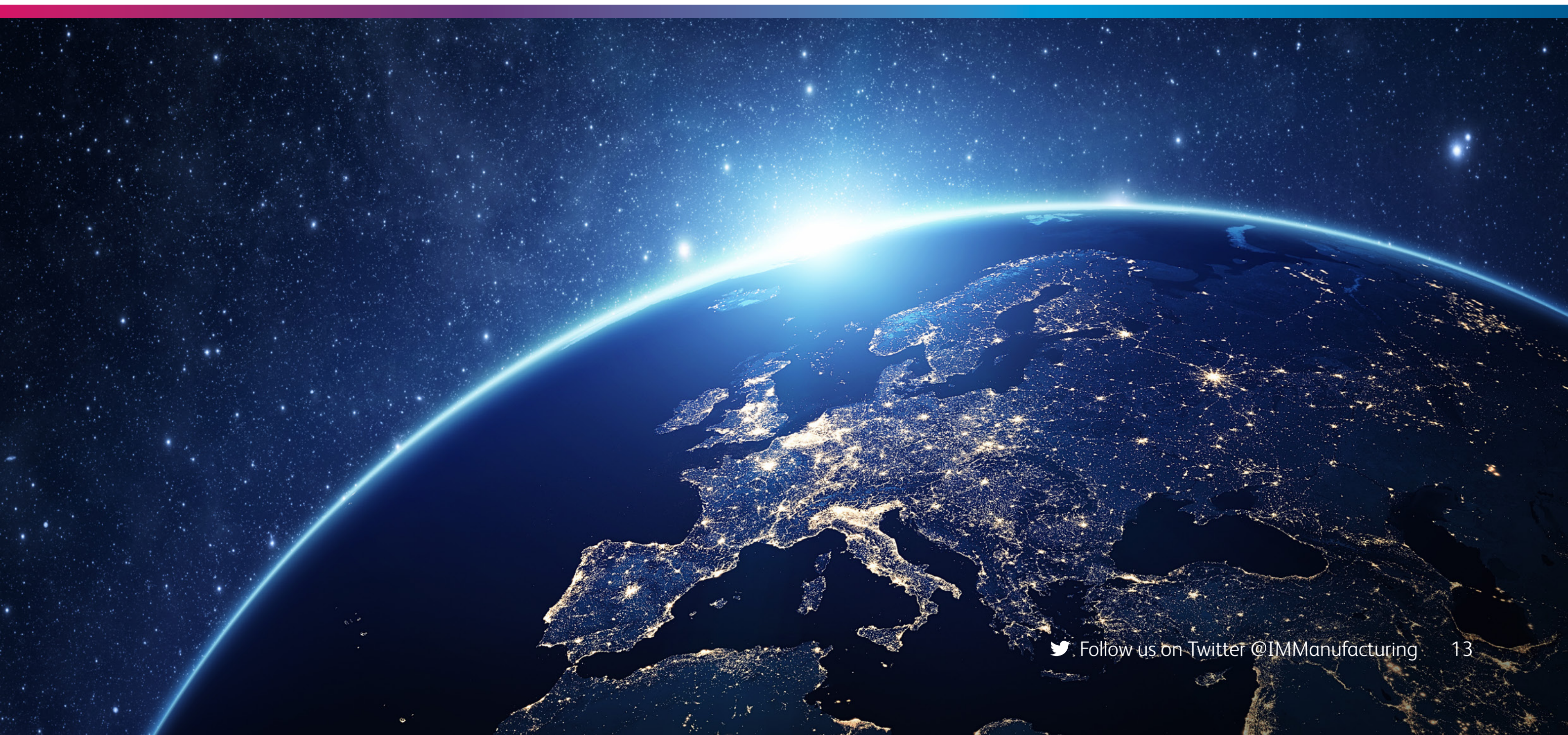
Colombia	(94)	**Mexico & Bolivia**	(joint 103)	**Kenya**	(145)
India	(85)	**Ecuador**	(110)	**Paraguay**	(150)
China & Suriname	(joint 100)	**Pakistan**	(126)	**Venezuela**	(161)

on this Index may well set alarm bells ringing. A leading risk analyst has considered the economic activities of close to 200 countries between August 2012 and August 2014. It found that sub-Saharan Africa and the Middle East held the most risk in terms of corruption and also the oil, gas and mining industries were found to be those most frequently exposed to the demands of bribery. In these sectors there are often public sector considerations and this provides a further layer of potential risk as will now be explained.

The Bribery Act 2010 sets out various offences and which are policed by the Serious Fraud Office. The legislation is centred around the proper performance of individuals and in this context their acting in good faith, impartiality or acting in accordance with a position of trust. If an individual intends to bring about the improper performance of others in their performance of their function or rewards that improper performance then an offence is committed. Similarly if that individual has knowledge or a belief that others have acted improperly in their role through inducement then an offence is committed. In order to make the assessment of any breach of expectation of proper performance, this is on the basis of what a reasonable person in the UK would expect to be the proper conduct of that person's role. Overseas local customs or practices must be disregarded unless they are specifically allowed or required in written laws in that country. There is a separate offence of the bribery of a foreign public official where a financial or other advantage to influence the official in the performance of their official functions is made. In the landscape set out above and with the UK legislative position, it can be seen that there are treacherous waters ahead for individuals when conducting business overseas. Actions of agents and distributors can also steer businesses towards the rocks. Although individuals are at risk personally from rewarding corrupt practice, businesses can also fall foul by failing to take adequate steps to prevent corrupt practices. Policies need to be rigorous and adhered to in order to protect a business and indeed those who work within it. Training of staff to spot the warning signs and to appreciate the policies in place and the legislation behind them is another key step to protect business interests.

At first it seemed that the Serious Fraud Office had been slow on the uptake insofar as dealing with bribery and corruption offences has been concerned. Very few cases were reported in this area. This can no longer be described as the case with a number of bribery investigations and newly prosecuted cases forming part of the Serious Fraud Office's workload. Indeed, there have been a number of high profile cases in recent months where the Serious Fraud Office has enjoyed some success in this particular field. Against this new landscape which could see an increased reliance on riskier overseas markets, it is therefore imperative for exporters to take the issue of eradicating or at least mitigating the risk of corrupt practices seriously as suggested, particularly as unlawful activity can easily find its way into transactions whether through the direct activities of employees or indeed the more indirect effects of agents in unfamiliar markets where their activities, through geography, are more difficult to control and monitor.

Effective anti-corruption policies and training can be a significant step in the right direction, as is obtaining sound advice should any fears or concerns arise.



The Trend Toward Reshoring

It is well documented that an increasing number of British manufacturers are seeking to relocate certain aspects of their operations back to Britain.

There are many reasons given for the trend towards 'reshoring' or 'onshoring'. Principal amongst these are the ability for manufacturers to keep closer control on quality, a reduction in and increased certainty of delivery times and a shortening and strengthening of supply chains. These factors are all big draws for British manufacturers and the trend towards reshoring is positive for the British economy, for job creation and for opportunities available to young talent keen to be involved in the sector. The result of the EU referendum and the significant uncertainty that this has for Britain's trading relationships with Europe and the rest of the world may well strengthen British manufacturer's resolve to continue in this trend.

However, relocating operations can be a complex and costly process, certainly in the short-term. A major challenge faced by manufacturers seeking to return to Britain is locating premises from which to conduct operations. So what are the options available to companies wanting to make the switch?

Most companies will look to either lease or acquire premises. There are a number of issues to be considered in making this choice, which can broadly be grouped into the following considerations: (a) flexibility; (b) funding the acquisition or occupation; and (c) autonomy/use. For any company wishing to return to the UK (or simply looking to start-up or expand operations) it is worth assessing each of these considerations in more detail.

Flexibility

A key issue will be how long new business premises are likely to be required for. Flexibility may be key. A big advantage of a lease is that the parties are free to agree any length of defined term that they wish. Whilst it is not possible for parties to agree to a 'rolling' lease term, including a break clause can give both parties the flexibility of being able to end the lease before the end of the contractual term. The period of notice that should be provided, and its impact on business continuity, will be a key consideration.

Assigning or underletting a lease can also be a far simpler method for a company to divest itself of business premises than achieving a freehold sale. Any steps and conditions contained in the lease that the tenant will need to take and comply with in order to effect a disposal should be carefully considered. Invariably, the landlord's consent will be required to the disposition, but the other conditions likely to apply, for example the provision of an authorised guarantee agreement and additional third-party guarantees, will depend on the circumstances and the terms of the lease. These considerations can have a significant impact on a company's ability to dispose of a lease and for on-going liability.

David Goy
Associate - Real Estate
T: +44 (0)114 274 4558
M: +44 (0)7714 599 498
E: david.goy@irwinmitchell.com

Funding the Acquisition or Occupation

A key consideration for any company wishing to purchase business premises will be whether it is able or willing to meet that capital expenditure. If the new premises will be required for a significant period of time, then the certainty that ownership brings for occupation and use may mean that acquisition is the preferred choice. Having a capital (and hopefully appreciating) asset on a company's books may also be an important investment and is potentially a great method of pension planning. Bank funding may well be available to companies to both finance the acquisition and to raise future capital. Conversely, it is unlikely that a bank will view a lease as representing appropriate security.

In contrast, a lease allows a company to 'pay as it occupies', which may be attractive. It will be very important for companies to pay particular attention to any provisions for rent review contained in the lease. Rent review will often be in accordance with 'open market rent', and the lease will generally specify the assumptions to be taken into account in making this calculation.

These assumptions can make a significant difference to the level of the review and it is important for tenants to take advice from both a legal and valuation perspective so that a degree of forward-planning can be undertaken.

Irwin Mitchell has a wealth of experience advising manufacturers looking to take new business premises and is expertly placed to discuss your requirements.

Use of premises

Any landlord will wish to retain a degree of control over the use of its premises; the extent of this control will generally decrease as the term of the lease increases. In particular, companies should consider the provisions of the lease dealing with permitted use and ability to make alterations to ensure that these authorise not only the initial intended use, but also give scope for companies to 'grow into' the premises.

This is not to say that without a landlord a company will be free to use that premises as it sees fit; there could be restrictions and fetters on use contained on the title and there will always be planning and regulatory considerations to take into account.

Restrictive Covenants in Employment Contracts

Companies can protect their know-how and client lists from former employees with well-drafted contracts

In an increasingly specialised industry, the minds of manufacturers are often more valuable than the machines, and manufacturers should be looking for opportunities to protect the know-how that drives their innovation. Restrictive covenants in employment contracts are one means of doing so.

Restrictive covenant clauses can take several different forms in a contract of employment, each with the effect of safeguarding, insofar as is possible, a company's knowledge and customer base:

- Non-Compete clauses prevent a former employee from competing with their previous employer.
- Non-Poaching clauses restrain a former employee from hiring former colleagues.
- Non-Solicitation clauses stop former employees from taking steps to encourage clients away from their former employer.
- Non-Dealing clauses prevent former employees from having any dealings with their previous employers' clients.

We hear an almost uniform refrain from clients when the issue of restrictive covenants arises (usually at a stage when steps are being taken to retrospectively – and often fruitlessly - protect a company's interests through litigation) – "there is no point in wasting money trying to include them in our employee's contracts because they're unenforceable".

That assumption is unfounded. Our recent experience is of willingness within the judiciary to enforce well-drafted and reasonable restrictive covenant clauses against former employees, contrary to the widely-held belief that they aren't even worth the paper they're written on and leaving restrictive covenants out of a contract of employment exposes the company to the risk of losing market position and custom to its competitors. The emphasis has to be on good drafting; clauses can be too wide in scope or too punitive and a court is likely to be disinclined to impose draconian restrictions on a former employee.

A second, less-commonly held view among clients is that clause should be drafted as strongly and as widely as possible to act as a deterrent to former employees. Such an approach errs too far on the side of caution at the risk of enforceability. Instead a middle ground needs to be adopted with a considered and appropriate protection being put in place to protect the company's interests, expertise and consumers.

Ciaran Dearden
Solicitor - Commercial Litigation
T: +44 (0)114 274 4635
M: +44 (0)7918 696 606
E: ciaran.dearden@irwinmitchell.com

The company should consider what it is exactly that it is trying to protect and stick to protecting only that. Be it access to customer records, access to technical expertise or former colleagues, it is worthwhile investing time to understand what an employee's role will expose him or her to and how and when exploitation of that know-how might prejudice the company's interests.

Having considered the potential risks, the employment contract should be drafted to include clauses, which include restrictive covenants necessary to protect legitimate business interests, and, in doing so, are reasonable both in scope and duration. This means there can be no one-size-fits-all restrictive covenant clause; our advice would always be to seek legal advice before entering into an employee contract if you think restrictive covenants may be relevant. Not doing so may turn out to be a false economy given the risk posed by a former employee taking with them details of your catalogue, customers and colleagues.

A High Court decision in the case of *Decorus Limited v Penfold [2016]* demonstrated the value and importance of well-drafted restrictive covenants when finding in favour of a company whose former employee had left along with copies of customer contact sheets and purchase logs. In awarding damages to the claimant company, the judge noted that whilst the original employment contract had contained very widely-drafted restrictive covenants which would have been incapable of enforcement, that contract had since been usurped as part of the internal pay review process by a new contract with more narrowly-focused clauses capable of enforcement.

Absent the re-drafting, the former employee would not have been prevented from making use of confidential and commercially sensitive information, allowing him to pry customers away from his former employee.

The judgment provided some useful indicators as to what a court will consider when deciding upon the enforceability of restrictive covenant clauses:

- The non-solicitation clause in the contract was deemed enforceable since the protection of confidential customer information was a legitimate business interest and the restriction was limited to six months in duration and only related to existing customers.
- Similarly, the non-dealing clause was also deemed enforceable because the company could show it had developed a unique business strategy in the provision of its services.
- In contrast, the non-compete clause was not enforceable since it sought to prevent the employee working in a variety of roles (not just sales) in any of the industries in which he had operated during his employment. This clause was severed from the contract as it was an illegal restraint of trade.

Our litigation expertise and experience in enforcement of restrictive covenant clauses also means that you will be well-advised if the urgent need arises for you to restrain the damaging actions of a former employee in breach of their restrictive covenant clauses.

Contractual Issues Specific to New Premises

If you ask a developer what their key goals are in the build of a new development, it usually boils down to a variation of "I want my building on time, in budget and to specification". Yet, it is an all too common scenario that the construction of new premises does not go according to plan.

The lesson for an employer is the importance of careful negotiation as to the events allowing the contractor time and money.

Emily Sinclair
Solicitor - Real Estate
T: +44 (0)114 274 4351
M: +44 (0)7714 599 498
E: emily.sinclair@irwinmitchell.com

In light of weather conditions earlier in the year, it was not be too difficult to imagine a scenario where a development was in delay because sustained high winds and rain meant the contractor could not get his crane off site or that storms had highlighted that the installed windows were inadequate and needed to be replaced. If the contractor claimed additional time and money under the contract for the crane and windows, would they be entitled to them? The answer is that it depends. Some important considerations are:

Additional time

Additional time in the form of an extension of time to the completion date is important because it pushes back the date from which liquidated damages will run. Whether the delay due to the crane and the windows is a "contractor risk event" or "employer risk event" depends upon the terms of the contract. The lesson for the employer is in the importance of careful negotiation as to the events allowing the contractor additional time as if the project does become delayed, this negotiation could determine an entitlement to liquidated damages for that delay.

Additional money

Depending on the terms of the contract, a contactor may be entitled to additional time but not additional money. Again, the lesson is careful contract negotiation to place certain events as "contractor risk events" to pass the burden to the contractor. By doing so, this could be the difference between the project being on budget or over budget.

Procurement

The form of building contract could have a big impact on who is responsible for events such as those set out previously. In traditional procurement, the design team is responsible for the design and the contractor is responsible for implementing the design. If the windows were a design issue for which the contractor had no responsibility, they are likely to get both time and money under the contract. This position is different under design and build procurement where the contractor is often given total responsibility for the design and workmanship of the development.

In design and build, it would not be unusual for the contractor to be denied time or money for the windows. However, as with all contracts, it would depend on the negotiated terms. As well as considerations in relation to time, budget and specification, there are other contractual issues unique to construction projects that cannot be ignored. Other considerations are:

Practical completion

Practical completion generally occurs when the works are complete save for snagging items. When practical completion is achieved, the employer can occupy the building, liquidated damages stop running and the contractor's insurance obligations usually end. Given the importance of practical completion, it is surprising that most standard form contracts do not define 'practical completion' and disputes around what it means and what items are properly "snagging" items are not uncommon. Accordingly, our advice is to clearly define practical completion in any form of building contract.

Warranties & third party rights

In the event of defects in the workmanship or design of the development, it is important the employer and its purchaser, lender or tenant (as appropriate) has recourse against the party responsible. This is achieved through either collateral warranties or third party rights and it is important that the drafting of the relevant contracts makes procuring these documents possible.

Legislation and Regulation

Part II of the Housing Grants, Construction and Regeneration Act 1996 (as amended) ("Act") regulates payment under construction contracts. Parties to a contract can negotiate the payment arrangements but cannot opt out of the payment rules under the Act. Our advice is therefore that you comply or you could find yourself on the losing side of a payment dispute. The Construction (Design and Management) Regulations 2015 represents an important change to health and safety in construction projects and enhances the role of the 'client' and the impact their decisions have on health and safety.

Our advice is therefore that you familiarise yourself with your obligations under these regulations and make suitable arrangements for managing the project.

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There are big changes coming in relation to supply chains. Organisations such as McKinsey are warning of the risks facing more traditional supply chains optimised to manage stable, high-volume production, and pointing towards a more agile future. This is something on the mind of many manufacturers.

"In our industry, the competitor that is best at managing the supply chain is probably going be the most successful competitor over time. It's a condition of success."

Jim Owens, the former chairman and CEO of construction equipment maker Caterpillar

Mark Evans
Associate - Commercial
T: +44 (0)114 274 4432
M: +44 (0)7889 811 056
E: mark.evans@irwinmitchell.com

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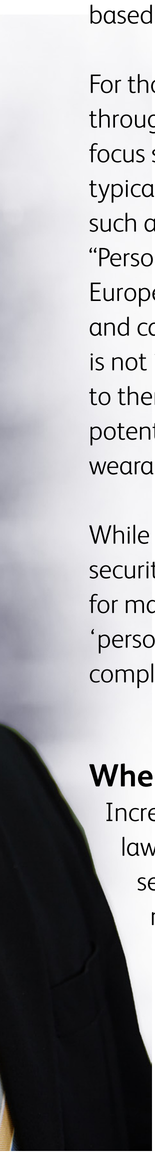

More agile chains are more able to respond to challenges as they are thrown at them – from significant increases in costs to fluctuations in currency, energy and raw material costs.

Increasing agility often means a greater dependency on "just in time" delivery and manufacture, so for key staff, greater visibility of the progress of deliveries can be a real advantage. This is leading many companies to provide their staff with more connected, GPS-enabled wearable technology. Many are also looking to pair these with cloud-based services.

For those with supply chains passing through Europe, this can bring into focus some issues which have not been typically faced in the supply chain, such as protection of personal data. "Personal data" is defined broadly in European data protection legislation, and can mean that even if an individual is not identified by name, data relating to them can still be personal data – potentially pulling tracking data from wearables into its scope.

While 'big data' has meant that IT security has become more of a priority for many organisations, dealing with 'personal data' introduces additional complexity.

Where are the cloud services?

Increasingly stringent data protection laws means the location of cloud services becomes ever more relevant, and the same is true of your contracts with the cloud services provider. There are limitations on when data can be transferred to many countries outside Europe, and requirements to include certain provisions relating to data protection in your contracts with the providers.

Many cloud suppliers are based outside Europe – can they commit to only using data centres within Europe or for technical reasons do they need to mirror data to sites outside? The old EU-US Safe Harbor regime has been ruled ineffective thanks to a case involving Facebook, and so far the replacement, 'Privacy Shield', has not been as widely adopted, which is likely to mean that the issue needs to be specifically addressed in your contracts

Do you have flexibility in a solution?

EU laws allow individuals to ask you to stop processing their personal data, and also give separate rights for them to require you to disclose all the personal data you hold about them. Many companies will have processes in place to gather personal data, though you may need to introduce new structures to allow the person responding to pick up any additional personal data generated by the supply chain.

If you are using a solution which tracks the location of individuals in your supply chain, whether directly or indirectly (for example, the location of a lorry driven by an employee), are you able to accommodate both of these points?

What does Brexit mean for all this?

The current EU data protection regime is being replaced by a regulation, which is directly applicable to all member states. It seeks to enhance privacy and push organisations towards a privacy-by-design thought process. It will come into force on 25 May 2018, so will likely apply to the UK, at least for a period, depending on how exit negotiations progress. The UK's Data Protection Minister, Baroness Neville-Rolfe DBE CMG, has indicated that the government could see a situation that the full revised rules could continue to apply to the UK even after exit if the UK remains in the single market.

What does this mean for my business?

If you are looking at updating your supply chain, whether it is adding partially autonomous vehicles or giving wearables to employees, you may stray into areas of regulation to many managers operating in the supply chain – whether relating to flight restrictions with drones or data protection issues. Lawyers and other consultants can help you to consider ramifications of proposals before they are implemented in this critical area and become issues for the business.

Have Your Old Designers Reclaimed Some Rights?

A couple of years ago, an IP audit on a small street furniture manufacturer entailed a review of all IP owned and licenced by the company.

One royalty agreement saw the company paying royalties to the holder of copyright in the steel bell bollard design that they were manufacturing. Our advice based on the copyright law in force at the time was that the company was free to manufacturer the bollards (depicted below) without having to pay further royalties as the designer's rights had expired by operation of Section 52 of the Copyright, Designs and Patent Act 1988 (CDPA).

Section 52 contained an exception to the duration of copyright protection in certain artistic works, which have been industrially manufactured. This means where an artistic work had been reproduced more than 50 times, the period of protection was limited to 25 years to bring it in line with the limited duration of a registered design right, compared to other artistic works which would be protected for the lifetime of the creator plus 70 years. This applies to all works of artistic works, which can include any graphic work, photograph, sculpture or collage, work of architecture or work of artistic craftsmanship, whether 2D or 3D, although the most common articles to be put into mass production are usually works of artistic craftsmanship.

So what has changed?

On 28 July 2016 (repeal date) Section 52 CDPA was repealed and any articles affected by the provision could possibly have protection again. This will have far reaching consequences on older artistic works whose 25-year term may have already expired under Section 25, but now have reclaimed the right to prevent others from using the artistic for the remainder of the much longer term. Thankfully, the amendment does not have retrospective force and will not affect any acts done while the article was out of copyright protection but there are some key dates to be aware of.

To limit the overall impact of the repeal, the UKIPO carried out a consultation in 2015, which introduced some transitional provisions. There are three key periods to consider:
the consultation was published on 28 October 2015 (consultation date) and for all contracts that were entered into before this date, the parties will benefit from a depletion period until 28 January 2017 (depletion date). Any articles already manufactured will have to be sold or destroyed by the depletion date. After this date no one may deal with any unauthorised copies of the protected article without permission of the author or unless an exception applies. All contracts that were entered after the consultation date would have to have been depleted by the repeal date.

When we advised our client that they no longer needed to pay royalties to the copyright holder of the bell bollard, they were reluctant to do so as they felt that they had a good relationship with the designer and did not believe the value of the royalties were worth putting that relationship in jeopardy. In order to better illustrate the above, let's imagine that our client had terminated the contract on 1 January 2013 and carried on using the design. They continued to manufacture the articles and entered into four contracts for the sale of the goods.

Iain Richardson
Senior Associate - Commercial
T: +44 (0)20 7650 3894
M: +44 (0)7957 910 772
E: iain.richardson@irwinmitchell.com

- **Contract 1** was signed on April 2013 for a one off shipment;
- **Contract 2** was signed on January 2014 for the sale of goods into mainland Europe.
- **Contract 3** was signed on June 2015 for the sale of goods into the UK; and
- **Contract 4** was signed on November 2015.

The goods made under contract 1 will not be affected by the repeal as any dealings with the goods would be during the period when copyright no longer applied. Contact 2 may not have been infringement in the UK but despite the repeal of the copyright law in the UK, it is possible that copyright still applied in other countries and it may be unlawful to offer for sale or sell from the UK works that are protected in another country. The goods manufactured under contract 3 would all need to be sold or dealt with before 28 January 2017. Any further dealings with the goods after that date may be liable to copyright infringement. Contract 4 was signed after the consultation date and any goods already manufactured would have to have been sold or destroyed before 28 July 2016, any further dealings post that date may be liable for outstanding royalty payments.

In light of the above, what should our client be considering now?

- If they haven't done so already, carry out another IP audit as soon as possible;
- Identify all existing products that may now be protected by copyright again and look to renegotiate the licence (if they haven't fallen out with the designer). The term of the licence may be key in negotiations, depending on whether the licence 'terminated on expiry of the 25 year period' or refers to valid for the duration of the copyright;
- Identify any stock that will need to be sold or destroyed. This may result in specific goods being completely removed from the product range and new marketing materials will need to be prepared;
- It is also advisable to review any current copyright licences to ensure that the change in law does not impact on the terms of the licence. Often in royalty agreements there may be a reduction on percentages as the copyright protection draws to an end and these may need to be renegotiated;
- Review the business model or plan and consider whether there are any alternative products or designs that can be developed which do not copy a substantial part of the existing article or artistic work.

Hopefully, the repeal of Section 52 will not have a significant impact on most businesses but there certainly is a risk for manufacturers that may have started reproducing goods in the mistaken belief that they are no longer protected by copyright. It is still early days but we expect a few demands for royalty payments to come through client's door or worse yet, copyright infringement proceedings issued.

Auto-Enrolment
What You Need to Know

Research indicates that people working in the manufacturing sector are more likely to join their company pension schemes than in any other industry. In fact nearly three quarters of people in the manufacturing industry join their company pension scheme, compared to just over a third in the retail sector. It is therefore crucial that employers within the manufacturing sector are aware of the auto-enrolment (AE) requirements introduced by Government legislation.

Andrew Ashley Taylor
Partner - Pensions
T: +44 (0)161 838 3051
M: +44 (0)7885 244 927
E: andrew.ashleytaylor@irwinmitchell.com

Issues to Consider

Calculating the staging date
There are a number of important stages to be completed in order to successfully identify and implement the AE requirements for your business. Each employer will have a 'staging date' when the automatic enrolment requirements will first apply to it.

Broadly, the staging date is determined by size of PAYE payroll, with the largest employers (120,000+) commencing on 1 October 2012 and medium sized employers (250+) on various dates up to 1 February 2014. Employers can look up the staging dates applicable for different-sized PAYE schemes on the Pensions Regulator's (Regulator) website by submitting their PAYE reference online.

Problems can arise if there is a discrepancy between the staging date that the regulator assigns and the date that the employer believes applies to it. In order to avoid this, employers should ensure that they provide the correct information to the regulator. Errors in calculating the correct staging date can lead to complaints from workers. Enrol workers too late and the employer may need to make backdated contributions, but too early and the employer could face claims for unlawful deduction from employees' wages.

Assessing the workforce

One of the trickiest aspects of the AE process can be assessing to which workers the employer duties will apply. This must be carried out at the staging date and also a number of later dates. It is important to note that AE is not limited to employees, but extends to the wider group of "workers". Although for some employees the categorisation as a worker may be obvious, there are a number of difficult cases and employers should ensure that they are familiar with guidance from the regulator and the requirements of the AE legislation. In particular, employers in the manufacturing industry need to watch out for workers who work in various locations or are expatriates.

Once the employer knows who qualifies as a worker for the purposes of AE, there is a three-part assessment in order to determine whether employer duties will apply to that worker. This will consider:

- the worker's age;
- whether the worker works in the UK under his contract; and
- the worker's earnings to see whether qualifying earnings are payable in the relevant pay reference period.

Again, there are a number of tricky areas for employers to look out for, including persons who are exempted workers for the purposes of AE and workers who have fluctuating earnings. Once its staging date has passed, each employer will have to continue to monitor the workforce and identify the Automatic Enrolment Date (AED) for each:

- new worker who is an eligible jobholder;
- existing worker with threshold earnings who reaches age 22; or
- existing worker who meets the threshold earnings limit for the first time.

Further, the employer's duty to re-enrol eligible workers which mainly arises around the time of the third anniversary of the original staging date is already a live issue for many larger employers and will soon be on the horizon for many more. Again, these difficulties can be overcome by employers ensuring that their records and payroll processes are equipped to deal with re-enrolment and also that they are planning for it well in advance.

The AE process

Broadly speaking, an employer will have one month from its staging date (and from any later AED) to enrol eligible workers into a qualifying pension scheme. Specified information about the process must be given to each eligible worker within one week of the AED. The Pensions Regulator has published detailed guidance in relation to the communications which should be sent to workers regarding AE and this guidance is a useful reference point in preparing any communications.

Employer duties beyond the staging date

Employer duties continue beyond the staging date, requiring the continual monitoring of workers who are not already eligible job-holders to determine if and when they qualify as a different category of worker for AE purposes. For employers in manufacturing, these on-going duties are unlikely to prove more problematic than the initial staging process, provided that the necessary monitoring and record-keeping systems are in place.

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UK POWERHOUSE

‘Midlands Engine’ Could Create 176,000 New Jobs By 2026

The Government’s aim of creating a ‘Midlands Engine’ could be boosted by the creation of 14,000 new automotive manufacturing jobs in the region over the next decade - but only if a suitable post Brexit export trade deal is negotiated and the crucial skills issue is tackled, according to our joint report with leading think-tank Cebr.

First announced last year, the Midlands Engine is a key part of Prime Minister Theresa May’s industrial strategy and similar to the ‘Northern Powerhouse’ plan, it aims to rebalance the UK’s economy by supporting regions outside of London through infrastructure investment and political devolution.

The latest UK Powerhouse report predicts that although the Midlands’ economy will continue to be outpaced by London over the next 10 years, the value of its output will increase by £29.3bn with 176,000 new jobs being created.

The report states that automotive manufacturing will be key to this growth and expects 14,000 new jobs in the sector to be created in the Midlands region.

Currently the automotive sector represents 3.8% of output across the West Midlands compared to a national 1.3% share. In 2015, motor manufacturing made up 8.2% of UK manufacturing compared to 6.2% in 2006.

According to the UK Powerhouse report, the economic output gap between the West Midlands and London will grow by £47 billion over the next 10 years.

Despite this optimism and prediction that over 14,000 new vehicle manufacturing jobs could be created in the Midlands before 2026, it says Brexit could still pose a number of threats for the outlook of cities such as Birmingham and Coventry, including the potential loss of the EU talent pool which could exacerbate the current skills crisis.

“The automotive sector is at the heart of the Midlands Engine and if the Government is keen for it to flourish, it’s vital that they take the necessary steps during Brexit negotiations to ensure it can thrive.

Whilst the industry has had much success in forging trading ties with emerging economies such as China, Europe remains a key market and access to the continent has provided a key support for investment into the UK from overseas car manufacturers. Even premium manufacturers such as Jaguar Land Rover derive around 40% of sales from the EU.

Negotiations on the future trading relationship following the referendum result will be an important determinant in the outlook for the automotive industry across the UK.

Still, the sector and region could see some fallout from the UK’s decision to leave the EU. There is already a serious issue of skills shortages with one in five vacancies in the West Midlands unfulfilled due to a lack of available skills in the labour market. Whilst cooperation with local colleges and universities will help to support the supply of skilled school leavers and graduates, the loss of an EU-wide talent pool, should negotiations take this route, could be of detriment to the continued expansion of the sector in the region.”

Chris Rawstron
Head of Business Legal Services, Birmingham


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A report for
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