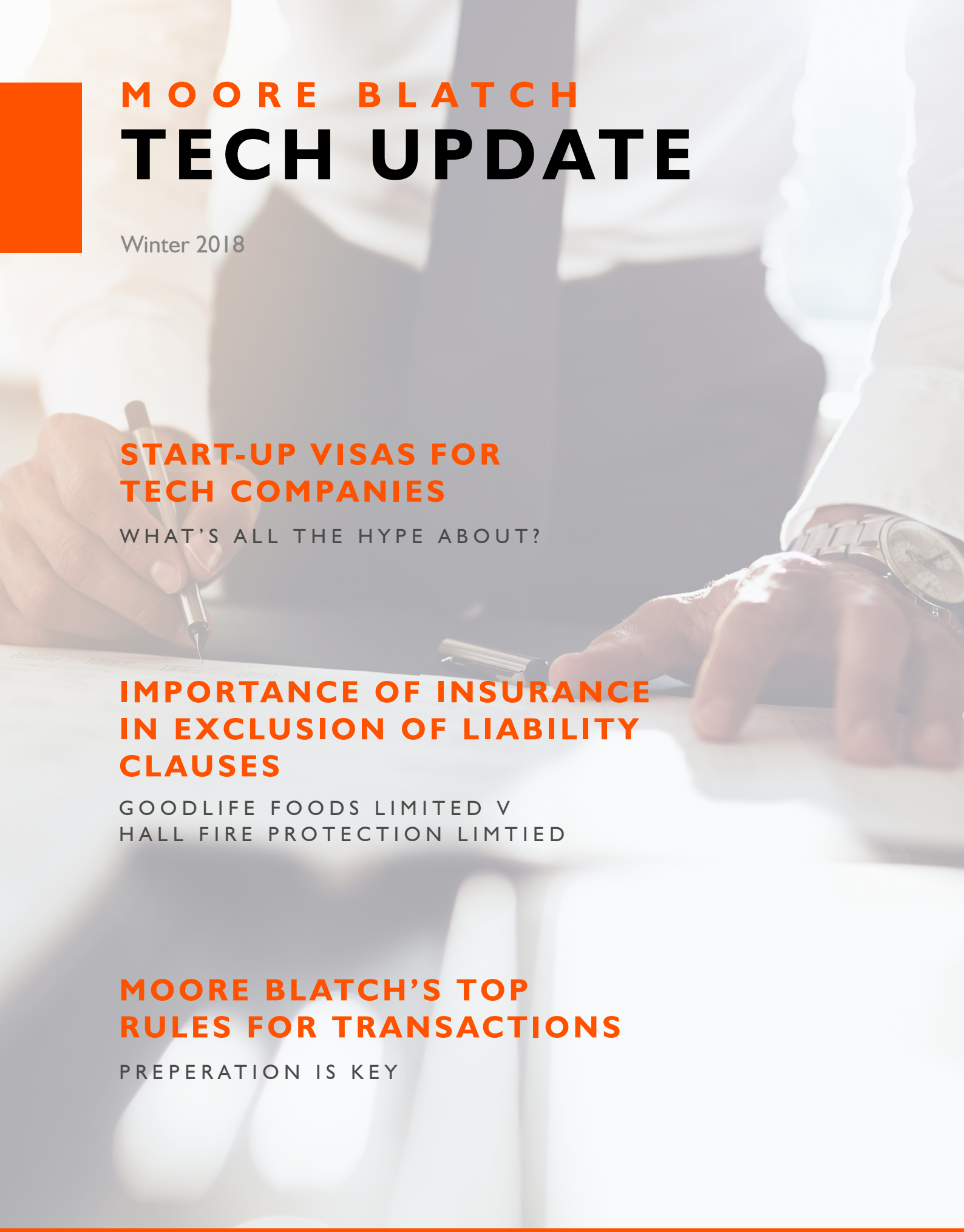
MOORE BLATCH

TECH UPDATE

Winter 2018



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PREPERATION IS KEY

MOORE BLATCH'S TOP RULES FOR TRANSACTIONS

Benjamin Franklin said *"by failing to prepare,you are preparing to fail"* and that is never more than true in transactional work.

As preparation is key to a smooth and ultimately successful acquisition or disposal, each quarter we will bring you some of our most important rules to follow leading up to that all important transaction. The first, appointing your key advisers.

We see many advisers on transactions, some good, some exceptional, and some not so exceptional. Our first rule is to pick your advisers wisely. It is likely that you will need at least a selection of lawyers including corporate financiers, accountants and tax advisers. Seeing as the transaction could be one of the most important events in years or lifetimes, it is important to ensure that you pick them wisely.

What should you look for? A good adviser should have many important attributes and we consider the following to be critical:

Experience

All of your advisers should have relevant experience of the type of transaction you are undertaking. If you are an IT business, then look for advisers who have relevant IT experience and ask them what they have done before in your field as it is wise to choose advisors with the right specialist experience.

I specialise in large scale reorganisations and employee incentives in the digital and TMT sectors, whilst Peter Jeffery specialises in high value acquisitions and disposals of digital and TMT businesses.

Relationship

You are likely to be working with your chosen adviser for weeks, if not months. Work out whether you have a good relationship with them and can (or even would enjoy) spending long periods with them. Any good adviser will be happy to meet many times before being formally engaged which can be an excellent opportunity to get a feel for that individual. We have clients who we know very well, and those relationships are enjoyable to maintain. Critically, our clients feel the same about us.

Old or new

Advisers with many years' experience are often valued and respected. Additionally, consider if you need additional advisers to help with the transaction. For example, your existing accountant's knowledge of the business may be invaluable in assisting with due diligence, but do they have the requisite knowledge to provide complex corporate tax advice?

Style

There may not be a right or wrong style, but nonetheless it is important to find advisers who match your own style. If you prefer to speak on the phone, find an adviser who likes to do the same. If you like your adviser to be available 24/7 no matter what, then make sure that is your adviser's preferred way of working too. Ultimately, different styles can cause conflict and when embarking on an important transaction, conflict with your adviser is the last thing you want.

Enthusiasm

You would think this to be a given, but sadly it's not always the case. Your transaction is likely to involve long hours and days (and possibly nights!). If your adviser isn't enthusiastic about the work to be done when you first engage them, then it's unlikely they will share your enthusiasm about the transaction itself. Your adviser should share your excitement, not overlook it.

Ultimately, good advisers not only provide the best advice during the transaction, but also ensure that it proceeds in the smoothest possible manner, with the most advantageous outcome.

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NEW REQUIREMENTS FOR PROVIDERS OF ESSENTIAL SERVICE

The Network and Security Information Regulations 2018 came into force earlier this year. These regulations impose security, incident reporting and registration requirements on providers of essential services (water, energy, transport, health, and digital infrastructure) and on businesses that provide online services to operators of essential services.

Businesses within the scope of these regulations need to register with the Information Commissioner's Office before the deadline of 1 November 2018 and take steps to comply with the new security requirements imposed by these regulations.

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START-UP VISAS FOR TECH COMPANIES

WHAT IS ALL THE HYPE ABOUT?

During this year's London Tech Week, a new visa route aimed at the tech industry was announced.

The 'start up visa' has been designed following advice from the Migration Advisory Committee (MAC) and feedback from the tech sector.

As the UK prepares for Brexit, the 'start up visa' is aimed at encouraging more entrepreneurs from overseas to set up here and will replace the existing Tier 1 Graduate Entrepreneur scheme.

Current visa schemes

The Graduate Entrepreneur visa is aimed at recent graduates. Up to 2,000 visas can be granted per year, however in the year ending March 2018 only 839 applications were approved.

After a visa is granted, the existing Graduate Entrepreneur route doesn't require applicants to show funding available to invest in a proposed business idea or meet any job creation requirements. This is in contrast to the large investment requirement for the Tier 1 Entrepreneur visa, where the applicant must show:

- £200,000 of available funds; or
- £50,000 if the funding is provided by an FCA-regulated venture capital firm, approved seed funding competition or accelerator, or the Department for International Trade.

Tier 1 Entrepreneurs also need to show that they have created two full-time jobs lasting 12 months each during the period of their initial visa to qualify for an extension.

The Financial Times recently reported that 1,946 IT professionals from outside the EEA were refused visas since November last year due to restrictions on the availability of Tier 2 visas for Sponsored Skilled Workers.

The tech sector was one of the worst affected with only the field of medicine being hit harder with 2,360 rejected applications.

New start-up visa scheme

The new 'start up visa' doesn't require applicants to have a degree. In addition to widening the pool of talent by accepting professionals who don't have a degree, we hope to see a rise in the number of visas granted.

Applicants under this scheme are required to have an endorsement and early indications show that the bodies that can provide have been expanded from universities and the Government's Entrepreneur Programme to include approved business sponsors including accelerators.

The original MAC report suggested that 'approved business sponsors' should have to put up a minimum level of investment in the region of £20,000 to £30,000, in exchange for equity in the business. The proposed new route is currently silent about both endorsements and investment.

Based on Government announcements to date we assume that there will be no investment, or job creation requirements to be met.

The future

The funding and endorsement criteria issues are likely to be clarified by the Government when more details are released.

We are told that the application process is expected to be 'faster and smoother', but again the Home Office hasn't identified how this process will actually work in practice.

The scheme is set to launch in spring 2019.

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THE IMPORTANCE OF INSURANCE IN EXCLUSION OF LIABILITY CLAUSES

GOODLIFE FOODS LIMITED V HALL PROTECTION LIMITED

A recent case '*Goodlife Foods Ltd v Hall Fire Protection Ltd*' has once again shown that the courts often place considerable importance on the availability of insurance in interpreting the validity (or not) of an exclusion of liability clause in a commercial contract.

The case of *'Goodlife v Hall Fire'* also shows the courts being generally supportive of businesses limiting liability through contractual terms (limitation and exclusion clauses are important in all commercial contracts, but particularly in the technology sector where potential losses can be far higher than the underlying contract value).

The case

In May 2012, a fire broke out at Goodlife's premises resulting in in losses of over £6 million. 10 years previously, Hall Fire Protection installed a fire suppression system which Goodlife later argued had failed to put out their fire.

Unable to bring any action under the contract they had with Hall Fire due to the time that had passed (their statutory limitation period had expired), Goodlife brought a claim for breach of contract and/or negligence against Hall Fire.

Hall Fire's standard terms excluded liability for any part of Goodlife's claim for damages.

Both the trial judge and the Court of Appeal found in favour of Hall and felt that the exclusion of all liability for loss or damage linked to property or goods from negligence or malfunctioning of the fire system was not an onerous term and had been duly incorporated into the contract.

Was the exclusion clause particularly onerous or unusual?

Even though there was a wide exclusion of liability, the court stressed that this had to be looked at in the overall context of the contract and highlighted that this was:

- a one-off supply contract,
- carried out by two relatively small organisations for a relatively small sum; and
- there were no ongoing maintenance obligations.

Given that all the judges felt that there was nothing particularly unusual or onerous in Hall trying to protect itself against unlimited liability arising in the future. In particular, the Court stressed that this was exactly the type of issue that should be covered by insurance - indeed, Hall had offered to accept wider liability in return for being paid to arrange insurance for Goodlife. This was not accepted by Goodlife.

Had the exclusion clause been fairly brought to Goodlife's attention?

Again, the two courts felt that it had: it was clearly set out as one of Hall's standard conditions and was not in any way buried away in small print or an unusual part of the contract – the Court of Appeal felt that it would be "commercially unrealistic" to say that it had not been fairly and reasonably brought to Goodlife's attention and added that, even if it had been a particularly onerous and unusual clause, it would still have been properly incorporated into the contract.

Was the exclusion clause reasonable in relation to the Unfair Contract Terms Act?

Again, the courts gave a resounding yes:

- commercial parties of equal bargaining strength should generally be bound by their terms;
- Goodlife had been given the option of paying an additional sum for insurance which would have reinstated potential liability;
- finally, the Court felt that it was reasonable for one party to attempt to exclude liability for the vast majority of damage that might arise from its own defective performance.

Overall, this recent decision is a further reminder of the recent trend of courts looking to uphold exclusion limitation clauses freely entered into between commercial parties and recognising that insurance is a key factor which will often support the validity of an exclusion clause.

The moral of the story

Do not pin your hopes on later arguing that a limitation/exclusion clause is too wide or onerous; it is far better to negotiate suitable amendments to the contract at the outset and/or take out insurance to cover the potential losses arising.

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QUESTION AND ANSWER

A family run innovation company, Morgan Innovation and Technology Ltd design, develop and manufacture innovative products in medical, defence and commercial industries. They are passionate about innovations that have a positive impact on society.

Here, Nigel Clarke from Morgan gives an insight into a unique business.

What is the history of Morgan?

My Mum & Dad, Sue & Howard Clarke founded Morgan IAT in 1997 with the aim of supporting innovations that would have a positive impact on society. A couple of years ago I joined the business as Managing Director.

What is your business mantra?

Underpinning everything are our values of family, fun and growth. Our people are the heart of our business and we promote a happy working environment, teamwork and inclusion.

And your corporate mission?

To have had a positive impact on 1.5 million lives by 2020, by harnessing innovations that create a better world. We are well on our way to achieving this, with the design, development and manufacturing of new products in the medical, defence and commercial industries.

How do you achieve this operationally?

We have developed a unique Innovation to Income (I2I) investment process and we reinvest 20% of our annual turnover into R&D. This enables us to support the next generation of innovators, from concept through to success in the marketplace. In 2018 three innovations will move from our R&D department into our production facility.

How does Morgan support innovation?

In 2017, Morgan's 30th year, we launched the MIAT Prize. It offered £30,000 of R&D support to the innovation with the greatest commercial potential to change people's lives. It was supported by Santander, East Hampshire District Council, SmallFry and the IET. Jon Bentley, of Gadget Show fame, was a judge.

With over 75 entries the prize went to iVisco, invented by Dr Arslan Khalid of Scottish start-up MobiDx. His revolutionary device provides point-of-care diagnostics for early detection of diseases. It profiles a single droplet of blood on a smartphone and measures blood clotting time using acoustic fields. It has huge benefits for developing nations.

What's next?

The MIAT prize was so successful that we are running it again in 2019. We are pleased to confirm that Santander are sponsoring again along with new sponsors Moore Blatch and Menzies accountants, both of whom are offering their professional services as part of the winners prize. More details can be found at: http://go.morgan-iat.co.uk.pages.services/2019-prize/index.html

We also support STEM in local schools, businesses and charities, to help students and graduates pursue careers in technology and innovation.

Nigel Morgan - Morgan Innovations & Technology Limited

morgan innovation&technology ltd

THE MORGAN INNOVATION & TECHNOLOGY PRIZE 2019

IS PRIVACY SHIELD ADEQUATE FOR DATA TRANSFERS TO THE US?

In July 2016, the European Commission formally adopted Privacy Shield, a new framework for exchanges of personal data between the EU and US for commercial purposes.

This means that Privacy Shield is approved by the EC as an adequate means of transferring personal data from the EEA to the US. This remains the position until the EC decides to change its adequacy decision.

In October 2017, the EC published its annual report on the functioning of the Privacy Shield. The report's conclusion was that whilst the US continues to ensure an adequate level of protection for personal data transferred under the Privacy Shield from the Union to organisations in the US, some further improvements could be made to the practical implementation of the Privacy Shield framework.

More recently the civil liberties committee and MEPs have been calling for a suspension and review of Privacy Shield following the Facebook - Cambridge Analytica data breach.

For now, Privacy Shield is an adequate means of transferring personal data to the US, but businesses who use third party processors in the US should keep an eye out for changes to this position, in particular, in the annual review this autumn.

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