Private Equity Bulletin

Enforcing drag-along rights – practical considerations

Drag-along rights are contractual mechanisms which enable a purchaser to acquire all of the shares in a company including those held by a dissenting minority. Such provisions usually provide that if a certain proportion of the existing shareholders agree to sell their shares to a non-related third party, the remaining shareholders may be obliged to also sell their shares upon the same terms.

It is often sufficient for dragging shareholders to threaten the enforcement of a drag-right procedure to bring "dragged" shareholders along, but in the instances where actual enforcement is required the drafting in the company's articles of association will be important for the efficiency of enforcement of the drag. Interestingly, the London office of Mayer Brown has seen a significant number of instances this year where drag-along rights have had to be enforced and in this article we consider some of the common pitfalls when enforcing drag-along rights.

Drag-right mechanics should be as complete as possible and, in particular, should deal with the actual process of transferring the dragged shares. For example, the mechanic should contain powers-of-attorney appointing the directors of the Company to complete a sale on behalf of any dragged shareholder who might refuse to co-operate with the drag process, as well as a procedure to sweep up any option holders or others with interests in the shares of the company.

Most company articles of association will contain a pre-emption procedure which applies on share transfers. However, in many cases it is not always clear whether the pre-emption provisions must be exhausted prior to the drag being operative, leading to potential significant time delay in the drag process.

Although those holding 75% or more of the share capital of a company can validly amend the company's existing articles of association, there is not a completely unfettered right to do so and such power must only be exercised *bona fide* for the benefit of the company otherwise there is a risk of a challenge including an unfair prejudice claim under s994 Companies Act 2006.

Whilst it was held in *Re Charterhouse Capital Ltd* [2015] EWCA Civ by the Court of Appeal that small amendments to the drag-along provisions in articles of associations to make them operative will be acceptable and will be upheld, it is still unclear whether inserting a drag-along right in a set of articles for the first time for the explicit purpose of completing a transaction pursuant to such drag-rights would be upheld, and this certainly will not be the case where the minority will be treated differently to the majority. However, in circumstances where both the majority and minority exit a business at the same price and on the same terms, it seems difficult to argue that there has been unfair treatment of the minority or any specific loss and it may be that a Court would be minded to uphold such actions where the purpose is to permit a wider transaction for the good of all shareholders.

If you have any questions about this update, please get in touch with:

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Connected and Autonomous Vehicles ("CAVs") in Europe: Challenges with using the data they generate

The emergence and surge in the public use of CAVs has brought data protection concerns into the spotlight. Numerous industry participants will seek to collect, analyse and exploit this immense amounts of data from CAVs for many different purposes. For example, original equipment managers ("OEMs") may use technical data like vehicle speed, battery life and fuel pump performance etc. to develop more efficient and advanced vehicles. Retailers and service providers could use car data analytics, including location tracking data, for in-car monetisation opportunities such as advertising.

As exciting as this treasure trove of opportunities sound, there are key legal issues in Europe which need to be dealt with before participants can harness the power of CAVs-generated data.

Given the many moving parts in CAVs, multiple participants may try to lay claim to ownership of the data. OEMs will assert that the role of their equipment plays a huge part in collecting and transmitting the data, whilst automobile companies like Toyota may assert that the equipment is part of the entire vehicle.

These different stakeholders will need to come to an agreement on who exactly owns the data, to whom it should be licensed and how that data can be used by successive vehicle owners, their passengers and third parties that they interact with (e.g. car dealers, insurers).

Further, the European Data Protection Directive 95/46/EC ("Directive") defines personal data as any information relating to an identified or identifiable natural person and the General Data Protection regulation 2016/679 ("GDPR"), which will replace the Directive in May 2018, has a very similar definition. The GDPR has expressly stated that an individual can be identified directly or indirectly by reference to location data and even technical telemetric data produced by sensors such as speed, acceleration and use of brakes could constitute personal data. As a result, connected car data will, in most cases, be deemed personal data, unless data processing has been designed to avoid data becoming personally identifiable.

Various stakeholders seeking to access and use CAV data will have to enter into carefully structured agreements that clearly identify each party's respective obligations with respect to the ownership of data collection, the use and protection of personal data and the apportionment of risk, particularly in the case of loss or misuse of data. This is particularly important given that European data protection authorities may impose fines of up to 4 per cent of the annual global turnover of an industry participant that is responsible for breaches of the principles governing data processing and rights of data subjects under the GDPR.

Please do let us know if we can assist by discussing these trends/deal terms with you directly as we would be happy to.

Interpretation of Discretionary Clauses and Implications for Private Equity Contracts

The recent high court decision in the case of *Watson and others v Watchfinder.co.uk Ltd* [2017] EWHC 1275 (Comm) illuminates the importance of finding balance in drafting discretionary/consent clauses as well as the need to be precise in determining the ambit of such provisions. Clauses that seem to give an absolute discretion, or are so open-ended that they essentially afford no restriction on the discretion, are looked upon unfavourably by the court.

Watchfinder.co.uk ("W") is a rapidly growing retailer specialising in the dealing of pre-owned luxury watches. Adoreum Partners ("AP") was engaged by W to provide business development services, including the introduction of potential investors. In return, AP would be paid a monthly retainer and a bonus fee upon the successful introduction of an investor. Additionally, a share option agreement was granted by W to the partners of AP, permitting them to acquire 5% of the shares in W. The share option agreement hinged on one condition:

"The Option may only be exercised with the consent of a majority of the board of directors of W."

Over the course of providing their services, AP managed to introduce Piton Capital, who later invested US$10m for a 15% shareholding in W.

AP later sought to exercise the option but the board of W vetoed the exercise of the option as it believed it had absolute discretion over such decision. The High Court ruled that there was an implied duty to exercise the contractual discretion rationally.

It is an implied term that a contractual discretion must be exercised in good faith and not arbitrarily or capriciously. Although this does not automatically mean that parties have to act reasonably, it does mean that:

- A decision maker needs to follow a proper considered process before exercising the discretion;
- All material considerations should be taken into account; and
- There should be evidence to support the decision and consistency with the intended commercial purpose of the discretion.

These implied terms relating to discretionary rights are applicable to private equity in a number of ways, Including:

- Investor consent matters; and
- Liquidation preference determination rights.

Following recent decisions of the Court, it seems prudent to minimise the risk of discretionary decisions being challenged by drafting more precisely the ambits and permitted criterion of such decisions and by evidencing the rationale for reaching each given outcome.

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Livingstone

FM Conference – Winning Strategies for a Consolidating Market

Date: 14 November 2017
Venue: the Soho Hotel, 4 Richmond Mews , London W1D 3DH

The UK Facilities Management industry is regarded as one of the most advanced outsourcing markets in the world and has always attracted considerable interest from acquirers and investors, domestic and international.

The last decade has seen sustained M&A activity as single service providers move to offer bundled or a total FM solution, soft providers diversify into hard, managing agents move into service delivery and international providers seek to follow customers abroad.

This half-day conference brings together executives, entrepreneurs and investors from across the FM sector.

The keynote will be delivered by Adrian Ringrose, recently retired CEO of Interserve plc, and panellists include senior representatives of ABM, CLEAN, CloudFM, idverde, Kier, Pimlico Plumbers and SPIE to discuss the successes and failures, opportunities and risks in this rapidly-evolving market, how to create shareholder value – and how not to destroy it!

Livingstone's Business Services sector team and lawyers Mayer Brown have brought together a compelling group of speakers and panellists from across the corporate, owner managed and investor communities to share their experiences at this closed, invitation-only event.

Programme Agenda

08.30-09.15	Registration and breakfast
09.15-09.30	Opening remarks
09.30-10.15	Keynote speech: Adrian Ringrose, former CEO of Interserve plc
10.15-11.30	Panel 1: Building Value in a Fast-paced Market - The Independent's View
11.30-12.00	Coffee and networking
12.00-13.15	Panel 2: Acquiring FM Businesses: Pitfalls & Opportunities
13.15-13.30	Concluding remarks
13.30-14.30	Light buffet lunch

This event will appeal to the following decision-makers:

- Owner managers contemplating their value strategies;
- CEOs, CFOs and M&A Directors of corporate groups considering potential acquisitions;
- Private Equity investors considering new investments; and
- FM professionals exploring opportunities within the M&A market.

If you would like to register for this event please contact Sonia Tavanai-Tamanai T: +44 20 3130 8628 E: stavanai-tamanai@mayerbrown.com