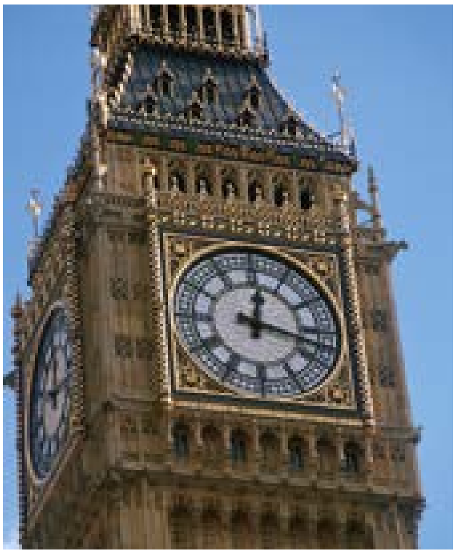
UK Corporate Briefing

Issue 6 - Summer 2016

The UK's EU referendum on 23 June 2016 delivered a leave result. The nature of the UK's future relationship with the EU and the timescale and details of the process for establishing that relationship remain to be seen. Against this uncertainty, we start this summer 2016 edition of Dentons' UK Corporate Briefing with some observations on how "Brexit" may impact on the regulation of companies and corporate transactions in the UK, before turning our attention to other developments in the second quarter of 2016.



Brexit

Where next for the regulation of companies and corporate transactions in the UK?

Regulation of companies

The establishment and regulation of companies in the UK has, since the UK joined the EEC in 1973, remained primarily a matter for UK domestic law.

Successive EU Company Law Directives, often based on English law, have influenced the development of that law, laying down EU-wide minimum harmonisation standards in a range of areas. These include the validity of company obligations, the formation of public limited liability companies and their capital requirements, foreign branches, single member companies, mergers and divisions, takeovers, accounting and audit requirements.

These Directives have been incorporated into successive UK Companies Acts, most recently the Companies Act 2006. That legislation, which followed a long review of company law in the UK, will almost certainly remain the cornerstone of UK corporate legislation following Brexit. The extent to which divergence between UK corporate law and corporate law in EU member states may occur over time will, of course, depend on multiple factors, including the terms of any renegotiation. EU corporate law requirements must, for example, be applied by EEA member states.

While the establishment and regulation of companies remains primarily a matter for domestic law, EU law has created two distinct legal entities which are intended to facilitate closer business relationships across member states. These are:

- the European Economic Interest Grouping (EEIG), a partnership-like entity with independent legal personality which must have members based in at least two countries; and

In this issue...

Please contact us if you would like to discuss any subject covered in this issue.

Read more >

- the Societas Europaea (SE), a European public limited company which must involve companies from at least two different member states.

Both EEIGs and SEs can be registered in any EU/EEA member state, including the UK. The status of these entities will require special consideration following Brexit. There are currently several hundred EEIGs and SEs registered in the UK (and several thousand across the EU/EEA).

Regulation of corporate transactions

There are two main areas where EU law provides for the regulation of UK corporate transactions.

The first relates to public company takeovers. Here, the Directive on Takeover Bids, which provides for minimum harmonisation of public company takeovers across the EU/EEA, has been incorporated into UK domestic regulation through changes to the UK Takeover Code and to the Companies Act 2006. However, much of the detail in these rules preceded implementation and remains UK-specific. Brexit is, therefore, unlikely to have a material effect on much of the detail of these rules.

In contrast, the regime for EU cross-border mergers established by the EU Cross-Border Mergers Directive, while now incorporated into UK law through secondary legislation, had no predecessor UK equivalent. The Directive allows a private or public company in one EU/EEA member state, including the UK, to merge with a company in another member state, provided certain steps are followed and certain conditions are satisfied. Although the Directive increases the choices available where a UK company wants to combine with a company from another EU/EEA state, there have been relatively few such mergers. The lengthy timetable and the procedural steps involved mean that a cross-border merger is not often the first choice of structure. Whether it will remain an option at all, following Brexit, remains to be seen.

Capital markets issuers

The EU Prospectus Directive enables an issuer of securities to "passport" its prospectus offering those securities to other EU/EEA member states. If the prospectus complies with the Directive's requirements and has been approved by the competent authority of an EU/EEA member state, the issuer can use it to raise capital across the EU/EEA without requiring further consents or approvals.

If post Brexit the UK is unable to agree with the EU any equivalent to the EU Prospectus legislation, a UK issuer wishing to make a pan-European public offering of its securities will need to apply for approval of its prospectus by the competent authority in an EU-regulated market, just as "third country issuers" currently do, and as was the case before "passporting" began in 2005. Conversely, the UK government might also require additional

UK regulatory approval in respect of "EU approved" prospectuses which are used to market securities in the UK.

Legislation update

Companies House: annual return changes

From 30 June 2016, the annual return that all UK companies must file at Companies House has been replaced by a confirmation statement.

The basic difference between the annual return and the confirmation statement is that the confirmation statement will not require previously delivered information to be repeated, making it simpler to complete. Instead a company will confirm that the relevant information has either been delivered to Companies House as required during the year or (if it cannot give this confirmation) is being delivered with the confirmation statement.

The confirmation statement covers the same areas of information regarding the company, its directors and shareholders as the annual return, but also reflects recent changes in company law. In particular:

- A company will have to supply information about its register of people with significant control (or state that it is exempt from the requirement to keep one).
- Where a private company has elected to keep statutory registers on the Companies House public register (see Companies House: private company registers below) it will have to confirm that all information necessary to keep those registers up to date has been filed at Companies House.

Unlike the annual return, there is no set date each year up to which the confirmation statement must be made. The only requirement is that no more than 12 months must elapse between confirmation statements. This rolling 12-month period means that a company can combine making a confirmation statement with another filing at any point during the year if this is administratively easier.

The fee for filing a confirmation statement will be the same as the fee for filing an annual return. This is £13 if online and £40 by paper. The confirmation statement regime also applies to LLPs.

The Small Business, Enterprise and Employment Act 2015 (Commencement No. 4, Transitional and Savings Provisions) Regulations 2016

The Companies and Limited Liability Partnerships (Filing Requirements) Regulations 2016

Companies House: private company registers

From 30 June 2016 private companies can opt out of holding their own statutory registers and instead keep information on the Companies House public register. This applies to all or any of the following registers:

- members;
- directors;
- secretaries;
- directors' residential addresses; and
- people with significant control (PSCs).

If a private company elects to hold register information at Companies House, this becomes part of the public record. Although details of a director's and a PSC's residential address will remain confidential, other information, notably information about a shareholder's address and a director's day of birth, will become part of the public record.

Register information held at Companies House must be kept up to date by the company and will be available for inspection to anyone via the Companies House website. The inspection rules which apply to private company registers, for example requiring those who wish to inspect a register of members or a PSC register to state the purpose of their request, will not apply.

Companies can opt in and out of holding register information on the public record at Companies House, but any information that was placed on the public record will remain part of the public record.

Companies (and LLPs, to which a similar regime applies) will need to balance the convenience of not having to administer their own statutory registers with the increased public disclosure of information.

The Small Business, Enterprise and Employment Act 2015 (Commencement No. 4, Transitional and Savings Provisions) Regulations 2016

Companies and Limited Liability Partnerships (Filing Requirements) Regulations 2016

Read more >

Companies House: changes to filing fees and statements of capital

Companies should be aware that, from 30 June 2016, there are some small changes to the fees payable to Companies House and to the information required on any statement of capital filed at Companies House.

Fees

The cost of an on-line incorporation is now slightly cheaper (£10 or £12 depending on the method used). Incorporations using hard-copy documents remain unchanged at £40. The cost of registering charges has increased, for both electronic and paper registrations, to £15 and £23 respectively. The cost of some copy documents (e.g. certificates of incorporation) has also decreased. The changes ensure Companies House fees accurately reflect its costs.

Statements of capital

The statement of capital form which a company must file whenever it makes a change to its share capital (e.g. issues new shares or reduces its capital) has been simplified. The change removes the requirement to show the amount paid up and unpaid on each share. Instead, a company now needs to show the aggregate amount (if any) unpaid on the total number of shares. This figure is easier for the company to establish and more useful for shareholders and creditors as it shows money which is still due to the company.

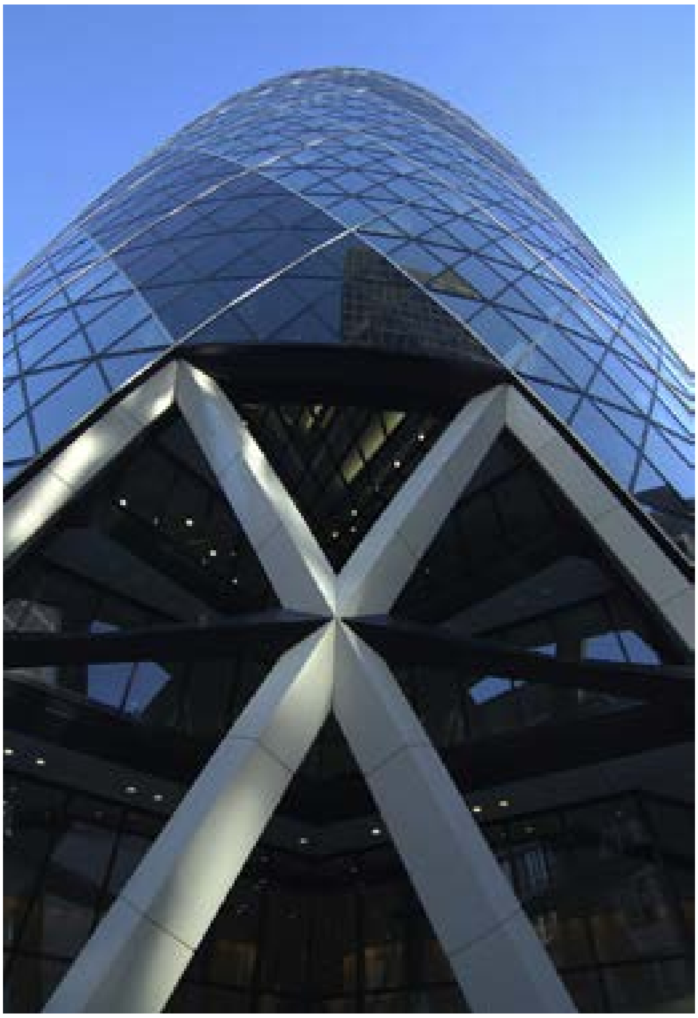
The Registrar of Companies (Fees) (Amendment) Regulations 2016

The Small Business, Enterprise and Employment Act 2015 (Commencement No. 4, Transitional and Savings Provisions) Regulations 2016

Audit regime: all change for public interest entities

From 17 June 2016 there are changes to the audit regime, in particular for public interest entities (PIEs). PIEs include companies admitted to the Official List and traded on the main market of the London Stock Exchange, credit institutions and insurance undertakings.

The changes derive from a new EU regulation ((EU) No. 537/2014) on the Statutory Audit of Public Interest Entities and a directive (2014/56/EU) amending the Statutory Audit Directive (2006/43/EC). Together these new measures aim to strengthen auditor independence and increase diversity in the audit market. They also create a single market for audit services and introduce a co-ordinated approach to the supervision of auditors in the EU.



Among the changes, new sections in the Companies Act 2006:

- require a PIE to have an audit committee and set out the role of the audit committee in relation to the appointment of its auditor;
- establish a framework for audit retendering and rotation, under which PIEs must broadly put their audits out to tender at least every 10 years and change their auditors at least every 20 years;
- require the audit report for a PIE to include a statement on any material uncertainty that may cast significant doubt about the company's ability to continue as a going concern; and
- allow the court to remove the auditor of a PIE on the application of the Financial Reporting Council or on the application of shareholders representing 5 per cent or more of the voting rights or share capital.

There are also related changes to DTR 7 (corporate governance), the UK Corporate Governance Code and the Financial Reporting Council's Guidance on Audit Committees.

A measure of more general application, not limited to PIEs, is that any contractual term that purports to restrict a company's choice of auditor is void.

[The Statutory Auditors and Third Country Auditors Regulations 2016]

Case law update

Warranty claims: excluding seller liability

The Court of Appeal has recently looked at exclusion clauses in the context of a contractual term in a share purchase agreement requiring the buyer to give notice of a warranty claim to the seller "within 20 Business Days after becoming aware of the matter".

Facts

A share purchase agreement will invariably include a seller protection setting out time limits on the buyer's right to bring a claim. In this case, the agreement in question included the following:

"The Sellers will not be liable for any Claim [defined as "a claim by the Buyer for a breach of Warranty"] unless the Buyer serves notice of the Claim on the Sellers (specifying in reasonable detail the nature of the Claim and, so far as is practicable, the amount claimed in respect of it) as soon as reasonably practicable and in any event within 20 Business Days after becoming aware of the matter."

The buyer brought a claim for breach of certain management accounts warranties given by the sellers in the share purchase agreement. The sellers argued, among other matters, that the claim was time-barred as the buyer had failed to give notice of the claim within the required period.

The Court of Appeal had to determine whether the phrase "aware of the matter" meant: (a) aware of the facts giving rise to the claim (even if unaware that those facts did give rise to a claim); (b) aware that there might be a claim under the warranties; or (c) aware of the claim, in the sense of an awareness that there was a proper basis for the claim.

The buyer had become aware of the facts which gave rise to the claim, namely falsification of the target's documentation and accounting records, more than 20 business days before giving notice of the claim, but it was not until within that period that it had had the opportunity to take professional advice from its accountants and determine that it had a proper basis for making its claim.

Decision

The Court of Appeal unanimously decided that (c) was the correct interpretation of the language and therefore found for the buyer.

The court held that the meaning of an ambiguous exclusion clause should be worked out from a linguistic, contextual and purposive interpretation of the clause. If that analysis did not disclose an answer with sufficient certainty, the ambiguity should be resolved by preference for the narrowest available interpretation.

The court held that linguistically the words did not favour one interpretation over another. However, a purposive interpretation of the clause narrowly favoured construction (c). The purpose of the provision was to prevent the buyer pursuing claims previously kept up its sleeve, rather than to force the buyer towards analysis and the obtaining of advice about known facts. This purpose was better served by an interpretation which focused on the buyer's awareness of the claim rather than its awareness of facts which might give rise to a claim. That conclusion was significantly reinforced by being the narrowest of the available interpretations of an ambiguous exclusion clause.

Comment

This decision offers a useful reminder of the principles which, faced with an ambiguous exclusion clause, the court will apply in interpreting it. Along with *Teoco UK Ltd v. Aircom Jersey 4 Ltd* [2015] EWHC (Ch), see below, it is a reminder of the importance of clarity in the contract terms which regulate when and how a party must give notice of any warranty claim.

Nobahar-Cookson & Ors v. The Hut Group Ltd [2016] EWCA Civ 128

Warranty claims: the importance of complying with the contractual requirements

Another recent case on warranty claims under a share purchase agreement highlights once again the importance of ensuring that any warranty claim is made strictly in accordance with the claims notification provisions in the agreement. Although every notification clause turns on its own wording, this High Court decision is a useful reminder of the principles which the court will apply.

Facts

Under the terms of the relevant share purchase agreement the notice of claims clause provided:

*"No Seller shall be liable for any Claim **unless** the Purchaser has given **notice** to the Seller of such Claim setting out reasonable details of **the Claim** (including the grounds on which it was based and the Purchaser's good faith estimate of the amount of the Claim (detail-ing the Purchaser's calculation of the loss, liability or damage alleged to have been suffered or incurred))."*

A separate provision required the buyer to give notice to a seller containing "*reasonable details of any matter or thing of which the Purchaser's Group becomes aware that indicates that … the Purchaser has or is likely to have a Claim*". However, it stated that this notice was not "*a condition precedent to the liability of a Seller in relation to a Claim provided the Claim is notified*" as set out above.

The buyer claimed damages for breach of various warranties contained in the share purchase agreement. The sellers applied to strike out two heads of the claim, on the basis that the buyer had not complied with the notification requirements. The buyer relied on two letters it had written to the sellers in support of its case that it had given a valid notice of claims.

Decision

The court agreed with the sellers that the buyer had not given valid notice of its claims. In reaching its decision the court gave a useful summary of legal principles relevant to interpreting warranty claim notice provisions and made the following observations:

- there is a significant difference between notifying a party of a claim and notifying a party that a claim may be made;
- where the agreement requires the buyer to give some level of detail of the claim, the notice should identify the particular warranty that is alleged to have been breached and state why, with some particularisation of the facts on which the alleged breach is based;
- the fundamental purpose of a contractual notice in these types of circumstances is commercial certainty; and
- proper compliance with contractual notice requirements is not a technical or trivial matter.

Viewed against these requirements, the buyer's letters failed against the first two. The first letter did not refer to the notice of claims clause and a reasonable recipient would not have understood it to be notice of a claim as opposed to notification of a potential claim. Although the second letter did make an actual claim, it failed to identify any specific warranties and therefore did not comply with the requirement to state the grounds on which the claim was made.

Comment

These facts are a reminder that, when drafting a share purchase agreement, clarity as to the content of a claims notice is important. As mentioned in the *Nobahar-Cookson & Ors v. The Hut Group Ltd* [2016] EWCA Civ 128 case (see above), ambiguous drafting will be construed narrowly. However, beyond that the court will look for strict compliance with the terms of the contract. As the court stated, "the touchstone here is commercial certainty".

Teoco UK Ltd v. Aircom Jersey 4 Ltd [2015] EWHC (Ch) (unreported)

Regulatory update

Market Abuse Regulation comes into force

Most of the EU Market Abuse Regulation (Reg 596/2014) (MAR) took direct effect in EU/EEA member states, including the UK, on 3 July 2016. MAR makes significant changes to the UK's civil market abuse regime.

MAR is supplemented by a number of delegated acts, technical standards and guidelines adopted by the European Commission and the European Securities and Markets Authority (ESMA).

In the UK, MAR has resulted in changes to the Financial Services and Markets Act 2000 and the Financial Conduct Authority (FCA) Handbook, including the Code of Market Conduct, the Model Code and the Disclosure and Transparency Rules, to ensure compatibility.

MAR applies directly to both listed issuers and AIM companies. There have therefore also been changes to the AIM Rules as a result of MAR. For more information on how MAR impacts on AIM companies, see The Market Abuse Regulation – Impact on AIM companies.

The new offence of market abuse

MAR provides that it is an offence to:

- engage or attempt to engage in insider dealing;
- recommend that another person engage in insider dealing or induce another person to engage in insider dealing;
- unlawfully disclose inside information; or
- engage in or attempt to engage in market manipulation.

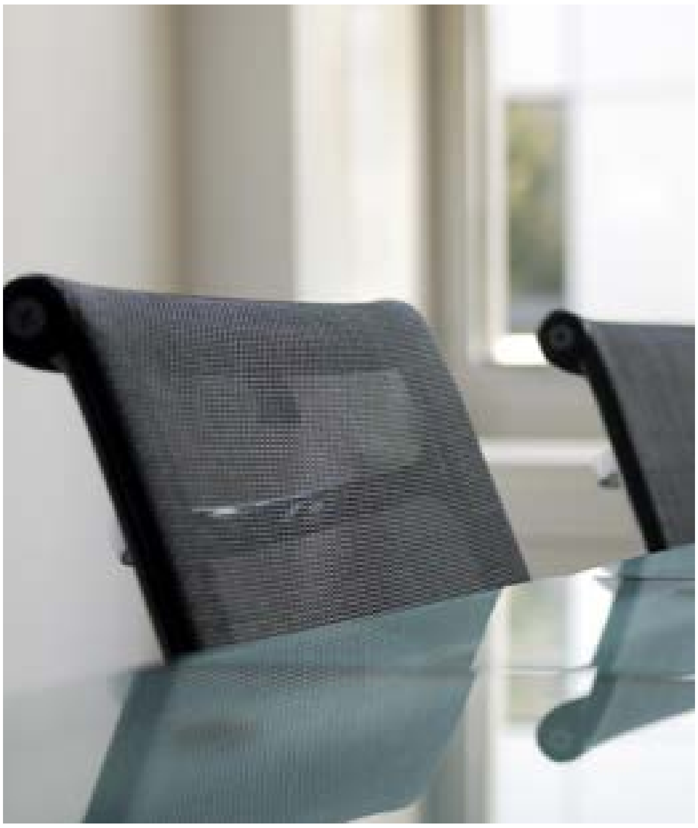
Although these offences are very similar to the previous regime in the UK there are some significant differences:

- MAR extends the market abuse regime to cover behaviour both inside and outside the EU.
- The offence of attempting to engage in market manipulation is new.
- There is a new market soundings safe harbour to the offence of unlawfully disclosing inside information.

Disclosure and control of inside information

As before, an issuer has an obligation to disclose to the public all inside information relating to it as soon as possible, but can delay disclosure if certain conditions are satisfied. There is, however, a new requirement for an issuer to notify the FCA if the issuer delays disclosure and to provide a written explanation of why the issuer believes that the delay was permissible if the FCA requests it. Where an issuer delays disclosure, it must keep a record of the circumstances.

The rules regarding insider lists which issuers (and their advisers) must keep are more detailed and prescriptive.



Dealings by persons discharging managerial responsibilities

There is a new regime for dealings by persons discharging managerial responsibilities (PDMRs) and persons closely associated with them. This catches a wider range of transactions including gifts and donations.

PDMRs and their closely associated persons must notify both the issuer and the FCA of every own account transaction within three business days. This obligation only applies once a threshold of €5,000 is reached, though voluntary notification below this level is also possible (and likely to be required by many issuers under their internal policies).

MAR provides that a PDMR must not, subject to certain limited exemptions, conduct any transaction relating to financial instruments of the relevant issuer during a "closed period" of 30 calendar days before the announcement of an interim financial report or year-end report. Pending clarification from the European Commission and ESMA, the FCA has stated that, where an issuer announces preliminary results, the closed period, where dealing is prohibited, is immediately before the preliminary results are announced. This is provided the preliminary announcement contains all inside information expected to be included in the year-end report.

Contacts

David Collins
Partner
D +44 20 7246 7597
david.collins@dentons.com

Richard Barham
Partner
D +44 20 7246 7109
richard.barham@dentons.com

Candice Chapman
Partner
D +44 20 7246 7141
candice.chapman@dentons.com

CS29593-UK Corporate Briefing Spring 2016-V5 — 12/07/2016