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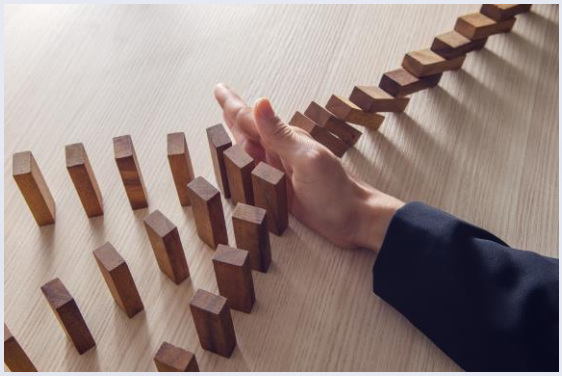

BUSINESS EXIT DISPUTES (AKA "SHAREHOLDER DISPUTES") – A LITIGATION AND INSOLVENCY LAWYER'S OVERVIEW

A Shareholder Dispute is a dispute amongst the owners of a company (the shareholders). Often that company is operating a business.

There are other types of owner-disputes depending on the business structure adopted, and each structure has a different set of laws which applies. For example, the main structures are:

1. Partners (in a partnership);
2. Directors or shareholders (of a company);
3. Unitholders (of a unit trust); or
4. Joint Venturers (of a Joint Venture).

This article deals mainly with disputes between directors or shareholders of a company, although the approach to resolution of disputes is similar across the structures.

Shareholder Disputes are often the result of one business partner wishing to leave the business, for any number of reasons (including deadlock, disagreement, or a desire to compete), and the resulting issues as to the manner in which that exit is to take place, the value of the business, and restraints as to what the exiting partner is or isn't allowed to do post-exit.

The dispute often involves elements of commercial law, corporations law, finance law, PPSR, property law, guarantee law, employment law, equity, intellectual property law, and insolvency law.

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Resignation as a Director

Resignation as a director can be a fairly straightforward affair, although the ramifications of resignation (and ramifications of not resigning) should be considered first, including for example that:

1. The resigning director may no longer have any power to prevent the company from entering into agreements (such as business sale agreements) unless the same is oppressive to them as a shareholder.
2. Resignation does not automatically remove directors from any guarantees they may have signed in respect of company debts.
3. Remaining as a director continues to expose the director to various personal liabilities in certain circumstances (including, for example, liability for insolvent trading).

Transfer of shares

The transfer of shares is generally the most problematic part of a shareholder exit, together with restraints on post-exit competition. There are only limited means of compelling a shareholder to transfer their shares (e.g. under a Shareholders Agreement, or by Court proceedings for oppression).

If the exit is amicable, the share transfer can be relatively easy such as where a Shareholders Agreement has been agreed at the outset (or along the way) and the exiting process is followed. A well drafted and comprehensive Shareholders Agreement commonly provides for the matters which would often be the subject of a dispute without it, such as the method of business valuation and method of payment to the exiting shareholder and any restraints on competition.

If the exit is acrimonious, such as where there is no Shareholders Agreement and one shareholder wishes to leave and set up in competition or there is disagreement about the value of the business, then the two main methods for resolving the exit in the absence of a Shareholders Agreement are negotiation, and Court application (including liquidation).

Court applications

An application can be made to Court for the appointment of a liquidator who will then sell the assets or business of the company. The Court application is often made on the basis that it is just and equitable to liquidate the company. This may be so where the relationship between the shareholders has broken down to such an extent that there is no longer any mutual trust and confidence, and the business cannot properly function.

Court applications for the appointment of liquidators should be made only after negotiations are exhausted (unless there is some factor requiring Court orders to be made immediately), because:

1. The appointment of a liquidator usually results in the erosion of the business' value or its perceived value/reputation;
2. Liquidator fees erode funds otherwise available to the shareholders; and

3. The business or its assets would likely be advertised for sale, with the result that a third party could potentially acquire it rather than the remaining shareholder.

Court applications can also be made based on oppression and appointment of receivers, for appointment of provisional liquidators, for declarations, for injunctive relief (to restrain or require certain things to be done), or for performance of a Shareholders Agreement.

Negotiation

In the absence of a Shareholders Agreement and to avoid Court proceedings, negotiation is generally embarked upon first. However, this can be increasingly difficult if the relationship has broken down to the extent that the parties are negotiating based on emotion rather than commercially.

One of the roles of a parties' lawyer is to ensure that commerciality remains the driving force for negotiations, and emotion is kept to a minimum. The goal is always to reach the best commercial outcome for all parties. The various potential outcomes available by negotiation, commonly include:

1. A buys B
2. B buys A
3. A and B split business
4. C buys A or B
5. Business is sold
6. Business is wound down and finalised
7. Liquidator is appointed (voluntary) and business is sold
8. Voluntary Administrator is appointed (if the company is insolvent or likely to become insolvent), and restructure

Following a successful negotiation, a Deed of Settlement is usually entered into by the parties, the transaction documents are signed and the transaction is implemented.

Shareholders Agreement

A well drafted and comprehensive Shareholders Agreement can avoid much delay, stress, and legal costs.

The main benefits of a Shareholders Agreement are:

A. It is effectively the rule book for the manner for shareholder exit, negotiated and agreed at a time *when the relationship is still amicable* and therefore commerciality takes priority over emotion.
B. It avoids, to a large extent, the need for negotiations between parties at the exit-stage (at least as to the method of business valuation and payment terms), when the relationship is no longer amicable.

C. It avoids, to a large extent, the need for Court proceedings, and the substantial costs that come with it.

Murfett Legal Shareholder Agreements, and Dispute Resolution

Our Commercial Law team at Murfett Legal prepares comprehensive Shareholders Agreements regularly. An example of the issues that are sometimes overlooked by new partners, or even current partners already operating, are contained in the following article Checklist for a New Equity Holders Agreement.

Our Commercial team can help you decide what business structure to use and draft the relevant commercial documents, including partnership agreements, company constitutions, trust deeds and shareholder agreements.

Our Litigation and Dispute Resolution team can assist you to negotiate a commercial resolution to any Partnership or Shareholder Dispute, and bring Court proceedings if necessary.

Our Insolvency team can utilise the various insolvency-related mechanisms for resolution, including the appointment of liquidators (solvent or insolvent) or voluntary administrators (insolvent).

Best of all, our teams all work collaboratively to achieve the best result for you, the client.

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