Mackrell. Solicitors

Top secret cheat sheet

ANTI-EMBARRASSMENT CLAUSES

It is not uncommon for the seller of a business to worry that the buyer of their business plans to “flip” it on for sale to another buyer shortly after purchase in order to make a quick profit. The buyer may know a specific third party interested in acquiring such a business or know how to rapidly increase its profitability and attractiveness to other acquirers – knowledge not available to the seller.

TOP SECRET
CONFIDENTIAL

In such cases, a seller might look to insert an “anti-embarrassment” clause into the agreement to restrict or discourage a rapid re-sale of their business. While not often used in corporate transactions in the UK, anti-embarrassment clauses can be of great reassurance to sellers and help to show a commitment from a buyer towards long term growth and investment in a business.

Some example situations of where such a clause may be appropriate include:

- An “off market” or under marketed sale where the buyer may have directly approached the seller, providing them with limited opportunity to assess the value of the business;
- A situation where selling shareholders have limited knowledge of the business and the management is proposing a buyout which may not reflect the true value of the business; or
- A sector or industry of rapid growth where the seller is concerned that the buyer may look to turn a quick profit on the business simply as a result of sale timing.

In order to deter the buyer selling the recently acquired business in its entirety (such as through the sale of shares in a limited company) or selling key assets and contracts with customers, anti-embarrassment can operate in two main ways:

1. Provide the seller with a contractual right to an upward revision to the original purchase price based on the profit generated by the buyer’s onward sale to a third party; or
2. Permit the seller to retain a minority shareholding in the business post-completion along with certain consent matters (detailed in a shareholder’s agreement) and financial benefits attached to the shares.

Both of these options can include a sliding scale so that the benefit received by the seller reduces over time, thereby not unduly penalising a buyer for agreeing to an attractive offer from a third party post-completion where there was no intention to cause the seller to lose out.

This kind of seller protection is always going to be subject to a hard fought debate between parties as very few buyers would be open to their hands being tied post-completion in such a way, however, it can be a good way of obtaining reassurance of a buyer’s intent for a business going forward.

For more information please feel free to get in touch:

Guvvy Sandhu
Consultant | Corporate Team
Guvvy.Sandhu@mackrell.com

Maung Aye
Partner | Corporate & Commercial Law Team
Maung.Aye@mackrell.com

mackrell.com