Shareholder Unanimity Required to Include a Drag-along Clause in a Company Bylaws

Decision of the General Directorate of Notaries of 4 December 2017. RJ/201/5478

The recent decision of the General Directorate of Notaries of 4 December 2017 (hereinafter the "Decision" and the "DGRN", respectively) requires unanimity of the company shareholders in order to include in the by-laws of the company a drag-along clause binding the shareholders to sell their shares by means of a forced sale of the company.

The Decision specifies the implications and requirements of the drag-along clause, which is often a prior requirement to purchasing a company so that, if a takeover bid of the entire company is made, external investors can require minor shareholders to sell their interest in the company. The drag-along clause is an agreement or pact among company shareholders that obliges (in the event of an external takeover bid to acquire the majority or all of the shareholders' equity) the remaining shareholders to transfer their shares under the same terms and conditions as have been offered to the major shareholder.

As a result of the Decision, company shareholders are required to agree to have a drag-along clause entered into the bylaws of a company that is registered with the Companies' Register.

The Decision reads as follows: "The drag-along clause requires the unanimous consent of shareholders to be entered into the bylaws, and its place cannot be taken by attributing a right of separation to the shareholder who would not have voted in favour of the buyout, as it does not refer to a clause merely restricting the transfer of company shares."

Accordingly, the DGRN does not classify the drag-along clause as a share assignment restriction clause, but rather a shareholder exclusion clause. Therefore, for an exclusion clause to be entered in accordance with applicable regulations, "a public deed of consent of all the shareholders will be needed or when express consent can be proved to have been given in the minutes of the pertinent company agreement, which must be signed by all the shareholders" (Section 207 of the Companies' Register Regulation).

Consequently, the DGRN expects all shareholders to comply with the others as regards the drag-along agreement. Thus, for all shareholders to be bound according to the by-laws, the individual consent of each one is required by unanimous approval at the general meeting of shareholders to proceed with the said modification to the bylaws. If the unanimous approval of the shareholders is not obtained, it could be remedied by the subsequent individual consent and ratification of the shareholders who, where appropriate, may not have been present at the general meeting of shareholders.

This means that the drag-along clause imposed by the major shareholder is not be enough to demand the forced sale of the company, rather the unanimous consent of all shareholders is be required, including minor ones.

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