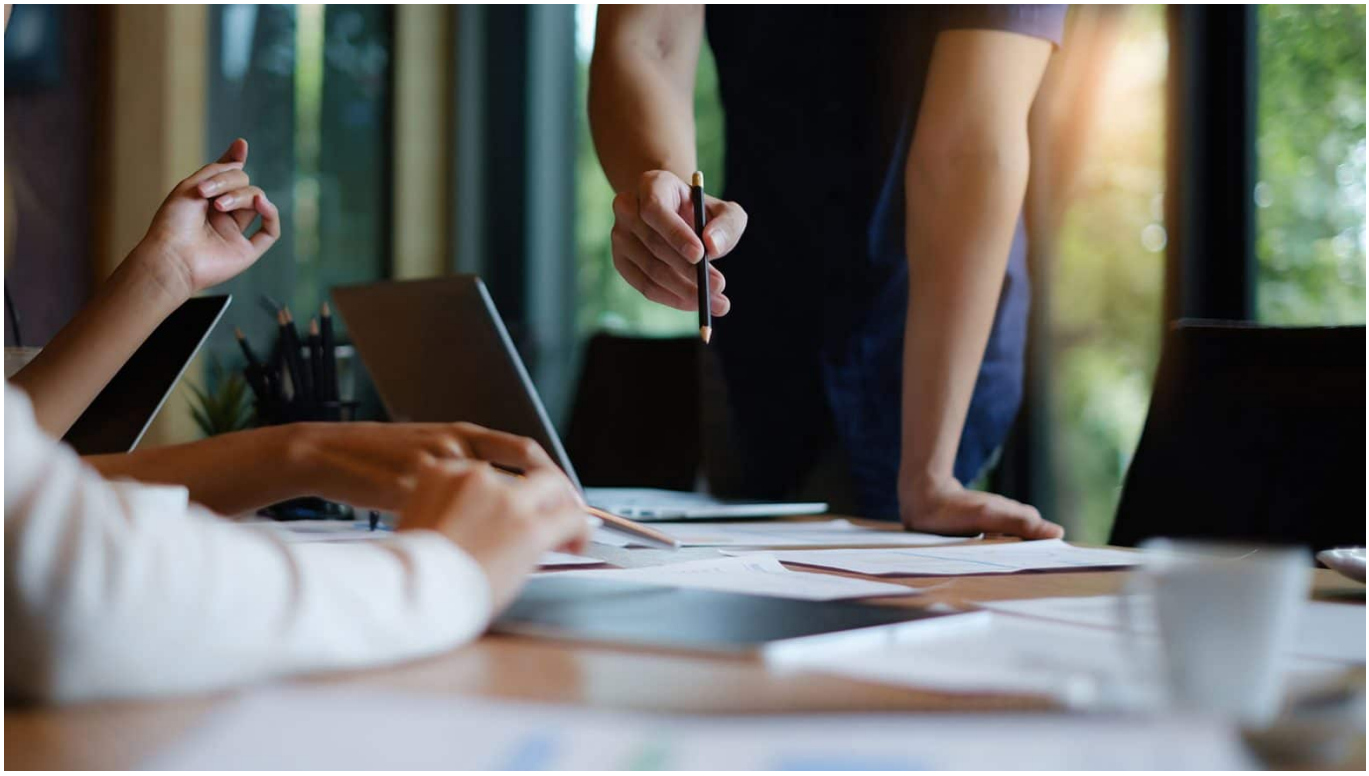
Drax! Messing up a notice can Smart!



As part of a share sale, it is common practice for sellers to give warranties (statements of fact) in relation to the target company being acquired and a buyer may seek to bring a claim against the seller if these warranties are found to be untrue. Any such claim will, however, be subject to the terms of the sale agreement, which can seek to limit any such claims, for example, by requiring the buyer to give notice by a specified date. This is an important provision for any seller as it gives them certainty over the price achieved for their shares, but any buyer should be careful to comply with the notice requirements, otherwise an otherwise good claim may fail as highlighted in the recent case of *Drax Smart Generation Holdco Limited v Scottish Power Retail Holdings Limited* [2023] EWHC 412 (Comm).

What lessons can be learnt from the Drax case?

This recent case highlights the importance of complying with notification clauses in share purchase agreements (SPAs). Here the buyer discovered that the target company did not have the benefit of an option agreement that the seller had warranted as having been assigned to it and the buyer sought to bring a claim for damages for this breach of this warranty.

The seller, however, defended this claim on the basis that the buyer's notice of claim did not specify that it was seeking to quantify its loss as a reduction in value of the shares and therefore the notice did not comply with the terms of the SPA, which required "reasonable detail" of the claim to be notified within a specified notice period.

The buyer issued a claim in the High Court seeking damages for the breach of warranty (quantifying its loss as the reduction in value of the sale shares) and the seller applied for summary judgment. The High Court agreed with the seller, concluding that because the buyer's notice did not specify the losses that it was now seeking to

claim, “reasonable detail” of the claim had not been provided and any claim was now prohibited under the terms of the SPA.

Reflections

Notice requirements are often insisted upon by a seller and can be fairly negotiated as part of the terms of the deal as they help give them certainty of the consideration that can be retained (and re-invested) following the sale. However, when negotiating a SPA the parties should consider if it is fair to exclude liability for an otherwise perfectly good claim if the notice of claim (inadvertently) does not include ‘reasonable details’ of all the claims that are later relied on by the buyer in court?

If the seller insists on such restrictive notice requirements, then the buyer should go into the agreement with its eyes open and seek to investigate (and notify) any claim for breach of warranty as soon as possible, as quantifying the loss for a breach of warranty is likely to require input from an expert accountant. It can take some time for this valuation exercise to be conducted and for a notice of claim to be prepared, so the buyer may seek to agree a longer notice period to compensate for the stricter notice requirements.

If you would like advice in negotiating, bringing or responding to a breach of warranty claim then please do not hesitate to contact our corporate or commercial dispute resolution teams who are happy to help.

Tom Bourne

Partner