COLLYER BRISTOW

CB CHECKPOINT

OPTIMISING YOUR KEY BUSINESS DOCUMENTATION, POLICIES & PROCEDURES

ABOUT COLLYER BRISTOW

Collyer Bristow LLP is a long-established central London law firm. We provide high-quality, individually tailored legal advice, often with a cross-border aspect, to a portfolio of international and domestic clients including businesses, ambitious entrepreneurs and wealthy individuals and families. We specialise in Business; Dispute Resolution; Private Wealth; and Real Estate services.

Our clients choose Collyer Bristow because they, like us, appreciate individuality, creativity and collaboration. They recognise that their needs may be unique and complex, or that in progressing with their legal issues they value a more engaged and personalised service from their lawyers. They recognise that the Collyer Bristow approach is one of building understanding, trust and relationships with clients. We take time to build relationships so as to understand the commercial objectives behind every transaction or dispute. We find this allows us to operate more strategically on our clients' behalf and to best support the achievement of the outcomes they desire.

The firm is well known for its high standards of client service. We combine a long history of high-quality legal work and professionalism with a dynamic, commercially astute team of lawyers. The firm and individuals are ranked in the leading legal directories including Chambers & Partners and the Legal 500.

INTRODUCING CB CHECKPOINT

There are a number of key policies, procedures and documents your business should have in place and keep up to date, both in order to be legally protected and prepared for investment or exit.

Collyer Bristow's 'CB Checkpoint' team will give your business a full check-over, reviewing your key documentation and advising on any suggested or required changes. We will deliver a full report of our findings and offer support, should you need it, to ensure legal protection for your business, its assets and, ultimately, its reputation.

This document sets out the key areas that any company should be thinking about across Corporate, Commercial and Crisis Management. Our 'CB Checkpoint' service addresses these considerations, and many others, in detail.

If you would like to discuss a fixed-price 'CB Checkpoint' review of all or part of your company's documentation, please contact me or email checkpoint@collyerbristow.com.

RAGAVAN ARUNACHALAM

Partner
Corporate & Commercial

+44 20 7470 4419
+44 7974 370824
ragavan.arunachalam@collyerbristow.com

CORPORATE CHECKPOINT

1) ARE YOUR COMPANIES HOUSE FILINGS UP TO DATE?

It is important to ensure that a company's filings at Companies House are kept up to date and reflect the details of the company on any particular date. Annually, a company must file both a confirmation statement and a set of accounts (even if the company is not trading/is dormant). The confirmation statement records a snapshot of the company, including the share capital, directors and individual shareholdings. Additionally, whenever changes are made to the company (such as appointing/removing directors or increasing the number of shares), filings will need to be made at Companies House. There are submissions deadlines for each of these filings. If these deadlines are missed there are penalties which range from fairly onerous fines to winding up the company, and in the most serious cases personal liability attaches to the directors (which may result in disqualification).

As part of the government's progress to increase corporate transparency, each company must have a register of "Persons with Significant Control" ("PSCs") and share these details with Companies House. PSCs are beneficial owners, who own or control that company (usually those holding more than 25% of the shares or voting rights in the company). Failure to provide this information is a criminal offence and may result in a fine or a prison sentence of up to two years. Further measures to increase corporate transparency are also likely to be put in place through the implementation of the Economic Crime and Corporate Transparency Act 2023, which received Royal Assent on 26 October 2023.

In summary, make sure all your filings, including the PSC register, are up to date!

2) ARE YOUR ARTICLES OF ASSOCIATION FIT FOR PURPOSE?

The company's constitution always consists of its articles of association and, in many cases, these can be usefully supplemented by a well-drafted shareholders' agreement.

The articles of association of each company is a publicly available document which regulates the internal affairs of the company by forming a contract between each member of the company (also called shareholders where the company has share capital), and between each member and the company itself.

Pursuant to various pieces of legislation (most recently the Companies Act 2006), the state has provided default articles of association for companies to adopt on incorporation. These "model" articles (previous legislation has referred to various tables of articles, most famously "table A") are not compulsory, but are often used by companies which do not require any sophisticated mechanics to regulate the interaction between members or between the company and its members (or indeed its directors).

It may be that the articles of association adopted on incorporation (e.g. the "model" articles) are fit for purpose. However, if your company has more than one director or member, you should consider having your articles of association reviewed to ensure that any disagreements between the directors and/or members are properly regulated.

For example, if there is a majority and minority shareholder, the majority shareholder might wish to insert "drag along" provisions into the company's articles of association to ensure that, should they wish to sell the company in the future, the process cannot be stymied by a reluctant minority. Often a third-party buyer will want to ensure that it can purchase 100% of the issued share capital. A "drag along" provision would ensure that, if the majority shareholder found a buyer for their shares, then they could "drag along" the minority shareholder with the proposed sale (usually on the same terms and for the same price per share). This would potentially make it much more likely that the majority shareholder would be able to realise the value in its shares. The corollary of this provision is "tag along". This addresses the situation where a minority shareholder is anxious that the majority shareholder might sell their stake to a third party without ensuring the minority can exit too.

CORPORATE CHECKPOINT

To avoid being left with a new majority shareholder with whom they do not have a good working relationship, "tag along" rights would step in to ensure that the majority shareholder could not sell without ensuring the minority shareholder can also sell their shares on the same terms.

3) DO YOUR ARTICLES OF ASSOCIATION HAVE ALL THE NECESSARY PROVISIONS?

If there is more than one shareholder, you should consider including rights of pre-emption on the transfer of shares. These rights essentially ensure that existing shareholders have the right to purchase shares from their fellow shareholders prior to such shares being offered to third parties. This provision is aimed at ensuring that share capital is kept within a defined body of individuals – something that might be particularly important for family-run businesses or other close-knit operations.

There may also be a need for mandatory share transfer provisions (sometimes called good and bad leaver provisions), which deal with shareholders being penalised for bad, and rewarded for good, behaviour. If your company has issued shares to management, or other senior employees, in order to incentivise and/or align their interests with those of the company, it is critical to examine how best to optimise this incentivisation.

4) DO YOU NEED A SHAREHOLDERS' AGREEMENT?

Many of the above provisions covered could also be inserted into a shareholders' agreement, which is simply a contract between the shareholders of the company (and the company itself). The main advantage of putting these provisions into a shareholders' agreement is that these arrangements would be kept private, as, unlike the company's articles of association, a shareholders' agreement is generally not publicly available.

A shareholders' agreement might also be the more usual place to insert any restrictive covenants, which would ensure shareholders do not compete with the company, as well as any shareholder consents that might protect shareholders against the board (or individual directors) going against the wishes of the controlling majority in relation to key commercial decisions.

The one thing that cannot be covered by a shareholders' agreement is share rights. These need to be set out in the articles of association. If the intention is to have one class of ordinary shares, this can be easily achieved with the "model" articles. However, if there is more than one shareholder, and therefore an appetite to have bespoke classes of shares with perhaps different economic and voting rights, then again this is something which will require bespoke changes to a company's constitution.

5) WHAT ELSE SHOULD YOU BE CONSIDERING?

We can also advise on board composition, quorum for meetings, information rights, and a whole host of other topics, but the key takeaway is that if your company has more than one shareholder/director, then you really ought to check that its constitution is fit for purpose.

COMMERCIAL CHECKPOINT

1) DO YOU HAVE WELL-DRAFTED, SIGNED CONTRACTS IN PLACE WITH YOUR KEY SUPPLIERS AND CUSTOMERS?

Every successful company is built upon its relationships with key suppliers and customers, which should be documented by a well-drafted, signed contract. While the commercial aspects (such as the purchase price and goods/services to be supplied) make up the substance of the contract, there are key legal terms which have a substantial impact on the relationship, including:

- the term and whether there are any renewal options – is there a fixed term or is it a rolling contract that must be terminated? Can the contract be renewed and, if so, how and by whom?
- the termination provisions – in what situations will the contract be automatically terminated? Can either party terminate the contract for convenience? Are the consequences of termination particularly onerous?
- the liabilities – in particular, are there any indemnities (i.e. a promise to be responsible for the other party's loss)?
- intellectual property provisions – which party has ownership of any intellectual property that is created during performance of the contract? Is any intellectual property assigned or licenced?
- force majeure provisions – which events outside a party's control can allow that party not to perform its obligations? Do these provisions apply even if the event is known or foreseeable, e.g. the COVID-19 pandemic? Is there a provision to terminate if the event in question continues for a certain period of time?

It is important to understand these terms, both when drafting and negotiating the contract, in case any issues arise during performance of the contract.

2) HAVE YOU PROTECTED YOUR INTELLECTUAL PROPERTY?

In addition to the intellectual property provisions in key contracts with customers and suppliers, a company should consider how to protect its own intellectual property. This may be by registering patents or trade marks, in the UK, EU or further abroad. A company should also ensure that any intellectual property rights that are created by employees or contractors while working for the company automatically vest in, or are assigned to, the company. This will avoid disputes in the future as to whether the intellectual property belongs to the company or the employee/contractor that created it. Generally, copyright in any work created by a company's employees during the course of their employment will belong to the company, unless agreed otherwise. However, the default position is that independent contractors and consultants will retain ownership of the copyright in any work they produce for a company, even if they are remunerated for this work. A company should therefore ensure its agreements with consultants and contractors include appropriate assignment/license clauses to address this.

COMMERCIAL CHECKPOINT

3) IS YOUR BRAND PROTECTED?

A company's brand is one of its key assets. It can be protected via the UK's sophisticated regime of intellectual property rights. Trade marks offer protection for brand names, logos, and other signs that indicate trade origin. A company that has registered its name and/or logo as a trade mark is much better placed to take action against potential infringers, since – in the absence of any registration – the company's only recourse would likely be a claim of 'passing off'. This is difficult to prove, since it necessitates demonstrating that the brand has accumulated goodwill. Trade marks can be registered in respect of multiple goods and services and for multiple territories – of course, the larger the scope of a trade mark, the higher the costs of its registration.

Companies that have already registered trade marks should run checks to ensure that those are still valid. UK-registered trade marks must be renewed every ten years or will expire.

4) ARE YOU OPERATING IN COMPLIANCE WITH DATA PROTECTION LAWS?

A company that collects, stores, uses, or otherwise processes personal data (i.e. any information relating to an identifiable living individual) will need to comply with data protection laws. In the United Kingdom this includes the UK General Data Protection Regulation (UK GDPR), Data Protection Act 2018 and Privacy and Electronic Communications (EC Directive) Regulations 2003. To the extent that a UK company is also active in the European Economic Area, it may also still need to comply with the equivalent EU data protection legislation. Compliance is particularly important, given the high level of fines that can potentially be imposed by data protection regulators such as the UK's Information Commissioner's Office (ICO) for contravention (up to 4% of worldwide turnover or £17.5 million, whichever is greater).

A company that acts as a data controller (i.e. where it determines the purpose and means of processing personal data) will need to register with the ICO by paying a fee. For most organisations, this is a straightforward process costing no more than £60. This registration must be renewed annually.

Any company that is a controller of personal data will need to have in place a privacy notice, which should be made available on its website and provided to the relevant data subject individuals whenever the company collects their personal data. This must cover certain information that the company is required to provide to data subjects, including (but not limited to) the lawful bases on which their personal data is processed, how long this data will be retained for, how it will be used, which third parties it might be shared with and what their legal rights are in respect of that data. If the company has a website using cookies (which is likely), then a cookies notice will also be required. These should align with the ICO's most up-to-date guidance, which currently states that non-essential cookies (e.g. performance and analytics cookies) should not be automatically be placed on visitors' devices without their express prior consent.

Depending on the scale of the company's processing of personal data and where it has a geographical presence, the company may also be legally required to appoint a data protection officer (DPO) and an EU data protection representative (as well as potentially a UK counterpart representative if the company also has a presence in the EU). Data protection impact assessments (DPIAs) must also be undertaken in certain cases, e.g. where the company intends to process personal data on a large scale or plans to undertake a systematic and extensive evaluation of an individual, including profiling.

COMMERCIAL CHECKPOINT

The company will need to have data processing agreements in place if it shares any personal data with its customers, suppliers, or other third parties. Where one party is the controller and the other is the processor, certain clauses stipulated in the UK GDPR must be included, but these can be adapted depending on the company's bargaining position.

It is important to check whether the company transfers any personal data outside of the UK. Under the UK GDPR, this can only be done if the country to which the data is transferred has been deemed to have adequate protections by the UK Government or if appropriate (contractual safeguards) are put in place between the exporting company and the recipient organisation. Alternatively, if the company is part of a larger multinational organisation, it may be possible to rely on binding corporate rules to transfer personal data to the company's affiliates; these would need to be approved first by all the relevant supervisory authorites.

If a company intends to send direct marketing via email to customers or other contacts, those recipients must first freely give their informed and specific consent via affirmative action (e.g. by ticking a box that has not already been pre-ticked).

5) DOES YOUR WEBSITE INCLUDE ALL NECESSARY INFORMATION ON YOUR BUSINESS?

In addition to a privacy and cookie notice, each UK company must include on its website certain information that is easily accessible. This is usually included on the 'About Us' or 'Contact Us' page, and includes without limitation:

- the full company name;
- the part of the UK in which it is registered (e.g. England and Wales);
- the company's registered number;
- the address of the company's registered office;
- the company's postal address and contact email address;
- how to contact the company via non-electronic means;
- the company's VAT number (if it undertakes an activity subject to VAT);
- details of any public register, including trade register, in which the company is registered, and the company's registration number in that register; and
- if the company's activities are part of a regulated profession, the details of the relevant professional body and the applicable professional rules.

It is also good practice to include a disclaimer stating how users can use the website's information, and what liability the company accepts for this (if any). This can be included in the privacy notice. If the company meets the relevant criteria set out in the Modern Slavery Act 2015, it may need to provide a slavery and human trafficking statement on its website for each financial year that ends on or after 31 March 2016. The statement must be linked to from the homepage.

COMMERCIAL CHECKPOINT

6) IS YOUR COMPANY INFORMATION DISPLAYED EVERYWHERE IT SHOULD BE?

A company must ensure that it complies with the laws relating to trading disclosures. This includes displaying its name at its registered office and each place of business. Certain details must be included on all business letters, order forms and websites. This includes the details that must be stated on websites (see above). In addition, where the name of one director is included (other than in the text or as a signatory), the name of every director of that company must also be disclosed.

Failure to comply without reasonable excuse constitutes a criminal offence, and renders the company and its directors who are in default liable to a fine.

CRISIS MANAGEMENT CHECKPOINT

1) WHAT PROVISIONS ARE IN PLACE TO MANAGE THE DEATH OF A SHAREHOLDER?

Shareholders are often pivotal to the decision-making of a private limited company. There may be a small number of shareholders, and these may: (a) not be keen to have new shareholders involved; and (b) be keen to ensure that, if a shareholder dies, their family benefits from the value that the deceased shareholder has added to the company. Therefore, in the event that a shareholder dies, a cross option agreement is sometimes a useful tool for the remaining shareholders to retain some control and certainty over the future of the company, while at the same time providing an economic upside to the departing shareholder's family. A cross option agreement provides the option for the personal representatives of the dead shareholder to sell and the remaining shareholders to buy their shares. This will prevent the shares leaving the pool of the existing shareholders. A cross option agreement is usually combined with life insurance policies, which are written in trust for the other option holders, such that the remaining shareholders can afford to purchase the shares at a fair price for the benefit of the deceased's family.

2) WHAT PROVISIONS ARE IN PLACE TO MANAGE THE INCAPACITY OF A SHAREHOLDER?

In the case of incapacity rather than death, an alternative to a cross option agreement is to put in place powers of attorney for shareholders and also directors. This will allow a shareholder or director to undertake some succession planning by empowering a trusted individual to act on their behalf should they become incapacitated.

If your company has more than one shareholder and you would like to know more about cross options, or if you have concerns over what might happen should one of the directors or shareholders be incapacitated, please do get in touch.

CRISIS MANAGEMENT CHECKPOINT

3) IN THE EVENT OF INSOLVENCY, CAN YOU DEMONSTRATE YOU TOOK EVERY STEP TO MINIMISE THE POTENTIAL LOSSES?

In the event that the directors of a company know or ought to have concluded that there was no reasonable prospect of avoiding insolvent liquidation, the directors must take every step with a view to minimising the potential loss to the company's creditors. It is imperative at this stage that the directors seek legal advice, and possibly the advice of an insolvency practitioner, to guide them through either the process of returning the company to solvent trading, or of liquidating the company. Failure to comply with this duty can result in serious personal penalties, including a court order that a director make such contribution to the company's assets as it thinks proper, a 15-year director disqualification or even imprisonment.

If you are the director of a company that is in financial difficulties, it is of critical importance that you get advice on how to proceed as soon as possible.

GET IN TOUCH

If you would like to discuss a fixed-price 'CB Checkpoint' review of all or part of your company's documentation, please contact me or email checkpoint@collyerbristow.com.

RAGAVAN ARUNACHALAM
+44 20 7470 4419
+44 7974 370824
ragavan.arunachalam@collyerbristow.com

Ragavan is a Partner in our Corporate & commercial team with close to two decades' experience of Company Law matters. He trained at Farrer & Co, and has been with Collyer Bristow since 2007.

He acts for private and public companies, banks, individual directors and shareholders, entrepreneurs, venture capitalists, and insolvency practices. He advises on a variety of matters including mergers and acquisitions, private equity, insolvency turnaround and shareholders' agreements and disputes.

For more information please visit:

COLLYERBRISTOW.COM/BUSINESS

Disclaimer: The information and opinions contained in this document are for general interest and information purposes only and are not intended to constitute specific legal, commercial or other professional advice. It should not be relied on or treated as a substitute for specific advice relevant to particular circumstances, While we seek to ensure that the contents are not misleading or outdated, you should obtain specific legal advice before making or refraining from making any business or personal decisions. Collyer Bristow LLP is a limited liability partnership registered in England under number OC318532, registered office St Martin's Court, 10 Paternoster Row, London, EC4M 7EJ, and is authorised and regulated by the Solicitors Regulation Authority. Any reference to a partner means a member of the LLP or an employee with equivalent standing and qualifications. A list of the members is available for inspection at the above address. This firm maintains professional indemnity insurance in accordance with the rules of the Solicitors Regulation Authority. © 2024 Collyer Bristow LLP