

## Corporate Finance/M&A - USA

### Delaware Chancery Court denies enforcement of drag-along right

Contributed by **Ropes & Gray LLP**

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In *Halpin v Riverstone National, Inc*<sup>(1)</sup> the Delaware Chancery Court denied enforcement of customary drag-along rights where the controlling stockholders failed to properly exercise their drag-along rights in accordance with the company's governing stockholders' agreement. The decision highlights the importance for controlling shareholders of adhering strictly to the letter of a stockholders' agreement when exercising drag-along rights.

In *Halpin* the acquisition of the company via a merger was approved by the written consent of the controlling stockholders. The stockholders' agreement contained a customary drag-along right that required the minority stockholders to agree to a change of control transaction approved by the majority stockholders. When the company delivered an information statement to the minority stockholders after the merger was effectuated exercising the drag-along right and asking the minority stockholders to consent to the transaction after the fact, the minority stockholders commenced an appraisal action in lieu of consenting.

On summary judgment, the Delaware Chancery Court rejected the company's argument that the minority holders had waived their appraisal rights by virtue of agreeing to the drag-along rights in the stockholders' agreement. The court instead characterised the drag-along provision as an agreement by the minority stockholders to take action that, if taken, would have resulted in the waiver of their appraisal rights. However, the minority stockholders were never called on to take that action because the majority stockholders used their unilateral ability to approve the transaction by written consent. Consequently, the voting shares of the minority stockholders were extinguished before they received the information statement regarding the transaction and could be called on to vote or provide their own consent. Had the majority holders followed the process contemplated by the stockholders' agreement and compelled the minority holders to vote or consent in advance, there likely would have been a different result.

The court's ruling did not address the issue of whether it is possible for common stockholders to waive affirmatively statutory appraisal rights in advance in the form of an explicitly worded drag-along provision. While Delaware case law has held that preferred stockholders can affirmatively waive statutory appraisal rights in that manner, the issue of whether an advance waiver of statutory appraisal rights by common stockholders is enforceable remains unsettled.

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#### Endnotes

(1) CA No 9796-VCG (Del Ch February 26 2015).

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