

Important note

Before taking or refraining from any action the company and shareholders must seek independent legal advice. In particular, the agreement will constitute a contingent contract for the purchase by a company of its own shares and therefore the procedural requirements for such contracts contained in Part VII of the Companies Act 2006 or any successor legislation will have to be strictly adhered to. All parties involved must also have a full understanding of the tax implications of corporate share purchase (and ensuing cancellation of shares).

No value is to be paid for the options themselves created under this agreement. The consideration for the grant of the options by either party is the option received from the other party.

We cannot advise on the particular merits of any one scheme but can only comment on the points in these notes. Clients and their solicitors must accept full responsibility for the legal and tax effects of any agreement based on this draft. One agreement is required for each shareholder.

Introduction

This draft cross option agreement covers the purchase from a critically ill shareholder or from the personal representatives of a deceased shareholder of their shareholding by the company. It works by creating a "sell" option for the shareholder in the event of death and/or critical illness, and a "buy" option for the company in the event of death only. As part of the arrangement the company will take out a plan on the life of the shareholder. If either option is exercised after the death or critical illness of the shareholder, subject to meeting the relevant company law conditions, the company may use the funds from the plan to buy the shares. These shares will automatically be cancelled.

Only a "sell" option is created in the event of a critical illness so that a shareholder who wishes to retain his shares may do so and cannot be forced to sell. However, if they choose not to sell at that point, they have no entitlement to any claim proceeds, which belong to the company.

Notes

This draft only caters for corporate share purchase. A separate draft is available for individual shareholder or partnership share purchase.

This draft agreement lays out options arising on death and, if required, critical illness by setting out optional wordings in square brackets. The solicitor drawing up the final agreement should therefore exclude the wordings that are not applicable. The square brackets and completion notes are for reference only and should be deleted, as they do not form part of the agreement.

As will be seen, this is a basic draft. It can be made more comprehensive but this is a matter for the parties and their own legal advisers. The starting point for any share purchase arrangement must always be a clear understanding of what the parties want to achieve.

Specimen cross option agreement (company share purchase)

Note

This draft is not designed to be completed by clients but is intended as a specimen to assist clients' legal advisers in drafting their own agreement. All notes are for guidance only and do not form part of the deed.

Note

This agreement should be dated on the day it is signed.

Note

The first party to the agreement is the shareholder who should be identified by full name and private address. The second party is the company and its registered address should be stated here in full.

Note

This section sets out the reason for executing the agreement.

Note

This clause C1 contains the "sell" options and the time limits on their exercise. These are not fixed and may be amended as the parties wish. Sub-clause C1i gives rise to an option on death. Sub-clause C1ii is an option in the event of incapacity. If either of these sub-clauses is not relevant they should be omitted.

A Deed of agreement

THIS DEED OF AGREEMENT is made on

D	D	M	M	Y	Y	Y	Y
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BETWEEN

of

(hereinafter called the "Shareholder")

and

whose Registered Office is situate at

(hereinafter called the "Company")

B Whereas

B1 The Shareholder is the holder of shares in the Company.

B2 The parties hereto desire that on the death [or incapacity] of the Shareholder his personal representatives [or he] shall have the option to sell and the Company shall have the option to purchase the Shareholder's shares in the Company on the terms hereinafter appearing.

C Whereby it is agreed as follows:

C1 i In the event of the death of the Shareholder the Shareholder's personal representatives shall have the option to require the Company to purchase his shareholding in the Company such option to be exercised by notice in writing served on the Company within [three] months from the date of death or within [one] month after a grant of representation in respect of the estate of the deceased has been obtained if later or such later time as the parties shall, by mutual agreement, determine. Such notice shall specify a date (being a date between [14] and [28] days after the date of the notice) on which (subject to determination of the value of the shares) the sale shall be completed.

C1 ii In the event of the incapacity of the Shareholder for which a valid claim is admitted by the underwriting company to the sum assured payable under the Policy (as defined in Clause C8 below) effected in connection herewith then the Shareholder shall have the option to require the Company to purchase his shareholding in the Company such option to be exercised by notice in writing served on the Company within [six] months from the date the claim is admitted by the underwriting company or such later time as the parties shall, by mutual agreement, determine. Such notice shall specify a date (being a date between [14] and [28] days after the date of the notice) on which (subject to determination of the value of the shares) the sale shall be completed.

Note

This is the “buy” option in the event of death and its time limits. Once again these are variable at the parties’ discretion.

C2 In consideration of the grant of the [option/options] in clause C1 above on the death of the Shareholder the Company shall have the option to purchase the Shareholder’s shareholding in the Company from the Shareholder’s personal representatives, such option to be exercised by notice in writing served upon the personal representatives within [three] months from the date of death or within [one] month after a grant of representation in respect of the estate of the deceased has been obtained if later or such later time as the parties shall, by mutual agreement, determine. Such notice shall specify a date (being a date between [14] and [28] days after the date of the notice) on which (subject to determination of the value of the shares) the sale shall be completed.

Note

This clause sets out the basis of valuation of the shares to be purchased. As can be seen this may be provided for in the constitutional documents of the Company. However, default provisions are provided for use where necessary and include terms for making valuation final.

C3 The value of the shares to be sold and the shares to be purchased shall be determined in accordance with the constitutional documents of the Company. Where there is no provision therein for valuing the shares or the agreement is silent as to value, the value shall be determined by the Company’s auditors or (if the Shareholder or his personal representatives (within [14] days after the date of the notice) notify the Company in writing that he/they object to the Company’s auditors determining the value or if the Company’s auditors decline an instruction to determine the value) by a firm of chartered accountants agreed between the Shareholder or his personal representatives and the Company or, in default of agreement within [21] days after the date of the notice, appointed by the President of the Institute of Chartered Accountants in England and Wales on the application of the Shareholder or his personal representatives or the Company. In determining the value of the shares the Company’s auditors or other firm of accountants shall act as expert and not as arbitrator and their certificate as to value shall be final.

Note

This clause sets a time limit for completing the sale, which may be amended according to the parties’ preferences.

C4 Completion of the sale of the shares shall take place at the registered office of the Company or such other place as may be agreed by the Shareholder or his personal representatives and the Company on the date specified in the notice or (if later) within 14 days after the purchase consideration shall have been finally determined when the Company shall pay the purchase price for the shares to the Shareholder or his personal representatives and the Shareholder or his personal representatives shall deliver to the Company transfers in respect of the shares duly completed in favour of the Company together with the certificates therefor (or failing such certificates an indemnity in terms which would be satisfactory to a reasonable purchaser) and shall sign all such documents and take any action as may be reasonably necessary or requisite to enable the Company to become the registered and beneficial owner of the shares.

C5 If the Shareholder or his personal representatives makes default in transferring the shares as aforesaid, the directors of the Company shall be entitled to receive and give a good discharge for the purchase price on behalf of the Shareholder or his personal representatives and the Shareholder hereby irrevocably appoints such one of the directors of the Company for the time being as the Company shall nominate in writing as the Shareholder’s attorney to execute on his behalf a transfer or transfers of the shares in favour of the Company and execute such other documents and do all such other acts as may be reasonably necessary to transfer title to the shares to the Company.

Note
This clause simply divides the cost of the sale and purchase.

Note
This clause provides for the effecting and maintaining of a policy by the Company to fund the purchase.

Note
This clause confirms that the agreement is conditional on all the legal conditions for share purchase being satisfied before it can go ahead.

- C6** An obligation to transfer shares under this agreement shall be deemed to be an obligation to transfer the entire legal and beneficial interest in such shares free from any lien, charge or other encumbrance.
- C7** The expenses of the valuation and the sale and purchase of the shares shall be borne equally by the Shareholder or his personal representatives and the Company or in such other proportions as they shall mutually agree.
- C8** The Company shall effect and maintain a life assurance policy or policies (herein referred to as the "Policy") providing for the payment of such sum on the Shareholder's death [or incapacity] as shall be mutually agreed between the parties.
- C9** Where the company is obliged to purchase an interest referred to in clauses C1i and C1ii, such obligation shall only extend to so much of the interest as the monies received from the life assurance policy is adequate to purchase.
- C10** Any notice in connection with this agreement shall be in writing and delivered personally or sent by first class pre-paid post to the relevant party at the address set out in this agreement or such other address as the recipient may have previously notified to the sender or by facsimile transmission to the then current facsimile number of the recipient. Proof of posting or despatch shall be deemed to be proof of receipt, in the case of a letter, on the business day after posting, and, in the case of a facsimile transmission, at the time of despatch.
- C11** This agreement is conditional on the parties hereto satisfying all company law requirements that permit a company to legally purchase its own shares. If the Company is prevented by company law from purchasing any (or is permitted to purchase only some) relevant shares following the valid exercise of an option, the Company shall only purchase that number of such shares that it can so purchase at that time. The Company shall purchase, as soon thereafter as it may do so, all the remaining shares covered by the option, [and pending such purchase, the Company shall not declare or pay any dividend or make any other distribution of its profits or reserves]. The Company shall procure that each of its subsidiaries which has profits available for distribution shall from time to time and to the extent it may lawfully do so declare and pay to the Company such dividends as are necessary to allow payment by the Company of any consideration due on the exercise of an option.

Note

This clause provides for various subsidiary matters i.e. ceasing to be a Shareholder or the winding up of the Company. It also makes the agreement subject to the overriding authority of the Company's constitutional documents. Any provisions in the article of association governing pre-emption rights should be checked to ensure they do not prevent exercise of the options.

C12 This Agreement shall:

- C12 i bind the Company and the personal representatives of the Shareholder,
- C12 ii cease to apply when the Shareholder shall cease to be a holder of any shares in the Company (but without prejudice to any prior liability of the Shareholder which shall have already arisen under this agreement),
- C12 iii cease to have effect on the winding up of the Company,
- C12 iv take effect only in compliance with and subject to the terms of the constitutional documents of the Company which shall take precedence over the terms hereof should there be any conflict between the two, and

C12 v be subject to the laws of

Note

Insert the country.

D Signatures

In witness whereof this instrument is executed as a deed on the day and year first mentioned above.

Note

The shareholder should sign along with two directors on behalf of the company. There is no legal requirement to use the company seal. The witness must be independent of the agreement, but the same person may witness all signatures.

Shareholder

Signed as a deed and delivered by the said

name

signature

Witness

name

signature

address

D Signatures

Company

Signed as a deed and delivered on behalf of the Company

name

position

signature

Company

Signed as a deed and delivered on behalf of the Company

name

position

signature

Witness

name

signature

address

Witness

name

signature

address