

# **IBA Guide on Shareholders' Agreements**

## **Serbia**

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### **Note**

At the time this article was prepared, the Serbian company law was in transition from the old Companies' Act of 2004 ('Old CA') to the new Companies' Act enacted by the Serbian Parliament in May 2011 ('New CA'). The New CA will start to apply from 1 February 2011 (except for certain provisions which will start to apply from 1 January 2014). By 1 February 2012, Serbian companies should have adjusted their organisation and functioning with the new solutions provided under the New CA. The main change introduced by the New CA in relation to shareholders' agreements is that it now explicitly allows the conclusion of shareholders' agreements in joint stock companies and that the shareholders' agreements have only contractual effect, while under the Old CA, they had certain corporate effects as well.

Answers to questions below are provided under and in accordance with the New CA insomuch as the legislative solutions are concerned. Since the New CA has not started to apply yet, answers to questions related to practical issues concerning the shareholders' agreements in Serbia are given with reference to practice existing under the Old CA, provided that we have outlined changes made by the New CA which may influence this practice in the future.

In addition, both the Old CA and the New CA provide for two principal forms of company: the limited liability company (the vast majority of Serbian companies are established as limited liability companies), and joint stock companies, including the closed and public joint stock companies, and allows the conclusion of shareholders' agreements in both these forms of company. Since the content and effects of shareholders' agreements in limited liability companies and joint stock companies have certain differences, in our answers we have outlined issues where these two forms of companies differ.

### **1. Are shareholders' agreements frequent in Serbia?**

Shareholders' agreements are not particularly frequent in Serbia. They are concluded mostly by members of limited liability companies, in cases in which specific relationships between the members requires that such relationships are regulated outside the company's by-laws (the Memorandum of Association). Shareholders' agreements are far less frequent in public joint stock companies. Closed joint stock companies are extremely rare in Serbia, and in most cases operate as single-shareholder companies so that there is no need for conclusion of shareholders' agreements.

**2. What formalities must shareholders' agreements comply with in Serbia?**

The New CA (as was the case with the Old CA) does not prescribe any specific requirements concerning the form of the shareholders' agreements. The shareholders' agreements are not registered with the relevant companies registries either, and this ensures their confidentiality (the Registry of Companies of the Agency for Commercial Registries of the Republic of Serbia).

**3. Can shareholders' agreements be brought to bear against third parties such as purchasers of shares or successors?**

Under the New CA, the shareholders' agreements have only contractual effect and are enforceable only vis-à-vis the shareholders who have concluded the shareholders' agreement. Therefore the shareholders' agreements cannot be enforced against third parties, nor against the company itself. The enforceability of shareholders' agreements against shareholders' successors is governed by the general rules of contract law, whereby the contract is binding on the successors unless the contract provides otherwise.

**4. Can a shareholders' agreement regulate non-company contents?**

The shareholders' agreements may regulate non-company matters. In fact, the need to regulate such matters is often the main reason for the conclusion of the shareholders' agreement, as it is not appropriate or effective to regulate such matters in the company's by-laws.

**5. Are there limits on the term of shareholders' agreements under the law of Serbia?**

The law does not impose any limitations on the term of the shareholders' agreements and the shareholders are free to set the term of the shareholders' agreement in whatever manner they find appropriate.

**6. Are shareholders' agreements related to actions by directors valid in Serbia?**

The capacity of directors to decide on certain issues may be regulated only by the company by-laws, within the limits prescribed by the New CA. Given that the shareholders' agreements have only contractual effect, any rules governing the capacity or the conduct of the directors which may be prescribed by the shareholders' agreement would not be enforceable either against the directors or against the company.

**7. Does the law of Serbia permit restrictions on transfer of shares?**

Under the New CA the transfer of shares in limited liability companies may be limited by the company by-laws. The types of limitations provided under the New CA include the pre-emptive rights of other members, transfer of shares with the prior approval of the company, but the members are free to establish any other types of limitations they find appropriate.

With regard to the joint stock companies, limitations on the transfer of shares is allowed only in closed joint stock companies and only insofar as the transfer may be limited by the pre-

emptive rights of other shareholders or by the prior approval of the company. Any such limitations have to be prescribed by the company's articles of association to be enforceable vis-à-vis third parties. Limitations on the transfer of shares in public joint stock companies are not allowed, at least inasmuch as corporate bylaws are concerned.

The New CA is not entirely clear as to whether limitations on the transfer of shares in joint stock companies may be imposed by the shareholders' agreement. Given that the shareholders' agreements have only a contractual effect, any such limitations would not be enforceable against third parties, ie, the violation of limitations on transfer of shares imposed by the shareholders' agreement would give the non-breaching shareholder only the claim for compensation of damages against the breaching shareholder.

#### **8. What mechanisms does the law of Serbia permit for regulating share transfers?**

The mechanisms provided under the New CA include the pre-emptive rights of the shareholders and the company. In addition, the members of limited liability companies may introduce any other types of limitations they find appropriate. No other limitations are allowed in public joint stock companies.

#### **9. In Serbia do by-laws tend to be tailor-drafted, or do they tend to use standard formats?**

The vast majority of Serbian companies operate on the basis of standard by-laws which often simply copy the main provisions of the companies' act.

#### **10. What are the motives in Serbia for executing shareholders' agreements?**

The main motives to conclude a shareholders' agreement in Serbia is the need to keep certain issues confidential, and the necessity to regulate contractual relationships between the shareholders separately from the purely corporate issues which are regulated by the company's by-laws. The complexity of certain issues is also often a driving factor for the conclusion of a shareholders' agreement.

#### **11. What contents tend to be included in shareholders' agreements in Serbia?**

In most cases the shareholders' agreements include content which the shareholders wish to keep confidential or content which is purely contractual in nature and which is not appropriate for company's by-laws. Specific responsibilities of the shareholders in the operations of the company, or certain special rights concerning the management of the company are also often the topic reserved for the shareholders' agreements rather than company's by-laws. Complexity of certain issues is also often a motive for conclusion of a shareholders' agreement.

#### **12. What determines the content included in shareholders' agreements in Serbia?**

The main factors influencing the decision as to what to include in shareholders' agreements are: (i) whether a specific issue concerns only the relationship between the shareholders which should be regulated by the shareholders' agreement, rather than company by-laws; (ii) whether

the agreement is binding upon all shareholders or only some; (ii) the need to ensure the confidentiality of certain issues; (iii) whether given the complexity of certain issues it is more appropriate to regulate it in the shareholders' agreement; and (iv) the need for flexibility.

Given that under the New CA the shareholders' agreements will have only contractual effect and that they will not be enforceable against the company or the third parties, it may be expected that in the future one of the main factors in deciding whether certain issue should be regulated by the shareholders' agreement or by the company's bylaws will be whether the shareholders need any given provision to be enforceable directly against the third parties and the company or not.

### **13. What are the most common types of clauses in shareholders' agreements in Serbia?**

The most common types of clauses in shareholders' agreements include the following: (i) clauses governing specific responsibilities of the shareholders in relation to operations, management and the financing of the company (such as technical assistance, commercial contracts between the shareholders and the company, intellectual property rights, equity and loan financing, etc); (ii) specific majorities (veto rights and similar); (iii) mechanisms for resolution of deadlock in the governing bodies of the company; (iv) special or preferential rights of shareholders; (v) dividend policies; (vi) exit mechanisms; (vi) put and call options, including methods for share evaluations.

### **14. What mechanisms does the law of Serbia permit to ensure participation of minorities on the board of directors and its control?**

The only mechanism for participation of minorities in the board of directors in joint stock companies explicitly provided under the New CA is cumulative voting. Voting agreements between the shareholders are also generally allowed by the New CA. The New CA (as was the case with the Old CA) is based on the principle of equal rights of all holders of ordinary shares (which always form one class of shares), and does not allow the division of ordinary shares into different classes of shares with different voting rights.

### **15. Is it possible in Serbia to ensure minority shareholder control by means of a shareholders' agreement?**

Given the principle of equal rights of all holders of ordinary shares in joint stock companies, minority shareholder control cannot be effectively enforced by means of shareholders' agreement in public joint stock companies.

Mechanisms to ensure minority shareholders control in limited liability companies should be set in the company's by-laws rather than the shareholders' agreement given that the shareholders' agreements have only contractual effect.

**16. What are the usual valuation mechanisms in connection with rights of first refusal or share transfer regulations?**

The most common valuation mechanisms used in Serbia include different types of book or net worth value, and valuations based on future earnings, value based on EBITDA or EBIT, and expert assessments.

**17. Is it admissible for a shareholders' agreement clause to refer dispute resolution to the courts other than those of Serbian and/or under a law other than that of Serbia?**

Insomuch as the shareholders' agreements have only contractual effect, they may refer to the foreign law and jurisdiction of foreign courts, provided that at least one of the shareholders is a national of a foreign country. Issues which concern purely corporate issues (ie, status of the company) fall within the exclusive jurisdiction of Serbian courts and are governed by Serbian law.

**18. Is it admissible for a shareholders' agreement to include an arbitration clause with seat outside Serbia and/or under a law other than that of Serbia?**

Since under the New CA the shareholders' agreements have only contractual effect they may include a foreign arbitration under foreign law, provided that at least one of the parties to the shareholders' agreement is a foreign national. Serbia is a party to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, and Serbian courts will routinely uphold arbitration clauses in agreements with foreign element.