

# IBA Guide on Shareholders' Agreements

## Germany

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### 1. Are shareholders' agreements frequent in Germany?

Shareholders' agreements are common in Germany. While they are mostly found in privately owned companies, shareholders' agreements are also in place between stockholders of public companies. In joint ventures they are often used to define the competences, rights and duties of the parties involved, in particular those which the parties want to keep confidential (see question 10).

### 2. What formalities must shareholders' agreements comply with in Germany?

Shareholders' agreements by themselves are not subject to any formal requirements. They are, however, for documentation purposes normally executed in writing. A formal requirement may apply if statutory law prescribes a specific form for some content of the shareholders' agreement (e.g. an obligation to transfer shares in a limited liability company).

Apart from that, the conclusion of a shareholders' agreement in relation to a public company (stock corporation) may trigger notification duties of the parties involved towards that company and, if listed, to the German Federal Financial Supervisory Authority (*BaFin*). This is evident in a case where certain stockholders agree to jointly exercise their rights and influence as shareholders of that company; in this case, the shareholders' agreement is the basis for a so-called "acting in concert" which results in each party being attributed the shareholding of all other parties for purposes of calculating the notifiable shareholdings. Moreover, due to recent changes in German securities law, notification duties may even be triggered if shares in a listed stock corporation are owned by a holding company which in turn is owned by a number of shareholders none of whom has individual control over that holding; if these shareholders agree on a right of first refusal regarding their shares in that holding company, according to the BaFin, this may lead to notification duties for all parties of the shareholders' agreement towards the listed stock corporation and towards BaFin.

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

Shareholders' agreements generally create a contractual relationship only between their parties and thus are only binding upon these parties. Therefore, they often contain a clause stipulating that a party shall transfer its shares only, if the potential acquirer is acceding to the shareholders' agreement simultaneously with acquiring the shares. While this creates only a contractual obligation of the transferring shareholder, the position of the remaining shareholders can be strengthened by stipulating in the articles of association of the company that any share transfer requires shareholder approval. Obviously, this works only, if the parties to the shareholders' agreement, except for the transferring shareholder, own the majority or at least a blocking minority of the voting rights in the company.

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

There are no legal rules regarding the content of a shareholders' agreement, therefore the parties are free to regulate non-company contents.

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

German law does not stipulate specific provisions on the term of shareholders' agreements. However, general law principles may restrict the term of the shareholders' agreement. If a shareholders' agreement is concluded for an indefinite or immoderate period, the parties may terminate the agreement basically anytime, even without good cause.

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

The provisions of a shareholders' agreement cannot be directly binding upon directors of the company, even if a director were a party to that agreement. What is possible, however, and what is often found in agreements amongst shareholders who in the aggregate are owning the majority or all of the shares in the company is an obligation of the parties to exercise their shareholder rights in a way to cause the directors to take or omit certain actions. Shareholders of a limited liability company (GmbH) may do so by giving the directors binding instructions through a shareholders' resolution or by issuing rules of procedure under which a director is required to ask for shareholders' approval before taking certain management measures.

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

Yes, German law permits restrictions on share transfers. In a German limited liability company even a complete prohibition of transfer is usually admissible. In stock corporations, however, restrictions are only permitted for registered shares but not for bearer shares.

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

The German Stock Corporations Act and the German Limited Liability Companies Act allow for the articles of association of the company to regulate share transfers. The German Limited Liability Act contains a general restriction on share transfers because it stipulates that a contract on the transfer of shares has to be notarised by a (German) notary public. German statutory law does not restrict the transfer of membership in a partnership.

In general, restrictions and their scope and design can be regulated in the company's articles of association. A regulation in shareholders' agreements is also possible but does not constitute an obstacle to the transferability as such, because a violation of such a restriction would only lead to a breach of contract and trigger damage claims and, if stipulated, further consequences.

**9. In Germany do bylaws tend to be tailor-drafted, or do they tend to use standard formats?**

Especially articles of association of specific forms of companies like family businesses or companies with minority shareholders tend to be tailor-drafted. For listed companies or group companies, standard formats are usually used as a basis for the articles of association but are accommodated to specific needs and wishes of the shareholders.

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

One important motive in Germany is that these agreements, in contrast to the content of the company's articles of association, do not have to be disclosed to the public or filed with the Commercial Register. Therefore, they often contain provisions which the parties wish to keep confidential. Furthermore, the articles of a German public company (stock corporation) may only contain provisions regarding certain core topics of the company; however, for example call or put options, rights of first refusal, etc. between the shareholders, may not be stipulated there. Hence, they have to be provided for in a separate agreement. Also, shareholders' agreements are more flexible than the articles, as changes or amendments do not have to comply with particular form requirements other than those determined in the agreement itself.

A further motive for executing a shareholders' agreement is tax driven: bundling their individual shareholdings by way of a shareholders' agreement may allow private individuals to mitigate or completely avoid German donation tax or inheritance tax in case that a shareholder transfers his shares for free or the shares of a late shareholder are transferred to his heirs.

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

Shareholders' agreements often contain pooling agreements in which a group of shareholders, e.g. shareholders belonging to one family, concentrate their votes to maintain a certain influence on the company, either in general or regarding specific topics. The composition and remuneration of board members are also often part of such agreements. Good-leaver and bad-leaver provisions as well as conditions for a transformation or liquidation of the company and for profit distributions tend to be included in shareholders' agreements, as well. Other clauses typically included are share transfer restrictions, rights of first refusal, tag-along or drag-along rights, put or call options and non-competition covenants.

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

In general, the parties to the shareholders' agreement are free to determine its content. In particular, they may deviate from the articles of association. For example, the parties to a shareholders' agreement may agree to exercise their voting rights in the shareholders' meetings of the company always unanimously, based on the results of an internal pre-voting amongst the parties to the shareholders' agreement. For this pre-voting, they may stipulate a higher or lower majority than stipulated in the articles for the respective shareholders' resolution.

As for agreements in general, provisions in shareholders' agreements are invalid, if they are infringing upon mandatory provisions of the law or contrary to public policy.

**13. What are the most common types of clause in shareholders' agreements in Germany?**

See question 11.

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

The German Stock Corporations Act provides rules on the composition of and minority integration in the company's boards. The German Limited Liability Companies Act provides

for minority rights, as well. A minority that holds at least 10% of the company shares can, for example, enforce the calling of a shareholders' meeting. Apart from that, the law allows in particular the articles of association of a German limited liability company to be tailor-drafted to ensure the influence of a minority shareholder on the board of directors: a shareholder may be granted the special right to nominate one or several directors or even for him personally to be a director of the company without a right of the other shareholders to remove him. In theory, this could be combined with a veto right of that shareholder against the appointment of any further director and against any instructions from the other shareholders even if they are owning the majority of voting rights. Thus, a minority shareholder could be given complete control of the company's management. While all this could also be dealt with in a shareholders' agreement, stipulating it in the articles of association of the company would give the minority shareholder a stronger position.

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

Yes, but see question 14.

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

That varies, depending on the specific type of right stipulated:

- Right of first refusal/pre-emption right: If the selling shareholder has agreed with an outside purchaser on the terms of the sale, the other shareholders are entitled to step into the deal instead of the outside party. Hence, the value of the sold shares has been determined between the seller and the outside purchaser; no further valuation mechanism is required.
- Obligation to tender the shares to/first option of, the other shareholders: Typically no specific valuation mechanism is pre-agreed for such a case, but it is left to the selling shareholder and the other shareholders to agree on a price for the share. Usually, the selling shareholder has to start by offering a specific price. If the parties cannot agree, the seller is free to sell the shares to an outside purchaser. To safeguard the interests of the other shareholders, it is usually further stipulated (in the articles of the company and/or the shareholders' agreement) that this sale to an outside purchaser may not be for a lower price than offered to the other shareholders in the first place, or the other shareholders are given a right of first refusal in addition to their first option.
- Call option/put option (i.e. a pre-agreed share sale agreement between two shareholders, to become effective at the discretion of either party): Usually an abstract valuation mechanism is agreed, but seldomly defined in great detail. Typically, it is stipulated that the value of the sold shares shall be established by an independent expert, using the valuation principles defined by the German Institute of Public Auditors in Germany (*Institut der Wirtschaftsprüfer, IDW*).
- Deadlock clauses: In 50/50 joint ventures, you may find various types of "shoot out clauses" to break a deadlock. Here, the price of the shares is determined on the basis of the parties' bids, so no abstract valuation mechanism is needed.

- Withdrawal clauses: If a shareholder is prohibited from selling his shares to an outside purchaser (e.g., because the shares of the company must be owned only by members of a specific family) and if he cannot sell his shares to his co-shareholders, the articles of the company and/or a shareholders' agreement usually provide for a right to withdraw from the company in specific circumstances. Under German law, the withdrawing shareholder is entitled to a compensation payment by the company in the amount of the fair market value of his shares. German courts usually refer rather broadly to "the" discounted earning method in order to establish the fair market value. In articles/shareholders' agreements one will usually find provisions as described above for put and call options. In exceptional cases, however, very detailed valuation mechanisms are stipulated, differentiating between various classes of assets owned by the company, applying liquidation discounts, etc. This can be in particular relevant, if it is clear that the company will have to sell a major part of its assets to fund the compensation payment to the withdrawing shareholder.

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

As long as shareholders' agreements do not directly or indirectly affect the structure of the company, a choice-of-law clause is admissible. In contrast, if for example the shareholders' agreement contains a binding voting agreement, a choice-of-law clause is ineffective because this is subject to mandatory provisions of the law of the (German) company.

A choice-of-forum clause, which refers dispute resolution to courts other than those of Germany, is also generally admissible, but the clause must not undermine effective legal protection. The question of which specific court in the country chosen is authorized to decide upon the dispute is to be answered in accordance with the procedural law chosen by the parties. If the parties choose a specific court, the effectiveness of this choice also depends on the rules in the chosen procedural law.

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

The parties are generally free to stipulate an arbitration clause with the seat of the arbitral tribunal being situated outside of Germany. Likewise, they are free to tailor-draft the procedural rules for the arbitration, be it by way of choosing the entire set of procedural rules of a foreign country or by cherry-picking rules from different jurisdictions. To enforce a foreign arbitral award in Germany, it needs to be declared enforceable by the German courts on the basis of the New York Convention.