

IBA Guide on Shareholders' Agreements

Ireland

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1. Are shareholders' agreements frequent in Ireland?

Shareholders agreements are frequent in all companies with shared ownership, with the exception of companies whose shares are admitted to trading or listing. Frequently they are used to set out complex governance arrangements in preference to complex articles of association, as articles of association must be publicly filed whereas shareholders agreements are generally not required to be filed.

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

There are no formal requirements under Irish law for shareholders' agreements.

It is a matter for debate as to whether a specific shareholders' agreement must be filed with the Companies Registration Office as a public document. In principle, if the provisions of the shareholders' agreement have been agreed to by *all* the members of a company, and which, if not so agreed to, would not have been effective unless they had been passed as special resolutions of the company, then the rule is that the agreement must be registered (section 143(4) of the Companies Act 1963).

However, the interpretation of the types of agreement that are covered by the filing obligation differs from the interpretation of a comparable provision of United Kingdom legislation. As a result, shareholders' agreements are rarely registered in Ireland.

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

Shareholders' agreements are only binding upon:

- . their signatories;
- . where a signatory dies, the persons administering the estate;
- . where a corporate signatory goes into an insolvency procedure, that corporate signatory, subject to rights on the part of a liquidator in a winding up and an examiner in the case of an examinership to seek to disclaim obligations under the agreement.

Incoming shareholders of a company must adhere to a shareholders' agreement before it will be binding on them. To address this point, a shareholders' agreement in a private company will typically prohibit the transfer of shares to any person who has not entered into a deed of adherence to the shareholders' agreement.

No third party can claim the benefit of or be made subject to the obligations in an agreement to which the third party is not a party.

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

Yes: a shareholders' agreement can regulate any matters which are capable of being legally agreed and regulated between the parties to the shareholders' agreement.

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

No. This is entirely a matter for the contracting parties to determine.

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

The power to manage an Irish company is delegated to the directors by a standard provision in the company's articles of association. The shareholders are permitted to vary or restrict this standard article by restricting the matters on which the directors are permitted to decide.

However, with respect to the directors' power of decision with respect to powers that have been delegated to them, each director of an Irish company has fiduciary and other duties that have primary importance in the conduct of their roles as directors. A restriction of a director's actions will be invalid to the extent that it would cause a director to breach those duties.

In principle, a director of an Irish company must not agree to restrict his or her discretion in a way that would affect his or her independent judgement. However, it is not inconsistent with a director's duty of independent judgement to agree to restrict his or her powers where it is required in order to enter into an agreement for the commercial benefit of the company.

Where the shareholders collectively instruct a director to do or not to do a particular thing, the director can decide not to obey that instruction where to do so would cause a director to breach the director's fiduciary duties.

It has been acknowledged in Irish case law that it is acceptable for a director to be appointed to represent the interests of a particular party and that there is nothing wrong with the appointing party acting to ensure that its nominees act in the interests of the appointing party, provided that in so doing they are not seeking to damage any other shareholder's interest in the company.

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

Yes. In fact a private company in Ireland must in its articles restrict the right of shareholders to transfer shares. If it does not do so, the company must reregister as a public limited company and comply with the minimum capital requirements required by the Irish transposition of Directive 77/91/EEC. The default form of restriction for a private company limited by shares in Ireland is that the directors may, "in their absolute discretion," decline to register any transfer of a share.

Shareholders' agreements will often set out more complex provisions as to share transfers, for example rights of first refusal and compulsory transfers by shareholders in particular circumstances.

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

A wide variety of mechanisms are permitted in Ireland for the regulation of share transfers. Any type of agreement is possible, including:

- giving existing shareholders a right of first refusal to buy shares put up for sale;
- an obligation on a shareholder to sell at a predetermined value in the case of a breach of agreement;
- an obligation to put the company up for auction after the passing of a particular time or event;

Where the company itself acquires its shares, whether by purchase or redemption (or purchase by a subsidiary) there are rules requiring that the source of the acquisition price be sourced either from a new issue of shares or from distributable profits.

Where a third party acquires 80% or more of the shares of an Irish company, the third party has a legal right to purchase the remaining 20% of shares on the same terms. A shareholders' agreement can, however, prevent this if expressly so stated.

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

In companies with shared ownership, the articles of association are always tailor-drafted, even if many of the provisions contained in the articles conform to a popular standard.

The vast majority of Irish one-owner companies adopt the default articles applicable to a company of their type either in whole or in part. Certain default articles, such as limits on the borrowing powers of directors, are typically disapplied.

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

The typical purpose of shareholders' agreements is to regulate the administration of companies with shared ownership, particularly with respect to matters that the shareholders would prefer not to be made public via inclusion in the articles of association which are filed in the Companies Registration Office.

A shareholders' agreement in Ireland may cover matters such as:

- a. matters which require shareholder consent or special majorities;
- b. shareholders' information rights;
- c. restrictions on the transfer of shares including put and call options; and
- d. rights to nominate directors.

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

A shareholders' agreement may cover such matters as:

- a. matters which require shareholder consent or special majorities;
- b. shareholders' information rights;
- c. restrictions on the transfer of shares including put and call options, drag-along rights and tag-along rights; and
- d. rights to nominate directors.

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

Most, but not all, of the provisions of a shareholders' agreement may equally be covered in the articles of association. The principal reason that certain matters are included in a shareholders' agreement is to avoid including them in the articles of association, which is filed as a public document.

13. What are the most common types of clauses in shareholders' agreements in Ireland?

A shareholders' agreement commonly includes clauses covering the following matters:

- a. the business of the company;
- b. reserved matters/restricted transactions;
- c. restrictions on the transfer of shares, drag-along rights and tag-along rights; and
- d. rights to nominate directors.

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

Minorities do not have any statutory rights to appoint directors. Irish law permits the shareholders to make arrangements for the governance of the company by agreement, such as granting a specified minority shareholder the right to appoint a director or directors.

The principal statutory mechanisms to ensure the participation of minorities in a company are the statutory rule that certain matters must be decided by special resolution (which requires a 75% majority of the shares carrying voting rights) and the statutory right of any shareholder (even a shareholder with only one share) to apply to the court for redress in cases of the oppression of a minority by the directors or the other members.

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

Classes of shares may be issued with or without voting rights. In this way, the holders of a minority of the shares representing a minority in value of the issued share capital of the company can control a majority of the votes in the company.

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

There are no statutory valuation mechanisms for rights of first refusal or share transfer regulations. If such mechanisms are specified, they will typically follow one of the generally applied valuation methods used in corporate finance.

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

A shareholders' agreement in respect of an Irish company may specify that the courts of any country as the (exclusive or non-exclusive) forum for the determination of disputes.

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

An arbitration clause in an Irish shareholders' agreement will typically be binding on the parties. Ireland is a party to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. Consequently, foreign arbitral awards will be generally capable of enforcement in Ireland in the same way as domestic awards.