

IBA Guide on Shareholders' Agreements

Brazil

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1. Are shareholders' agreements frequent in Brazil?

Yes, shareholders' agreements are frequent in Brazil. The main purpose of this type of agreement is to regulate the main shareholders' interests. Shareholders' agreements are easier to enforce, and so are much more common than quotaholders' agreements.

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

Pursuant to article 118 of Brazilian Corporations Law (Law # 6404/76 – *Lei das Sociedades Anônimas*), shareholders' agreements need to be registered before the company's headquarters to be valid among the shareholders and third parties.

In addition, considering the above mentioned formality, shareholders' agreements need to be written and, as all agreements in Brazil, to comply with article 104 of the Brazilian Civil Code.

Therefore, the requisites of validity of a shareholders' agreement in Brazil are that it:

- (i) be executed by capable agents;
- (ii) specify a licit, possible and determinable object;
- (iii) be written; and
- (iv) be registered before the company's headquarters.

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

Yes, shareholders' agreements are valid and enforceable against third parties, including the purchasers of shares and/or successors. Usually the agreement foresees the conditions of purchases of shares by a third party and/or the transference of shares. In any case, the new shareholder needs to comply with conditions of the shareholders' agreement, but its resolution could be required in accordance with the specific rules of the shareholder's agreement.

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

Shareholders' agreements cannot regulate non-company contents. Pursuant to article 118 of Brazilian Corporations Law, the agreements may regulate only:

- (i) the purchase and sale of shares;
- (ii) the preference to acquire shares;
- (iii) the exercise of voting rights; and
- (iv) the exercise of control.

However, other subjects could be regulated by the shareholders' agreement as a matter of exercise of voting rights, such as the company's policy of investments and the company's budget.

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

Brazilian law does not limit the term of shareholders' agreements. The term can be undetermined (which is the most common situation) or the shareholders can set a deadline to the agreement or establish a goal to be achieved.

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

No. Shareholders' agreements can stipulate goals to be pursued by the company and, indirectly, by the directors. However, it is not possible to indicate specifically the actions to be taken by the directors. The directors must work towards the company's best interests respecting the law, the company's by-laws and also the shareholders agreements.

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

Yes, Brazilian law permits restrictions on the transfer of shares pursuant to article 36 of the Brazilian Corporations Law. The main reasons for such restraint are:

- (i) the need of shareholders to avoid unwanted changes in the equity interest;
- (ii) to avoid the entry of unwanted third parties into the company;
- (iii) to avoid unregulated transfer of stock, without the consent of the majority of the shareholders; and
- (iv) to establish company control in the hands of the shareholders, avoiding the concentration of stock in the hands of the few.

However, it is not possible to prohibit the transfer of shares, pursuant to the second part of article 36 of the Brazilian Corporations Law, but only to restrain the possibilities of transfer.

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

Brazilian law permits restrictions to share transfers and fixing of the tag along right as one of the possibilities, regulated by article 254-A of the Brazilian Corporations Law. However there are other options not regulated by the law. Besides the tag along, the most common mechanisms are: right of first refusal; drag along; tender offer; put and call options; deadlock provisions; Texas/Mexican shoot-out; and Russian roulette.

Right of first refusal

- Contractual right of someone to decide whether or not he wants to buy something, e.g. shares of a company, before its owner may offer it to anyone else.

Tag along

- If the majority shareholder sells his stake, the minority stockholders have the right to join the deal and sell their stake under the same terms and conditions as the majority shareholder.

Drag along

- If the majority shareholder sells his stake, minority shareholders are forced to join the deal.

Tender offer

- The tender offer is a public offer or invitation (usually announced through a newspaper advertisement) by a prospective acquirer to all stockholders of a publicly traded corporation (the target corporation) to tender their stock for purchase for a specified price within a specified time, subject to the tendering of a minimum and maximum number of shares.

Put and call options

- Put option: the buyer has the right, but no obligation, to sell the asset at the strike price by a certain date, while the other party - the seller - has the obligation to buy the asset at the strike price if the buyer exercises the option.
- Call option: the buyer of the call option has the right, but no obligation, to buy an agreed quantity of a particular stock.

Deadlock provisions

- A contractual clause or series of clauses in a shareholders' agreement which determine how disagreements on key issues are to be solved in relation to the management of the enterprise.

Texas/Mexican shoot-out

- Deadlock provision clause, which determines that both parties in disagreement write their bids for the other's shares and seal it. On a determined day, both parties meet and disclose their bids simultaneously. Whoever offers the largest bid must buy the counterparts' shares and remain in the society.

Russian roulette

- Deadlock provision clause, which determines that either one of the parties in disagreement shall service the other part informing the price it would pay for his shares. If the serviced party refuses to sell his participation in the society, he must buy the other party's shares for the price it offered, and the servicing party must sell its shares for the price it offered.

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

In Brazil the bylaws tend to use standard formats. Brazilian corporations operate in the market based on standard bylaws with generic regulations, which give force to all aspects of shareholders' agreements.

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

The motive to execute a shareholders' agreement in Brazil is to regulate the purchase and sale of shares, the preference to acquire shares, the exercise of voting rights, or the exercise of control. Furthermore, the shareholders' agreement could be seen as a faster way to issue decisions, since it reduces the discussion of certain subjects and groups the votes of several shareholders.

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

The content of the shareholders' agreement must obey article 118 of Brazilian Corporations Law. However, as explained in answer to question 4 above, the voting rights and exercise of control are generic dispositions and may cover any other topics, provided that they comply with Brazilian law.

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

According to the answers to questions 4 and 11 above, article 118 of the Brazilian Corporations Law determines the purpose of the shareholders' agreements in Brazil and some additional content may be included to regulate the voting rights and the exercise of control.

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

The most common types of clauses in shareholders' agreements in Brazil are:

- (i) the right of first refusal;
- (ii) the tag along and drag along clauses; and
- (iii) the preparatory meetings among the shareholders who executed the shareholder's agreement to decide how to vote in the general meetings of the company.

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

Article 141 of Brazilian Corporations Law regulates the multiple voting rights and ensures the participation of minorities on the board of directors.

Brazilian Corporations Law determines that shareholders representing at least 10% of the voting capital can require the multiple voting procedure. This procedure entitles each share to as many votes as there are council members and to give each shareholder the right to vote cumulatively for only one candidate or to distribute his votes among several candidates.

In addition, article 141 of Brazilian Corporations Law also ensures the right of a shareholder to appoint a member of the board of directors if it represents 10% of the preferred shares without voting rights or 15% of the common shares.

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

Yes, anyone can sign a shareholder's agreement. The minority shareholders can join forces by means of a shareholder's agreement and gain power to vote.

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

The usual valuation mechanisms in connection with rights of first refusal or share transfer regulations differ from publicly-held companies to closely-held companies. In publicly-held companies the price is that quoted by the stock market.

In closely-held companies, the market value is estimated based on present profits, expected profits and development of the company, the balance of payments, the administrative control and the transfer of the company's power of control.

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

Yes, it is admissible for shareholders' agreements to refer dispute resolution to courts other than those of Brazil. The other means to resolve a dispute arising from a shareholders' agreement are mediation, conciliation and arbitration. However, the use of law other than that of Brazil is not accepted.

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

It is possible for a shareholders' agreement to include an arbitration clause with seat outside Brazil, according to Law 9307, Brazilian Arbitration Law. However, is not possible to establish a foreign law to regulate the shareholders' agreement in Brazil.