

# **IBA Guide on Shareholders' Agreements**

## **Spain**

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

Shareholder's agreements (known as "*pactos de socios*" or "*pactos parasociales*") are very common in Spain. Actually, during the past two decades there has been an increase in the execution of shareholders' agreements and, in the last few years particularly regarding the incorporation of start-ups. SMEs and entrepreneurs are keen to execute this type of agreements at the beginning of their business activities as a first step to a more professional management of their company, among other reasons.

According to the Spanish securities exchange commission (*Comisión Nacional del Mercado de Valores* or CNMV), approximately 21 per cent of companies listed in Spain have shareholders' agreement in place, and they are even more common in private companies.

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

Shareholders' agreements are regulated by the general principle of contractual freedom of the Spanish Civil Code (art. 1255) and Spanish law does not require any specific formalities for the validity and enforceability of shareholders' agreements.

Notwithstanding the foregoing, there are some particular cases where notarization is required. For instance, if the shareholders' agreement deals with real estate contributions, intellectual property rights transfer, to the extent that such contributions and transfers will require the formality of being executed in a notary public deed, the shareholders' agreement will need to be raised into public before a Spanish notary. In addition, if the parties wish that the shareholders' agreement is registered with the Commercial Registry (which is voluntary and just sought by the parties to put the general public on notice about the existence and content of the shareholders' agreement), then the agreement will also need to be raised into public.

Without prejudice to the foregoing, it must be noted that in the case of public companies certain shareholders' agreements (such those involving stock transfers, voting rights, or conversion of securities), must be filed with the Commercial Registry (and, consequently, raised into public before a Spanish notary), and also notified as a 'relevant fact' to the CNMV.

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

Shareholders' agreements are only binding between the parties thereto in accordance with article 1091 of the Spanish Civil Code (“*The obligations arising from the agreements have the force of law between the contracting parties, and must be fulfilled according to the same.*”). Its effectiveness will be limited to the parties that have executed the agreement and will also be binding and effective *vis-à-vis* the company if it has also executed the shareholders' agreement.

If the company is not party to the shareholders' agreement (which is sometimes common, since usually the shareholders agreement is entered into between all, or some, of the shareholders) the agreement will not be enforceable against the company in accordance with article 29 of the Spanish Companies Act (“*The agreements that remain reserved between the partners will not be enforceable against the company.*”).

However, the majority of scholars agree that a third party beneficiary of a shareholders' agreement may enforce (from a contractual point of view) such shareholders' agreement, even if such party was not a signatory of the same.

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

Yes. In fact, one of the reasons why shareholders' agreements are common in Spain is precisely to regulate matters not strictly related to the governance and ownership of the company, where the rigidity of corporate law and the limited scope (and ‘impersonality’) of by-laws, in addition to the strict criteria applied by commercial registrars to authorise the recording of corporate resolutions and other corporate actions, make it necessary to regulate such non-company matters on a separate agreement.

Yes. Spanish law does not prevent shareholders' agreements from regulating non-company matters. In fact, the expression “*shareholders' agreement*” has been used by the Spanish doctrine to designate the agreements concluded between some, or all, of the partners of a company in order to complete, specify or modify the legal and statutory rules that govern the company and their own internal relations and to regulate matters which do not have to be strictly related to the governance and ownership of the company.

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

In general, shareholders' agreements in Spain are fixed-term agreements (since under Spanish law, shareholders' agreements in perpetuity are not valid) and once the term has expired, the termination will be effective, without further extension. Nevertheless, in practice, shareholders' agreements may be “indefinite term agreements” if their term is linked to the duration of the company to which they refer.

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

Shareholders' agreements can regulate matters related to directorship such as the rules to elect and remove directors. However, a shareholders' agreement cannot dictate how

directors must cast their vote or how they should carry out their duties. In Spain directors are subject to fiduciary duties, which means that, even if they have been appointed by specific shareholders, the directors must act always in the best interests of the company and in compliance with their own fiduciary duties to avoid liability.

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

Restrictions regarding the transfer of the shares vary in Spain depending on the type of entity. In the case of a “sociedad limitada” (S.L., which is a private limited liability company similar to a US limited liability company), shareholders will be entitled to impose an absolute restriction on the transfer of shares during a maximum term of five years (art. 108 of the Spanish Companies Act). Shareholders may agree on a longer term but the opposing shareholders will have the right to separate from the company. In addition, shareholders may also include in shareholders’ agreements (and, generally, in the by-laws) other share transfer restrictions. If no specific transfer restrictions have been included by the shareholders, the general share transfer regime provided for under Spanish law, will be applicable.

In the event of a “sociedad anónima” (S.A., which is also a limited liability company which may be public or private and roughly similar to a US corporation), absolute restrictions on transfer (or limitations which make the share transfer virtually impossible) are not permissible (art. 123 of the Spanish Companies Act). Clauses containing such restrictions will be null and void. Certain mechanisms may be available to validly circumvent this prohibition, including the pooling of voting interests at a holding company level (preferably on a S.L.).

Other valid restrictions under Spanish law include requiring the shareholders or the board of directors to authorize an intended share transfer (especially to avoid competitors acquiring an interest in the company), granting of rights of first refusal in favor of other shareholders and/or the company, call options, etc.

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

Spanish law allows most of the mechanisms commonly used in corporate transactions such as tag-along and drag-along rights, put and call options, rights of first refusal, ‘russian roulettes’ and ‘shot gun’ provisions, etc. Some of these mechanisms are already regulated by Spanish corporate law (e.g., rights of first refusal which is an inherent shareholder right which cannot be waived in advance) while others are not specifically provided for by the law but have been generally accepted, and are frequently included, in shareholders’ agreements (e.g., tag-along/drag-along rights).

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

Most Spanish corporations, particularly SMEs, use standard by-laws. In any case, article 28 of the Spanish Companies Act (“Independence of intent”) indicates that “the deed of incorporation and by-laws may also include any agreements or terms that the founding

partners or shareholders deem suitable, provided that they are neither unlawful nor breach the principles of the type of company involved”.

Consequently, shareholders usually tailor-draft the by-laws when they want to further regulate certain aspects of the company or its governance.

#### **10. What are the motives in Spain for executing shareholders’ agreements?**

As indicated above, the main motive is to avoid the rigidity of Spanish corporate law (even when the regulation of SLs was intended to allow greater flexibility than in the case of SAs), the limitations inherent to by-laws and the intervention of commercial registrars who tend to take a very formalistic approach regarding the registration of company’s resolutions, by-laws and incorporation documents. By-laws, for example, cannot include in many cases all the necessary pacts to regulate the great diversity of matters affected in a business project, specific voting mechanisms or reserved matters (veto, majorities, monitoring and information committees), exit routes (sale-purchase options, joint sale, tag-along and drag-along rights), deadlock mechanisms, etc., that shareholders wish to regulate as regards the company and as regards their own relationships. In any case, shareholders’ agreements must be “consistent” with the provisions of by-laws.

#### **11. What contents tend to be included in shareholders’ agreements in Spain?**

The content of a shareholders’ agreement is quite varied. Typically, shareholders’ agreements regulate issues such as: (i) share transfer mechanisms; (ii) restrictions on the transfer of shares; (iii) voting mechanisms (such as quorums and reserved matters); (iv) resolution of deadlocks; (v) financing requirements and capital calls; (vi) commercial matters, including business plan; (vii) business strategy; (viii) non-compete covenants; (ix) management control; (x) right of information; and (xi) composition of the company administrative body and appointment of directors and other management positions.

#### **12. What determines the content included in shareholders’ agreements in Spain?**

Circumstances influencing the decision as to what to include in shareholders’ agreements may be: (i) whether the specific agreement can legally be the subject matter of by-laws; (ii) whether the agreement is binding upon all shareholders or only some; (iii) whether the complexity of the agreement or its nature would not make it suitable for regulation by the by-laws; (v) whether the parties intend to keep their agreement confidential; (vi) whether the parties intend to have parties who are not shareholders or members of the company join the agreement (eg, shareholders’ agreements with third parties such as future shareholders are common); (vii) the formalistic and complex procedure of modifying the company by-laws.

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

The most common clauses are those dealing with tag along/drag along rights, put and call options, resolution of deadlocks, anti-dilution, shareholding preservation, financing obligations, special majorities at board of directors of shareholders’ level for certain matters, as well as those dealing with corporate governance (especially in family protocols)

and commercial matters, as well as some types of clauses which regulate the contents mentioned in section 11 above.

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

Spanish law establishes a proportional representation system regarding the appointment of the members of the board of directors where minority shareholders that meet certain thresholds of ownership are entitled to proportional representation at the board of directors. In addition, shareholders' agreements may grant special voting rights and other protections to minority shareholders.

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

Yes, through any of the mechanisms indicated earlier, including rights of first refusal, put and call options, and supermajority requirements. While Spanish law resolves deadlock situations (e.g., when minority rights impede the normal operation of the company) through judicial dissolution, such situations may be regulated otherwise in the shareholders' agreement.

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

The most common valuation mechanisms are variations of the book or net worth value, value based on future earnings, value based on a multiple of past earnings, value based on a multiple of EBITDA or EBIT, and comparable market value.

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

Yes, as a general rule it is admissible for a shareholders' agreement clause to refer dispute resolution to the courts other than those of Spain and/or under a law other than that of Spain. As an example, we can find on the art. 3.1 of the Regulation 593/2008 of the European Parliament and of the Council (applicable in Spain, and titled as "Freedom of choice"). The same holds true for the selection of non-Spanish courts as forum to resolve disputes among the parties to the shareholders' agreement". Nevertheless, there are certain matters that will need to be governed by Spanish law.

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

There is no impediment under Spanish law for shareholders or members to agree to resolve their disputes through arbitration. Such possibility is regulated by Royal Decree 1784/1996, of July 19, by which the Regulation of the Mercantile Registry is approved. Said Royal Decree establishes that an S.A. or an S.L. can include in its deed of incorporation clauses in which the partners agree to submit to arbitration the disputes of a corporate nature between the shareholders, and of these with the company or its governing bodies. In a nutshell, for

the reasons indicated above, an arbitration under a law other than Spanish law would be admissible.