

IBA Guide on Shareholders' Agreements

Norway

Bjarte Bogstad

Bull & Co

1. Are shareholders' agreements frequent in Norway?

Shareholders' agreements are widely used in Norway, especially in private companies, abbreviated "AS", but also to some extent in public companies, abbreviated "ASA".

Private companies are in Norway regulated by the Private Limited Liability Companies Act (1997), public companies by the Public Limited Liability Companies Act (1997).

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

There are no specific formalities that the parties to the shareholders' agreement in Norway must abide by, and oral agreements are just as binding as written agreements.

The shareholders' agreement cannot be registered in the Company Register, and the Company Register does not allow references to shareholders' agreements in the company's articles of association (which must be registered). Therefore, the shareholders are left with either incorporating the clauses in the articles of association, and/or entering into a separate shareholders' agreement.

This triggers a question about interpretation, whether the articles of association or the shareholders' agreement should have preference if they appear incompatible. For this reason it is advisable to have a clause in the shareholders' agreement stating that the latter has preference if in conflict with the articles of association.

A note to the above for public companies is that the Securities Trading Act (2015) has rules regarding shareholders "*acting in concert*", which should be observed for public companies when entering into a shareholders' agreement.

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

In Norway, a shareholders' agreement is only binding upon the parties themselves. They can probably also be enforced by injunction, although it is disputed to what extent this applies under different circumstances.

The traditional and still dominating view is that the decision made by the general meeting is valid regardless of whether some shareholders have voted in breach of their contractual obligations, but there is now some doubt if this can be upheld.

There is a discussion in legal jurisprudence if a purchaser of shares who is aware of the existence of the shareholders' agreement can disregard it, or is obliged to honour the agreement. There seems to be no dominating view, and no court decision on the matter. The same applies to the question if a shareholders' agreement can be connected to the shares (similar to a lien).

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

There are no legal definitions as to the content or requirements of a shareholders' agreement, hence it may also include non-company matters. However, the normal content (see section 11 below), is limited to the rights and obligations of the shareholders, and the governance of the company. If the shareholders' agreement is closer to a quasi-partnership, or a joint venture, then operational issues are more likely to be included.

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

There are no limits to the term of shareholders' agreements in Norway.

In legal theory, there is a discussion of whether shareholders' agreements (similar to rental agreements, distribution agreements, etc. without a set time period), also can be terminated. And shareholders' agreements qualifying as a partnership under the Partnerships Act, has as a general rule that any party may withdraw from the partnership and require that the other parties shall purchase his/her part. It is therefore advisable to include a clause stating that the shareholders' agreement cannot be terminated, save for the occurrence of certain pre-defined events.

Care must be taken in drafting these, since the shareholders' agreement may be better for the minority shareholders than the minimum protection given by mandatory company law.

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

The directors' fiduciary duty is towards the company, not a specific shareholder. This is the case even if the director is appointed by a specific shareholder.

It is normal that the shareholders' agreement contain clauses regarding certain issues within the authority of the board of directors that instead shall be dealt with — or approved by — the shareholders, with certain majority requirements. But not that the directors themselves are bound to the shareholders' agreement through them signing this, ref. above.

For such clauses to be binding on the board of directors, as *instructions to the board of directors*, they must be passed as a resolution by the general meeting.

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

Yes. Note that the Private Limited Liability Companies Act has pre-emption rights as the standard option, as opposed to the Public Limited Liability Companies Act. The redemption price shall be set based on the fair value of the shares at the time at which the claim was filed, which is quite litigious. The fair value of the shares depends on a broad list of issues related to concrete circumstances which tend to vary from case to case.

Therefore, it is advisable to describe a specific valuation mechanism in more detail in the shareholders' agreement.

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

Mechanisms used for the regulation of share transfers are typically:

- qualifications for being a share purchaser/shareholder (fulfilling certain criteria)
- pre-emption rights
- sale and purchase options
- tag/drag clauses,
- withdrawal (right to be redeemed from the company if weighty reasons in favour of the shareholder being redeemed)
- redemption by the company (if the shareholder is in material breach of his/her obligations towards the company, or a serious and permanent conflict of interest has arisen between the shareholders)
- redemption by the parent company (if the parent company has 9/10 or more of the shares in the subsidiary; can also be claimed by the minority shareholder)
- consent from the board of directors, which only can be refused on reasonable grounds.

The first four, and the last one listed, are (if relevant) typically included in a shareholders' agreement, while the others listed follow from company law.

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

They tend to be standard formats, unless there is a good reason to make bespoke bylaws. This could e.g. be the case if there are qualifications for being a shareholder, specific pre-emption clauses are desired (see Section 7), if there are specific issues related to family owned companies, venture capital and/or PE owned firms, or if there are a significant difference between the shareholders.

See also Section 10 below.

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

The company law only setting out general principles, the main motive is to make bespoke solutions adjusted to the parties' needs and interest, as with any other agreement. Further, confidentiality plays a large part, since as with other business agreements, the parties want to keep some information/certain issues private/secret.

In addition to this, not every issue (e.g. issues justifying bespoke bylaws, ref. Section 9) can or is appropriate to be registered in the Company Register.

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

In general, the content is related to governance of the company, the rights and obligations of the shareholders, and any specific interests of the individual shareholders. See also Section 13 below.

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

See Sections 9–11 above and Section 13 below.

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

This again depends on the type of company, and the shareholders in question (see Section 9). However, the “standard” format is often at least the following:

- parties
- background and purpose
- relation to the articles of association
- shareholder rights
- regulations regarding the board of directors (composition, proceedings, decisions)
- resolutions by the general meeting
- transfer of shares (including pre-emption rights and determination of fair value, tag-along and drag-along clauses)
- issue of new shares
- dividend policy
- non-compete clause
- breach of agreement
- termination
- governing law
- dispute resolution

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

Minority participation

The directors on the board are elected by the general meeting with a majority decision, save for representatives for the employees, which through mandatory law are elected by the employees (relevant for companies with more than 30 employees).

It is possible to include in the articles of association that certain shareholders or shareholder groups have the right to appoint one or more of the members of the board, even the entire board of directors, save for the employee representation.

It is also normal to include in the shareholders’ agreement that shareholders holding more than a certain percentage of the shares, or certain shareholder groups, shall be entitled to appoint one or more of the directors to the board. In general terms it is advisable to consider including this in the articles of association, thus giving the minority shareholder a better protection.

Minority control

The shareholders’ agreement can contain clauses giving negative control (veto rights) to minority shareholders in certain pre-defined matters dealt with by the board of directors, and/or control over certain pre-defined issues otherwise (e.g. funding, sale of assets/IP, sale of subsidiaries, etc.). This being sensitive/internal matters, it would normally only be included in the shareholders’ agreement, not in the articles of association.

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

Yes, for the board of directors as set out above.

For the general meeting (relating to the shares etc. of the company), there are certain measures in the company laws giving negative control (e.g. change of the articles of association requiring 2/3 majority of the votes and the shares present at the general meeting). But for the minority

shareholders to get control, this needs to be regulated in the shareholders' agreement (or through the articles of association).

Note that the company laws contain provisions regarding the abuse of a position on the board of directors, or at the general meeting, giving certain shareholders or others an unfair advantage at the expense of other shareholders or the company.

Note also that mandatory company law, and the Act relating to conclusion of agreements Section 36, relating to unfair contract terms, set a limit on what may be validly agreed in a shareholders' agreement.

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

The most common is probably "fair" market value, without any further description, it being the default solution in the law. However, this encourages litigation, see Section 7 above. Other valuation mechanisms depend on the company and industry in question, including the positioning of the company and the industry (early phase, development, mature, etc.). This therefore includes everything from book value, to book/sales and EBIT/EBITDA multiples, to more aggressive valuations mechanisms. Further, mechanisms for solving any deadlock situation may be through independent third party valuation, a variety of put/call options, competing sealed bids, etc.

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

Yes. The parties may as a general rule refer the dispute resolution to the courts outside Norway, hereunder under a law other than Norwegian law. See, however, the Lugano convention article 22, section 2, Norwegian private international law regarding exclusive venues and mandatory Norwegian legislation and principles, and the "*Ordre public*" principle. Any decision related to this issue should therefore be very carefully considered, before a bespoke solution is drafted.

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

Yes. Norway has ratified the New York convention on the recognition and enforcement of foreign arbitral awards—hence, a shareholders' agreement for a Norwegian company may include an arbitration clause with a seat outside Norway, and a law other than Norwegian law. See however the limitations set out in Section 17 above, not only limited to a narrow interpretation of the "*Ordre public*".