**IBA Guide on Shareholders’ Agreements**

**Uruguay**

**Sebastian Ramos and Manuel Lecuona**

**Ferrere**

1. **Are shareholders’ agreements frequent in Uruguay?**

Shareholders agreements are increasingly frequent in medium and large companies.

1. **What formalities must shareholders’ agreements comply with in Uruguay?**

No formalities are required for the validity or effectiveness of shareholders’ agreement. Nevertheless, Uruguayan law establishes formal and publication requirements when the parties want the shareholders’ agreement to be enforceable (*oponible*) vis-à-vis third parties who are not signatories to the same.

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

As a rule, shareholders’ agreements are only binding upon their signatories.

The law does permit enforceability (*oponibilidad*) vis-à-vis third parties by means of a procedure that includes notarization of signatures, delivery of a copy of the agreement to the company, filing of the agreement with the Public Registry of Commerce, and notation on all share certificates of a reference to the shareholders’ agreement (Art. 331 of the Business Companies Law).

1. **Can a shareholders’ agreement regulate non-company contents?**

Yes. The law does not prevent shareholders’ agreements from regulating non-company matters, in addition to customary corporate issues.

It is commonplace to regulate the licensing of intellectual property rights, management rights and obligations, provision of goods or services, non-competition, confidentiality, among others.

1. **Are there limits on the term of shareholders’ agreements under the law of the Uruguay?**

Yes. Under Uruguayan law shareholders’ agreements can have a maximum term of fifteen years (Art. 331 of the Business Companies Law, with final paragraph as drafted in article 59 of law 17,243 of year 2000). Prior to the year 2000 this limit was only five years.

Legal engineering instruments are commonly used to try to get around this limit (which include negative consequences in the event of nonrenewal, puts or calls associated with nonrenewal, or automatic renewals except with lengthy prior notice). However, the uncertainty deriving from the legal provisions frequently leads to including a variety of solutions in the bylaws, for greater certainty. A minority of scholar opinion has questioned the validity of using mechanisms that tend to ensure or encourage a duration beyond the fifteen-year maximum.

1. **Are shareholders’ agreements related to actions by directors valid in Uruguay?**

There is no conclusive caselaw as to whether it is legitimate to establish conditions in shareholders’ agreements as to directors’ capacity to decide on corporate business. Uruguayan law places corporate administration in the hands of the board of directors, and subjects directors to the duties of care and of loyalty. The directors, in turn, have the personal responsibility of acting in the interest of the company and not of the shareholders who nominated them for such office. The duties of care and loyalty give rise to directors’ responsibilities vis-à-vis shareholders and third parties, which cannot be limited or exonerated even if the conduct is incurred as a consequence of the provisions of a shareholders’ agreement.

1. **Does the law of Uruguay permit restrictions on transfer of shares?**

The Business Companies Law expressly provides that “*shares shall be transferred freely*.” However, it allows the bylaws to limit transferability of registered or book-entry shares (not bearer shares), but only to the extent that such limitation “*does not imply prohibition of their transfer*” (Art. 305 of the Business Companies Law).

In the case of bearer shares or when the shareholders do not want the details of their internal relations to be known publicly, limitations on transfer tend to be introduced in shareholders’ agreements, rather than in the bylaws. When shares are bearer (which is usual in Uruguay), however, it is essential for the shares to be deposited or pledged to guarantee the effectiveness of the transfer restrictions.

Since the law does not permit outright prohibition of share transfers, shareholders’ agreements normally establish mechanisms to permit transfer under certain conditions.

Although such cases rarely come to that stage, the corporate oversight authority (*Auditoría Interna de la Nación*) has struck down bylaws clauses establishing mechanisms for allowing share transfers that are so complex that, in fact, they imply a prohibition of their transfer.

1. **What mechanisms does the law of Uruguay permit for regulating share transfers?**

Apart from the prohibition that we mentioned in the previous answer, Uruguayan law does not regulate any share transfer mechanisms. Therefore, the parties are free to agree the most suitable mechanism for them.

The most usual mechanisms (whose features and sophistication may vary) are:

1. **Right of first refusal**. This is an agreement whereby the shareholder wishing to sell to a third party must first offer the shares to the holder of the first refusal right. If the holders of the right do not buy the shares, the shareholder normally can freely sell to a third party. This is the basic structure, but its regulation and mechanisms can be diverse and highly complex.
2. **First option**. This is a variation of the right of first refusal in which a fixed price is agreed to from the outset.
3. **Russian roulette**. This is another variety of right of first refusal whereby shareholders with the right to buy fix the price of the seller’s shares (frequently with certain limitations). The peculiarity is that upon fixing the price of the other holder’s shares, the buyers are simultaneously assuming the obligation to give the original selling shareholder a purchase option on their package at the same price per share they offered.
4. **Consent Powers**. This involves the need to obtain the board of directors’ consent prior to being able to transfer shares. The pure version of this mechanism is at variance with the rule that disallows structures whose effect may be to totally prohibit share transfers. This is not an advisable option under Uruguayan law.
5. **Buyback rights**. These give the company the right to redeem the shares of a certain shareholder in specific circumstances, such as withdrawal or death of the shareholder.
6. **Buy-sell Agreements**. These impose on the shareholder the obligation to sell and on the company the obligation to redeem the shares in certain circumstances, such as withdrawal or death of a shareholder.
7. **In Uruguay do by-laws tend to be tailor-drafted, or do they tend to use standard formats?**

The bulk of Uruguayan corporations operate based on standard bylaws. They have generic regulations that give the majority control over appointment of the board of directors, and the board of directors control over almost all administration of the company, with only a few limits imposed by law.

1. **What are the motives in Uruguay for executing shareholders’ agreements?**

The main motive is that shareholders normally acquire an off-she-shelf company with standard bylaws and, instead of amending the bylaws to satisfy their needs, which is a lengthy process and the changes to the bylaws become public, they indirectly amend the bylaws through the shareholders’ agreement.

Shareholders’ agreements are more flexible documents than bylaws. In such agreements the shareholders feel more comfortable in regulating conditions for their business that they do not want to be in the public domain. They are also easier to update or amend since, unlike bylaws, their amendment does not require approval by any government office.

Many businesses use totally standard bylaws complemented by a shareholders’ agreement that includes all the complex elements regulating their relationships. Others include certain basic rules in the bylaws and leave the more specific conditions for a shareholders’ agreement. Rarely is the entire content on complex relations among shareholders included in the bylaws.

1. **What contents tend to be included in shareholders’ agreements in Uruguay?**

Shareholders’ agreements tend to have a variety of purposes that include the following: (a) regulating election of directors, (b) determining the quorum or special majorities for certain decisions, (c) deciding on the activities to be undertaken by the company, (d) regulating the company’s form of financing and the shareholders’ obligations, (e) regulating exercise of share preference or purchase-sale rights, (f) establishing particular rights of certain shareholders such as nominating certain executives, selling the company certain inputs with a preference, or receiving certain periodic information, (g) establishing specific obligations of certain members such as providing technical assistance, contributing trademarks, or contributing business or political influence, (h) non-competition, (i) confidentiality, (j) licensing of intellectual property rights.

Those called syndication agreements organize a pool for coordinated voting at shareholders’ meetings, either by following a leader, resolving at a prior internal meeting, or based on an agreed program.

The emphases vary over time, according to the sophistication of the parties involved, international trends, and good and bad experiences in high-profile cases in the market.

1. **What determines the content included in shareholders’ agreements in Uruguay?**

The main circumstances influencing the decision as to what to include in shareholders’ agreements are (i) whether the specific agreement can legally be the subject of bylaws; (ii) whether the agreement is binding upon all shareholders or only upon some of them; (iii) whether the agreement includes corporate and non-corporate issues; (iv) whether given their complexity it would not make sense to include the solutions in the bylaws; (v) the need for confidentiality; (vi) the need for flexibility; (vii) the assessment of formal obstacles that could be met by the proposed solutions in obtaining approval by the pertinent regulatory authority (*Auditoría Interna de la N*ación, i.e., corporate oversight authority); (viii) duration to be given to the agreement; and (ix) importance of ensuring that such agreements can be enforced (*oponible*) against any purchasers.

1. **What are the most common types of clauses in shareholders’ agreements in Uruguay?**

Shareholders’ agreements tend to include clauses on the following matters, among others: (a) the activities in which the company will engage, with other types of activities requiring agreement by all shareholders, (b) agreement as to corporate governance (voting at shareholders’ meetings, election of board of directors, voting at board of directors), (c) guarantees as to information and control, (d) guarantees for equitable relationships with related companies, (e) methods for share valuation in the event of transfer, (f) policies for dividends distribution and/or financing of the company, (g) non-competition, (h) confidentiality, (i) licensing of intellectual property rights.

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

Uruguayan law permits division of shares into series or classes, cumulative voting, special majorities, voting agreements, voting trusts, and irrevocable powers. All these mechanisms are viable under Uruguayan law but, regarding irrevocable powers, jurisprudence has been contradictory as to whether such obligations are subject to specific enforcement or only provide the right to claim damages in the event of nonfulfillment.

1. **Is it possible in Uruguay to ensure minority shareholder control by means of a shareholders’ agreement?**

The division of shares into classes can make it possible to maintain control without the need to hold the majority of the shares. Since as a rule the majority principle applies within each class, the shareholder having a majority in the controlling class can maintain control over the board of directors without holding a majority of the company’s capital.

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

The most common mechanisms for valuing companies are diverse versions 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, comparable market value, expert assessment with or without predefined methodological criteria, advanced fixed price, and best third-party bid (with a variety of methods), among others.

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

Uruguayan law is extremely restrictive regarding jurisdiction and applicable law. Under the prevailing interpretation of Uruguayan rules on jurisdiction and conflicts of law it is not admissible to submit disputes among shareholders of a Uruguayan company to the decision of a court of another jurisdiction and/or to foreign law.

Nevertheless, the parties may submit their disputes to arbitration and in such case, they may choose a law different than that of Uruguay.

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

To the extent that it is an international agreement, arbitration abroad and/or under a foreign law is admissible. Despite the fact that Uruguayan law is extremely restrictive regarding choice of jurisdiction and applicable law, Uruguay is a party to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. As a rule, courts will recognize an arbitration clause, even with seat abroad and/or under other than Uruguayan law, when at least one of the parties pertains to a foreign jurisdiction.