IBA Guide on Shareholders' Agreements

Norway

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1. Are shareholders' agreements frequent in Norway?

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

The reason for this wide use is that Norwegian company laws are mainly based on a set of default rules that may be suitable in general, but are not suitable specifically for the company or cooperative in question.

There are two different types of Norwegian limited liability companies in Norway based on shares, namely those governed under the Private Limited Liability Companies Act (1997) for private companies, which have the addition 'AS' to their corporate names, and those governed under the Public Limited Liability Companies Act (1997) for public companies, which have the addition 'ASA' to their corporate names.

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

There are no specific formalities that the parties to a shareholders' agreement in Norway must abide by, and oral agreements are just as binding as written agreements. A shareholders' agreement can, therefore, be limited to as little as an oral voting agreement and can even be included in a document with another name, for example a share purchase agreement.

The latter was claimed in a court case in 2018 (*Nordic wildfish*), which in the share purchase agreement stated that 'a shareholders' agreement is entered into' related to tag-along and drag-along obligations, but the Appeal Court rejected the claim, deeming it only an intention to enter into a shareholders' agreement. In its argument, it stated the following:

> 'It is crucial for the Court of Appeal that a shareholders' agreement with such

far-reaching consequences must be expected to be prepared in detail, where the prerequisites and consequences are clearly communicated. This is especially true when a negative majority is of great importance to the person selling shares.'

At a minimum, this shows the importance of not only putting such an agreement in writing, but also drafting the provisions clearly, and confirming that whatever is agreed is also understood by the parties, even if such an assumption can be expected of professional parties.

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

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

A note to the above, for public companies, the Securities Trading Act (2007) includes rules regarding shareholders 'acting in concert', which should be observed by 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 to the agreement themselves. They can probably also be enforced through an injunction, although it is disputed to what extent this applies in different circumstances.

The traditional and dominant view is that decisions made during a company's general meeting are valid regardless of whether some shareholders have voted in breach of their contractual obligations, but there is now some doubt in legal jurisprudence as to whether this can be upheld.

There is, in addition, a discussion in legal jurisprudence about whether a purchaser of shares who is aware of the existence of a shareholders' agreement can disregard it or whether they are obliged to honour the agreement.

There seems to be no dominant view either way and no court decisions on the matter. The same applies to the question of whether 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. This may be the case if the

agreement covers different transaction steps for multiple entities in order to achieve a new transaction structure.

However, the content (see the answer to Question 11) is usually limited to the rights and obligations of the shareholders and the governance of the (one) company.

If the shareholders' agreement is closer to a quasi-partnership or a joint venture, then operational issues are more likely to be included, in addition to what is set out above.

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 about whether shareholders' agreements (similar to rental agreements, distribution agreements etc, without a set time period) can be terminated. Shareholders' agreements qualifying as a partnership under the Partnerships Act include, as a general rule, that any party may withdraw from the partnership and require that the other parties shall purchase their shares. 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 when drafting these clauses, since the shareholders' agreement may provide better protection for minority shareholders than the minimum protections provided by mandatory company law.

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

A director's fiduciary duty is towards the company, not a specific shareholder. This is the case even where the director is appointed by a specific shareholder. A director of the board is, therefore, a board member who is not bound by the shareholders' agreement.

It is, therefore, normal that the shareholders' agreement includes clauses regarding certain issues pertaining to the authority of the board of directors that instead shall be dealt with or approved by the shareholders, with certain majority requirements.

For such clauses to be binding on (limiting) the board of directors, as instructions to the board of directors, they must be passed as a resolution during the general meeting. In an Appeal Court case in 2023 (*Blom*), it was rejected that the specific shareholders' agreement per se could also be seen as an instruction to the board. See the answer to Question 14 related to veto rights, etc.

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

Yes. It is worth noting that the Private Limited Liability Companies Act has pre-emption rights (not the right of first refusal) as the standard option, as opposed to the Public Limited Liability Companies Act, where there are no pre-emption rights or the right of first refusal.

The redemption price shall be set based on the fair value of the shares at the time the claim was filed, which is quite litigious. The fair value of 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 and how to solve disagreements in detail in the shareholders' agreement.

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

The typical mechanisms used for the regulation of share transfers include the following:

- qualifications for being a share purchaser/shareholder (fulfilling certain criteria);
- right of first refusal/pre-emption rights;
- sale and purchase options;
- tag-along/drag-along clauses;
- details pertaining to a demerger/merger;
- withdrawal (right to be redeemed by the company if weighty reasons in favour of the shareholder being redeemed apply);
- redemption by the company (if the shareholder is in material breach of their 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 nine-tenths or more of the shares in the subsidiary, which can also be claimed by the minority shareholder); and
- consent from the board of directors, which can only be refused on reasonable grounds.

Of the mechanisms listed above, most but not all follow from company law. And even if the specific matter follows from company law, a shareholders' agreement may set out deviations from the above.

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

They tend to use standard formats, with a bespoke shareholders' agreement, unless there is a good reason to (also) create bespoke by-laws. This could be the case if there are specific qualifications for being a shareholder, if specific pre-emption/redemption clauses are desired (see the answer to Question 7), if there are specific issues related to family-owned companies, venture capital and/or private equity-owned firms, or if there are a significant difference between the shareholders.

See also the answer to Question 10.

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

The applicable company law only sets out general principles: the main motive to execute a shareholders' agreement is to set down bespoke solutions adjusted to the parties' needs and interests, as with any other agreement. Further, confidentiality plays a large part in such agreements, since as with other business agreements, the parties likely want to keep

some information/certain issues private. In addition to this, not every issue (eg, issues justifying bespoke by-laws (see the answer to Question 9)) can or is appropriate to be published via 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 the answer to Question 13.

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

See the answers to Questions 9 to 11 and Question 13.

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

This depends on the type of company and the shareholders involved (see the answer to Question 9). However, the 'standard' format depends on the circumstances of the following:

- parties;
- background and purpose;
- relation to the articles of association;
- shareholders' rights (including different share classes);
- regulations regarding the board of directors (composition, proceedings and decisions);
- resolutions by the general meeting (restricted matters);
- transfer of shares (including the right of first refusal/pre-emption rights and determination of fair value, tag-along and drag-along clauses);
- issuance of new shares;
- financing;
- investments;
- dividend policy;
- non-compete clauses;
- indirect ownership;
- breach of agreement;
- termination;
- governing law; and
- dispute resolution.

A note of caution that Norwegian employment law has mandatory rules related to non-compete and non-solicitation provisions that may limit the validity of such provisions in a shareholders' agreement, especially if the employment is seen as the dominant matter and/or it is seen as 'one' combined matter (regardless of this being set out in different agreements). This was the conclusion in an Appeal Court case in 2020 (*Plumber*), where an employee was forced to sell their shares when their employment was terminated.

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

Minority participation – requirement of equal gender representation

The directors on the board are elected by the shareholders present at the general meeting, through a majority decision. In addition, in companies with more than 30 employees, the employees are entitled to elect one director and one observer to the board (which increases with the company size).

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 set out above.

An important aspect to note is the new provisions in company law for private companies (public companies having been subject to such rules for some time) related to equal gender representation on the board of directors, in effect from 31 December 2024 for companies with more than NOK 100 million in combined operational and financial income. Any board composed of more than two board members must, if the two first are women, elect a man as the third member. The law sets out detailed rules on gender representation, depending on the number of board members. Transitional rules apply, for example companies not fulfilling the above criteria but with more than 50 employees are subject to the same rules from 30 June 2025 and for companies with more than 30 employees from 30 June 2026. Separate rules apply for employee representatives.

It is normal to include in a 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 better protection. Also, due to the rules on gender representation, it may be beneficial to go more into detail regarding the fulfilment of these obligations, especially if the parties themselves are planning to appoint key personnel/themselves to the board.

Minority control and veto rights

The board of directors are, as stated above, not bound by the shareholders' agreement and company law states that a normal majority is sufficient unless the articles of association includes stricter rules (eg, a certain qualified majority or requires a unanimous decision). However, it is not valid to include veto rights for certain board members in the articles of association.

Despite this, shareholders' agreements normally contain clauses providing 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 (eg, funding, sale of assets/intellectual property, sale of subsidiaries, etc.). This is with the understanding that the parties must elect new board members if they are not adhering to the shareholders' agreement. However, in the abovementioned *Blom* Appeal Court case from 2023, the court

was more general in its approach, stating that the veto rights (in question) also between the parties to the shareholders' agreement were invalid, since they were in contradiction with significant third-party interests (creditors, employees, society at large, etc.). The Appeal Court's decision has been criticised, since the court could have reached the same conclusion through an interpretation of the shareholders' agreement in question. The company was, however, in a distressed situation and this might be the core of the case, that in such a scenario, the veto rights were not sufficiently justified and set aside as invalid.

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 company law providing negative control (eg, a change of the articles of association requiring a two-thirds majority of the votes and the shareholders present at the general meeting). For the minority shareholders to gain control, this needs to be regulated in the shareholders' agreement (or through the articles of association).

It is worth noting that 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. It is also worth noting that mandatory company law, and Section 36 of the Formation of Contracts Act relating to the conclusion of agreements 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 the 'fair' market value, without any further description, it being the default solution in law. However, this encourages litigation (see the answer to Question 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 the book value, to book/sales and earnings before interest and taxes (EBIT)/earnings before interest, taxes, depreciations and amortisation (EBITDA) multiples, to more aggressive valuation mechanisms. Further, mechanisms for solving any deadlock situation may be through an 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 Nor way?

Yes. The parties may, as a general rule, refer the dispute resolution to courts outside Norway, under a law other than Norwegian law. See, however, Section 2, Article 22 of the Lugano Convention and 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 Question 17 above, which are not only limited to a narrow interpretation of the *ordre public*.