

And finally, investors in a national or domestic corporation do not face normally the major problem the foreign investor confronts, namely consequences normally arising from absentee ownership. The foreign investor invests, the national investor manages and the shareholders' agreement is an objective standard establishing the rights of all.

## 7 THE GENERAL PHILOSOPHY OF CORPORATE LAW

The principal problem which has hindered the growth of shareholder control has been well expressed by two commentators and whose solution, in the opinion of your author, lies in the use of the shareholders' agreement:

Stockholders are owners of the corporation but not of its assets, and they do not possess direct decision-making authority over the use of those assets. (Baum and Scott 2005)

The main task of counsel then becomes to weaken this entrenched fiat of corporate law by the use of appropriate documents, the main one being of course the shareholders' agreement. But there are other complementary devices such as the choice of the more malleable corporate forms which lend themselves to direct shareholder control, such as the private limited liability company.

And now it is time to begin the journey through the contours of the shareholders' agreement and its place in the hierarchy of shareholder control for while the shareholders' agreement creates rights between the owners of capital it is also a source, a valuable and important fountain of division of authority between the classic management by a board of directors and the powers of the shareholders.

In brief, a shareholders' agreement is also a primary method for shareholder control. But it is not the only one as we shall see in the next chapter.

## CHAPTER 1

# The Multiple Varieties of Shareholder Control

Adroit Lawyers have invented the ingenious device of a voting trust...what is in essence an irrevocable proxy for a term of years.

John J. Woloszyn, *A Practical Guide To Voting Trusts*, 4. U. Balt. L. Rev. 243 (1974-1975)

### 1.1 A DETAILED LIST OF SHAREHOLDER CONTROL

The shareholders' agreement falls within the area of law known as "shareholder control" and while it is a major component of this sector with the most creative potential, it is not the only method accessible to shareholders.

This chapter explores the various forms of shareholder control ordinarily exercised by a separate document and while the various forms have their specific role, it is the shareholders' agreement which contains the most varied and effective form as shall be demonstrated.

Nevertheless, each investment by a client is sui generis and counsel must be prepared not to prejudice what form of shareholder control is the most adequate but assemble all the objectives of the client before making a decision.

Shareholder control can certainly be seen as an aspect of shareholder activism. However our concern is not with shareholder democracy or engagement, but rather and specifically with ensuring within the close corporation that the rights of all shareholders, at times in conflict with management, at other times the minority interests in conflict with the majority shares, are protected and given sensible remedies.

Shareholder defense on the part of the minority or individual shareholder is hardly possible in the megalithic public corporation, except where its source is statutory. Shareholder control in the publicly quoted companies is a dim reality which does not affect the day to day life of either management or the shareholder, the latter

normally visualizing their ownership as an investment and satisfied with a dividend stream or eventual capital gains.

There are techniques for shareholder control in the public corporation but this involves many of the alternative methods, such as classes of shares, voting trusts, pooling agreements, which in turn render the public corporation encumbered with legal complexities when a public listing is sought. Shareholder control in public corporations must seek other avenues which are not explored in this treatise.

Generally, all shareholder techniques find their most efficient use in the close corporation. However, there is no doubt that at times one or more of the following techniques may be used, with or without the execution of a shareholders' agreement and a brief review highlighting the principal characteristics of such alternatives is warranted.

Consequently, we shall consider the various alternatives to a shareholders' agreement, granting most of them only achieve limited objectives but this will afford counsel a general, panoramic view.

An initial, basic list relating to shareholder control is:

- Shareholders' agreement
- Pooling agreement, also known at times confusingly as a shareholder voting agreement
- Voting trust
- Holding company
- Pre-emptive rights
- Different classes of shares
- Classification of directors
- Quorum requirements
- Proxy
- Cumulative voting
- Bylaws
- Plurality and majority voting
- Restriction of powers of directors
- Director veto provisions
- Restrictions on transfer of shares in articles of incorporation
- Limited term to corporate existence
- Trust
- Subsidiaries, affiliates, and interlocking directorates
- Miscellaneous methods.

The above list cannot be thought of, nor is it intended, as being definitive. It is, rather, offered as suggesting alternatives to the shareholders' agreement in the appropriate circumstances. The alternatives are not so satisfactory or so adaptable as the shareholders' agreement, but are more suitable for specific purposes as we shall shortly see.

Moreover, some of the techniques available can be either utilized through a shareholders' agreement or can be part of the articles of incorporation. Thus, beyond the shareholders' agreement, the pooling agreement, the voting trust, and the holding

company, many of the other alternatives can be part of the articles of incorporation and thus valid and effective against third parties.

But, initially, some generalizations are in order about the shareholders' agreement as this is the first on the list so as to gain a broad perspective and to which legal instrument this primer devotes its attention.

### 1.1.1 The Shareholders' Agreement and Shareholder Control

The essence of a shareholders' agreement is not just coordinated control of votes, but rather influence in a diffuse and varied form: primarily it is the continuous control of votes throughout the term of the shareholders' agreement; not sporadic, which is exactly where other techniques fail; capturing the votes of others, those that hold capital equity in the same company, directly or indirectly. The shareholders' agreement seeks to control the votes in the general assembly and, if desired by the participants, also the board of directors although many limitations restrict such control.

But the dominion of the shareholders' agreement does not stop with the control of votes. The shareholders' agreement permits to condition the wide spectrum of ownership of shares, ranging from transfer to valuation; from the right to nominate directors to the right to dismiss directors; from the right to usurp managerial functions and to the traditional passive role of a general assembly into an active participant in the life of the company.

While the shareholders' agreement is frequently used to secure representation by minority shareholders on the board of directors, its use is far more varied and can be molded to create multiple rights, not only in the minority shareholders, but also ensure the majority is not terrorized by the minority and thus the issue of control cannot be seen as merely opposite poles. The influence of the shareholders' agreement is far more subtle.

The minorities do not want to be silenced but the majority does not want to be intimidated. Transfer rights, exit rights, corporate policy, accounting standards, dividend policies, are just some of the more common uses without being in any sense an exhaustive list, and which shall all be explored in this treatise.

There are many similar expressions other than "shareholders' agreement" which must be understood as not indicating different concepts but rather usage which has settled in, wanted or not, amongst the legal profession.

### 1.1.2 Similar Expressions for "Shareholders' Agreement"

Frequent, substitute expressions for "shareholders' agreement" are "collateral agreement", "convention of voting rights", "defense of minority", "shareholder pacts", "shareholder conventions", "side agreement", "stock restriction agreement", "syndicate of defense", "syndicate of votes", "syndicate of boycott", "voting agreement", "voting right shareholders agreements", "voting defense", and "pact of consultation."

In shareholders' agreements where voluntary or obligatory options exist to purchase the shares of an owner, the expressions to describe such situations frequently



invoke the phrases "buy-and-sell agreement" or "sale and purchase agreement" or "survivor-purchase agreement" and if the optionee is the corporation, the description may be "stock purchase agreement" or "stock retirement agreement". These phrases describe a specific situation and are not as inclusive as the more generalized term "shareholders' agreement".

Whatever the designation given to a particular document, the shareholders' agreement will be recognized by its intentions of conditioning the right of vote of the signatories which are always shareholders, but of course can include signatories who are not shareholders such as a lender, investor, or promoter of the company and of course the company itself, although the latter may raise questions of the validity of the shareholders' agreement.

This, because limitations to the corporate power granted by legislation are not looked favorably upon by the courts and this theme of rights of the company which cannot be abrogated shall bear a continuous analysis throughout this dissertation.

The hallmarks of the shareholders' agreement is its attempt of control of votes; its normally long duration; its wide-ranging impact on a number of corporate topics; its private nature, all underpinned by the theory of contract whose principles permit a substantial amount of creativity based on consent.

An exploration and defense of this theoretical foundation of contract is presented in Chapter 2.

### 1.1.3 Alternative Legal Instruments for Shareholder Control on Voting

There are various alternative legal instruments and methods which achieve some of the objectives of the shareholders' agreement but which are legally different and normally far more limited in their scope and effect.

All of them have basic objectives in mind: to exercise control on shareholder conduct on one or more topics; to empower shareholders; to contain the board of directors; to exercise over the corporate enterprise. Seen from this perspective, the national and international practitioners have various tools with which to achieve such control, some more effective than others.

As might be expected, the various legal theories in question are not closed, rigid compartments, with clearly defined boundaries; differences there exist, but often there is a mixture of characteristics. Nevertheless, there are general distinguishing guidelines which are helpful.

### 1.1.4 Pooling Agreements, Also Known as the Shareholder Voting Agreements

The pooling agreement (unfortunately also known confusingly as the shareholder voting agreement) arises where a group of shareholders, whose shares individually do not confer substantial voting power, agree to vote their shares as one voice, thus striving to obtain more influence in the company. There is no transfer of title.

At all times, each shareholder retains title and therefore ownership to the share(s) in question. The pooling agreement is normally for a specific general assembly although there is no mandatory rule that this is the norm. It is what lawyers do and of course can be varied.

A common definition of a pooling agreement is as follows:

A pooling agreement is a contract among shareholders that their shares will be voted as a unit. (Wang, William 1975-1976).

However, such a general definition, although accurate, leaves unsaid the multiple elements which make up a pooling agreement and which need to be incorporated into this document. Additionally, the issue of enforcement, or the lack of it, lurks behind the details.

The essential critical difference between a pooling agreement and a shareholders' agreement is that the pooling agreement does not create very many rights. It is usually limited to a particular event where a specific vote is required. It normally requires a proxy mechanism. Moreover, a pooling agreement is a creature of the common law whose development has been by case law.

In the civil law system, it would be considered an atypical contract with all the inconveniences, namely, uncertainty as to the guiding principles to be applied to such an instrument.

A pooling agreement only relates to voting and therefore as a creative tool in the hands of the practitioner, its use is limited. The client can expect no more than to the agreement will vote as agreed. But this affords limited protection for at the time of drafting how will the practitioner predict the various issues which will arise at the foreseen general assembly unless the pooling agreement is confined to a restricted list of items?

Moreover, as the pooling agreement is a contract between the parties involved it can hardly speak to the future whose general assembly agenda is as yet unknown, which a shareholders' agreement can. The shareholders' agreement does speak to the future.

Additionally, a pooling agreement has no use in creating pre-incorporation rights so that its use as to protecting future rights is stunted.

Furthermore, a pooling agreement is dependent upon the vote of a shareholder. How shall the issues of demise or transfer of share be resolved when they happen, if taking place prior to the general assembly in question? The more complex the pooling agreement becomes the more reasonable it is to choose another alternative.

Finally, it is not usual for pooling agreements to be the subject of legislative action, although some examples do exist. Thus, in the American state of Delaware we find the following definition:

An agreement between two or more persons, if in writing, and signed by the parties thereto, may provide that in exercising any voting rights, the shares shall be voted as provided by the agreement, or as the parties may agree, or as determined in accordance with a procedure agreed upon by them (Del. Code Ann. Tit. 8, §218, 2005).



This definition is in conformity with the definition suggested by the American Bar Association's Model Business Corporation Act (4th edition 2008, incorporating the heretofore separate American Bar Association sponsored Model Close Corporation Supplement and all future references are to this edition) and all that appears to be required is a writing executed by the relevant parties.

From the wording of these guidelines, it can be determined no time periods are prescribed nor are there any guidelines as to what remedies are available should there be a breach of contract. Therefore, to what extent one party may denounce the agreement on the grounds the agreement no longer has any use, or one party wishes to transfer his interest is left to the imagination of counsel.

Moreover, one of the serious problems with a pooling agreement is how is it drafted so as to be effective. Normally, the agreement contains proxy mechanisms which are needed as often not all the shareholders may appear for the general assembly in question. Attorneys in an effort to make the proxy mechanisms effective and not revocable just minutes before the general assembly of shareholders have developed various techniques which can be classified as follows:

- an irrevocable proxy to a third party;
- each shareholder grants an irrevocable proxy to the other shareholders to be used in case there is a default by a shareholder.

Sometimes the proxy arrangements are described as "express irrevocable proxies" other times as "express vested irrevocable proxies". But the problem persists: if one shareholder or signatory to the pooling agreement defaults, how is enforcement made compulsory? There are no simple linear answers and the response will vary from jurisdiction. In the section below entitled "*Proxy and irrevocable power of attorney coupled with interest*" this topic is explored in more detail.

A simple pooling agreement has the following structure, although a more extensive pooling agreement is set forth under "*CHAPTER THREE DRAFTING SUGGESTIONS*":

**FORM NUMBER 1**  
**PROXY AND**  
**POOLING AGREEMENT**

"Limited Proxy and Pooling Agreement

This Pooling agreement "(Agreement)" of limited use and objectives is made as of the ...day of... between ...("") and ...(""), representing ...% of the outstanding and issued capital of ...corporation.

**Recitals**

1. The Board of Directors has submitted to the general assembly of ...corporation to be held on the ...day of...20..., a request for a vote on whether or not the corporation should augment its capital by -with a subscription by present shareholders on a pro rata basis or should the corporation consider a public offering.

After informal discussions, the present signatories have agreed to recommend a subscription by present shareholders so as to preserve the classification of corporation as a close corporation.

**Agreement**

In consideration of the foregoing and other good and valuable consideration, the adequacy and receipt of which is hereby acknowledged, the signatories to this agreement herein agree as follows

(a) to vote their shares in favor of the augment of capital with subscription rights in the present shareholders, provided prior subscriptions have been completely realized, and

(b) the signatories hereby irrevocably appoints ...as their representative with an irrevocable proxy to act on their behalf but if she/he is unable to act, then ... as its proxy, with full power of substitution, to execute written consents and vote all shares with respect to the matters as put to vote in the general assembly hereinbefore indicated, or any adjournments of same, and it is expressly provided that this proxy is coupled with an interest and is therefore irrevocable during the term of this Agreement.

(c) Unless implemented by the ...day of ..., 201..., this Agreement shall terminate and be considered null and void except for any damages due thereunder.

This Agreement is not assignable and shall be governed by the laws of ...

Signed and executed this ...day of ... 201...

Signatories"

This pooling agreement makes reference to a proxy coupled with an interest which is an attempt to avoid the application of the common and civil law rules that all proxies, based on principal and agent, can be revoked, unless the proxy has been given to a third party, even another shareholder, who has a special interest in having such a proxy, e.g., an investor.

Legislative guidance concerning pooling agreement in general is missing and it is difficult to find statutory material dealing with this topic, although of course there are numerous decisions in most jurisdictions commenting on this instrument.

This may explain why often a pooling agreement is confused with a voting trust, with which it is easily distinguishable as the latter requires a transfer of title of ownership of the shares. It is frequent to see in legal instruments the caption "Pooling Agreement" and then the instrument is replete with provisions creating a trust in a third party, i.e., what is drafted is legally a voting trust.

And finally, the more material inserted in pooling agreement the less it shall resembles this legal instrument which historically is a short, proxy arrangement, revocable or not, for a specified general assembly.



### 1.1.5 The Venerable Voting Trust

In its purest form, a voting trust is created pursuant to a written agreement wherein the shareholders transfer their shares to a trustee and, the shareholders may or may not, receive certificates from the trust. Moreover, the trustee, or trustees, must have the power to vote the shares in question.

However, care must be taken not to extend the concept to its absurdity, as in one reported case where the trustee personally was owner of 1% of the corporation in question but through a voting trust the trustee had the power to vote all the shares. The voting trust was declared invalid as a distortion of corporate law. Perhaps this is a situation of hard cases make bad law for there seems no violation of trust law principles.

Nonetheless, the statutory requirements of a voting trust are widespread and varied although many American States have adopted the American Bar Association's Model Business Corporation Act wherein a voting trust is defined as hereinafter indicated.

The usual essential elements of a valid voting trust, with variations dependent upon the jurisdiction, are:

- the trust is reduced to writing;
- the trust is formed by one or more shareholders;
- any person can be a trustee;
- there must be a term to the trust as specified in the relevant statute;
- a copy of the trust must be filed at the office of the company;
- the shares of the shareholder must be surrendered and thereafter new shares issued in the name of the trustee;
- the new shares must bear a legend referring to the trust agreement.

The critical difference from a pooling agreement and a shareholders' agreement is that the voting trust requires a transfer of title of shares, thus converting the shareholder from owner to a beneficiary.

What is wrong with a voting trust from the practitioner's viewpoint as a method of controlling shareholder votes? Why does the counselor need to seriously consider the alternative of a shareholders' agreement? Many reasons compel this conclusion.

To start with, a shareholder has to give up her/his share. This implies various disadvantages. Many statutes, both in common law and civil law countries, grant shareholders the right of information. Shareholders have a right to demand an accounting of the management or to assert mismanagement and seek recourse to a court.

Under a voting trust, who is the shareholder? A good argument can be made that the shareholder is the beneficiary of the trust, and only the trustee can request information from the corporation.

Furthermore, how shall the trustee vote on any issue? Normally, the creation of a trust will of necessity require a trust agreement to which various general lines of desired action by the trustee can be indicated by the shareholders.

We can envisage a general meeting of the beneficiaries, but is the trustee bound to accept their recommendations or the terms of the trust agreement? As the concept of a trust implies independent judgment, our answer must be, probably not, although the beneficiaries may have an action against the trustee. And the idea of a trustee while highly developed in the common law jurisdiction is virtually unknown in the civil law jurisdictions, although analogies can be made.

Moreover, the statutes normally set a time limit to a voting trust which often is not in the interest of minority shareholders since upon the lapse of the voting trust their rights become subject to the majority rule except for any statutory or equitable principles in the jurisdiction protecting minority owners.

Additionally, the tax treatment of trusts in many countries is not the same as the tax treatment of individuals and as soon as a voting trust is created the shareholder may find the new tax status in not advantageous, e.g., in the USA, trusts cannot qualify for special tax treatment granted to small corporations containing a reduced number of shareholders where same are treated as partnerships.

And finally, what is probably the most damaging aspect of all is that statutes regulating the voting trust normally require the trust to be registered at the company headquarters. Thus, the desire of a client to keep out of public view aspects of a transaction cannot be satisfied. All is known.

### 1.1.6 American Bar Association Definition of a Voting Trust

A typical statutory regulation of a voting trust is that embraced and recommended by the American Bar Association in its model act known as the Model Business Corporation Act (MBCA). The relevant part reads as follows:

#### § 7.30. Voting trusts.

(a) One or more shareholders may create a voting trust, conferring on a trustee the right to vote or otherwise act for them, by signing an agreement setting out the provisions of the trust (which may include anything consistent with its purpose) and transferring their shares to the trustee. When a voting trust agreement is signed, the trustee shall prepare a list of the names and addresses of all owners of beneficial interests in the trust, together with the number and class of shares each transferred to the trust, and deliver copies of the list and agreement to the corporation's principal office.

(b)...

(c) All or some of the parties to a voting trust may extend it for additional terms of not more than 10 years each by signing an extension agreement and obtaining the voting trustee's written consent to the extension. An extension is valid for 10 years from the date the first shareholder signs the extension agreement. The voting trustee must deliver copies of the extension agreement and list of beneficial owners to the corporation's principal office. An extension agreement binds only those parties signing it. (American Bar Association Model Business Corporation Act).

Note the MBCA requires delivery of the agreement to the headquarters of the Company, an obligation which many signatories will wish to avoid and hence not utilize the route of a voting trust.

## CHAPTER 14

# Drafting Suggestions for Controlling the Board of Directors

---

The lot of the minority shareholder in a close corporation is not always happy.

Robert A. Kessler, *Corporations: Majority Power and Shareholder Arrangements for Control*, 4 Nova. L. J. 1 (1980)

### 14.1 FOREIGN INVESTOR PROTECTION

The theory of the shareholders' agreement in any jurisdiction shall not be different if a shareholder is a foreigner, or, what is usually the case, a non-resident foreign shareholder.

Nevertheless, the non-resident shareholder needs special protection as it is too easy for contentious other shareholders to convoke meetings where notice is not properly served but this fact is difficult to prove.

Therefore, what follows are suggestions for applicable forms and the first form is an extremely simple format as to management in a private corporation but with special regard for the foreign non-resident shareholder as to requiring notice through registered mail return receipt requested, an antiquated method but still highly effective for ensuring proper delivery of notice.

#### FORM NUMBER 21

#### PROTECTION AS TO MEETINGS

#### FOR NON RESIDENT INVESTOR

#### "BOARD OF DIRECTORS

The Board shall have responsibility for the supervision and management of the Company and its business.



The parties hereby agree to use their voting rights to ensure that for so long as xxx [indicate shareholder or others] holds at least 10 per cent of the Company's issued ordinary share capital; xxx may appoint such number of Company Directors as is proportionate to its percentage of shareholding in the Company (rounded up to the next whole number) and may appoint alternates for such directors.

The chairman shall be a director appointed by the Board. The chairman shall have a second or casting vote (Author: optional).

The parties shall procure that meetings of the directors are convened in... and held at least once every two months and that a written agenda for each meeting of the directors specifying the matters to be raised at the meeting is sent (together with the notice convening the meeting which may be given by telephone, facsimile, e-mail or telex) not less than five Business Days before the date of the meeting to all directors (or their alternates) entitled to receive notice of the meeting whether situated within or outside the ... but a meeting of the Board may be convened by giving reasonable notice (such notice to specify the agenda of the meeting and any resolutions proposed to be passed) if the interests of the Company would be likely to be adversely affected to a material extent if the business to be transacted at such Board Meeting were not dealt with as a matter of urgency or if all the Directors agree (an 'Emergency Board Meeting').

PROVIDED that as regards shareholder xxx (Author: foreign investor) notice shall obligatorily be given by registered mail with return receipt requested to the address indicated in this shareholders' agreement.

FURTHER,

No resolution or significant action of the Board may be taken at a Board meeting without, compliance with the above paragraph except that such consent shall not be required if the Company has used all reasonable endeavors to obtain xxx consent and it has been unreasonably refused.

A Director shall be treated as present in person at a meeting of the Directors notwithstanding that he is not physically present at the place where the meeting is held if he is in communication with the meeting by conference telephone or other communication equipment such as video conference or even personal computer virtual conferences so long as all parties physically present at or so in communication with the meeting are able to be heard by all others. Such a Director shall be counted in the quorum of the meeting and shall be entitled to vote at the aforesaid board of directors meeting."

The above form specifically seeks to prevent the alleged absentee foreign investor and shareholder from being sidelined, whether by design or lapse, from any important meeting of the board of directors. The following form ensures the "voice" of the foreign investor shall always be heard at the general assembly.

It is quite frequent, unfortunately, that when dissension sets in resident shareholders often attempt to take advantage of an absentee shareholder with notices of convocations never received and by the time the absentee shareholder does realize what

happened counsel is prescribed by the statute of limitations from taking effective action.

## 14.2 PROTECTION AS TO PRESENCE IN GENERAL ASSEMBLY

The form immediately following can be used either for a private or public corporation as it seeks to restrict the functioning of a general assembly indirectly through quorum requirements and unanimous voting conditions.

Moreover, if we are dealing with a public corporation and due to the diffuse shareholding, the following form must be restricted to where a group of shareholders are able to constitute a majority of the shares.

### FORM NUMBER 22

#### PROTECTION AS TO PRESENCE IN GENERAL ASSEMBLY

"Agreement made this ... day of ..., year ....., between:

[list all parties, residences, with whom married, regime of marriage]

WHEREAS the Corporation was duly incorporated pursuant to the laws of... by Articles of Incorporation bearing the date of...and bearing the denomination of '...' [name]

AND WHEREAS the following shareholders registered on the books and records of the Corporation holding a majority of the shares authorized and issued are as follows:

#### SHAREHOLDER COMMON SHARE OTHER SHARE

AND WHEREAS the above shares constitute all of the presently issued and outstanding shares in the capital stock of the Corporation, which shares are free and clear of any liens, claims and encumbrances whatsoever;

AND WHEREAS the parties have agreed to enter into this Agreement for the purposes of ensuring the affairs of the Corporation shall be conducted in accordance with the intention of the shareholders and to provide for their respective obligations with respect to the Corporation.

NOW THEREFORE, the parties agree as follows:

1. The present shareholders' agreement regulates the relations between the signatories; specifically it regulates the convocation and functioning of the general assembly.

The parties shall procure that the annual meetings of the general assembly are convened according to the terms of the law that a written point of order for each meeting of the general assembly specifying the matters to be raised at the meeting is sent (together with the notice convening the meeting which may be given by telephone, facsimile, e-mail or telex) not less than five Business Days before the date of the meeting to all shareholders entitled to receive notice of the meeting whether



situated within or outside the jurisdiction of the corporation but a special meeting of the general assembly may be convened by giving reasonable notice (such notice to specify the points of order of the meeting

PROVIDED that as regards shareholder xxx (**Author:** foreign investor) notice shall obligatorily be given by registered mail with return receipt requested to the address indicated in this shareholders' agreement.

FURTHER,

A shareholder shall be treated as present in person at a meeting of the general assembly notwithstanding that he is not physically present at the place where the meeting is held if he is in communication with the meeting by conference telephone or other communication equipment such as video conference or even personal computer virtual conferences so long as all parties physically present at or so in communication with the meeting are able to be heard by all others. Such a shareholder shall be counted in the quorum of the meeting and shall be entitled to vote at the aforesaid board of directors' meeting."

PROVIDED FURTHER,

That no general assembly shall be validly constituted without the presence of at least ...percentage of all the issued shares and for voting purposes on any point of order there shall be required ...percentage of the shares present at such general assembly.

**[indicate quorum conditions as to formation and deliberation]**

5. The following items must be deliberated by a unanimous vote of those present at the meeting of the board of directors:

**[indicate those items requiring an unanimous vote, or in the alternative a high vote requirement can be established]**

Date and signatures"

As can be seen, this form protects quite well the foreign non-resident shareholder as it requires a presence and impedes voting if a high vote quorum is established.

### 14.3 VETO BY NON-RESIDENT FOREIGN INVESTOR

Another clause, this time referring to the composition and functioning of board of directors of a private company as distinct from giving notice. Here we have language which ensures an effective veto by the non-resident foreign investor:

**FORM NUMBER 23  
ENSURES VETO OF  
NON-RESIDENT SHAREHOLDER**

"BOARD OF DIRECTORS

Article... Establishment of the Board of Directors

The Company shall have a Board of Directors.

Article... Powers of the Board of Directors

The Board of Directors shall be the highest authority of the Company and shall have power to decide all major issues of the Company and be in charge of overall supervision of the Company.

Article... Composition of the Board of Directors

(1) The Board of Directors shall consist of five (5) directors (as an example)

(2) Each shareholder shall be entitled to appoint the number of directors as proportionately to its shareholding ratio as possible. The Party entitled to appoint a majority of directors shall be entitled to appoint the Chairman and the General Manager (CEO).

Provided, however, shareholders X, Y,... (here insert the non-resident shareholder) shall be entitled to appoint at least one director each.

Article... Term and Powers of the Directors

(1) Each director shall be appointed for a term of three (3) years and may, upon the expiration of his term, serve consecutive terms if re-appointed by the Party that originally appointed him. If any director fails to take office during his term or is unable to perform his duties or there is any other reason, the Party which originally appointed him may replace him by giving 5 Business Days' prior written notice to the Company and the other Parties, and the substituted director shall serve for the outgoing director's remaining term.

(2) The Chairman shall exercise his authority within the limits established by the Board of Directors and may not under any circumstances contractually bind the Company or otherwise take any action in excess of his scope of powers regulated by the Board of Directors.

Article... Powers of the Board of Directors

(1) Resolutions involving any the following matters may only be adopted upon the unanimous affirmative vote of each and every appointed director after consultation with the general assembly of shareholders and upon receipt of a recommendation from said assembly:

- a. Investment or other expenditure, taken individually (but including all related investments or expenditures), in excess of **[establish currency limit]** or equivalent;
- b. Approval of the relevant accounting reports and financial statements for the previous fiscal year and approval of the financial budget plan for the following fiscal year;
- c. Approval of any employee option plan;
- d. Increase or decrease in the number of directors or statutory auditors;



- e. Amendment of the Articles of Association of the Company or the adoption or amendment of any internal regulations;
- f. Any increase or decrease of the registered capital of the Company, or any issuance of securities;
- g. Merger, consolidation, split, major acquisitions, disposition of major assets of the Company or change of the Company's legal structure;
- h. Dissolution, or liquidation of the Company;
- i. Any incorporation or dissolution of a joint venture company or subsidiary in which the Company owns interest;
- j. Any establishment, relocation or closing of a branch office;
- k. Approval of a director's right to hold office in a competitor of the Company and transactions between the Company and a director;
- l. Any delegation of powers from the Board of Directors;
- m. Any approval of investment in another person or economic entity in excess of **[establish currency limit]** in any one instance;
- n. Any borrowing or guarantee of monetary debt in excess of **[establish currency limit]**;
- o. Acquisition of all or important part of the business of another person or economic entity;
- p. Approval of any expenses in excess of **[establish currency limit]** in any one instance;
- q. Appointment and replacement of an outside counsel or accounting auditor
- r. Acquisition of assets with a value of **[establish percentage limit]** or more of the Registered Capital of the Company at the time of such acquisition;
- s. Declaring dividends to the Parties; and

(2) All resolutions of the Board of Directors other than those listed in Article above shall be adopted upon the affirmative vote of more than half (1/2) of the directors present at the Board meeting:

#### Article... Convention of Board Meeting

(1) The Company shall convene the first meeting of Board of Directors within thirty (30) days of the formation of company. At the first Board meeting, the General Manager shall prepare and submit to the Board of Directors a business plan (an annual working plan) approved by the Parties for the period of two (2) years from the formation of said company.

(2) The Board meeting shall be held at least once each calendar quarter and the Board meeting shall be called and presided by the Chairman. Upon the request of two (2) or

more of the appointed directors, or the General Manager, the Chairman shall convene an extraordinary Board meeting in order to review and approve the matters submitted by such two (2) or more of the appointed directors, or the General Manager.

(3) The Chairman shall give fifteen (15) days' prior written notice to the directors about the agenda, time and location of the meeting of the Board of Directors by registered mail return receipt requested. Within five (5) days from receipt of such notice, the directors shall confirm receipt of such notice in writing to the Chairman. Each Party shall make their best efforts to cause the directors appointed by such Party to attend the Board meeting. The Chairman shall give notice to the directors about the details of the subject matter of the Board meeting five (5) days prior to the date of the meeting.

In special cases, and with the written consent of two-thirds (2/3) or more of the appointed directors, the fifteen (15)-day notice period for the Board meeting may be shortened. The Chairman shall determine the procedure for carrying out the Board meeting. Resolutions may be adopted at the Board meeting only with respect to the items of which the directors have been notified in advance in the aforementioned manner, unless all attending directors unanimously agree in writing to add more items.

(4) A Board meeting may be convened only with the attendance of two thirds (2/3) or more of the appointed directors (**the percentage should be sufficient to obligatorily include a director nominated by any non-resident shareholder**). If the number of directors attending the duly notified Board meeting is not sufficient to form a required quorum (of 2/3 or more), then such meeting shall be immediately adjourned and rescheduled and written notice of such rescheduled meeting shall be delivered to the directors not less than five (5) days in advance of the rescheduled meeting. If the number of directors who attended such rescheduled meeting is not sufficient to constitute a quorum under the first sentence of Article (4), but is more than one-half (1/2) of all appointed directors, then a quorum shall be deemed to exist for purposes of the rescheduled meeting notwithstanding the first sentence of this Article except if a director nominated by ...is not present (**director nominated by any non-resident shareholder**).

(5). Any director unable to attend a meeting of the Board of Directors may, by executing an appropriate power of attorney, appoint a proxy to attend and vote in his place, and such proxy shall be recognized as the duly authorized representative of the director.

Provided, however, in the case of a director appointed by a non-resident shareholder, then the presence of such director shall be mandatory for a validly constitutive meeting of the board of the directors. In the case of absence of such director at a rescheduled meeting, the Company shall apply to a court for judicial appointment of a director, upon such notice being given to the shareholder with a right to appoint such director.

(5) The Board of Directors shall prepare the minutes of Board meeting setting forth the decisions made at such meeting, and after being signed by all attending directors and proxies, keep such minutes in the records of the Company.



(6) At the request of at least two-thirds (2/3) of the appointed directors, a resolution of the Board meeting may be adopted by votes through facsimile, letters or other written form. Such resolution may be signed by the directors individually and shall have the same force and effect as a resolution adopted at a formally convened Board meeting (provided, however, that such resolution shall be valid on the condition that such resolution was made in accordance with this Article and in such case, all directors shall be deemed to have attended the relevant Board meeting except that any signature of a director appointed by a non-resident shareholder must be duly notarized.”

The above form is particularly efficient in protecting the interests of any absentee shareholder as it renders the board of directors ineffective to act without the presence of the director indicated by such shareholder.

#### 14.4 RESTRICTION ON MANAGEMENT

Another form which is even more constraining on management than the forms above as it contains more prohibitions, and hence more proper for the close, private corporation, is as follows. All that needs to be changed from the above form are the powers of the board of directors.

##### FORM NUMBER 24

##### ENSURES VETO OF NON-RESIDENT

##### SHAREHOLDER AND RESTRICTS CONSIDERABLY

##### POWERS OF BOARD OF DIRECTORS

##### “BOARD OF DIRECTORS

In view of the existence of shareholders who are non-residents, and to ensure due protection of their rights, the Board of Directors shall not cause any of the following actions, except with the consent of at least four (4) of the members of the Board of Directors:

- 1) any transactions, or modifications or alterations of same, with any officers, directors or individual members of the management of the Company;
- 2) any amendment, modification, rephrasing, alteration, or restatement of the articles of incorporation;
- 3) any change in the territory so that the company modifies its commercial operations as to where its presence is active;
- 4) any change in the company's name or the name under which it carries on business, or alteration of service mark or trademark;
- 5) any sale, conveyance, lease, transfer or other disposition of all or substantially all of the assets of the Company involving an amount in excess of ....separately or accumulated;

- 6) any modification in any rights attached to any shares, options to purchase shares, or other financial instruments conferring the right to shares, including the issuance of new shares;
- 7) any composition or arrangement with creditors or any action which would result in the company's declaring bankruptcy, insolvency, entering into, liquidation, or being subject to receivership;
- 8) any merger, acquisition, consolidation, amalgamation, recapitalization or other form of business combination
- 9) any agreement to remunerate the directors unless recommended by the general assembly;
- 10) any material modification, alteration, or change of the business plan, any financial expenditure not contemplated by the business plan, the entry into any line of business other than those which are contemplated by the business plan, or the failure to implement any line of business contemplated by the business plan;
- 11) any dividend payments or other payment or distribution on account of the ordinary shares or other share capital of the company;
- 12) other than in the ordinary course of business, any sale, transfer, lease, assignment, or any agreement to sell, transfer, lease, assign, or otherwise dispose of any material part of the company's property or assets (or any interest therein) in an amount exceeding...whether separately or cumulatively;
- 13) any issuance, redemption, repurchase, acquisition or agreement to issue, redeem, repurchase or acquire, any ordinary share or other share capital of the company or rights of any kind convertible into or exchangeable for ordinary share or other share capital of the company, or any option, warrant or other subscription or purchase right with respect to ordinary share or other share capital of the company;
- 14) any use of any shareholder's service marks, trademarks, or other proprietary information in conjunction with operation of the company's business; or
- 15) no resolution shall be passed for the winding-up or dissolution of the company nor shall any of the parties present or cause to be presented any petition for the winding-up, dissolution or administration of the company (unless in either case the company shall have become insolvent);
- 16) no alterations shall be made to the company's name;
- 17) the company shall not issue any debenture or loan stock (whether secured or unsecured) or create any Encumbrance over all or any part of its undertaking or assets;
- 18) apply for the admission of any share to any recognized investment exchange or enter into negotiations to effect a sale of the whole or substantially the whole of the undertaking, business and assets of the company;
- 19) no alteration shall be made to the company's accounting methods and practices;



## CHAPTER 23

# International Joint Ventures and the End of the Shareholders' Agreement

---

The most contentious and far-reaching legal tool for operating a close corporation was the Shareholders' Agreement, a contract entered into by some or all of the shareholders of a close corporation that provided for the corporation's management.

Hawell Wells, *The Rise of the Close Corporation and the Making of Corporation Law*, 5 Berkeley Bus. L. J. 263 (2008)

### 23.1 TERMINATION OF THE JOINT VENTURE

All joint ventures present common problems of withdrawal but the international joint ventures brings to the practitioner additional complex legal problems, specifically issues of repatriation of funds from a foreign jurisdiction; disposition of assets; continuation of the joint venture; prohibition of non-competition between equity owners for a reasonable length of time in a defined territory; maintenance or not of important contracts of technology; valuation of shares in the event of a pre-contractual buy-out.

Clearly, either the shareholders' agreement or the joint venture agreement should address matters concerning withdrawal from the joint venture.

As indicated previously in this treatise, the joint venture agreement suffers from what may be termed "dated", being viewed ordinarily as a document which precedes the formation of the joint venture company. This is not a foregone legal infirmity.

The joint venture agreement can easily provide it shall survive the formation of the company and it should. However, a detailed, drafted shareholders' agreement concerning the topics hereinafter to be discussed is advisable as it seen as "contemporary", a compass for regulating the conduct of the shareholders in such a capacity.

The use of the shareholders' agreement avoids arguments about whether or not the joint venture agreement and its provisions were "merged" into the formation of the company. No matter the joint venture agreement may state to the contrary, counsel seeking litigation will just disregard the declaration but the presence of a timely shareholders' agreement shall be the most effective response.

### 23.2 REASONS FOR WITHDRAWAL

Common reasons for providing a legal basis for withdrawal from a joint venture are accumulated losses over a set period; failure to obtain commercial objectives agreed upon at the beginning of the joint venture; breaches of any serious contractual obligations (e.g., failure to supply goods or capital from one of the partners); breach of other documents forming part of the joint venture documentation; force majeure, e.g., outbreak of civil strife; actions taken against a partner by a third party, deadlocks; moral offenses, particularly in civil law jurisdictions; persistent vetoes which make it impossible for a stable management to continue; change of control in a corporate shareholder; adverse judicial procedures against a shareholder; and, advisably, changes in the local law which materially affect the joint venture adversely. This is a partial list which can be expanded substantially depending on the facts of each joint venture.

Many of these concepts are admittedly fluid and open for discussion as to meaning and to the extent counsel can itemize them with precision, the probability of litigation is reduced. As an example, a substantial increase in local taxes may be seen by the local partner as perfectly anticipated but this point of view may not be suitable to the foreign investor-partner who finds the profit margin too small or the tax increase onerous. Consequently, some degree of orientation has to be provided by the documents so as to curtail judicial discretion.

Finally, the above examples are illustrative of what might be cause for the termination of the joint venture. But the shareholders' agreement must provide for these occurrences to be "triggering events".

### 23.3 MECHANISMS OF EXITING

For whatever reason the joint venture has come to an end, whether legally or as a practical matter, the close corporation prenuptial agreement – the shareholders' agreement – becomes a critical document to unravel and prevent what can be messy, costly litigation.

The basic assumption is the shareholders' agreement has a mechanism for permitting the shareholders to exit, failing which there will dissolution and liquidation of the joint venture.

What are the possible clauses, all of which shall be in the shareholders' agreement?

### *Put and Call Options*

The shareholders' agreement can provide what party shall the right to purchase (the put) the other's shares or be subject to an obligatory sell (the call). Of course it is not so simple, since if nothing is done, i.e., no right is exercised by anyone, nothing happens. In such a case, it has to be provided that there is then dissolution.

Of course, sitting at a conference table with counsel and discussing these problems is not terribly conducive to a successful launch of the joint venture. But it should be done, but with good spirits, the legal advisor pointing out these are routine clauses, much as warranties or due diligence clauses.

### *Russian Roulette*

Under this threatening sounding option, the parties agree that either party may serve upon the other party a notice to sell his shares for a certain price, and if the recipient wishes, she/he may refuse to sell, but may buy at the same price.

No one is bound to either sell or buy and if nothing is done, we know the result. The company is put into dissolution.

### *The Auction*

Under this method, the shareholders' agreement agrees that any shareholder can serve notice to hold an auction. And sealed bids are submitted. The item to be auctioned can vary from shares to buying up the business. No one is obligated to bid. If no one bids, the company is put into dissolution.

### *Resolution through Good Faith Dealing*

Perhaps the most palatable to the parties initiating their joint venture shall be clauses stating that in the event of a "triggering event", the parties shall negotiate in good faith towards a sale of shares of one to the other: or to a third party; or the sale of the company; or other reasonable solutions presented at the time.

Should a consensual solution not be reached, the company shall be put into dissolution. The emphasis is on the word "consensual".

### *Post-termination Issues*

When the occasion for a withdrawal is vested, or the client believes valid grounds exist for taking this position, the ambient amongst partners can become quite tense and suspicious. Counsel is forced to confront a number of possible scenarios and it is wise to be prepared for them by way of documentation.



If the parties agree there has arisen a reason for withdrawal, or if consent is not possible, but the client insists withdrawal has become urgent and must be accomplished, what concerns does a potential departure create beyond the reason for the withdrawal?

Independently of the validity or not of the reasons for the withdrawal, the issues are multiple and varied but the material can be grouped into generalities which must be the subject of discussion between the parties so as to arrive at an amiable resolution.

Arguing about whether or not withdrawal is possible will hardly unravel the deadlocks. Far better for the parties to accept the joint venture is not functioning and attempt to clarify all post-termination issues:

- The conduct of parties after the termination of the joint venture, usually obligations of no-competition.
- The survival of the joint venture company, thus avoiding dissolution.
- The continuation (or not) of contracts such as technology licenses.
- The release of the withdrawing partner from any guarantee and its discharge
- The valuation of the investment of the withdrawing partner.
- The repatriation of the investment of the withdrawing partner.

All of these items are amenable to drafting language in the shareholders' agreement and can be specifically under a heading referring to "termination of the joint venture".

#### 23.4 POST-TERMINATION RESTRAINTS ON COMMERCIAL CONDUCT OF JOINT VENTURE PARTIES

Once it is agreed that a partner shall withdraw from the joint venture, it is prudent that the shareholders' agreement have provided for a non-competition clause. A typical clause is reproduced below:

##### FORM NUMBER 41

##### NON COMPETITION CLAUSE

"Confidentiality and non-competition agreement

This Confidentiality and Non-Competition Agreement (the 'Agreement') is made as of this ... day of ...20... ('Effective Date') by and between the shareholders of Corporation...and the company all referred to collectively as the 'Parties.'

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements set forth below, the Parties agree as follows:

##### Confidentiality

The Parties shall keep secret and shall not at any time use for Parties' own or any third party's advantage, or reveal to any person, company, organization or any other entity, and shall use the Parties' best endeavors to prevent the publication or disclosure of, any and all Confidential Information (as defined below).

If any of the Parties breaches his obligation of confidentiality hereunder, the Parties shall be liable to the Company and other shareholders for all damages (direct or consequential) incurred as a result of the Parties' breach.

The restrictions in this Article... shall not apply to any disclosure or use authorized by all Parties or required by law.

'Confidential Information' shall mean information relating to the business, customers, products and affairs of the Company or Parties (including without limitation, marketing information) deemed or treated confidential by the Company or Parties, or which the Parties knows or ought reasonably to have known to be confidential, and trade secrets, including without limitation designs, processes, pricing policies, methods, inventions, technology, technical data, financial information and know-how relating to the business of the Company.

For purposes of Article... of this Agreement, the Company shall include all subsidiaries of the Company as well as any company in which in has direct or indirect control whether through voting capacity as a shareholder or director.

##### Non-competition

The Parties agree that they shall not engage in any business directly competitive with that carried on by the Company or each other, provided that nothing in this clause shall preclude the Parties from holding or being otherwise interested in any shares or other securities of any company, any part of which is listed or dealt in on any stock exchange or recognized securities market anywhere, and the Parties shall notify the Company and each other in writing of his interest in such shares or securities in a timely manner and with such details and particulars as the Company or the other parties may reasonably require.

Further, for a period of five (5) years following the termination of this Agreement:

(a) parties shall not approach clients, customers, suppliers or contacts of the Company or other persons or entities introduced to Parties in Parties' capacity as a parties or shareholder of the Company for the purposes of doing business with such persons or entities and will not interfere with the business relationship between the Company or Parties and such persons and/or entities;

(b) unless expressly consented to by the Company, Parties will not provide services as a parties or otherwise for any competitor of the jurisdiction of the Company, or engage, whether as principal, partner, licensor or otherwise, in any business which is in direct or indirect competition with the business of the Company or any of the Parties; and

(c) unless expressly consented to by the Company, Parties will not seek directly or indirectly, by the offer of alternative employment or other inducement whatsoever, to solicit the services of any employee of the Company employed as at the date of termination of this Agreement, or in the year preceding such termination.

The provisions provided in this Article ... shall be separate and severable and enforceable independently of each other and independent of any other provision of this



Agreement. In the event that any provision of this Article...should be found to be void under applicable laws and regulations but would be valid if some part thereof were deleted or the period or area of application reduced, such provisions shall apply with such modification as may be necessary to make them valid and effective."

### 23.5 CONTINUATION OF THE JOINT VENTURE

Following upon the post-termination conduct of the partners are the contentious issue of what shall happen to the joint venture company. Remembering that there are further important items, such as repatriation of the investment, or discharge from liabilities it is recommended drafting technique that the survival of the joint venture company be conditioned upon the fulfillment of the other obligations, otherwise the remaining partner has no incentive to be as useful and helpful as possible.

In other words, cooperate, collaborate, or face dissolution. Counsel should not expect that when the joint venture spirit evaporates the partners shall willingly collaborate to exonerate one another from their legal obligations towards the joint venture.

In fact, probably just the opposite will happen, with a great deal of maneuvering and therefore arms are needed, in this case, the effective threat of dissolution.

#### FORM NUMBER 42

#### SURVIVAL OF JOINT VENTURE

"Effects of termination

Should a partner decide to withdraw from the joint venture, for any of the reasons previously set forth in this shareholders' agreement as conferring such a right, then such termination of equity interest and withdrawal from the joint venture company shall be subject to all terms and conditions of the shareholders' agreement as well as, in particular, the following clauses:

(A) In the event of a termination of the joint venture by one of the partners electing to withdraw from the joint venture, pursuant to the terms of this shareholders' agreement, the parties agree to take all necessary steps to ensure the withdrawal is made in strict accordance with the terms of this shareholders' agreement in so far as compliance with all of the clauses concerning post-termination obligations.

The joint venture company shall continue to provide the services necessary to fulfill its commercial object and in all cases shall not cease functioning until there has been filed a request for dissolution, should such event come to pass, and in such event, its activities shall continue under the auspices of the Court.

(B) In the event of any termination pursuant to the terms of these clauses, the Partner which has not (i) given notice of termination, (ii) dissolved, (iii) become bankrupt, (iv) breached any provision or condition of the shareholders' agreement, shall be entitled, at its sole option, to elect by written notice to the other Partner, given within 30 days

after such notice of intention of termination, to purchase the Interest of the other Partner at fair market value as defined in this shareholders' agreement.

(C) Should the Partner holding said option not elect to purchase the interest of the other Partner, then the joint venture shall file for dissolution and liquidation."

Note this clause requires the remaining shareholders to buy out the withdrawing partner.

### 23.6 CONTINUATION OF CONTRACTUAL OBLIGATIONS

Many joint ventures are founded not only upon the financial capacity of the individual partners but also their technological prowess or know-how. Frequently, the formation of an international joint venture is accompanied by the execution of supply contracts of parts; transfer of technology licenses; divulging of trade secrets, customer lists, the information is varied but almost always of critical commercial importance.

When therefore, one partner wishes to withdraw from the joint venture, the unraveling of these commercial interests can be quite complex, and litigious, if the shareholders' agreement has not been drafted with these problems in mind.

If the withdrawal is peaceful and in accordance with the terms of the shareholders' agreement, then the following clause is suggested, and in all cases, such a clause should be part of the shareholders' agreement so as to create the necessary contractual obligations:

#### FORM NUMBER 43

#### SURVIVAL OF CONTRACTS

"Survival... If the voluntary withdrawal of a partner should occur, then the aforesaid withdrawal shall not affect any of the Parties' respective rights accrued or obligations, including the company, or contracts executed between the withdrawing party and the company or other partners, owed before notice of withdrawal

However, in the event the parties are unable to agree as to the terms of the withdrawal, or should there be initiated litigation concerning the terms and conditions of the withdrawal, then all contracts to which the withdrawing partner is a party shall be terminated provisionally pending the outcome of the litigation."

This is a clause with severe consequences but its objective is to discourage meaningless or frivolous litigation. It forces the other investor-partner to consider her/his actions with prudence and is intended to bring the parties to the negotiating table.

### 23.7 EXISTING LIABILITIES OF WITHDRAWING PARTNER

Assuming there is no contention between the withdrawing partner and the remaining partners, but the withdrawing partner is responsible as guarantor for any debts of the



joint venture company, a frequent occurrence when a multinational is one partner and a local investor another.

What if the credit institution refuses to release the withdrawing partner?

This is a theoretical possibility but not likely to happen, particularly if the withdrawing partner threatens to initiate dissolution procedures. But to make this threat, there has to be in the shareholders' agreement-the elements to permit such a threatening petition.

#### FORM NUMBER 44

#### GROUNDS FOR DISSOLUTION

"Dissolution and liquidation

Dissolution There shall be considered as valid grounds for a petition by a shareholder, for dissolution of the corporation, any one of the following reasons:

- (a) Breach by a shareholder, or the corporation, of the terms and conditions of the shareholders' agreement;
- (b) Breach of any contract to which a shareholder is a party and the other party is either a shareholder of the same corporation or the corporation is a party;
- (c) The written consent of all shareholders;
- (d) A deliberation to such effect by the board of directors of the corporation;
- (e) Accumulated losses over a period of time exceeding ...fiscal years;
- (f) Failure to obtain commercial objectives agreed upon at the beginning of the joint venture and as reflected in the joint venture documentation, including the shareholders' agreement;
- (g) *Force majeure*;
- (h) Actions taken against a shareholder by a third party which adversely affects the interests of the shareholder in the corporation; the corporation; or is contrary to any of the terms and conditions of any of the joint venture documentation;
- (i) Deadlocks which render the functioning of the corporation improbable and likely to cause stagnation economically, particularly at the level of the board of directors or a similar organ of a comparative legal structure;
- (j) Moral offenses affecting the public image of either the corporation or any shareholder;
- (k) Changes in the local law which materially and adversely affect the joint venture;
- (l) In the case of a shareholder who is a corporate entity, a shareholder ownership change which is likely to affect the joint venture negatively, with particular relevance in the areas of confidential information, trade secrets, competition, trade and customer lists as examples only.

Liquidation and Winding Up.

(a) Prior to the filing of a petition for dissolution, the shareholder seeking such dissolution shall serve notice upon all shareholders and the corporation of such intention. Within a thirty (30) day period any shareholder, or the corporation if duly authorized, may make an offer to purchase the interest of such shareholder in accordance with the relevant clauses of this shareholders' agreement concerning the market value of such shares and other terms as to purchase.

(b) During the period of the winding up of the affairs of the joint venture, the rights and obligations of the shareholders with respect to the management of the joint venture shall continue, except as to a shareholder that has wrongfully caused the dissolution, which shall have forfeited all such rights.

(c) Upon dissolution of the joint venture as described above, the assets of the joint venture shall be applied or distributed in the following order:

- (i) To creditors, including shareholders who are creditors to the extent permitted by law, in satisfaction of liabilities of the joint venture other than liabilities for distributions to shareholders;
- (ii) To the shareholder in satisfaction of liabilities, if any, for distributions; and
- (d) To the extent possible, the joint venture shall be liquidated in the same fiscal year in which the corporation is sold or otherwise disposed of."