THE IMPORTANCE OF HAVING A GOOD SHAREHOLDERS' AGREEMENT

POR

Jesús PEÑA

A shareholders' agreement is a private written agreement between all or some of a company's shareholders helping to define their roles and how they will reach certain decisions. It is one of the best ways for shareholders to protect their interests. Any use of a shareholders' agreement should be considered in line with the Company's by laws.

A shareholders' agreement, is a separate contract made between the shareholders, relating to the operation of the company. Such an agreement will usually cover issues that are similar to those covered in a company's by laws but, within the confines of the law, can cover whatever the parties to the agreement wish.

Without a shareholders' agreement, in the event of a dispute or a breakdown in trust between the shareholders, there will be no agreement in place on how to resolve the dispute or agree a way to terminate the relationship of the shareholders (other than the statutory provisions and the terms set out in the by laws).

When negotiating shareholders' agreements, it is always important to bear in mind that each shareholder may have different priorities. This may depend on a number of factors including the percentage of shares held by that individual and the respective duties of the shareholders. Someone who holds the majority of the shares in a company could be concerned about being chairman of the board and having a casting vote. Someone who holds a minority of shares in the company could be concerned about ensuring that he is a director whilst he is a shareholder so that his voice is heard (even if he can be outvoted). As with all negotiations, compromise will of course have to be reached between the parties so that a deal can be struck.

Although each document will be different, a shareholders' agreement will typically deal with some or all of the following:

Decision making at the general meetings of shareholders: What is the quorum, decisions by simple majority or supermajority, special veto rights.

Constitution of the Board and voting: How many members? What is a quorum? Who votes? Who may exercise a tie-breaking vote, etc..

Decision-making on the Board: Are decisions made by a simple majority, or supermajority? Are there certain classes of issues (e.g. raising additional equity, acquisitions, mergers, liquidation, etc.) which may require supermajority.

Appointment of Board of Directors. Who appoints the officers of the company? Is each appointment made by the assembly of shareholders? Or do certain shareholders or classes of shareholders have the right to appoint one or more directors on the board?

Appointment of Officers. Is the CEO, or are other officers appointed by a simple majority of the Board? Or are certain officers to be designated by certain supermajorities of directors? Does any board member have veto power over appointment of officers?

Dividends. Whether the company is to have a particular policy on dividends.

Raising Additional Capital. What triggers a capital call? What happens if one or more shareholders cannot keep pace with the capital call, will they be diluted? If so, to what extent?

Ensure arms' length transactions: minority shareholders need protections against special related party transaction, which may siphon off the assets of the company to the sole benefit of the controlling shareholder.

Rights of First Refusal. When one shareholder wishes to sell, other shareholders often want a right to buy the exiting shareholder, to ensure that they are not co-shareholders with strangers, or worse, hostile parties.

Put and Call Options. Can one shareholder opt to sell his shares to other shareholders (put option) or can a shareholder opt to buy shares of another shareholder (call option)? If so, at what price? Pricing the shares of privately held companies involves complex valuation issues typically performed by investment advisors.

Drag along and Tag Along Rights. If a shareholder decides to sell shares, can he trigger an obligation of other shareholders to sell on the same terms (drag along rights)? Or if there is one shareholder who sells, can another shareholder decide to tag along with such transaction, and sell on the same terms at the same time (tag along rights)?

Dispute Resolution. Will there be mediation, arbitration, or resort to a court system? Under the laws of what country?