

Shareholders' agreements in Jersey – an overview

Insights - 15/11/2023

Ogier has been seeing a steady stream of instructions relating to shareholders' agreements with a Jersey nexus. This briefing note provides an overview of the relevant Jersey legal issues that arise with the use of such agreements in commercial transactions.

| What is a shareholders' agreement?

A shareholders' agreement is a contract entered into between shareholders of a company relating to the governance of the company and the nature of the relationship between these shareholders, for example in relation to share transfers in the company. It will broadly complement the memorandum and articles of association of the Jersey company and carry out an analogous function.

Typically, there are two different scenarios where shareholders' agreements are relevant in a Jersey context:

1. a Jersey law governed shareholders' agreement in relation to scenarios where there is a strong local connection to Jersey, for example in transactions where all (or most) of the parties are Jersey resident or where there is a private wealth context with a Jersey trust holding structure
2. a foreign law governed shareholders' agreement in relation to a Jersey company that is used as a holding entity as part of an investment structure

A Jersey law governed shareholders' agreement will be no different from any other shareholders' agreement and will generally be a highly bespoke document that details the agreement between the shareholders. In Jersey, a form of such agreement will broadly be in the same structure as an English law shareholders' agreement. Jersey law has similar concepts to English law and so a

well drafted English law shareholders' agreement will often require little amendment.

Is a shareholders' agreement required for a Jersey company?

Under Jersey law, the main constitutional documents of a company will be its memorandum and articles of association. Therefore a shareholders' agreement is not a requirement for a company under the Companies (Jersey) Law 1991 (**Jersey Companies Law**). However, the use of a shareholders' agreement offers numerous advantages to all parties when used as a complement to a Jersey company's existing articles. In high value cross-border transactions, it would be very unusual not use a shareholders' agreement where there is an arrangement between shareholders and an underlying company. In such situations, the benefits afforded by a shareholders' agreement outweigh the initial costs in preparing this document.

What are the advantages of a shareholders' agreement?

The Jersey Companies Law describes a company's articles of association as having contract-like characteristics in that their effect is to "bind the company and its members to the same extent as if they respectively had been signed and sealed by the company and by each member". However, it does not go as far to say that the articles are a contract. Notably, certain contractual remedies such as a recession or termination will not be available under a Jersey company's articles. Therefore, most of the advantages of a shareholders' agreement stem from its effect as a "pure" contract.

- **Flexibility** – Under a shareholders' agreement, it is possible to agree terms that are not readily suitable to include in the articles. This includes provisions such as warranties, representations, information rights, and restrictive covenants that are readily enforceable under contract law
- **Privacy** – Subject to the potential requirement filing, as discussed below, a shareholders' agreement will be a private document and so may contain commercial terms which the parties may not want to be contained in the articles, which are required to be publicly filed
- **Remedies** – As a "pure" contract, parties to a shareholders' agreement will have the full range of contractual remedies available to them backed up by an established body of case law. Whereas a claim for damages can be easily made under a shareholders' agreement, a claim under the articles may be restricted by Jersey customary law and statutory procedures under the Jersey Companies Law
- **Dispute resolution** – A shareholders' agreement does not need to be governed by Jersey law.

This allows parties to use another law, frequently English law, as the governing law and to provide for foreign courts, or even arbitration, to be the jurisdiction for any disputes. This may lead to easier enforceability, particularly if the shareholders are based outside Jersey

What is the interaction between a Jersey company's articles and a shareholders' agreement?

A Jersey company's articles and a shareholders' agreement are complementary documents that carry out similar but different functions. It is best practice to ensure that the articles and shareholders' agreement are consistently drafted to avoid any interpretation issues or conflicting obligations.

A matter may be validly taken under the articles and be binding on the company but also be in breach of the shareholders agreement and merely result in a claim for damages. Conversely, a matter may be validly taken under the shareholders' agreement but be void against the company for not being carried out in accordance with the articles. This may, again, merely result in damages.

Regarding any provisions dealing with the prevailing document in case of any inconsistency, it is also important to consider that a Jersey company may not fetter its statutory powers via an agreement between it and its members. Although an English case, this position as set out in *Russell v Northern Bank Development Corporation Ltd* [1992] 1 WLR 588, is likely to be considered persuasive by a Jersey court.

Does Jersey law require a shareholders' agreement to be filed?

Under Article 100 of the Jersey Companies Law there is a requirement to file with the Jersey registrar a copy of all agreements, which have been agreed to by all the members of the company and which, if it had not been agreed to by all members, would not have been effective for its purpose unless it had been passed as a special resolution. This therefore does capture shareholder agreements if the relevant provisions are not already replicated in the articles filed with the Jersey registrar.

To avoid the filing requirement, it is therefore important to draft the shareholders' agreement to ensure that it does not trigger this clause. This is done by replicating parts of the shareholders' agreement that would require a special resolution passed by the members in the publicly filed articles. These parts broadly contain constitutional aspects of the company such as director appointments, resignations and powers as well as decision making powers of shareholders and directors. Share transfer restrictions, share issuance procedures, drag along and tag along rights and share class rights should be also included. Matters peripheral to the company's

constitution such as information rights between shareholders or restrictive covenants would not necessarily be required to be included.

Ogier's lawyers have substantial experience, gained both onshore and offshore, at drafting and commenting on shareholders' agreement and all manner of corporate governance related documents. Should you have any queries in relation to a shareholders' agreement with a Jersey nexus, please do not hesitate to reach out to your Ogier contact or learn more about our services on our [Corporate page](#).

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