

Shareholders' Agreement and Bye-laws: Italy: International Joint Ventures

- **Resource type:** Practice note
- **Status:** Law stated as at 25-Nov-2014
- **Jurisdiction:** Italy

This Q&A provides country-specific commentary on *Practice note, Shareholders' agreement and bye-laws: international joint ventures*, and forms part of our *international joint ventures transaction guide*.

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1. What are the main documents that regulate the constitutional arrangements and day-to-day operation of a joint venture company incorporated in your jurisdiction? (Please answer this and other questions in respect of the corporate vehicle that is most likely to be used for a private joint venture with two or more corporate shareholders.)

A company can be incorporated by agreement or by unilateral act, with the following documents:

Deed of incorporation (atto costitutivo)

The deed of incorporation of a company must be drafted by public deed and contain the main constituent elements of the company's structure:

- Shareholders' personal data and number of shares subscribed by each of them.
- Name of the company.
- Activities within the company's purpose.
- Amount of the subscribed and of the paid-up capital.
- Number of subscribed and paid-up shares, nominal value and type.
- Estimated value of credits and other assets contributed in kind, if any.
- Guidelines of the profit-sharing arrangements between the shareholders.
- Advantages granted to the founders or promoters, if any.
- Establishment of governing bodies of the company and the choice of corporate governance model, as well as the appointment of the first directors, statutory auditors and auditor vested with the audit of the accounts.
- Duration of the company and, where the company was incorporated for an unlimited time, the notice period (minimum 180 days and not more than one year) after which a shareholder may withdraw from the company.
- Incorporation costs.

Bye-laws (statuto)

The bye-laws contain a complete description of the company's structure and rules governing its operations. Some of these elements are the same as those in the deed of incorporation. The bye-laws are "the law" governing the company. They include, among other things:

- Company's object.
- Municipality of the registered office of the company and of branch offices, if any.
- Capital.
- Types of shares and rights attached to them.

- Procedure for the issue, transfer of, and liens on, shares (including pre-emption rights and other restrictions on share transfers).
- Operations, powers granted to and operating procedures for the governing bodies - shareholders' meetings, board of directors (including quorum and majorities), supervisory boards (if any).
- Appointment of, and powers granted to, the sole director or to the board of directors.
- Rules governing the appointment of the managing directors.
- Provisions on the board of auditors and on the subject vested with the audit of the accounts of the company.
- General principles of profit distribution.
- Dissolution and liquidation.
- Deadlock and hardship clauses, if any.
- Arbitration clause.

In the case of conflict between the deed of incorporation and the bye-laws, the latter will prevail.

Shareholders' agreements

Shareholders' agreements are not legally required but are very often adopted for a joint venture company. They govern the relationship between parties to a joint venture company. They can be complementary or dissimilar to the constitutional documents of the company.

The most common provisions include:

- Criteria for the appointment of representatives to the board of directors and board of statutory auditors (*collegio sindacale*).
- Agreement that the parties reserve some major decisions concerning the operation of the company to the shareholders' meeting, rather than to the board of directors. Such a provision may sometimes cause problems as it may conflict with the company's constitutional documents (for example, in the case of decisions that are usually considered to be only within the scope of the directors' powers). This can usually be avoided by ensuring consistent drafting of the two documents.
- Quorum and voting agreements.
- Restrictions on share transfers (for example, prior approval of the board of directors required for share transfers).
- Specific rules concerning pre-emption rights on share transfers (for example, exclusion of pre-emption rights in the case of intra-group transfers and so on) or as a consequence of a proposed winding-up of the company. Pre-emption rights on share transfers must always be provided for in the bye-laws or a shareholders' agreement as they are not automatically provided for by Italian statute. Italian law does, however, provide for option rights on the issue of new shares.
- Drag along and tag along rights.
- Call options and put options.
- Further capitalisation and funding of the company with respect to the joint venture project.
- Distribution policy.
- Details of the contributions of the joint venture parties (for example, work, human resources, know-how, use of patents and trade mark, investments). Also, details of accounting procedures for expenses borne directly by the shareholders and the circumstances in which they can be re-charged to the joint venture company, and so on).
- Consequences of the termination of the joint venture agreement.
- Allocation of risks and liabilities.
- Minority shareholders' protection.
- Restrictive covenants.
- Deadlock and conflict resolution.

- Confidentiality.

Agreements regarding voting rights, restrictions on share transfers and joint management relating to listed companies and joint-stock companies (*società per azioni*) can only last for a maximum duration of, respectively, three or five years. For joint-stock companies, if such agreements do not provide for a term, any party to them may withdraw with prior notice of 180 days. In addition, shareholders' agreements relating to listed companies must be made public.

There is no equivalent limit on the duration of similar agreements for limited liability companies (*società a responsabilità limitata*). Both types of company may be used as a corporate joint venture vehicle.

2. Is it possible to amend the constitutional documents of a company? If so, what are the relevant voting requirements?

Bye-laws of joint-stock companies can generally be amended by a shareholders' extraordinary meeting or, if provided by the bye-laws, by the board of directors in respect of specific issues (for example, establishment of branches, representative powers of the directors, transfer of registered office in Italy, mergers through incorporation in the case of a 90% equity holding).

The shareholders' extraordinary meeting can amend the bye-laws by a majority vote representing more than 50% of the corporate capital, unless a higher quorum is provided for in the company bye-laws. However, if a statutory quorum is not achieved for a first "call" meeting, a quorum representing more than one-third of the company's share capital is required at a second "call" meeting with a voting majority of two-thirds of the capital represented at the meeting. (*For an explanation of the first and second "call" system, see Control and minority protection, Country Question 2 (www.practicallaw.com/A21157).*) For listed companies, an attendance quorum of at least half of the company's share capital and a voting majority of two-thirds of the capital represented at the meeting are required to amend the constitutional documents at the first call meeting.

Bye-laws of limited liability companies can generally be amended by a shareholders' meeting with a majority vote representing at least 50% of the corporate capital,

The bye-laws may provide for a higher majority, thus potentially enabling minority shareholders to block amendments of the bye-laws.

3. Is every shareholder automatically bound by a company's constitutional documents?

Yes.

4. Is it necessary for a company's constitutional documents to be registered and open to public inspection?

Yes. The deed of incorporation and bye-laws must be registered with the Companies Registry. They are open to public inspection and can be copied.

5. Is it necessary for a shareholders' agreement to be registered and open to public inspection?

Shareholders' agreements are generally not registered. However, there is a statutory obligation to report such agreements to the competent authorities:

- In some specific areas (for example, broadcasting and television, publishing).
- When they govern the operation of listed companies.
- When they may have the effect of restricting competition among undertakings and fall within the provisions of the Italian Antitrust Act, or when they may result in the abuse of a dominant position.

6. Is a company bound by its constitutional documents?

Yes. The deed of incorporation and bye-laws bind the company and its members. A company is not bound by a shareholders' agreement.

7. Is it common practice for a joint venture company to be a party to a shareholders' agreement relating to the joint venture?

No.

8. What are the remedies for breach of a shareholders' agreement?

The only remedy for breach of a shareholders' agreement is a claim for damages against the shareholder in default, as the agreement is not enforceable against the joint venture company and does not prevail over the company's constitutional documents. Consequently, shareholders' agreements usually contain indemnity clauses.

Members may be able, in limited circumstances (for example, risk of significant and non-recoverable damages), to obtain precautionary protective measures if a shareholders' agreement is breached, until the court rules on the merits. (Remedies may include, for example, seizure of shares in the company.)

9. What are the remedies for breach of a company's constitutional documents?

Any resolution of the general meeting (ordinary and extraordinary), that conflicts with applicable law or the company's bye-laws, is subject to annulment on request of the:

- Shareholders, provided they did not attend the shareholders' meeting, they dissented on the specific resolution, or they abstained from voting.
- Directors.
- Board of statutory auditors.

Actions of the directors that conflict with the law or the company's bye-laws may result in liability for damages to the company or, in some cases, to the company's shareholders and creditors.

The most serious management irregularities may give rise to criminal liability of directors (for example, conflict of interest, false accounts, illegal distribution of profits, and so on).

Share transfers carried out in violation of share transfer provisions included in the bye-laws are null and void.

10. In which document would you commonly insert the following provisions:

There are few hard and fast rules but the following is a common division.

(a) Object and scope of the venture.

Bye-laws.

(b) Capitalisation and funding.

Bye-laws and shareholders' agreement.

(c) Board composition and management arrangements.

Bye-laws and shareholders' agreement.

(d) Distribution of profits (including dividend policy).

Bye-laws and shareholders' agreement.

(e) Provisions for dealing with deadlock.

Bye-laws and/or shareholders' agreement.

(f) Termination provisions (including right of withdrawal).

Bye-laws and/or shareholders' agreement.

(g) Restrictive covenants.

Shareholders' agreement.

(h) Rights to appoint and remove directors.

Bye-laws and/or shareholders' agreement.

(i) Quorum for board and shareholder meetings.

Bye-laws.

(j) Procedures for shareholders' meetings.

Bye-laws.

(k) Division of shares into classes.

Bye-laws.

(l) Chairman's casting vote.

Bye-laws.

(m) Notice provisions.

Bye-laws.

(n) Share transfer provisions.

Bye-laws and/or shareholders' agreements.

(o) Minority protection (veto rights and so on).

Bye-laws and/or shareholders' agreement.

11. In the event of a conflict between a shareholders' agreement and a company's constitutional documents, which document is likely to prevail?

From the company's point of view, the bye-laws prevail.

As between shareholders, a valid provision of the shareholders' agreement prevails over a conflicting clause in the bye-laws. However, the only remedy for breach of a shareholders' agreement is a claim for damages.

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Professional qualifications. Admitted to the Supreme Court and the Council of State 1991. Admitted to the Italian Bar 1983

Areas of practice. Corporate acquisitions (JV and M&A), corporate litigation, Energy

Recent transactions

- **Hutchinson SA** Assisted Hutchinson SA (world leading manufacturer in rubber, thermoplastic elastomer and polymer products : sealing equipment and acoustic and thermal insulation products, with over 31,000 employees worldwide) in the acquisition of Gasket International (specialised in designing and manufacturing valve sealing system components for the oil and gas market) headquartered in Italy (Castelli Calepio and Grumello) and China (Suzhou), with over 70 million Euros turnover and 250 employees.
- **Total E&P Italia** Assisted Total E&P Italia SpA in the sale to Mitsui & Co., the Japanese multinational, of its stake of Total's 100% subsidiary, Total E&P Energia Italia S.r.l (owner of
- **Rosneft** CMS Italy assisted Rosneft JV Projects SA, indirectly 100% controlled by OJSC Rosneft Oil Company, ranked among the world's top publicly traded oil and gas companies, in the acquisition of 13,7% shares of Saras SpA, owned by the Moratti family (closing to take place on April 23 next) - Value over 178 million Euros. CMS also assisted in relation to the subsequent VTO (Voluntary Tender Offer) for a maximum value of 94 million Euros. The team provided assistance in the drafting of the Tender Offer, its related publicity formalities, as well as the consultations with the relevant stock exchange and the market regulator authority.

Languages. Italian, English, French, German

Professional associations/memberships.

- IBA – International Bar Association

- UIA – Union Internationale des Avocat
- UAE – Union des Avocats Européens
- ABA – American Bar Association

Publications.

- EEIG – the European Economic Grouping 1995
- Getting the Deal Through - Oil Regulation 2013
- Getting the Deal Through - Gas Regulation 2013
- Renewables Support Mechanisms Across Europe
- Renewable Energy Experts in Europe

Resource information

Resource ID: 4-107-4088

Law stated date: 25-Nov-2014

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Series: Country Q&A

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