**LEGAL ISSUES RELATED TO SHAREHOLDER AGREEMENT/ MEMBERS’ AGREEMENT**

**IN VIETNAM**

In current developed economy, it is increasingly common for individuals and organizations (domestic and foreign) to cooperate in the field of business and join forces to operate businesses. When they cooperate to build a business, rights, obligations and bond will arise between them. This is expressed through documents and agreements signed and acknowledged between the parties. There are mandatory documents specifically regulated by law such as the company charter, and there are also non-mandatory documents, but are still quite commonly used as agreements between individuals and organizations who jointly setting up a company. That is the “Shareholder Agreement” for a joint stock company or the “Members’ Agreement” for a limited liability company (hereinafter collectively referred to as “**Shareholder Agreement**” or “**Agreement**”, and “shareholders” for joint stock companies and “members” for limited liability companies will be collectively referred to as “**Shareholder**”). The Shareholder Agreement has been specifically regulated by the laws of many countries. In Vietnam, although this type of agreement is quite commonly used, there are no specific regulations governing it. Therefore, there are many problems arising around drafting, implementing, as well as ensuring its legal validity. The following article will analyze the legal and practical issues surrounding this Agreement.

1. **Legal basis**
* Civil Code issued on November 24, 2015 (“**Civil Code 2015**”);
* Law on Enterprise issued on June 17, 2020 (“**Law on Enterprise 2020**”);
1. **Some general issues about the Shareholder Agreement**
	1. **Definition**

In Vietnam, the Law on Enterprise 2020 and guiding documents do not have any regulations mentioning or recognizing the definition of the Shareholder Agreement. Therefore, to define the Shareholder Agreement, we need to consider the nature of this Agreement. Accordingly, the nature of the Shareholder Agreement is as its name suggests, an agreement between shareholders and members of a company. These can be the founding shareholders and members at the time of the company’s establishment, or shareholders and members who contribute, purchase shares or capital contributions (shares and capital contributions hereinafter collectively referred to as “**Shares**”) after the company has been established. This Agreement is a collection of commitments and constraints on the rights and obligations of the participating parties on issues related to the company. It can be about the management and operation of the company, it can also be related to voting rights, share transfer rights or other issues depending on the agreement and consensus between the participating parties.

In short, it can be understood that “*Shareholder Agreement is an agreement between two or more Shareholders of a company on issues related to the company and/or the rights and obligations of Shareholders, made before or after the company is established and is binding on Shareholders participating in the agreement*”.

* 1. **Subject of the Shareholder Agreement**

As mentioned in Section 2.1, the Shareholder Agreement is signed between two or more Shareholders of the company. This can also be an agreement between all Shareholders of the company, or between some groups of Shareholders, this is not limited. Therefore, the binding value of the Shareholder Agreement is not always applicable to all Shareholders of the company, but can only bind and regulate the relationship between Shareholders participating in the Agreement.

* 1. **Purpose and content of the Shareholder Agreement**

When negotiating and signing the Shareholder Agreement, the company’s Shareholders may have many different purposes, in order to establish a cooperative relationship between the parties. The Shareholder Agreement helps participating Shareholders increase their ability to control and manage the company; increase efficiency when voting and vetoing company issues; restrict and control the rights to transfer Shares, withdraw capital of the remaining Shareholders in the Agreement, etc.

The Shareholder Agreement can go beyond the company’s charter and legal regulations regarding the rights that shareholders participating in the agreement may have. Accordingly, some common contents often included in the Shareholder Agreement include: agreement on corporate governance issues; about the rights and obligations of Shareholders in the company (which can be voting rights, the right to transfer shares, the right to appoint people to management positions in the company, etc.), about distribution of profit, distribution of liquidated assets, regulations on handling deadlock, etc. These issues are agreed upon by the parties and may comply with the law, but there are also cases that are not completely in accordance with the law, but the parties accept and agree with each other. This may lead to some risks to the legal validity of the Shareholder Agreement.

1. **Practice**
	1. **Issues related to the legal validity of the Shareholder Agreement**

As mentioned, Vietnam’s Law on Enterprise 2020 and guiding documents do not have specific regulations governing the Shareholder Agreement. Therefore, the Shareholder Agreement can be considered from the perspective of a civil contract according to the provisions of the Civil Code 2015 when it meets the conditions for the validity of the contract. According to the Civil Code 2015, for a contract to be valid it must ensure a number of conditions specified in Article 117, specifically including: (i) The subject has legal personality and/or legal capacity in conformity with the transaction; (ii) The subject is completely voluntary; and (iii) The purpose and content of the transaction do not violate legal prohibitions or are not contrary to social ethics.

Thus, for the Shareholder Agreement to be effective as a civil contract, it is necessary to ensure the above conditions. Therefore, when drafting and implementing the Shareholder Agreement, it is necessary to ensure the conditions on the subject, the voluntary commitment, and special attention should be paid to the purpose and content of the Shareholder Agreement not to violate the prohibition regulations and not contrary to social ethics.

In addition, the Shareholder Agreement is different from normal civil contracts since the content of the Agreement relates to the company’s internal management issues, therefore, the content of the Shareholder Agreement is also bound by laws on enterprise.

The Law on Enterprise 2020 also has specific regulations on the rights and obligations of Shareholders in the company. Besides the Law on Enterprise 2020, the Company Charter is also a document to keep in mind when drafting and implementing the Shareholder Agreement. The Company Charter is drafted and issued in accordance with the law both in terms of content and registration procedures. Therefore, the Company Charter is recognized as a legally valid document for the company itself, its Shareholders and relevant third parties. In practice, Vietnamese law does not have specific regulations on the issue of Law on Enterprise 2020, Company Charter or Shareholder Agreement, which will govern the others.

Normally, Shareholders can also agree to have the Shareholder Agreement take priority. In case of any dispute related to the conflict between the Shareholder Agreement and the Company Charter, the parties will agree to adjust the Charter to be consistent with the Shareholder Agreement. However, adjusting the Charter will still depend on the will of the parties from time to time. Accordingly, to avoid problems arising, when drafting the Shareholder Agreement, in addition to checking the conditions of the subject, the voluntary commitment, the purpose and content of the Shareholder Agreement as mentioned above, the company also needs to consider drafting so that the content of the Agreement is consistent with the provisions of laws as well as the Company Charter. At the same time, the Shareholder Agreement should not include the content that Shareholders do not have the authority to decide according to the laws on enterprise and the Company Charter.

* 1. **Legal validity of the Shareholder Agreement with third parties**

The third party in the Shareholder Agreement can be the remaining Shareholders of the company or individuals and organizations that have been or will be carrying out transactions related to the issues recorded in the Shareholder Agreement. For example, the party receiving the transfer of Shares from a Shareholder committing to limit the right to transfer shares in the Shareholder Agreement.

Normally, the Shareholder Agreement is only signed and is binding between Shareholders, and cannot be binding on a third party because the third party is bona fide and does not know about that agreement. On the other hand, according to the law, Shareholders have the right to freely vote, transfer shares, and exercise their other rights, so third parties do not know and are not required to know about the restriction on the rights of the Shareholder in the Shareholder Agreement. Accordingly, when a Shareholder violates the Shareholder Agreement to carry out a transaction with a bona fide third party, that transaction may not be considered invalid.

Therefore, to overcome this point, in practice, companies often consider “adding” content that mentions the limitations caused by the Shareholder Agreement in the Company Charter or other company documents that the third party must know when intending to carry out a related transaction with the company. Thereby, the third party, through studying the company’s relevant documents, will indirectly know the possible existence of a Shareholder Agreement that affects and limits some rights of Shareholders in certain specific cases. For example, with respect to agreements on transfer restrictions on Shares, the Company Charter may mention cases where Shares are restricted from transfer according to separate, voluntary agreements between Shareholders.[[1]](#endnote-1) When there is such a mention, the third party must be aware that there are agreements restricting the transfer of Shares, and in that case, they need to work with the transferor to determine whether or not there is a Shareholder Agreement affecting and limiting the right to transfer the Shares they intend to purchase. Thus, in general, Shareholder Agreements related to the transfer of Shares as mentioned above can also bind third parties who are not participating in the Agreement.

1. **Conclusion**

Although Vietnamese law does not have specific regulations, Shareholders in the company still have the right to negotiate and sign the Shareholder Agreement to optimize their rights on the basis of balancing interests with other Shareholders. The law respects the freedom of agreement of Shareholders but must be on the basis of not violating the prohibition provisions or violating social ethics as well as not affecting or infringing on the rights and interests of other subjects who do not to participate in the Shareholder Agreement. Accordingly, when drafting or signing a Shareholder Agreement, it is necessary to consider the conformity with the provisions of law, the Company Charter as well as take advantage of the provisions of law to skillfully publicize the Shareholder Agreement in the Charter or other company documents, partly ensuring that Shareholders participating in the Agreement always comply and properly implement the agreed commitments.

**ADK Vietnam Lawyers**

1. According to the book “Basic legalities of M&A” by Lawyer Truong Huu Ngu (2018), Industry and Trade Publishing House, Sections 242 and 243, page 257 [↑](#endnote-ref-1)