Using AoAs and SHAs strategically

Shareholders often enter into agreements with each other on how the company will be managed and on what their specific rights and obligations are (for example, those relating to share transfer restrictions, voting rights, profit distribution, and shareholder departures).

Besides the specific subject-matters that the law requires the articles of association to cover (such as allocating powers from the board of directors or the general meeting and how the company is represented), shareholders can choose which instrument (i.e., the articles or association (AoA) or shareholder agreement (SHA)) they want to use to stipulate their arrangements. Because these two instruments have different legal statuses, one should consider strategically what each one should include. In this Strelia Series, we'll examine the key elements that you should bear in mind.

Keeping things private

Having the articles of association mention shareholder arrangements means you will make them public information, as the AoA must deposited at the court clerk's office and an excerpt of them must be published in the Belgian Official Gazette. If parties want to keep their arrangements confidential, they should stipulate them in a shareholder agreement.

What about enforceability

If shareholders take a decision that breaches the company's articles of association (e.g., a special majority), the decision can be declared void. In contrast, a decision that breaches a clause in a shareholder agreement (e.g., a voting arrangement) would theoretically give rise to only a claim for damages on grounds of a contractual breach. However, there is a nuance to this: a breach of a shareholder agreement can result in the nullity of the decision in question if it can be demonstrated that the decision would not have been adopted without the contested vote. It goes without saying that a strategic interest often comes into play here, as a party might prefer an arrangement that has a lower degree of enforceability.

How flexible is one over the other

The AoA typically offer less flexibility. For example, any amendment to them require a supermajority of 75%, which cannot be lowered. It can be argued that SHAs, however, can stipulate a reduced majority, based on a pre-meeting, whereby a vote in favor of an amendment will be cast if 60% of the shareholders agree on it at the pre-meeting. This would effectively lower the mandatory vote threshold set by law.

Another example of the AoA's lack of flexibility is the so-called creation of share classes, which can have major implications. Changes to the rights associated with a share class indeed require a 75% supermajority within each class. This could give disproportionate leverage to minority shareholders. Mechanisms can be put in place to address these concerns.

Does one exclude the other

SHAs can often complement the articles of association. For example, although SHAs cannot exclude the shareholder withdrawal and exclusion procedures, they should include leaver provisions (e.g., options) since the two types of procedures—although mandatory—are subsidiary in nature. Additionally, a judge must apply the price calculation mechanisms described in the SHA in the event of shareholder withdrawal or exclusion unless those mechanisms are deemed manifestly unreasonable. Finally, shareholders may agree in the SHA that they will not invoke the mandatory withdrawal and exclusion procedures provided this is in the company's interest.

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