Control and minority protection (joint ventures) Q&A: Japan

by Aritsune Miyoda, *Mori Hamada & Matsumoto*

Country Q&A | Law stated as at 31-Mar-2020 | Japan

This Q&A provides country-specific commentary on *Practice note, Control and minority protection (joint ventures): Cross-border*, and forms part of *Cross-border joint ventures*.

Control and minority protection

1. In the absence of specific provisions in the shareholders' agreement or bye-laws of a company, what protections are automatically given to a minority shareholder under the law of your jurisdiction?

Certain matters that relate to the control of the company must be approved by a special resolution of the shareholders. A special resolution requires approval by two-thirds of the voting rights held by the shareholders present at the meeting (see *Question 3* and *Question 4*).

Statutory protections for minority shareholders of a private venture company also include the right to:

- Propose an agenda at a shareholders' meeting: shareholders must hold 1% or more of the voting rights of all shareholders or 300 or more voting rights.
- Convene a shareholders' meeting: shareholders must hold 3% or more of the voting rights of all shareholders.
- Access and/or copy the corporate books of the company: shareholders must hold 3% or more of either the voting rights of all shareholders or all shares issued by the company.
- File for legal proceedings to liquidate the company under certain extraordinary circumstances: shareholders must hold 10% or more of either the voting rights of all shareholders or all shares issued by the company.

In certain circumstances, a shareholder holding 3% or more of either the voting rights of all shareholders or all shares issued by the company can file for a lawsuit to remove directors. A shareholder can also claim liability of the directors through a derivative lawsuit or, under certain limited circumstances, file for an injunction to enjoin directors' activities.

2. What different classes of shares can be issued and typically which class carries which rights?

In the context of a joint venture, different classes of shares may have different features, typically covering the following:

- Dividends (typically, in the form of certain preferred dividends).
- Distribution of residual assets (typically, in the form of certain preferred distribution rights).
- Voting rights.
- Restrictions on transfer.
- Shareholders' rights to convert into common shares (or the right to require the company to redeem such class shares).
- Company's rights to force certain classes of shares to be converted into common shares (typically on an initial public offering (IPO)) or to redeem such shares.
- Certain reserved matters to be approved by the holders of certain classes of shares.
- Rights to appoint certain directors and company auditors.

In addition, although not very often used in practice, private companies are allowed to provide in their articles of incorporation that different shareholders will be treated differently with respect to dividends of surplus, distributions of residual assets and voting rights. Such shares will be deemed as class shares with different features.

3. Are specific voting majorities required by law for any corporate actions (for example, increasing share capital, changing the company's constitutional documents, appointing and removing directors and so on)?

Ordinary resolutions can be passed by a majority of the voting rights held by the shareholders present at the shareholders' meeting.

A special resolution is needed for certain material matters relating to the control of the company, which requires a two-thirds majority of the voting rights held by the shareholders present at the meeting. Such matters include:

- Amendment to the articles of incorporation.
- Corporate reorganisation (for example, merger, business transfer, corporate split (*kaisha bunkatsu*)).
- Share exchange (*kabushiki koukan*).
- Share transfer (*kabushiki iten*).
- Issuance of shares by a private company (that is, a company setting out in its articles of incorporation that share transfers are subject to approval by the company).

However, a private company's directors (or board of directors) can be authorised to issue shares under a special resolution of the shareholders. This must set out the maximum number of shares to be issued as well as the minimum issue price. Such authorisation will be effective for one year from the special resolution.

The appointment and removal of directors requires an ordinary resolution at the shareholders' meeting, unless otherwise provided in the company's articles of incorporation.

4. Are there any statutory restrictions on quorum or voting requirements at director and/or shareholder meetings? Do they need to be proportionate to shareholdings?

Board meeting

The quorum requirement is a majority of the directors eligible to vote on the matter, and the voting requirement is a majority of the directors present at the meeting. These requirements can be increased in a company's articles of incorporation.

Shareholders' meeting

The statutory quorum is a majority of the voting rights eligible to vote on the matter. The quorum can usually be altered by the company's articles of incorporation. However, for some matters, it cannot be less than one-third of the voting rights eligible to vote, including the appointment or removal of directors and statutory auditors, and matters requiring a special resolution.

Unless otherwise provided in the company's articles of incorporation, the voting requirement for an ordinary resolution is a majority of the voting rights held by the shareholders present at the meeting. The voting rights will be exercised proportionately to the shareholding, except where a private company's articles of incorporation provide otherwise (see *Question 6*).

The voting requirement for a special resolution is two-thirds of the voting rights held by the shareholders present at the meeting, unless otherwise increased in the company's articles. However, for certain rare extraordinary events, the statutory voting requirements are set at an even higher level, such as either:

- 50% or more of the shareholders eligible to vote and two-thirds or more of the voting rights held by such shareholders (for example, an agenda to amend the articles to provide that share transfers are subject to approval by the company).
- 50% or more of the shareholders eligible to vote and 75% or more of the voting rights held by such shareholders (that is, where there is an agenda to amend a private company's articles to provide that the right to dividends as declared, the right to a liquidating distribution and/or the exercise of voting rights are not to be proportional).

5. Are there any matters reserved by law to the approval of the shareholders' meeting? Is it common for the minority shareholder to request that any matter be reserved to the shareholders' meeting approval? In which document is a list of reserved matters commonly inserted?

Yes, certain matters are reserved by law for majority or supermajority approval by shareholders. Ordinary shareholder resolutions will be required on matters such as appointment of directors, determination of remuneration of directors and approval of financial statements. Special shareholder resolutions will be required to resolve matters such as amendments to the articles of incorporation, business transfers and certain business reorganisations.

Depending on the level of shareholding by the minority shareholders, it would not be unusual for certain matters to be reserved for approval by shareholders in a manner that would give minority shareholders a veto right.

Reserved matters are most commonly dealt with in a shareholders' agreement, but it is also possible to address these matters in the articles of incorporation.

6. Can voting majorities required by law be disapplied to protect a minority shareholder (for example, through class rights or weighted voting)?

Voting requirements can be increased in the company's articles of incorporation. Minority shareholders can also be protected by the following arrangements:

- **Class rights.** A private company can provide certain class rights in its articles of incorporation under which the shareholders' voting rights can be provided disproportionately to the shareholding.
- **Cumulative voting.** Unless otherwise provided in the company's articles of incorporation, cumulative voting is possible with respect to the election of directors.
- **Class shares.** Minority shareholders can be protected by certain class shares. For example, a private company can issue class shares that allow the shareholders of each class share to elect a certain number of directors at their respective class shareholders' meetings, regardless of the number of voting rights owned by such class shareholders at the company's shareholders' meeting on matters other than the election of directors. Class shares with certain veto rights can also be issued.

7. Does a director owe a duty to act in the interests of the company and its shareholders or can it act to protect the interests of, for instance, the majority shareholder who appointed it, disregarding the interests of a minority shareholder?

Directors owe a duty to act in the interests of the company and all its shareholders (not just the specific shareholders who nominated them). Where minority shareholders exist, directors must carefully consider any matters giving rise to a conflict of interest between the majority shareholder and the minority shareholders.

8. Is there any statutory provision in your jurisdiction that would restrict the freedom of the parties to agree on a tag along?

No, tag along rights are commonly provided in shareholders' agreements. However, it would be unusual to include tag along rights in the articles of incorporation, as the articles are generally focused on the broader activities of the company.

9. Can the majority shareholder compel the minority shareholder to sell and transfer all its shares to a third party buyer under a drag along provision, or are there any statutory provisions in your jurisdiction that limit the freedom of the parties to agree to this procedure?

Drag along rights are commonly provided in a shareholders' agreement. However, it would be unusual to include drag along rights in the articles of incorporation, as the articles are generally focused on the broader activities of the company.

Parties have freedom of contract, and if the shareholders' agreement provides a drag along provision, the Japanese courts will generally observe such a provision, unless the court finds the relevant provisions unfair or against the public interest.

Contributor details

Aritsune Miyoda

Mori Hamada & Matsumoto
W *Mori Hamada & Matsumoto*

Areas of practice: Mergers and acquisitions, Compliance/Anti-corruption.

END OF DOCUMENT

