

SHAREHOLDER PROTECTION IN CLOSE CORPORATIONS

Close corporations, which are legal forms popular with small and medium enterprises, are crucial to every major economy's private sector. However, unlike their 'public' corporation counterparts, close corporation minority shareholders have limited exit options, and are structurally vulnerable in conflicts with majority or controlling shareholders. 'Withdrawal remedies' – legal mechanisms enabling aggrieved shareholders to exit companies with monetary claims – are potent minority shareholder protection mechanisms.

This book critically examines the theory and operation of withdrawal remedies in four jurisdictions: the United States, the United Kingdom, Germany, and Japan. Developing and applying a theoretical and comparative framework to the analysis of these jurisdictions' withdrawal remedies, this book proposes a model withdrawal remedy that is potentially applicable to any jurisdiction. With its international, functional, and comparative analysis of withdrawal remedies, it challenges preconceptions about shareholder remedies and offers a methodology for comparative corporate law in both scholarship and practice.

Alan K Koh is Assistant Professor of Business Law at Nanyang Business School, Nanyang Technological University (Singapore), where he teaches corporate law and governance. He earned his Dr jur at Goethe University Frankfurt and is an Advocate and Solicitor of the Supreme Court of Singapore. His research focuses on comparative law and corporate law and governance in Asia. He is an elected member of the International Academy of Comparative Law.

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Shareholder Protection in Close Corporations

THEORY, OPERATION, AND APPLICATION
OF SHAREHOLDER WITHDRAWAL

ALAN K. KOH

Nanyang Technological University



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To my father, who taught me how (and how not) to learn, teach, and live

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Preface

In close relationships, oppression, discord, and injustice are ubiquitous. Regrettably, no one person, much less a single book, can address that. This Book's goal is necessarily modest: to show how shareholder oppression and conflict in close corporations may be resolved by withdrawal. My substantive arguments and proposals are aimed primarily at persons working in corporate law (whether scholars, practitioners, or policymakers). But this Book's very form itself is an argument about comparative law methodology. It shows how comparative law – shorn of the interminable debates plaguing it – may be used as a *practical* tool for a first serious and coherent scholarly project on a classic legal problem that is executable by a single, determined jurist armed with time and the necessary language proficiencies. In other words, this Book is also intended as a working model of how to do comparative law seriously – and hopefully, to its intended audience, reasonably well – in English.

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Every scholar begins their career heavily in scholarly debt. Happily, publishing a Book – and writing this section – is a way to acknowledge this, even if such debts only keep mounting. This Book began life as a scholarly project sparked by professional tribulations shortly after earning my first degree at the Faculty of Law, National University of Singapore (NUS Law). Along the way, it became a dissertation that was accepted for the award of the degree of Dr jur (Doctor of Law) (*summa cum laude*) by the Goethe University Faculty of Law in July 2019. I am deeply in debt to my *Betreuer*, Professor Moritz Bälz, for accepting me as *Doktorand* that blazing summer day in 2015, for his patience and candid feedback over the four years and three jobs it took to finish, and (together with Frau Marion Lewald) for shepherding me through an unfamiliar if rational and efficient administrative process. I am also grateful to Professor Tobias Tröger for graciously committing to act as *Zweitgutachter* (examiner) for a foreigner of strange background and for his critical comments on key parts of the dissertation, and to Professor Andreas Cahn for chairing my *Disputation* and for his feedback.

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With one exception, my immediate family never quite understood what I was doing and why, but my parents tolerated with minimal complaint my constant presence at home before a screen surrounded by precariously balanced towers of paper. For their tolerance and patience I am grateful. An educator both inside and outside the public school system for most of his life, my late father Koh Joon Seng was also my first teacher, and in a roundabout way inspired me to take on the path of not just a scholar, but also an educator like he was. This Book, which was completed shortly after he left us, is dedicated to him. Among the living, my deepest gratitude is to my constant companion and now wife, Samantha, for everything – hugs, hand-crafted caffeinated beverages, reading countless drafts of this Book in various stages of despair and completeness, supporting me and my mother through my father's final days, and the unshakeable belief that this Book would against all odds someday see the light of day. To her I owe everything.

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I have attempted to state the laws of the various jurisdictions touched on as they were available to me as of the end of 2020 to early 2021, although (fittingly and usually unavoidably for most comparative works) due to limitations in accessibility to resources greatly exacerbated by the COVID-19 pandemic, the laws of Germany and Japan are mostly stated as of 2017–18 with only partial updates since. Errata and updates, if any, will be available at my website (www.alankkoh.com) or SSRN page (<http://ssrn.com/author=1855690>).

Abbreviations

A; A2d; A3d	Atlantic Reporter 1st/2nd/3rd series (West)
AB	Aktiebolag
AC	Appeal Cases
AD2d; AD3d	New York Reports Appellate Division, 2nd/3rd series
AG	Aktiengesellschaft
All ER	All England Law Reports
ann.	annotated
AnnCalCorpCode	West's Annotated California Corporations Code
AppCt	Court of Appeals; Appellate Court; Appeals Court
AppDiv	Appellate Division
BB	<i>Betriebs-Berater</i>
BCC	British Company Cases
BCLC	Butterworths Company Law Cases
BGB	Bürgerliches Gesetzbuch
BGBI	Bundesgesetzblatt
BGH	Bundesgerichtshof
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen
BR	West's Bankruptcy Reporter
Bt	betéti társaság
BT-Drs	Bundestagdrucksache
BV	Besloten vennootschap
c.; ch.; Ch.	chapter of a book; a statute
CA	Court of Appeal (may differ by context but usually England and Wales)
CalApp4th; CalApp5th	California Appellate Reports, 4th/5th series
CalRptr2d; CalRptr3d	California Reporter, 2nd/3rd series
CB	Cumulative Bulletin
CDCal	United States District Court for the Central District of California

cf.	<i>confer/conferatur</i> (compare)
CFR	Code of Federal Regulations
Ch	The Law Reports, Chancery Division series (England and Wales); Chancery Division, High Court of Justice of England and Wales (as part of neutral citation)
ChD	Chancery Division, High Court of Justice of England and Wales
1st/2nd/ ... Cir	United States Court of Appeals for the 1st/2nd/ ... Circuit; (Louisiana) Court of Appeal, 1st Circuit
Co.	Company
Comp.	Compiled
Corp.	Corporation
CSOH	Outer House of the Court of Session (Scotland) (neutral citation)
Ct	Court
CtApp	Court of Appeals; Court of Appeal
Cth	Commonwealth (Australia – federal)
D__	District (United States District Court for __ District)
DB	<i>Der Betrieb</i>
DC	District of Columbia
Del	Delaware
DelCh	Court of Chancery of Delaware
DGCL	Delaware General Corporation Law
Dist.	District
Div.	Division (of the Inner House of the Court of Session (Scotland))
DLLCA	Delaware Limited Liability Company Act
EBOR	<i>European Business Organization Law Review</i>
ECFR	<i>European Company & Financial Law Review</i>
ECR	European Court Reports
ed.; eds.	editor; editors
ed.	edition
... Edw 7	King Edward VIII (years of reign)
EEC	European Economic Community
e.g.	<i>exempli gratia</i> (for example)
et al.	and others
et seq.	and what follows
EU	European Union
EWCA Civ	Court of Appeal of England and Wales (Civil Division) (neutral citation)
EWHC ... (Ch)	High Court of Justice of England and Wales (Chancery Division) (neutral citation)

List of Abbreviations

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EWHC ... (Comm)	High Court of Justice of England and Wales (Commercial Court) (neutral citation)
F; F2d; F3d	Federal Reporter 1st/2nd/3rd series (West)
f.; ff.	folio (on the (next) page(s))
fig.	figure
Fla	Florida
fn.; fns.	footnote(s) (usually referring to a footnote in the cross-referenced text)
FSupp	Federal Supplement (West)
Ga	Georgia
GenG	Genossenschaftsgesetz (Gesetz betreffend die Erwerbs- und Wirtschaftsgenossenschaften)
GK	Gōdō Kaisha
GmbH	Gesellschaft mit beschränkter Haftung
GmbHG	Gesetz betreffend die Gesellschaften mit beschränkter Haftung
GmbHR	<i>GmbH-Rundschau</i>
Hare	Hare's Reports (English Reports)
HB	House Bill
HGB	Handelsgesetzbuch
HKC	Hong Kong Cases
HKCA	Hong Kong Court of Appeal
HKCFA	Hong Kong Court of Final Appeal
HKLRD	Hong Kong Law Reports and Digest
HL	House of Lords (UK)
IH	Inner House of the Court of Session (Scotland)
Ill	Illinois
Ill2d	Illinois Reports, 2nd series
IllApp3d	Illinois Appellate Court Reports, 3rd series
Inc.	Incorporated
Ind	Indiana
IRC	Internal Revenue Code (US)
IRS	Internal Revenue Service
Ibid.	ibidem (in the same place)
i.e.	<i>id est</i> (in other words)
J	Judge/Justice (United States); Justice (common law jurisdictions generally)
JCLS	<i>Journal of Corporate Law Studies</i>
Kaishahō	<i>Kaisha Hō</i> [Companies Act] (Japan)
Kan	Kansas
KanApp2d	Kansas Court of Appeals Reports, 2nd series
kft	körlátolt felelősségű társaság

KG	Kommanditgesellschaft
KGaA	Kommanditgesellschaft auf Aktien
KK	Kabushiki Kaisha
KMU	kleine und mittlere Unternehmen
L	law; laws
La	Louisiana
LG	Landgericht
LJ	Lord Justice/Lady Justice; <i>Law Journal</i>
LLC	Limited Liability Company
LRev	<i>Law Review</i>
LMCLQ	<i>Lloyd's Maritime and Commercial Law Quarterly</i>
LQ	<i>Law Quarterly</i>
LQR	<i>Law Quarterly Review</i>
Ltd	Private Limited Company (UK); Public Limited Company (Singapore)
Mass	Massachusetts; Massachusetts Reports
MassLRptr	Massachusetts Law Reporter
MBCA	Model Business Corporation Act
Md	Maryland; Maryland Reports
Md App	Maryland Appellate Reports
MdSpecApp	Maryland Court of Special Appeals
Mich	Michigan; Michigan Reports
Minn	Minnesota
Minshū	Saikō Saibansho Minji Hanreishū
Misc 2d/3d	New York Miscellaneous Court Reports, 2nd/3rd series
MLR	<i>Modern Law Review</i>
Mo	Missouri
MoMiG	Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen
Mont	Montana; Montana Reports
n.; nn.	note(s) (usually referring to another footnote within this Book but also for sources using endnotes/non-footnotes)
NC	North Carolina
NCApp	North Carolina Court of Appeals Reports
NCCUSL	National Conference of Commissioners on Uniform State Laws
ND	North Dakota (state and neutral citation)
NE2d; NE3d	North Eastern Reporter, 2nd/3rd series (West)
Neb	Nebraska; Nebraska Reports
Nev	Nevada; Nevada Reports

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NI	Northern Ireland
NJ	New Jersey; New Jersey Reports
NJSuper	New Jersey Superior Court Reports
NJW	<i>Neue Juristische Wochenschrift</i>
NJW-RR	<i>Neue Juristische Wochenschrift Rechtsprechungs-Report</i>
No.	number
NM	New Mexico; New Mexico Reports
NTA	Kokuzei-chō [National Tax Agency] (Japan)
NW; NW2d	North Western Reporter, 1st/2nd series (West)
NY; NY2d; NY3d	New York; New York Reports, 1st/2nd/3rd series
NYBCL	New York Business Corporation Law (McKinney)
NYLLCL	New York Limited Liability Company Law (McKinney)
NYS2d; NYS3d	West's New York Supplement, 2nd/3rd series
NZG	<i>Neue Zeitschrift für Gesellschaftsrecht</i>
NZLR	New Zealand Law Reports
OH	Outer House of the Court of Session (Scotland)
OHG	offene Handelsgesellschaft
OLG	Oberlandesgericht
Or	Oregon; Oregon Reports
OrApp	Oregon Reports, Court of Appeals
P; P2d; P3d	Pacific Reporter 1st/2nd/3rd series (West)
Pa	Pennsylvania
PA	Public Act (US)
para.	paragraph
PL	Public Law (US)
plc.	Public Limited Company (UK)
Pte Ltd	Private Limited Company (Singapore)
Pty Ltd	Proprietary Limited Company (Australia)
PULLCA	Prototype Limited Liability Company Act
QC	Queen's Counsel
r.; rr.	rule(s)
RSC	Revised Statutes of Canada
Rdn	Randnummer
Re. . . .	in the matter of . . . (common law cases)
Rev.	Revised
RG	Reichsgericht
RGBI	Reichsgesetzblatt
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen
RI	Rhode Island
RULLCA	Revised Uniform Limited Liability Company Act
s.; ss.; §	section(s)
S	Seite

SB	Senate Bill
SC	South Carolina; South Carolina Reports
SCC	Supreme Court of Canada (neutral citation)
Scot	Scotland
SCR	Supreme Court Reports (Canada)
SE	Societas Europaea
SE2d	South Eastern Reporter (West), 2nd series
SGCA	Singapore Court of Appeal (neutral citation)
Shōhō	<i>Shōhō</i> [Commercial Code] (Japan)
SI	Statutory Instrument
SME	small and medium enterprise
SLR	Singapore Law Reports
SLT	<i>Scots Law Times</i>
So3d	Southern Reporter, 3rd series (West)
SpruchG	Spruchverfahrensgesetz (Gesetz über das gesellschaftsrechtliche Spruchverfahren)
Stat.	Statutes
SupCt	Supreme Court
Super	Superior Court
SW2d; SW3d	South Western Reporter, 2nd/3rd series (West)
tbl.	table
Tenn	Tennessee
Tex	Texas
UG	Unternehmergeinschaft
UK	United Kingdom of Great Britain and Northern Ireland
UKPC	Privy Council of the UK (neutral citation)
ULLCA	Uniform Limited Liability Company Act
USA/US	United States of America
US	United States Reports
US-CC	US-Close Corporation
USCA	United States Code Annotated (West)
... v. ...	against (common law cases)
Va	Virginia; Virginia Reports
VC	Vice-Chancellor (England and Wales; Delaware)
... Vic	Queen Victoria (years of reign)
VLR	Victorian Law Reports (Victoria, Australia)
vol.	volume
Wash	Washington
Wash2d	Washington Reports, 2nd series
WashApp	Washington Appellate Reports
Wheat	Wheaton (volume of United States Reports by Henry Wheaton)

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WL	Westlaw (document identifier)
WLR	Weekly Law Reports
WVa	West Virginia; West Virginia Reports
YK	Yūgen Kaisha
ZJapanR [JJapanL]	<i>Zeitschrift für Japanisches Recht</i> [<i>Journal of Japanese Law</i>]