**NON- PECUNIARY PRIVATE BENEFITS IN PUBLICLY TRADED CORPORATIONS: HOW INVOLUNTARY DISSOLUTON STATUTE MAY BE THE SOLUTION**

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**CHAPTER I**

**INTRODUCTION**

* 1. **Introduction of the Issue**

One of the major conflicts that corporate law of various jurisdictions aims to resolve is the conflict between influencing shareholders[[1]](#footnote-1) and the minority shareholders[[2]](#footnote-2). Law strives to protect the minority from influencing shareholders’ exploitation of their power to appropriate disproportionate gains from the corporation at the expense of the minority shareholders[[3]](#footnote-3). Conventional shareholder rights are likely to become mere formalities in the absence of special measures protecting the minority shareholders when there is an influencing shareholder in the corporation[[4]](#footnote-4), who influences the entity directly or “behind the scenes”[[5]](#footnote-5) to maximize his own benefits. While shareholders should be given an area of freedom to guard their own benefits when exercising their shareholder rights, the outer limits of this freedom should be carefully drawn.

Although it is accepted that the “corporate machinery may not be manipulated so as to injure minority shareholders”[[6]](#footnote-6), ensuring that the machinery is not being misused might be problematic in some instances. It is particularly important and challenging for the law to control influencing shareholders’ extraction of “non- pecuniary private benefits”[[7]](#footnote-7) from their shareholder position in publicly traded corporations[[8]](#footnote-8). In this respect, even if the functionally good law keeps the size of pecuniary private benefits of control small, it may do little about non- pecuniary private benefits[[9]](#footnote-9). Hence, there is a need to reconsider corporate law[[10]](#footnote-10), and adapt it to the growing sophistication of the business community[[11]](#footnote-11), with regards to extraction of non- pecuniary private benefits. In this sense, non- pecuniary private benefits appear as a new type of agency problem in corporate law[[12]](#footnote-12).

This study opines that the minority shareholders can realize significantly less return on their investment in shares than what would be realized when influencing shareholders’ extraction of non- pecuniary private benefits is left uncontrolled[[13]](#footnote-13). In a nutshell, due to this extraction, the overall value of the minority shareholders’ investment is harmed, especially because of detoriation in the corporation’s profit margin[[14]](#footnote-14). Non- pecuniary private benefit extraction will more likely happen in publicly traded corporations rather than close corporations because close corporations generally do not reach to a socioeconomic level suitable for non- pecuniary private benefit generation. Accordingly, this study advocates (as a “second- best solution”)[[15]](#footnote-15) that this conduct should be considered “oppressive” [[16]](#footnote-16) to the minority shareholders[[17]](#footnote-17), as the non- pecuniary private benefit extraction can substantially defeat the “reasonable expectations” held by the shareholders in committing their capital to a particular publicly traded corporation[[18]](#footnote-18), by “milking it to death”[[19]](#footnote-19). It is opined that the minority can use the presence of involuntary (judicial) dissolution statutes as a negotiation tool against the influencing shareholders in these situations[[20]](#footnote-20), thus discourage extreme forms of abuse ex ante[[21]](#footnote-21).

Accordingly, this study’s aim is twofold. First, it seeks to show that a “transaction- based” legal structure, which is useful for targeting extraction of “pecuniary private benefits”, is not adequate for controlling the influencing shareholders’ appropriation of non- pecuniary private benefits, hence falls short of providing any justification and compensation for the minority shareholders. Secondly, this study expresses that integrating the issue of detrimental non- pecuniary private benefit extractions with the “involuntary dissolution” (i.e., judicial dissolution) action[[22]](#footnote-22) will provide a convenient protection for the minority shareholders[[23]](#footnote-23). Thus, to control this oppressive conduct, this study proposes the use of the statutory “involuntary dissolution action” and the “reasonable expectations” standard for the assessment of the “oppression” ground, and courts’ discretion to order influencing shareholders pay compensatory damages pro rata to the minority shareholders as remedy[[24]](#footnote-24). Herein, to carve out the solution from the dissolution “judicial wild card”[[25]](#footnote-25), this study proposes to use the U.S. corporate law’s[[26]](#footnote-26) conception of the “reasonable expectations” standard, which is the most widely accepted standard to measure the “oppression” by shareholders that provide a statutory ground for involuntary dissolution (or alternative reliefs) of the corporation in the U.S.[[27]](#footnote-27). On the other hand, it exemplifies the problems about transaction- based systems through Turkish law, where judicial dissolution statute is available to be widely interpreted and applied in the context of publicly traded corporations.

* 1. **Importance and Beyond**

Restraining shareholder rent- seeking is one of the key challenges about the regulation of corporations, thus is not something new[[28]](#footnote-28). However, the background leading to this concern finds its roots in economics rather than law. Today, one of the most important priorities of societies is to grow economically, and fostering corporations is seen the key to this goal[[29]](#footnote-29). In fact, being equipped better in mobilizing and accumulating capital is an important historical determinant that determined the development difference present between civilizations[[30]](#footnote-30). Therefore, states are taking various measures to promote the corporate form and support its development[[31]](#footnote-31).

Contemporary state policies largely reflect efforts to generate economic growth; they search for new market instruments to link corporations with investors, and use means of the modern technology for the realization of economic targets. These efforts are, by their nature, causing publicly traded corporations’ existence and prosperity. Correspondingly, publicly traded corporations’ wealth is a matter of public concern, as they are socioeconomic organizations comprising of a wide group of constituents (not only investors, but also managers, employees, suppliers, creditors, communities, and States) and thus, their wealth is directly related with the wealth of the related society[[32]](#footnote-32). Therefore, by a little exaggeration, they can even be called as “quasi-public” enterprises, “private entities with public impact”[[33]](#footnote-33) or “too-big-to-fail-enterprises”[[34]](#footnote-34).

One of the challenges in getting publicly traded corporations grow is to accomplish both (1) to tunnel investment into corporations and (2) to preserve the corporate wealth created, at the same time. Accordingly, once investments are linked with corporations, making sure that corporate wealth is being used purposefully and not wasted for outside interests, becomes the next target. The facts that corporate profit growth may slow[[35]](#footnote-35) and a presence of a gap “between the amount of equities that investors will desire and what companies will need to fund growth” is expected over the next decade, makes it even more important to focus on fund outflow[[36]](#footnote-36).

It is in this study’s view that the issue of non- pecuniary private benefit extraction should seen as a topic concerning the fund outflow aspect regarding publicly traded corporations, from a capital market law perspective. Hence, it is an issue relating to the well- being of the corporations, investors, capital market, and the economy at large[[37]](#footnote-37). Today, it is statistically known that the number of controlling shareholders is globally increasing[[38]](#footnote-38), and presence of influencing shareholders increase the probability of non- pecuniary private benefit extraction[[39]](#footnote-39). Therefore, the non- pecuniary benefits issue is a topic that is likely to attract the attention of policymakers in a near future. On the other hand, shareholder protection, which is also stated as one of the three main objectives of securities regulation by International Organization of Securities Commissions (IOSCO)[[40]](#footnote-40), is a necessity for countries that aim to grow economically[[41]](#footnote-41). The fact that while there is convergence in major jurisdictions in treatment of conflicts between shareholders and managers, there is a little convergence with regards to the conflict of interests between minority and influencing shareholders[[42]](#footnote-42), shows that this area of corporate law might need new approaches[[43]](#footnote-43). After all, globalization increases the pressure to implement good legal rules[[44]](#footnote-44)

* 1. **Framework for Analysis**

This study comprises six chapters. Chapter One introduces the study, defines its importance and objective. It provides a guide way for readers by showing the selected methodology, and scope. In Chapter Two, the concepts introduced in Chapter One are defined. Background of the present legal structure and the flaws therein are shown. Rather than extensively focusing on the Turkish law or U.S. law in detail, it lies down the general principles concerning the field, and explains why law should focus on this area. Hence, the problem with the present approach is explained, and the loopholes that the non- pecuniary benefit extractions goes through are signaled.

In Chapter Three, components of the transaction based system in Turkey are evaluated. Hence, the provisions present in the current legal structure are given in detail. Then, the loopholes in this system are expressed, and it is shown that this system is not adequate for controlling extraction of non- pecuniary private benefits.

Chapter Four introduces the “reasonable expectations” standard and provides the theoretical framework of the conception. It tries to show how the standard is used in the context of involuntary dissolution. Corollary, it shows how the U.S. shareholder oppression law works, and details the elements of the reasonable expectations standard. It explains how the non- pecuniary benefits issue and reasonable expectations can be linked. At last, it provides the justifications for applying this concept to publicly traded corporations and draws the limits of it.

Chapter Five details the involuntary dissolution action in Turkish law, and explains how the structure works in the current statutory scheme. It highlights the elements of this cause of action. Then, it combines the reasonable expectations standard with the elements of this provision, and brings forward the proposed interpretation for the provision to tackle the non- pecuniary benefits extractions. It also expresses the appropriate relief for these incidents.

In Conclusion, approach of this study is summarized and proposed. It claims that the proposal may be used in other jurisdictions, as in this field of law, globalization can in fact create a global approach towards publicly traded corporations, its main constituent, shareholders and their non- pecuniary private benefit extractions.

**CHAPTER II**

**DEFINING THE CONCEPTS AND THE FLAW**

**2.1. Non- Pecuniary Private Benefits**

**2.1.1. Generally**

An investment in shares of a publicly traded corporation is primarily done with the purpose of receiving benefits in return that law does not prohibit[[45]](#footnote-45). Put differently, what the corporation can legally give in return, primarily determines what purpose the investor has while investing. Corollary, if a jurisdiction, such as Turkey[[46]](#footnote-46), provides that a corporation can only be established for economic purposes (i.e., a corporation is statutorily obliged and restricted to return economic benefits), investors will invest in them with the purpose of receiving (i.e., extracting) economic benefits (i.e., pecuniary benefits) in return[[47]](#footnote-47). However, even when there is no explicit restriction in terms of corporate law, like in Delaware[[48]](#footnote-48), there can be other statutory provisions present, constraining the investor’s purpose to extract non- economic (i.e., non- pecuniary) benefits in return[[49]](#footnote-49). Nevertheless, it is acknowledged that it is likely that the goal of a “shareholder is not only to maximize his wealth, but to improve his total utility from attaining a combination of pecuniary and non- pecuniary benefits”[[50]](#footnote-50).

Then, investment in shares of a publicly traded corporation can provide the investor both shared and private benefits[[51]](#footnote-51). While the former benefit represents benefits that accrue to all shareholders proportionate to their rights arising from their investment (e.g., dividends), the latter benefit only accrues to certain shareholders but not to other shareholders[[52]](#footnote-52). Put differently, private benefits represent the disproportionately appropriated values (i.e., benefits) from a share investment, and requires a benefit received to the exclusion of the other shareholders[[53]](#footnote-53). Herein, when the appropriation of disproportionate benefits involves a resource flow from the corporation to the shareholder or brings a directly related future benefit that can be monetarily expressed[[54]](#footnote-54), this benefit is called a “pecuniary private benefit”[[55]](#footnote-55). However, when this appropriation does not involve a resource flow from the corporation itself to the shareholder or brings a benefit that can be monetarily expressed, this benefit is called a “non- pecuniary private benefit”[[56]](#footnote-56). While pecuniary private benefits can be extracted by any shareholder who is surrounded by the necessary conjuncture, non- pecuniary benefits are idiosyncratic to the shareholder who extracts it[[57]](#footnote-57) and provides benefits most probably unattainable by the other shareholders, even when the latter shareholders are in the same conjuncture[[58]](#footnote-58).

While (1) tunneling transactions (e.g., self- dealing or related party transaction violating the arm’s length principle[[59]](#footnote-59), expropriation of corporate opportunities, dilutive share issues[[60]](#footnote-60)), (2) insider trading[[61]](#footnote-61) and (3) sale of corporate control can be listed as the primary methods of extracting pecuniary private benefits, there is no such list for the non- pecuniary private benefits[[62]](#footnote-62). Various methods can be used to extract non- pecuniary private benefits, but still, it is accurate to state that the extraction itself will generally be derived through (1) “distorted management of the company business” (transaction based, an internal act) or (2) an “external undertaking” (non- transaction- based, an external act)[[63]](#footnote-63). Hence, to extract these benefits, a shareholder can either lead the corporation to make business decisions that does not contribute to the corporation’s economic benefit maximization target (internal act) or can individually take actions which damages the corporation’s business or well- being but enhances his own benefits (external act).

While it is true that extraction of non- pecuniary private benefits might reduce the profit of the corporation from levels otherwise achievable and harm the extractor shareholder’s shared and private pecuniary benefits at the same time, the extractor nevertheless takes this path because he believes that the pecuniary loss is well compensated with the non- pecuniary gain[[64]](#footnote-64). While their conducts may even evolve to a point that harms the values of a society like avoidance of political corruption, freedom of speech, freedom of religion and social state (welfare state) principle[[65]](#footnote-65), such conducts may still increase the extractor’s non- pecuniary benefits if he is personally standing against such values. “The value of non- pecuniary benefits is very dependent on the people’s mindset and preferences shaped by their particular culture”[[66]](#footnote-66). The notion that the human decision- making process is not always governed by reason, and people do not always act in accordance with the rational choice theory[[67]](#footnote-67), also justifies these allegedly “unwise” extractions.

**2.1.2. Types of Non- Pecuniary Private Benefits**

The non- pecuniary private benefits that a shareholder can extract can be classified as (1) psychic satisfaction[[68]](#footnote-68), (2) reputation in society or certain social circles (i.e., prestige)[[69]](#footnote-69), and (3) political power[[70]](#footnote-70). To start with the first, an example of a shareholder increasing his psychic satisfaction via his shareholder position might be a shareholder influencing the corporation to hire or invest in people that he likes (e.g., a relative, girlfriend, friend…)[[71]](#footnote-71) as employees or to invest in projects he appreciates (e.g., refraining from taking corporate actions that can change the environment of the hometown of the shareholder negatively to uphold personal satisfaction or the existing reputation, or transferring a sports player/manager that the shareholder will enjoy watching in the sports team owned by the corporation or force the team to use a self- penned club song)[[72]](#footnote-72). Secondly, one can increase his reputation in society by using his shareholder position, by forcing the corporation to act in a manner that will attract the attention of elites or media[[73]](#footnote-73) (e.g., investing in projects that will get the attention of the high elites or create a place among them, or continuing a business’s failing venture just for personal pride, settle lawsuits to avoid controversy)[[74]](#footnote-74).

Lastly, as for increasing his political power, a shareholder might use his influence on the corporation (1) to force it conduct a business that fosters certain ideas to shape the public opinion (e.g., a newspaper or broadcasting corporation publishing pro- government/hyperpartisan/non-partisan/ news, a corporation refusing to lease its premises to a liquor store due to religious reasons) or (2) to tunnel corporate money to other institutions or actions for “astroturfing” purposes in a concealed manner (e.g., transferring money via advertisements to newspapers or social media platforms, litigation financing, or excessive dividend declaration) [[75]](#footnote-75). Moreover, a shareholder can use his shareholder position to create a public persona suitable for his political ambitions by building a campaign on his successful shareholder position in the corporation, without interfering in the company management (i.e., via an “external undertaking”), and try to politically benefit from his alignment with the corporation in the electors’ eyes[[76]](#footnote-76). In such case, the shareholder would not only be risking the reputation of the corporation but also the reputation of other shareholders. While this conduct may be violating capital market law if such statements may be associated with share value, it may also be alleged that both the corporation and its shareholders would have the right to request the compensation of their non- pecuniary damages caused as a result of the extractors external undertaking type of conduct[[77]](#footnote-77).

It is important to note that this study conceptualizes non- pecuniary private benefits and the harm caused by its extraction as an issue limited to the “shareholder status” in the corporation. Meaning that, if a shareholder also has a seat in the management of the corporation and uses his office or corporate assets to extract non- pecuniary private benefits, this should be considered as a benefit derived from his managerial position, not from his shareholder position[[78]](#footnote-78). For example, the president of a publicly traded corporation might be using the corporation’s yacht for his personal pleasure off- duty and organize parties for his own friends, even though this use is not a part of his official compensation package. However, the corporation might have just rented the yacht and earned money, or at least the yacht’s off- duty time might have used to make repairs or just to “rest” the vehicle, because the total hours the yacht has been used effects the price of the yacht when sold in the secondary market. In this case, the president is not only using a vehicle that he would have normally paid a rent for free, but he is also deriving the non- pecuniary benefit of pleasure and reputation. Still, the president is using the yacht directly via his managerial position in the corporation, not directly via his shareholder position. Hence, this extraction should not be considered within the scope of this study’s conception of non- pecuniary private benefits.

**2.1.3. Justification for Mandatory Protection**

It is fair to ask why corporate law should worry about non- pecuniary private benefits, and provide specific mechanisms to control its extraction, especially in the context of publicly traded corporations. It is easy to answer this question by simply stating that its extraction is causing an increase in the amount of capital flowing out of the corporation without a proper business purpose; and without implementing the measures that preserve the wealth of publicly traded corporations, it is impossible to generate the necessary economic growth in a country. This, by itself, jusitifies why publicly traded corporations requires a special consideration[[79]](#footnote-79). Still, the reasons that justify a mandatory protection against these extractions should be expressed in detail through both general considerations and a theoretical perspective. After all, “corporate law everywhere continues to bear the imprint of the historical path through which it has evolved, and reflects as well the influence of a variety of non-efficiency-oriented intellectual and ideological currents”[[80]](#footnote-80).

1. **General Considerations**

First of all, a “major preoccupation of company law is to uphold the integrity of the company system as a vehicle to conduct and undertake business based upon the collective investment of its members and assumption of risks by those who lend money or give credit to the company”[[81]](#footnote-81). While business life has some inherent risks (e.g., economic crises, natural disasters, poor business judgment)[[82]](#footnote-82) and law, by various measures (e.g., rules on capital maintainance, minimum capital requirements, fraudulent transfer law), tries to balance the risks therein; extraction of non- pecuniary benefits provides an additional layer of risk to the integrity of the corporate stakeholders. Although the primary constituent affected from the extraction and feel oppressed would be the shareholders, they will not be the only one that is protected by the virtue of a measure controlling such extraction but other constituents, so the integrity of the system, will also benefit[[83]](#footnote-83). A structure that empowers shareholders, gives a signal to the market that these extractions will be sanctioned, would also cut the costs of administrative agencies trying to track the related violations and use its funds in other fields[[84]](#footnote-84).

Secondly, it is important to recognize that investors can “make a business judgment whether to buy into such a minority position, and if so on what terms”[[85]](#footnote-85). In principle, parties can even choose the law of a jurisdiction which does not include a remedy for any benefit extraction or oppression, and this choice of law should be respected[[86]](#footnote-86). This approach naturally takes one to the initial conclusion that extraction of non- pecuiary private benefits should be ignored as long as it is disclosed to the public. Likewise, while it is true that an undisclosed extraction of non- pecuniary private benefit might also violate securities law’s disclosure requirements, disclosure system is not the correct remedy for this issue because; (1) actions regarding this issue will usually be ones that are not covered by the disclosure obligations[[87]](#footnote-87), (2) actions that give raise to the issue here is usually taking the appearance of “bad business judgment” and disclosure of the “bad judgment” does not reveal its expectation- frustrating nature, (3) disclosure is not adequate to discipline influencing shareholders directly[[88]](#footnote-88), especially in an inefficient market which does not sufficiently accurately price the different securities[[89]](#footnote-89), (4) disclosure will only work if the market is sophisticated enough to figure out the harms associated with a particular conduct[[90]](#footnote-90). After all, the rationale that the disclosure and the “comply or disclose” regime relys on, is the assumption that the market will enforce the voluntary standards if a corporation does not comply (or the non-complying corporations have to live with the increase in cost of capital due to pressure for more effective corporate governance) [[91]](#footnote-91), which will not work in an environment explained above.

Thirdly, as a matter of fact, it will often be the “Wall Street Rule”[[92]](#footnote-92) that is seen as the best remedy for “diseases” in the context of publicly traded corporations[[93]](#footnote-93). Having said that, it is oppressive to the minority to force them exit the corporation by selling their shares with a loss suffered due to the breach of the terms upon which their investment was made, by the influencing shareholders[[94]](#footnote-94). After all, once the market finds out the dissension, a minority interest will be even less inviting to prospective purchasers[[95]](#footnote-95), and the prejudiced shareholder will not be able to get his pro rata share from the accumulating capital in the corporation[[96]](#footnote-96). Besides, as the shareholders’ interests in the corporation has a proprietary aspect, any action eliminating this interest should be scrutinized, and an act forcing another shareholder to sell his stock should be seen no different from an economic and constitutional perspective[[97]](#footnote-97). While this point might also lead to the suggestion that the public enforcements (via criminal sanctions or administrative actions) should be the one policing this appropriation, in a marketplace with concentrated ownership and influencing shareholders having political power, the political angle is likely to be an effective contraint on public enforcement[[98]](#footnote-98). Thus, the minority shareholder should be the police of his own rights, and the law should provide a statutory cause of action for them to effectively police their rights.

Lastly, it is in the best interest of both minority shareholders and the market[[99]](#footnote-99) to provide shareholders a last resort safety valve, whose presence would signal the market (i.e., influencing shareholders) that extraction of detrimental non- pecuniary benefits is not a normal emolument of shareholding[[100]](#footnote-100), make minority shareholders “feel confident that a just appeal to the courts will not go unheeded”[[101]](#footnote-101), and consequently constrain these extractions. After all, it is in the ultimate interest of business that the investing public is induced to invest by the imposition of the risk- eliminating rules[[102]](#footnote-102) and investors’ confidence in the markets is restored[[103]](#footnote-103).

1. **Using the “Nexus of Contracts” Theory**

The goal of the law governing for- profit enterprises is seen twofold; first, to provide a legal framework for those who wish to undertake business activities efficiently[[104]](#footnote-104), and second, to advance aggregate welfare of all who are affected by these enterprises’ activities[[105]](#footnote-105). However, this goal, despite underlining the wider policy considerations, leaves the question of what role law should bear in regulating corporations unanswered. Herein, one of the regulatory theories[[106]](#footnote-106), the “nexus of contracts” theory, the most academically influential attempt to articulate the doctrinal basis for corporate law in recent years in U.S.[[107]](#footnote-107), provides a viable answer. Although this theory is criticized by commentators[[108]](#footnote-108) and the jurisdiction which it originated (U.S.) differs from most of the jurisdictions in nature[[109]](#footnote-109), this study opines that the “nexus of contracts” theory bears significance for determining why and how law should deal with influencing shareholders’ extraction of private non- pecuniary benefits.

According to the “nexus of contracts” theory of corporate law, corporations are not mere entities but a nexus of contracts[[110]](#footnote-110), in which corporate constituents contract with the corporation[[111]](#footnote-111). This contractual view of corporations brings the notion that the “corporate contract”, as an umbrella contract which includes all parties’ all bargains, should be characterized by a process of construction rather than a passive discovery[[112]](#footnote-112). Therein, corporate law’s primary function is conceived of as the facilitation of the parties’ bargains[[113]](#footnote-113). It is argued that (1) “corporate law, both statutory and judicial, acts as a set of standard terms that lowers the cost of contracting”[[114]](#footnote-114), (2) “it is enabling rather than directive”[[115]](#footnote-115), (3) corporate law should be treated as “a standard- form contract, supplying terms most venturers would have chosen but yielding to explicit terms in all but a few instances”[[116]](#footnote-116), (4) the rules that should be supplied by corporate law are ones that “if uniformly applied, will maximize the value of corporate endeavor as a whole”[[117]](#footnote-117). It is said that corporate law will fulfill its function if the contract created by the statutory terms it provides matches the results of costless bargaining[[118]](#footnote-118). In accordance with this theory, in the U.S., where the the theory originated, state corporate laws consists principally of enabling provisions that operate as defaults from which corporations may opt out[[119]](#footnote-119).

Capital market law is the principal component of corporate law[[120]](#footnote-120) and it regulates publicly traded corporations to a wide extent. Capital market law does not seek to protect investors against the possibility of loss or against their own folly but places the responsibility of the investment on investors’ shoulders after setting up the right environment[[121]](#footnote-121). Contractual theory is also compatible with this area of law, and the issues that it is regulating are constituting the remaining terms of the contractual relationship regarding corporations[[122]](#footnote-122). After all, “an offer of securities to the public is an offer to enter into a contract whereby members of the public will acquire securities from their issuer…The terms of that contract are based on the marketing material (prospectus) which is produced by the issuer of those securities before their issue and on a continuing basis thereafter”[[123]](#footnote-123). Due to the mandatory nature of securities law, the terms of this contract are automatically added to the contract between parties through the obligations placed on the issuers by the listing rules and the statutory prospectus and disclosure rules[[124]](#footnote-124). In this sense, capital market law provides standard contract terms to the parties, so decreases the transaction costs[[125]](#footnote-125), and the terms it mandatorily imposes on parties are in fact ones that the parties would have added[[126]](#footnote-126). These terms exist because the informational needs of investors, and the parties’ need of preserving the integrity of the marketplace would have required them to include these terms in their contract[[127]](#footnote-127).

Then, the publicly traded corporation “can be viewed as a standard form multiparty contract, some of the terms which are specified by statute”[[128]](#footnote-128). Corollary, it can be expressed that “a stockholder’s right between himself and the corporation and the other stockholders are contractual, and that the terms of the contract are to be found in the agreement of association and the provisions of aplicable statutes”[[129]](#footnote-129). In this sense, the relationship between the corporation and a shareholder is partly, but not solely and purely contractual in nature[[130]](#footnote-130). Mandatory rules of corporate law, including capital market law, consists unnegotiatable standard terms of the contract between the participants; and law will give contractual effect to the bargain of the shareholder and the corporation only if they are not against generic legal limits to contracts such as illegality or public policy considerations, and mandatory rules of corporate law[[131]](#footnote-131). Of course, for law to fulfill its function of lowering the transaction costs for the participants[[132]](#footnote-132), these mandatory rules should reflect the terms that corporate participants would simply have wanted them to be written into the contract if laws were amended to drop all limitations[[133]](#footnote-133). In fact, it is claimed that statutory norms generally mirror the structures favored by partcipants of publicly traded corporations, so law seems successful in fulfilling its function in the publicly traded corporation context, but this is more debatable regarding the law governing the close corporations participants[[134]](#footnote-134).

It is also well understood that parties in long- term transactions or contracts (i.e., relational contracts)[[135]](#footnote-135), such as shareholders in corporations, do not adopt complete contracts which addresses all potential contingencies and conflicts[[136]](#footnote-136). “Transaction costs affect the ability of the parties to make exhaustive agreements capable of addressing all possible contingencies that may arise in the course of their relationship”[[137]](#footnote-137). Hence, one important function of the “default rules of corporate law is to provide a means of accommodating, over time, developments that cannot easily be foreseen at the outset”[[138]](#footnote-138). Accordingly, it cannot be claimed that mandatory terms with this character would have not been added by the parties to the contract if the statutory limitations are dropped, because it is not rational to expect parties to write terms on issues which they cannot foresee[[139]](#footnote-139) or cannot write into a formal document at one particular time due to reasonable transaction costs[[140]](#footnote-140). In these cases, if the contract is remaining silent, the law concerning these entities should be there to act as a gap filler for some unwritten probable but unforeseen issues as well[[141]](#footnote-141). Otherwise, the parties may face costly adjustments to address these unforeseen contingencies or one party may seek to extract private benefits from the other party through opportunistic behaviour during the course of the relationship[[142]](#footnote-142). Hence, in these instances, law has to protect parties from both bad bargain and bad luck[[143]](#footnote-143).

Before claiming that corporate law should act as a gap filler regarding a certain issue, it must be recognized that shareholders’ alleged failure to structure a protective scheme against a certain issue does not necessarily mean that they would have bargained for it but somehow failed to do it. There can be times that shareholders can simply choose to remain silent on purpose, and not implement a more favorable term than the default rules of corporate law[[144]](#footnote-144). However, this silence can also occur as “often parties avoid issues in contract negotiations precisely because they cannot agree on specific terms and hope the issue will either not come up or will be resolved in their favor by a court”[[145]](#footnote-145). If the silence is chosen due to this rational apathy[[146]](#footnote-146), then it means that the transaction costs avoided the formation of a term that would otherwise be included in the contract. Corollary, it is generally assumed that issues such as “shareholder oppression” would have been bargained by shareholders if bargaining were costless[[147]](#footnote-147), and an oppressive conduct would violate the agreement that the parties would have reached if they had negotiated a solution to the disputed point[[148]](#footnote-148). As a matter of fact, presence of statutory involuntary dissolution remedy in many U.S. states’[[149]](#footnote-149) corporate statutes prove that shareholders fail to protect themselves by contract, and the oppression statutes gives the “shareholder the benefit of a hypothetical bargain that she never memorialized in an enforceable agreement”[[150]](#footnote-150).

Some other issues (e.g., rules on insider trading, proxy voting, disclosure, unfair self- dealing, fraudulent transfer) have a mixed character; they are there to act as measures against circumvention of some mandatory corporate law rules which are implemented for wider policy goals of the law[[151]](#footnote-151), but can also be regarded as a legislative assertion that these are issues that shareholders would have bargained to have strong protections[[152]](#footnote-152). “The principled rationale for mandatory terms of these types is usually based on some form of ‘contracting failure’: that some parties might otherwise be exploited because they are not well informed; that the interests of third parties might be affected; or that collective action problems…might otherwise lead to contractual provisions that are inefficient or unfair. Mandatory rules may also serve a useful standardizing function, in circumstances (such as accounting rules) where the benefits of compliance increase if everyone adheres to the same provision”[[153]](#footnote-153). These rules also facilitate freedom of contract by helping corporate participants, through creating corporate forms that are to some degree flexible[[154]](#footnote-154), and operate on a basis which classifies rules as permissive (“may” rules), presumptive (“may waive” rules) and mandatory (“must” or “must not” rules) rules[[155]](#footnote-155).

All in all, this study asserts that participants of a corporation would bargain for protection against extraction of unjustified detrimental private non- pecuniary benefits if bargaining were costless, due to its oppressive nature[[156]](#footnote-156). Thus, if corporate law remains silent to the issue of extraction of non- pecuniary benefits and courts reject to supply implicit contract terms, corporate law will not be fulfilling its function, “because it will not match the results of costless bargaining”[[157]](#footnote-157). Similarly, accepting that judicial supervision generates significant costs[[158]](#footnote-158), when no judicial supervision is imposed on extraction of unjustified private non- pecuniary benefits, this opportunistic conduct will be less costly for its participants (in this study’s context, influencing shareholders and managers). However, if a protection against this conduct is established, this conduct will be treated as one that has a cost (i.e., price) for its participants[[159]](#footnote-159). Accordingly, the participants’ opportunistic incentives will be curbed and other parties of the bargain will have a mechanism to ensure they accurately get what they bargained for.

**2.2. Influencing Shareholder**

While the conventional perspective is that when there is no majority or strong minority shareholders the power vacuum in corporations is filled by the management[[160]](#footnote-160), this study underlines a special case that may rise under a distorted market of corporations. It does so by using the term “influencing shareholder”, rather than the controlling, majority, dominant, or blockholder shareholder terms, in order to embrace both both intralegal and extralegal perspective of control associated with shareholding[[161]](#footnote-161). In this study, the term “influencing shareholder” is used to refer to a shareholder; (1) who can somehow ensure that the direction of corporate conduct comports with the wishes or interests of him[[162]](#footnote-162), or (2) whose actions outside the corporate machinery (i.e., outside the internal affairs of the corporation, externally) effects how the corporation acts and get valued in the marketplace[[163]](#footnote-163). However, "influencing shareholder” term should be regarded as an interdisciplinary concept which does not aim to provide a conclusive legal definition as to nature of the persons or relationships but rather aims to signal a specific set of shareholders with non- pecuniary private benefit extraction tendency and opportunity. For instance, influencing shareholders may be a subset of controlling shareholders, but may also be deemed a shadow director under certain circumstances from the legal viewpoint of the applicable jurisdiction.

A shareholder can exert influence on the corporate machinery (1) by either exercising his own shareholder rights (primarily the voting right to approve issues that statute requires shareholder consent and to elect the management)[[164]](#footnote-164), or (2) by not exercising but using the effect of the prospect of exercising shareholder rights, including exitting the corporation by selling shares or not discharing the board members of their actions corresponding their duty period[[165]](#footnote-165). In other words, a shareholder can still exert his influence on a corporation without exercising any of his shareholder rights[[166]](#footnote-166); but the power that this influence has will depend on the power that the formal influence (e.g., ability to vote) gives to the shareholder[[167]](#footnote-167), or how effective he can use the human nature of the managers for his advantage. When this second path is taken, the influence is exercised “behind the scenes”. Similarly, a shareholder whose actions out in the marketplace might influence how the corporation might act or the shareholder’s mere presence in the corporation as a shareholder can be an issue that effects the corporation’s well- being or valuation. However, as no shareholder right is formally exercised in these instances, the presence of these types of influences can only be perceived if the issue evaluated from an extralegal perspective.

An institution can be deemed “influenced behind the scenes” when its officially appointed management carries out the institutional operations or policies by following the demands of people who do not hold an official post into consideration[[168]](#footnote-168). Herein, the influencer refuses to live with the independent decisions of the official management, and instead chooses to substitute the managements’ judgment with his own judgment regarding certain issues, but still insulates both the management and himself from liability by taking the advantage of rules on management liability (e.g., business judgment rule) in most instances[[169]](#footnote-169). After the initiative is realized, the management remains in the post and continues its normal operations until a future intervention happens[[170]](#footnote-170). This takes place, because the management is prone to drift with the tide, as it is aware that these informal initiatives carry the vieled threat of formal challenge aimed at the management[[171]](#footnote-171). In addition to this, “a range of human motivations, including but by no means limited to greed, can inspire fiduciaries and their advisors to be less than faithful to their contextual duty”[[172]](#footnote-172). Accordingly, by definition, an influencing shareholder does not need to have a corporate controlling power or any other legal arrangement that forces the board or other shareholders to surrender his influence attempts.

In this respect, when one approaches the management structure “from the perspective of democratic political theory, rather than through a strict assessment of legal rights”[[173]](#footnote-173), publicly traded corporations appear as one of the institutions suitable to be subject to behind the scenes influence[[174]](#footnote-174). The central premise of the corporate law is that shareholders must live with the business decisions of the directors unless the statute requires shareholders’ vote[[175]](#footnote-175). However, just like a voter in democratic system exerts influence on politicians by communicating their collective concerns about specific policy choices, not only at election time but during every moment between elections, despite having limited legal rights (e.g., voting from election to election), a shareholder can exert influence on the management separate from the one that he will via his shareholder rights (e.g., voting and suing)[[176]](#footnote-176). Also, both the threat to sell share holdings or not to participate in future issuance of shares (these can lower the share price and a hostile take-over can be possible)[[177]](#footnote-177) and the wide range of human emotions that the directors have (they can receive future position or lucrative deal offers that can change their mind), may cause a director to place his or others’ interests before the welfare of the corporation[[178]](#footnote-178).

It is acknowledged that the corporation’s management is responsive to the wishes of the people who elected them[[179]](#footnote-179), and that the influencing shareholders can extract private benefits[[180]](#footnote-180) and oppress the minority acting through the board and corporate officers[[181]](#footnote-181). Hence, it is not unusual to see that traditional governance norms of publicly traded corporations are overridden by somehow insulating the board of directors (and the management) from its supervisory and decision making power[[182]](#footnote-182). However, as its presence is well- known[[183]](#footnote-183), law has already includes mechanisms to deal with this issue[[184]](#footnote-184). Although it is tough to observe and measure these interventions[[185]](#footnote-185), there are some empirical studies that provide insights about how it works.

Despite the presence of early researches on how shareholders try to influence the management, John Holland’s 1995 dated research represents an important one that highlights the behind the scenes influence issue comprehensively for the purposes of this study[[186]](#footnote-186). According to Holland’s research on how financial institutions influence their investee companies on corporate governance issues, “much of the process of influence and intervention conducted by financial instituions was outside of the public gaze”[[187]](#footnote-187). He expressed that financial institutions’ choices (i.e., methods) for corporate influence and intervention can be grouped as follows: (1) do nothing, (2) interact directly with company publicly or by privately (“behind the scenes”) pressuring the board and top executives, (3) public pressure via the media, (4) using the market pressure by selling their investment[[188]](#footnote-188). He noted that the institutions used these intervention methods individually and in combination[[189]](#footnote-189). Herein, the “behind the scenes” method indicates “use of close corporate links to precondition and influence companies before they made decisions”[[190]](#footnote-190), and Holland’s cases showed that this method can be implemented by a simple “phone call”.[[191]](#footnote-191)

A research conducted in 2014 by scholars Joseph A. McCahery, Zacharias Sautner and Laura T. Starks shows that John Holland’s 1995 dated findings are still applicable today. First of all, their survey found that majority of institutional investors engage in direct discussion with management, including private discussions with a company’s board outside of management’s presence[[192]](#footnote-192). Furthermore, similar to Holland, they found that institutional investors take public measures only after the private interventions have failed[[193]](#footnote-193). Hence, authors note that implementation of public measures such as shareholder proposals signals that institutional investors could not negotiate a behind the scenes agreement with management[[194]](#footnote-194). Moreover, they express that their research suggests that private discussions with management is a general phenomenon, not restricted to particular investor types[[195]](#footnote-195).

As it is understood from the findings of the above studies, shareholder influence behind the scenes is a reality rather than a theoretical assumption[[196]](#footnote-196). This reality points out the fact that shareholders can, and are, influencing corporate conduct without using the mechanisms that corporate and securities law provide them. Instead, they prefer to rely on private discussions with the corporation’s management before taking any other steps. Hence, if the management listens the shareholder and take a corporate action accordingly, this action is seen as a product of the management’s business judgement. Consequently, this causes the circumvention of many legal measures that are implemented to protect minority shareholders from extraction of private benefits of influencing shareholders; the action will not be subject to rules constraining director’s self- dealing in most instances. As a result, especially in the context of non- pecuniary private benefits, minority shareholders are ending up with no measures to protect themselves apart from the Wall Street Rule.

It must be noted that any “behind the scenes” communication between the management and an influencing shareholder might violate securities law’s disclosure rules, proven that it has some materiality. Apart from this, there is no such rule that requires every “behind the scenes” communication be disclosed or registered, which cannot be classified under some other disclosure requiring communications such as a shareholder proposal or proxy solicitation[[197]](#footnote-197). Hence, it can be said that law is generally silent about the disclosure of “behind the scenes” communication, even though it would be misleading for the prospective investors who reasonably assume that the corporation enjoys full range of statutory powers concerning its management[[198]](#footnote-198). Of course, it is a tough task to prove the content of any “behind the scenes” communication for the petitioners, without the help of a “whistleblower” or private “watchdog institutions”. Still, this study opines that it is not impossible[[199]](#footnote-199), and believes that it should lead to the appropriate legal consequences when detected as suggested by this study. The fact that a liability imposed by the “shadow director” theory is in effect in some foreign jurisdictions (such as United Kingdom, Australia and Hong Kong) shows that behind the scenes influence may be proven in courts[[200]](#footnote-200).

On the other hand, the extralegal perspective required to perceive the kind of influence which a shareholder can have on a corporation by simply taking actions outside the corporate machinery is easier to illustrate. An influencing shareholder, who is associated with the corporation itself in the eyes of public due to his “founder” position or large shareholding in the corporation, might easily damage the corporation’s reputation and harm its business or valuation by publicly making outrageous comments about a fraction of a community in which the corporation has customers or lenders[[201]](#footnote-201). While this outside (external) action can harm the corporation’s well- being, it would also influence the corporate management while making business decisions: The management might try to compensate the loss caused by the shareholder in certain ways such as through advertisement campaigns, or they might align with the shareholder’s view and operate accordingly.

**2.3. The Transaction- Based System**

**2.3.1. Generally**

As one California court wisely puts forward, shareholders “may not use their power to control corporate activities to benefit themselves alone or in a manner detrimental to the minority. Any use to which they put the corporation or their power to control the corporation must benefit all shareholders proportionately and must not conflict with the proper conduct of the corporation’s business”[[202]](#footnote-202). Although it is simple to say, finding the right legal basis and facts for this responsibility is difficult.

Corporate law, in terms of the internal affairs of the corporation, operates on the basis that “conscientious disagreements with respect to corporate business management and policy are more or less inevitable and ordinarily reconcilable”[[203]](#footnote-203). In this case, shareholders have two protections against “perceived” inadequate business performance in publicly traded corporations. “They may sell their stock (which, if done in sufficient numbers, may so affect security prices as to create an incentive for altered managerial performance), or they may vote to replace incumbent board members.”[[204]](#footnote-204) On the other hand, law provides grounds for relief when the disagreement is not “conscientious” and a fraud or illegality is shown. However, it is challenging to grant a relief for an oppressive conduct as an independent ground, absent a specific statutory provision, when the claimant shows no fraud, illegality, mismanagement, wasting of assets, deadlock or other grounds concerning corporate law[[205]](#footnote-205).

Conventional corporate law principles of “majority control” and the “business judgment rule” (or its derivatives) hands in “the unbridled privilege to manage the corporation as it saw fit” to the majority of shareholders[[206]](#footnote-206), and fails to curb any abuse[[207]](#footnote-207). Thus, specific measures scrutinizing suspicious transactions are implemented to restrain this power from extracting unjustified disproportionate benefits and oppress the minority[[208]](#footnote-208). Hence, how much law can control extraction of non- pecuniary private benefits depends on how adequate these specific measures are able to detect this type of extraction.

Law generally deals with the disproportionate benefit extraction issue by providing measures that either require procedures that has to be completed before completing the transaction, or by testing the transaction after it is completed[[209]](#footnote-209). Thus, it is focused on tracking suspicious transactions. However, the way it approaches to the transactions is problematic when non- pecuniary private benefits are taken to consideration. First of all, when non- pecuniary private benefits are extracted without any transaction taking place (via an external undertaking), rules focused on transactions does not work, but only general principles such as “duty of good faith” may be used as a legal basis to create a statutory duty not to extract. Secondly, even when there is a transaction taking place, the procedures or the transaction tests might not get activated. This approach creates the flaw present in the current structure of corporate law.

In terms of Turkish law, basically, this flaw arises from the fact that the specific rules implemented to deal with these issues do not differentiate between different forms of private benefits of control[[210]](#footnote-210). The “transaction- based” system it implemented, just like Delaware’s[[211]](#footnote-211), fails to effectively detect the non- pecuniary private benefits. As a matter of fact, transaction- based systems does not preclude law from acknowledging the presence of non- pecuniary private benefits, but simply directs practitioners to disregard it, because transaction- based systems’ rules generally require preliminary evaluations about the (1) relatedness of the parties of the deal or (2) value of the assets subject to the deal. However, these preliminary points have nothing to do in the detection of non- pecuniary private benefits[[212]](#footnote-212). Hence, it also ignores that “many classic business judgment decisions can also have a substantial and adverse affect on the “minority’s” interest as shareholder”[[213]](#footnote-213). In this setting, it is not difficult for an influencing shareholder to frustrate minority shareholders’ interests through means that would otherwise be illegitimate[[214]](#footnote-214).

A good example of how these systems directs courts to disregard “private non- pecuniary benefits” can be seen in Court of Chancery of Delaware’s 2004 dated Hollinger Inc. v. Hollinger Int’l, Inc., 858 A. 2d 342 ruling. There, the key question before the Court was if the corporation’s shareholders were required to vote to approve (or disapprove) of the sale of “substantially all” of the corporation’s property and assets under the related statutory section, and the Court ruled that a shareholder approval was not necessary because the asset in sale (The Telegraph Group, which owns United Kingdom’s influential “Telegraph” newspaper), even though it is likely its most valuable asset, did not constitute “substantially all” of the corporation’s assets. The Court stated that the statutory provision “is designed as a protection for rational owners of capital and its proper interpretation requires this court to focus on the economic importance of assets and not their aesthetic worth”[[215]](#footnote-215). Herein, petitioners asked the Court to think the “non- pecuniary private benefits” that the asset is providing them (without referring to the conception itself), and claimed that in the consideration of the assets’ satisfaction of the “substantially all” requirement, the fact that the ownership of the Telegraph can provide a “dinner with the Queen” should be thought on[[216]](#footnote-216). However, the Court refused this argument by stating that “investors in public companies do not invest their money because they derive social status from owning shares in a corporation whose controlling manager can have dinner with the Queen. Whatever the social importance of the Telegraph in Great Britain, the economic value of that importance to…as an entity is what matters…not how cool it would be to be the Telegraph’s publisher”[[217]](#footnote-217). The Court stressed that “Although stockholders would expect that International would capitalize on the fact that some potential buyers of the Telegraph would be willing to pay money to reeive some of the non- economic benefits that came with control of that newspaper, it is not reasonable to assume that they invested with the expectation that International would retain the Telegraph Group even if it could receive a price that was attractive in light of the projected future cash flow of that Group. Certainly, given the active involvement of International in the M & A market, there was no reason to invest based on that unusual basis” [[218]](#footnote-218). Still, the Court acknowledged that there might be investors investing for non- pecuniary private benefits but, nevertheless, it has to disregard this under the transaction- based rule as follows: “It may be that there exists somewhere an International stockholder (other than Mrs. Black or perhaps some personal friends of the Blacks) who values the opportunities that Conrad Black had to dine with the Queen and other eminent members of British society because he was the *Telegraph's* publisher. But…the test addresses the rational economic expectations of reasonable investors, and not the aberrational sentiments of the peculiar (if not, more likely, the non- existent) persons who invest money to help fulfill the social ambitions of inside managers and therby enjoy (through the ownership of common stock) vicariously extraordinary lives themselves”[[219]](#footnote-219).

**2.3. Rationale of Transaction- Based Systems**

Transaction- based systems inherently disregards non- pecuniary benefits because they are designed (1) to abide by the “legal certainty” principle[[220]](#footnote-220), and (2) to provide an adequate solution to the problem of distinguishing between efficient and inefficient deals[[221]](#footnote-221). Firstly, transaction- based systems try to not to hamper the “legal certainty” in the marketplace, so it tries to define the “related- party” and the “values of the assets” subject to the transaction by precise limits. However, any standard to track the non- pecuniary benefits would need terms with somehow indefinite limits open to arbitrary interpretation[[222]](#footnote-222). This would oblige legal practitioners, including courts, undertake the duty and power to scrutinize every transaction, and this will lead to an increase in the transaction costs[[223]](#footnote-223), and people will hesistate completing any transaction due to the concern of being punished in court afterwards[[224]](#footnote-224).

Secondly, this system makes effort to distinguish efficient and inefficient deals, and permit the efficient ones because these provide benefits to the corporation and the minority shareholders. Presence of an influencing shareholder in a corporation can bring advantages to the minority shareholders in three ways[[225]](#footnote-225). Firstly, influencing shareholders will be well positioned to monitor the corporation’s management, and secondly, in the case of related party transactions, ownership relations between two sides can help to lower transaction costs between these sides[[226]](#footnote-226). Thirdly, an influencing shareholder’s good reputation in the market may also help the corporation to secure deals that will eventually increase its profits by signalling the market positive feedback about the corporation in terms of its credibility[[227]](#footnote-227). On the other hand, it is well understood that the existence of any private benefit which is not shared with the minority gives the influencing shareholder an incentive to deviate from the maximization of the corporation’s value, corollary, these shareholders will take decisions based on their will to maximize the sum of the corporation’s value and the value of their private benefits[[228]](#footnote-228). With this understanding in mind, corporate law allows minority shareholder expropriation to the extent that the action/transaction is undertaken by satisfying the procedures and remedies set by the transaction- based system, which makes sure that the minorities’ frustration is sufficiently compensated (or not frustrated). In other words, allowing the influencing shareholder to treat the corporation as its alter ego to generate income may be tolareted as long as there is an indemnification.

There are scholars who also highlight the flaws of the system while acknowledging the rationale of it. For example, according to Jens Dammann, “just as the law should enforce an upper limit for the extraction of private benefits in order to protect the minority shareholders, it should also strive to set a lower limit for the permissible extraction of private benefits”[[229]](#footnote-229), otherwise, he says, minority shareholders will not be prevented from free riding at the expense of the controller and desirable controllers will not emerge[[230]](#footnote-230). He asserts that “the appropriate upper limit for the extraction of private benefits is equal to the net benefits that the controller’s presence creates for the corporations”[[231]](#footnote-231). Yet, he claims, the transaction- centered approach fails to detect the correct amount of benefits that a shareholder can extract, because it focuses on the fairness (fair dealing and fair price) of individual transactions between the corporation and the controller[[232]](#footnote-232). He indicates that transaction- centered approach may lead to excessive private benefit extraction in some corporations and too little extraction in others[[233]](#footnote-233). Moreover, Dammann states that this approach fails to prevent emergence of controllers who are motivated by private non- pecuniary benefits of control[[234]](#footnote-234), and that it can never stop the shareholder from enjoying these benefits[[235]](#footnote-235). In this sense, he endorses the claims of this study.

In many jurisdictions, “shareholders may be held accountable for having engaged in ‘unfair’ self- dealing”[[236]](#footnote-236). In this sense, while corporate law theory disdains from private pecuniary benefits[[237]](#footnote-237), extraction of private pecuniary benefits is not illegal per se; in other words, shareholders have the right to enjoy private pecuniary benefits of their investments[[238]](#footnote-238). Still, it is acknowledged that this may harm the minority shareholders if the extraction reduces both the share and production of surplus available to them[[239]](#footnote-239). When this is the case, the extracting party has the burden of justifying any actions which would provide him private benefits but meanwhile deprive other shareholders of the characteristics inherent in their investment[[240]](#footnote-240). This is what the transaction- based system is for; it tracks the extractions and provides a remedy for the harm; hence justifies the extraction. This justification may be provided in any form; it may be a requirement to approve the transaction via resolutions or may be a compensation paid by the influencer voluntarily based on an agreement or ordered by the court after an initiation of a lawsuit that focuses on this extraction.

**2.4. Conclusion**

As it is shown in this chapter, the conflict between influencing shareholders and minority shareholders have aspects that should be evaluated with both a legal and an extralegal perspective. Private pecuniary benefits represents an interesting part of this conflict. The principle regarding private pecuniary benefits is laid down as follows: As long as law places the burden of justfying the harms on the extracting influencing shareholders, these extractors hold the right to be “selfish owners” [[241]](#footnote-241) and run the corporation as they will[[242]](#footnote-242). This is why much of the tunneling can be regarded legal by statutes and judges[[243]](#footnote-243); law legitimates receiving these benefits if properly justified, due to the benefits it can provide to the minority and the corporation as a whole[[244]](#footnote-244). However, as shown above, there are no adequate means of detecting the extraction of non- pecuniary private benefits in the current structure of corporate law, due to the construction of the present mechanism, thus this extraction is never justified.

These being said, it is important to note that in a corporation with a perfectly functioning corporate governance structure, the corporation would be primarily protected against the extraction of unjustified non- pecuniary private benefits by the virtue of one of the conventional principles of corporate law: The business judgment rule (and its derivatives). In a corporation where directors are not responsive to the wishes of the shareholders, it will be completely up to the directors to engage in any transaction that would benefit one of the shareholders privately, except in cases in which shareholder approval is required. Moreover, directors’ statutory power to manage the affairs of the corporation also gives them the power to oust a shareholder who extracts non- pecuniary private benefits via an external undertaking: For example, directors can simply sue that shareholder on behalf of the corporation for defamation[[245]](#footnote-245) (or sue under any other tort or contract claim) or choose to buy- out his shares (or adopt alternative schemes)[[246]](#footnote-246). However, as noted in this Chapter, the extralegal perspective of influence is the notion that avoids the perfect functioning of the corporate governance system, especially in corporations in which shareholders holding a large stake is present.

While the rationale of the transaction- based system might suggest that extraction of non- pecuniary private benefits can also be seen permissible and legitimate, if properly justified ex ante via board or general assembly resolutions (i.e., internal corporate procedures), the nature of non- pecuniary private benefits do not let this rationale be implemented in jurisdictions such as Turkey, but may be implemented in ones like Delaware, as it will be further explained later. That being said, this study advocates for linking this extraction with the “involuntary dissolution” statute, to make sure that there is a path to take for minority shareholders to force the extractor justify the extraction. Still, the justification proposed here is not to legitimize this kind of extraction, but contrary, to show that it is one that law does not legitimates and sanctions.

**CHAPTER III**

**COMPONENTS OF THE TRANSACTION- BASED SYSTEM IN TURKISH LAW**

**3.1. Generally**

Turkish law includes various measures which can be used to track and constrain non- pecuniary private benefit extractions in publicly traded corporations[[247]](#footnote-247). However, not all has the same effectiveness concerning both the purpose of restraining influencing shareholders and activating the minority shareholders’ motivation to be the gatekeepers of both their private interests and public policy. However, in order to lay down the flaws that the legal regime has, both the general and specific rules that might cover these extractions should be summarized.

General rules of Turkish law includes statutory provisions that can be used to curb abuses of both the influencing and minority shareholders[[248]](#footnote-248). In this regards, Turkish law does not preclude a shareholder from suing another shareholder (either minority or influencing) and demanding compensation of his losses caused by the virtue of the abuse that the defendant shareholder carried out[[249]](#footnote-249). Commentators opine that the Article 2 of the 4721 numbered Turkish Civil Code[[250]](#footnote-250), which states that abuse of a right would not be protected by law, requires abusers injuring the corporation and its shareholders compensate this injury; consequently, abuses of shareholders rights would make the abusers liable for the damages in accordance with Article 49 of the 6098 numbered Turkish Code of Obligations[[251]](#footnote-251) on tort law[[252]](#footnote-252). However, it is a fact that the plaintiff shareholder would have a hard time in satisfying the requirements and burden of proof of this tort cause of action[[253]](#footnote-253); as the plaintiff has to show the injury, bad faith of the abusers (i.e., breach of a duty and unlawfulness of the act, which would be established using Article 2 of the Turkish Civil Code), and whether the exercise of the shareholders rights is the proximate cause of the injury[[254]](#footnote-254). This is also why the contemporary approach to deal with shareholder abuses is to create case- specific provisions in Turkish law[[255]](#footnote-255).

6102 numbered Turkish Commercial Code (TCC) includes many provisions that would indirectly curb the influencing shareholder power if activated, even though these provisions are not tailored with the primary aim of curbing that power. These provisions can be listed as[[256]](#footnote-256); petition for nullity of the general assembly resolution (Article 447), prohibition on return of capital (Art. 480(3)), petition for rescission of general assembly resolutions (Article 446), petition for nullity of board resolutions (Article 391), petition for rescisson of certain board resolutions (Article 460/5), principle of equal treatment (m.397), duty to not to compete (Article 396), prohibition on deals with the corporations and loans (Article 395 and 358), pre-emption rights (Article 461 and 466), rights arising from corporate restructurings (Article 191- 193), restrictions regarding dividend distribution (Article 507), requiring just cause justification for certain internal corporate decisions (Articles 531, 461(2), 466(2), 479(2), 399(4), 360, and 493), restrictions regarding articles of incorporation (Article 340)[[257]](#footnote-257), and provisions dealing with the liability of the board of directors (Article 553). In addition to these, Capital Market Board’s (CMB) share privilige revocation authority (due to certain types of bad management of the corporation) also constrains the influencing shareholder’s power (6362 numbered Capital Market Law (CML) Article 28). While the instruments listed for Turkish law represent indirect provisions that may help minority shareholders in their endevour curbing influencing shareholder power, this does not necessarily mean that those are completely ineffective. Rather, the notion that those are not designed to particularly fight against this abuse makes them ineffective against certain issues, such as the non- pecuniary private benefit extractions[[258]](#footnote-258). After all, these provisions require shareholders to track all external transactions and internal corporate resolutions, and “hunt them down” transaction by transaction (or resolution by resolution), and this notion lessens the effect and viability of these instruments[[259]](#footnote-259).

Some alternative theories that are suggested by commentators to curb the controlling shareholder- related damages to the corporation and its shareholders are the “lifting the corporate veil”, “shadow director” or “shareholders’ fiduciary duties” theories[[260]](#footnote-260). However, the legal basis and application standards of these theories are not explicitly shown in the TCC regime[[261]](#footnote-261). Accordingly, in this chapter, this study focuses on the primary statutory provisions which can be used to deal with influencing shareholders’ extraction of non- pecuniary private benefits.

**3.2. Specific Provisions**

There are certian specific statutory provisions in the CML that can provide an effective constraint on influencing shareholder’s non- pecuniary private benefit extractions. While the efficiency of the provisions are questionable[[262]](#footnote-262), in theory; (1) the influencing shareholder may be deemed the “parent” according to the rules on corporate groups; (2) the non- pecuniary benefit extractions can be subject to rules on fundamental corporate changes or (3) to rules on concealed distribution of capital and related- party transactions; and (4) the benefit extractions can even be traced under the securities authority’s miscellanous powers. Thus, in this section, these provisions and the loopholes they have with regards to non- pecuniary are explained in detail.

**3.2.1. Fundamental Corporate Changes**

In general, corporate law regards amendments to the articles of incorporation, sale or dispositions of all or substantial part of the property of the corporation and dissolution as fundamental corporate changes[[263]](#footnote-263), and regulates these specifically even when these do not give rise to any self- dealing. It chooses to deal with these changes specifically because of (1) the effect that these changes has on the corporation’s ability to pursue the purpose for which it is chartered[[264]](#footnote-264), and (2) the “provisions of state corporation statutes authorizing charter amendments, mergers and other fundamental corporate changes give considerable leeway to directors and majority shareholders to take unfair advantage of minority shareholders”[[265]](#footnote-265). For example, those in control of the corporation may take actions that have a short- term effect of lowering the price of the corporation’s share, in order to acquire the minority’s share at an artificially low price[[266]](#footnote-266). In this regards, fundamental corporate changes represents a technique that can be used to freeze- out minority shareholders[[267]](#footnote-267). Consquently, law tries to avoid these negative outcomes by scrutinizing these changes.

As corporate law moved away from requiring unanimous approval of fundamental changes[[268]](#footnote-268), it needed to provide alternative ways to deal with changes which create uncertainty concerning the fair value of the affected shares that causes reasonable persons to differ about the fairness of the terms of the corporate action[[269]](#footnote-269). In order to minimize the negative affects of the changes for minority shareholders and opportunistic behaviours of those in control of the corporation, corporate law includes some “dissenters’ rights” that are triggered when a fundamental change is taking place. Statutes enforce the dissenters’ rights by requiring special quorum (both for board of directors and shareholders) for approval of the changes or authorization of the board for the transaction, separate class or group voting for changes specifically effecting the a group of shareholders, or giving appraisal rights in some events[[270]](#footnote-270). In this sense, fundamental corporate changes also represents one of the seldom limitations imposed by corporate law on the board’s discretion[[271]](#footnote-271). Additionally, some detailed disclosure may also be required.

Turkish law regulates fundamental corporate changes in publicly traded corporations under a special regime, partially with the aim to harmonize its law with the European Union’s and with the aim to protect minority shareholders’ interests in especially corporations with a controlling shareholder[[272]](#footnote-272). Article 23 of the CML designates certain corporate changes and transactions as “significant transactions” and provides that these transactions are subject to special procedures. Accordingly, in the secondary legislation promulgated under Article 23, CML divides significant transactions into two classes, whereby it names certain changes and transactions (1) “significant transactions” per se, and (2) lists certain other changes and transactions that would be accepted as “significant transactions” only if those meet with the “significance” threshold it defines[[273]](#footnote-273). However, it also provides to exceptions to this classification: Firstly, CMB may deem a transaction significant, if a transaction related to the corporate structure, taken as a whole, may significantly change the business and basic operation of the corportion and effect the investors’s investment decision (Significant Transactions Communique Article 4(3)). Secondly, the board of directors is liable for any violation of these rules (Significant Transactions Comminique Article 18)[[274]](#footnote-274).

The transactions that CML designates as “significant transactions per se” are; mergers, divisions, corporate restructurings, establishing new share priviliges or revoking or changing prior share priviliges. (Significant Transactions Comminque Article 4). On the other hand, the transactions that would be deemed “significant” if it meets the “significance” threshold are listed as; (1) transfer or loan of all or a substantial part of the corporate assets or establishment of a possesory interest, (2) change of the specified corporate purpose, (3) acquisition or loan of significant amount of assets from related parties. The “significance” threshold represents a criteria that requires calculation of the proportion of the transaction to the assets or other elements determined in Article 6 of the Significant Transactions Comminique.

Although this regime poses a constraint on non- pecuniary private benefit extractions through corporate dealings, the “downside of the transaction- by- transaction approach is that it can be side- stepped…by adoption of a non- regulated transaction which achieves the same functional goal”[[275]](#footnote-275). The fact that CML gives the corporation the right to cancel a significant transaction plan even after the proposal is submitted to the general assembly and voted (Significant Transactions Comminique Article 10(4)), shows that the law gives the leeway to the controllers to achieve their purposes through alternative structurings. Also, controllers can use different techniques to achieve what they desire, without triggering dissenters’ rights[[276]](#footnote-276). Even when the action triggers dissenters’ rights, the complex procedures of the rights may leave the minority shareholders without a practical way for obtaining a fair remedy[[277]](#footnote-277). Apart from this, an influencing shareholder can extract non- pecuniary private benefits without through external actions, without using any corporate dealings, and this would deem this regime ineffective. Thus, this provision is ineffective for protecting the minority against non- pecuniary private benefit extractions.

**3.2.2. Concealed Distribution of Capital and Related- Party Transactions**

Related- party transactions, or self- dealing, represents a technique for value diversion[[278]](#footnote-278), in which corporate insiders transfers a corporation’s resources through self- dealing transactions and obtain private benefits from control[[279]](#footnote-279). The conduct of transferring resources out of the corporation to a corporate insider is generally termed as “tunnelling”[[280]](#footnote-280); in this regards, self- dealing is just one type of tunnelling. The related- party transactions “category includes both transactions in which related parties such as directors and controlling shareholders deal with the corporation- traditional self- dealing and managerial compensation- as well as transactions in which related parties may appropriate value belonging to the corporation- the taking of corporate opportunities and trading in the company’s shares”[[281]](#footnote-281). The primary concern about related- party transactions is that a director or controlling shareholder may transact with the corporation on less favorable terms than could be obtained in an arm’s length transaction[[282]](#footnote-282), and obtain disproportionate benefits and exclude other’s from their proportionate share from this transaction.

While related- party transactions has long been in the focus of corporate law[[283]](#footnote-283), improving the mechanisms used for the monitoring of these transactions are still among the main concerns of regulators. As a “do nothing” approach gives leeway to abuses due to the temptation to “take the money and run” and outright ban is not desirable, jurisdictions try to adopt efficient schemes[[284]](#footnote-284). However, this is not an easy task due to self- dealing’s problematic nature. Rules, which prescribe specific behaviours ex ante, are less useful in this area, because self- dealing is “too complex to regulate with no more than a matrix of prohibitions and exemptions, which would threaten to codify loopholes and create pointless rigidities. Rather than rule- based regulation, then, intra- corporate topics such as insider self-dealing tend to be governed by open standards that leave discretion for adjucators to determine ex post whether violations have occurred”[[285]](#footnote-285). In general, legal strategies adopted to control related- party transactions consists of mandatory disclosure, corporate dissolution, requiring disinterested director approval, shareholder approval, prohibiting certain transactions per se, law of corporate groups, fiduciary duties[[286]](#footnote-286).

Turkish corporate law deals with related- party transactions specifically through two mechanisms promulgated under the CML: (1) Provision on concealed distribution of capital (CML Article 21), and (2) rules on related- party transactions under the corporate governance requirements (CML Article 17(3)). The concealed distribution of capital provision aims to track de facto dividend distributions through related- party transactions ex post[[287]](#footnote-287), and is doctrinally related to both the legal capital rules providing protection to creditors and minority shareholder protection[[288]](#footnote-288). In this regards, it represents a provision which provides the consequences that could have provided through shareholder fiduciary duties[[289]](#footnote-289). On the other hand, rules on related party transactions under corporate governance requirements deals with related- party transactions ex ante by requiring a board of directors resolution, which is approved by the majority of the disinterested directors, in order to carry out certain transaction determined by the CMB: If the transaction is not approved by the majority of the disinterested directors, then the details of the transaction is disclosed and it is submitted to the general assembly for a shareholder approval in which the interested parties would not have a voting right (Article 17(3)). Under this framework, the legislative intent is to use the disinterested directors as a “controlling instrument” regarding the protection of the corporation’s long- term interests and the balance of differing interests among shareholders[[290]](#footnote-290), but gives the ultimate decision power to the shareholders.

The regulatory interpretation of the provision of concealed distribution of capital would be better understood if the CML’s official text English is examined: While the literal translation of the title of Article 21 is “concealed distribution of income”, the official English text uses the “prohibition of illegal transfer pricing activities” title. However, this translation is misleading, because the provision itself is wider than just covering transfer pricing[[291]](#footnote-291): As one court notes, this provision protects the minority shareholders against “special governance practices”[[292]](#footnote-292). As a matter of fact, Article 21 of the CML tracks corporate governance practices that are implemented to transfer funds from the corporation to one of its related parties: In this regard, this provision is focused on the conduct of tunneling, but only covers tunneling aimed at maximizing pecuniary benefits of the related party. Therein, transfer pricing represents only one of the tunneling techniques that the provision covers[[293]](#footnote-293). Other tunneling techniques that the provision covers are transactions that would under normal circumstances not be completed or refraining to transact[[294]](#footnote-294).

According to the CML Article 21, a concealed distribution of capital occurs when an action satisfies the following four main elements: (1) the transfer is made by the publicly traded corporation or collective investment organizations, or the subsidiaries and affiliates of these entities, (2) the transfer is made to a related party (the term “related party” is defined as a direct or indirect relationship with a real or legal entity in terms of management, audit, or share ownership (Article 21(1))) of these schemes, (3) the transfer is made in a concealed manner (meaning in violation of the principles set forth in the provision), (4) the profit or assets is decreased or the increase of their profits or assets are prevented as a consquence of the transfer[[295]](#footnote-295). As understood, CML lists two types of concealed distributions; (1) transaction based (active action), and (2) non- transaction based (passive action). A transaction would be seen as a concealed distribution under the “transaction based distribution” type, if it is a transaction which violates the principles of “conformity with market practices, prudence and honesty principles of commercial life, and arm’s length principle” (Article 21(1)). The provision also lists examples of this type of transactions it covers as “contracts or commercial practices containing different prices, fees, costs or conditions or producing a trading volume” (Article 21(1)). On the other hand, a non- transaction based concealed distribution can occur if a corporation refrains from taking an action that is required to complete in order to protect its profit or asset or increase them: This kind of action would only be a concealed distribution if its in contrary to what is expected from the corporation as prudent and honest merchants in the scope of their articles of incorporation or bylaws, or due to commercial practices (Article 21(2)). Moreover, different from the transaction based distribution, this kind of passive action would only be deemed a concealed distribution if this refrainment increases the assets or profits of the related parties (Article 21(2)). If a transaction, or non transaction, takes place in violation of the provision, the amount of concealed distribution should be returned back to the corporation, and responsible parties should be prosecuted under the criminal and administrative sanctions of the CML (Article 21(4)).

The Comminique on Corporate Governance, which includes the rules for the ex ante inspection of the related- party transactions, expresses that definitions in accounting standards will be used to define the term “related party”, which includes vague terms that would cause uncertainty in legal context[[296]](#footnote-296). Comminque states that a board of directors resolution, and an appraisal report on the transaction, is required for the following transactions between the corporation or its subsidiary and their related parties, provided that it meets the initial monetary thresholds determined by the Comminique: (1) transactions such as asset and service purchase, and obligation transfers, (2) transactions such as asset and service sale (Article 9(2)). If these transactions meet the second monetary threshold set by the Comminique, the board of directors resolution should be approved by the majority of the disinterested directors: If the majority of the disinterested directors do not approve the transaction, then the transaction plan is submitted to the general assembly for shareholder approval (Article 9(3)). In addition to these principles, Article 10 of the Corporate Governance Commique provides that a board of directors resolution is needed for “common and continuous transactions”, which are defined as “transactions, whether as a part of the corporation’s ordinary commercial operations or not commercial, that are or will be completed for at least two times during a single fiscal year” (Article 3(1)(m)), excluding transactions such as dividend distribution (Article 10(4)); and a special appraisal report should be disclosed if the transaction meets the threshold but fails to have the approval of the majority of disinterested directors. The Commique also states that corporations and their subsidiaries cannot grant collateral, pledge, mortgage and surety in favor of third parties, unless the grant is one of the grants authorized by the Comminique, and requires approval of the majority of disinterested directors for some grants, and orders the disclosure of the disinterested directors reasons for rejecting the transaction if their majority does not approve (Article 12).

The main problem regarding both the concealed distribution of capital and related party transactions rules is that both require the other party of the transaction be a related party[[297]](#footnote-297). In this regards, transactions which includes a non- related party are out of the scope of these provisions. While the complex and vague definition of related parties can widen the coverage of this concept, the fact that the legal certainty principle and intersecting coverage of the provision with other provisions[[298]](#footnote-298) requires both the courts and the regulatory authorities to be consistent and precise about their conclusions, and their interpretation would probably (and should) lead to a narrow interpretation of the term’s coverage. Furthermore, while the broad language of CML Article 21(2) can be interpreted as a provision that gives the chance to track transactions with non- related parties completed for the benefit of a related party, the fact that an increase in the related-party’s assets is required makes the provision ineffective against non- pecuniary benefits[[299]](#footnote-299). In addition to this, both shareholders’ motivation and ability to monitor these transactions are in question, because they are not directly compensated if a violation arises and do not have adequate access to sufficient information ahead of the planned transaction. While the disclosure requirements would provide them some information, transactions structured to stay below thresholds and with non- related parties would still not be disclosed under this special disclosure regime (but would still be subject to the general disclosure regime which can be circumvented). Meanwhile, the requirement that transactions with related parties should be documented and archived for at least eight years as evidence of compliance with the provision (CML Article 21(3)), does not give a hand in advance planning. Thus, directors’ fiduciary duties still represent the most effective and last resort constraint on the related- party transactions.

**3.2.2. Liability in Corporate Groups**

The efficiency advantages of structuring as a corporate group, rather than relying on contractual relationships (such as licensing, trade or subcontracting), so substituting market relationships by hierarchy, saves significant transaction costs[[300]](#footnote-300). Accordingly, as corporations began to organize other business entities to conduct some parts of their business and to acquire other entities as an alternative method of expansion, a corporation started to no longer represent the entire enterprise[[301]](#footnote-301). This notion caused two legal problems: Firstly, member entities of the corporate groups started to run for the benefit of the whole group, rather than the individual benefit of the entity itself, and secondly, managing the related- party (inter- group) transactions became a more complicated issue[[302]](#footnote-302). Gradually, jurisdictions had to deal with the advantages and disadvantages (mainly, the negative effects on the minority and creditors)[[303]](#footnote-303) of this reality[[304]](#footnote-304). Corollary, to match with the realities of commercial life, two different regulatory approaches regarding corporate groups developed: (1) entity principle, and (2) enterprise principle[[305]](#footnote-305). In entity principle, each business entity within the corporate group is treated as separate and distinct from every other entity, on the other hand, in the enterprise principle the entities in a group are treated as a single unit under certain (i.e. selective) circumstances[[306]](#footnote-306).

Turkish law adopted an “enterprise principle” interwoven with a “control system” by the enactment of the TCC[[307]](#footnote-307), and codified the rules on corporate groups by using the German “konzernrecht” (i.e. concern law) as its model[[308]](#footnote-308). In TCC, the central conception of the legal construction regarding corporate groups is “control”[[309]](#footnote-309); whether a corporate group exists (consequently a liability) depends on this conception[[310]](#footnote-310). It states that presence of corporations that are directly or indirectly controlled by another corporation forms a corporate group (Article 195(4))[[311]](#footnote-311). Rather than defining control rightaway, TCC provides criterias for determining the existance of control[[312]](#footnote-312). Accordingly, similar to what the German law does[[313]](#footnote-313), it divides the “control” types into three groups, hence implicitly the corporate groups into the following three classes; (1) integrated groups (formed through holding voting rights bearing the particular features the statute provides) (TCC Article 195(1)(a) and 195(2)), (2) contractual groups (formed through a specific private contract between entities) (TCC Article 195(1)(b)), and (3) other groups (formed through any other technique) (TCC Article 195(1)(b)). TCC makes these distinctions because the conflict of interests differs depending on the level of the integration that the corporations have[[314]](#footnote-314). TCC also puts forward the principle that the parent can be an “undertaking” (i.e. enterprise), meaning that the controlling parent does not necessarily have to be an artificial legal entity or a business entity (Article 195(5))[[315]](#footnote-315).

Under TCC Article 195(1)(a), an integrated group can be formed through holding; the majority of the voting rights, a privilege given by the articles of incorporation to nominate necessary number of director required to secure a board resolution, or the majority of voting rights through a contract (such as shareholders’ agreement) in addition to the holders own voting rights. The “control tools” listed in Article 195(1)(a) do not function as a “presumption for control”, rather the law deems control when these tools are in effect[[316]](#footnote-316). Additionally, Article 195(2) states that a corporation’s ownership of majority of the shares (or the necessary number of shares to pass decisions regarding management) of another corporation would create a presumption of control[[317]](#footnote-317).

While TCC Article 195(1)(b) states that a corporate group can be formed by any contract (contractual group), the contract that the statute particularly refers is a distinct type of contract called “domination contract” [[318]](#footnote-318). Although the validity of these contracts depend on its registration and publication in the trade registry, failure to do so would not effect the application of the provisions on corporate groups to the particular relationship between the corporations (TCC Article 198(3)). In domination contracts, the dominant corporation acquires the right to direct the management and affairs of the subservient corporation, and the subservient corporation is under the duty to obey and implement the orders of the dominant corporation[[319]](#footnote-319). The contract itself provides the dominant party the power to use the statutory powers of the board of directors of the subservient corporation[[320]](#footnote-320), however, it does not effect the powers of the shareholders (i.e. general assembly)[[321]](#footnote-321). Likewise, the statutory authority to sign these contracts is given to the board of directors of the both parties[[322]](#footnote-322), however the secondary legislations nevertheless requires the approval of both corporations’ shareholders for validity[[323]](#footnote-323). Note that if the the subservient party of the domination contract is a publicly traded corporation, this contract can be accepted as a fundemental corporate change and a shareholder approval might be necessary under Article of the 23 CML.

Although both the law and commentaries are able to outline the scope of the first two types of groups, a corporate group that can be classified under the “other group” class does not have any definite definition. It is opined that whoever exerts control or actually manages the corporation would be deemed the parent of the controlled corporation[[324]](#footnote-324). Some other commentators state that the type of control necessary for the establishment of these groups is obtained through “voting agreements”[[325]](#footnote-325). According to the Official Comment to TCC; mergers, divisions and share acqusitions can also be evaluated under this classification[[326]](#footnote-326).

According to the statutory provisions on corporate groups, three situations may give rise to the parent entity’s liability: (1) Intrusion in subsidiary’s management (TCC Article 202(1)), (2) general assembly resolutions violating subsidiary’s interests (TCC Article 202(2)) and (3) breach of trust (TCC Article 209)[[327]](#footnote-327). In all situations, the presence of a corporate group is necessary to establish any parent liability. The main principle regarding the first two situations that may give rise to parent liability is that the parent entity will be only liable for the unlawful exercise of its control power over the subsidiary. However, the for the third situation, rather than unlawful exercise of control over the subsidiary, the parent’s liability can only arise if it has a reputation that provides confidence in the third parties’ view and if it violates its duty of good faith[[328]](#footnote-328). Furthermore, the legal basis of the first two sitatuations is accepted primarily as a tort claim[[329]](#footnote-329), but the third situation’s legal basis is analogized to the precontractual liability doctrine of “culpa in contrahendo”[[330]](#footnote-330).

Regarding the fist situation (intrusion in subsidiary’s management), the statute states that the parent cannot use its control over the subsidiary in a way that would cause loss[[331]](#footnote-331) to the subsidiary through any transactions (such as transfer of funds from one subsidiary to other, not to renew the subsidiary’s facilities, supressing the investment projects of the subsidiary) (Article 202(1)(a)). It holds that, losses arising from these transactions would make the parent’s board of directors liable, consequently the parent, only if these transactions are ones that a faithful and cautious managers of an independent corporation would not approve under the same conditions (Article 202(1)(d)): To avoid liability, the parent can compensate the loss of the subsidiary (Article 202(1)(a)). However, if the parent does not compensate the loss until the end of the operation year, the minority shareholders or the creditors (even if the corporation is solvent, Article 202(1)(c)) can sue the parent demanding the parent to compensate the loss of the corporation, or alternatively, the complaning shareholders can demand the buy-out of their shares by the parent (Article 202(1)(b)). It must be noted that, if the subsidiary is a wholly-owned one, then the subsidiary’s management is obliged to comply with the directions coming from the parent which are a part of the corporate group’s policy (Article 203), unless these will make the corporation insolvent or put in zone of insolvency or cause the loss of significant assets (Article 204): In this case, the parent can again avoid liability by compensating the loss (Article 206), however the level of loss that should occur (zone of insolvency) for the establishment of any liability is much higher compared to the level of loss required in the non- wholly- owned subsidiaries[[332]](#footnote-332).

As for the second situation that may give rise to liability (through general assembly resolutions), it can be said that the liability may occur only due to certain significant general assembly resolutions. These resolutions can be exemplified as significant amendments to the articles of incorporation, dissolution, issue of shares, change of entity form, mergers and divisions, changes regarding the quorum or share transfer restrictions[[333]](#footnote-333). According to TCC Article 202(2), if the subsidiary’s general assembly resolution is taken due to the exercise of the votings rights of the parent, and if the action taken by the resolution does not have any rational explanation for the subsidiary, the dissenting minority shareholders can sue the parent for their direct damages, or alternatively, demand a buy-out of their shares (Article 202(2))[[334]](#footnote-334).

The third situation that may give rise to the parent’s liability is the breach of trust (i.e. confidence)[[335]](#footnote-335). This theory is transplanted from the Swiss case law[[336]](#footnote-336) into the Turkish corporate law[[337]](#footnote-337). The breach of trust doctrine represents a separate cause of action, situated somewhere between contractual and tort liability[[338]](#footnote-338). A parent can be liable under this section, if a damage occurs, only (1) when a subsidiary is engaging in relationships with third parties, and these third parties are engaging in this relationship due to the subsidiary’s inducement (this may also be directly through an action taken or a statement submitted by the parent)[[339]](#footnote-339) of the third party that the parent (or the group) is specifically “backing or supervising the subsidiary” in the action that is subject to the relationship between the third parties and the subsidiary, and (2) the parent knowingly does nothing to prevent the legitimate expectations that this inducement created in the view of the third parties and derive benefit to the corporate group from this inducement[[340]](#footnote-340). It is important to note that in this situation the parent is not held liable for the subsidiary’s violation of a contract (e.g., failure to perform a contractual obligation), rather it is held liable for its (parent’s) own violation of the duty of good faith if it refrained from perfoming an obligation that this duty burdens[[341]](#footnote-341). Moreover, the breach of trust theory is only applicable if there is no contractual relationship between the parent and the third party, and the tort law cannot provide a satisfactory remedy[[342]](#footnote-342).

Apart from the general criticism to the statutory construction on the grounds that it is difficult to prove detrimental interference on a transaction by transaction basis, especially where the businesses are highly interconnected[[343]](#footnote-343), the nature of the rules on corporate groups includes five main loopholes with regards to extraction of non- pecuniary private benefits. First of all, although the Turkish law on corporate groups resembles the doctrine of imposing fiduciary duties (particularly, duty of loyalty)[[344]](#footnote-344) on certain shareholders in Delaware, the fact that a secondary legislation states that a corporate group can at minimum comprise of three entities distinguishes this regulation from the doctrine of fiduciary duties[[345]](#footnote-345). According to the Article 105(1) of the Trade Registry Regulation, a corporate group forms when an entity has two or more subsidiary companies, controlled either directly or indirectly[[346]](#footnote-346). Hence, according to this regulatory interpretation, the rules on corporate groups do not address to transactions of controllers that have only one subsidiary[[347]](#footnote-347). Therefore, many private benefit extractions (not only the non- pecuniary ones) can escape from the rules of this section if there is no three- entity group present.

Secondly, while the criterias for determining control is broadly defined under Turkish law (including the de facto control technique), these criterias may give a hard time in proving that the activities of influencing shareholders are in fact activities of “controllers”. As the definition for influencing shareholder suggests[[348]](#footnote-348), a shareholder can influence the corporation by purely relying on the prospective power to remove the director from position or using the “human nature” of the director. In this sense, a shareholder can influence a director without legally being a controller. In cases which this is possible, shareholders will prefer not to engage in any legal controlling relationship; after all, “as long as it is cheaper to control without contract the parent’s cost/benefit analysis will favor contractless control”[[349]](#footnote-349). However, claiming that this kind of control is also in the purview of the provision would be contrary to the legislative intent and the legal certainty principle[[350]](#footnote-350).

Thirdly, when a controlled corporation’s loss is compensated under the rules of corporate group, no cause of action remains under the rules on corporate groups[[351]](#footnote-351). However, in the case of non- pecuniary benefits, there are wider considerations that goes beyond the mere protection of shareholders and creditors[[352]](#footnote-352). After all, compensating a subsidiary’s loss would not deem an action which is against public policy “legal”. While, practically, a shareholder whose loss is compensated would not go after the benefit extractor (because he will not have any damages to demand), this might not always be the case, and the shareholder might have the motivation for acting like a private attorney general for various (but more likely for non- pecuniary reasons)[[353]](#footnote-353). Although one can say the lack of damages would preclude the shareholder from taking a cause of action, law does not necessarily require presence of damage to remedy a frustration. For example, there is no damage requirement to initiate a judicial dissolution action under Turkish law and a court can practically dissolve a corporation without the establishment of any damage (even though the court would have a hard time in doing so)[[354]](#footnote-354).

Fourthly, while the first two situations for liability can theoretically cover the non- pecuniary benefit extractions via external undertaking (if the subsidiary refrains from taking a legal action against the detrimental benefit extraction due to the extractor shareholder’s (parent’s) order to “not to sue”, the shareholder can be liable for this inaction under Article 202(1)), it would be challenging to use those sections for transaction based non- pecuniary private benefit extractions. As TCC Article 202(2) requires there to be a shareholders’ resolution on a significant issue and that the action taken by the resolution does not have any rational explanation for the subsidiary, a simple and ordinary transaction that does not require shareholders’ authorization would easily escape from the requirement of the provision. Likewise, one can prove that an independently acting board of directors would have also done the action, and accordingly, make both the board and the parent immune, as the board of directors’ actions represent the corporations actions[[355]](#footnote-355).

Lastly, the application of the third situation that may give rise to parent liability (breach of trust) is ineffective in the context of non- pecuniary private benefit extractions. To start with, non- pecuniary private benefit extraction can done without the involvement of the corporation itself. In other words, for a shareholder to extract private non- pecuniary benefits, the corporation does not have to engage in any transaction with a third- party, and the shareholder can derive the benefit via an external undertaking. In addition to this, even if the corporation engages in a transaction with a third- party, the shareholder does not need to have the third party induced by the corporation to extract non- pecuniary benefits from his status as a shareholder; inducement of a party who would under normal circumstances would not do business with the corporation is not a prerequisite of non- pecuniary benefit extraction. Alternatively, he can simply extract it through an external undertaking without having neither the corporation nor the third party involved in any kind of relationship[[356]](#footnote-356). Also, it is important to note that in the non- pecuniary extraction context the shareholder’s reputation is not used to induce the third party, and the shareholder is the one who is willing to use the reputation of the corporation. In this sense, the usage of reputation (trust) is vice versa in the context of non- pecuniary benefit extractions. Therefore, this third situation for liability does not cover the circumstances that an extraction can take place, hence fails to provide adequate protection for the minority shareholders.

**3.2.3 Securities Authority’s Miscellaneous Powers**

While the title of “securities authority’s miscellaneous powers” can include all of the enforcement measures of the CMB under the CML, for the purposes of this study, it is used to refer to the authority under Article 92[[357]](#footnote-357). According to the Official Comment to CML Article 92, this provision shows the measures which the CMB can apply in cases concerning “authorized capital system”, which refers to the capital system that gives the board of directors the authority to increase the share capital with a resolution (TCC Article 456(2)), without shareholder approval (as opposed to the subscribed capital system in which the share capital increase decision is in shareholders’ monopoly), by relying on the grant of authority under the articles of incorporation (TCC Article 460). However, contrary to the official comment, the context of the provision shows that it can be applied to many events, for example, to concealed distribution of capital cases (not surprisingly, Article 94(2) of the CML explicitly states that Article 92 can be applied to cases in which concealed distribution of capital is detected). In fact, an equivalent of this article was present in the abolished CML, and the broad authority that the abolished article gives to the CMB was underlined by commentators[[358]](#footnote-358).

According to Article 92(1) of the CML, securities authority’s power under this article is limited to the events in which (1) a loss or decrease in the assets or capital of the issuer has occurred (2) due to the issuer’s actions in violation of the statute, capital market legislation, articles of incorporation and fund bylaws, or actions contrary to the corporate purpose[[359]](#footnote-359). Provided that the requirements of the Article 92(1) is satisfied, the CMB can (a) request from related parties to take measures in order to cure the violations and carry out the necessary transactions, (b) initiate a nullity or rescission suit against the actions causing violation of Article 92(1), (c) revoke the signature authority of the responsible persons, and if a criminal complaint is filed then the CMB can remove them from their positions, and appoint members to the board of directors.

While this provision can, on its face, be applied to extraction of non- pecuniary private benefits, this would be problematic[[360]](#footnote-360). As the article is focused on actions that reduce the legal capital or assets, non- pecuniary benefit’s effect on the detoriation in profit margins would not be completely covered by the article. Furthermore, making the securities authority the police of these extractions causes two problems. First of all, from the investor point of view, knowing that an administrative agency has broad powers and it can try to effect the operation of the corporation by using the “non- pecuniary extraction” card, is an element that lowers the trust to the efficient functioning and the integrity of the market, and investors (especially international investors) will not be induced to invest in a market like this. Secondly, the notion that the benefits of such detection will not be directly transferred to shareholders would lower the shareholder motivation to act as a gatekeeper, and would instead leave all the work to the agency, and this would increase the costs of regulatory enforcement. Thirdly, the notion that a securities agency should exercise its powers in accordance with the scope and aim of the statute may bar the authority from using the power under this provision for the control of non- pecuniary private benefits[[361]](#footnote-361). All in all, leaving the issue of non- pecuniary benefit extractions to this provision will cause inefficiency, thus it is not convenient.

**3.3. Conclusion**

As shown throughout this Chapter, both the general theories and the specific provisions that might be used to deal with non- pecuniary private benefit extractions has flaws and loopholes. The loopholes exist in the specific provisions primarily because the provisions are focused on either the relatedness of the parties, or the value of subject of the transaction. On the other hand, their effect on restraining influencing shareholders and motivating the minority for exercising their rights is problematic. Besides, empowering courts and authorities to bring the non- pecuniary benefit claims into the coverage of these rules, when the vagueness of the provisions are taken into consideration[[362]](#footnote-362), poses threat to the integrity of the marketplace and the legal system. Therefore, this issue has to be solved through another mechanism that has a convenient theoretical basis and justification for the detection and protection of these extractions.

The art of lawmaking has never been an easy task; every legislation, be in the form of rules or standars, face with the problem of simplicity- complexity and over-under inclusivity[[363]](#footnote-363). In this sense, while it is true that the presence of the existing measures are curbing both the pecuniary and non- pecuniary private benefit extractions of influencing shareholders, these can be improved. Accordingly, this study proposes to use the judicial dissolution provision in such a way that would catch the all undetected non- pecuniary private benefit extractions and meanwhile provide the effects of deterring influencing shareholders and motivating the minority shareholders, and lay down the issue on a theoretically rational basis.

**CHAPTER IV**

**THE “REASONABLE EXPECTATIONS” STANDARD**

**4.1. Generally**

Generally, the “reasonable expectations” term is not a legal term of art[[364]](#footnote-364). Still, the concept of “reasonable expectations” is used to refer to the law- backed expectations of a party, and distinguished from the “expectations stemming from circumstances divorced from the legal culture”[[365]](#footnote-365). In the words of a Canadian court, laws “regulate voluntary relationships by regard to the expectations raised in the mind of a party, by the word or deed of the other, and which the first party ordinarily would realize it was encouraging by his words and deeds. This is what we call reasonable expectations, or expectations deserving of protection.”[[366]](#footnote-366)

The “reasonable expectations” doctrine that this study focuses on is one that is used in the context of “shareholder oppression” in U.S. corporate law[[367]](#footnote-367). However, this conception can be found both in private law and public law. In the private law context, U.S. courts have originated this doctrine in insurance law, which started to grow by 1960’s in the U.S.[[368]](#footnote-368), whereas scholars originated its development in general contract law[[369]](#footnote-369). On the other hand, in public law context, “reasonable expectations” theory has a counterpart called “legitimate expectations” in administrative law, which mainly focuses on the expectations that public authorities evokes[[370]](#footnote-370).

In U.S. corporate law, the “reasonable expectations” doctrine appears as a standard that determines whether an “oppression” has occurred[[371]](#footnote-371): This doctrine is crucial, because “oppression” provides an independent ground for involuntary dissolution of the corportion[[372]](#footnote-372). The usage of “reasonable expectations” concept as a standard[[373]](#footnote-373) to assess oppression in U.S. shareholder oppression law was strongly advocated for the first time by Professor O’Neil back in 1975[[374]](#footnote-374). However, this concept did not originate in U.S. law. An Australian scholar, Allen Afterman, linked this concept to oppression for the first time in his 1969 dated article[[375]](#footnote-375). Still, the judicial use of the concept had to wait until the 1972 dated Ebrahimi v. Wesbourne Galleries Ltd.[[376]](#footnote-376) decision of the U.K. court. On the other hand, U.S. law had to wait until New Jersey’s 1979 dated Exadakitilos v. Cinnaminson Realty Co.[[377]](#footnote-377) decision for the real linkage of the conception to the definition of oppression in judiciary; but it was the New York courts who has developed the standard to today’s extent[[378]](#footnote-378).

**4.1.1. Theoretical Framework of the “Reasonable Expectations” Conception**

U.S. law’s conception of “reasonable expectations” standard in the context of corporate law, which is initially derived from English case law[[379]](#footnote-379), resembles the contractual view of corporate law[[380]](#footnote-380). Hence, its usage under the involuntary dissolution statute is also compatible with the nexus of contracts theory[[381]](#footnote-381). Jurisdictions that have adopted the reasonable expectations approach “embrace the central tenet of the nexus of contracts theory of the firm, that the primary role of corporate law should be to enforce participants’ contract”[[382]](#footnote-382).

According to the contractual theory, an economic analysis does not solely focus on enforcement of expressly articulated bargains and pays attention to bargains never fully articulated as well, “because at some point the costs of setting out a bargain in writing will exceed the benefits”[[383]](#footnote-383), so some parts of the agreement will be left unwritten. Also, as the nature of the corporate contract is a long- term one rather than a discrete transaction, it is not possible to foresee and state every possible conflict that may arise in the future, in the contract[[384]](#footnote-384); and “economically rational investors will often prefer to live with an incomplete bargain, addressing problems later, if and when they arise”[[385]](#footnote-385). Sometimes even the bargain- limiting interpersonal trust or other market or reputational constraints are seen as reasonable substitutes for the articulated bargains, thus leave the issue unwritten[[386]](#footnote-386). Herein, as said above, corporate law comes in and acts as a standard form contract, thereby reduces the costs and provide an adequate deal for the participants, and aims to not to let any bargain unarticulated. Furthermore, corporate law devises (and should devise) rules to govern this incomplete contract of parties when dispute arises between parties[[387]](#footnote-387).

“Shareholder oppression doctrine reduces the need for expensive ex ante bargaining, allowing the participants to proceed with an incomplete agreement”[[388]](#footnote-388). Accordingly, economic theory[[389]](#footnote-389) suggests that both the express terms of the agreement and the terms that the agreement would have included if the negotiations had been costless, should be equally considered to fully construe the parties’ agreement[[390]](#footnote-390). In this sense, the usage of the "complementary interpretation” method of the contract law to construe the full extent of the agreement is proposed[[391]](#footnote-391). Herein, the “reasonable expectations” standard is there to make the construction: The “reasonable expectations constitute the bargain of the parties in light of which subsequent conduct must be appraised”[[392]](#footnote-392). In this sense, the “reasonable expectations” standard is not a tool serving to the conversion of an expectation to a right[[393]](#footnote-393), rather it is an analysis or method that is used to find or interpret the explicit or implicit terms of the contract[[394]](#footnote-394).

As understood, while the reasonable expectations standard does not hand in an outright “right” to the shareholders, it may provide a protection pursuant to a statutory provision that permits its usage. Although corporate law prohibits the usage of this conception for certain issues, such as by requiring parties to arrange certain issues explicitly in articles of incorporation for validity[[395]](#footnote-395), it may permit its usage in the context of judicial dissolution based on the abovementioned economic theory. After all, in the context of shareholder oppression, the “parties’ failure to build in specific protections against the majority appropriating wealth from the minority is plausibly a result, not of their desire to permit such appropriation, but rather of the prohibitive cost of writing a contract to achieve that result. To the extent that courts can supply implicit contract terms that are consistent with the parties’ preferences, they can reduce the cost of forming”[[396]](#footnote-396) a business. From another perspective, one can also claim that the judicial dissolution context suggests that the activation of this proceeding based on oppression allegation evidences a shareholder dissension, and the notion that this dissension is not solved through other procedures of corporate law signals the court that there might be an ambiguity in the corporate contract[[397]](#footnote-397), and this requires a further evaluation by the court through the reasonable expectations standard[[398]](#footnote-398).

It must be noted that the protection provided by the “reasonable expectations” standard frameworked on the view stated above would not get defeated when the petitioner shareholders’ investment’s value is undiminished or even increased. A shareholder may claim that his reasonable expectations are frustrated whenever the understanding of the parties (for example, as to the role of the influencing shareholder is expected to play) is defeated (by the influencing shareholders contrary action)[[399]](#footnote-399). However, this does not preclude the reality that the frustrated shareholder will not be able to recover anything out of this frustration when no damage arises, as the “remedies that a court will apply will logically depend on the harm to the minority shareholder or her interest in the corporation”[[400]](#footnote-400).

Although reasonable expectations standard is used in the context of close corporations[[401]](#footnote-401), by usually analogizing close corporations to partnerships[[402]](#footnote-402), contractual gaps also exist in publicly traded corporations[[403]](#footnote-403). There “inevitably will be a point at which the costs associated with specifying how particular issues should be dealt with will exceed the benefits. Hence, the corporate constitution and related contractual arrangements will not address in a comprehensive fashion all pertinent issues. It follows that an investor, when he buys his shares, may have expectations that will not be reflected in legal documentation.”[[404]](#footnote-404) Although, ordinarily, an investor only gets the opportunity to buy equity on ‘take it or leave it’ basis[[405]](#footnote-405), this does not preclude him from having some reasonable expectations tied to his shareholder status[[406]](#footnote-406). The reasonable expectations standard is already in use in different contexts of corporate law, such as interpretation of the articles of incorporation if there is ambiguity about the rights of the shareholders, without distinguishing between close or publicly traded corporations[[407]](#footnote-407). Moreover, thinking from another perspective, the fact that the ultimate share purchaser was not a party to the drafting of the documents which determines his rights, giving effect to his reasonable expectations would align with the classic contract interpretation technique (“contra proferentem”) in the case of ambiguity[[408]](#footnote-408).

As the contractual relationship between the publicly traded corporation and the shareholder is different than the close corporation context, the sources of the “reasonable expectations” that will be frameworked has to be different. This due to the following reason: While the main document that reflects the explicit terms of this contract (articles of incorporation) becomes a document that binds all the present and prospective shareholders once the corporation incorporates and changes its nature[[409]](#footnote-409), in the context of close corporations, the nature of this contract generally remains intact as if it is a partnership contract due to the nature of the close corporation[[410]](#footnote-410). This is primarily because both the parties and the understanding between them generally remains unchanged and the newcomers purchase the shares by most likely knowing both the implicit and explicit conditions of the membership[[411]](#footnote-411). However, once a corporation becomes a publicly traded one, newcomers purchase the shares from the market, and the dispersed nature of the shareholders makes impossible for the member to know the “hidden” terms (e.g. terms arising from conduct or intent) unless they are disclosed to the public. While this fact does not prohibit the application of the “reasonable expectations” theory for investors of public securities[[412]](#footnote-412), it requires a limitation on the sources of the “reasonable expectations” in the context of publicly traded corporation[[413]](#footnote-413).

Then, what are the basic reasonable expectations of shareholders in publicly traded corporations? Although different types of investors might have different expectations[[414]](#footnote-414), it is accurate to state that majority of investors invest their capital in shares with the expectation that they will realize a return in terms of capital directly by dividends or indirectly by an increase in the market value of their shares[[415]](#footnote-415). They voluntarily invest in corporations, rather than, for example, treasury bonds, with the belief that they will realize more money from this investment, by taking their risk preferences into account[[416]](#footnote-416). They have no expectation of receiving pecuniary benefits through a side contract with the corporations, such as an employment or property lease transaction[[417]](#footnote-417). Secondly, they believe that the managers of the corporation possess and apply their professional managerial expertise (i.e., business judgement) to pursue corporate goals[[418]](#footnote-418). They assume that the corporation will work to reach the goal of providing economic benefits, and that their investments’ destiny will depend on the economic variables of the marketplace.

Accordingly, it can be stated that the self- interest of shareholders is predominating; they do not feel to be responsive to the needs of others, but rather stick to their personal commitment to the contractual obligations, and can choose to leave this commitment simply by selling their stock[[419]](#footnote-419). Then, shareholders’ expectations in publicly traded corporation represents the interests that the mere shareholder status entitles, such as right to have proportionate stake in the corporation’s dividends and various other shareholder rights[[420]](#footnote-420). These being said, there are investors that do not fit into this pattern; some investors have the expectation of influencing corporate policies (e.g., a climate change activist investing in a petroleum company), or personal feelings attached to their pecuniary expectations (e.g., a football fan investing in the club he supports), hence face subjective exit difficulties[[421]](#footnote-421). Still, just like expecting that a share in close corporation will hand in an employment in the same corporation is a specific expectation[[422]](#footnote-422); these ones are also “specific expectations” rather than a “general” one and requires proof of this understanding and bargaining (thus, it is highly unlikely that these will be deemed “reasonable” in the context of publicly traded corporations) [[423]](#footnote-423).

Then, the two “basic reasonable expectations” that all shareholders of publicly traded corporations have are the followings: (1) the corporation will be run to pursue economic benefits in the manner formally accepted or disclosed[[424]](#footnote-424), and (2) that the corporation’s success will be primarily depending on the managers own business judgement[[425]](#footnote-425) and shareholders’ impact will be limited (i.e., only on fundamental corporate changes such as changes in articles, approval of major transactions)). Investment in publicly traded corporations carries with it an implicit consequential grant, permitting the use of invested money in accordance with these basic expectations. Hence, these basic “expectations belong to all shareholders and, absent evidence to the contrary, are both reasonable and central to the decision to invest in the corporation”[[426]](#footnote-426). In this sense, the conception of “basic reasonable expectations” refer to a narrower scope of expectations (in fact, just two), and represents a subset of the “general reasonable expectations”. Likewise, this categorization does not mean that shareholders do not have any other shareholder rights other than the ones corresponding to the basic reasonable expectations. To the contrary, other shareholder rights are categorized under the general reasonable expectations.

The implicit consequential grant, interwoven with these basic expectations, are arising from the terms of the contract between corporate participants[[427]](#footnote-427), which are mandatorily added to the contract due to mandatory standard rules of corporate law for publicly traded corporations in Turkey[[428]](#footnote-428) and U.S.[[429]](#footnote-429). In this sense, these expectations arise because of the statutory rules that forms the terms of the relationship between the parties[[430]](#footnote-430). Put differently, due to the statutory provisions, shareholders have expectations about what their legal rights are[[431]](#footnote-431). After all, “the law and expectations are related by a mutual feedback mechanism” and “reasonable expectations affect the state of the law and the state of the law affects reasonable expectations”[[432]](#footnote-432). The statutory norms reflect the shareholder expectations envisioned by the legislators[[433]](#footnote-433). Then, just like shareholder rights is primarily found in the statutory rules of corporate law[[434]](#footnote-434), searching through the same source for detecting their basic reasonable expectations is logical[[435]](#footnote-435).

As acknowledged by a respected commentator, the expectations of shareholders of publicly traded corporations is that “the managers’ knowledge and energies will be used to maximize corporate profits for the ultimate purpose of increasing shareholder wealth”[[436]](#footnote-436). Accordingly, when an action is taken to realize an influencing shareholders’ non- pecuniary benefits, these basic reasonable expectations are being frustrated, because; (1) the corporation is not acting to pursue an economic benefit, or it is being drifted away from its purpose by way of external undertakings by influencing shareholders and (2) the management is choosing to substitute its own judgment with the influencing shareholder’s judgment. Moreover, this conduct also breaches the mandatory rules of corporate law due to the statutory source of these expectations. This basis theoretically justifies why these basic “reasonable expectations” could provide a protection for non- pecuniary private benefit extractions. However, as these basic reasonable expectations generally do not provide a “right” to the shareholders[[437]](#footnote-437), the enforcement of these expectations would require specific statutory rules that protects their circumvention (various provisons outlined in the next subchapter) or a specific statutory shareholder right (the judicial dissolution provision) that will call their consideration.

**4.1.2. Basic Reasonable Expectations’ Current Protection in Corporate Law**

“Certain basic expectations of investors are enforceable in the courts”[[438]](#footnote-438) in the current structure of corporate law, separate from the broader list the dissolution provision- related ones protects. As it is shown in this subchapter, corporate laws of both Turkey and U.S. already provides protections for the basic reasonable expectations stated in this study, but fails to provide a cause of action when these expectations are violated by the extraction of non- pecuniary private benefits.

In U.S. law, courts note that “general expectations are the right to proportionate participation in the earnings of the company, the right to any stock appreciation, the right with proper purpose to inspect corporate records and the right to vote if the stock has voting rights”[[439]](#footnote-439). Corollary, courts constructed the argument that “if a minority shareholder can show that another shareholder employed by the company is receiving compensation so far in excess of what is reasonable for his position and level of responsibility that he is, in actuality, receiving de facto dividend to the exclusion of the minority shareholder, such an act may support a finding of minority shareholder oppression”[[440]](#footnote-440). Similarly, the statutory rule that “the business and affairs of every corporation…shall be managed by or under the direction of board of directors…” (Del. Gen. Corp. L. Sec. 141(a)) required the courts to construct the “the “board sterilization” doctrine, which “forbade governance structures depriving the board of its statutory authority to manage corporate affairs”[[441]](#footnote-441). These being said, the same provision also expresses that the articles of incorporation can provide terms that alters the principle regarding the board sterilization[[442]](#footnote-442). As understood, U.S. law generally contains the legal standings that generally protects the basic reasonable expectations of the shareholders[[443]](#footnote-443).

In Turkish law, the facts that a publicly traded corporation has a large amount of surplus or net profits does not automatically entitle the shareholders to the payment of dividends, and the general assembly (i.e., general meeting of shareholders) has the authority to declare dividends (TCC Article 408(2)(d)) or reject to declare to increase long- term profitability and dividends thereof (TCC Article 523), does not change the following principle: The right to proportionate participation in corporate earnings (TCC Article 507(1)) represents shareholder’s entitlement to have the property and business of the corporation devoted during the corporate existence to attainment of the common objects[[444]](#footnote-444). While a shareholder’s expectation to receive dividends every term may be unreasonable, his expectation that the corporation will pursue the objective of achieving economic benefit is a reasonable one and should be enforceable in court. In fact, a general assembly resolutions rejecting to declare dividends while it is financial reasonable to do so might violate the fundamental structure of the corporation, so be void under TCC Article 447(1)(c)[[445]](#footnote-445). In addition to this, the statute provides that a petititon can be filed to the court for the determination that the board resolution that contravenes with the fundamental structure of the corporation or capital maintanence principle, or violates or harms especially the essential shareholder rights themselves or their exercise is viod (TCC Article 391 (b), (c)). Likewise, a petition can be presented to the court for the annulment (i.e., rescission) of the general assembly resolutions which violates the statute or articles of incorporation and especially the rule of good faith (TCC Article 445(1))[[446]](#footnote-446). Furthermore, the general assembly can only act on issues explicity provided in the statute and articles of incorporation (TCC Article 408(1))[[447]](#footnote-447). On the other hand, the board of directors has the power to act on any issue necessary to pursue the corporate purpose, unless the right to act on the issue is left to the general assembly under the statute or the articles of incorporation (TCC Article 374(1)). To support this principle, TCC Article 375 lists certain powers and duties that shall be exercised by the board of directors, and states the power and duty to exercise the oversight and steering function as one of them. Lastly, the notion that corporation’s capital is protected against unlawful distribution even to its own shareholders by explicitly stating that “shareholders shall not have the right to request the return of the capital they provided, their right to liquidation share is reserved” (TCC Article 408(2)), shows that the protection of the basic expectations of the shareholders is statutorily getting the support from the shareholder rights.

**4.1.3. Purview of the Basic Reasonable Expectations**

**1) Expectations Regarding the Corporate Purpose**

Throughout the varied history, it is seen that the body corporate has been seen as a community directed to a particular end or purpose[[448]](#footnote-448). Corollary, the principle that there is an implied contract among the shareholders of a corporation to pursue the purpose which it was chartered has long been recognized by the judiciary[[449]](#footnote-449). Rather than endeavouring to determine which constituent’s benefits should be the corporation’s primary concern, this study focuses on the point that the ultimate purpose of the for- profit corporation is to generally generate or return economic benefits[[450]](#footnote-450). Herein, shareholder wealth maximization or profit growth are merely means to an end, or an instrumental good[[451]](#footnote-451). This notion is supported by the fact that the resources in the treasury of a for- profit corporation reflect the economically motivated decisions of investors and customers[[452]](#footnote-452), thus is an indication of support to corporation’s business (economic) ideas rather than non- pecuniary policies[[453]](#footnote-453). Likewise, the duties and constraints brought to ensure that the directors are acting in the interest of the corporation ensures this notion.

In Turkey, the corporation statute say explicitly that the purpose of the corporation is to provide economic benefit (TCC Article 331), and courts accept that the purpose of the corporation is to pursue the ultimate aim of generating profit and distributing it[[454]](#footnote-454). In fact, this notion imposes a special limit to the corporation’s capacity. A corporation cannot quit from its statutory purpose of generating economic benefit, even if all shareholders agree to do so[[455]](#footnote-455). This principle was not accepted in the Swiss statute that the prior Turkish corporation statute took as a model, nevertheless, Turkish legislators changed the related Swiss provision purposefully[[456]](#footnote-456), and devoted the corporation model to the pecuniary field of social life[[457]](#footnote-457). The statute itself includes an enforcement mechanism for this principle in relation with corporate dissolution: TCC Article 210(3) provides that the Ministry of Trade can demand the dissolution of the corporation which is in a continuous course of conduct violating the public policy, such as using the corporation to carry out criminal activities; however, this provision should not only be thought from the aspect of criminal activities; any action that violates statutory rules implemented to protect or further public interest can be regarded as actions violating the public policy[[458]](#footnote-458). Considering the importance given to the publicly traded corporations in the advancement of a country’s economic progress, and the explicit Constitutional provision in Turkey authorizing the state to implement measures to make sure corporations are operating in accordance with the economic neccessities of the country[[459]](#footnote-459); it can be accepted that the provision requiring corporations have economic purpose is one that is implemented to protect and further the public interest[[460]](#footnote-460). This interpretation should bring the economic purpose principle within the scope of the Ministry’s TCC Article 210(3) and Article 353(1) authority[[461]](#footnote-461).

On the other hand; while the ultimate object of corporations was accepted as the pecuniary gain of its shareholders long ago by some U.S. state courts[[462]](#footnote-462), the corporation statutes in the U.S., including Delaware’s, generally do not say explicitly that the purpose of the corporation is to make or maximize profits[[463]](#footnote-463). Still the economic purpose, or the purpose to make profits is assumed by the courts and commentators[[464]](#footnote-464). It is said that “the statutory and case law formulations of the directors’ and officers’ duty of care can easily be read to imply profit maximization as the ultimate goal”[[465]](#footnote-465). It is “within the law relating to fiduciary duties that shareholder primacy finds its most direct expression”[[466]](#footnote-466). In this sense, in Delaware, the “wealth maximization obligation derives not from an agency or trust relationship, but merely because that is what the shareholders, implicitly or explicitly, contracted for when they purchased their investment”[[467]](#footnote-467). Delaware courts continue to affirm the notion that corporate policies has to seek to maximize the economic value of a corporation for the benefit of its shareholders[[468]](#footnote-468). The enactment of the “public benefit corporation statute”[[469]](#footnote-469) should have an effect on the evaluation of the corporate purpose issue in Delaware in a way that confirms the for- profit corporation’s devotion to the pecuniary field of social life.

The context of the corporate purpose of “returning economic benefits” can be better understood if the corporate donations issue is investigated from the aspect of corporate law. Generally, it is opined that corporations are allowed to make donations as long as this would aid the long- term benefit alligned with that common end[[470]](#footnote-470). For example, U.S. law accepts that corporate donations, including ones used for an advancement or disadvancement of political agenda, can benefit the corporation in the long run and does not prohibit it[[471]](#footnote-471). Similar to U.S. law, Turkish corporate law does not explicitly bar corporations from making donations[[472]](#footnote-472) and scholars opine that donations related to long- term benefit of the corporation is not void[[473]](#footnote-473). This being said, it has some important statutory limitations concerning donations of publicly traded corporations. CML Article 19 requires publicly traded corporations to have an explicit term in their articles of incorporation authorizing them to make any donations and empowers both the general assembly and the CMB with the power to impose a monetary limit to the donations, and states that total sum of the donations of a given year shall be added to the sum of the distributable dividends. Moreover, in the secondary legislation about donations, it is specifically stated that donations will be subject to provision concerning concealed distribution of capital[[474]](#footnote-474). Thus, it can be said that in the case of publicly traded corporations, Turkish law is strict and does not want to leave any room for tunneling corporate funds concealed as donations even when the general assembly generally consents. As understood from these points, the corporation’s devotion to the pecuniary field of social life presents a much more solid image in Turkey than in the U.S.

From the perspective of shareholders, a corporation’s failure to fulfill its corporate purpose of providing economic benefits will be violating shareholders’ right to dividend in Turkey[[475]](#footnote-475). After all, when the corporation shows an effort to provide economic benefits, it in fact works to maximize the value of the coporation, and residual claimants (in the case of a solvent corporations, this is the shareholders) are the ultimate beneficiaries of an increase in the corporation’s value[[476]](#footnote-476). This notion links the economic purpose, oppression and reasonable expectations issues together, because the right to dividend resembles shareholders’ right to demand corporation pursue the corporate purpose of providing economic benefit[[477]](#footnote-477). In this regards, a Missouri court stated the following: “By advancing ‘failure of the company to fulfill its corporate purpose’ as a basis for liquidation independent of the statute, plaintiff presents no claim upon which relief can be granted. This is not to say that continued corporate existence without a reasonable prospect for profitable operation might not be a circumstance of demonstrating ‘oppression’”[[478]](#footnote-478).

As noted before, a dividend is the share, received by a shareholder, of the publicly traded corporation’s profits legally available for dividend (i.e., it cannot be declared out of the assets generally), and it is not a debt for the corporation until it has been declared by the corporation[[479]](#footnote-479). Statutes regulate dividends primarily for the protection of creditors, so the corporation has freedom not to pay dividends unless there is a contrary statutory provision forcing its distribution[[480]](#footnote-480). These principles are equally applicable to Delaware[[481]](#footnote-481), and Delaware law accepts that “the declaration and payment of a dividend rests in the discretion of the corporation’s board of directors in the exercse of its business judgment”[[482]](#footnote-482). Corollary, some commentators argue that the right to dividends is illusory[[483]](#footnote-483). On the other hand, in Turkey, the general assembly has the authority to not to declare any dividends[[484]](#footnote-484), but in the absence of allocating funds for the statutory reserves or reserves promulgated by the articles of incorporation[[485]](#footnote-485), the resolution on not to declare dividends out of any profits formed in the corporation should be justified by relying on the statutory grounds such as the reasons to increase long- term profitability and dividends (TCC Article 523)[[486]](#footnote-486). Then, both in Turkey and U.S., an investor buying shares knows that he does not have a right to dividend unless it is declared[[487]](#footnote-487). However, the differing delegation of the power regarding the dividend declaration in Delaware (board of directors) and Turkey (general assembly) signals that economic benefit pursued by the corporation is aimed at returning much of it to the shareholders in Turkey. Corollary, different than the share investors of a Delaware corporation, investors in Turkish corporations know that the destiny of the economic benefit accrued is in their own hands, and it is highly likely that they will decide to distribute it among themselves.

Then, it can be stated that any corporate action which does not align with the corporate purpose of providing (and maximizing) economic benefits will be effecting shareholders right to dividend and may oppress them by frustrating their basic reasonable expectation[[488]](#footnote-488). Just like the expectation frustrating nature of an action causing withholding of dividends or its suppressment has long been recognized in the U.S.[[489]](#footnote-489), it is equally recognized that “the operation of the business for the sole benefit of the majority of the stockholders, to the detriment of the minority stockholders, would constitute such ‘oppressive’ conduct as to authorize a dissolution of the corporation”[[490]](#footnote-490). Likewise, TCC Art. 531 may be used to judicially dissolve the corporation in case it fails to declare satisfactory dividends over the long run, with no sound reason to justify the denial[[491]](#footnote-491). Corollary, corporate conduct that does not align with the corporate purpose of maximizing economic benefits but meanwhile advances interests of some shareholders can also be deemed “oppressive”[[492]](#footnote-492). In this sense, a corporate action that enhances the non- pecuniary private benefit of a shareholder would be an act that does not align with the corporate purpose of providing economic benefits, and would be oppressive as it works only for the interest of one shareholder. Consequently, the basic reasonable expectation regarding economic benefit purpose will be bringing this action to the the purview of judicial dissolution[[493]](#footnote-493).

**2) Expectations Regarding the Management**

It it is well- established that shareholders of a corporation may not directly manage the business and affairs of the corporation[[494]](#footnote-494), at least without specific authorization in the statute[[495]](#footnote-495). This principle appears as one of the reflections of type strictness in corporations[[496]](#footnote-496). While shareholders, in theory, control the enterprise’s management through their right to elect the directors[[497]](#footnote-497), their remaining rights regarding corporation’s management is restricted. They have the right to vote on fundamental corporate changes, such as mergers, discharge of the board of directors from liability, articles of incorporation amendments and sale of substantial part of the assets[[498]](#footnote-498). Still, these rights do not give shareholders utimate control over the business, and in fact, it can be circumvented depending on how wisely the directors can structure the business plan[[499]](#footnote-499). Of course, with power comes responsibility: Directors generally owe duties in discharging the corporation’s management function[[500]](#footnote-500), and law protects this power and responsibility by invalidating schemes- other than statutorily recognized exceptions[[501]](#footnote-501)- that prevent directors discharge of management in accordance with their duties (e.g., fiduciary duties)[[502]](#footnote-502). This statutory norm on board decision-making[[503]](#footnote-503) constitutes one of the basic reasonable expectations of the shareholders in publicly traded corporations[[504]](#footnote-504).

“The essential attribute of a shareholder in a corporation is that he is entitled to participate, according to the amount of his stock, in the selection of the management of the corporation, and he cannot be deprived or deprive himself of that power”[[505]](#footnote-505). While this “essential attribute” does not provide a vested right to become a director- shareholder[[506]](#footnote-506), it provides that shareholders’ rights in the corporation requires the corporation’s management handled by the elected management[[507]](#footnote-507). Corollary, right to elect directors is considered as one of the fundamental rights of the shareholders, so deserve a great deal of protection by law[[508]](#footnote-508). This is not for nothing: The representation of the collective interests of shareholders by a centralized management by a board of directors is accepted as a necessary concomitant of the corporation and its most distinctive attribute[[509]](#footnote-509). After all, centralized authority enhances organizational efficiency because the centralization of decision- making serves to economize transmission and handling of information[[510]](#footnote-510); and groups make better decisions than individuals and group decisionmaking is an important constraint on agency costs[[511]](#footnote-511).

The “right to have the affairs of the corporation managed by the board of directors is a right of each shareholder derived from the statute under which the company is formed”[[512]](#footnote-512). After all, as underlined in Delaware, the powers and duties conferred or imposed upon the board of directors are by the statute[[513]](#footnote-513), not merely by the shareholders[[514]](#footnote-514). Consequently, it is held by the courts that the “individual directors are in no sense the personal representatives of the stockholders by whose suffrage they hold office. However much they might be influenced by the wisdom and wishes of the stockholders, it remains their duty to exercise their own judgment in all final corporate action.”[[515]](#footnote-515) While the “shareholders in the corporation are entitled to the influence and advice of every director in the management of their affairs” [[516]](#footnote-516), directors are the ones owing certain duties and responsibilities, arising from their management power (standard of conduct). They are the ones who are expected to use their independent judgment to pursue the corporate purpose of maximizing economic benefits[[517]](#footnote-517). Herein, the “cautious manager” standard in Turkey[[518]](#footnote-518) and the “business judgment rule” in Delaware[[519]](#footnote-519) are the “standards of review” that determines whether a director does his job correctly; or in other words, whether he may be held liable. Still, the notion that the shareholders’ expectations regarding the management should be protected unless the abrogation regarding directors’ duties is provided in the statutorily defined legal arrangements (e.g., articles of incorporation) requires courts to opine that the validity of boards decision or contracts to delegate powers and duties to others (which is generally seen as a decision given under the business judgment rule) would be subject to additional judicial scrutiny[[520]](#footnote-520). Sterilizing the board of directors out of their powers by delegating them to the general assembly is even not likely in jurisdictions where the general assembly’s power is statutorily limited and the articles of incorporation may not deviate from its statutorily defined content unless it is explicitly allowed by the statute itself (TCC Article 340).

A director who is acting under the influence of a shareholder, as well as the influencer, would be violating the inalienable rights and duties conferred upon him by the statute[[521]](#footnote-521). After all, the effect of any scheme or action circumventing these principles “is to deprive the other shareholders of the benefits and protections which law perceives to exist when the corporation is managed by an independent board of directors, free to use its own business judgment in the best interest of the corporation”[[522]](#footnote-522). This statutory norm about the board of directors does not only protect the shareholders but also other corporate constituents such as creditors, thus it cannot be changed where the “public” might be affected[[523]](#footnote-523). The wide range of constituents in the context of publicly traded corporations indisputably require that this statutory norm continue its unstinted effect[[524]](#footnote-524).

Turkish law implemented explicit provisions to prevent the abolishment and provide effective functioning of the board of directors. TCC Article 530 provides that a corporation can be dissolved through the petition of shareholders, creditors or the Ministry of Trade if one of the “statutory organs” is not available, and board of directors is accepted as one of these organs[[525]](#footnote-525). As the articles of incorporation can only deviate if the statute permits the deviation (Article 340); the general assembly of shareholders can only act if the statute or the articles of incorporation conferred or imposed upon them the right (TCC Article 408(1)); the board resolutions concerning delegation of inalienable powers of corporate organs are void (TCC Article 391(1)(d)); and some of the statutory powers and duties conferred or imposed upon the board of directors are generally nondelegable or inalienable (TCC Article 375), the board of directors can be accepted as a “statutory organ” and it cannot be abolished or sterilized[[526]](#footnote-526). Likewise, general principles deriving from contract law can be used to hold directors who act like agents of particular shareholders responsible for corporate losses caused of this agency; and this discourages participation in any kind of circumvention[[527]](#footnote-527). Same principles can be summarized much easily for Delaware: There, the statutory rule that “the business and affairs of every corporation…shall be managed by or under the direction of board of directors…” (Del. Gen. Corp. L. Sec. 141(a)) required the courts to construct the “the “board sterilization” doctrine, which forbade governance structures depriving the board of its statutory authority to manage corporate affairs”[[528]](#footnote-528).

These being said, as repeatedly signaled above, there is one specific case that may deem a shareholder’s expectation regarding management “unreasonable”: A statutory authorization. For instance, if the statute has a provision that gives the corporation an option to elect a special regime that would permit its management by other parties, such as Delaware’s “management by stockholder” provision for close corporations[[529]](#footnote-529), and if that regime is elected, then shareholders’ expectation regarding the management would not be reasonable. Similarly, a statute may itself authorize a delegation of duties, including any nondelegable and unalienable ones (as the voting trust statute and the provision expressing that the articles of incorporation can provide terms that alters the principle regarding the board sterilization[[530]](#footnote-530) in Delaware does[[531]](#footnote-531)). While these kinds of provisions generally do not exist in Turkish corporate law, in the situations that the statutory rules on corporate groups applies, boards’ decision- making power’s sterilization is permitted by the statute[[532]](#footnote-532). However, apart from this specific case, even the circumstances that cause the election of the directors does not change their power and duties, so a shareholder’s expectation regarding the management will continue to be reasonable. For example, while TCC Article 334(1) permits public entities to have representitives on the board of directors of certain corporations if there is a specific term in the articles of incorporation, Article 334(3) states that these representatives have the same rights and duties as directors elected by the general assembly. Similarly, TCC Article 360 and CML Article 28 permits the corporation to have certain share groups that has some privileges regarding the corporate management by granting them the right to be represented in the board of directors: Moreover, CML Article 28 states that except cases which render it reasonable and compulsory, the privilige to be represented in the board will be removed by the CMB if the corporation has loss consecutively for five years. The official comment to CML expresses that this provision will push priviliged groups to act in the best interest of the remaining groups[[533]](#footnote-533). Still, these provisions does not explicitly rebut the rule that the directors elected by the priviliged shares should exercise independent judgment for the advancement of the corporate purpose, or treated differently than normally elected directors[[534]](#footnote-534). If the statute had presumed these directors would be subservient to the members of the priviliged group, it would have granted an immunity for these directors just like it did for the ones in corporate groups[[535]](#footnote-535). Consequently, the following principle can be be accepted: If a board of directors of a corporation is acting under the influence of a shareholder and giving decisions accordingly, shareholders’ basic reasonable expectation regarding the management will be frustrated[[536]](#footnote-536), and this frustration will be bringing the issue inside the purview of judicial dissolution.

**4.2. Shareholder Oppression Law in the U.S.**

**4.2.1. Generally**

The “reasonable expectations” standard, in the context of U.S. corporate law, has evolved through the application of shareholder oppression law. In the U.S., “oppression” appears as one of the several grounds for involuntary or judicial dissolution[[537]](#footnote-537), and in fact the most common ground implemented by state legislatures[[538]](#footnote-538). The MBCA, whose model acts are adopted in all or substantially by 29 states and its 1969 version by 4 states[[539]](#footnote-539), includes a provision on dissolution based on oppression[[540]](#footnote-540). Historically, oppression a topic spoken by U.S. scholars and courts since 19th century[[541]](#footnote-541). Probably, this is not only because the cases grow out of the business environment present in the U.S., but also due to the legal environment in the country. As Coffee opines, “to the extent that American courts have permitted greater contractual freedom in corporate law, their relative tolerance has been coupled with greater judicial activism in reading implied terms into the corporate contract and in monitoring for opportunism”[[542]](#footnote-542).

The statutory provisions remedying shareholder oppression has a long history[[543]](#footnote-543). Although Illionis’ and Pennsylvania’s are often noted as the first states to include “oppression” as a ground for dissolution in their statutes in 1933, a California statute authorized a petition for dissolution if the directors or those in control of the corporation have been guilty of “persistent unfairness” towards minority shareholders in 1931[[544]](#footnote-544). On the other hand, the Model Business Corporation Act included oppression as a ground by 1950[[545]](#footnote-545). These being said, Illinois led the U.S. in developing the conception until 1980s, and then handed over the reins to New York[[546]](#footnote-546). Corollary, it is not surprising to see that courts of states in which MBCA’s oppression provision is adopted are referring to the standards that New York courts “popularized”[[547]](#footnote-547).

The development of the shareholder oppression cause of action required a definition of oppressive conduct, as an allegation of oppression is not a claim for relief, but rather, a legal standard to be fulfilled before a court may order liquidation of a corporation[[548]](#footnote-548). “Dictionary definitions of ‘oppression’ include ‘the act or an instance of unjustly exercising authority or power’, ‘coercion to enter into an illegal contract’ and…’unfair treatment of minority shareholders (esp. in close corporation) by the directors or those in control of the corporation”[[549]](#footnote-549). Logically, it is expected that the corporate codes would establish a definition or principles determining the concept, but the reality is otherwise[[550]](#footnote-550). Legislatures generally made no attempt to define oppression, and equipped the statute with this elastic term whose meaning varies with the circumstances presented in a particular case, and felt the existing case law would provide sufficient guidelines for courts and litigants[[551]](#footnote-551).

As the definition for “oppression” has not necessarily been a codified (i.e., statutory) one, states have embraced definitions by case law[[552]](#footnote-552). Accordingly, three approaches have been developed to define oppression[[553]](#footnote-553): (1) A burdensome, harsh and wrongful conduct, a visible departure of fair dealing, and violation of fair play on which every shareholder who entrusts his money to corporation is entitled to rely (a definition derived from British law[[554]](#footnote-554)), (2) a conduct closely related to the violation of the fiduciary duty of good faith and fair dealing owed by the majority to the minority shareholders (based on a partnership analogy[[555]](#footnote-555)), (3) a violation of the reasonable expectations of the minority (a definition judicially used for the first time by a British court). The sufficiency of the conduct justifying relief based on oppression is determined in accordance with the definition that oppression has[[556]](#footnote-556). Of course, different definitions of oppression provide different outcomes: The conclusion reached when a situation is evaluated by asking whether the conduct is a “misconduct” may be different from the one in which whether the conduct, without considering if it is a “misconduct” or not, harms shareholders’ interests is evaluated[[557]](#footnote-557) (for example, the “reasonable expectations” definition for oppression lead the courts to measure the oppression from the minority’s perspective, and primarily look whether the minority is denied something for which he bargained, irrelevant from the majority shareholder’s purpose[[558]](#footnote-558)). Today, the mainstream of U.S. corporate law evaluates oppression from the majority’s side[[559]](#footnote-559), hence look whether the majority’s conduct is oppressive or not, rather than focusing on the minority’s interests[[560]](#footnote-560).

In the U.S., shareholder oppression doctrine is generally evaluated through the lens of close corporations[[561]](#footnote-561). It is explained that the majority shareholders’ purpose to “freeze- out’ or “squeeze- out” the minority shareholders bring forward the oppression issue[[562]](#footnote-562). Oppression “is usually directed at a minority shareholder personally, whereas fraudulent or illegal conduct can instead be directed at solely the shareholder’s investment in the corporation”[[563]](#footnote-563). While a minority shareholder need not to be deprived of his shares to be squeezed out, “he can be oppressed by actions which reduces his claim on the corporation’s assets or deprives him of the return on his investment to which he is entitled”[[564]](#footnote-564). Hence, it is said that the primary purpose of the shareholder oppression law is to protect the shareholders’ investment, because the oppressive conduct that frustrates the reasonable expectations of the shareholder leaves the shareholder without any adequate means of recovering his investment[[565]](#footnote-565). This argument is supported by the fact that statutes generally provide less drastic remedies than dissolution and the most common alternative remedy is the buyout of the oppressed investor’s holdings[[566]](#footnote-566). The logical implication of this view is that oppression liability arises when the value of a shareholder’s investment is harmed[[567]](#footnote-567). Herein, the function of the standards that define oppression, such as the “reasonable expectations” analysis, is seen as a key to identify whether the investment is harmed[[568]](#footnote-568).

The term “squeeze- out” (or freeze- out) means the use by some of the owners or participants in a corporation of strategic position to eliminate one or more of its owners or participants from the corporation[[569]](#footnote-569). Common freeze- out techniques include the termination of a minority shareholder’s employment, the refusal to declare dividends (or inadequate dividends), the removal of a minority shareholder from a position management, and the siphoning off of corporate earnings through high compensation to the majority shareholders[[570]](#footnote-570), and misapplication or waste of corporate funds[[571]](#footnote-571). Related- party transactions violating arms- lenght principle[[572]](#footnote-572), diverting corporate funds for personal use of shareholders or directors[[573]](#footnote-573), and mergers[[574]](#footnote-574) are also among the techniques used to siphon off corporate earnings and oppress the minority. When these are the case, the minority shareholders, having no ready market for the stock of a close corporation, can be “locked- in” to the corporation, yet “frozen- out” from any business returns[[575]](#footnote-575). On the other hand, there can also be uncommon freeze-out techniques as well such as “conspiracy to deprive shareholder of his interest in the corporation”, as noted in the Davis v. Sheerin[[576]](#footnote-576) decision: “Even though there were findings of the absence of some of the typical “squeeze out” techniques used in closely held corporations, e.g., no malicious suppression of dividends or excessive salaries, we find that conspiring to deprive one of his ownership of stock in a corporation, especially when the corporate records clearly indicate such ownership, is more oppressive than either of those techniques.”

“For example, the close corporation investor generally looks to salary more than dividends for a share of the business returns because the ‘earnings of a close corporation often are distributed in major part in salaries, bonuses and retirement benefits’. When actual dividends are not paid, therefore, a minority shareholder who is discharged from employment and removed from the board of directors is effectively denied any return on his investment as well as any input into the management of the business. Once the minority shareholder is faced with this ‘indefinite future with no return on the capital he or she contributed to the enterprise,’ the majority often proposes to purchase the shares of the minority shareholder at an unfairly low price.”[[577]](#footnote-577)

In a claim based on oppression, a plaintiff must demonstrate the oppressive conduct[[578]](#footnote-578), and a nexus between that misconduct and his interest in the corporation; the remedies that the court will apply will depend on the harm to the petitioner shareholder’s interest in the corporation[[579]](#footnote-579). While, in absence of a statutory limitation, majority shareholers can also initiate this action, the facts that the statutes generally only consider oppressive acts of shareholders who are in control of the corporation (then, the majority has to establish that the minority is in control)[[580]](#footnote-580) and harm to the majority’s interest in the corporation should be shown would dimish their chances of success[[581]](#footnote-581). Furthermore, while there is generally no requirement of showing the “intent to oppress” or “bad faith”[[582]](#footnote-582), establishing that those in control of the corporation willfully treated the minority in a manner to which other shareholders were not subjected would help in proving this nexus[[583]](#footnote-583). Similarly, while there is no requirement for the petitioner minority shareholder to show he has “no fault”, the petitioners bad faith would potentially undermine this nexus[[584]](#footnote-584). Furthermore, oppression statutes generally intend the courts proceed on case by case basis[[585]](#footnote-585), because “actions which might be oppressive under one set of circumstances would not be oppressive under others”[[586]](#footnote-586). While claim for oppressive conduct can be independently supported by evidence of variety of conduct, a finding of oppression will not be based on a single act, and the focus will be on a pattern of conduct[[587]](#footnote-587). Here, “as the parties’ full understanding may not even be in writing but may have to be construed from their actions”[[588]](#footnote-588), the conduct can be evidenced by a wide range of evidence[[589]](#footnote-589), including tax returns[[590]](#footnote-590) or documents such as corporate minutes and financial statements[[591]](#footnote-591). Acknowledging the challenges in evidencing these issues, states’ enacted provisions in their judicial dissolution statutes which requires, in addition to all other disclosure requirements, the corporation make available all the books and records under reasonable working conditions for the necessary preceding years[[592]](#footnote-592).

**4.2.2. Legal Nature of the Action**

U.S. state legislatures have developed two ways of relief for the oppressed shareholders in close corporations; the first one was to amend the corporate dissolution provisions to include “oppression” (or a similar term)[[593]](#footnote-593) by majority shareholders as a ground for involuntary dissolution of the corporation, and the second one was to impose an enhanced (i.e., heighthened) fiduciary duty on majority shareholders[[594]](#footnote-594), and allow the oppressed shareholders to sue the majority for breach of this duty in states without an oppression- triggered dissolution provision[[595]](#footnote-595). The oppression cause of action is accepted as a different and separate claim from the breach of fiduciary duty cause of action in states with oppression- triggered dissolution provisions[[596]](#footnote-596), and bears the characteristics of a direct action rather than a derivative one[[597]](#footnote-597). Accordingly, when a court wishes to protect the minority shareholders, the court should characterize the acts of the defendant shareholders in such a manner as to bring the acts within the definition of oppression[[598]](#footnote-598), or a violation of fiduciary duty[[599]](#footnote-599). A good example of these two camps, Delaware (through fiduciary duty doctrine) and New York (through the oppression statute) law are evaluated in the next subchapters of this study.

An obvious but important aspect that should be taken to consideration in determining the legal nature of the action is that the courts have limited relief to instances in which the shareholder has been harmed as a shareholder and the doctrine does not interfere with other doctrines or rights arising from other relationships[[600]](#footnote-600). However, this does not mean that the shareholder’s position as a shareholder should bring the harm to him; oppression doctrine recognizes that a shareholder’s share investment can be harmed through oppressive corporate conduct towards the shareholder in the role of shareholder, director, officer or employee[[601]](#footnote-601). In this regards, the oppressive conduct is searched relating to the affairs of the corporation and shareholders’ relationship due to this relation[[602]](#footnote-602).

Thought within these lines, the nature of the “shareholder oppression” cause of action, or the “duty not to oppress minority shareholders” is the subject of great debate[[603]](#footnote-603). This is because it has both contract and tort law aspects[[604]](#footnote-604). As the oppression takes place in the relationship between shareholders and within the internal affairs of the corporation, it might be seen contractual due to the contractual nature of corporations[[605]](#footnote-605). In this regards, for instance, California’s long- arm statute does not apply the involuntary dissolution provision to corporation’s incorporated in different states, which shows that California sees this issue as one within the internal affairs of the corporation[[606]](#footnote-606). Moreover, the usage of the reasonable expectations standard for the interpretation of oppression and the contractual analogy shows that “all the values at stake in a claim of shareholder oppression are, at bottom, contractual values”[[607]](#footnote-607). In this regards, for instance, it can be said that, Delaware courts refusal to recognize a judicially- created cause of action where there are no special provisions in the articles of incorporation, by- laws or shareholders’ agreements shows that Delaware places the issue in the realm of contract[[608]](#footnote-608).

Some authorities state that a corporate oppression claim has more of the characteristics of a tort claim than of a contract claim[[609]](#footnote-609). It is said that the tort law aspect predominates[[610]](#footnote-610), because a situation giving rise to an oppression claim often does not include a promise to be enforced, and “the duty is one imposed by law because of the nature of the relationship and not because of an agreement between the parties, and the claim is based upon intentional conduct designed to inflict injury on other”[[611]](#footnote-611). Corollary, this outcome stands “even if it might be said that contractual agreement gives rise to that relationship”[[612]](#footnote-612). Moreover, holding the view that the relationship between the corporation and the shareholders is contractual; it can be said that influencing shareholder’s interference in the minority shareholder- corporation relationship, who will be regarded as a third- party for that specific relationship, can be subject to the tort claim of “interference with contractual rights” when the influencing shareholder is conspiring the corporation breach its contract with the minority by oppressing them[[613]](#footnote-613). Thus, it is no surprise that some jurisdictions such as Mississippi directly apply the elements of the intentional tort to this cause of action[[614]](#footnote-614).

**4.2.3. Delaware Law**

Although Delaware law has no general involutary dissolution provision[[615]](#footnote-615), there are some sections in the statute that has similarities with the involuntary dissolution proceedings of other U.S. states under shareholder oppression law. For example, Sec. 226 of the Del. Code Ch. 1 Title 8 provides that a custodian, who is not charged with dissolving the corporation, can be appointed when the shareholders are deadlocked on the election of directors, the board is deadlocked or the corporation’s business has been abandoned but it has not dissolved or liquaidated. Likewise, Sec. 273, which is plainly based on a partnership analogy[[616]](#footnote-616), permits the judicial dissolution of a two stockholder joint venture corporation if such stockholders are unable to agree upon the desirability of discountinuing such joint venture. Additionally, Sec. 355 states that the statutory close corporations can grant an option to initiate the right to dissolve the corporation to any sthareholder under the articles of incorporation of the close corporation upon occurance of any specified event or contingency. Accordingly, even when the corporation formally becomes a statutory close corporation, shareholders receive no additional protection unless they foresee their needs and provide this dissolution option explicitly by using this provision or another private contract such as shareholders’ agreement[[617]](#footnote-617). Still, these measures are not intending or remedying issues which the shareholder oppression law is dealing with.

Despite the statutory standing, whether a cause of action for shareholder oppression exists in Delaware remains an unsettled question[[618]](#footnote-618). As Delaware’s corporate statute does not address to this issue and the Courts reject to create a specific judicial standard[[619]](#footnote-619), it is claimed that the shareholder oppression doctrine is not in effect in Delaware[[620]](#footnote-620). Corollary, some commentators state that “the lack of an oppression remedy in Delaware could…simply affirm the notion of the ‘race to the bottom’”[[621]](#footnote-621), and suggest that states will gradually follow Delaware in this issue as well[[622]](#footnote-622). Some others claim that Delaware should be considered a special case, given that any special rules on oppression will have the potential to create uncertainty among public corporations that provide a significant share of the Delaware state revenues.[[623]](#footnote-623)

The ones opining that Delaware law has a shareholder oppression cause of action, remarks that Delaware analyzes the facts for oppression using the “reasonable expectations” standard as the primary test[[624]](#footnote-624). Others assert that even when the the application of the “shareholder oppression” cause of action is rejected[[625]](#footnote-625), Delaware law does not preclude a cause of action for minority shareholder freezout in close corporations, but simply thinks that the “entire fairness test” is the proper judicial approach to be applied to the actions of the shareholders that freezeout the minority shareholders[[626]](#footnote-626). On the other hand, Delaware courts rejected to adopt an enhanced fiduciary duties approach in the context of close corporations, and rather use the same fiduciary duty standard for all types of corporations, and this effects the jurisdictions’ handling of oppression cases[[627]](#footnote-627).

Due to the lack of a special statutory provision on shareholder oppression in Delaware, a court would have a hard time in accepting to recognize a special rule for close corporations for shareholder oppression: The court has to either conclude that a cause of action for oppression exists in common law and this common law claim is not preemepted by the Subchapter XIV of the Delaware General Corporation Law[[628]](#footnote-628). Corollary, relying on the influential Nixon v. Blackwell[[629]](#footnote-629) decision, it is said that Delaware law uses corporate monitors of fiduciary duties, the business judgment rule and entire fairness standard, when a case involves a corporation, and rejects using another or enhanced monitor similar to partnership fiduciary law when a close corporation is the subject[[630]](#footnote-630).

The Delaware Supreme Court considered the special problems regarding closely held corporations in Nixon v. Blackwell case for the first time, and the court applied the entire fairness test[[631]](#footnote-631) and held that the directors and controlling shareholder sustained their burden of proving entire fairness[[632]](#footnote-632). Court rejected to recognize any further common law protections[[633]](#footnote-633), and suggested that the Delaware Code includes elective provisions for closely held corporations for shareholders to modify their relationships by contract, and this in fact reduces the need for judicial protection[[634]](#footnote-634). Of course, while it is true that the minority shareholders can bargain and do not agree to buy shares if the contracts do not include special protection against future oppression, the rationale for the oppression issue shows that this contingency is one that cannot always be foreseen at the time of contracting[[635]](#footnote-635).

Apperantly, currently, the viable option for the complaining shareholder is to bring the oppression claim under the fiduciary duties doctrine of Delaware[[636]](#footnote-636), which provides that shareholders owe duties to each other under certain circumstances[[637]](#footnote-637). The Gagliardi v. TriFoods Intern, Inc. court stated this point as follows: “I need not to address the general question whether Delaware fiduciary duty law recognizes a cause of action for oppression of minority shareholders; I assume for purposes of this motion, without deciding, that under some circumstances it may”[[638]](#footnote-638). Plaintiffs should “allege claims for breach of fiduciary duties in efforts to secure a review of their claims under the ‘entire fairness’ doctrine, which requires majority shareholder to demonstrate the fairness- in terms of price and dealing- of their conduct rather than under the ‘business judgment rule which gives the majority shareholders far more latitude in their decision-making”[[639]](#footnote-639). However, the “only obstacle that prevents application of the entire fairness test to freezeout transactions is the definition of the elements of a freezeout (discharge of the minority, failure to pay dividends, precluding the minority from participation on the board or management of the enterprise) as a form of self- dealing”[[640]](#footnote-640). The remedies available to complaning shareholders would change depending on the case: For example, in an explicit freezeout merger case, appraisal or rescissory damages would be available; for other kinds of oppression schemes, compensatory and equitable reliefs can be in play, but the dissolution and a buyout of the minority shares in lieu of dissolution would be more questionable[[641]](#footnote-641).

**4.2.4. New York Law**

Before the enactment of the specific statutory provision in 1979, statutory scheme of New York placed substantial obstacles in the path of the petitioners seeking the dissolution of the corporation and the judiciary was reluctant to order it[[642]](#footnote-642). In 1979, New York legislature added sections 1104-a and 1118 to the New York’s Business Corporation Law (BCL) to provide aggrieved shareholders relief against oppression[[643]](#footnote-643). The enacted provisions permit shareholders of the corporation to petition for judicial dissolution of the corporation on the grounds of oppressive actions exercised upon the petitioning shareholder by directors or those in control of the corporation[[644]](#footnote-644). Sec. 1104-a provides a different ground and conditions from (1) Sec. 1104[[645]](#footnote-645) which permits judicial dissolution where shareholders are so divided that the votes required for the election of directors cannot be obtained or when there is internal dissension such that dissolution would be beneficial to the shareholders[[646]](#footnote-646), and from (2) the common law right to dissolution where management breaches its fiduciary duty to its shareholders[[647]](#footnote-647). Corollary, Sec. 1104-a is seen as “the kind of relief available to allegedly oppressed minority shareholders when a derivative claim is unavailable for whatever reason”[[648]](#footnote-648), and a present but inadequate legal action alternative does not preclude this action[[649]](#footnote-649).

It is said that the enactment of the Sec. 1104-a “may be considered a legislative recognition of the fact that the relationship among shareholders of such corporations closely approximates that among partners…However, to dissolve a corporation under the new statute, more is necessary than the desire to ‘get out’”[[650]](#footnote-650). BCL Sec. 1104-a limits the judicial dissolution avenue for shareholders in three ways. The first limit it puts forward is that only holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation entitled to vote in an election of directors may present a petition of dissolution. In this respect, New York statutory law precludes the claims brought by small minority interests, “possibly because of a perceived tendency for small shareholders to bring frivolous claims”[[651]](#footnote-651). Still, in some instances, relying on the “common- law right to dissolution”, New York courts have expanded the remedy beyond this legislative limitation[[652]](#footnote-652). The second limit the provisions has is that this avenue is not available in corporations registered as an investment company under the Investment Company Act of 1940 and for corporations whose shares are listed on a national securities exchange or regularly quoted in an over-the- counter market by one or more members of a national or an affiliated securities association. Thus, this cause of action is not available for New York publicly traded corporations. The third limit the provision includes is that the dissolution petition has to rely on one or more of the statutory grounds. The statutory grounds are as follows: “(1) The directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders; (2) The property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by its directors, officers or those in control of the corporation”[[653]](#footnote-653).

The judicial dissolution provision gives the court the discretion to grant dissolution or not. It indicates that the court should take into account the following points in determining whether to proceed with involuntary dissolution: “(1) Whether liquidation of the corporation is the only feasible means whereby the petitioners may reasonably expect to obtain a fair return on their investment; and (2) Whether liquidation of the corporation is reasonably necessary for the protection of the rights and interests of any substantial number of shareholders or of the petitioners”[[654]](#footnote-654). Accordingly, a “court has broad latitude in fashioning alternative relief, but when fulfillment of the oppressed petitioner’s expectations by these means is doubtful, such as when there has been a complete deterioration of relations between the parties, a court should not hesistate to order dissolution”[[655]](#footnote-655). In addition to these, Sec. 1111(b)(3) states that a dissolution proceeding pursuant to Sec. 1104-a should not be denied merely because it is found that the corporate business has been or could be conducted at a profit. In addition to this, it should be noted that while the New York State Legislature had the option to provide a “no fault” (i.e., establishment of bad faith of the defendant or that the plaintiff has no fault) requirement as an element of the lawsuit, it rejected it in favor of a procedure that requires a showing of “oppressive” behaviour[[656]](#footnote-656). However, keeping the general principles of law in mind (the general principle applied here is the doctrine of “unclean hands”)[[657]](#footnote-657), courts stress that “when a minority shareholder whose own acts, made in bad faith and undertaken with a view toward forcing an involuntary dissolution, give rise to the complaint of oppression should relief be barred”[[658]](#footnote-658). Moreover, exercising their discretion, courts may reject to order the involuntary dissolution, even if the petitioner have been able to demonstrate grounds for dissolution, provided that the petitioner may obtain a fair return on his investment pursuant to a buy- out provision of a shareholders’ agreement[[659]](#footnote-659).

While New York legislature enacted an “buy- out” alternative to dissolution under Sec. 1104-a by Sec. 1118 and conditioned every order of dissolution upon permitting the buy- out election, but did not provide the same alternative for the proceedings under Sec.1104[[660]](#footnote-660). Pursuant to this section, upon the commencement of a dissolution proceeding under section 1104-a, any nonpetitioning shareholder or the corporation may elect to purchase the shares owned by the petitioning shareholders at fair value at any time within ninenty days after the filing of such petition or at such later time as the court in its discretion may allow[[661]](#footnote-661). If the electing shareholders or the corporation are unable to agree with the petitioner upon the fair value of such shares, the court can determine the fair value of the shares as of the day prior to the date on which such petition was filed and may award interest from the date the petition is filed to the date of payment fort he petitioner’s share at an equitable rate upon judicially determined fair value of the shares[[662]](#footnote-662). As noted by a New York court, value “should be determined on the basis of what a willing purchaser, in an arm’s lenght transaction, would offer for the coporation as an operating business, rather than as a business in process of liquidation”[[663]](#footnote-663). Moreover, shareholders can also explicitly agree in advance in a shareholders’ agreement that “an 1104-a dissolution proceeding will be deemed a voluntary offer to sell, or fix “fair value” in the event of judicial dissolution and that their agreement would be enforced”[[664]](#footnote-664).

While this “buy- out” alternative to dissolution provides a mechanism analogous to the appraisal remedy given to shareholders in certain cases of fundamental corporate changes[[665]](#footnote-665), there are some concerns about it. Some commentators state that the “buy- out” alternative has nullified the effects of sec. 1104-a and an oppressed shareholder who seeks remedy other than appraisal will not petition for dissolution[[666]](#footnote-666). This opinion is seems reasonable: If a complaining shareholder does not want to withdraw from the corporation by recovering the value of his investment but wants to induce those in control to agree to a change in corporate policies, he will not be able to use this provision, because the nonpetitioning shareholders or corporation, whose aim is to squeeze- out the petitioner will be more than happy to buy- out the complaining shareholder. In this regards, a respected commentator states the following: “A buyout award, however, does not provide the aggrieved minority shareholder with compensation for the past de facto dividends that it failed to receive. Although a proper company valuation for buyout purposes adds the de facto dividend amounts back into the corporation’s income, that adjustment is because the valuation is typically based upon the company’s earnings. In other words, de facto dividends are profits that have not been recorded as such on the company’s books, typically for tax reasons. Before performing a valuation that is based on the amount of profits that a company generates, the company’s books must be adjusted to account for these mischaracterized profits (that is, the de facto dividends must be added back into earnings)”[[667]](#footnote-667).

As the Sec. 1104-a differed from Sec. 1104 on statutory grounds for dissolution, courts rejected to treat cases under Sec. 1104 as guidelines for Sec. 1104-a and the courts have developed another set of judicial guidelines for the “oppression” provision[[668]](#footnote-668). Although the term “oppressive actions” is not statutorily defined, the “reasonable expectations” standard is used to define the term since 1980s in New York[[669]](#footnote-669). This standard, as used in the state’s In Re Topper decision a year after the enactment of the provision in 1979, has become the touchstone for evaluating oppressive conduct[[670]](#footnote-670). In In Re Topper, the court first reviewed the legislative context in which the statute was enacted and showed that the reasonable expectations test for oppression influenced the legislators[[671]](#footnote-671). The court opined that the language and intent of the statute means that the court’s examination of oppressive conduct need not be confined merely to effect on the shareholder in his sole role as shareholder, as the provision directs the court to consider more than “fair return on investment” (Sec. 1104-a(b)(1)) and also to probe “protection of the rights and interests”[[672]](#footnote-672) of the petitioners (Sec. 1104-a(b)(2))[[673]](#footnote-673). In doing so, the court took the nature of the close corporations into consideration[[674]](#footnote-674), and concluded as follows: “Clearly, BCL 1104-a determines that oppression of the “rights and interests” of minority shareholders in a close corporation is an abuse of corporate power. These rights and interests derive from the expectations of the parties and special circumstances that underlie the formation of close corporations. The Court may determine the understanding of the parties as to the role the complaining shareholder is expected to play from agreements and evidence submitted. The Court can then decide whether the controlling shareholders have acted contrary to that understanding or, in the language of the statute, ‘have been guilty of oppressive actions toward the complaining shareholders.’”[[675]](#footnote-675) As the details of the reasonable expectations standard is explained later, no further analysis will be put forward in this section.

**4.2.5. Remedies**

In the U.S., generally, an actual dissolution is not the only remedy at court’s disposal when oppressive conduct has occurred, and both state statutes and courts have authorized alternative remedies less drastic[[676]](#footnote-676). Although it is thought that a profitable corporation will find a purchaser at a dissolution sale, so the resources of the corporation will not be removed from public intercourse and the detrimental affects of the dissolution to the society will be less; alternative remedies are still at play to give the parties what they want most[[677]](#footnote-677). After all, in an oppression suit, the shareholder is ordinarily seeking some type of individual relief[[678]](#footnote-678). Thus, the most adequate remedy is to award to the oppressed shareholder those benefits which he reasonably expected but has not received because of the oppressor’s conduct[[679]](#footnote-679).

It is accepted that the “judicial dissolution statute is remedial in nature and should be liberally construed”[[680]](#footnote-680). In fact, alternative remedies’ broadening list have decreased the number of orders of actual dissolution over the years[[681]](#footnote-681). “Alternative remedies adopted by legislatures and courts include: Appointment of a provisional director, appointment of a custodian, ordering a buyout of one shareholder, or some other form of relief such as ordering a change in the corporation's charter or bylaws”[[682]](#footnote-682) or “treating a group of related corporations as a single entity for the purpose of determining appropriate relief”[[683]](#footnote-683). Courts do not hesitate to provide unconventional remedies, such as a minority buy-out of the majority[[684]](#footnote-684).

In Baker v. Commercial Body Builders, Inc., 264 Or. 614 (1973), the court thoroughly listed the suggested alternative remedies in U.S. law as follows: “(a) The entry of an order requiring dissolution of the corporation at a specified future date, to become effective only in the event that the stockholders fail to resolve their differences prior to that date; (b) The appointment of a receiver, not for the purposes of dissolution, but to continue the operation of the corporation for the benefit of all the stockholders, both majority and minority, until differences are resolved or ‘oppressive’ conduct ceases; (c) The appointment of a ‘special fiscal agent’ to report to the court relating to the continued operation of the corporation, as a protection to its minority stockholders, and the retention of jurisdiction of the case by the court for that purpose; (d) The retention of jurisdiction of the case by the court for the protection of the minority stockholders without appointment of a receiver or ‘special fiscal agent’; (e) The ordering of an accounting by the majority in control of the corporation for funds alleged to have been misappropriated; (f) The issuance of an injunction to prohibit continuing acts of ‘oppressive’ conduct and which may include the reduction of salaries or bonus payments found to be unjustified or excessive; (g) The ordering of affirmative relief by the required declaration of a dividend or a reduction and distribution of capital; (h) The ordering of affirmative relief by the entry of an order requiring the corporation or a majority of its stockholders to purchase the stock of the minority stockholders at a price to be determined according to a specified formula or at a price determined by the court to be a fair and reasonable price; (i) The ordering of affirmative relief by the entry of an order permitting minority stockholders to purchase additional stock under conditions specified by the court; (j) An award of damages to minority stockholders as compensation for any injury suffered by them as the result of ‘oppressive’ conduct by the majority in control of the corporation.”

**4.3. Components of the “Reasonable Expectations” Standard**

As it is expressed above, the reasonable expectations standard is an important concomitant of the U.S. judicial dissolution law. While the reasonable expectations standard had become a codified standard in some states such as Minnesota[[685]](#footnote-685) and North Dakota[[686]](#footnote-686), it was primarily developed by case law. These being said, courts have generally applied this standard by justifying its imposition through a statutory language that the involuntary dissolution statute provides[[687]](#footnote-687). Accordingly, some courts have refrained from using the standard, claiming that the approach would be simply inconsistent with their statute[[688]](#footnote-688). Still, the standard’s historic origin requires the evaluation of the case law, as well as scholarship, for determining its character traits and components of the standard, rather than through the statutes’ investigation. Both the case law and scholarship reveal that there are three primary traits of the reasonable expectations standard bears importance for the evaluation of the components of the standard.

The first trait of the reasonable expectations standard comes from the oppression doctrine’s the legal thrust in rebuting or diactivating the protection of the business judgment rule provides for a corporate decision[[689]](#footnote-689). While “it is a fundamental principle of corporate law that a decision does not receive the protection of the business judgment rule if the decisionmaker is ‘tainted’ by a conflict of interest in the transaction”[[690]](#footnote-690), the oppression doctrine “conveys…that such decisions require a more probing judicial review than the conventional business judgment rule allows”[[691]](#footnote-691). “After all, the oppression doctrine is premised on the notion that decisions about seemingly routine matters (e.g., employment, management, dividends) can be part of a minority shareholder freezout”[[692]](#footnote-692). “Courts must evaluate the majority’s actions, keeping in mind that, even if some actions may be individually justifiable, the actions in total may show a pattern of oppression that requires the court to provide a remedy to the minority”[[693]](#footnote-693). In this sense, in jurisdictions that adopted the shareholder oppression doctrine, the reasonable expectation standard acts like a standard such as the business judgment rule[[694]](#footnote-694), and is adopted by the courts instead of the business judgment standard when oppresive conduct is shown by the petitioner[[695]](#footnote-695).

The second trait of the reasonable expectations standard is that it permits the usage of hypothetical bargaining[[696]](#footnote-696). “In a sense, ‘reasonable expectations’ describes all the conditions and premises a highly comprehensive shareholders’ agreement might contain. The parties’ reasonable expectations could be described as an implied multilateral contract among the shareholders”[[697]](#footnote-697). Courts accept that “the expectations of shareholders are not always encompassed in written agreements and written agreements are not always dispositive of shareholder expectations”[[698]](#footnote-698). “The parties’ full understanding may not even be in writing but may have to be construed from their actions”[[699]](#footnote-699). That being said, the expectations of the shareholder should be first searched through the following sources that shareholder rights may spring from; “(1) the corporations organic documents, (2) agreements between shareholders or between the corporation and shareholders, (3) statutory corporation law, and (4) decisional law governing the operation of corporations”[[700]](#footnote-700). In this regards, in jurisdictions which gives full effect to shareholders’ agreement (which is a private contractual agreement) or lets it modify several statutory shareholder rights, evidence of breach of a shareholder’s agreement is also considered in establishment of oppression[[701]](#footnote-701). If explicit evidence exists indicating that minority agreed to defer certain rights in certain circumtances, the court should rely on that evidence in assessing the reasonableness of the minority’s expectation[[702]](#footnote-702). Still, from the hypothetical bargaining standpoint, “never should the minority participant be understood as assenting to the effective confiscation of his or her investment”[[703]](#footnote-703) without any valid reason[[704]](#footnote-704). “In the absence of evidence indicating that the parties reached a consensus contrary to these understandings, the majority’s violation of the hypothetical understanding should give rise to oppression liability”[[705]](#footnote-705).

The hypothetical bargain rhetoric requires the consideration of all sides’ expectations, and not only the minorities’. In this sense, the court must also consider the majority’s expectation regarding his right to control the business[[706]](#footnote-706) and the majority’s legitimate right to make business decision for the corporation to be balanced against minority’s certain interests[[707]](#footnote-707). However, this “balancing” does not require a reference to the business judgment rule (which traditionally does not balance anything), but it simply requires courts to base their analysis not solely on an inquiry into the petitioner’s expectations[[708]](#footnote-708). A court can reasonably determine that in a case in which the minority shareholder was aware of the misconduct and participated in it, unfairness would result if the minority is permitted to seek judicial intervention after ten years of acquiescence or participation in the alleged misconduct[[709]](#footnote-709). Likewise, the side (either the complaining shareholder or the oppressor) who broke his promises arising from the understanding between the parties will not be able to enforce the promises made by the other side of the agreement[[710]](#footnote-710); in this sense, satisfying the expectations of the other party in a particular course of action will give the party the right to have its own expectations entertained. In this regards, a majority shareholder’s right to control his business will be kept alive (so as the business judgment rule) as long as he looks after the minority’s expectations. Accordingly, in Gimpel v. Bolstein 477 N.Y.S.2d 1014 (1984), court underlined that the petitioner shareholder who frustrated the defendant shareholders’ reasonable expectations would not be able to have entertained his own reasonable expectations as follows: “Also, it must be recognized that “reasonable expectations” do not run only one way. To the extent that Robert may have entertained “reasonable expectations” of profit in 1975, the other shareholders also entertained “reasonable expectations” of fidelity and honesty from him. All such expectations were shattered when Robert stole from the corporation. His own acts broke all bargains.”

A third trait of the standard is that for a relief to be available, it has to be “frustrated”; or in other words, the allegedly oppresive conduct has to be one that “frustrates” the reasonable expectations[[711]](#footnote-711). In Brenner v. Berkowitz, 134 N.J. 488 (1993), the court stated that “a court should consider the seriousness of the violation” and “whether the misconduct places the minority shareholder’s investment at risk”. In Baker v. Commercial Body Builders, Inc. 264 Or. 614 (1973) court stated the following: “On the other hand, it has been said that a single act in breach of such a fiduciary duty may not constitute such ‘oppressive’ conduct as to authorize the dissolution of a corporation unless extremely serious in nature and that even a continuing course of ‘oppressive’ conduct may not be sufficient for that purpose unless it appears that, as a result, there has been a disproportionate loss to the minority or that those in control of the corporation are so incorrigible that they can no longer be trusted to manage it fairly in the interests of its stockholders…although a showing of ‘imminent’ disaster is not required, liquidation is not available upon showing of mere vague apprehensions of possible future mischief or injury or to extricate minority stockholders from an investment that turns out to be a bad bargain”. In this sense, “a continuing course of oppressive conduct for which the future holds little or no hope of abatement”[[712]](#footnote-712) would be important in the determination of whether a conduct is oppressive and has the force to frustrate reasonable expectations[[713]](#footnote-713). Likewise, the fact that the complaining shareholder was offered a fair opportunity to avoid the allegedly oppressive conduct but rejected to take it can deem the conduct not oppressive[[714]](#footnote-714).

The influential New York decision, Matter of Kemp & Beatley, Inc., 64 N.Y.2d 64 (1984) outlined the components of the “reasonable expectations” conception. The Court stated “oppressive actions refer to conduct that substantially defeats the ‘reasonable expectations’ held by minority shareholders in committing their capital to the particular enterprise”[[715]](#footnote-715). The Court added that “A court considering a petition alleging oppressive conductmust investigate what the majority shareholders knew, or should have known, to be the petitioner’s expectations in entering the particular enterprise. Majority conduct should not be deemed oppressive simply because the petititoner’s subjective hopes and desires in joining the venture are not fulfilled. Disappointment alone should not necessarily be equiated with oppression…Rather, oppression should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture. ”[[716]](#footnote-716) Four primary components of the reasonable expectation conception can be taken from the decision: (1) The expectations should be defeated substantially, (2) the expectations which were central to the minority’s decision to join the venture should be taken to consideration (note that the codified version of the standard in some states[[717]](#footnote-717) shows that the Court’s understanding that the “expectations at the time when he joins the venture should be taken to consideration” is not sufficient and the expectations as they “develop during the course of the shareholders’ relationship with the corporation and with each other” can also be taken to consideration) [[718]](#footnote-718), (3) the oppressive conduct will be evaluated with a focus on the minority’s expectations (i.e. perspective), (4) the expectations should be objectively present (i.e., should not be hidden and unrealistic hopes unknown by anyone)[[719]](#footnote-719). Corollary, these four components also represent the four- step requirement for relief under the reasonable expectations analysis[[720]](#footnote-720).

The reasonable expectations approach to oppression allows a court to apply a standard that has no reference to the actions of the abuser shareholders[[721]](#footnote-721). In this sense, the acts of the oppressor shareholders may be both reasonable and made in good faith, but can still be oppressive if it frustrates a minority shareholder’s reasonable expectations[[722]](#footnote-722). The focus of the standard is on the expectations of the minority, and not on the conduct of the those in control[[723]](#footnote-723). This is why the standard does not require the establishment of “bad faith” of the oppressor by the complaining shareholder[[724]](#footnote-724). Accordingly, courts can look at how the acts of the oppressor shareholders effect a minority shareholder without looking at the acts themselves[[725]](#footnote-725). Herein, “from an evidentiary standpoint, the courts’ analyses seem to require to types of pattern- related evidence: (1) general evidence of a behavioral pattern that appears typical in close corporations and (2) specific evidence that the shareholders’ actual course of conduct in the company at issue fits within the pattern”[[726]](#footnote-726). The behavioral pattern typical in close corporations is treated as the evidence that shows a reasonable expectation is present[[727]](#footnote-727), and specific evidence proves that these expectations are real and frustrated[[728]](#footnote-728). However, if a specific conduct is explicitly permitted by the corporate contract between corporate consituents, that conduct does not give rise to oppression[[729]](#footnote-729).

**4.4. Justifications for Application to the Publicly Traded Corporation**

**4.4.1. Generally**

This study acknowledges that the availability of a lawsuit for judicial dissolution on the basis of “reasonable expectations” in the context of publicly traded corporations is highly controversial. While “oppression may be more easily found in closely- held, family corporation than in a larger, public corporation”[[730]](#footnote-730), the close corporotion does not hold a monopoly on oppressive conduct[[731]](#footnote-731). In fact, as underlined by commentators, most statutes in U.S. which provide oppression (hence building a case on the reasonable expectations analysis was theoretically possible) as a ground for involuntary dissolution were open to shareholders in all corporations in late 1980’s[[732]](#footnote-732).

After origination of the conception in English case law[[733]](#footnote-733), involuntary dissolution actions, in connection with the reasonable expectations standard, concerning publicly traded corporations became not only possible but also has been assessed by courts in jurisdictions such as the U.S. states Maine[[734]](#footnote-734) and Maryland[[735]](#footnote-735), Canada[[736]](#footnote-736), United Kingdom[[737]](#footnote-737), New Zealand[[738]](#footnote-738), Hong Kong[[739]](#footnote-739) and Bermuda[[740]](#footnote-740). Therefore, it is not accurate to state that this approach is incompatable with the nature of publicly traded corporations. The fact that courts tend to recognize the presence of “reasonable expectations” even when the shares are received as a gift or inherited[[741]](#footnote-741), shows that this standard can be used even when a shareholder joins the corporation after its inception without developing any expectations prior to his membership in the corporation[[742]](#footnote-742). Moreover, U.S. courts are already applying the reasonable expectations theory for the benefit of public securities’ investors in different contexts[[743]](#footnote-743). This makes it possible to apply the doctrine to publicly traded corporations in which the investment and the expectation tied is quite different than investments in other kinds of entities. These being said, it is accurate to state that the there are challenges that has to be expressed, and the unique nature of these entities requires the application of this approach have some inherent limits[[744]](#footnote-744).

Before moving on, one short paranthesis should be open to address the issue why the oppression remedy is generally seen inherent in the close corporations context but less in the publicly traded corporation context. The answers seems obvious: Close corporations are prone to oppression issues due to operational structure (i.e. close corporations have greater freedom to put in place mechanisms for corporate governance) and illiquidity, whereas publicly traded corporations’ operative structure (e.g., securities law and listing rules force them to implement a governance regime less prone to oppression) and liquidity does lower the neccessity for an oppression remedy[[745]](#footnote-745).

**4.4.2. Challenges in Defending the Imposition**

While it is acknowledged that the publicly traded corporation can be the subject of oppressive acts[[746]](#footnote-746), justifying imposition of the dissolution measure based on the theory of reasonable expectations in their context is a challenging task primarily due to the following assertion: When a corporation sells share to investors (and whenever investors buy its stock on the market), the investors knowingly consent implicitly (i.e., contracts) to the arrangements that the corporation has disclosed, even to the ones that might cause diversion of corporate assets to the corporate participants[[747]](#footnote-747). Because in theory, if the investors wanted to have more favorable terms in their contract (e.g., articles of incorporation), they would have withhold their investment and wait until other corporations offered them a better arrangement[[748]](#footnote-748). Also, a shareholder who buys the share knowing that a shareholder is causing distorted management is already compensated by buying the share at a lower price that reflect that fact[[749]](#footnote-749), because an efficient market reflects the distortion to the price even when an individual shareholder is not aware of the issue[[750]](#footnote-750).

While this assertion has a plausible basis, realities are intact. Firstly, investors in publicly traded corporations has little ability to negotiate the arrangements, and their understanding about the looseness of corporate participants’ obligations is problematic[[751]](#footnote-751). Acknowledging this fact, contract law accepts a contract term unfairly surprising unenforceable even if the term is impounded in the contract price and lowers the price for the benefit of the “surprised” party[[752]](#footnote-752). Secondly, a publicly traded corporation might change its long- standing policy at some point during an investor’s participation in the corporation[[753]](#footnote-753), and the investor who bought the share at a price that did not reflect this fact might find himself in a position that was not foreseeable in advance[[754]](#footnote-754), and his exit by selling the share to the market at the share price now reflecting the fact might cause an unfair loss for him[[755]](#footnote-755). Then, the market will provide a lower break-up price for the minority shareholders who simply want to take the Wall Street Walk, and these shareholders will lack an effective escape[[756]](#footnote-756). Then, the lack of escape mechanisms (i.e., selling the share) in close corporations, which is stated as the primary reason why shareholder protection against oppression is necessary in close corporations and not in publicly traded ones[[757]](#footnote-757), is partly in effect in the publicly traded context as well[[758]](#footnote-758). In fact, the rationale of applying the oppression remedy to publicly traded corporations can be traced to the willingless to remedy the shareholders when an oppressive conduct depresses the price of the share in the marketplace[[759]](#footnote-759). Furthermore, the fact that there is always a threat of certain amount of pilfering in corporations with influencing shareholders and investors diversify their portfolios accordingly, would fail[[760]](#footnote-760), because without an adequate disclosure and understanding about this prospective pilfering, shareholders cannot be deemed “consented” frustration of their expectations[[761]](#footnote-761). Even when there is adequate disclosure, shareholders would not meaningfully consent them because consent to such action would be underinformed due to transaction costs, just like in close corporations[[762]](#footnote-762).

The imposition of the dissolution and reasonable expectations theory on publicly traded corporations is not incompatible with the nexus of contracts theory and the general theory of corporate law built on[[763]](#footnote-763). As already stated before, under “a contractarian framework, the oppression action is a default contractual term embedded in any contract between a corporate stakeholder and the corporation” and the broad language of the statute “leaves it to the courts to determine what approach to contractual gap- filling should be undertaken when interpreting the oppression provisions” [[764]](#footnote-764). However, it should be noted that a pure contractual analysis would also require accepting that a dissolution right through the lens of the “reasonable expectations” protection should be a “partially alterable” mandatory rule, meaning that while the right to involuntary dissolution cannot be completely waived, the court’s wide interpretation power regarding the provision can be indirectly restricted[[765]](#footnote-765): For example, as the expectations becomes important in absence of a contract, “when a contract exists in which the parties listed their expectations, aggrieved parties should not be allowed to later sue and claim that their expectations were different than those enumerated”[[766]](#footnote-766). Still, the notions that; (1) shareholders of publicly traded corporations are constantly changing (so there is no way of contracting with a defined set of people and their expectations), (2) the expectations that will taken into consideration in the publicly traded corporations’ context arise from the mandatory statutory provisions itself as outlined in this Chapter (so parties cannot waive these specific provisions by contract, and in this sense, the dissolution doctrine’s function can also be seen as providing a gatekeeper to those mandatory terms), and (3) the uncertainity on which legal document (e.g., articles of incorporation, shareholders’ agreement consisting of all shareholders, or shareholders’ agreement consisting of some shareholders, bylaws, disclosure documents) should include the interpretation restriction term to provide a conclusive effect[[767]](#footnote-767), would not support restricting the theory to close corporations [[768]](#footnote-768).

The wider public policy concerns intervowen with the issue requires the involuntary dissolution rights’ mandatory imposition[[769]](#footnote-769). Firstly, due to the undeniable importance of publicly traded corporations in economic life of a nation[[770]](#footnote-770), the issues within the scope of the dissolution statute cannot be simply left to markets[[771]](#footnote-771). The reliefs that the court may order, such as dissolution, buy- out or compensation, would undeniable effect the market, investors, creditors and the public in large. Secondly, if majority of the market’s leading corporations refuses to offer better arrangements, investors’ only viable options will be to either invest in unwillingly or not invest in stock markets at all, and potential sources of the capital for corporations will be squandered[[772]](#footnote-772). Investors would likely hesistate to venture their capital in a market where expectation- frustrating conducts are unchecked by law[[773]](#footnote-773). This might adversely effect corporate credit rating, and force corporations to rely on debt[[774]](#footnote-774). Besides, a lack of regulation might cause deprivation of investment values because market prices are already depressed because of the possible frustrating actions[[775]](#footnote-775). Furthermore, by serving as a check on management, dissolution statute forces the management to provide effective management[[776]](#footnote-776) and this serves the corporate and economic progress.

Another wider consideration that has to be thought on is that a dissolution statute protecting against shareholder oppression protects not only the oppressed shareholders and the value of their particular investment[[777]](#footnote-777), but also the corporation itself[[778]](#footnote-778) (and the marketplace), hence the public interest. For example, California, by recognizing the oppression in close corporations as an issue concerning public interest, chose not to give effect to terms of shareholders’ agreements that alter or waive provisions of the statute regarding involuntary dissolution[[779]](#footnote-779). Likewise, in jurisdictions in which the state is expressly obliged to make sure corporations operate in accordance with public interest, such as Turkey[[780]](#footnote-780), this obligation requires imposition of necessary measures to cover all the possible activities that will contravene public interest, and issues evaluated accordingly[[781]](#footnote-781). In this regards, Article 48(2) of the Turkish Constitution states that “the State shall take measures to ensure that private enterprises operate in accordance with national economic requirements and social objectives and in security and stability”. Likewise, Article 35 expresses that the right to property may be limited by law in view of public interest and the exercise of the right to property shall not contravene public interest[[782]](#footnote-782). These articles align well with the “social state” principle that the Constitution adapted (Article 2)[[783]](#footnote-783). Then, the dissolution statute’s and reasonable expectation theory’s function to protect the corporation and the public interest can justify the imposition of the measure on publicly traded corporation, especially when the non- pecuniary private benefit issue is taken into consideration[[784]](#footnote-784), even when no protection for a particular shareholder’s particular investment is provided.

Moreover, the history of the oppression statutes and reasonable expectations standard have nothing that prohibits the imposition of these on publicly traded corporations. Prior to 1948, minority shareholders in English companies were without much of a remedy against overreaching behaviour by majority shareholders, and the English counterpart provision of today’s oppression statutes granting the usage of the reasonable expectations standard was introduced by the English Companies Act of 1948[[785]](#footnote-785). In this sense, oppression statutes were born to deal with the misconduct of the majority or influencing shareholders. As these shareholders can also be present in publicly traded corporations, and there is no alternative provision dealing with the issues that the oppression statute covers[[786]](#footnote-786), the rationale for using this statute is valid in this context as well. For example, in Canadian oppression law, which is built upon the English counterpart, it is opined “that the oppression legislation, which enables small shareholders to challenge conduct that historically was relatively invulnerable, is explicable as part of a program to make public investment in Canadian securities markets more widely attractive”[[787]](#footnote-787).

There are some other counter arguments that can be made as well. Firstly, shareholders, “in entrusting their capital to the corporation, they accept the disadvantages of the corporate system along with its advantages”[[788]](#footnote-788). Then, investors can reduce the volatility of risk by diversifying their stock portfolios, and that law need not bend over backwards to give special protection to shareholders who refuse to do this[[789]](#footnote-789). Secondly, given that many issues which can activate the dissolution statute is hard to prove[[790]](#footnote-790) and many of them unlikely to outweigh the more traditional issues of maximizing profits and share prices, it seems unlikely that the typical shareholder will use this remedy[[791]](#footnote-791). Thirdly, in publicly traded corporations, the capital, product and employment markets constrain the opportunistic behaviour[[792]](#footnote-792). These points requires one to think once again whether the dissolution statute, or the field of corporate law is adequate for use and “the answer depends on whether adequate gap- fillers are being generated from other potential sources”[[793]](#footnote-793). Lastly, a dissolution statute based on reasonable expectations might pose threat to the integrity of the marketplace; investors would have a distrust about a law without any settled precedent and wide discretion granted to courts[[794]](#footnote-794). As the general argument for justification stated above for the usage of the dissolution measure in the context of publicly traded corporations is sufficient for its adoption through the reasonable expectations standard, there is no reason to further dwell in these counter arguments.

**4.4.3. Rethinking the Conception**

**1) Generally**

As noted in the previous section, the nature of publicly traded corporations differs from the nature of close corporations, therefore, the application of the reasonable expectations standard to these entities through the judicial dissolution provision should take these differences into consideration. This rethinking brings forward the following two questions: (1) From which sources will the expectations be carved out? (2) Which expectations will be taken into consideration?

The answer of both questions depends on the acknowledgement of the following two principles: (1) The disclosure policy of capital market law, regarding publicly traded corporations, forces the limitation on the sources of reasonable expectations analysis, and (2) investment in publicly traded corporations are in general made with the intention to be entitled to benefits the mere shareholder status entitles. The prior principle is the outcome of the fact that both current and outside investors are entitled to assume that the corporation is being run according to the terms disclosed to the market, not on some hidden agreement or arrangement[[795]](#footnote-795). Thus, as also noted in the previous chapter, there should be no investigation of any unwritten bargains or agreements to determine the “reasonable expectations” of minority shareholders[[796]](#footnote-796).

On the other hand, the latter principle is the outcome of the fact that shareholders in publicly traded corporations invest in with the expectation to receive dividends or profit from the difference between the purchase and sale price of a particular share. Therefore, this pecuniary aspect of their investment is central to their investment in publicly traded corporations, and only expectations related to this central aim should be taken into account in the context of publicly traded corporation, unless there is a showing of specific fact (i.e., specific reasonable expectations)[[797]](#footnote-797), which is unlikely to be considered in the context of publicly traded corporations because of the highly personal[[798]](#footnote-798) and unwritten (or undislosed)[[799]](#footnote-799) nature of these expectations. Therefore, only the interests that the mere shareholder status entitles (i.e., general reasonable expectations) should be considered, and particularly the basic reasonable expectations regarding corporate purpose and management should be in focus. After all, both the expectation regarding corporate purpose and corporate management are intervowen with the pecuniary aspect of their investment, thus central to the realization of this aim and objectively present as it represents a mutual understanding arising from the statutory framework.

While the latter principle answers the latter question stated at the beginning of this subchapter by stating that only the general reasonable expectations, and particularly the basic reasonable expectations should be considered; the prior question (sources) is still unanswered. However, keeping both principles in mind, it can be said that the “reasonable expectations” should be structured from (1) the statutory provisions (both corporate and capital market law) and additional layer of regulations (particularly, the listing rules) relating to the purpose and governance structure of the corporations, (2) corporation’s organic documents (e.g., articles of incorporation, bylaws) and shareholders’ meeting (i.e. general assembly) or board of directors’ resolutions[[800]](#footnote-800), and (3) public disclosures (i.e., announcements)[[801]](#footnote-801) that the corporation is making in accordance with the securities regulations. Next section of this chapter investigates the theory and application of this answer regarding the sources.

**2) Sources**

The basic reasonable expectations is borne by the virtue of the statute. However, these expectations represent a general sketch of the notions that they are referring, and the more they are detailed the more convincing their frustration can be proven before courts. After all, the conduct that causes the frustration of these expectations will often be a case specific one, and will require showing of a specific aspect of the frustrated basic expectations. Therein, the specific aspects or details of the basic reasonable expectations will arise from certain sources. While these sources include ones that are also considered in the close corporation context (such as the statute, corporation’s organic documents, shareholders or board of directors resolutions), the public disclosure documents as a source of basic reasonable expectations deserves a special explanation due to its unique position in the operation of publicly traded corporations.

The contractual nature of the relationship between the corporation and its shareholders[[802]](#footnote-802) requires the evaluation of the effect of the capital market law’s disclosure mandate to the reasonable expectations of the shareholders. Turkish capital market law, ex ante, requires issuers to disclose the information legally required to disclose through the public disclosure platform (CML Article 3(1)(k)). Accordingly, it brings ex post liability, and imposes legal responsibility on persons responsible for the disclosures required by the CML (CML Article 32), in addition to the responsibilities concerning the disclosures made due to issuance of capital market instruments (CML Article 10 and 11). In practice, there are two types of disclosures in Turkish capital market law: (1) disclosure related to a capital market instrument issuance, (2) ongoing disclosure (based on current events, periodic statements and specific events). Herein, the “ongoing disclosure” requirements include both the events that the law mandates disclosure (such as quarterly and yearly financial reports (Article 14), related party transactions (Article 17)) and the material events (Article 15). Therefore, in addition to the expressly prescribed events that should be disclosed, CML’s “disclosure on current basis” rule requires issuers to disclose any material event on a current basis (Article 15) [[803]](#footnote-803). The determination of the scope of this requirement is made in accordance with the Comminique on Material Events Disclosure, but it generally refers to “information, events, and developments which may effect the value and price of capital market instruments or the investment decision of investors” (CML Article 15(1))[[804]](#footnote-804).

Thinking the general effect of securities law to the contract between corporate constitutents and the disclosure aspect regarding publicly traded corporations, one can say that the information disclosed on the public disclosure platform, unrelated from the cause of the disclosure, can establish a reasonable expectation on the investors’ side. Efficient capital market hypothesis[[805]](#footnote-805), which the fraud on market theory is also based on, supports this conclusion: Market price of shares traded on well- developed markets reflects all publicly available information (including any material misrepresentations), and an investor who buys or sells share at the price set by market does so in reliance on the integrity of that price, thus investor’s reliance on any public representations (including misrepresentation) may be presumed[[806]](#footnote-806). Then, if a disclosed information is sufficient to establish an expectation on the investors’ side, it can be presumed that the expectation is present.

As the information disclosed on the public disclosure platform is due to the prescription of the mandatory rules of capital market law, these information statutorily supplement the terms of the corporate contract[[807]](#footnote-807). Then, if a corporate action or a shareholder later frustrates these supplemented terms, it would be violating the terms of the corproate contract. Once these disclosures are seen as a term of the contract, it is easier to accept that these can be basis for some reasonable expectations of shareholders, and for the frustration of these expectations. For example, if a corporation discloses as a material event (Communique on Material Events Disclosure, Article 5) or statement for the verification of a news or rumour (Communique on Material Events Disclosure, Article 9(1)) under disclosure on current basis) the fact that they do not endorse a particular government policy, thus did not contribute in a campaign to fund abortions; if it later changes this policy and funds abortions without disclosing that the corporate policy has been changed, they would be violating the reasonable expectations of the shareholders in connection with the corporate purpose, even where disclosure of such change is not mandated under capital market law. In this regards, the information disclosed in the public disclosure platform can be used to establish reasonable expectations, and the scope of the expectations can be carved out from the statements of the issuer on the public disclosure platform.

Another aspect that should be evaluated from the aspect of disclosure’s role in the reasonable expectations analysis is the notion that the corporate governance regulations of the CML requires corporations to establish an “investor relations department”, which would work to ensure the communication between the corporation and the investor (Communique on Corporate Governance Article 11). This department, together with some other duties, has the duty “to respond to the written information requests of the shareholders regarding the corporation” (Communique on Corporate Governance Article 11(5)(b)), and it plays a central role in the protection and exercise of shareholder rights (Communique on Corporate Governance, Corporate Governance Principles 1.1.). As understood, while the function of the “investor relations department” is not disclosure, the effect of this department’s operations may function as a disclosure. For example, if an investor asks a question about the operations of the corporation and the investor relations department officially answers this request by providing detailed information (let’s say, more detailed than the ones mentioned in the public disclosure platform or prospectus), the effect of this answer will be treated like disclosure of material information by the investor. Corollary the following question appears: In a case this department makes a material statement on the details of the corporation’s operation, in a manner more detailed or inconsistent with the disclosures made in the prospectus or through the public disclosure platform, will this statement play a role in the construction of the investor’s reasonable expectations?

The court’s reasoning in the U.S. case, Bank of New York Mellon v. Commerzbank Capital Funding Trust II, 65 A.3d 539 (2013), presents an answer to this question: “The reasonable expectation of the public investors —in this case, the holders of the Trust Preferred Securities—must therefore be given effect. The investors' reasonable expectation in this case is that the DresCap Trust Certificates are Parity Securities. That result is hardly novel or surprising, because the Bank itself created that expectation: (i) in various communications with its German regulators, (ii) in its own internal communications, and (iii) with third parties. Particularly telling is that in a November 2009 e-mail exchange, a Bank employee, in response to an investor's inquiry, confirmed that, “[Y]es, the [DresCap Trust I Certificates] is a hybrid Tier 1 instrument which would qualify as a parity instrument.” That communication and others like it confirm that of the two competing interpretations, the Trustee's interpretation is the more reasonable, because the Defendants themselves believed— and contributed to the investment community's reasonable belief—that the DresCap Trust Certificates were Parity Securities.” Building on the reasoning in this case, it can be said that a response of the investor relations department of a corporation can play a role in the interpretation of an issue and contribute to the expectations of a shareholder and deem it a reasonable one. After all, this department speaks on behalf of the issuer, and the information it gives or discloses to the particular investor would be made in accordance with the capital market law, and thus become a part of the contract between the corporation and the shareholder.

While one can assert that the particular answer of the investor relations department would stay in between the two parties and can only contribute to the specific reasonable expectations of an investor, this argument fails: The fact that any material information should be disclosed to the public obliges the issuer to announce the information given to a particular investor to the public, and failure to do this does not change the nature of the information, it just means that there is a violation of the disclosure requirement, and the material nature of the information is enough to elevate it to a level that would deem it a term between the corporation and the shareholders in general.

Moving forward, another aspect of the disclosure issue in capital market law would require asking whether a simple media advertisement or coincidental communication (e.g., answering an inquiry of a newspaper, or a managers’ speech given during a conference in a university, or an unauthorized officer’s reply to an investor’s inquiry e- mail) unrelated from investor relations department or disclosures done via the public disclosure platform would give rise to some reasonable expectations[[808]](#footnote-808). While these may give rise to expectations both in the context of close and publicly traded corporations, this expectation would only be reasonable in the close corporations and not the latter, in the context of shareholder oppression law. Applying the contractual theory once again, the reason why a disclosure made in accordance with securities law would give rise to reasonable expectations is that these disclosure would act as a supplement to the terms of the contract between the corporation and the shareholders due to the statutory framework that ties certain liabilities and rights to these disclosures[[809]](#footnote-809). On the other hand, any advertisement or coincidental communication that is not made as a part of capital market law requirements would not have this affect[[810]](#footnote-810). Although these might be used as extrinsic evidence that would establish the basis of the implied terms of the corporate contract in close corporations, granting their usage in the context of publicly traded corporations would greatly damage the integrity of the market. After all, in theory, investors make their investment decisions relying on the information disclosed in accordance with capital market law, because only these are added as terms to their contracts with the corporation. Accepting the opposite will create a greate uncertainty for investors; it is also their reasonable expectation that the terms of the contract are those that are disclosed, and the reasonable expectations theory requires the consideration of all parties’ expectations.

The disclosure principle of capital market law leads to the conclusion that another valuable source for reasonable expectations (just like advertisements or coincidental communications), shareholders’ agreement, is highly unlikely to be used by shareholders who are not a party to it for the establishment of reasonable expectations. Although these agreements are used in the context of publicly traded corporations as well as close corporations[[811]](#footnote-811), their limited disclosure hampers its usage through the reasonable expectations theory. After all, a corporation cannot disclose an agreement that it is not aware of (given that its not a party to the agreement) during the public offering or as a part of ongoing disclosure obligations. In this regard, the only explicit measure that CML brings is requiring the disclosure of a shareholders’ agreement if it is the legal basis which triggers the disclosure obligation on parties who acquire or dispose the specified percentages (%5, %10, %15, %20, %25, %33, %50, %67, %95) of total share capital or voting rights (Comminuque on Material Events Disclosure, Article 12 and 13). Even in this case, only the mere presence or related part of the agreement would be disclosed and not the whole (Comminuque on Material Events Disclosure, Article 15). On the other hand, as Turkish law does not enforce the rights arising from a shareholders’ agreements through shareholders’ rights but through general contractual rights (i.e., not under corporate law, but under contract law), even when a corporation is a party to this agreement, shareholders will not have the power to initiate a dissolution action based on such agreements[[812]](#footnote-812). In this regards, even when a corporation is a party to this kind of agreement and thus discloses it to the public, the rights arising under it is not based on corporate or capital market law[[813]](#footnote-813), hence does not became a part of the corporate contract between the shareholders and the corporation. Therefore, shareholders’ agreement would be an unlikely basis for investors of publicly traded corporations to build an expectation on, when it is not disclosed.

One last but important outcome of deploying a theory that permits usage of listing rules[[814]](#footnote-814) and disclosures in the determination of reasonable expectations is that the shareholder of a corporation whose shares (through depository receipts or otherwise) are listed in a foreign stock exchange, or even listed in two different stock exchanges, would have the chance to use the foreign listing rules or disclosures made in accordance with the foreign securities regulations for his benefit. For instance, a shareholder who bought a share from a local market can use a corporate disclosure made in a foreign market in the establishment of his reasonable expectations. The aggregate approach towards the corporate contract justifies the notion that a local shareholder’s contract with the corporation includes the foreign listing rules and disclosures made therein as terms to the contract. In this sense, the reasonable expectations theory, and the oppression statute in general, would also provide a back door for both the lawmakers and practitioners to apply their laws or expectations in an extraterritorial way[[815]](#footnote-815). This outcome would, more or less, allign well with the interconnected nature of today’s corporate economy and world in general.

**4.5. Conclusion**

The reasonable expectations standard is a theory that is applied through the shareholder oppression law in the U.S. As shown above, shareholder oppression law, and the reasonable expectations standard, has unique elements and components, and much of it is based on close corporation context. However, the theory underlying them does not bar their application to publicly traded corporation. In applying it to publicly traded corporation context, contractual theory of corporate law is helpful. Still, the sources where the reasonable expectations will be investigated are different than the close corporations.

When the oppression, or the involuntary dissolution in general, is evaluated through the lens of publicly traded corporations, it is seen that both the theory and application would have a rational basis. The reasonable expectations standard represents a standard that can be used to interpret the equivalent Turkish judicial dissolution provision, and when this is chosen the Turkish provision’s scope would be flexible enough to be used as a mechanism that will help the minority to be protected from non- pecuniary benefit extractions.

**CHAPTER V**

**INVOLUNTARY DISSOLUTION ACTION IN TURKISH LAW**

**5.1. Generally**

Turkish law first introduced the involuntary dissolution action in corporations in 2012 with the enactment of the TCC[[816]](#footnote-816), and this action represents one of the fundamental innovations that the TCC has when compared with the prior statute[[817]](#footnote-817). Prior to TCC, such an action was not provided by the law and the courts rejected to grant such a relief in absence of a statutory authorization, even though the Swiss statute which the prior Turkish statute took as a model had included that action[[818]](#footnote-818). However, today, the involuntary dissolution action is available for shareholders of all corporations including publicly traded ones in Turkey[[819]](#footnote-819).

The reasons for today’s public policy to grant a statutory involuntary dissolution action has a simple explanation. It is believed that the threat which the judicial dissolution provision creates can successfully prevent shareholders’ selfish or unjust usage of corporate resources[[820]](#footnote-820), and save minority against the frustrations caused by the majority through the corporate governance structure[[821]](#footnote-821). The involuntary dissolution right also functions as a mechanism that oversees the operation of the general assembly and the board of directors[[822]](#footnote-822).

The rationale of today’s public policy can also be based on the general evolution of the corporate law. Firstly, historically, the dissolution of a corporation is appartained to sovereingty[[823]](#footnote-823), thus neither a state could have dissolved a foreign corporation based on its own law nor shareholders’ could have authorized a dissolution of their corporation[[824]](#footnote-824). While the dissolution action was once accepted as a power within the sole province of the legislative body, as corporate charters were granted by law, there seemed to be little reason for confining this action solely to the legislative body’s authority[[825]](#footnote-825). Secondly, corporate law evolved to a point in which the involuntary dissolution action is recognized and needed as a “minority right”[[826]](#footnote-826), in order to protect the minority against the abusive exercise of power[[827]](#footnote-827). This action does not only give the minority an option to secure his investment, which is somehow locked and turned into a worthless asset in the corporation, through dissolution or an alternative remedy[[828]](#footnote-828), but also gives a leverage point in his bargaining with the shareholders who are inclined to abuse their rights. In this sense, the involuntary dissolution action’s primary effect is to deter the vicious shareholders from abusive actions by the threat the action poses and consummate the minority rights granted by the law[[829]](#footnote-829). In Turkish law, deterrence from abusive action is particularly claimed as the justification of imposing this provision on publicly traded corporations[[830]](#footnote-830).

The institutional structure of the corporation and the stakeholders in connection with the corporate institution requires this right to be exercised through and under the supervision of the judiciary by satisfying certain elements[[831]](#footnote-831). As the capital element predominates over the personal relations element in especially publicly traded corporations, there is no statutory “exit right” (i.e., appraisal right) in corporations in Turkish law[[832]](#footnote-832), other than the ones arising from special and limited circumstances under CML (e.g., fundamental corporate changes) and TCC (e.g., mergers). As “the greater the liquidity of the investment, the less opportunity one party will have to profit from dissension by obtaining a strategic advantage over any other party”[[833]](#footnote-833), the involuntary dissolution action essentially functions as a right that provides an indirect exit to shareholders who do not get what they bargained for by providing them a just valuation for their investment. After all, “appraisal rights protect the dissenting minority shareholder agasint being forced to either remain an investor in an enterprise fundamentally different than that in which he invested or sacrifice his investment by sale of his shares at less than a fair value”[[834]](#footnote-834).

These being said, the mere existence of an involuntary dissolution remedy (i.e., hypothetical right of the shareholders to file an action under the provision) does not raise the market value of the shares or reduce the applicable discounts or marketability[[835]](#footnote-835). The liquidity aspect becomes an issue in close corporations due to lack of a secondary market for shares[[836]](#footnote-836), and in publicly traded corporations due to the unfavorable conditions of the exit price set by the efficient markets[[837]](#footnote-837). In this regards, while the prior illiquidity is caused by the non- existing market for shares, the latter illiquidity is caused by the loss of a potential public market which would have given a profit to the shareholders that could not be alone compensated by a positive reflection on the book value and earnings of the corporation[[838]](#footnote-838). After all, in addition to the equity grounds and wider considerations stated before, law also has to consider the availability of a “good” exit, because “bad” exists will cause substantial systemic costs by fostering an inefficient allocation of resources: It is crucial for a free enterprise system to give the resource owners the ability to redirect the use of their resources in accordance with his changing perceptions, and so the system will realize an optimal allocation of resources[[839]](#footnote-839).

**5.2. Legal Nature of the Action**

While there are various claims on the legal theory (e.g., rules of good faith, relationship of trust, restriction on inalienable personal rights) for the termination of long- term relational contracts based on “just cause” in general[[840]](#footnote-840), it is accepted that the involuntary dissolution with “just cause” is based on the general principle of “rules of good faith”[[841]](#footnote-841). According to Article 2 of the Turkish Civil Code, which is applicable to TCC through TCC Article 1 which states that the TCC is a part of the Turkish Civil Code, everyone shall comply with the rules of good faith when exercising a right or fulfilling an obligation and the legal system does not protect an outright abuse of a right[[842]](#footnote-842). In this regards, it would be in violation of duty of good faith to expect someone to abide by a contract when the contractual relationship is unbearable for him[[843]](#footnote-843). While this rule is mandatory in nature, however, it is only used secondarily[[844]](#footnote-844). By adopting the view that the rules of good faith is the basis of the action, Turkish law implicitly takes the view that the involuntary dissolution based on just cause is contractual in nature rather than tort[[845]](#footnote-845).

As understood, the “just cause” concept finds its roots in the contract law in Turkey; it arises from the contract itself and appears as an unwritten general ground for ending a long- term contractual relationship when conditions that makes the continuance of the relationship unbearable for the parties[[846]](#footnote-846). In fact, by accepting that the rules for the simple partnership will be applied to commercial companies if there is no applicable law in the TCC (TCC Article 126), the statute implicilty refers to the contractual nature of the corporations[[847]](#footnote-847). It is accepted that the simple partnership contract is not a unilateral contract but a contract in which all parties fulfill their obligations to reach the common purpose[[848]](#footnote-848), thus the obligations are not the considerations that match with each other, and its dissolution for just cause is the remedy for the violations of the understanding among partners[[849]](#footnote-849). However, the usage of the simple partnership provisions in the context of corporations for recognizing an involuntary dissolution right was not accepted prior to the TCC[[850]](#footnote-850), and the TCC had to recognize an equivalent conception through the enactment of the involuntary dissolution provision[[851]](#footnote-851).

Nevertheless, the perspective used for the contractual nature of partnerships is equally applicable to corporations. “Time and human nature may cause a divergence of interests and a breakdown in consensus”[[852]](#footnote-852), and the transaction costs would make it practically impossible to construct a partnership or corporate contract addressing all contingencies by providing an adequate justification. In this regards, the “relational contract” theory is applied to the corporate contract to better understood the unique problems it possess. The “relational contract” term refers to a contract that is “used to govern a long- term relationship in which all contingencies and performance standards cannot be specified in advance”[[853]](#footnote-853). Applied to the corporations context, “one may understand the creation of a close corporation as the creation of ‘a long- term relational contract which contemplates that each participant will contribute capital or services and that proceeds will be equitably shared’”[[854]](#footnote-854). Generally, courts play an active and indispensable role in monitoring and interpreting these contracts[[855]](#footnote-855). The notion that Turkish law enacted a statutory provision for an involuntary dissolution action, despite giving the parties the opportunity to include terms (so terms containing “just cause” ground as well) for voluntary dissolution (TCC Article 529(1)(c)) [[856]](#footnote-856), shows that the corporate contract is seen as a long- term relational contract in all corporations (both close and publicly traded) in Turkish law.

The notion that termination on the ground of “just cause” is an inherent element of Turkish contract law also supports the contractual nature of the judicial dissolution claim. Turkish law distinguishes between contracts where there is a single exchange of performance which ends the contract automatically by fulfilment (discrete contracts), and long- term relational contracts[[857]](#footnote-857). It is accepted that the legal theories (primarily, the duty of good faith (Turkish Civil Code Article 2) [[858]](#footnote-858), and the restriction on one’s power to waive or alter individual freedoms (Turkish Civil Code Article 23) [[859]](#footnote-859)) suggesting the establishment of a termination with “just cause” is inherent in any long- term relational contract due to the mandatory nature of those general theories, and cannot be waived or altered by the parties of the contract[[860]](#footnote-860).

Then, the minority shareholder protection under involuntary dissolution “can be understood as an extension of contract theory, providing a constraint against opportunistic action by the majority that violates the parties’ reasonable expectations in entering into a long- term relationship”[[861]](#footnote-861). A commentator summarizes this notion as follows: “When the intention is to establish a relationship more than a discrete bargain, this open texture is, in fact, part of the agreement. Through the mechanism of majority control, provided as part of the default rules of corporate law, the corporation retains the ability to adapt. However, should the majority take opportunistic advantage of its control to exclude the minority from the value of the corporation--conduct that the minority would never have agreed to at a hypothetical bargaining table and that lies far outside the parties' objectively reasonable expectations at the time of investment-- the majority would act in contravention of the equitable duty of good faith and fair dealing implied as a term in every contract. Shareholder oppression law, therefore, involves the enforcement of the parties’ reasonable expectations. Actions that violate the reasonable expectations of the parties will also breach the implied covenant of good faith and fair dealing implied in every contract”[[862]](#footnote-862). Then, when the hypothetical bargaining approach is adopted, the involuntary dissolution action is clearly placed in the realm of contract rather than in the realm of tort[[863]](#footnote-863).

**5.3. Elements of the Cause of Action**

**5.3.1. Generally**

According to TCC Article 531, the two main elements of the involuntary cause of action are (1) owning the statorily required amount of shares to qualify as a petitioner and (2) establishing a “just cause” for the dissolution of the corporation. The latter element requires the “cause” to amount to a level which justifies the dissolution of the corporation[[864]](#footnote-864); only this kind of “cause” would be a “just” one. Likewise, the mere fact that the petitioner’s claim suffices the “just causes” is not enough for the court to grant the dissolution of the corporation; the alleged “just causes” should be sufficient to justify the dissolution of the corporation[[865]](#footnote-865). These causes should be evidenced by objective facts[[866]](#footnote-866). On the other hand, the prior element requires that petitioners of the case; (1) should be “holders of shares representing at least five percent of the share capital” in publicly traded corporations (the percentage requirement can be fulfilled by just one or together with other shareholders), and (2) the shareholder status should be present both at the time of the filing of the suit and the proceeding and at the time of alleged just cause’s occurance[[867]](#footnote-867). The defendant of the case is the corporation itself, and it will be represented by its statutorily authorized organ, the board of directors[[868]](#footnote-868).

The legislative intent in structuring such provision is to primarily protect the minority’s interests[[869]](#footnote-869). Accordingly, the involuntary dissolution action gives the court a broad discretion in both determining whether the just cause element is satisfied and the adequate remedy[[870]](#footnote-870). The Official Comment to TCC Article 531 explicitly expresses that the definition of the elements and the alternative remedies are left to courts and scholarship. The rationale for enacting a statute which hands over a broad power to courts can be explained as follows: “When Parliament enacts corporate law it does so with a broad- brush approach which often makes it difficult to distinguish between different types of companies or different types of corporate transactions. However, courts can examine specific sitations on a case-by-case basis, and can provide remedies to fit particular circumstances. This is difficult for Parliament to do. Perhaps the best example is the development of the oppression remedy. There is little doubt that this is now the most effective remedy available to minority shareholders”[[871]](#footnote-871).

The provision itself does not have a “fault” requirement, thus, neither the petitioning shareholders nor the shareholders who caused the dissension should have a fault[[872]](#footnote-872). A “just cause” can occur even without the fault of any party[[873]](#footnote-873). However, the petitioning shareholder’s fault may give rise to a claim that he is abusing his rights under the rules of good faith and this can bar his application[[874]](#footnote-874), or can effect the court’s decision on whether the conducts give rise to a “just cause” for dissolution[[875]](#footnote-875). Likewise, injury is not an element of this action[[876]](#footnote-876), but can effect court’s decision on whether the conduct gives rise to “just cause”.

Although some commentators opine that due to the minority protection rationale of the provision, the majority shareholders cannot initiate this proceeding[[877]](#footnote-877), reaching such a conclusion is not possible as there is no explicit restriction in the provision. While the rules on good faith may give rise to the same conclusion under the circumstances in which the majority abuses his power and nevertheless demands the involuntary dissolution of the corporation, such a conclusion cannot be conclusively attributed to the provision due to its wording. Accordingly, as some other commentators express, this issue should be concluded through the evaluation of the concept of “just cause”[[878]](#footnote-878). Similarly, rules of good faith will bar a party who caused the unbearability himself for petitioning for involuntary dissolution[[879]](#footnote-879).

Likewise, suing for the involuntary dissolution of the corporation can be in violation of the rules of good faith if other specific provisions that might provide a relief was not used prior to the initiation of the dissolution lawsuit[[880]](#footnote-880). This being said, the involuntary dissolution statute does not include the element requiring the usage of other rights given to the shareholders under the statute before initiating a lawsuit under the involuntary dissolution provision; accordingly, not exercising other shareholder rights prior to the exercise of this right does not preclude the shareholder from initiating the involuntary dissolution lawsuit by itself[[881]](#footnote-881). However, some specific instances may bar the petitioners claim. For instance, if the petitioner is claiming that mismanagement is causing the “just cause”, his claim will not be able to establish the just cause because a mismangement cannot amount to a just cause in cases which TCC Article 376 and 377 on “zone of insolvency” are applicable[[882]](#footnote-882). Likewise, a shareholders having the majority to pass a general assembly resolution to voluntarily dissolve the corporation may be rejected by the court due to the availability of this alternative path[[883]](#footnote-883).

**6.3.2. Effect of the Mandatory Nature of Corporate Law**

As the Official Comment to TCC explicitly expresses, the statutory provision on articles of incorporation underlines the contractual nature of the corporation[[884]](#footnote-884). This being said, the mandatory nature of Article 340 extensively limits the “freedom of contract” in the context of corporations’ articles of incorporation[[885]](#footnote-885). Corollary, corporate participants are employing the method of private contracting, and arranging shareholders’ agreements among themselves in order to provide themselves further rights and interests[[886]](#footnote-886). While the notion that the shareholders’ voluntary consensus to limit the involuntary dissolution right does not fetter the exercise of the corporation’s statutory powers would support the validity of this consensus[[887]](#footnote-887), the mandatory nature of Turkish corporate law represents the hurdle against this validity. The involuntary dissolution right cannot be waived by articles of incorporation due to TCC Article 340[[888]](#footnote-888), because neither the explicit language of the statutory provision nor a “legislative intent” interpretation grants this waiver[[889]](#footnote-889). Likewise, as the waiver of the right that involuntary dissolution provision gives would violate the public policy[[890]](#footnote-890), even without TCC Article 340, circumventions of involuntary dissolution provision is prohibited due to its own mandatory nature[[891]](#footnote-891).

The right to petition for judicial dissolution cannot be altered for the same reasons by, for instance, lowering the statutory minimum of percentage share ownership through articles of incorporation[[892]](#footnote-892), because the legislative intent is to (1) avoid frivolous lawsuits[[893]](#footnote-893), (2) give effect to concerns of shareholders only if these concerns amount to certain level (this is also why a “just cause” is required) and the notion that a minimum number of shareholding is required also protects the notion that the dissension should amount a certain level: In publicly traded corporations, ownership of five percent can be held by millions of people, which means the oppression is felt by in a large scale and this elevates the concerns regarding the corporation to a certain level that establishes a public interest in judicial intervention. Likewise, this provision cannot be altered by the articles of incorporation by limiting the definition of just cause to certain events. However, if such a term is included in the articles of incorporation (i.e., a term that specifies certain events that gives rise to a just cause for dissolution)[[894]](#footnote-894), this can be deemed a “voluntary dissolution cause” under TCC Article 529(1)(c) and given effect to that extent, without limiting the right arising from the involuntary dissolution provision[[895]](#footnote-895). After all, the involuntary dissolution proceeding does not only protect the interest of the petitioning shareholders but also other stakeholders[[896]](#footnote-896).

On the other hand, parties might indirectly restrict the interpretation of the just cause if they write an incident as a cause for voluntary dissolution to their articles of incorporation[[897]](#footnote-897). While shareholders cannot write the incidents that cannot be deemed as just causes for involuntary dissolution, they can limit the involuntary dissolution provision’s application by determining the scope of voluntary dissolution. In this case, as the involuntary dissolution is a right that should be activated in last resort, the court might reject an involuntary dissolution claim that has some relation with those stated voluntary dissolution incidents[[898]](#footnote-898). Herein, parties can also claim that the fact that, while an incident is explicitly specified as a “voluntary dissolution trigger” but a related fact is not, shows that this unspecified incident is not one that parties would deem just cause. However, this would also mean the circumvention of the rule, so the court has to be careful in imposing this kind of restriction on its own interpretation.

Corollary, the right to initiate an involuntary disssolution action cannot be waived or altered by shareholders’ agreement, because TCO Article 27 provides that a private contract cannot violate mandatory statutory provisions[[899]](#footnote-899) or public policy[[900]](#footnote-900). In this regards, an involuntary dissolution proceeding cannot be submitted to arbitration rather than courts due to a shareholders’ agreement or articles of incorporation term requiring parties to solve their disputes in arbitration[[901]](#footnote-901), because parties cannot take issues that they cannot resolve themselves without court’s intervention to arbitration, and the subject matter jurisdiction of the involuntary dissolution proceeding is explicitly left to the court at the corporation’s headquarters[[902]](#footnote-902). Then, the fact that involuntary dissolution provision is one that concerns public policy requires invalidation of shareholders’ agreements’ terms waiving[[903]](#footnote-903) or altering the provision[[904]](#footnote-904). Accordingly, if a shareholder proceeds with a lawsuit under the judicial dissolution provision of TCC, despite an explicit term in the shareholders’ agreement that this right is waived, other parties to the shareholders’ agreement cannot sue the dissenting shareholder for damages due to breach of the contract term[[905]](#footnote-905).

On the other hand, a shareholders’ agreement can include a term that entitles parties a right to dissolve the corporation for just cause. In this case, some commentators opine that the just cause in this agreement may be given effect under the involuntary dissolution provision, provided that the parties of the agreement and the shareholders of the corporation are the same; after all, parties’ opposition to the effect of the agreements’ just cause under the involuntary dissolution provision may be deemed violation of duty of good faith[[906]](#footnote-906). Although this study agrees with this opinion, it opines that the reason for this conclusion should be based on a different understanding: While the notion that TCC does not give shareholders the right to alter this statutory provision by articles of incorporation or any other private contractual arrangement requires the acceptance that a just cause in shareholders’ agreement cannot be given effect under the involuntary dissolution provision, provided that the parties to the contract and the shareholders of the corporation is same, the court can accept the agreement as an evidence that shows the parties’ bargain and accept the just cause stated there as a just cause under the involuntary dissolution provision. However, in the context of publicly traded corporations, this debate is unnecessary as the parties of the shareholders’ agreement and the corporation’s shareholders will never be completely the same. That being said, if a particular agreement between certain shareholders is causing the occurance of just cause, then the petitioner can evidence the presence and thrust of the conduct which effects his interests by showing the shareholders’ agreement[[907]](#footnote-907), but cannot use the agreement to establish any additional expectations, if the agreement is not one disclosed to the public by the virtue of the disclosure rules of the CML and consequently became a part of the corporate contract.

**5.4. The “Just Cause” Concept**

Commentators often opine that “the generality of the oppression statutes makes it difficult to delineate, in analytic form, the constituent elements of conduct that violates the statute”[[908]](#footnote-908). Likewise, there is no consensus in Turkish law concerning the definition of the “just cause”[[909]](#footnote-909). As Turkish statutory law for corporations does not have an explicit definition for the “just cause” element, the court has to decide whether an occurance is a “just cause” using its discretion authority under Article 4 of the Turkish Civil Code[[910]](#footnote-910). While exercising its interpretation authority, the court may benefit from approaches from model legal systems’ commentator opinions, statutes or court decisions[[911]](#footnote-911), and this is particularly why this study proposes to benefit from U.S. law’s approach.

The just cause concept has been evaluated on two theoretical grounds: (1) analogy to other sections of the TCC’s company law provisions, and (2) derivation from general notions of good faith that underlie the Turkish corporate law through the Turkish Civil Code. Although the analogy to rules of good faith is generally accepted[[912]](#footnote-912), the analogy to other company’s involuntary dissolution statutes is generally rejected due to the characteristic differences between the corporation and other types of business entities[[913]](#footnote-913). This is especially grounded on the notion that corporations are capital companies and its shareholders’ personalities are not important according to its corporate typology; however, it should be equally acknowledged that this notion does not preclude the possibility that the corporation may be built on the personalities of its shareholders by the virtue of the corporate features including prviliged shares[[914]](#footnote-914), which are also a method to guarantee non- pecuniary private benefit extractions[[915]](#footnote-915), as often seen in publicy traded corporations.

Accordingly, while some commentators opine that the occurance of the “just cause” should be an objective fact rather than a subjective fact arising in connection with the personality of a particular shareholder[[916]](#footnote-916), some other commentators express and the case law shows that subjective facts can be taken into consideration in the context of close corporation owned by a particular family[[917]](#footnote-917). It is also stated that the special rules (e.g., rules on dividend distribution) and alternative avenues for relief through the CML (e.g., retirement right), in addition to the TCC, limits the number of incidents that would be accepted as a just cause in publicly traded corporations[[918]](#footnote-918). Likewise, cases concerning only personal interests and does not effect the corporation cannot be accepted as just causes under the current interpretation[[919]](#footnote-919). All in all, “just cause” is understood as an incident directly related with a risk about the corporation’s ability to continue and develop its existence, and as it is provided as a relief for minority, risks about the existential interests of the minority[[920]](#footnote-920).

As these explanations gives no clear guidance, it may be easier to define the “just cause” by distinguishing it from the U.S. law’s similar concept of “oppression”. The Mardikos v. Arger, 116 Misc. 2d 1028 (1982) court explaination regarding the New York State Legislature choice of employing the “oppression” conception rather than a wider conception highlights the following related distinction: “In attempting to provide relief to unfairly- treated minority stockholders the New York Legislature had before it several options. It could have authorized dissolution on the very broad grounds which are available in Connecticut, where dissolution is authorized for “any good and sufficient reason” (Conn.Gen.Stats.Ann. Section 33.382), or the Legislature could have followed Indiana, which provides for the appointment of a receiver when necessary to provide “ample” justice… The New York Legislature, however, elected to provide relief on the more narrow grounds of requiring a showing of “oppressive” conduct.” While the oppression concept is one of the occurances caused by the misconduct by those in control of the corporation[[921]](#footnote-921), it is distinguished from the other occurances (illegality, fraud, misapplication of assets or waste) within the same classification[[922]](#footnote-922). The thrust of the shareholder oppression statute is protection from the abusive exercise of powers, and by the application of the “reasonable expectations” theory the doctrine evolved to a point in which it addresses particularly the shareholder’s protection from the outcome of a conduct whether faulty (i.e., abusive) or not: Oppression is the wielding of power in a manner which destroys a shareholder’s vital interest and expectations[[923]](#footnote-923). Then, the “just cause” concept, on its face, addresses a wider range of factors than the oppression concept and can comprise of any good and sufficient cause[[924]](#footnote-924).

**5.4.1. Current Interpretation**

The general understanding regarding the “just cause” concept is that a party can establish “just cause” if the alleged facts shows that the petitioner’s participation in the corporation will be unbearable for him[[925]](#footnote-925). It is said that the “unbearability” criteria is the only principal factor for the “just cause” concept’s definition[[926]](#footnote-926), and should be defined in accordance with the rules of good faith[[927]](#footnote-927). In other words, if upon an occurance of an event expecting a party to the contract to continue the contractual relationship would be contrary to due rules of good faith, this occurance would be deemed a “just cause”[[928]](#footnote-928). Corollary, whether a contractual relationship had become unbearable is determined in accordance with the rules of good faith[[929]](#footnote-929). In this sense, the standard that will be used to test whether there is a “just cause” is the “unbearability” standard[[930]](#footnote-930).

As the “unbearability” definition of the “just cause” concept is a broad one, there are two criterias that are used to limit the definition: (1) “frustration of the trust among participants” and (2) “frustration of the inter- personal relations”[[931]](#footnote-931). It is opined that the concept should be evaluated case by case, and even the conditions of the place of incorporation and the culture therein should be included to the evaluation[[932]](#footnote-932). Then, the incidents causing the “just cause” can be defined as “transactions or actions that frustrates a shareholders’ rights or interests in a continous and essential manner, and deems the shareholder’s participation in the corporation unbearable for him according to the rules of good faith”[[933]](#footnote-933).

Commentators opine that the situations such as (1) shareholders other than the majority are continuously aggreived because of the majority’s selfish actions, (2) shareholders’ right to information is continuously violated, (3) continuous mismanagement (i.e., management not based on planning, technique or information), (4) usage of corporate resources for the benefit of others’ rather than the corporation itself, (5) continuous financial problems, (6) suppression of dividends despite the presence of resources for its distribution[[934]](#footnote-934); (7) majority’s refusal to take action against a management that manages the corporation in a detrimental manner which harms the minority’s economical interests [[935]](#footnote-935).

The scholarship refers to Swiss case law for the interpretation of the “just cause” concept[[936]](#footnote-936). Accordingly, it is said that the Swiss case law regards (1) corporation’s continuous mismanagement, (2) corporation’s constant financial loss that takes the corporation to the zone of insolvency, (3) dissension among shareholders in close corporations owned by families, (4) accruing no corporate profits or not declaring any dividends for a long time, (5) payment of no compensation to the corporation’s board of director’s for a long time, (6) impossibility of realizing the corporate purpose[[937]](#footnote-937). Then, the “just causes” giving rise to the dissolution of a corporation can be listed under two main categories; (1) causes arising from majority’s abuse of power, and (2) causes unrelated from the majority abuse[[938]](#footnote-938).

In a recent decision, a Turkish court ordered the dissolution of a corporation ruling that the following events justified the acceptance that a “just cause” has occurred: Board of director’s violation of their duties, dissension among shareholders, violation of the rule on equal treatment of shareholders, violation of the shareholder’s information and inspection right, grant of corporate opportunities to other shareholders, rejecting to hold general assembly meetings[[939]](#footnote-939). However, it is not necessary for the occurance of the “just cause” to establish a continuing course of conduct or a bundle of conduct; a one time particular conduct by itself can be sufficient to establish the just cause[[940]](#footnote-940).

It is fair to ask how the “just cause” conception can cover the non- pecuniary private benefit extractions under its current interpretation. As seen above, “distorted management” (i.e., corporate management that does not serve to the corporate purpose of accruing profits) is accepted as one of the incidents that gives rise to just cause[[941]](#footnote-941). This practice includes two aspects; first one is concerning the actions of the corporation itself and the second one is actions taken by corporate insiders (e.g., directors, managers, shareholders) on their own behalf. For the latter aspect, scholars’ suggestion that a management or shareholder actions aimed at lowering the market share of the corporation to provide benefits to competitors is a distorted management that creates a just cause for dissolution[[942]](#footnote-942), shows that an external act (external in the sense that the insider acts outside the internal corporate machinery, in the market) aimed at disturbing the functioning of the corporation can also create a just cause. It can also be said that corporation’s inaction to deter an influencing shareholder’s external undertakings that effect the corporation negatively can be seen as a “distorted management” itself, as the board of directors are statutorily obligated to defend the corporation’s interests by initiating lawsuits against such persons if needed. For the prior aspect, a corporate practice in between bad business judgment (which is allowed by the statute to some extent through the provisions dealing with liability of board of directors) and impossibility (whether it is possible to accrue profits through the business of the corporation)[[943]](#footnote-943) of corporate purpose (which is by itself a reason for corporate dissolution according to TCC Article 529(1)) can be thought upon[[944]](#footnote-944). In this sense, even the fact that corporation’s current finances are in balance or the corporation is profiting does not bar the court from dissolving the corporation[[945]](#footnote-945). These two aspects leads to the conclusion that extraction of non- pecuniary benefits can be subject to the just cause element’s current analysis, as the distorted management herein includes both external and internal acts which non- pecuniary private benefit extractions are derived through[[946]](#footnote-946).

**5.4.2. Using the “Reasonable Expectations” Standard**

Although the general context that the “just cause” concept refers is well understood, as shown above, this understanding does not provide any specific guidance to practitioners (both the parties to the case and the law enforcement authority). While defining the “just cause” element through a legal standard (such as the “reasonable expectations” standard) may generate substantial costs for practitioners[[947]](#footnote-947), providing a specific guidance will establish a legal certainty and predictability in the legal environment, which will certainly lower the costs associated with the current elusiveness[[948]](#footnote-948). In this regards, using the “reasonable expectations” analysis to define the “just cause” concept will not only improve the legal environment, but will also provide a theoretically justified standard adequate for the detection of the non- pecuniary private benefit extractions. After all, the “unbearability” standard used for the current interpretation is too vague and broad to provide a systematic evaluation, and trying to cover non- pecuniary benefit extractions under the judicial dissolution provision by way of such standard would be practically impossible as it will bring great uncertainty and arbitrariness to the marketplace.

While the reasonable expectations standard might be seen as a stranger for the current interpretation of the “just cause” element, this appearance is deceptive. After all, the “unbearability” aspect of the concept used in Turkish law resembles the U.S. law’s conception of the duty of good faith, which is also connected with the reasonable expectations standard. As the involuntary dissolution cause of action’s legal nature is contractual and the good faith obligation is the legal basis of the claim in Turkish law, it sounds perfectly logical to adopt the U.S. law’s “reasonable expectations” standard as the definition of the “just cause” element in Turkish law. Likewise, commentary already acknowledges that just cause concept is also related with the demolishment of the minority’s expectations from the corporation[[949]](#footnote-949).

In U.S. law, in the words of the Kirke La Shelle Co. v. Paul Armstrong Co., 263 N.Y. 79 (1933), duty of good faith can be explained as follows: “…in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing”. Accordingly, the covenant of good faith “restrains a contracting party from engaging in arbitrary or unreasonable conduct that has the effect of frustrating the contract’s overarching purpose and denying the other party the benefit of its bargain. The Court, however, may not substitute its own notions of fairness for the terms of the agreement reached by the parties, and will therefore only invoke the implied covenant when the contract does not expressly address the subject at issue”[[950]](#footnote-950). In the U.S., the test for whether a party violates the duty of good faith in the context of a contractual relationship is as follows: “Is it clear from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith—had they thought to negotiate with respect to that matter. If the answer to this question is yes, then, in my opinion, a court is justified in concluding that such act constitutes a breach of the implied covenant of good faith”[[951]](#footnote-951). U.S. case law further suggests that in a contractual context, the duty of good faith is connected with the “reasonable expectations” of the parties: In Katz v. Oak Industries Inc., 508 A.2d 873 (1986), the court acknowledged that when the court holds that good faith requires a party not to violate the other party’s expectations, it is recognizing that sometimes the silence in contract is a recognition that the parties occasionally have understandings or expectations that were so fundamental that they did not need to negotiate about those expectations. Then, the concepts of good faith and reasonable expectations are compatible in nature.

To illustrate how the conception may help the definition of the just cause under Turkish law, one can state the following example: While a term in articles of incorporation that lets the corporation transfer all of its profits to a third party would be held invalid because it is deemed as an abandonment of its economic purpose and violation of the shareholders’ right to dividend[[952]](#footnote-952), the corporation can nevertheless continue doing the same practice through other apperantly legitimate ways by casual business transactions like asset sale or purchase or any transaction of transfer pricing[[953]](#footnote-953). In this case, shareholders can use the judicial dissolution card in order to stop this continuing course of conduct[[954]](#footnote-954). Herein, the shareholders right to dividend is not directly violated, because there is neither a profit accruing in the corporate treasury nor an article term is authorizing the transfer; the treasury is being emptied through practice of distorted management with no substantial transaction taking place at once. Even when a profit accrues and the general asssembly’s rejects to declare dividends, and a court invalidates this resolution claiming that it violates shareholders’ right to dividend, the court does not have the power to order the declaration of the dividend in Turkish law[[955]](#footnote-955), thus its original powers does not provide a remedy, so a petitioner is not obliged to use this path before the judicial dissolution proceeding[[956]](#footnote-956). In this case, shareholders’ right to judicial dissolution arises because their reasonable expectations regarding management and economic benefit is frustrated, and this frustration gives rise to the necessary just cause. However, if the “just cause” is defined through the “unbearability” definition, the tunneling exemplified here would not rise to the level of unbearability unless the monetary amount rises to a substantial level, which would then be first analyzed (and remedied accordingly) under whether this may be deemed as return of capital (TCC Art. 480(3)) or unlawful dividend distribution to shareholders (TCC Art. 512)[[957]](#footnote-957) in case the party at other side is a shareholder (TCC Art. 480(3)), or it brings the company to the zone of insolvency (TCC Art. 376). Still, it is likely that CML provisions on concealed distribution of capital will intervene before the aforementioned provisions are even applied, because of the complex nature of the transactions causing tunneling and the hints recognized beforehand.

**5.5. Remedies**

The proper remedy in judicial dissolution cases is to restore the petitioner as nearly as possible to the position she would have been in had there been no wrongdoing; in other words, if the wrongdoing is the denail of petitioner’s reasonable expectations, these expectations are the ones that should be restored by the court decision[[958]](#footnote-958). According to TCC’s judicial dissolution provision, if a court finds that the alleged facts amount to a “just cause” which would grant the dissolution of the corporation, rather than dissolving the corporation, the court can order alternative remedies[[959]](#footnote-959). Therefore, the relief that can be provided to the petitioner can be classified as (1) dissolution and (2) alternative remedies. The origin of this nature of the statutory authority to order wide range of remedies, which is an unconventional thing for the Turkish law, is seen as the common law, and suggested that it should be evaluated through that lens but harmonized with the principles of the civil law[[960]](#footnote-960). This notion also supports transplantation of the U.S. law’s reasonable expectations standard.

As the continuity of corporations is a principle upon Turkish corporate law is built, courts are statutorily obliged to search for alternative remedies that will keep the corporation alive, before ruling in favor of dissolution[[961]](#footnote-961). However, the court’s power to order alternative remedies is restricted in two ways. Firstly, there should be a just cause amounting to a dissolution order[[962]](#footnote-962). Secondly, the alternative remedy should be ordered only if the solution (i.e., remedy) ordered is (1) adequate for the situation and (2) acceptable. In this regards, the court should also consider whether the corporation is a publicly traded one or not[[963]](#footnote-963).

The first limitation, “adequacy for the situation”, signals that the court has to find the best solution that will remedy the petitioner’s frustration[[964]](#footnote-964). On the other hand, the “acceptability” limitation signals that the court should consider the interests of all parties and stakeholders relating the case before ordering a particular remedy and order one that is acceptable for all stakeholders[[965]](#footnote-965). The “acceptability” limit also requires the court to order an “enforceable” relief[[966]](#footnote-966); after all, just like a court cannot order a singer to sing good[[967]](#footnote-967), the remedy ordered should be one that will not hamper the compensation of the frustration to the full extent due to enforceability problems. This interpretation of the limitations are also consistant with the interpretations of the equivalent Swiss law provision, which the TCC’s provision is taken from[[968]](#footnote-968).

Despite all these limitations, the broad authority that the involuntary dissolution provision gives to the court in terms of the remedy shows how an unconventional approach is taken by the legislature: After all, the general rule in Turkish law is that in issues in which the corporation’s general assembly should decide through a resolution, a court cannot substitute its own judgment with the general assembly’s unless a statutory exception provided for the court[[969]](#footnote-969). In this regards, even the order to compel the corporation to declare dividends is a violation of this principle[[970]](#footnote-970). The involuntary dissolution provision itself contradicts with this general rule, thus it is also possible to claim that these general principles impose an additional limit on the court’s power to order alternative remedies[[971]](#footnote-971).

The limits imposed on the discretionary power by the provision itself requires the court to balance the interests assocciated with the corporation (primarily the case’s parties’ interests, but also stakeholder interests) and consider the nature of corporations[[972]](#footnote-972). In this regards, the court cannot disregard the fact that the corporation is a private law institution that is built on the majority rule (TCC Article 418) concept (so the interests of the majority), and completely change the balance of interests postulatet by the law[[973]](#footnote-973). In other words, the court cannot transform the corporation to a corporation that is completely different than the one contemplated by the parties[[974]](#footnote-974). Accordingly, while the court may order distribution of dividends in a case in which petitioner’s “just cause” claim is based on the factual determination that there is malicious suppression of dividends, it cannot put a term to the articles of incorporation that sets a minimum dividend amount to be distributed at all times. However, the court can order a bundle of remedies by ordering the buy- out of certain shares in addition to the distribution of the dividends at the same time[[975]](#footnote-975).

The statute itself exemplifies the alternative remedies by expressing the buy- out of the petitioner’s shares by paying the “real value” of the shares as one relief, however, this does not mean that the court should give priority to this type of remedy; the court is not bound by the statutory example and can order any other relief in accordance with the limits drawn for its discretion[[976]](#footnote-976). The court is also not bound by the relief asked by the petitioner; after all, this lawsuit is one that simply asks for the dissolution of the corporation, and this is the only demand that the petitioner can have according to the statute[[977]](#footnote-977). Regarding the buy- out remedy, the question on who can purchase the shares of the dissenting shareholder is answered as the “corporation itself”[[978]](#footnote-978). Naturally, this increases the possibility of dissolution orders. In circumstances which the corporation is not able to purchase the shares due to financial difficulties, courts may order the dissolution of the corporation holding that there is no other adequate and acceptable alternative remedy[[979]](#footnote-979).

The alternative remedies suggested in scholarship consists of (1) ordering the distribution of dividends, (2) providing the minority the privilege to have a representative in the board, (3) amending or rescinding a board of directors’ or general assembly resolution, (4) amending the articles of incorporation, (5) ordering the division of the corporation and dissolve it partially, (5) order the sale of certain corporate assets including subsidiaries[[980]](#footnote-980). Although the origin, Swiss case law, suggests that a compensation can be paid to the petitioner, Turkish scholarship generally rejects this kind of remedy[[981]](#footnote-981).

**5.5.1. Remedying Non- Pecuniary Private Benefit Extractions**

While the remedies suggested in connection with the judicial dissolution provision seems efficient to cure the non- pecuniary benefit extractions, this is deceptive. After all, as noted in U.S. law by the Brodie v. Jordan, 447 Mass. 866 (2006) court, the proper remedy for freeze- out is to restore the minorty shareholder as nearly as possible to the position he would have been in had there been no wrongdoing. In the context of non- pecuniary private benefits, the minority will be only remedied if the extracted benefit is shared with the minority. Accordingly, the adequacy of the suggested remedies in Turkish law should be evaluated from this perspective.

It is in this study’s view that in the context of non- pecuniary benefits in publicly traded corporations, a direct compensation flowing from the influencing shareholder to the petitioner would be the best remedy due to four reasons: Firstly, this remedy puts the least burden on the corporation, its constituents and the marketplace. After all, any remedy concerning the institutional framework of the corporation will effect the operations and the securities prices of the corporation, and this will cause unprecented effects in the marketplace. As the balanced and trustworthy operation of the markets is one of the aims of the securities laws, and particularly CML’s[[982]](#footnote-982), the aim of the capital market law should not be undermined due to the consequences of the involuntary dissolution remedy; and any remedy apart from compensation would undermine this operation. Accordingly, the legislative intent concerning the marketplace should be taken in consideration before ordering for a remedy, and the compensation remedy should be chosen in order to keep up this intent to full extent. Secondly, applying the contractual theory for corporations, one can also claim that a violation of the terms of a contract by one of the parties would rise a claim for demanding damages, and ordering the compensation remedy does align with this theoretical foundation. Thirdly, it would be easier for the legal enforcement to supervise the compensation remedy.

Lastly, putting the burden on the influencer directly will effectively constrain the influencer, and give the petitioner’s motivation to track the wrongdoers. After all, any remedy that is not directed at the wrongdoer but to the corporation would benefit the wrongdoer as well[[983]](#footnote-983). On the other hand, awarding the remedies such as compensation from the corporate treasury is inappropriate in publicly traded corporations because the burden would ultimately fail on innocent investors[[984]](#footnote-984). Also, a remedy such as buy- out may be in the ultimate interest of the wrongdoer because the reason that he conducted the oppression might be that he wants to trigger the buy- out remedy; and buying- out of the shares for a cheaper price than the price that would have been set by the market if there had been no private benefit extraction or triggering other buy- out rights under the CML for shareholders reaching certain thresholds might actually serve his plan[[985]](#footnote-985). Thus, while structuring the remedy, it is important to think that the wrongdoer may benefit from the remedy, because maybe it was his intention to lower the share prices and then purchase them through this remedy by a much more cheaper price[[986]](#footnote-986).

It is important to state that while ordering the minority to join the benefits accrued on the influencer sides could have been an even more adequate remedy, the fact that the non- pecuniary private benefits cannot be calculated would make this impossible. Moreover, due to the nature of non- pecuniary benefits, it is easier to calculate the damages it gave to the corporation compared to the profits it accrued on the influencer’s side. Also, as a counter argument to the adequacy of the direct compensation remedy, one can say that the court should “while awarding damages directly to the innocent shareholder may seem equitable with respect to the parties before court, other interests, particularly those of the corporation’s creditors, should no be overlooked”[[987]](#footnote-987). Still, the creditor interests should not predominate over shareholder interests, because creditors are already adequately protected by various provisions in the statute even when the corporation is solvent; and in most cases, shareholders will activate other measures that would protect both the shareholder and creditors interest at the same time, such as the ones relating to rules of stated in Chapter III.

**5.5.2. The Problem of Direct Compensation**

The general rule in Turkish law is that the court cannot give an order against a person who is not a party to the case (i.e., a third- party in terms of the case) as a defendant[[988]](#footnote-988), unless there is an explicit statutory ground or succession[[989]](#footnote-989). Accordingly, it is said that no one apart from the corporation can be made the defendant of an involuntary dissolution case, and corollary the court cannot order a relief that does not concern the corporation itself[[990]](#footnote-990). The contrary scenario will violate the third parties’ constitutional rights[[991]](#footnote-991). This same approach also bars the court from ordering other uncommon remedies, such as a majority buy- out[[992]](#footnote-992), because the majority is not a party to the case[[993]](#footnote-993).

While remedies such as ordering board of directors responsible for the occurance of just cause pay the damages of the petitioners are generally rejected by commentators; some also opine that the court should be able to order the buy out of the dissenting minority by the other shareholders of the corporation even though those shareholders are not a party to the case, because those shareholders’ third- party status concerning the case is a matter of civil procedure law and not corporate law[[994]](#footnote-994). In truth, by giving the court the authority to order any relief it finds appropriate, without being constrained with an obligation to stick to what the petitioner has demanded, this provision has already been an exceptional case for the civil procedure law[[995]](#footnote-995). Accordingly, it is in this study’s view that the general civil procedure law principle should only be applied secondarily to the judicial dissolution cases[[996]](#footnote-996). In the acceptance of alternative approach, the court may order the payment of the compensation only from the corporation’s own treasury, but such payment will not remedy the aggreived party as he will still suffer damage due to the decrease in the value of his shares as a result of decrease in corporate treasury after compensation.

It is necessary for the courts to be able to use the judicial dissolution provision to order compensatory damages flowing from the influencing shareholder to the petitoners, because otherwise the petitioners will not be able to receive any compensation. After all, TCC in general, including the rules outlined in Chapter III, is not structured for this kind of remedy. For example, while it is accepted that an action such as wrongful witholding of dividends causes a wrong inflicted upon the individual shareholder rather than effecting the corporation and gives an individual casue of action to the shareholder, actions that effect the attractiveness of the corporation as an investment and the underlying value of its assets are derivative injuries in nature[[997]](#footnote-997). Likewise, while shareholders cannot use TCC in general to sue an abuser for compensation due to a damage occurred because of his abuse of his own rights by exercising his voting right to intentionally hurt the corporation, shareholders can sue this abuser under TCO Article 41(2) for compensation[[998]](#footnote-998), however, the nature of this tort law provision has elements that will hamper its effective usage. Another scenario under which a direct compensation might be possible without giving rise to criticism due to the civil procedure law, is the situation in which the parties to the case settles the lawsuit. However, the involuntary dissolution action is explicitly put under the court’s authority, therefore, parties cannot agree on a remedy that will constrain the court’s authority in the finalization of the proceeding[[999]](#footnote-999).

**6.6. Application to Non- Pecuniary Private Benefit Extractions**

The adequacy of the judicial provision based on the “reasonable expectations” standard for curing the harms the non- pecuniary private benefit extractions of influencing shareholders can be summarized in three parts. Firstly, in order to claim that the judicial dissolution provision can be an adequate construction to use against non- pecuniary private benefit extractions, one should examine the motives for bringing a dissolution proceeding, because if the motives do not align with the control of this kind of extraction, then the provision’s theoretical standing will not mean anything in practice: “Except for the rare case where the petition is prompted by pique, a shareholder suing for dissolution is trying to accomplish one of three things: (1) to withdraw his investment from the firm; (2) to induce the other shareholders to sell out to him; or (3) to use the threat of dissolution to induce the other shareholders to agree to a change in the balance of power or in the policies of the firm”[[1000]](#footnote-1000). Then, shareholders’ motives to induce the abusers to abide by the collectively beneficial policies of the corporation and pave the way for their exit from the corporation by helping the market to value their shares accurately without being degraded by the abuser’s extractions alligns well with the function of the judicial dissolution provision.

Secondly, it should be stated that the judicial dissolution action, by its nature, represents a unique legal construction that is inherently adequate to be applied to extraction of non- pecuiary private benefits. In this regards, the judicial dissolution action’s natural difference from the minority shareholder protection measures underlined in Chapter III provides an adequate ground to track non- pecuniary private benefit extractions of influencing shareholders through this legal tool. This inherent feature can be read from the words of an English court as follows: “I do not think it is essential to a case of oppression that alleged oppressor is oppressing in order to obtain pecuniary benefit. If there is oppression, it remains oppression even though oppression is due simply to the controlling shareholder’s overwhelming desire for power and control, and not with a view to his own advantage in the pecuniary sense. It seems to me the result rather than the motive is the material thing…If a person, relying on majority control in point of voting power, dispenses with the proper procedure for producing the result he desires to achieve, and simply insists on this or that being done or omitted, his conduct is oppressive because it deprives the minority of shareholders of their right as members of the company to have its affairs conducted in accordance with its articles of association”[[1001]](#footnote-1001). In this regards, the judicial dissolution lawsuits does not focus where, how and even why the abusive conduct has occurred, it rather focuses on the effect of the conduct to the basic interests of the petitioning shareholders. Put in terms of Turkish law, what it requires is a showing that there is a just cause for involuntary dissolution; no motivation but a frustrating result has to be showed. As embedded in the given words of the English court, a minority who is deprived of his right as a shareholder to have the corporation’s affairs conducted in accordance with the corporate contract should have the “just cause” to petition for a relief. This notion makes the lawsuit suitable for its embracement of non- pecuniary private benefit extractions. Accordingly, a minority shareholder can successfully petition for judicial dissolution due to non- pecuniary private benefit extractions done through both distorted management and external undertaking (by either alleging that influencing shareholder’s own actions or the corporation’s inaction against external undertaking effects the corporation negatively and causes a distorted management) violates the corporate contract, and this gives the necessary just cause for dissolution and alternative remedies such as direct compensation as recommended in this study.

Thirdly, a statutory involuntary dissolution grounded on “just cause” interpreted through the “reasonable expectations” standard, paves the way for considering the non- pecuniary private benefits of shareholders more than the current standards. After all, as the Brenner v. Berkowitz, 134 N.J. 488 (1993) court observed, “in determining whether a shareholder’s expectations are reasonable and whether the corporation or controlling shareholders or directors unreasonably thwarted them, courts should consider even non- monetary expectations of the shareholder” and “even the termination of the employment of the shareholder’s children in certain situations may consistute oppressive conduct sufficient to constitute a violation under the statute”. Then, just like the oppression doctrine considers the non- pecuniary private benefits of the dissenting shareholder through the reasonable expectations standard, the wider concept of “just causes” can equally and easily consider the non- pecuniary private benefits of the abusing shareholder in the determination of the conduct that consitutes “just cause”. The reasonable expectations standard, by covering all the rights, expectations and basic principles of the corporate and securities laws[[1002]](#footnote-1002), gives the petitioner the opportunity to demand relief against conduct which otherwise will not be covered by any statutory remedy.

**5.7. Conclusion**

The judicial dissolution action under Turkish law represents an important feature of the TCC. Still, as it is shown in this Chapter, Turkish law’s judicial dissolution statute presents unique problems to the current structure of the TCC and the law in general. Despite the evaluations of the commentators and the origin Swiss case law’s help, Turkish law has not yet developed its own way for dealing with the provision[[1003]](#footnote-1003). Therefore, U.S. law’s “reasonable expectations” standard can give a hand in the establishment of a legal approach towards the provision.

Turkish judicial dissolution provision can yet play a big part in tracking and remedying influencing shareholder’s non- pecuniary private benefit extractions. However, in order to carry out this task, the provision’s “just cause” element and remedial nature has to be kneaded purposefully. If the just cause element is interpreted through the reasonable expectations standard outlined above and the provisions’ nature is considered while finding out the proper remedy such as direct compensation from the influencer to the petitioners, the judicial dissolution provision can be an effective constraint against the non- pecuniary private benefit extractions.

**CHAPTER VI**

**CONCLUSION**

Traditionally, corporate law is structured to deal with pecuniary benefit extractions of corporate constituents. However, constituents are also able to extract non- pecuniary benefits from the corporation and these extractions poses as much as threat as the pecuniary benefit extractions to the corporation itself and the economy in general, when publicly traded corporations are taken into consideration. Therefore, tracking and controlling non- pecuniary private benefit extractions through legal mechanisms that will deter a main extractor, influencing shareholders, and remedy the main sufferer, minority shareholders, bears importance.

While the measures aimed at tracking pecuniary private benefit extractions of shareholders seems to be sufficient to track the non- pecuniary private benefit extractions as well, this assertation fails, because this transaction- based system is mainly focused on the relatedness of the parties of a relationship or the value of the assets subject to the relationship. However, non- pecuniary private benefit extractions can easily go through these points undetectedly by taking the form of distorted management or external undertaking. Still, these undetected extractions can be covered and remedied by the last resort mechanism of the corporate law: judicial dissolution. After all, a minority who is deprived of his right as a shareholder to have the corporation’s affairs conducted in accordance with the corporate contract should have the “just cause” to petition for a relief. This notion makes the lawsuit suitable for its embracement of non- pecuniary private benefit extractions.

Accordingly, this study investigated the loopholes present in the Turkish corporate law that are paving the way of non- pecuniary private benefit extractions in the context of publicly traded corporations and suggested that the Turkish judicial dissolution statute can be used to control and remedy these extractions. To strengthen the theoretical foundation of this suggestion and the effectiveness of the statute, it proposed to adopt the “reasonable expectations” standard used in the U.S. in the context of shareholder oppression law to define the “just cause” required for judicial dissolution and alternative remedies in Turkish law. Corollary, it recommended structuring the reasonable expectations standard in a way that can be used for publicly traded corporations and rethinking the Turkish judicial dissolution provision accordingly.

While proposing to use the judicial dissolution statute in the context of publicly traded corporations to remedy a shareholder frustration caused by another shareholder is controversial, it is not incompatible with the nature of these entities and a judicial dissolution conception built on the reasonable expectations standard. However, to make this solution viable for remedying this frustration, the sources, and interests that the reasonable expectations standard covers should narrowly tailored. In order to use the reasonable expectations standard as a guideway for the just cause ground in Turkish law and provide an appropriate remedy (direct compensation) for the non- pecuniary private benefit extractions, the current Turkish provision should be flexibily interpreted in accordance with its inherent nature. It is envisioned that this study will guide practitioners in both theoretical and practical way to understand how to deal with non- pecuniary private benefit extractions.

The theoretical foundation of the involuntary dissolution statute combined with the reasonable expectations standard can make this legal construction a sufficient mechanism to track the non- pecuniary private benefit extractions of influencing shareholders in the context of publicly traded corporations, not only in Turkey but also in various jurisdictions including the U.S. After all, non- pecuniary private benefit issue is an institutional (humankind) reality and the judicial dissolution mechanism itself inherently posseses common features in even traditionally different jurisdictions such as the U.S. and Turkey.

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   The term “influencing shareholder” is often used to refer to shareholders who have a controlling influence over corporate strategy decisions or shareholders who are using the “responsive” nature of the board of directors to achieve their goals (“…directors are responsive to the wishes of shareholders who elected them.” (F. Hodge O’Neal, Robert B. Thompson, *O’Neal’s Oppression of Minority Shareholders* 3 (2nd Ed., Vol. 1 (1997))). Meanwhile, the “minority shareholder” term is used to refer any other shareholder that does not fit in the description of the “influencing shareholder”. See, Chapter 2.2. [↑](#footnote-ref-1)
2. Maria Gutierrez, Maria Isabel Saez, *A Contractual Approach to Discipline Self-Dealing by Controlling Shareholder*s, <http://www.eea-esem.com/files/papers/eea-esem/2011/459/December2010.PDF> (Last visited: 01/01/2016) p. 2. [↑](#footnote-ref-2)
3. Greta M. Fung, *A Common Goal From Two Different Paths: Protection of Minority Shareholders in Delaware and Canada*, 57 Alb. L. Rev. 41, p. 1. [↑](#footnote-ref-3)
4. Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34 (1993): “In the absence of devices protecting the minority stockholders, stockholder votes are likely to become mere formalities where there is a majority stockholder.” [↑](#footnote-ref-4)
5. “Behind the scenes” influence refers to the process in which the influencer shapes the corporate policy in accordance with his own wishes using informal and external channels rather than a formal voting or communication; and “direct” influence refers to the process in which the formal channels of influence such as voting or communication are used, see, Chapter 2.3.2. [↑](#footnote-ref-5)
6. Condec Corp. v. Lunkenheimer Co., 43 Del. Ch. 353 (1967). [↑](#footnote-ref-6)
7. See, Chapter 2.1.1. [↑](#footnote-ref-7)
8. “…monitoring of the controlling shareholder extracting control rents is not yet adequately established.” (Jeong Seo, *Who Will Control Frankenstein? The Korean Chaebol’s Corporate Governance*, 14 Cardozo J. Int’l & Comp. L. 21 at 29); “Controlling shareholders tend to value non- pecuniary returns of control, deriving satisfaction and status from controlling the business” (Erica Gorga, *Culture and Corporate Law Reform: A Case Study of Brazil*, 27 U. Pa. J. Int’l Econ. L. 803 (2006) p. 888); “Most prominently, private benefits should increase with firm size because larger firms offer potentially larger pecuniary and nonpecuniary benefits” (Michael J. Barclay, Clifford G. Holderness, *Private Benefits From Control of Public Corporations*, Journal of Financial Economics 25 (1989) at 385). [↑](#footnote-ref-8)
9. Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, <http://law.stanford.edu/wp-content/uploads/sites/default/files/publication/257565/doc/slspublic/Controlling-Shareholders.pdf> (Last visited: 10/10/2016), p. 1663. [↑](#footnote-ref-9)
10. “Still, European jurisdictions are reluctant to hold controlling shareholders liable for having engaged in ‘unfair’ self-dealing as long as they are not formally part of management” and “corporate governance reforms have improved Corporate Law tools to deter directors, but not controlling shareholders, who are, in fact, the ones who tend to extract larger private beneﬁts in Europe.” (Gutierrez/Saez, p. 8); “There are also differences among our jurisdictions in the extent to which the extraction of private benefits via related- party transactions is constrained” (Kraakman, et. al. Anatomy of Corporate Law 180 (2nd Ed. 2009)). [↑](#footnote-ref-10)
11. “Even the Delaware courts themselves appear to be suspicious of the motivations and objectives of today’s shareholders…Evolving types of shareholders and developments in the way institutional shareholders exercise their power will test the foundation of the Delaware system.” (Jill E. Fisch, *Leave it to Delaware: Why Congress Should Stay Out of Corporate Governance*, 37 Del. J. Corp. L. 731 (2013), p. 781-782); “In the United States, for example, courts rely on the business judgment rulet o protect transactions that provide non- monetary benefits to insiders at the expense of outside shareholders… Not surprisingly, these are the areas where the abuse of minority shareholders in the United States is perceived to be significant.” (Simon Johnson, Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, *Tunnelling,* The American Economic Review, Vol. 90 No.2 (2000), p. 23); Air Line Pilots Ass’n, Intern. v. UAL Corp., 717 F. Supp. 575 (1989): “It is evident that the Delaware courts have not considered corporate laws and principles as static, but more precisely as tools, though premised on specific values, sufficiently flexible to be adapted to the growing sophistication of the business community.” [↑](#footnote-ref-11)
12. Efforts diverting corporate value to individual purposes, including non- pecuniary benefits, are refered to as agency costs (Andrew William Winden, Sunrise, Sunset: An Empirical and Theoretical Assessment of Dual- Class Stock Structures, 2018 Colum. Bus. L. Rev. 852 (2018), p. 894). Historically, agency problem in the context of corporations referred to the understanding that shareholders as the principals of the corporation require legal protection to control management as their agents, because without this legal protection those managers might be inclined to maximize their personal benefits rather than shareholder value (Katharina Pistor/Yoram Keinan/Jan Kleinheisterkamp/Mark D. West, *The Evolution of Corporate Law: A Cross- Country Comparison,* 23 U. Pa. J. Int’l Econ. L. 791 (2014), at 796). [↑](#footnote-ref-12)
13. “While the ability of a controlling shareholder to take advantage of non- pecuniary benefits may seem less pernicious, the result can be just as financially harmful to non- controlling shareholders and other stakeholders since the controlling shareholder who takes advantage of either type of benefit, pecuniary or non- pecuniary, may be effectively ‘maximizing the controlling shareholder’s utility’, but not necessarily ‘maximizing the value of the corporation’” (Dirk Schlimm, Lisa Mezetti, Bernard S. Sharfman, *Corporate Governance and the Impact of Controlling Shareholders*, Corporate Governance Advisor Vol. 18 Issue 1 (2010) p. 3). “The reason is that the existence of *any* private benefit – whether pecuniary or non-pecuniary – which is not shared with the minority shareholders gives the controlling owner an incentive to deviate from the maximization of total firm value. Indeed, she will take decisions based on her will to maximize the sum of firm value and the value of her private benefits” (Olaf Ehrhardt, Eric Nowak, *Private Benefits and Minority Shareholder Expropriation- Empirical Evidence from IPOs of German Family- Owned Firms*, CFS Working Paper No. 2001/10 p. 6). [↑](#footnote-ref-13)
14. Deterioration in profit margins does not only affect the amount of dividend that a shareholder might receive, but it also affects the price of the shares, so it can decrease the amount of profit that a shareholder can realize by selling his share. (“…if a public corporation retains profits rather than delaring dividends, the price of the firm’s shares will rise accordingly.” (Douglas K. Moll, *Shareholder Oppression & Dividend Policy in the Close Corporation*, 60 Wash. & Lee. L. Rev. 841 (2003), at 842)) [↑](#footnote-ref-14)
15. In economics, the “second- best” solution represents the best outcome that can be realized, when some of the conditions necessary for the best (i.e., first- best) solution are not present. See, Kelvin Lanchaster, Richard G. Lipsey, *The General Theory of the Second Best*, The Review of Economic Studies, Vol. 24 No. 1 (1956- 1957) at 11: “It is well known that the attainment of a Paretian optimum requires the simultaneous fulfillment of all the optimum conditions. The general theorem for the second best optimum states that if there is introduced into a general equilibrium system a constraint which prevents the attainment of one of the Paretian conditions, the other Paretian conditions, although still attainable, are, in general, no longer desirable. In other words, given that one of the Paretian optimum conditions cannot be fulfilled, then an optimum situation can be achieved only by departing from all the other Paretian conditions. The optimim situation finally attained may be termed a second best optimum because it is achieved subject to a constraint which, by definition, prevents the attainment of a Paretian optimum.” [↑](#footnote-ref-15)
16. Matter of Kemp & Beatley, Inc., 64 N.Y. 2d 63 (1984): “Defining oppressive conduct as distinct from illegality in the present context has been considered in other forums. The question has been resolved by considering oppressive actions to refer to conduct that substantially defeats the “reasonable expectations” held by minority shareholders in committing their capital to the particular enterprise”. [↑](#footnote-ref-16)
17. “Thus, an abuse of corporate position for private gain at the expense of the stockholder is oppressive conduct.” (Baker v. Commercial Body Builders, Inc., 264 Or. 614 (1973)); “The core protection against majority oppression is the prohibition on non pro rata distributions and the related prohibitions on self-dealing…The doctrine of “minority oppression” can be understood as a supplemental judicial response to this problem.” (Edward B. Rock, Michael L. Wachter, *Waiting for the Omelet to Set: Match- Specific Assets and Minority Oppression in Close Corporations*, 24 J. Corp. L. 913 (1999) p. 923); “When oppression is viewed as an investment- centered doctrine that protects the value of a close corporation shareholder’s investment, the implication is that oppression liability arises when the value of a shareholder’s investment is harmed” (Douglas Moll, *Shareholder Oppression v. Employment at Will In the Close Corporation: The Investment Model Solution*, 1999 U. III. L. Rev. 517 (1999), p. 551) [↑](#footnote-ref-17)
18. It is acknowledged that oppressive conduct is not unique to close corporations, see; “An investor in a large, publicly-held corporation can certainly feel oppressed, *i.e.*, that his investment goals are being thwarted by the management’s operation of the company or that management has engaged in “bad acts.”” (Ladd A. Hirsch, James D. Sheppard, *Claims for Oppression By Minority Shareholders in Private Companies Under Texas and Delaware Law: A Plaintiff’s Perspective*, Presented: 2012 Securities Regulation and Business Law Conference, February 10, 2012, Dallas, at.2); “…shareholders of both public corporations and close corporations are similarly affected by oppressive conduct” (Douglas Moll, Employment at Will, footnote 117); “While oppressive conduct is more easily found in the context of a close corporation, we are aware of no case law expressly limiting it to such a context” (Redmon v. Griffith, 202 S.W.3d 225 (2006)). [↑](#footnote-ref-18)
19. White v. Perkins, 213 Va. 129 (1972): “The word ‘oppressive’, as used in the statute does not carry an essential inference of imminent disaster; it can contemplate a continuing course of conduct. The word does not necessarily savor of fraud, and the absence of ‘mismanagement, or misapplication of assets’ does not prevent a finding… It is not synonymous with ‘illegal’ and ‘fraudulent’.” [↑](#footnote-ref-19)
20. “…we have to remember that no laws, no matter how sophisticated in their design, can carry out the burden of social control through their threats alone. To be really effective, the law has to be able to persuade, or at least make sense to, the community it is supposed to govern And it must be kept in mind that the corporation (and the business World) is just that: a commmunity. It has its own attitudes, norms, customs, habits and more” (Christopher D. Stone, *Where the Law Ends, The Social Control of Corporate Behavior* 229 (1975)) [↑](#footnote-ref-20)
21. “…the dissolution right is mainly a negotiating tool in situations of minority ‘oppression’, thus discouraging extreme forms of abuse ex ante” (Kraakman, et. al., p. 162) [↑](#footnote-ref-21)
22. This study could have simply offered a statutory provision to be added to the related statute, however, this approach would have not provided a viable solution for the near future and would have lacked a doctrinal basis that the solution can be built upon. However, it is important to note that some jurisdictions like China and India have company statutes that include specific provisions concerning controlling shareholder abuses wide enough to cover the issue stated in this study. For China’s Company Law Article 20, see; Colin Hawes, Kun- Luen Alex Lay, Angus Young, *The Chinese ‘Oppression’ Remedy: Creative Interpretations of Company Law by Chinese Courts*, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2503754> (Last visited: 10/10/2016). For India’s Companies Act Sec. 397, see; Vikramaditya Khanna, Umakanth Varottil, *The rarity of derivative actions in India: reasons and consequences, The Derivative Action in Asia: A Comparative and Functional Approach*, Ed. Dan W. Puchniak/Harald Baum/Michael Ewing- Chow, 370- 372 (2012). [↑](#footnote-ref-22)
23. Dissolution rights are also listed among the legal strategies to constrain related- party transactions, see, Kraakman, et. al., p. 154. [↑](#footnote-ref-23)
24. “The remedy for illegal self- dealing might be compensation to the minority for the pro rata diminution in the value of the minority’s stock plus an injunction forbidding such conduct in the future” (Robert A. Ragazzo, *Toward A Delaware Common Law of Closely Held Corporations*, 77 Wash. U.L.Q. 1099 (1999) p. 1118). [↑](#footnote-ref-24)
25. Commentators state that judge- made or statutory oppression remedies create a potential judicial wild card that creates costly uncertainty (See: Paul G. Mahoney, *Trust and Opportunism in Close Corporations, The Concentrated Corporate Ownership*, Ed. Randall K. Morck 194 (2000)). [↑](#footnote-ref-25)
26. It is fair to ask why Delaware law is not used specifically for this part of the study as well. The answer would be the following: New York has played the dominant role on the development of the “reasonable expectations” standard (Charles W. Murdock, *The Evolution of Effective Remedies for Minority Shareholders and Its Impact Upon Valuation of Minority Shares*, 65 Notre Dame L. Rev. 425 (1990) at 465), not Delaware. Also, there is a debate on whether Delaware law has a shareholder oppression doctrine in effect, and some argue that there is none (see, Chapter V). However, in the only case in which a Delaware court evaluated a shareholder oppression claim, Litle v. Waters (CA No. 12155, 1992 WL 25758 (Del. Ch. Feb. 11, 1992)), the Court used the “reasonable expectations” standard, and cited a New York case as the reference. Thus, this study chooses to evaluate the issue by building up on the Delaware and New York law, and will refer to other U.S. states’ evaluations, as well as the Model Business Corporation Act, when needed. [↑](#footnote-ref-26)
27. Douglas K. Moll, *Shareholder Oppression & Reasonable Expectations: Of Change, Gifts, and Inheritances in Close Corporation Disputes*, 86 Minn. L. Rev. 717, p. 728- 731. Matter of Kemp & Beatley, Inc., 64 N.Y. 2d 63 (1984): “…this court holds that utilizing a complaining shareholder's “reasonable expectations” as a means of identifying and measuring conduct alleged to be oppressive is appropriate.” [↑](#footnote-ref-27)
28. Tobias H. Troger, *Corporate Groups- A German’s European Perspective, German and Nordic Perspectives on Company Law and Capital Markets Law*, Ed. Holger Fleischer/Jesper Lau Hansen/Wolf- Georg Rince 174 (2015). [↑](#footnote-ref-28)
29. European Union stated “jobs and growth” as Europe’s priority, and declared unlocking investment in Europe’s companies as the key to growth (*Green Paper, Building a Capital Markets Union*, 02/18/2015, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=COM:2015:63:FIN&from=EN> (Last visited: 11/15/2015)). Relationship between economic growth and corporations is also recently underlined in the preamble of USA’s Jumpstart Our Business Startups Act (H.R. 3606 (Apr. 5, 2012)), by stating the regulation as “An Act to increase American job creation and economic growth by improving access to the public capital markets for emerging growth companies”. Also see: Kenneth W. Dam, *Equity Markets, The Corporation, and Economic Development,* <http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1195&context=law_and_economics> (Last visited: 12/07/2015). Similarly, Constitutional Court of Republic of Turkey (Registration No: 1989/23 Judgment No: 1990/26 Date: 10/25/1990) stated corporations as “one of the most important economic and social organization of modern times” and acknowledges their role in economic developments of countries. [↑](#footnote-ref-29)
30. Timur Kuran, *Why the Middle East is Economically Underdeveloped: Historical Mechanism of Institutional Stagnation,* <https://econ.duke.edu/uploads/assets/People/Kuran/Why%20ME%20underdeveloped.pdf> (Last visited: 01/10/2016), p. 84. [↑](#footnote-ref-30)
31. These measures are taking the form of legal, economic, cultural, and political measures. For example, corporate taxation is one of the legal measures that is used to promote doing business in corporate form in some parts of the world (See: Murat Can Pehlivanoglu, *An Essay on the Logic of Taxing Stock Corporations by the Corporate Tax Regime in Turkey*, Beykent University Law School Journal, June 2015 Vol: 1 Issue: 1). Recognizing corporations as a bearer of constitutional rights is another one, as this gives them immunities and protection from various threats, therefore, makes this body an attractive form (See: John J. Flynn, *“The Jurisprudence of Corporate Personhood: The Misuse of a Legal Concept”,* Corporations and Society, Ed. Warren J. Samuels and Arthur S. Miller (1987)). [↑](#footnote-ref-31)
32. Note that, today, some corporations are even richer than some countries. For example, according to The Atlantic, if Apple Inc. were a country, it would be the 55th richest country in the world (“Apple is basically a small country now”, <http://www.theatlantic.com/technology/archive/2015/02/apple-is-basically-a-small-country-now/385385/> (Last visited: 10/10/2015)). It has a yearly net income of approximately 50 billion USD (<https://www.nyse.com/quote/XNAS:AAPL/company> (Last visited: 10/10/2015)). Like many other publicly traded corporations, it creates many jobs for people and currently has 66 000 employees in just USA (<http://www.apple.com/about/job-creation/> (Last visited: 10/10/2015)). These figures help to imagine the economic opportunities that a publicly held corporation can create in a society. [↑](#footnote-ref-32)
33. Anne Tucker, *The Citizen Shareholder: Modernizing the Agency Paradigm to Reflect How and Why a Majority of Americans Invest in the Market* 1333, <http://digitalcommons.law.seattleu.edu/sulr/vol35/iss4/13/> (Last visited: 10/10/2015). [↑](#footnote-ref-33)
34. “A too-big-to-fail firm is one whose size, complexity, interconnectedness, and critical functions are such that, should the firm go unexpectedly into liquidation, the rest of the financial system and the economy would face severe adverse consequences.” (Ben S. Bernanke, Testimony, 10/09/2010, <http://www.federalreserve.gov/newsevents/testimony/bernanke20100902a.htm> (Last visited: 10/10/2015)). [↑](#footnote-ref-34)
35. According to a study, due to the changes in global competition and the economic environment, global corporate profits may fall as a share of GDP in the next decade, and this will make companies fight for a smaller slice of the profit pie (Playing to Win: The New Global Competition for Corporate Profits, McKinsey&Company, September 2015, <http://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/the-new-global-competition-for-corporate-profits> (Last visited: 10/10/2016)). [↑](#footnote-ref-35)
36. See: The Emerging Equity Gap, McKinsey Global Institute, 2011, <http://www.mckinsey.com/industries/private-equity-and-principal-investors/our-insights/emerging-equity-gap> (Last visited: 10/10/2016). Together with the changing landscape of market, the following fact shows that threats to corporate wealth are not pure speculations but current: According to a study, “corporations in the S&P 500 in 1958 lasted in the index for 61 years, on average. By 1980, the average tenure had shrunk to about 25 years. Today, it stands at just 18 years based on seven year rolling averages” (See: Creative Destruction Whips Through Corporate America, Innosight, Winter 2012, <http://www.innosight.com/innovation-resources/strategy-innovation/upload/creative-destruction-whips-through-corporate-america_final2015.pdf>, 04/15/2016). [↑](#footnote-ref-36)
37. Minority shareholders of publicly traded corporations are worth to be specifically protected because of their importance in corporate, economic, and social chain (During the debates in the U.S. Congress on Securities Act of 1933 and Securities Exchange Act of 1934, Senators and Representatives opposed to those regulations were arguing that investors are “suckers” and “fools”, and they will remain so despite any efforts to protect them. Meanwhile, President Roosevelt was explaining that the legislative program was intended to protect investors. At the end, those opposing arguments failed. (John H. Walsh, *Can Regulation Protect “Suckers” and “Fools” From Themselves? Reflections on the Rhetoric of Investors and Investor Protection Under the Federal Securities Law*, 8 J.Bus.Sec.L.188, at 189)). Shareholders, like the investing public as a whole, are made up of both deep pocket and shallow pocket investors (e.g., an employee, retired person or a housewife), and they tunnel their savings to the capital market by especially doing direct or indirect (e.g. via hedge funds and pension funds (Leo E. Strine names employees who are provided with an employer-provided supplement to contributions that are made to a 401(k) plans as “forced capitalists” (Leo E. Strine, *Towards Common Sense and Common Ground? Reflections on the Shared Interest of Managers and Labor in a More Rational System of Corporate Governance*, <http://www.law.harvard.edu/programs/olin_center/papers/pdf/585.pdf> (Last visited: 10/10/2015), p. 6).)) investment in publicly traded corporations. They reinvest their savings back into business instead of amassing them under pillow, and provide progress in the economy. It is important to set forth that “savings and formation of capital are same things” and “a capitalistic economy is based on the accumulation and availability of capital” (William C. Prather, *Savings Account* 4 (6th ed. 1981)). Therefore, any economic suffering of shareholders is in fact a suffering of businesses and the economy as a whole (For example, in US economy, in 2014, about one-fifth of the borrowers sold stocks or bonds or borrowed against their retirement accounts to finance a home purchase (“Selling Stocks to Buy a Home”, The Wall Street Journal, M4, 10/23/2015). Drops in stock values, can affect down payment power of homebuyers directly, thus, create a domino effect in the economy. See: Luigi Zingales, *The Future of Securities Regulation*, <http://www.law.yale.edu/documents/pdf/cbl/Zingales_Future_Securities.pdf> (Last visited: 10/10/2015), p. 20). In addition to this, providing measures that protect shareholders; decreases the risk of loss for investors and so encourages people (remember, investing is a voluntary act) to reinvest their savings (Barbara Black, *Behavioral Economics and Investor Protection: Reasonable Investors, Efficient Markets*, 44 Loy. U. Chi. L. J. 1493 (2013) p. 1495. When investors are protected by law, they are encouraged instinctively to finance companies because they believe that with legal protection, more of the firm’s profits would come back to them as interest or dividends (Rafael La Porta, Florencio Lopez-de-Manes, Andrei Shleifer, Robert Vishny, *Investor Protection and Corporate Valuation* (1999), <ftp://ftp.repec.org/opt/ReDIF/RePEc/fth/harver/hier1882.pdf> (Last visited: 10/10/2015), at 2)), thus activates the capitalist cycle. Today, countries that protect shareholders have more valuable stock markets, larger numbers of listed securities per capita and a higher rate of initial public offering (IPO) activity than the unprotecting countries (La Porta, Silanes, Schleifer, Vishny, *Investor Protection: Origins, Consequences, Reform*, The World Bank, Financial Sector Discussion Paper No.1 (1999), <http://www1.worldbank.org/finance/assets/images/Fs01_web1.pdf> (Last visited:10/10/2015), p. 14). [↑](#footnote-ref-37)
38. OECD Corporate Governance Factbook 2015, <http://www.oecd.org/daf/ca/Corporate-Governance-Factbook.pdf>, p. 11. [↑](#footnote-ref-38)
39. “Controlling shareholders tend to value non- pecuniary returns of control, deriving satisfaction and status from controlling the business” (Erica Gorga*, Culture and Corporate Law Reform: A Case Study of Brazil*, 27 U. Pa. J. Int’l Econ. L. 803 (2006), p. 888) [↑](#footnote-ref-39)
40. Objectives and Principles of Securities Regulation, IOSCO, <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD323.pdf> (Last visited: 10/10/2015), p. 1. [↑](#footnote-ref-40)
41. For the connection between securities market, economic growth and shareholder protection, see: Bernard S. Black, The Legal and Institutional Preconditions For Strong Securities Markets, UCLA Law Review (781) 2001. It is important to not to both overestimate and underestimate the impact of legal structure. It must be kept in mind that law itself, is only a part of the social wheel, functioning together with many other parts of the wheel. An American scholar, James Willard Hurst, puts forward this approach for the American corporate law as follows: “To say that corporation law helped multiply enterprises and helped technology and business ambition create a larger scale of firm is not to say that the particular corporation law we had was indispensable to these outcomes. United States economic history shows too much ingenious improvising, too much restless energy, to make such a thesis plausible. However, it would be equally unreal to conclude that because it was not indispensable the corporation law we had was unimportant to these business outcomes. The functional needs to be served were there- the need of a workable internal division of powers within business organizations, the need to attract capital with appeals varied according to scale and risk and investors’ goals. Had we devised some different legal format to serve these needs, the underlying business drives would have required that the other form of organization in working substance must resemble the corporation.” (James Willard Hurst, *The Legitimacy of the Business Corporation in the Law of the United States 1780-1970* 159- 160 (1970)). [↑](#footnote-ref-41)
42. Luca Enriques, *Book Review: The Comparative Anatomy of Corporate Law (2004),* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=621142>, at 24. [↑](#footnote-ref-42)
43. Although not evaluated in the context of “non- pecuniary benefits”, scholars started to discuss alternative measures (e.g., corporate waste doctrine, fiduciary duties) which can control the political contributions made by corporations in U.S. after the Citizens United v. FEC 588 U.S. 310 (2010) decision(See, Jonathan Romiti, *Playing Politics with Shareholder Value: The Case for Applying Fiduciary Law to Corporate Political Donations Potst- Citizens United*, 53 B.C.L. Rev. 737 (2012); Joseph K. Leahy, *Are Corporate Super Pac Contributions Waste or Self- Dealing? A Closer Look,* 79 Mo. L. Rev. 283); Joseph K. Leahy, *Corporate Political Contributions as Bad Faith*, 86 U. Colo. L. Rev. 477 (2015).). [↑](#footnote-ref-43)
44. Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, *The Economic Consequences of Legal Origins Journal of Economic Literature*, Vol. XLVI (June 2008) p. 327. As IOSCO stated, global market place brings an increasing interdependence of regulators and the linkage among regulators can be “assisted by the development of a common set of guiding principles and shared regulatory objectives” (Objectives and Principles of Securities Regulation, p. 2).  [↑](#footnote-ref-44)
45. Note that while the law itself may not foresee or ban it, the fact that the society foresees and condemns an extraction can destroy people’s incentives to extract and prevent such extraction (“Assuming these are correct characterizations of attitudes in Britain, proprietors of successfull business would have often lacked potent non- pecuniary incentives to retain control” (Brian R. Cheffins, *Corporate Ownership and Control, British Business Transformed* 63 (2008)). [↑](#footnote-ref-45)
46. TCC Article 331: “A corporation may be incorporated to pursue any lawful economic purpose and subject.”. [↑](#footnote-ref-46)
47. Shareholders are the primary investors of a corporation, and they are called as shareholders as they invest in “shares”. Adam Smith, in his “The Money Game” book, gives the following advice on how shares should be viewed: “A stock is for all practical purposes, a piece of paper that sits in a bank vault. Most likely you will never see it…The most important important thing to realise is simplistic: The stock doesn’t know you own it. All those marvelous things, or those terrible things, that you feel about a stock…are unreciprocated by the stock…You can be in love if you want to, but that piece of paper doesn’t love you, and unreciprocated love can turn into masochism, narcissism, or even worse, market losses and unreciprocated hate” Adam Smith, *The Money Game* 81 (1968).. However, law regards the status of this “heartless” paper much more simplistic. Shares are complex financial assets consisting of contractual promises, made by one person to another, including the promise to pay money upon certain conditions, in exchange of money or other financial assets given in advance (Tamar Frankel, *The New Financial Assets: Separating Ownership From Control*, <http://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1007&context=sulr> (Last visited: 10/10/2016) at 934.). Turkish and U.S. laws (e.g. Delaware) accepts that a share gives its holder contractual rights (Constitutional Court of Republic of Turkey R. 2015/29 J. 2015/95 D. 22/10/2015 (stating status of securities in Turkish law as contractual rights). [Ellingwood v. Wolf's Head Oil Refining Co., 38 A.2d 743, 747 (Del.1944)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1944110800&pubNum=162&originatingDoc=I5e4581b7556d11d9a99c85a9e6023ffa&refType=RP&fi=co_pp_sp_162_747&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_162_747) (stating rights of stockholders are contract rights)). [↑](#footnote-ref-47)
48. Del. Code Ch. 1 Title 8 Sec. 101 (b): “A corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes, except as may otherwise provided by the Constitution or other law of this State.” [↑](#footnote-ref-48)
49. For example, rules limiting corporations’ donations to political parties for elections, civil rights acts prohibiting corporations’ right to refuse to do business with people due to religious grounds, tax law, or rules of competition law controlling how a corporation treats a competitor can limit the benefits a shareholder can extract from his investment.

    Likewise, a corporation’s obligation to abide by some rules due to its registration with an international organization might restrict how it operates. For example, soccer clubs competing in Europe’s UEFA club competitions are required to comply with the Financial Fair Play rules implemented by the organization, thus they must organize their finances according to the “break- even” rules therein, or face administrative sanctions (See: Valerie Kaplan, *UEFA Financial Fairplay Regulations and European Union Antitrust Law Complication*s, <http://law.emory.edu/eilr/content/volume-29/issue-4/comments/uefa-fairplay-european-union-antitrust.html>, Last visited: 27/12/2016). Hence, how and how much they spend money is under scrutiny, which constrains the investors extracting non- pecuniary benefits. [↑](#footnote-ref-49)
50. Sang Yop Kang, *“Generous Thieves”: The Puzzle of Controlling Shareholder Arrangements in Bad-Law Jurisdictions*, 21 Stan. J.L. Bus. & Fin. 57 (2015) at 87; (“Those institutions most inclined to be activist investors are associated with state governments and labor unions, and often appear to be driven by concerns other than a desire to increase the economic performance of the companies in which they invest.” (Leo E. Strine, Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk’s Solution for Improving Corporate America*, 119 Harv. L. Rev. 1759 (2006) at 1765) [↑](#footnote-ref-50)
51. All over the world, national laws recognize a variety of legal units through which individuals can conduct their profit-oriented activities. People, who want to do business or have a stake in, generally voluntarily choose the best suitable legal model for themselves among the provided ones (Although there is freedom of choice in terms of legal models, for some types of business activities like banking and insurance, selection of some legal models can be mandatory to carry out that specific activity. For example, in Delaware/U.S., a limited liability company is barred from the business of banking, according to Del. Code Title 6 Chapter 18 Sec. 18-106 and only corporations can do banking business. Still, banking power of corporations are denied (Del. Code Title 8 Chap. 1 Sec. 126), unless the corporation complies with the statutory requirements of the Del. Code Title 5 Chapter 7 (For further US Law restrictions, see: Chester Rohrlich, *Organizing Corporate and Other Business Enterprises* 3-11 (1949)).). They invest their money, sometimes together with their effort (i.e., labor), into the model that they choose. Indeed, the Latin origin of the word “invest”, “vestire”, signals the strong connection between the invested business and the investor by it’s meanings; “to dress, clothe, wrap in robes, envelope or surround” (Jason Zweig, *The Devil’s Financial Dictionary* 119 (2015)). In this context, the publicly traded corporation, one of the legal models for profit-oriented activities, appears as one of the easiest models to have a stake in and the hardest model to turn a business in: It is one of the easiest to have a stake in because it is reachable for investing through stock markets; it is one of the hardest to turn a business in because it has to comply with the vast ocean of regulations and cope with the market forces. [↑](#footnote-ref-51)
52. Although the following passage is not written for the purpose of illustrating shared- private benefits distinction, it represents a good summary about this distinction: “In a widely held public corporation, shareholders' wealth is not affected by the corporation's performance other than through the value of the corporation's shares, a condition that results from shareholders holding diversified portfolios in an efficient capital market. In that circumstance, all shareholders will agree that the company should maximize the value of its shares (although they may still differ over how this is best accomplished)--what economists call the “unanimity principle.” However, this shared commitment to profit maximization will not hold if a shareholder can gain from the corporation's activities in ways that other shareholders cannot. For example, a shareholder who owns a tavern across the street from one of the corporation's factories will have a different view about closing that plant than other shareholders; the tavern owner may oppose the plant closing even if closing the plant is best for the corporation.” (Ronald J. Gilson, Curtis J. Milhaupt, *Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism*, 60 Stan. L. Rev. 1345 (2008) at 1361) [↑](#footnote-ref-52)
53. “Even though it is not defined in a strict legal sense, this catch- all term seems to be commonly understood as including everything that controlling shareholders are able to get out of their position without minority shareholders receiving proportionate share.” (Hofstetter, One Size Does Not Fit All, p.616); In Sinclair Oil Corp. v. Levien, 280 A.2d 717 (1971), court noted the following about self- dealing, which is one of the techniques for extracting private benefits: “The dividends resulted in great sums of money being transferred from Sinven to Sinclair. However, a proportionate share of this money was received by the minority shareholders of Sinven. Sinclair received nothing from Sinven to the exclusion of its minority stockholders. As such, these dividends were not self- dealing.”; For example, Cheffins notes that “information flow and retainment of access to preferential data” is one of the benefits associated with an investment (Cheffins, Corporate Ownership, at 62). Unless this benefit is not available for all shareholders, it cannot be regarded as a “private” one, because it is not a benefit received in exclusion of the other shareholders. [↑](#footnote-ref-53)
54. For example, a shareholder can earn a reputation for being a director- friendly shareholder while he is a shareholder of a corporation, and this might give him the opportunity to receive more favorable investment deals from competitor corporations in the future (Warren Buffett is a good example of this case, see, Linda Sandler, Buffett’s Savior Role Lands Him Deals Other Holders Can’t Get, WSJ, 14/08/1989). While the reputation itself is a non- pecuniary private benefit, the fact that it is extracted and later used to acquire a pecuniary benefit (favorable future investment) makes it a pecuniary benefit in terms of the distinction of this study, because it brings a benefit that can be monetarily expressed. [↑](#footnote-ref-54)
55. Gilson, p. 1663. “The private benefits can be pecuniary, including higher salaries for individual blockholders or below-market transfer prices for corporate blockholders” (Michael J. Barclay, Clifford G. Holderness, *Private Benefits From Control of Public Corporations,* Journal of Financial Economics 25 (1985) p. 374). [↑](#footnote-ref-55)
56. Gilson, p. 1663. “Private benefits need not come from the firm’s cash flow, however. For example, there may be nonpecuniary control amenities for individual blockholders or synergies in production for corporate blockholders” (Barclay/Holderness, p.374). [↑](#footnote-ref-56)
57. A scholar, expressing a similar point, is against making a generalization: “The assumption that all non- pecuniary private benefits are idiosyncratic to the corporate controller is problematic, and it is most likely incorrect.” (Alessio M. Pacces, *Rethinking Corporate Governance, The law and economics of control powers* 86 (2012)) However, as it is evaluated below, this idiosynractic nature deserves a special focus for especially state- controlled corporations. [↑](#footnote-ref-57)
58. Enriques/Gilson/Pacces, *The Case for an Unbiased Takeover Law (With an Application to the European Union)*, 4 Harv. Bus. L. Rev. 85, p. 98. [↑](#footnote-ref-58)
59. “Related party transactions are evidendt as one of the major ways through which controlling shareholders divert corporate resources to themselves.” (Yu- Hsin Lin, *Overseeing Controlling Shareholders: Do Independent Directors Constrain Tunelling in Taiwan?,* 12 San Diego Int’l L.J. 363 (2011) p. 365) [↑](#footnote-ref-59)
60. Simon Johnson, Rafael La Porta, Florencio Lopez- de – Silanes, Andrei Shleifer, *“Tunneling”,* Capital Markets and Company Law, Ed. Klaus J. Hopt/Eddy Wymeersch 612 (2003). [↑](#footnote-ref-60)
61. Erica Gorga, *Culture and Corporate Law Reform: A Case Study of Brazil*, 27 U. Pa. J. Int'l Econ. L. 803 at.8. [↑](#footnote-ref-61)
62. “The ways in which a member’s interests may be prejudiced are almost unlimited.” (Robin Hollington Q.C., *Shareholders’ Rights* 171 (6. ed, (2010))) [↑](#footnote-ref-62)
63. Hofstetter uses the “internal benefits of control” and “external benefits of control” distinction to express a similar but different differenciation (Hofstetter, One Size Does Not Fit All, p. 617). [↑](#footnote-ref-63)
64. Harold Demsetz, Kenneth Lehn, *The Structure of Corporate Ownership: Causes and Consequences*, Journal of Political Economy, 1985, Vol. 93 No. 6 (1985) at 1161. It is presumed that stockholders act in their own best economic interests when they vote (Unitrin, Inc. v. American General Corp., 651 A.2d 1361 (1995)), however, as underlined, this is just a “presumption”. “For example, the Steinbrenner family, even if they have spent a lot of money to run the New York Yankees, is compensated (at least partially) when the New York Yankees win the World Series championship (of course, the Steinbrenner family may expect financial benefits from the team as well)” (Sang Yop Kang, *Understanding the Controlling Shareholder Regimes,* JSD Dissertation (2011) <https://academiccommons.columbia.edu/catalog/ac%3A132059>, footnote 72). [↑](#footnote-ref-64)
65. Today, it is easy for corporations to contribute in political campaigns, even without disclosing their position, by concealing these donations within casual business transactions. Even though there is a cap that restricts a person’s total contribution amount to political campaigns, it is ineffective for these conducts. The danger of letting this happen can be understood from the US experience by reading the following report by Politico regarding excessive contributions: “Taken together, the trend lines reflect a new political reality in which a handful of superaffluent partisans can exert more sway over the campaign landscape than millions of donors of more average means. And that’s to say nothing of the overwhelming majority of voters who never spend so much as a single dime on politics (The Center for Responsive Politics estimates that only 0.28 percent of American adults donate to campaigns.)” (See: “Top political donors”, <http://www.politico.com/story/2014/12/top-political-donors-113833> (Last visited: 01/16/2016)). [↑](#footnote-ref-65)
66. Sang Yop Kang, *Re- Envisioning the Controlling Shareholder Regime: Why Controlling Shareholders and Minority Shareholders Often Embrace*, 16 U. Pa. J. Bus. L. 843, p. 895 [↑](#footnote-ref-66)
67. “The rational choice model of human behavior postulates that individuals ‘can perfectly process available information about alternative courses of action…can rank possible outcomes in order of expected utility…and can choose the course of action that will maximize their personal expected utility’…There are good reasons to believe, however, that reliance on such assumptins of rationality and efficiency in information processing is misplaced. Human decision- making processes are not always governed by reason. A susbstantial amount of behavioral evidence reveals that people do not consistently act in accordance with rational choice theory” (Susanna Kim Ripken, *The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation*, 58 Baylor L. Rev. 139 (2006), at 156-158). [↑](#footnote-ref-67)
68. “There can, for example, be a dynastic angle, with a founder or a successor from the same family orchaestrating his replacement by his children or other relatives so as to give them a head start in life and to secure his own legacy.” (Brian R. Cheffins, Corporate Ownership, p.63) [↑](#footnote-ref-68)
69. “Such private benefits include the non- financial benefits he can extract through the prestige of being publicly recognized as the founder or heir of an important enterprise.” (Karl Hofstetter, *One Size Does not Fit All: Corporate Governance For “Controlled Companies”,* 31 N.C. J. Int'l L. & Com. Reg. 597, p. 619) [↑](#footnote-ref-69)
70. Note that the political power here refers to the individual’s political reputation and influence. It does not include a particular corporation’s power to influence the social agenda or the well-being of the economy of the country. [↑](#footnote-ref-70)
71. Burkhart, Michael, Fausto Panunzi, Andrei Shleifer, “[*Family Firms*](http://scholar.harvard.edu/shleifer/publications/family-firms)” Journal of Finance 58 (5), p. 2168: “A founder may derive pleasure from having his child run the company that bears the family name.” As an example of “investing in people a shareholder likes”, Rupert Murdoch’s political contribution of corporate money to Republican Party’s John Kasich can be given. When asked about the corporations’ decision to contribute to John Kasich’s political campaign, Murdoch reportedly admitted that this decision has no business purpose and was instead given to just support his friend John Kasich (Donald B. Tobin, “CEOs Shouldn’t Use Corporate Treasury as Personal Political Piggy Bank”, <http://www.rollcall.com/news/51140-1.html>, Last visited: 23/10/2016). [↑](#footnote-ref-71)
72. In Shlensky v. Wrigley, 95 Ill.App.2d 173 (1968), minority shareholders’ derivative lawsuit alleged that; Mr. Wrigley, the president and majority shareholder of the corporation which was operating a baseball team, refused to install lights to the team’s stadium due to his personal opinions rather than reasons regarding the welfare of the corporation, because he thought “baseball is a daytime sport” and “installation of lights and night baseball games will have a deteriorating effect upon the surrounding neighborhood”, thus the team was not able to play games at nights and this was lowering the attandence, hence the revenue of the corporation; and that this is the direct reason of the detoriating financial condition of the corporation. Although court rejected these arguments, the case itself can be regarded as an interesting example of how a shareholder can obtain a non- pecuniary benefit (keeping baseball’s daytime sport trait and not letting the neighbourhood deteriorate) and harm the corporation and its minority shareholders at the same time.

    A more recent example can be given from England. Russian businessman Roman Abramovich, who bought the English soccer club Chelsea FC plc (a public limited company in United Kingdom) for 140 million GBP in 2003, wanted the club to transfer the Ukrainian striker Andriy Shevchenko, despite the club managers’ negative opinion. According to The Telegraph, Abramovich and Shevchenko were close friends, talking frequently on phone and their wives were meeting to go shopping, even though they live in different countries before Shevchenko’s transfer to Chelsea in 2006 (<http://www.telegraph.co.uk/sport/football/2337467/Mutual-friendship-clinched-transfer.html>, Last visited: 10/10/2016). Although Shevchenko was one of the best strikers in Europe at those times and cost a fortune to Chelsea FC to transfer (30 million GBP transfer fee and 5.2 million GBP yearly salary; <https://www.theguardian.com/football/2007/jan/13/newsstory.sport>, Last visited: 10/10/2016), he was frequently left out of the Chelsea FC squad by the club manager, performed poorly during his spell at Chelsea FC, and is seen as one of the worst transfers of the club history (<http://www.dailymail.co.uk/sport/football/article-3145665/Chelsea-transfers-10-best-10-worst-Premier-League-signings.html>, Last visited: 10/10/2016) Chelsea FC plc states Abramovich as “the ultimate controlling party” of the company’s parent company (<http://www.chelseafc.com/the-club/about-chelsea-football-club/club-personnel.html>, Lasti visited: 10/10/2016) As understood from these facts, the controlling shareholder- Abrahamovic- increased his psychic satisfaction by transferring a close friend to his club, and watching him play for his club; but the corporation didn’t benefit from this business project, and suffered both financial and sportive damage as a result of this move.

    There are further recent examples from England: The soccer club Reading’s co-owner Thai businesswoman stunned fans with a self- penned club song in 2015. Similarly, a Malaysian businessman who is the controlling shareholder of the Cardiff City soccer club sought to change the colors of the club soccer jersey’s to one he thinks will be commercially more successful (Simon Chadwick, “Why Southeast Asian football is still struggling to be accepted and respected on the global stage”, <http://www.scmp.com/sport/soccer/article/2054449/why-southeast-asian-football-still-struggling-be-accepted-and-respected>, Last visited: 14/12/2016). [↑](#footnote-ref-72)
73. “Media attention could be anaother form of non- pecuniary benefits to a controlling shareholder who would like to be famous” (Sang Yop Kang, Re- Envisioning the Controlling Shareholder Regime, footnote 137). [↑](#footnote-ref-73)
74. “Also, there can be the buzz associated with owning a major company and a potential entree to elite circles occupied by leading politicans and the wealthy. For instance, Simon Marks, who dominated Marks & Specer until his death in 1964 ‘enjoyed the trappings of wealth, the influence it gave him with politicans and the allure of film stars and celebrities…’” (Brian R. Cheffins, Corporate Ownership, p.63). Similarly, by the virtue of owning a business in a specific field, a businessman can join the country’s president in political trips, engage in high- circle relationships, and have lobbying power.

    For example, Donald Trump’s aim to cure his reputation (i.e., public persona maintainance) affected his corporations’ business decisions. After he was elected as the President, in order to be able to focus on his Presidency and maintain a public persona suitable for it, he settled three lawsuits against one of his ventures, the Trump Univesity, for 25 million USD and also avoided to testify in the trial. A Trump Organization spokesperson said that Trump settled in order to “devote his full attention to the important issues facing our great nation” (Katie Lobosco/Drew Griffin, “Donald Trump settles Trump University lawsuits”, CNN, 18/11/2016, <http://money.cnn.com/2016/11/18/news/trump-university-settlement/)>. As understood, Trump’s decision was based on maximizing his non- pecuniary private benefits (i.e., avoiding the minimization of his non- pecuniary private benefits) rather than an economically driven decision. [↑](#footnote-ref-74)
75. “Astroturf” term is used as a term opposite to the “grassroots” term, and Koch Brothers’ spending of corporate money can be given as a good example of “astroturf” political movements. It is said that the Koch Brothers’ playbook make sure that the ideas are sold via non- profit organizations, which from outside look like they are esttablished and sponsored by concerned citizens, but in fact they are fake populist movements secretly manufactured by Koch Brothers’ corporations and their friends. These non- profit organizations try to sell ideas, before selling candidates, by running advertisements, staging education and media events, targeting political opponents, filing lawsuits and so on (Jane Mayer, Dark Money, The Hidden History of the Billionaires Behind the Rise of the Radical Right, New York 2016, p.159).

    A corporation can tunnel money to institutions which in return provide him non- pecuniary benefits, by declaring excessive dividends to its shareholders. For example, an oil production corporation, whose shares are partly owned by a newspaper, might declare excessive dividens during some periods of the year to enrich the newspaper which in return provides “astroturfing” for the oil production corporation’s other shareholder’s activities. Although declaration of dividens seems good for the minority shareholders as well at first sight, these might prevent the corporation from expanding and so deprieve the shareholders from greater long- term returns (this argument was asserted in Sinclair Oil Corp. v. Levien, 280 A.2d 717 (1971): “The motives for causing the declaration of dividends are immaterial unless the plaintiff can show that the dividend payments resulted from improper motives and amounted to waste. The plaintiff contends only that the dividend payments drained Sinven of cash to such an extent that it was prevented from expanding.”) [↑](#footnote-ref-75)
76. A recent example of this is Donald Trump’s candidacy for U.S. presidency. Donald Trump staked his presidential campaign on being a savvy businessman, he advertised himself as a wealthy successful businessman and thus convinced people that he is a good leader, will make good deals for the country and create economic progress (<http://www.bbc.com/news/election-us-2016-37533263> (Last visited: 10/10/2016). In other words, he used his business success as a predictor of political success, and openly and continuously referred to his corporate empire (<http://www.independent.co.uk/news/world/americas/us-elections/why-donald-trump-isn-t-the-successful-businessman-he-claims-to-be-us-elections-republican-politics-7173666.html> (Last visited: 10/10/2016)). However, due to his proposals and comments, he also created a hatred towards himself and his corporation (<http://www.dailymail.co.uk/news/article-3355593/Trumps-image-removed-Dubai-development-amid-uproar.html> (Last visited: 10/10/2016)), but nevertheless, he believed the candidacy will be beneficial for his business (<http://www.foxnews.com/politics/2016/09/30/trump-presidential-campaign-could-be-good-for-his-hotels.html> (Last visited: 10/10/2016). Accordingly, short before the election, some claimed that Trump started to sabotage his own candidacy, because he never truly intended to be the president, rather, he planned to channel the sentiment he created with the campaign to his businesses (Michael Moore, Trump Is Self- Sabotagin His Campaign Because He Never Wanted The Job In The First Place, <http://www.huffingtonpost.com/michael-moore/trump-self-sabotage_b_11545026.html> (Last visited: 10/10/2016)) However, the affect of his campaign on his business is unknown yet.

    A presidential candidate like Trump might also effect the well being of the corporation that he is a shareholder in unconventional ways: For example, Trump has made it clear that he is a fan of private prisons and his immigration policy signaled that there might be even greater numbers of immigrant lock ups, thus, after he got elected, stock prices of the private prison corporations skyrocketed (<http://www.aljazeera.com/indepth/opinion/2016/11/stop-private-prisons-161126142726748.html> (Last visited: 10/10/2016)). This example makes it possible to imagine an example in which a businessman speaks on an issue which will improve the business of the competitor corporation of the corporation which he holds shares, during an election campaign. While this might increase his political power, value of the corporation’s shares that he is holding might decrease and other investors might suffer. For example, Trump’s criticism about the Vanity Fair magazine and mocking the “really poor numbers” they have caused the magazine notch highest number of subscritptions ever sold in a single day (<http://www.independent.co.uk/news/world/americas/vanity-fair-subscriptions-100-fold-donald-trump-tweet-restaurant-review-a7481201.html> (Last visited: 10/10/2016)). A similar negative effect can also take place if the same person wants to increase taxes for certain corporations, just like Trump does (<http://www.reuters.com/article/us-usa-trump-rexnord-idUSKBN13S0PU> (Last visited: 10/10/2016)). [↑](#footnote-ref-76)
77. Similarly, in cases where the board of directors uses a shareholder’s reputation for the benefit of the corporation but causes a damage to that shareholder, the aggrieved shareholder has the right to request compensation of his non- pecuniary damages from the directors, see, Murat Can Pehlivanoğlu, *Pay Sahiplerinin Manevi Tazminat Hakkı ve Yönetim Kurulu Üyelerinin Sorumluluğu*, 38 BATİDER 199 (2022), at 222 (Pehlivanoğlu, 2022). [↑](#footnote-ref-77)
78. Non- pecuniary private benefits is not only available for shareholders: “…the prospect of participating in the growth and the increased value of the business, and the challenge, the independence, the prestige, the feeling of achievement, and the other intangible benefits of being part of the management…” (Ingle v. Glamore Motor Sales, Inc., 73 N.Y.2d 183 (1989) (Hancock, J., dissenting)). [↑](#footnote-ref-78)
79. According to Constitutional Court of Republic of Turkey, legal status of some corporations differs from other corporations due to their capacity, arising from their level of capital, to affect social and economic texture of the society widely (Registration No: 2010/10 Judgment No: 2011/110 Date: 06/30/2011). [↑](#footnote-ref-79)
80. John Armour, Henry Hansmann, Reiner Kraakman, *The Essential Elements of Corporate Law: What is Corporate Law?*, The Harvard John M. Olin Discussion Paper Series, Discussion Paper No. 643 7/2009 at 26. [↑](#footnote-ref-80)
81. Loh Siew Cheang, William M.F. Wong, *Company Law Powers and Accountability* 667 (2003). [↑](#footnote-ref-81)
82. Case of OAO Neftyanaya Kompaniya Yukos v. Russia, EHCR Application No. 14902/04 (Bushev, J. dissenting): “As a general rule, a shareholder accepts a risk of devaluation of the relevant shares on account of mismanagement or other reasons.” ; Re Elgindata Ltd [1991] BCLC 959, 994a- 994b, Warner J: “…a shareholder acquires shares in a company knowing that their value will depend in some measure on the competence of the management. He takes the risk that the management may prove not to be of the highest quality.” [↑](#footnote-ref-82)
83. This will also be coherent with the Turkish capital market law’s economic and macroprudential approach. ”A microprudential approach is one in which regulation is partial equilibrium in its conception and aimed at preventing the costly failure of financial institutions. By contrast, a ‘macroprudential’ approach recognizes the importance of general equilibrium effects, and seeks to safeguard the system as a whole (Samuel G. Hanson, Anil K. Kashyap, Jeremy C. Stein, *A Macroprudential Approach to Financial Regulation*, Journal of Economic Perspectives (Vol.25 No.1 Winter 2011), p. 3). In the Official Comment to CML, it is stated that provisions should always take issuer-investor-transaction elements into consideration all together and thus treat publicly traded corporation as an element of the whole market, and have an economic logic (Official Comment to CML, p.12 and 23). [↑](#footnote-ref-83)
84. “The better shareholders can protect themselves by using their voting power to hold management and directors responsible, the less they or the markets need to rely on actions of the courts and regulators. In striking this needed balance, the United States needs to be mindful that it is ultimately the shareholders who have the greatest interest in efficient regulation because they pay the price, in reduced share value, when the cost of such regulation exceeds its benefits.” (Committee on Capital Markets Regulation, Interim Report of the Committee on Capital Markets Regulation, Novermber 30, 2006, <http://capmktsreg.org/app/uploads/2014/08/Committees-November-2006-Interim-Report.pdf> (Last visited: 10/10/2016) p. xi) [↑](#footnote-ref-84)
85. Nixon v. Blackwell, 626 A.2d 1366 (1993): “A stockholder…who pays for those shares…can make a business judgment whether to buy into such a minority position, and if so on what terms.” [↑](#footnote-ref-85)
86. Nightingale & Associates, LLC v. Hopkins, F. Supp. 2d (2008) WL 4848765. For example, Alibaba company decided to have its IPO in NYSE rather than HKEX to let the current shareholders keep the control of the company, because HKEX Listing Rules was not permitting the share structure that Alibaba wanted to preserve the current control scheme (Enoch Yiu, Outdated fintech regulations hurting Hong Kong, Jack Ma says, SCMP, <http://www.scmp.com/business/companies/article/2042400/hong-kong-must-reform-financial-rules-attract-new-economy-ipos>, Last visited: 10/10/2016). While this is not related to the choice of law issue regarding oppression, it is an example of how legal market is respecting and providing options for parties’ choices. [↑](#footnote-ref-86)
87. A majority of the corporate actions or external undertakings resulting an extraction of private non- pecuniary benefit are not covered by the ambit of the disclosure obligations, because they will be regarded as actions within the ordinary course of business or will not be regarded as material. For example, U.S. federal securities law require publicly traded corporations to report certain material corporate events on a current basis, in addition to the annual and quarterly reports, by using Form 8-K (which was updated in accordance with Sarbanes Oxley Act Sec. 409); however, any action within the ordinary course of business will not easily qualify as an issue that should be disclosed on a current basis according to this form (see: Fast Answers, Form 8-K, SEC, <https://www.sec.gov/answers/form8k.htm)>. Similarly, Turkish capital markets law also requires publicly traded corporations to report certain material events on a current basis, and again, actions within the ordinary course of business will not easily quliafy as an issue that should be disclosed (see, II- 15.1 numbered Comminique on Material Events Disclosure). In addition to these, some stock exchanges are also requiring, by their listing requirements, timely disclosure of events which might reasonably be expeted to materially affect the market for the securities (see, New York Stock Exchange Listed Company Manuel Sec. 202.05). [↑](#footnote-ref-87)
88. While speaking on corporate political activity, Kwak notes the following: “But required disclosure is neither a panacea nor the sole possible remedy to the problems presented by corporate political activity…although disclosure alone would potentially curb some questionable corporate political activites at the margin, it would not on its own give shareholders the power to do anything about spending that they opposed for either poitical or shareholder value reasons.” (James Kwak, *Corporate Law Constraints on Political Spending*, 18 N.C. Banking Inst. 251 (2013), p. 263) [↑](#footnote-ref-88)
89. “In reality, however, markets are not perfect, and the efficiency level of a capital market is a function of the economic and legal conditions in a given jurisdiction. If a market is not sufficiently efficient to accurately price the different securities, nonintervention will fail as an effective solution.” (Goshen, p. 405) [↑](#footnote-ref-89)
90. The magical (and logical) wording of the following line hinders the truth that there are prerequisites for a publicity system to work: “…publicity is justly recommended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” (Louis D. Brandeis, *“What Publicity Can Do*”, Harper’s Weekly, December 20, 1913, p. 10) [↑](#footnote-ref-90)
91. Gilson/Milhaupt, p. 1363 and 1368. [↑](#footnote-ref-91)
92. The “Wall Street Rule” or “Wall Street Walk” is “the process by which shareholders indicate their disagreement with management decisions by selling their stock” (Eric A. Welter, *The Shareholder Proposal Rule: A Change to Certainty*, 60 Geo. Wash. L. Rev. 1980, p. 1982). [↑](#footnote-ref-92)
93. As Henry G. Manne have said, shareholders of a corporation “have entered a perfectly well understood risk-assumption contract and can exit their corporate "citizenship" for the cost of a stock broker's sales commission… The essence of individual shareholder participation is ‘exit,’ not ‘voice.’”(*Citizen Donaldson*, 7 August 2003, Wall Street Journal, <http://www.wsj.com/articles/SB106021603064104800> (Last visited: 10/10/2015)). [↑](#footnote-ref-93)
94. “Experts have traditionally characterized public corporation shareholders as capable of escaping managerial oppression by selling their stock in liquid securities markets. However, markets discount the firm's shares to the extent that managerial underperformance destroys wealth. Thus, the public shareholder may escape by selling, but if no one constrains management from decreasing firm value, the selling shareholder may be largely shorn of the value of her investment.” (Park McGinty, *Replacing Hostile Takeovers,* 144 U. Pa. L. Rev. 983, p. 991) [↑](#footnote-ref-94)
95. F. Hodge O'Neal, *Oppugnancy and Oppression in Close Corporations: Remedies in America and Britain*, 1 B.C. INDUS. & COM. L. REV. 1, (1959) at 2. [↑](#footnote-ref-95)
96. A scholar signals the same point while writing on dissolution: “Even though the dissenting shareholders are paid the full value of their pro rata interst in the corporation’s tangible assets, they may stil be seriously prejudiced. In the case of a publicly financed corporation, they are inevitably forced to sacrifice their contributions toward the cost of organizing and promoting the corporation. Shareholders are obviously not made whole when all they receive is their pro rate share of the corporation’s assets, exclusive of the expense of promotion…Unjustified dissolution results in the loss of the value inherent in an accumulation of capital- the life- breath of corporate entrerprise. Thus, the distribution of tangible assets can never give the stockholder his full proportionate interest in the property of the corporation because the asset of ‘accumulated capital’ ceases to exist on dissolution” (George D. Hornstein, *Voluntary Dissolution- A New Development in Intracorporate Abuse*, 51 Yale L.J. 64 (1941), p. 69) [↑](#footnote-ref-96)
97. For the implications of this approach, see the Australian case, Gambotto v. WCP Ltd (1995) 182 CLR 432. [↑](#footnote-ref-97)
98. “As to controlling shareholders’ extraction of private benefits of control, dominant owners’ political influence is likely to be an effective constraint on public enforcement.” (Kraakman, et. al, p.177) [↑](#footnote-ref-98)
99. “The significant role for nonpecuniary benefits of control has macroeconomic effects that impact a country as a whole” (Gilson, p. 1667). [↑](#footnote-ref-99)
100. According to a U.S. Court, a similar approach was held by the Congress for the insider trading issue: “Congress intended by the Exchange Act to eliminate the idea that the use of inside information for personal advantage was a normal emolument of corporate office.” (Securities and Exchange Commission v. Texas Gulf Sulphur Co., 401 F.2d 833 (1968), at footnote 9) [↑](#footnote-ref-100)
101. Bassick v. Aetna Explosives Co., 246 Fed. 974, 993 (1917): “A great deal of the important business of the country is necessarily done in corporate form. Sufficient capital cannot be obtained for many large enterprises without the aid of the investing public. It is in the ultimate interest of business and the projection and prosecution of large enterprises that the investing public must feel confident that a just appeal to the courts will not go unheeded.” Latimer Holdings Ltd. and Powell-v-Sea Holdings Ltd. [2004] NZCA 226: “In our view, s174 can and does apply to listed companies with tradeable shares, but the considerations which will apply to them will not necessarily be the same as obtain with respect to closely held companies. But it would be quite wrong for the New Zealand corporate community to think that the activities of listed companies are beyond the reach of this provision.” [↑](#footnote-ref-101)
102. “Investor protection legislation is designed to induce retail investors to take risks.” (John J. A. Burke, *Investor Protection under MIFIDL Cure Worse Than the Disease*, <http://eilfe.com/wp-content/uploads/2013/02/JournalofLawFinance.pdf> (Last visited: 10/10/2016) p. 7). [↑](#footnote-ref-102)
103. See, Marine Bank v. Weaver, SCOTUS 455 U.S. 551 (1982), stating Securities Act of 1934 “was adopted to restore investors’ confidence in the financial markets”. [↑](#footnote-ref-103)
104. Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework For Company Law in Europe, p.29. [↑](#footnote-ref-104)
105. Kraakman et. al., p. 49. LC Capital Master Fund, Ltd. v. James, 990 A.2d 435 (2010): “Corporate law must work in practice to serve the best interests of society and investors in creating wealth.” [↑](#footnote-ref-105)
106. The competing regulatory philosophies rest on two differing theories of the purpose of corporate law; for illustrative purposes they are referred here as the freedom to contract theory and the state regulatory policy theory. The former understands the law, simply put, as a model provided in order to simplify privately negotiated agreements and the later understands the law as the governmental specification of a regulatory framework which can neither be waived nor opted out of. The latter is the tradition followed by Continental European corporate law…” (Gunter H. Roth, Peter Kindler, *The Spirit of Corporate Law* 3 (2013)) [↑](#footnote-ref-106)
107. Ross Grantham, *The Rights of Company Shareholders*, Cambridge Law Journal 67 (3), November 1998, p. 578. [↑](#footnote-ref-107)
108. Grantham, p. 580. [↑](#footnote-ref-108)
109. Jens Dammann, *The Mandatory Law Puzzle: Redefining American Exceptionalism in Corporate Law,* 65 Hastings L. J. 441, p. 444. [↑](#footnote-ref-109)
110. Frank H. Easterbrook, Daniel R. Fischel*, The Economic Structure of Corporate La*w 12 (1991). [↑](#footnote-ref-110)
111. “Yet some deference should be shown the corporation’s status as a legal peson. Corporate consitituents contract not with each other, but with the corporation…The various constituencies thus must be (and are) linked to the nexus and not to each other.” (Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, UCLA, School of Law Research Paper No. 02- 06 (2002), p. 8-9) [↑](#footnote-ref-111)
112. Christopher A. Riley, *Contracting Out of Company Law: Section 459 of the Companies Act 1985 and the Role of the Courts*, The Modern Law Review 55:6 (1992), p. 785. [↑](#footnote-ref-112)
113. Grantham, p.579 [↑](#footnote-ref-113)
114. Frank H. Easterbrook/Daniel R. Fischel, p. 236- 237. [↑](#footnote-ref-114)
115. Easterbrook/Fischel, p.15 [↑](#footnote-ref-115)
116. Easterbrook/Fischel, p.15. [↑](#footnote-ref-116)
117. Easterbrook/Fischel, p.35. [↑](#footnote-ref-117)
118. “Under the expanded choice conception of corporate law, ideally the standard form will match the results of costless bargaining.” (Cheffins, p.787) “To the extent that courts can supply implicit contract terms that are consistent with the parties’ prefer- ences, they can reduce the cost…” (Mahoney, p.193) [↑](#footnote-ref-118)
119. Roberta Romano, *The Sarbanes- Oxley Act and the Making of Quack Corporate Governance,* 114 Yale L. J. 1521, at 1596. [↑](#footnote-ref-119)
120. Easterbrook/Fischel, p.276. [↑](#footnote-ref-120)
121. Alastair Hudson, *Securities Law* 324 (2008). [↑](#footnote-ref-121)
122. “The articles may not be the only contractual terms of the relationship between the company and a shareholder. The company and a shareholder may establish additional contractual arrangements governing their relationship. These additional agreements are typical where a different class of shares created and issued, such as preference shares or redeemable shares. The terms of issue of these shares, typically contained in the issue document, supplement the provisions in the articles.” (Susan McLaughlin*, Unlocking Company Law* 148 (2. Ed, 2012)). [↑](#footnote-ref-122)
123. Hudson, p.329. The legal nature of the marketing material (prospectus) shows the rationale of accepting its terms as the additional terms of the corporate contract: The term ‘prospectus’ is well understood to refer to a document soliciting the public to acquire securities from the issuer, and the use of the term “prospectus” to refer to public solicitations explains why securities laws grant buyers a right to rescind or sue for damages without proof of fraud or reliance if there is a violation of the statutory prospectus requirements, because the information therein determines the market price of the security (Gustafson v. Alloyd Co., Inc., 513 U.S. 561 (1995)). [↑](#footnote-ref-123)
124. Hudson, p.534. “The relation between a corporation and a preferred shareholder is one of contract, especially as to the preferential right secured by the terms of the issue” (Schaad v. Hotel Easton Co., 369 Pa. 486 (1952)). [↑](#footnote-ref-124)
125. Ronald Coase outlines the concept of “transaction costs” as follows: “In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure the terms of the contract are being observed, and so on. These operations are costly, sufficiently costly at any rate to prevent many transactions that would be carried out in a world in which the pricing system worked without cost.” (R.H. Coase, *The Problem of Social Cost*, 3 J. Law & Econ. 1 (1960) p. 15) [↑](#footnote-ref-125)
126. The historical evolution of securities law in England can be traced to recognize this nature of the securities law: “Even in the Victorian period of the promoters before the company acquired its distinct persnality, there would be some advertising literature which sought to induce investors to spend their Money on acquiring securities of the given kind. This advertising material was known as a prospectus” (Hudson, p.23). Consequently, the common law dealing with investment contracts has dealt frequently with the provisions of prospectuses (Hudson, p.24). The offer of securities and their acquisiton constituted a contract. The principal focus of the litigation, therefore, tended to focus on the question whether or not those promoters had commited fraud in the marketing of the company or had some negligent misrepresentation or misstatement in the formation of the contract for sale of the shares (Hudson, p.22). Similarly, advisors to the company, whether or not they were directors of that company or partners in a joint stock company, also faced similar liability for any involvement in the making or dissemination of such statements (Hudson, p.22). [↑](#footnote-ref-126)
127. As securities’ “worth comes only from the claims they entitle their owner to make upon the assets and earnings of the issuer, or the voting power that accompanie such claims”, “deciding whether to buy or sell a security thus requires reliable information” and with this data, “investors can attempt a reasonable estimate of the present value of the bundle of rights that ownership confers” (James D. Cox, Robert W. Hillman, Donald C. Langevoort, *Securities Regulation* 1 (3. Ed. 2001)). Securities laws other rules working to preserve the integrity of the marketplace by protecting investors from fraud and manipulations also bears connection with the informational needs component: Investing in corporations, after all, is voluntary; corporations can obtain some money from investors only if they make an offer more attractive than the existing alternatives (Easterbrook/Fischel, p.283). Mechanisms that will give investors the ability to distinguish between good and bad offers and invest pro rata accordingly will benefit both the investors and society (Easterbrook/Fischel, p.280.). [↑](#footnote-ref-127)
128. Kirshnan S. Chittur, *Resolving Close Corporation Conflicts: A Fresh Approach*, 10 Harv. J. L. & Pub. Pol’y 129 (1987), at 159. Western Foundry Co. V. Wicker, 403 III.260 (1949): “The terms of this contract are embodied in the charter of the corporation and in the appropriate provisions of the corporation statute in force at the time the articles of incorporation were adopted.” [↑](#footnote-ref-128)
129. Crocker v. Waltham Watch Co., 315 Mass. 397 (1994). [↑](#footnote-ref-129)
130. McLaughlin, p. 148. In the limited liability company context, but still applicable to corporations, a Delaware court held the following: “…the purely contractarian view discounts core attributes of the LLC that only the sovereign can authorize, such as its separate legal existence, potentially perpetual life, and limited liability for its members. See 6 Del. C. §§ 18–201, 18– 303. To my mind, when a sovereign makes available an entity with attributes that contracting parties cannot grant themselves by agreement, the entity is not purely contractual. Because the entity has taken advantage of benefits that the sovereign has provided, the sovereign retains an interest in that entity. That interest in turn calls for preserving the ability of the sovereign's courts to oversee and, if necessary, dissolve the entity. Put more directly, an LLC agreement is not an exclusively private contract among its members precisely because the LLC has powers that only the State of Delaware can confer. Those powers affect the rights of third parties, who at a minimum must take into account the LLC's separate legal existence and its members' limited liability shield. Just as LLCs are not purely private entities, dissolution is not a purely private affair. It involves third party claims, which have priority in the dissolution process.” (In re Carlisle Etcetera LLC, 2015 WL 1947027 (A.3d 2015)) [↑](#footnote-ref-130)
131. McLaughlin, p. 148. This point is stated as follows for Turkish law: “Corporations’ articles of incorporation are also subject to the generic mandatory provisions of the 6098 numbered Code of Obligations’ Article 26 and 27, hence, a corporation’s purpose cannot violate public policy, public interest, mandatory rules of statutes, morality, fundamental personal right or be impossible” (Hasan Pulasli, *Yeni Sirketler Hukuku Genel Esaslar* 396 (2012)). [↑](#footnote-ref-131)
132. “In the nexus of contracts understanding of the corporation, legal rules are analogized to a standard form contract voluntarily adopted—perhaps with modifications—by the parties. As with any standard form contract, the law’s principal purpose in this area is to facilitate private ordering by reducing bargaining costs.” (Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, Harvard Law Review Vol. 119 (2006) at 18) [↑](#footnote-ref-132)
133. Posner illustrates this as follows: “…the rules of Corporation law limiting the payment of dividends to the amount of “earned surplus” shown on the corporation’s boks give reditors one kind of protection against attempts by borrowers to increase the risk of default after the loan has been made- protection, we have seen, that in absence of a legal rule creditors would probably write expressly into each loan contract…If corporations laws were amended to drop all limitations on the payment of dividens, creditors who wanted dividedn limitations would simply have to require that they be written into the loan agreement.” (Richard A. Posner, *Economic Analysis of Law* 294- 295 *(*2. Ed. 1977)); “We therefore perform a thought experiment: “If the parties could costlessly bargain over the question, which rule would they adopt?” and then adopt that bargain as the corporate law default rule.” (Bainbridge, Director Primacy, p.18). [↑](#footnote-ref-133)
134. “The statutory norms were not problems for public corporations, because the norms themselves mirrored the governance structures favored by public corporations. They were, however, a problem for the close corporations participants who desired to change those governance mechanisms.” (Harwell Wells, *The Rise of the Close Corporation and the Making of Corporation Law*, 5 Berkeley Bus. L.J. 263 (2008) at 287) [↑](#footnote-ref-134)
135. The phrase “long- term contracts” is generally used as a synonym for relational contracts (Melvin A. Eisenberg, *Why There is No Law of Relational Contracts,* 94 Nw. U.L. Rev. 805 (2000), at 814). However, this usage is misleading: “For example, a long-term fixed-rent lease in which the tenant is responsible for maintenance, insurance, and taxes may involve little relationship between landlord and tenant. Similarly, a long-term lease of capital equipment, like aircraft, may require almost no contact between the parties so long as periodic payments are made. In contrast, a two-week contract to remodel a room may be highly relational, as may be a one-day contract between a photographer and a portrait sitter.” (Eisenberg, Relational Contracts, p.814) Therefore, it the defining the relational contract term under a spectrum approach by comparing with discreteness seems more accurate: “Macneil sometimes treats discreteness as an end of a spectrum rather than as a definition of a body of contracts. Under this approach, a contract is characterized as lying at the discrete end of the spectrum if it has less of certain characteristics--for example, less duration, less personal interaction, less future cooperative burdens, less in the way of units of exchange that are difficult to measure and as lying at the relational end of the spectrum if it has more of the relevant characteristics.” (Eisenberg, Relational Contracts, p.813) [↑](#footnote-ref-135)
136. Manuel A. Utset, *A Theory of Self- Control Problems and Incomplete Contracting: The Case of Shareholder Contracts,* 2003 Utah L. Rev. 1329, at 1332; Charles J. Goetz, Robert E. Scott, *Principles of Relational Contracts*, 67 Va. L. Rev. 1089 (1981), at 1091- 1092: “A contract is relational to the extent that the parties are incapable of reducing important terms of the arrangement to well-defined obligations. Such definitive obligations may be impractical because of inability to identify uncertain future conditions or because of inability to characterize complex adaptations adequately even when the contingencies themselves can be identified in advance. As the discussion below illustrates, long- term contracts are more likely than short-term agreements to fit this conceptualization, but temporal extension per se is not the defining characteristic… In conventional contracts, the parties generally are able to reduce performance standards to rather specific obligations. By contrast, relational contracts create unique, interdependent relationships, wherein unknown contingencies or the intricacy of the required responses may prevent the specification of precise performance standards. Complexity and uncertainty each play conceptually distinct roles, although they frequently operate in combination.” [↑](#footnote-ref-136)
137. William J. Aceves, *The Economic Analysis of International Law: Transaction Cost Economics and the Concept of State Practice*, 17 U.Pa. J. In’l Econ. L. 995 (1996), p. 1002. [↑](#footnote-ref-137)
138. Armour/Hansmann/Kraakman, p. 21. [↑](#footnote-ref-138)
139. “…the parties cannot engage in explicit bargaining over many aspects of their interaction because they cannot foresee every possible contingency that might befall their venture” (Terry A. O’Neill, p. 659). [↑](#footnote-ref-139)
140. “Recall that, in a relational contract, the parties cannot set out all of their rights and obligations to each other in a formal document at one particular time at reasonable cost. If courts do not use their equitable discretion provided by the oppression action to give effect to relational contracts, they would be ignoring the fundamental manner in which these participants make corporate bargains.” (Mohamed F. Khimji, Jon Viner, *Oppression- Reducing Canadian Corporate Law to a Muddy Default*, 47 Ottawa L. Rev. 123 (2015), at 150) [↑](#footnote-ref-140)
141. “As a result, courts must devise rules to govern the parties' rights and obligations when disputes arise between them. In turn, the role of the law will be not merely to enforce the parties' agreement, but also to impose upon them rights and obligations to which they have not, in fact, agreed.” (Terry A. O’Neill, p. 659) [↑](#footnote-ref-141)
142. Acaves, p. 1002. [↑](#footnote-ref-142)
143. “The Court cannot protect parties from a bad bargain and it will not protect them from bad luck” (Concord Auto Auction, Inc. v. Rustin, 627 F.Supp. 1526 (1986)). [↑](#footnote-ref-143)
144. Utset, p.1346- 1347. [↑](#footnote-ref-144)
145. Eric J. Gouvin, *Resolving the Subsidiary Director’s Dilemma*, 47 Hastings L.J. 287 (1996), at.330. [↑](#footnote-ref-145)
146. The concept of “rational apathy” is usually used in the context of corporate voting and is defined as “the indifference that a voter usually feels when they make the reasonable assumption that his or her vote will not have any real influence on the conclusion of an election” (http://thelawdictionary.org/rational-apathy/ (Last visited: 10/10/2015)). [↑](#footnote-ref-146)
147. “It is generally assumed that participants in corporations would bargain for protection against oppression and unfair prejudice if bargaining were costless” (Cheffins, p. 789). [↑](#footnote-ref-147)
148. Michael E. DeBow, “*Oppression” of Minority Shareholders: Contract, Not Tort*, 54 Ala. Law. 128 (1993), at 128. [↑](#footnote-ref-148)
149. Sandra K. Miller, *Minority Shareholder Oppression in the Private Company in the European Community: A Comparative Analysis of the German, United Kingdom, and French “Close Corporation Problem”,* 30 Cornell Int’l L. J. 381, at 392). [↑](#footnote-ref-149)
150. Anupam Chander, *Minorities, Shareholder and Otherwise*, 113 Yale L. J. 119 (2003), at 144. [↑](#footnote-ref-150)
151. Melvin Aron Eisenberg, *Contractual Freedom in Corporate Law: Articles & Comments; The Structure of Corporation Law,* 89 Colum L. Rev. 1461, at 1485. [↑](#footnote-ref-151)
152. “Some mandatory rules may survive because they mimic the market: they would be universally adopted by contract assuming the parties thought about them” (Bernard S. Black, *Legal Theory: Is Corporate Law Trivial?: A Political and Economic Analysis,* 84 Nw. U.L. Rev. 542 (1990), at 551); “It is simply not plausible…to suggest that the legislature and the courts have sought to develop the law exclusively on the basis of what, ex ante, the parties would have agreed to had transaction costs not been prohibitive. On the contrary, it is clear that both Parliament and the courts have been motivated by other considerations.” (Grantham, p. 581) [↑](#footnote-ref-152)
153. Armour/Hansmann/Kraakman, p.20. [↑](#footnote-ref-153)
154. Armour/Hansmann/Kraakman, p.20. [↑](#footnote-ref-154)
155. Of course, the more a statutory framework is mandatory in nature, the more the legislative bodies assume the full responsibility for the balance and effectiveness of the framework (Fleischer, p.20). [↑](#footnote-ref-155)
156. “…the parties’ failure to build in specific protections against the majority appropriating wealth from the minority is plausibly a result, not of their desire to permit such appropriation, but rather of the prohibitive cost of writing a contract to achieve that result.” (Mahoney, p.193), “…minority shareholders, want strong investor pro- tection to limit the private benefits extracted by entrepreneurs at their expense.” (Marco Pagano, Paolo F. Volpin, *The Political Economy of Corporate Governance*, <https://www.jstor.org/stable/4132703?seq=1#page_scan_tab_contents> (Last visited: 10/10/2016), p. 1006) [↑](#footnote-ref-156)
157. “Under the expanded choice conception of corporate law, ideally the standard form will match the results of costless bargaining.” (Cheffins, p.787) “To the extent that courts can supply implicit contract terms that are consistent with the parties’ prefer- ences, they can reduce the cost…” (Mahoney, p.193) [↑](#footnote-ref-157)
158. Cheffins, p. 789. [↑](#footnote-ref-158)
159. For the discussion of this approach in the context of corporate profit- social welfare allignment, see: Easterbrook/Fischel, p.39. [↑](#footnote-ref-159)
160. Christian Kersting, *The Role of Shareholders in Public Companies in Germany, German and Nordic Perspectives on Company Law and Capital Markets Law* 119, Ed. Holger Fleischer/Jesper Lau Hansen/Wolf- Georg Rince (2015). [↑](#footnote-ref-160)
161. See, Chapter 2.2.1. For instance, while the holder of non- voting shares do not have a power to control the corporate machinery, because he lacks the voting power in the decision- making structure of the corporation (intralegal perspective), he can still have a controlling power over the corporation under the extralegal perspective: After all, investors can always vote with their feet and dollars or through other mechanisms explained below. [↑](#footnote-ref-161)
162. Kaplan v. Centex Corp., 284 A.2d 119 (1971): “’Control’ and ‘domination’ are here used in the ordinary meaning of the words and they may be exercised directly or through nominees. But, at minimum, the words imply (in actual exercise) a direction of corporate conduct in such a way as to comport with the wishes or interests of the corporation (or persons) doing the controlling”. [↑](#footnote-ref-162)
163. To avoid any doubt, influencing shareholder term is different than the “beneficial owner” term because a beneficial owner refers to a person (in most cases) hiding his identity behind complex network of legal relationships, whereas influencing shareholder does not try to hide his identity, but to the opposite, intends to build a persona explicitly through his shareholder position by disclosing it to the rest of the world. [↑](#footnote-ref-163)
164. Kaplan v. Centex Corp., 284 A.2d 119 (1971). [↑](#footnote-ref-164)
165. “…a shareholder or a group of shareholders can be regarded as having control when it is likely that they would win a contested vote.” (J.E. Parkinson, *Corporate Power and Responsibility* 60 (1993)) [↑](#footnote-ref-165)
166. “…influence can be exercised by means other than voting; a significant shareholder need not always cast a vote to sway management.” (Gilson/Milhaupt, p.1353) [↑](#footnote-ref-166)
167. Gilson/Milhaupt, p. 1364. [↑](#footnote-ref-167)
168. A recent example of this in the political context took place in South Korea. There, President Park “is accused of letting her confidante Choi Soon- sil, who does not hold an official government post, view confidential documents and presidential speeches. Choi is accused of using her relationship with Park to accumulate millions of dollars in donations to her foundation.” (Madison Park, Growing South Korean protests demand President Park’s resignation, <http://edition.cnn.com/2016/11/26/asia/south-korea-mass-protests/index.html>, Last visited: 27/11/2016) [↑](#footnote-ref-168)
169. “The fiduciary duties of corporate insiders, and the ability of derivative suits to enforce them, have been cited as a possible constraint on corporate political activity…Today, derivative suits claiming a breach of fiduciary duty face a difficult uphill battle, primarily because of the importance of business judgment rule in fending off challenges to insiders’ decisions” (Kwak, p. 265). If the protection that a jurisdiction gives to bad faith business decisions differs, then the managers will not be safe from liability for damages caused by the decisions influenced behind the scenes (Rosenthal v. Rosenthal, 543 A.2d 348 (1988): “The business judgment rule does not, however, protect business decisions that result from fraud or bad faith”.). But then, of course, the bad faith should be proved, however, the mere fact that the shareholder discussed an issue with the manager does not necessarily mean the manager took that decision in bad faith. [↑](#footnote-ref-169)
170. John Pound, *The Rise of the Political Model of Corporate Governance and Corporate Control*, 68 N.Y.U. L. Rev. 1003 (1993), p. 1032. [↑](#footnote-ref-170)
171. “Regular, periodic access to the corporate franchise gives shareholders, like public citizens in a democracy, a baseline of power. That power, however, is not manifested merely through formal voting challenges. Instead, power can be exercised through a rich variety of means. These may include the simple communication of concerns from shareholders to management; private negotiation between shareholders, management, and directors; rallying of support for specific issues or policy changes; and the establishment of formal lobbying campaigns. Underlying each of these informal initiatives is the veiled threat of a voting challenge aimed at board representation or control.” (Pound, p.1012) [↑](#footnote-ref-171)
172. In re El Paso Corp. Shareholder Litigation, 41 A.3d 432 (2012). [↑](#footnote-ref-172)
173. Pound, p.1028. [↑](#footnote-ref-173)
174. “More than one- third of the funds also influenced managers [of public corporations] more directly through letters or direct negotiations.” (Paul Rose, *Common Agency and the Public Corporation,* 63 Vand. L. Rev. 1355 (2010), at 1365) [↑](#footnote-ref-174)
175. “Like other stockholders, a controlling stockholder must live with the informed (i.e., sufficiently careful) and good faith (i.e., loyal) business decisions of the directors unless the DGCL requires a vote. That is a central premise of our law, which vests most managerial power over the corporation in the board, and not in the stockholders.” Hollinger Inc. v. Hollinger Int'l, Inc., 858 A.2d 342 [↑](#footnote-ref-175)
176. A commentator explains this as follows: “The raw power to vote the board out of office is not the nexus of the shareholder oversight process. Rather, the mere existence of this baseline voting entitlement itself allows shareholders pursue a wide variety of less structured, ongoing forms of monitoring that do not directly revolve around the election of the board. One such monitoring tactic is the initiation of more limited voting challenges, such as a proposal to change corporate governance structure or to elect a single director. A second tactic is informal, between elections negotiation and lobbying on specific aspects of corporate policy. The existence of baseline electoral power, together with the threat of its regular exercise, create the necessary leverage for these more informal tactics” (Pound, p.1029). [↑](#footnote-ref-176)
177. Commentators underline this notion in the context of sovereign wealth fund investment as follows: “Even if the voting rights of SWF-held shares are suspended, the SWF still may be able to influence strategically the portfolio company's decisions to the extent that the portfolio company hopes for future capital infusions from the SWF; simple reciprocity can operate without the SWF having to invoke the portfolio company's formal governance structure because the future also casts a shadow. So long as the portfolio company knows what the SWF wants, the portfolio company's desire for future equity capital on favorable terms may allow the SWF to influence the portfolio company's behavior despite its lack of voting rights.” (Gilson/Milhaupt, p. 1366) [↑](#footnote-ref-177)
178. In re RJR Nabisco, Inc. Shareholders Litigation, 14 Del. J. Corp. L. 1132 (1989): “Greed is not the only human emotion that can pull one from the path of propriety; so migh hatred, lust, envy, revenge, or, as is here alleged, shame or pride. Indeed any human emotion may cause a director to place his own interests, preferences or appetites before the welfare of the corporation.” [↑](#footnote-ref-178)
179. “…directors are responsive to the wishes of shareholders who elected them.” (O’Neal, Thompson, *O’Neal’s Oppression,* p.3). For a study on the boards’ responsiveness to shareholders that examined the issue in relation with shareholder proposals, see: Yonca Ertimur, Fabrizio Ferri, Stephen R. Stubben, *Board of Directors’ Responsiveness to Shareholders: Evidence from Shareholder Proposals*, <http://www.hbs.edu/faculty/Publication%20Files/08-048_182eb805-b8f6-4f7a-bf04-2dd08ad52ae1.pdf> (Last visited: 10/10/2016). [↑](#footnote-ref-179)
180. “First, the political process was not immune from the problem of self- dealing by active investors.” (Pound, p. 1032) [↑](#footnote-ref-180)
181. Burt v. Burt Boiler Works, Inc., 360 So.2d 327 (1978). “Majority rule may also fail to check opportunistic behavior by shareholders if they can use private negotiations with management to obtain greenmail-type payments in exchange for agreeing to support managerial interests. There are numerous strategies that large investors can employ in their relations wih management to further their private interests.” (Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. Rev. 561 (2006), at 596) [↑](#footnote-ref-181)
182. Steven M. Davidoff, “In Silicon Valley, Chieftains Hold Sway With Few Checks and Balances”, New York Times, 05/07/2012: “In the Valley, however, the idea of the visionary chief executive dominates, and there may be little room for input from directors. This sentiment was voiced recently by Reed Hastings, the chief of Netflix and a director for Facebook and Microsoft. Speaking at the Stanford Directors' College, a yearly retreat where public company directors learn the art of being a director, he reportedly cast skepticism on the traditional board model. According to Kevin M. LaCroix of the D&O Diary, ''Hastings said several times that for the board of a large publicly traded company 'the fundamental job is to replace and compensate the C.E.O.' Where the company has the resources to hire outside consultants as needed, it is not the board's role to offer counsel or advice.''…So the new thing in Silicon Valley appears to be for public companies to be run as private ones without significant input from boards and shareholders. This leaves the wunderkinder of the Internet free to run their companies without interference. The question is whether this is merely a bubble in corporate governance or a trend that will spread to the rest of corporate America.” [↑](#footnote-ref-182)
183. Pound, p.1008. [↑](#footnote-ref-183)
184. In fact, the fiduciary duty obligation imposed on majority shareholders in some U.S. jurisdictions is partly based on the assumption that elected directors and officers, in exercising their discretionary authority, will favor the interests of the majority shareholders because of the ability of these shareholders to control the outcome of a shareholder vote and to select or remove directors (J.A.C. Hetherington, *Defining the Scope of Controlling Shareholders’ Fiduciary Responsibilities*, 22 Wake Forest L. Rev. 9 (1987), p. 12). [↑](#footnote-ref-184)
185. Joseph A. McCahery, Zacharias Sautner/Laura T. Starks, *Behind the Scenes: The Corporate Governance Preferences of Institutional Investors,* February 2015, <http://abfer.org/docs/2015/program-2/behind-the-scenes-the-corporate-governance-preferences-of-institutional-investors.pdf> (Last visited: 10/10/2016) p. 7. [↑](#footnote-ref-185)
186. See McCahery, et. al. for references of related studies. [↑](#footnote-ref-186)
187. John Holland, *The Corporate Governance Role of Financial Institutions in Their Investee Companies*, *ACCA Research Report 46* 26 (1995). [↑](#footnote-ref-187)
188. Holland, p. 32. [↑](#footnote-ref-188)
189. Holland, p.33. [↑](#footnote-ref-189)
190. Holland, p. 48. [↑](#footnote-ref-190)
191. Holland, p.35. [↑](#footnote-ref-191)
192. McCahery, et. al, p.1. [↑](#footnote-ref-192)
193. McCahery, et. al, p.8. [↑](#footnote-ref-193)
194. McCahery, et. al, p.8. [↑](#footnote-ref-194)
195. “Our results are consistent with the studies of individual institutions that engage behind the scenes with management (Carleton, Nelson, and Weisbach (1998), Becht et al. (2009), and Dimson, Karakas, and Li (2014)), and with Brav et al. (2008a) who document that many hedge funds (48% of their sample) are very active in seeking communication with management. Our results thus suggest that private discussions with management are not restricted to these particular investors or investor types, but rather are a more general phenomenon.” p.8. [↑](#footnote-ref-195)
196. For example, Michaell Edkins, global head of corporate governance and responsible investment at Blackrock: “In our experience (private engagement) has a degree of traction with management. And we can raise (an) issue without having to dictate how management should address it. In a way, that’s always the weakness of the shareholder proposal route.” (Barry Burr, *Money Managers increasing activism on governance- but quietly, Pensions and Investments*, http://www.pionline.com/article/20120319/PRINT/303199980/moneyM managersMincreasingMactivismMonMgovernanceM8212MbutMquietly, Last visited: 10/10/2016). For more examples, see: Pound, p. 1054- 1057 and Anabtawi, p.597. [↑](#footnote-ref-196)
197. In U.S. securities law, Item 407(f) of Regulation S- K requires corporations to disclose whether its board of directors provides a process for shareholders to send communications to the board. However, this regulation does not require the presence or the content of the communication be disclosed. For solicitation rules, see: 17 CFR 240.14-1 to 13. [↑](#footnote-ref-197)
198. A commentator, writing in another context, states the following: “At most, it might be argued that future shareholders should not be misled about the scope of a company’s powers and that, since it is legitimate for them to assume that the company enjoys the full range of statutory powers, the absence of any indication to the contrary is positively misleading…” (Eilis Ferran, *The Decision of the House of Lords in Russell v. Northern Bank Development Corporation Limited,* 53 Cambridge L.J. 343 (1994) p. 365) [↑](#footnote-ref-198)
199. It is beyond this study’s scope to suggest any “art of persuasion” for plaintiffs. [↑](#footnote-ref-199)
200. “A shadow director is a person in accordance with whose directions or instructions the directors of the corporation are accustomed to act” (Ian M. Ramsay, *Allocating Liability in Corporate Groups: An Australian Perspective,* 13 Conn. J. Int’l L. 329 (1999), p. 350). [↑](#footnote-ref-200)
201. For example, Donald Trump’s harsh comments about Mexican immigrants, Macy’s decided to stop to sell a Trump- branded clothing in its stores (Shan Li/Stephen Battaglio, Trump’s losses mount after incendiary remarks, <http://www.latimes.com/business/la-fi-trump-woes-20150710-story.html>, Last visited: 30/11/2016). Similarly, some other businesses cancelled their contracts with the entities co- owned by Trump (Daniel Bukszpan, Donald Trump Lost All of These Business Deals Since June, <http://fortune.com/2015/12/17/donald-trump-deals-lost/>, Last visited: 10/10/2016). Moreover, “A December survey of American consumer opinion, fielded by the BAV Consulting division of advertising and marketing giant Young & Rubicam (and the largest and longest running study of brands in the world), found that since Donald Trump’s run for president, the Trump brand has lost the confidence of the people who can afford to stay at one of his hotels, play at one of his country clubs or purchase a home in one of his developments. It is also rapidly losing its association with the gilded traits Trump has long promoted as the essence of his business” (Will Johnson/Michael D’Antonio, Trump’s Campaign Is Damaging His Brand, <http://www.politico.com/magazine/story/2016/01/donald-trump-2016-brand-business-213515>, Last visited: 30/11/2016) [↑](#footnote-ref-201)
202. Jones v. H.F. Ahmanson & Co., 1Cal. 3d 93, 108 (1969). [↑](#footnote-ref-202)
203. RKO Theatres v. Trenton- New Brunswick Theatres Co., 9 N.J.Super. 401 (1950). [↑](#footnote-ref-203)
204. Blasius Industries, Inc. v. Atlas Corp. 564 A.2d 651 (Del. Ch. 1988). [↑](#footnote-ref-204)
205. Davis v. Sheerin, 754 S.W.2d 375 (1988). [↑](#footnote-ref-205)
206. Andrew P. Campbell, *Litigating Minority Shareholder Rights and the New Tort of Oppression,* 53 Ala. Law. 108 (1992), p. 108. [↑](#footnote-ref-206)
207. Exadaktilos v. Cinnaminson Realty Co., Inc., 167 N.J.Super. 141 (1979):“…freeze-out maneuvers in close corporations constitute an abuse of corporate power. Traditional principles of corporate law, such as the business judgment rule, have failed to curb this abuse.”; “In the United States, for example, courts rely on the business judgment rulet o protect transactions that provide non- monetary benefits to insiders at the expense of outside shareholders (e.g., empire-building)…Not surprisingly, these are the areas where the abuse of minority shareholders in the United States is perceived to be significant.” (Simon Johnson, Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, *Tunnelling,* The American Economic Review, Vol. 90 No.2 (2000) p. 23) [↑](#footnote-ref-207)
208. Fix v. Fix Material Co., Inc., 538 S.W.2d 351 (1976): “…the law places equitable limits on the actions of controlling shareholders which might operate to the detriment of the minority…” [↑](#footnote-ref-208)
209. “In broad outline, our major jurisdictions rely heavily on approval- by disinterested directors, shareholders, or both- as the primary check on managerial transactions and on standards as the primary check on controlling shareholders transactions. In addition, when it comes to listed companies, all jurisdictions nowadays follow the lead of U.S. securities law in providing for the mandatory disclosure of related-party transactions…” (Kraakman, et. al., p. 177-178). [↑](#footnote-ref-209)
210. “…efficient legal rules must differentiate between different forms of private benefits of control.” (Hofstetter, *One* Size, p. 662) For a similar approach commenting on the implications of the different treatment of non- pecuniary private benefits, see: Pacces, p. 223. [↑](#footnote-ref-210)
211. As for Delaware’s transaction- based system, see generally: Jens Dammann, *Corporate Ostracism: Freezing Out Controlling Shareholders,* 33 Iowa J. Corp. L. 681. [↑](#footnote-ref-211)
212. Furlow stresses a similar point in the context of director liability, by stating that lack of financial interest does not show that the decision is given with a proper motive: “The fact that the directors who made the challenged decision were independent and disinterested does not guarantee that they have satisfied their duty of loyalty. It merely means that their impartiality was not compromised by financial self- interest.” (Clark W. Furlow, *Good Faith, Fiduciary Duties, and the Business Judgment Rule in Delaware,* 2009 Utah L. Rev. 1061 (2009) p. 1087) [↑](#footnote-ref-212)
213. Hollis v. Hill, 232 F. 3d 460 (2000). [↑](#footnote-ref-213)
214. “Cases appearing as bad management may be lawful according to the statute, articles of incorporation, or duty of good faith.” (Sumer, p. 213). [↑](#footnote-ref-214)
215. At 349. [↑](#footnote-ref-215)
216. At 384. [↑](#footnote-ref-216)
217. At 384. [↑](#footnote-ref-217)
218. At 385. [↑](#footnote-ref-218)
219. At 385. [↑](#footnote-ref-219)
220. Legal certainty principle advocates for “clearly defined legal rules that enable people to ‘know the nature of their rights and obligations and be able to plan their actions with some confidence about the legal consequences” (John A. Lovett, *On the Principle of Legal Certainty in the Louisiana Civil Law Tradition: From the Manifesto to the Great Repealing Act and Beyond*, 63 La. L. Rev. 1397 (2003), at 1397). Stroud v. Grace, 606 A.2d 75 (1992): “It is important that there be certainty in the law. We emphasize that the Court of Chancery must act with caution and restraint when ignoring the clear language of the General Corporation Law in favor of other legal or equitable principles.” [↑](#footnote-ref-220)
221. “The question of whether transactions involving conflicting interests are efficient or inefficient is at the root of the self-dealing problem. For this reason, an adequate solution to the problem requires mechanisms that can distinguish between efficient and inefficient deals.” (Zohar Goshen, *The Efficiency of Controlling Corporate Self- Dealing: Theory Meets Reality*, 91 Cal. L. Rev. 393 (2003), p. 401) [↑](#footnote-ref-221)
222. In this sense, standards used to track these benefits such as “reasonable expectations” may inherently violate this principle. See, J.C. Bruno, *“Reasonable Expectations”- A Primer on an Oppressive Standard,* 71 Mich. B.J. 434 (1992), stating that “reasonable expectations” test would create instability and uncertainty in the field of corporate law. [↑](#footnote-ref-222)
223. “…this drive for predictability is particularly strong in areas of law that define legal relationships with stranges, those with whom we are not engaged in an onging business, family, religious or other kind of ling- term social relationship.” (Lovett, p.1397) [↑](#footnote-ref-223)
224. “At the same time, the value of legal certainty is often understood from a specific philosophical and political orientation- grounded in the theories of separation of powers and legal positivism- that seeks to limit a judge’s discretionary power to render decisions based on sources and consideratons other than the rules expressly stated in the positive law”. (Lovett, p.1398) [↑](#footnote-ref-224)
225. Minority shareholders will benefit from the presence of dominant shareholders so long as the benefits from reduction in managerial agency costs are greater than the costs of private benefits of control (Ronald Gibson, Jeffrey Gordon, *Controlling Controlling Shareholders*, 152 U.PA.L.Rev. 785 (2003) at 786). Also, a orporation with a controlling shareholder “is more likely to focus on building a leading position and is able to take a longer-term view about the growth and investment needed to accomplish that goal. In contrast, widely held public rms must answer to shareholders every quarter orpora more focused on maximizing earnings in the immediate term” (Playing to Win: The New Global Competition for Corporate Profits, McKinsey&Company, Executive Summary p. 8). [↑](#footnote-ref-225)
226. Dammann, Corporate Ostracism, p.706-707. “It is possible that, in certain situations, a transaction with an interested shareholder may be the best option available to the group. For example, a corporation seeking credit may find that, in some circumstances, a loan taken from its con- trolling owners is the cheapest option. Indeed, in some cases, an important transaction may simply be impossible without such self- dealing.” (Goshen, p.400) [↑](#footnote-ref-226)
227. Pehlivanoğlu, 2022, p. 201. [↑](#footnote-ref-227)
228. Olaf Ehrhardt, Eric Nowak, *Private Benefits and Minority Shareholder Expropriation - Empirical Evidence from IPOs of German Family-Owned Firms*, <http://www.ipo-underpricing.com/Downloads/Ehrhardt_Private%20Benefits.pdf> (Last visited: 10/10/2016) at 6. [↑](#footnote-ref-228)
229. Jens Dammann, *Corporate Ostracism,* p. 692. [↑](#footnote-ref-229)
230. Dammann, *Corporate Ostracism*, p.696. [↑](#footnote-ref-230)
231. Dammann, Corporate Ostracism, p. 692. [↑](#footnote-ref-231)
232. Dammann, Corporate Ostracism, p. 692 and 742. [↑](#footnote-ref-232)
233. Dammann, Corporate Ostracism, p. 696. [↑](#footnote-ref-233)
234. Dammann, Corporate Ostracism, p. 744. [↑](#footnote-ref-234)
235. Dammann, Corporate Ostracism, p. 711. [↑](#footnote-ref-235)
236. Kraakman, et. al., p. 175. [↑](#footnote-ref-236)
237. “The third possibility for non-pecuniary benefits is the controlling shareholders' ability to enter into transactions with the firm on unfavorable terms...corporate law theory generally disdains this kind of private benefit, as it hurts minority investors. As minority shareholder protection improves, this potential shield against holdup will also diminish” (Martin Gelter, *The Dark Side of Shareholder Influence: Maganerial Autonomy and Stakeholder Orientation in Comparative Corporate Governance,* 50 Harv. Int’l L.J. 129 at.167). Although the writer, in this study’s opinion, mistakenly calls this kind of benefit a non- pecuniary one, he correctly points out the fact that “The evidence suggests that this kind of shareholder protection has increased over the past years in several major jurisdictions” (Gelter, Footnote 240). [↑](#footnote-ref-237)
238. “Private benefits are not a problem per se” (Enriques, Gilson, Pacces, *The Case for an Unbiased Takeover Law (With an Application to the European Union)*, 4 Harv. Bus. L. Rev. 85 at 98). [↑](#footnote-ref-238)
239. Pacces, p. 91 and 99. [↑](#footnote-ref-239)
240. “When an investor purchases equity securities in a public company, he reasonably expects that the issuer has the burden of justifying any actions which would result in depriving him of the characteristics inherent in his investment in publicly traded securities” (Securities Exchange Act Release No. 33-5884, Securities Act Release No. 34-14185, 42 Fed. Reg. 60,090 (1977) (J.A.C. Hetherington, *When the Sleepers Wakes: Reactions on Corporate Governance and Shareholder Rights*, <http://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1272&context=hlr> (Last visited: 10/10/2016) at 250)). [↑](#footnote-ref-240)
241. Stanley J. Wilkes v. Springside Nursing Home, Inc. & others, 370 Mass. 842 (1976). [↑](#footnote-ref-241)
242. Wheeler v. Pullman Iron & Steel Co., 17 L.R.A. 818 (1892): “Every one purchasing or subscribing for stock in a corporation impliedly agrees that he will be bound by the acts and proceedings done or sanctioned by a majority of the shareholders, or by the agents of the corporation duly chosen by such majority, within the scope of the powers conferred by the charter.” [↑](#footnote-ref-242)
243. Johnson/Porta/Silanes/Shleifer, p.617. [↑](#footnote-ref-243)
244. “…when private benefits involve neither distortion nor diversion of the firm’s surplus, they fill in the gaps of market (contractual) incompleteness. In other words, they account for some value that would have not been produced otherwise” (Pacces, p. 92). [↑](#footnote-ref-244)
245. For details of the corporate defamation claims, see; Norman Redlich*, The Publicly Held Corporation as Defamation Plaintiff,* 39 St. Louis U. L.J. 1167 (1995). [↑](#footnote-ref-245)
246. In Cheff v. Mathes, 41 Del. Ch. 494 (1964), the Delaware court evaluated the boards’ action to buy- out a shareholder due to his poor reputation and laid down the following decision: “…if the actions of the board were motivated by a sincere belief that buying out of the dissident shareholder was necessary to maintain what the board believed to be proper business practices, the board will not be held liable for such decision, even though hindsight indicates the decision was not the wisest course…Accordingly, we are of the opinion that the evidence presented in the court below leads inevitably to the conclusion that the board of directors, based upon direct investigation, receipt of professional advice, and personal observations of the contradictory action of Maremont and his explanation of corporate purpose, believed, with justification, that there was a reasonable threat to the continued existence of Holland, or at least existence in tis present form, by the plan of Maremont to countinue building up his stock holdings”. [↑](#footnote-ref-246)
247. Today, in Turkish law, only one type of business enterprise can become a publicly traded one (Commenting on the prior Capital Market Law, a scholar states the following: “A public limited company is the only type of company on which the right to offer its shares to the public is conferred” (Sibel Hacimahmutoglu, The problems of minority protection and their solutions within the legal framework in Turkish corporate governance, Journal of Banking Regulation Vol. 8 (2007), p.133). This type, corporation, is mainly governed by 6102 numbered Turkish Commercial Code (TCC); however the Code is not specifically devoted to the regulation of the publicly traded version of the corporation (During the times when the abolished TCC was still in force, it was argued that the corporation that TCC was regulating was in essence the publicly held corporation and not the closely held one (Tugrul Ansay, *Cagdas Anonim Sirketlerin Sorunlari ve Turk Anonim Sirketleri* 45 (1971)). The Official Comment to TCC explicitly states that TCC is not frameworked to regulate a specific type of corporation, so implicitly claims that it tailored a suitable suit for all both close and publicly traded corprations (Official Comment to TCC Article 338). Nowadays, as publicly held ones are extensively subject to 6362 numbered Capital Market Law (CML) while still remaining in the scope of TCC, that old argument lost its importance. A similar argument is also claimed for U.S. law, expressing that corporate law is designed for large corporations with many owners and it assumes that ownership will be passive and separated from control (Stephen M. Bainbridge, *Corporation Law and Economics* 830 (2002)).). When a corporation becomes a publicly traded one, it is subject to the provisions of both TCC and CML. In addition to these, stock exchange regulations are also governing publicly traded corporations. Corporations (in Turkish, “anonim sirket”) are accepted as business enterprises with legal personality. Currently, many sources are translating “anonim sirket” to English as “joint stock company” or “joint stock corporation”. As some scholars pointed out, while explaining the reason of translating German company type “Aktiengesellschaft” as “joint stock company” in English, this translation has its reason in historical facts rather than legal facts (Jean J. du Plessis, Bernhard Großfeld, Ingo Saenger, Otto Sandrock, *An Overview of German Business or Enterprise Law and the One-Tier and Two-Tier Board Systems Contrasted*, <http://webcache.googleusercontent.com/search?q=cache:lGxds4ADX4sJ:www.springer.com/cda/content/document/cda_downloaddocument/9783642230042-c1.pdf%3FSGWID%3D0-0-45-1275843-p174267777+&cd=1&hl=tr&ct=clnk&gl=us&client=safari>, Last visited: 10/10/2016, at 5). Even the Turkish name for this corporation comes from a bad translation of a French company type name “societe anonyme” (the first Turkish corporate statute was taken modeled after France’s). Recently, in the Official Comment to TCC (Official Comment to CML, p.11), it is written that the US equivalent of the “anonim sirket” law is “corporation” law. Turkish scholars also opine that the entity which American calls “corporation” refers to the “anonim sirket” entity in Turkish law (Oguz Imregun, *Amerikan Ortakliklar Hukukunun Ana Hatlari* 35 (1969)) Thus, this study chooses to stick to its own translation. Due to the statement of CML that issue of shares of non-public corporations is not subject to the provisions of this statute (CML Article 2(1)) (Note that this exception is only valid for one type of only capital market instrument (shares), and one type of issuer (non- public corporations). Consequently, if a non- public corporation issues debt securities, this issue will be within the scope of the CML (Yanli, Sermaye Piyasasi Araci, p.10)), it can be said that Turkish capital market law classifies corporations as public and non-public ones. Still, this classification is not the ultimate one. Under this statute, the term “publicly held corporation” is being used to refer “a corporation whose shares are offered to public or are deemed be offered to public”, excluding ones collected money through crowdfunding platforms (CML Article 3(1)(e)) and “a corporation, whose shares are traded on an exchange or who has more than 500 shareholders” are deemed publicly held corporations, with the exception of corporations benefited from crowdfunding (CML Article 16(1)). This being said, CML provides exemptions. According to Article 33, some securities issues and corporations that are deemed “publicly held” can be exempt from certain requirements and even from the scope of CML by the governing authority, Capital Markets Board of Turkey (CMB), in presence of certain conditions. For example, if a corporation which is deemed publicly held due to its number of shareholders does not want to be listed on a stock exchange can, by shareholder approval, be exempted from the scope of the CML (Comminique on Principles Pertaining to Removal of Corporations from the Scope of Law and Obligations of Trading of Shares on Exchange, Article 5(1), Official Gazette Date: 30/12/2013 Number: 28867 (Repeated)). Another principle of CML, which changes the classification of corporations, is that if shares of corporations who are deemed publicly held corporations are not traded on the exchange, these corporations have to apply to the exchange and have their shares traded on the exchange (CML Article 16(2)). Thus, while a corporation can run away from being listed on an exchange for a limited time by carrying out a public offering without being listed (Communique on Sales of Capital Market Instruments (II-5.2), Article 13(1)), it cannot escape forever from being listed on an exchange. Turkish capital market law has the ultimate purpose to make all publicly held corporations a publicly traded one. Thus, the status of being publicly held is an interim one. The reasons of this policy are stated as to “have harmony with the EU approach which only accepts corporations being traded on exchanges as publicly traded corporations” and “to provide an effective structure for the protection of publicly traded corporation’s shareholders, as it is economically more meaningful to protect ones who invested in corporations of a certain sizes” (Official Comment to Article 16 of CML) (In the Official Comment of TCC, which is a prior text to the CML, it is stated that keeping a group of corporations (publicly held corporation) between the corporation and publicly traded corporation is a policy issue that must be evaluated (Official Comment to TCC, p. 39). The structure of CML shows that the policy in Turkey is to keep that group only for a limited period of time.). In conclusion, it can be said that the real classification of corporations under Turkish capital market law is (1) corporations and (2) publicly traded corporations. However, after the regulation of collecting money through crowdfunding platforms by CML, corporations which collected money through crowdfunding became subject to another mid- regime, see, III- 35/A.2 Crowdfunding Communique. [↑](#footnote-ref-247)
248. It is argued that corporations are not merely entities but in fact a “nexus of contracts” or a “set of implicit and explicit contracts” (Easterbrook/Fischel, p.12). This description refers to actors that engage in an association with the corporation (e.g., production employees, managers, investors, warranty holders, tort claim holders) and the arrangements among them (both contract and corporate law based) (Easterbrook/Fischel, p.12.). This nature arises the following common conflicts and legal problems for these entities: “Conflicts between managers and shareholders, conflicts among shareholders, and conflicts between shareholders and the corporation’s other constituencies, including creditors and employees” (Kraakman, et. al., p.22.). The classification of the legal nature of the relationship between the corporation and the shareholders, and shareholders’ relationship among themselves depends on the law of the jurisdiction this relationship takes place (The two opposite theories regarding the evaluation of the relationship corporate consituents are the (1) institutional theory, and (2) contractual theory. While the “institutional theory” dominates the Continental Europe jurisdictions, the “contractual theory” leads in Anglo- Saxon jurisdictions (Sibel Hacimahmutoglu, *AT Komisyonu’nun Ortakligin Kontrolunu Ele Gecirme Araci Olarak Pay Alim Onerisine Iliskin 13. Ortakliklar Hukuku Yonerge Teklifi Uzerine Bir Inceleme*, 21 Banka Huk. Dergisi 95 (2001), at 100)). In this regards, the relationship between the corporation and the shareholder is accepted as a contractual relationship in both Turkish and Delaware law, and the terms of this relationship are based primarily in the articles of incorporation (For Turkish law, see, Tekinalp, p.83 and for Delaware law, see, Boilermakers Local 154 Retirement Fund v. Chevron Corp., 73 A.3d 934 (2013).). While this assertion also leads to the principle that the relationship between the shareholders among themselves is contractual in nature in Delaware (Morris v. American Public Utilities Co., 14 Del. Ch. 136 (1923): “…it is spoken of as “a dual contract--one between the state and the corporation and its stockholders, the other between the corporation and its stockholders.” That there is a third aspect in which the contract may be regarded would appear clear, for not only is there a contractual tie binding in the two respects observed by the Utah court but there is as well a contractual relation in many particulars existing between the stockholders inter sese.”), this issue is subject to debate in Turkish law and it is generally claimed that there is no contractual relationship among them (N. Fusun Nomer, *Anonim Ortaklikta Pay Sahibinin Sadakat Yukumlulugu* 81, Doctoral Dissertation (1998)). [↑](#footnote-ref-248)
249. Yargitay 11 H.D. E. 2002/706 K. 2002/3409 T. 11/04/2002: “If the shareholders… engaged in malicious transactions, these issues can only be made subject of an involuntary dissolution or compensation claim.” [↑](#footnote-ref-249)
250. Official Gazette Number: 24607 Date: 08/12/2001. [↑](#footnote-ref-250)
251. Official Gazette Number: 27836 Date: 04//02/2011. [↑](#footnote-ref-251)
252. Erdogan Moroglu, *Anonim Ortaklikta Cogunluk Pay Sahiplerinin Azinlik ve Imtiyazli Pay Sahiplerine Karsi Korunmasi*, 17 Banka Huk. Dergisi 47 (1993), at 52- 53. [↑](#footnote-ref-252)
253. Tugrul Ansay, *Anonim Sirket Idare Meclisi Kararlarinin Iptali Meselesi*, 2 Banka Huk. Dergisi 371 (1964) at.382. [↑](#footnote-ref-253)
254. Moroglu, Anonim Ortaklikta Cogunluk, p.54. The Dutch case of Kip and Sloetjes v. Rabobank [NJ 1997, 662 (HR 1997)] presents a good example of this issue. “In this case a bank negligently withdrew credit from a group of corporations, and subsequently forced the shareholders- who personally had granted security for the obligations of the corporation- to sell their shares” (Karel Frielink, *No Derivative Action in Curacao: A claim based on tort is possible though*, Karel’s Legal Blog, 02/09/2015, <http://www.curacao-law.com/2015/09/02/no-derivative-action-in-curacao/> (Last visited: 10/10/2016)). The case involved “a claim for damages by shareholders against a third party on the basis of an alleged wrong to the shareholders in their own right which had allegedly forced them to sell their shares at a very disadvantageous price”, the court “affirmed shareholders’ right in principle to claim damages for an individual injury” and “considered, inter alia, that in the case concerned, payment of damages to the corporation would not repair the shareholder’s alleged injury (viz. the loss resulting from the sale of their shares)” (Wouter H.F.M. Cortenraad, *The Corporate Paradox: Economic Realities of the Corporate Form of Organization* 242 (2001)). [↑](#footnote-ref-254)
255. See, Ali Pasli, *Special Status of Controllers of Joint Stock Corporations*, <http://www.journals.istanbul.edu.tr/iuhfm/article/download/1023010512/1023009749> (Last visited: 10/10/2015)).

     “The instance of controlling shareholders and groups has in some jurisdictions led to the concept of duties to other shareholders and in some instances to the company. For instance, Israel has an explicit duty of controlling shareholders to other shareholders; Belgium, France, and Italy have provisions concerning the abuse of other shareholders by a majority investor. India also recognises oppression by controlling shareholders with 393 cases lodged in 2010 However, all rights need enforcement, either public or private, and this appears weak: very few cases if any are brought each year in the reviewed jurisdictions. In particular, derivative law suits are rare since financial incentives are lacking (*i.e.* litigants might have to cover all the costs of the action but awards are paid to the company). However both Israel and India have taken or propose to take steps to improve the situation: in Israel a specialised court has been established and the regulator can and does support derivative and other actions financially: in India the security regulator established a fund to support derivative suits financially. France has some limited powers of discovery in which a judge can require the release of documents to litigants. Efficient and effective public enforcement appears important as market mechanisms remain limited in jurisdictions with concentrated ownership.” (OECD (2012), *Related Party Transactions and Minority Shareholder Rights*, OECD Publishing, p.14) [↑](#footnote-ref-255)
256. Zühtü Aytaç, *Liability of Board of Directors Arising from the Unlawful use of Control*, BATIDER C. XXIX Sa.4 (2013) at 18-19. [↑](#footnote-ref-256)
257. Due to the statement in the Article 340 that “The articles of incorporation shall not deviate from the provisions of this Statute unless the Statute explicitly permits the deviation”, it can be concluded that the Turkish corporate law relies strongly on mandatory corporate law. Official Comment to TCC Article 340 states that German law is the inspiration for this provision. “Internationally, this U.S. – style libertarianism in corporate law is the exception rather than the rule. Most foreign corporate law systems rely strongly on mandatory corporate law. In France, for example, the law governing public corporations is notorious for leaving little room for private ordering, and German corporate law goes so far as to provide that all provisions in the German Stock Corporations Act are mandatory unless indicated otherwise” (Jens Dammann*, The Mandatory Law Puzzle: Redefining American Exceptionalism in Corporate Law, 65 Hastings L.J. 441* (2014), at 444).), rather than having an enabling nature. However, recent case law (T.C. Yargitay 11. HD E. 2014/15813 K. 2015/8851 T. 07/07/2015) suggests that (similar to what the Official Comment to TCC Article 340 expresses despite Article 340 explicit language) as long as a statutory provision is not conclusive in nature, articles of incorporation can include supplementary terms regarding the issue the provision is framing. Moreover, recent commentary (Rauf Karasu, *Emredici Hukumler Ilkesinin Kapali Tip Anonim Sirketler ve Limited Sirketler Acisindan Dogurdugu Sorunlar ve Cozum Onerileri*, Ticaret ve Fikri Mulkiyet Hukuku Dergisi 2015/1 (2015)) argues that even when the language does not explicitly permit an alteration, the provision can be still altered by the articles of incorporation if an interpretation of the “legislative intent” would permit this alteration. [↑](#footnote-ref-257)
258. Writing on German corporate law, which has a similar structure with the Turkish corporate law, Fleischer notes that the shareholder derivative actions are not well developed in German law, compared to the U.S. law, and instead rescission suits (actions that challenge the validity of resolutions passed by corporate organs) are the most forceful weapon in the hands of the minority shareholders, and have an institutional function. (Holger Fleischer, *A Guide to German Company Law for International Lawyers- Distinctive Features, Particularities, Idiosyncrasies*, Max Planck Private Law Research Paper No. 15/8 (2015), at 23) [↑](#footnote-ref-258)
259. The specific provisions are criticized by some scholars as they are too complicated, lack practicability and legal theory (See: Caglar Manavgat, *Bagimsiz Yonetim Kurulu Uyelerinin Islevleri ve Sahip Olmalari Gereken Nitelikler*, BATIDER March 2014 Volume XXX Issue 1, p.62 and Zuhtu Aytac*, Liability of Board of Directors Arising from the Unlawful Use of Control*, BATIDER Dec. 2013 Vol. XXIX Issue 4). [↑](#footnote-ref-259)
260. Aytac, p.11-13. [↑](#footnote-ref-260)
261. See, Aytac, p.11-13. For a commentary on how shadow director theory may apply, see, Cafer Eminoğlu, Anonim Şirket Özelinde Fiili Yönetim Organı (2022); for lifting the corporate veil, see, Veliye Yanlı, Anonim Ortaklıkta Tüzel Kişilik Perdesinin Kaldırılması (2000); for shareholder fiduciary duties, see, Ömer Teoman, Yaşayan Ticaret Hukuku Kitap 12 (2008), p. 35- 42. [↑](#footnote-ref-261)
262. Aytaç, p. 52 [↑](#footnote-ref-262)
263. Michael P. Dooley, Michael D. Goldman*, Some Comparisons Between the Model Business Corporation Act and the Delaware General Corporation Law,* 56 Bus. Law. 737 (2001), p. 749. [↑](#footnote-ref-263)
264. Klopot v. Northrup, 131 Conn. 14 (1944). [↑](#footnote-ref-264)
265. F. Hodge O’Neal, *Oppression of Minority Shareholders: Protecting Minority Rights,* 35 Clev. St. L. Rev. 121 (1987), p. 134. [↑](#footnote-ref-265)
266. Barry M. Wertheimer, *The Shareholders’ Appraisal Remedy and How Coruts Determine Fair Value*, 47 Duke L.J. 613 (1998), p. 613. [↑](#footnote-ref-266)
267. Kraakman, et. al., p. 205. [↑](#footnote-ref-267)
268. Voeller v. Neilston Warehouse Co., 311 U.S. 531 (1941), Footnote 6: “At common law, unanimous shareholder consent was a prerequisite to fundamental changes in the corporation. This made it possible for an arbitrary minority to establish a nuisance value for its shares by refusal to cooperate. To meet the situation, legislatures authorized the making of changes by majority vote. This, however, opened the door to victimization of the minority. To solve the dilemma, statutes permitting a dissenting minority to recover the appraised value of its shares, were widely adopted.” [↑](#footnote-ref-268)
269. See, Model Bus. Corp. Act Ann Sec. 13.01 Official Comment. 1 (2007) on appraisal rights. Also see, Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34 (1993), explaining the rationale for enhanced judicial scrutiny of a sale or change of control transactions: “Absent effective protective provisions, minority stockholders must rely for protection solely on the fiduciary duties owed to them by the directors and the majority stockholder, since the minority stockholders have lost the power to influence corporate direction through the ballot… Board action in the circumstances presented here is subject to enhanced scrutiny. Such scrutiny is mandated by: (a) the threatened diminution of the current stockholders' voting power; (b) the fact that an asset belonging to public stockholders (a control premium) is being sold and may never be available again; and (c) the traditional concern of Delaware courts for actions which impair or impede stockholder voting rights…” [↑](#footnote-ref-269)
270. Dooley/Goldman, p. 750- 756. [↑](#footnote-ref-270)
271. Kraakman, et. al., p. 205. “The fact that shareholder approval is required for major transactions and for changes to the company’s constitution seems to support the proposition that members contract with the mangement for the company to be run as the shareholders choose.” (Janice Dean*, Directing Public Companies: Company Law and the Stakeholder Society* 36 (2001)) [↑](#footnote-ref-271)
272. Official Comment to CML Article 24. [↑](#footnote-ref-272)
273. Communique on Significant Transactions and the Retirement Right (“Significant Transactions Comminique”), Official Gazette Number: 31168 Date: 27/06/2020. [↑](#footnote-ref-273)
274. However, there are also provisions having the same effect in TCC regime. For instance, in cases where a transaction may cause loss in capital or indebtness as shown under TCC Art. 376, board of directors are required to get shareholders’ consent, see, Ömer Teoman, Yaşayan Ticaret Hukuku (Hukuki Mütalaalar), İstanbul 2012 at 111- 116. [↑](#footnote-ref-274)
275. Kraakman, et. al., p.241. [↑](#footnote-ref-275)
276. O’Neal, Oppression of Minority Shareholders, p.138. [↑](#footnote-ref-276)
277. O’Neal, Oppression of Minority Shareholders, p.139. [↑](#footnote-ref-277)
278. Kraakman, et. al., p. 174. [↑](#footnote-ref-278)
279. Luis H. Gutierrez, Carlos Pombo*, “Corporate Governance and Firm Valuation in Colombia”, Investor Protection and Corporate Governance* 373, Ed. Alberto Chong/Florencio Lopez-de-Silanes, (2007). [↑](#footnote-ref-279)
280. Pierre- Henri Conac, Luca Enriques, Martin Gelter, *Constraining Dominant Shareholders’ Self- Dealing: The Legal Framework in France, Germany and Italy*, ECFR 4/2007, at 496. [↑](#footnote-ref-280)
281. Kraakman, et. al., p. 174. [↑](#footnote-ref-281)
282. Kraakman, et. al., p. 174. [↑](#footnote-ref-282)
283. There are also other fields of law, like tax law, that deals with related- party transactions extensively. [↑](#footnote-ref-283)
284. Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, *The Law and Economics of Self- Dealing*, Journal of Financial Economics 88 (2008), at 431. [↑](#footnote-ref-284)
285. Kraakman, et. al., p.60. [↑](#footnote-ref-285)
286. Kraakman, et. al., p. 175. For a theoretical distinction between these preferred solutions, see, Goshen, p.398. [↑](#footnote-ref-286)
287. Murat Can Pehlivanoglu, *Concealed Distribution of Capital in Publicly Held Joint Stock Corporations in Turkish Capital Market Law and Corporate Tax Law: An Approach From “Transaction” and “Associated Persons” Terms’ Aspects*, LL.M. Thesis (2015), <https://tez.yok.gov.tr/UlusalTezMerkezi/tezSorguSonucYeni.jsp> (Last visited: 10/10/2016) at 1. [↑](#footnote-ref-287)
288. Conac, et. al., p. 502. TCC Art. 480(3) prohibits return of capital to shareholders and payment of any interest for capital unless Art. 510 conditions are satisfied. It is claimed that TCC Art. 480(3) may be used to avoid concealed distribution of capital, and Article 512 for concealed distribution of income, see, Aydın Çelik, Anonim Ortaklıkta Malvarlığı (2021), p. 419. However, commentators have no unified opinon about such approach, see, Funda Özdin, *“Sermayenin İadesi Yasağı”nın (TTK m. 480/3) Örtülü Malvarlığı Aktarımının Önlenmesi Açısından Geniş Yorumlanması Zorunluluğu- Alman ve İsviçre Hukukları ile Karşılaştırılmalı Olarak-*, Tüzel Kişilik Penceresinden Anonim Ortaklık Sempozyumu (Ed. Havva Karagöz et. al.) 85 (2021). [↑](#footnote-ref-288)
289. Halit Aker, *Hakim Isletme ile Bagimli Sirket Arasindaki Hukuki Iliski ve Hakim Isletmenin Sadakat Borcu*, 22 Banka Huk. Dergisi 153 (2003), at 185. For example, in Delaware, “rather than expanding the statutory sections governing dividends and stock redemptions to other types of transactions, Delaware law evaluates claims about improper transfer payments and self- dealing under the rubric of fiduciary duty” (Quadrant Structured Products Co., Ltd. v. Vertin, 102 A.3d 155 (2014)). [↑](#footnote-ref-289)
290. Official Comment to CML Article 17. [↑](#footnote-ref-290)
291. Pehlivanoglu, p.23. [↑](#footnote-ref-291)
292. T.C. Yargitay 19. CD E. 2016/11171 K. 2016/21824 T. 25/10/2016. [↑](#footnote-ref-292)
293. “Transfer price” is the price (i.e., consideration) charged for goods, services and intagible properties transacted between related parties, and the term “transfer pricing” refers to this process in general (Pehlivanoglu, p. 22). The primary component of a transfer pricing process is a transaction taking place; in other words, when there is no transaction, there is no transfer price (Pehlivanoglu, p. 23). Rules on transfer pricing tries to determine whether the “transfer price” is identical to the price that parties dealing at “arm’s length” would have set by using standards that compares the transactions and shows whether the price is not one that parties dealing at arm’s length would have reached: A price that violates the “arm’s length” principle is “dangerous”, because this violation suggests that the transaction may be acting as a cover for a fund transfer from one party to another, which would otherwise violate a statute if transferred under the rules of that statute (Pehlivanoglu, p.28). [↑](#footnote-ref-293)
294. Pehlivanoglu, p. 23. [↑](#footnote-ref-294)
295. Yargitay 19 CD E. 2015/4724 K. 2016/16728 T. 27/04/2016. [↑](#footnote-ref-295)
296. For example, see, Turkish Accounting Principles, TMS 24 on Related Party Statements, Article 9, <http://kgk.gov.tr/DynamicContentDetail/6538/TMS/TFRS-2017-Seti>, Last visited: 10/03/2017. [↑](#footnote-ref-296)
297. Note that the “relatedness” required under these provisions are different than the ones under the rules of corporate groups, which deals with the issue form a “control” perspective (See, Chapter 3.2.2.). However, these provisions only require there to be a relation between the parties (Pehlivanoglu, p. 106). [↑](#footnote-ref-297)
298. The fact that these provisions cover similar or affiliated corporate actions that some other provisions, such as rules on corporate groups or insider trading, also covers requires the determination of their provisions in way to enforce all effectively, in accordance with the legislative intent. For an examination of this problem, see, Caglar Manavgat, *Ortulu Kazanc Aktariminin Ortakliklar Toplulugu Duzenlemelerindeki Sinirlari*, 31 Banka Huk. Dergisi 87 (2015). [↑](#footnote-ref-298)
299. In the Yargıtay 11. HD E. 2005/3321 K: 2006/3772 T: 10/04/2006 case that dealt with the concealed distribution of capital provision of the abolished CML, the court held that a corporation, which is in need of building factories and facilities for its business of electricity production and transmission, would always need cement; thus, if it refrains to exercise its pre- emptive rights in a share capital increase, this action would cause damage to the corporation and its shareholders, and this action is a concealed distribution. However, the related provision of the annulled CML did not include a requirement of “an increase in the profits or assets of the related parties”. [↑](#footnote-ref-299)
300. Karl Hofstetter, *Parent Responsibility For Subsidiary Corporations: Evaluating European Trends*, 39 Int'l & Comp. L.Q. 576 (1990), at 576. [↑](#footnote-ref-300)
301. Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. Corp. L. 573 (1985), at 607. [↑](#footnote-ref-301)
302. OECD (2012), Related Party Transactions and Minority Shareholder Rights, p.9 and 11. [↑](#footnote-ref-302)
303. Thomas W. Walde, *Parent- Subsidiary Relations in the Integrated Corporate System: A Comparison of American and German Law,* 9 J. Int’l L. & Econ. 455 (1974) at 493. [↑](#footnote-ref-303)
304. The notion that this construction gives the controller of the corporate group an ability to take advantage of the subsidiaries represents the disadvantages. The methods which the controller can take advantage of the subsidiaries can be illustrated as follows: For example, subsidiaries can sell their products at reduced prices to parents, buy goods and services from parents at inflated prices, pay excessive management fees to the parents, declare excessive dividends, or engage in transactions at the request of their parents that the subsidiaries never would have undertaken on their own (Gouvin, p.290). [↑](#footnote-ref-304)
305. Ian M. Ramsay, *Allocating Liability in Corporate Groups: An Australian Perspective,* 13 Conn. J. Int’l L. 329 (1999), at 329. [↑](#footnote-ref-305)
306. Ramsay, p.329. [↑](#footnote-ref-306)
307. While its provisions are based on the principle of control, and does not mention the “common management” standard that the German law uses in the corporate groups context (Unal Tekinalp, *Liability for Breach of Trust in Corporate Groups, Festschrift für Klaus J. Hopt zum 70. Geburtstag am 24 August 2010: Unternehmen, Markt und Verantwortung* 1437, Ed. Stefan Grundmann, Brigitte Haar, Hanno Merkt, et. al., (2010)), this does not preclude the Turkish system from being situated under the “enterprise principle” in the entity- enterprise principle distinction, because the fact that the parent can be liable for actions taken by the subsidiary shows that the group is treated as a single unit in certain circumstances for the establishment of liability. [↑](#footnote-ref-307)
308. As the Official Comment to TCC puts forward, the rules on corporate groups in Turkish law differs from its German equivalent and has unique features, even though German law is used as a model for the provision (Official Comment to TCC Law of Corporate Groups Section). One of the points that Turkish law differs from German law is that Turkish law applies the related provisions to all kinds of companies, including corporations (TCC Article 195(1)). [↑](#footnote-ref-308)
309. Official Comment to TCC Law of Corporate Groups Section. [↑](#footnote-ref-309)
310. Gul Okutan, *Sirketler Toplulugu,* Bankacilar Dergisi Sayi 79 Aralik 2011, at 91. [↑](#footnote-ref-310)
311. As a corollary of this definition, TCC Article 195(3) states that the parent can exert its control over a subsidiary through both directly or indirectly via other subsidiaries. [↑](#footnote-ref-311)
312. Okutan, p. 92. [↑](#footnote-ref-312)
313. Hofstetter, Parent Responsibility, p. 580. [↑](#footnote-ref-313)
314. For example, in a wholly- owed subsidiary, there are no other shareholders except the parent corporation, so the conflict of interests that this relationship creates may be primarily regulated on the threat it poses to creditors. This differing notion is also recognized in U.S. law. In Anadarko Petroleum Corp. v. Panhandle Eastern Corp., 545 A.2d 1171 (1988), the Delaware court opined that “in a parent and wholly- owned subsidiary context, the directors of the subsidiary are obligate only to manage the affairs of the subsidiary in the best interest of the parent and its shareholders” and “a parent does not owe a fiduciary duty to its wholly owned subsidiary”. [↑](#footnote-ref-314)
315. Okutan, p. 95. [↑](#footnote-ref-315)
316. Official Comment to TCC Article 195. [↑](#footnote-ref-316)
317. It should be noted that TCC also gives the parent the ability to transform a subsidiary to a wholly- owned one and integrate further: The parent, which holds at least ninty percent of both the shares and voting right has the right to buy- out the minority, if the minority is causing a deadlock or substantial problems in the operation of the corporation (Article 208). However, this provision is not applicable to publicly traded corporations due the explicit preemption that the CML Article 27/3 provided for TCC Article 208. [↑](#footnote-ref-317)
318. Veliye Yanli, *Dominion Agreements,* Regesta Vol. 3 Issue. 1 2013/1 (2013), at 5. While Yanli uses the “dominion contract” term to refer “domination contract”, Walde interchangebly uses the “domination contract” or “enterprise contract” terms to refer to same concept (Walde, p. 495). [↑](#footnote-ref-318)
319. Yanli, Dominion Agreements, p. 8. [↑](#footnote-ref-319)
320. In this respect, compared with the “management agreements” which generally confers the authority regarding day-to-day operation of the corporation (California Corporate Code Sec. 300(a): “The board may delegate the management of the day-to-day operation of the business of the corporation to a management company or other person provided that the business and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board.”), the “dominion contract” represents a contract that confers all the discretion of the board of directors, including the power to make ultimate decisions regarding the corporation. [↑](#footnote-ref-320)
321. Yanli, Dominion Agreements, p. 8. [↑](#footnote-ref-321)
322. Yanli, Dominion Agreements, p.11. [↑](#footnote-ref-322)
323. Trade Registry Regulation (Official Gazette Date: 27/01/2013 Number: 28541), Article 106(2) and Regulation on the Procedures and Principles of the Corporation’s General Aseembly’s and Participatory State Representatives (Official Gazette Date: 28/11/2012 Number: 28481) Article 30(h). [↑](#footnote-ref-323)
324. Okutan, p. 94. [↑](#footnote-ref-324)
325. Aytac, p. 16. [↑](#footnote-ref-325)
326. TCC Official Comment to Article 195. [↑](#footnote-ref-326)
327. Okutan, p. 96-97. [↑](#footnote-ref-327)
328. Okutan, p.101. [↑](#footnote-ref-328)
329. Ersin Camoglu, *Sirketler Toplulugunda Hakimiyetin Kotuye Kullanilmasindan Dogan Sorumluluk Davalari,* Galatasaray Universitesi Hukuk Fakultesi Dergisi 2013/2 (2013) at 23. [↑](#footnote-ref-329)
330. Vito Roberto, Corinne Widmer, *Tort Liability for Servises: Where Did We Come from, Where Are We Going to?, XVIth International Congress of Comparative Law* 208 (2002). Commentators opine that historically, the breach of trust doctrine was meant to compensate for alleged shortcomings of tort law, whereas culpa in contrahendo typically deals with the breasch of contract- related precontractual duties like good faith and fair dealing (Roberto/Widmer, p. 217). [↑](#footnote-ref-330)
331. Regarding the concept of “loss” in this section of the statute, Okutan opines that the “loss” suggested here has a wider scope than the “damage” concept used in contracts law (Okutan, p. 97). [↑](#footnote-ref-331)
332. Okutan, p. 99. [↑](#footnote-ref-332)
333. Camoglu, Sirketler Toplulugu, p.27. [↑](#footnote-ref-333)
334. Okutan, p. 100. [↑](#footnote-ref-334)
335. TCC 209: “In situations where the reputation that a corporate group has built up in public or among consumers has reached such a level as to inspire confidence, the parent is responsible for the trust that is inspired by the use of that reputation.” [↑](#footnote-ref-335)
336. The decision that led the development of this provision is the Wibru Holding AG/Swissair Beteiligungen AG BGE 120 II 331 decision, and a commentator summarizes the case as follows: “The case at hand required decision on the question of whether the Swissair was to be held liable for the creditors' claims of its bankrupt subsidiary, IGR Holding Golf and Country Residences AG, because both IGR's letter paper and its advertising brochure title pages contained the Swissair logo in their footers, as well as the statement that “IGR is a Swissair company”. The Federal Court held that these statements inspired confidence. The confidence gained in this way is lost in a legally relevant manner, because IGR did not observe Swissair standards in their professional behaviour, which should have caused Swissair to intervene. As Swissair did not intervene, the Federal Court ruled that Swissair was to be held liable as a result of “general principles of liability arising from culpa in contrahendo”. The key to this decision is not the legal principle of culpa in contrahendo. It is only possible to understand the decision by looking at what happened outside the legal system: the emergence of a specific order of expectations in the economy. Over the course of several years, these expectations have been molded so that the independence of a subsidiary from its parent from the point of view of assets has been put into a different perspective. Parent companies are now expected to vouch for their dependent subsidiaries to a greater extent, the greater the subsidiary's advertising affiliation to the group becomes. This is nothing else than a social norm, which does not apply for legal purposes, but rather for sociological purposes (it has been stabilised in the economy counter-factually). It is this social norm that has been absorbed by the Federal Court and transformed into a legal norm through legal morphogenesis.” (Marc Amstutz, *The Letter of the Law: Legal Reasoning in a Societal Perspective,* 10 German L.J. 361 (2009) p. 378) [↑](#footnote-ref-336)
337. Okutan, p. 102. [↑](#footnote-ref-337)
338. Roberto/Widmer, p.216. [↑](#footnote-ref-338)
339. “In order for a mother company to incur a liability vis-à-vis a creditor of a daughter company, the mother company must make a declaration of intent which supports the daughter company with respect to the daughter company’s business partner, which opens the way for entering into the contract, and which “provides comfort” to such a third party or, at the very least, it must engage in acts and evince attitudes which one, on the basis of life experiences, imply such as statement. There is no requirement that such a statement of intent be in the form of a guarantee agreement or a surety declaration.” (Tekinalp, Liability for Breach of Trust, p.1443) [↑](#footnote-ref-339)
340. Okutan, p. 102. [↑](#footnote-ref-340)
341. Okutan, p.103. [↑](#footnote-ref-341)
342. Gul Okutan Nilsson*, Sirketler Toplulugunda Guvenden Dogan Sorumluluk*, Galatasaray Universitesi Hukuk Fakultesi Dergisi 2013/2 (2013), at 47. [↑](#footnote-ref-342)
343. Hofstetter, p. 582. [↑](#footnote-ref-343)
344. Okutan, p.97. [↑](#footnote-ref-344)
345. Turgut Cankorel*, Shareholder Fiduciary Duties: A Review of Turkey’s New “Group of Compaies” Regime in the Light of Delaware Fiduciary Duty Law*, The Turkish Commercial Law Review, Vol. 1 Issue. 1 February 2015 (2015), at 64. [↑](#footnote-ref-345)
346. Article 105(1): “A corporate group, in the context of Article 195(4) of the statute, consists of at least two subsidiary companies that are directly or indirectly bound to another company. A corporate group, in terms of Article 195(5) of the statute, also forms when at least two subsidiary companies are directly or indirectly bound to an entity, and that entity is regarded as the controller of the group. The controller is regarded as the parent, and the subsidiaries are regarded as the daughter companies.” [↑](#footnote-ref-346)
347. While a court can stick to this interpretation, it might also rule that, claiming this is a secondary legislation and it mentions something that the statute does not explicitly says, one controller and one subsidiary is sufficient for the formation of a corporate group. Still, there is no court decision as of this date which interprets the provisions of the law of corporate groups, so the interpretation that the secondary legislation provides is in effect. [↑](#footnote-ref-347)
348. See, Chapter 2.2. [↑](#footnote-ref-348)
349. Walde, p. 501. [↑](#footnote-ref-349)
350. “Control should not arise from coincidences and be built on a certain basis.” (Gul Okutan Nilsson, *Turk Ticaret Kanunu Tasarisi’na Gore Sirketler Toplulugu Hukuku* 139 (2009)) [↑](#footnote-ref-350)
351. Okutan, Turk Ticaret Kanunu Tasari, p. 250. [↑](#footnote-ref-351)
352. See, Chapter 4.4. [↑](#footnote-ref-352)
353. For example, in the context of investor activists, commentators note that investor activists want companies to disclose how they spend corporate treasury money on politics not only because this is their money, but also because of their generally‐held belief that political spending can pose risks to shareholder value, but majority of the companies that appear to spend from their treasuries do not report to investors on this spending (See generally, Heidi Welsh & Robin Young, Corporate Governance of Political Expenditures: 2011 Benchmark Report on S&P 500 Companies, Sustainable Investments Institute (Si2) 33-34 (2011), http:// www.irrcinstitute.org/pdf/ Political\_Spending\_Report\_Nov\_10\_2011.pdf, Last visited: 10/10/2016). [↑](#footnote-ref-353)
354. See, Chapter 5.3. [↑](#footnote-ref-354)
355. Aytac, p.43. [↑](#footnote-ref-355)
356. See, Chapter 2.2. [↑](#footnote-ref-356)
357. For example, a similar authority is also given under Article 96, but this provision is focused on violations of the capital market institutions, which are defined as; investment firms, collective investment schemes, independent audit firms, appraisal firms and credit rating agencies, portfolio management companies, mortgage finance institutions, housing finance and asset finance funds, asset leasing companies, central clearing institution, central depository instutiton, trade repositories, and other institutions determined by the CMB (Article 35); thus not all publicly traded corporations- but only specific ones- are subject to this article, so the article is beyond the scope of this study. [↑](#footnote-ref-357)
358. See generally, Caglar Manavgat, *Sermaye Piyasasi Kanunu’nun 46.1.C. Hukmu Cercevesinde Sermaye Piyasasi Kurulu’nun Hukuka Aykiriligin Tespiti veya Iptal Davasi Acma Yetkisinin Kapsami*, 27 Banka Huk. Dergisi 43 (2011). [↑](#footnote-ref-358)
359. Manavgat, Sermaye Piyasasi Kanunu, p. 49. [↑](#footnote-ref-359)
360. See, Sahin, p. 298, opining that several enforcement provisions can be used to take measures against any substantial loss that a corporation has. [↑](#footnote-ref-360)
361. In this regards, in U.S. law, a court held the following: “Indeed, the Commission has a unique obligation to consider the effect of a new rule upon “efficiency, competition, and capital formation,” 15 U.S.C. §§ 78c(f), 78w(a)(2), 80a–2(c), and its failure to “apprise itself —and hence the public and the Congress—of the economic consequences of a proposed regulation” makes promulgation of the rule arbitrary and capricious and not in accordance with law.” (Business Roundtable v. SEC, 647 F.3d 1144 (2011) [↑](#footnote-ref-361)
362. In Pryor v. Municipal Court, 25 Cal.3d 238 (1979), the court expressed the problems associated with vague statutes as follows: “…vague statutory language also creates the danger that police, prosecutors, judges and juries will lack sufficient standards to reach their decisions, thus opening the door to arbitrary or discriminatory enforcement of the law.” [↑](#footnote-ref-362)
363. For the concerns regarding legal commands’ promulgation as rules and standards, see generally; Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L.J. 557 (1992). [↑](#footnote-ref-363)
364. Stephen A. Smith, “*The Reasonable Expectations of the Parties”: An Unhelpful Concept,* 48 Can. Bus. L.J. 366 (2009), p. 367. [↑](#footnote-ref-364)
365. Bailey H. Kuklin, *The Plausibility of Legally Protecting Reasonable Expectations*, 32 Val. U. L. Rev. 19, p.28. Smith, at 368: “As a matter of ordinary language, however, ‘the reasonable expectations of the parties” could mean different things. ‘Reasonable’ could mean ‘rational’…or ‘normal’…or ‘moral’…and no doubt many other things as well. The ‘expectations of the parties’ is equally ambiguous.” [↑](#footnote-ref-365)
366. Westfair Foods Ltd. V. Watt, 1991 ABCA 122, Karens JA. [↑](#footnote-ref-366)
367. The same standard is also used in different contexts of the U.S. corporate law, separate from the oppression case. For example, in Elliott Associates, L.P. v. Avatex Corp. 715 A.2d 843 (1998), the Delaware court expressed that the reasonable expectations standard can be used to determine the rights of preferred shareholders if there is ambiguity in the contract. [↑](#footnote-ref-367)
368. Stephen J. Ware, *A Critique of the Reasonable Expectations Doctrine*, University of Chicago Law Review, Vol. 56 Issue 4 (1989), p. 1466. [↑](#footnote-ref-368)
369. W. David Slawson, *Binding Promises: The Late 20th-Century Reformation of Contract Law* 73 (1996). [↑](#footnote-ref-369)
370. Maya Sigron, *Legitimate Expectations Under Article 1 of Protocol No.1 to the European Convention on Human Rights* 44 (2014). [↑](#footnote-ref-370)
371. Bontempo v. Lare, 444 Md. 344 (2015): “…the ‘reasonable expectations’ doctrine is the test for oppressive conduct…” [↑](#footnote-ref-371)
372. John E. Davidian, *Corporate Dissolution in New York: Liberalizing the Rights of Minority Shareholders*, St. John’s Law Review: Vol. 56 Iss. 1, Article 2, p. 49 and 59. [↑](#footnote-ref-372)
373. The “reasonable expectations” standard is only one of the three standards that the courts use to determine whether an oppressive conduct has occurred or not (Moll, Dividend Policy, p. 853). [↑](#footnote-ref-373)
374. F. H. O’Neal, Squeeze- Outs of Minority Shareholders, 1975, p. 525. [↑](#footnote-ref-374)
375. See generally: Allen B. Afterman, *Statutory Protection for Oppressed Minority Shareholders: A Model for Reform*, 55 VA. L. REV. 1043 (1969) [↑](#footnote-ref-375)
376. 2 All E.R. [1972] 492, 2 W.L.R. 1289: “…are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure.” [↑](#footnote-ref-376)
377. 167 N.J.Super. 141 (1979) p. 155: “The special circumstances, arrangements and personal relationships that frequently underly the formation of close corporations generate certain expectations among the shareholders concerning their respective roles in corporate affairs, including management and earnings. These expectations preclude the drawing of any conclusions about the impact of a particular course of corporate conduct on a shareholder without taking into consideration the role that he is expected to play. Accordingly, a court must determine initially the understanding of the parties in this regard. Armed with this information, the court can then decide whether the controlling shareholders have acted in a fashion that is contrary to this understanding or in the language of the statute, ‘have acted oppressively toward one or more minority shareholders.’” [↑](#footnote-ref-377)
378. Cynthia S. Grandfield, *The Reasonable Expectations of Minority Shareholders in Closely Held Corporations: The Morality of Small Businesses*, 14 DePaul Bus. L.J. 381 (2002) at.387. [↑](#footnote-ref-378)
379. Harry J. Haynsworth, *The Effectivesness of Involuntary Dissolution Suits as a Remedy for Close Corporation Dissension,* 35 Clev. St. L. Rev. 25 (1987), <http://engagedscholarship.csuohio.edu/clevstlrev/vol35/iss1/5> (Last visited: 10/10/2016) at 37. [↑](#footnote-ref-379)
380. Brian R. Cheffins, *An Economic Analysis of the Oppression Remedy: Working towards a More Coherent Picture of Corporate Law*, 40 U.T.L.J. 775, at 782- 783; “Protecting ‘reasonable expectations’ has the ring of contract law…” (James D. Cox, *Corporate Law and the Limits of Private Ordering*, 93 Wash. U.L. Rev. 257 (2015) at 267) [↑](#footnote-ref-380)
381. Benjamin Means, *The Vacuity of Wilkes*, 33 W. New Eng. L. Rev. 433 (2011) at 464. [↑](#footnote-ref-381)
382. Terry A. O’Neill, p. 691. [↑](#footnote-ref-382)
383. Cheffins, p. 785. [↑](#footnote-ref-383)
384. Terry A. O’Neill, Self- Interest and Concern for Others in the Owner- Managed Firm: A Suggested Approach to Dissolution and Fiduciary Obligation in Close Corporations, 22 Seton Hall L. Rev. 646, p.659. [↑](#footnote-ref-384)
385. Benjamin Means, A Contractual Approach to Shareholder Oppression Law, 79 Fordham L. Rev. 1161 (2010), p.1187. [↑](#footnote-ref-385)
386. Means, A Contractual Approach, p. 1192- 1193. [↑](#footnote-ref-386)
387. Terry A. O’Neill, Self- Interest and Concern for Others in the Owner- Managed Firm: A Suggested Approach to Dissolution and Fiduciary Obligation in Close Corporations, 22 Seton Hall L. Rev. 646, p.659. [↑](#footnote-ref-387)
388. Means, A Contractual Approach, p. 1194. [↑](#footnote-ref-388)
389. “The view of the business entity as a “nexus of contracts” was conceptually born as a result of the avid acceptance tht the law and economics theory found within business law.” (Mary- Hunter Morris, *Only “The Punctilo” If I Say So: How Contactual Limitations on Fiduciary Duties Deny Protection to Victims of Oppressive Freeze- outs Within Private Business Entities*, 10 Duq. Bus. L.J. 73 (2008), at 77) [↑](#footnote-ref-389)
390. Cheffins, p. 792- 793. [↑](#footnote-ref-390)
391. “The precise content of the parties’ declarations and of the contract, respectively, is to be determined according to the rules of interpretation. These rules primarily refer to the parties’ actual will…as it is recognizably, expliticlty or implicitly, expressed in the declarations. If an actual and mutual will of parties concerning a certain issue cannot be derived from the contract, the gap in the contract may be filled by reconstructing the hypothetical will of the parties by complemantary interpretation…This is a method by which the solution to a certain question is extrapolated from the parties’ will concercing other matters. This concept allows the courts to sustain the contract while flexibly adapting it…” (Ewoud Hondius, Hans Christoph Grigoleit, *Unexpected Circumstances in European Contract Law* 60 (2011)) [↑](#footnote-ref-391)
392. Application of Topper, 433 N.Y.S.2d 359 (1980). [↑](#footnote-ref-392)
393. “To create such would oblige a party at the whim of one whose personal interests are served by the conversion of an expectancy to a right. It would permit the rewriting of a contract by a court, without limitation except by what is reasonable for an insured to expect. There is no more reason, logic nor justification to enlarge an insurance policy to match an insured's expectations than to permit the rewriting of any contract, on the same basis.” (Progressive Cas. Ins. Co. V. Marnel, 587 F. Supp. 622 (1983)) [↑](#footnote-ref-393)
394. This notion is underlined in the context of insurance law by a U.S. federal court as follows: “The most likely resort to reasonable expectations by a Connecticut court, and, significantly, that acknowledged to be the majority view, *Insurance Law, supra* at 351, would be as an interpretative tool where the language of a policy is ambiguous…There is logic to a reasonable expectation being used as a construction tool where there is ambiguity in policy language.” (Progressive Cas. Ins. Co. V. Marnel, 587 F. Supp. 622 (1983)) Also, see, Ware (p.1461): “Traditionally, courts interpreting written contracts focused primarily on the contract's language. Consideration of factors beyond the "four corners" of the document was discouraged. Modern courts construing standard form insurance contracts have deviated from this course and begun aiding the insured against the insurer. One of the methods used to tilt insurance disputes in favor of the insured is the ‘reasonable expectations doctrine’…” [↑](#footnote-ref-394)
395. In Elliott Associates, L.P. v. Avatex Corp. 715 A.2d 843 (1998), the Delaware court held that rights distinguishing a preferred stock from common stock must be expressly and clearly stated in the articles of incorporation, and these rights will not be presumed or implied by the court, because the statute requires their explicit expression in the articles of incorporation. In this sense, while the integration clauses in contracts does not effect the court’s authority to imply or presume terms or interpret them accordingly when there is ambiguity (Eagle Industries, Inc. v. DevVilbiss Health Care, Inc., 702 A.2d 1228 (1997)), the Elliot Associates, L.P. v. Avatex Corp. decision shows that a statutory integration clause (i.e. requirement of express statement in articles) limits the courts’ authority to apply the same power of construction. [↑](#footnote-ref-395)
396. Mahoney, p.193. [↑](#footnote-ref-396)
397. Note that while the oppression issue is in most instances theoretically based on a contractual gap (i.e. silence), rather than an ambiguity, there may be circumstances that ambiguity can also be a reason, for example when a shareholders’ agreement is used together with the articles of incorporation to carve out shareholders’ rights. [↑](#footnote-ref-397)
398. SI Management L.P. v. Wininger, 707 A.2d 37 (1998): “A court considering extrinsic evidence assumes that there is some connection between the expectations of contracting parties revealed by that evidence and the way contract terms were articulated by those parties. Therefore, unless extrinsic evidence can speak to the intent of all parties to a contract, it provides an incomplete guide with which to interpret contractual language. Thus, it is proper to consider extrinsic evidence of bilateral negotiations when there is an ambiguous contract that was the product of those negotiations, as in Eagle.” [↑](#footnote-ref-398)
399. “Arguments that seek to deflect judicial remedies upon the grounds that the worth of the minority shareholder's investment has not diminished or has even increased are countered by BCL 1111(b)(3) which specifically directs that ‘dissolution is not to be denied merely because the corporate business has been or could be conducted at a profit.’… The Court may determine the understanding of the parties as to the role the complaining shareholder is expected to play from agreements and evidence submitted. The Court can then decide whether the controlling shareholders have acted contrary to that understanding or, in the language of the statute, ‘have been guilty of oppressive actions toward the complaining shareholders.’” (Application of Topper, 107 Misc.2d 25 (1980)) [↑](#footnote-ref-399)
400. Brenner v. Berkowitz, 134 N.J. 488 (1993) [↑](#footnote-ref-400)
401. In U.S. law, as only corporations are allowed to issue shares to public and be publicly traded via a stock exchange (However, ownership interests (units) of partnerships and limited liability companies can also be publicly traded. In terms of U.S. tax law, if interests in any partnership are traded on an established securities market or readily tradable on a secondary market, this entity is called a “publicly traded partnership” (IRC Sec. 7704 (b)). In terms of U.S. business enterprise law; (1) these entities are called “master limited partnership”, (2) they are established as “limited partnerships” under state law, and (3) investors buying its units become a “limited partner” and be the member of the partnership along with other “general partner(s)” (MLP Ass., <http://www.mlpassociation.org/mlp-101/> (Last visited: 10/10/2015)). “Master limited partnership” term sometimes also refer to publicly traded limited liability companies, if that entity had chosen to be taxed as a partnership (MLP Ass. <http://www.mlpassociation.org/public-policy/mlp-laws-regulations/definition-of-publicly-traded-partnership/> (10/10/2015)). Both publicly traded partnership and limited liability company can issue membership interests (these are not regarded as shares in corporate law) and these are not always accepted as securities (For example, California corporate law does not accept membership interests in a limited liability company as a “security”, if it can be proved that all of the company’s members are actively engaged as managers (Cal. Corp. Code Sec. 25019). For more, see: Larry E. Ribstein, *Unincorporated Business Entities* 282, 292 (1996)). Therefore, corporation remains the only entity, which can issue shares publicly traded), a business entity must incorporate before going public (Robinson, Eppler, *Going Public*, Securities Law Series 5 (Vol. 1, 1978)). Although the federal government could have provided a corporate law for publicly traded corporations (U.S. Constitution’s “Commerce Clause” allows Congress to preempt state law involving publicly traded corporations (Arthur R. Pinto, *“The United States”,* Public Companies and the Role of Shareholders 16, Ed. Sabrina Bruno/Eugenio Ruggiero (2011))), there is no general federal corporation statute and states have the authority to govern the internal affairs of corporations incorporated in their state (CTS Corp. v. Dynamics Corp., 481 U.S. 69 (1987) and Ellen S. Podgor, John F. Cooper, *Overview of U.S. Law* 264 (2009). A Delaware court explains “internal affairs doctrine” as follows: “Internal corporate affairs involve those matters which are peculiar to the relationships among or between the corporation and its current officers, directors and shareholders. The internal affairs doctrine requires that the law of the state of incorporation should determine issues relating to internal corporate affairs” (McDermott Inc. v. Lewis, 531 A.2d 206 (Del. 1987)). In U.S., having a federal corporate statute is considered “politically unrealistic” (Balotti/Finkelstein, p. G-15)). This being said, corporate law seems to vary little from state to state (Brett H. McDonnell, *Two Cheers for Corporate Law Federalism*, 30 J. Corp. L. 99 (2005) at 109) and federal law plays a significant role in the functioning of internal governance of corporations (Lucian Arye Bebchuk*, Federalism and the Corporation: Desirable Limits on State Competititon in Corporate Law*, 105 Harv. L. Rev. 1435 (1992) at 1142). Law that governs corporations is to a large extent statutory (Ribstein, p.1); in federal level, securities laws (namely, Securities Act of 1933 and Securities Exchange Act of 1934) and tax law (In addition to these federal regulations; Williams Act, Foreign Corrup Practices Act, Sarbanes- Oxley Act, and Dodd- Frank Act are listed among the most significant federal intrusions (Fisch, p. 739)), and in state level, Delaware’s corporate law (It is said that Delaware’s real competitor is the federal government, rather than other states (Fisch, p.738). Delaware’s constitutional amendment allowing the SEC to certify questions to the Delaware Supreme Court is given as an interesting example of the outcome of this competition: “...the SEC certification procedure was unprecedented, reflecting another example of Delaware’s innovation in its lawmaking structure…Delaware’s adoption of the new certification procedure can be understood as a from of reverse federalization…Certification also expands the scope of authoritative resolutins of Delaware law, allowing for both greate predictability and increased responsiveness to problematic legal issues.” (Fisch, p.772)), are the leading sources. Another highly regarded source by both States and practitioners is the Model Business Corporation Act (MBCA) of the American Bar Association (Arthur D. Wolfe, Frederick J. Naffizger, *The Law of American Business Organizations: An Environmental Approach* 281 (1984). “A majority of states within the U.S. have largely adopted a version of Model Business Corporation Act (MBCA), Thus, when a Corporation is choosing whether to incirporate in is home state or in Delaware, it is usually choosing between a version of the MBCA and the Delaware General Corporation Law.” (Brett H. McDonnell, p.129)). In addition to these, stock exchange regulations and state securities laws (blue- sky laws), which vary widely from state to state (but most are similar to the Uniform Securities Act) (William Burnham, *Introduction to the Law and Legal System of the Unitd States* 604 (2011)), are also regulating these corporations (Note that corporations listed on exchanges like NYSE are subject to a limited scope of state securities laws, as federal securities laws provide a vast exemption scope for them (Securities Act of 1933, Sec. 18)). There are also other specific laws like tax, banking and bankruptcy (insolvency) law, which effect corporate life, but they will not be mentioned unless it is relevant to this study). Similarly, instead of defining the “corporation” or types of corporations, several statutes, like Delaware’s, define the “closely held corporation” (James D. Cox, Thomas Lee Hazen, *Corporation Law* 13 (2012)). According to Title 8 Chapter 1 Section 341 of the Delaware Code, a corporation can choose to be a “close corporation” if it has no more than 30 shareholders (exclusive of treasury shares), has at least one transfer restrictions in all class of shares, promises to make no “public offering” and if it has other traits stated in the related subchapter. Thus, Delaware law does not make a distinction between publicly traded and not traded corporations, but makes a distinction between corporations and close corporations. In this sense, for Delaware, it can be said that a “normal” corporation is one that is held by many people (at least more than 30) and the State’s law holds the view that “every corporation is deemed to be ‘public’ one day” (Similarly, Harry G. Henn states that corporation statutes were “not drafted with particular concern for the close corporation” (Henn, p. 404)). [↑](#footnote-ref-401)
402. Terry A. O’Neill, p. 695. [↑](#footnote-ref-402)
403. Brian R. Cheffins, *Company Law: Theory, Structure, and Operation* 470 (1997). [↑](#footnote-ref-403)
404. Cheffins, Company Law, p. 467. [↑](#footnote-ref-404)
405. Cheffins, Company Law, p.66. [↑](#footnote-ref-405)
406. Professor Cheffins illustrates an example of this in his book by noting the following incident (Cheffins, Company Law, p. 467): Hollinger, the Canadian holding company controlled by Conrad Black which controlled Telegraph, sold shares to investors and reduced its holding from 66 per cent to 57 per cent in 1994. Though the documentation pertaining to the sale said nothing about the Telegraph’s pricing policy, Mr. Black gave the impression that he put profit before circulation, but after the sale Mr. Black changed the track and joined in a price war with the Times, and this caused a major fall in the share prices of the corporation, surprising its new purchasers (for details, see: <http://www.independent.co.uk/news/business/cazenove-quits-as-broker...egraph-group-leading-city-firm-severs-link-with-conrad-1410892.html>, Last visited: 02/11/2016). Note that this conduct might be actionable under U.S. law, if a claim can be construed on the Sec. 10(b) of Securities Exchange Act of 1934 and Rule 10b- 5 promulgated under this section. However, it must be noted that this rule does not protect investors from “pure” corporate mismanagement, see, Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977): “But we do not think it would have chosen this "term of art" if it had meant to bring within the scope of § 10(b) instances of corporate mismanagement such as this, in which the essence of the complaint is that shareholders were treated unfairly by a fiduciary.” [↑](#footnote-ref-406)
407. For example, in Elliott Associates, L.P. v. Avatex Corp. 715 A.2d 843 (1998), the Delaware court expressed that the reasonable expectations standard can be used to determine the rights of preferred shareholders if there is ambiguity in the contract. [↑](#footnote-ref-407)
408. See generally, Kaiser Aluminum Corp. v. Matheson, 681 A.2d 392 (1996) and Bank of New York Mellon v. Commerzbank Capital Funding Trust II, 65 A.3d 539 (2013) (“The ‘reasonable expectation of investors’ principle is a specialized application of the contra proferentem doctrine.”). For the connection between contra proferentem and reasonable expectations theory in a wider context, see, David J. Seno, *The Doctrine of Reasonable Expectations in Insurance Law: What to Expect in Wisconsin*, 85 Marq. L. Rev. 859 (2002). [↑](#footnote-ref-408)
409. In Turkish law, Moroglu states that although the articles of incorporation initially represents a partnership agreement between the founders, once the incorporation takes place and the articles of incorporation is filed to appropriate state authority, the terms of the articles of incorporation tuns into terms that binds everyone who has a relationship with the corporation, thus this nature requires the terms of this document to be interpreted as objective rules of law in general, not as terms that only binds the incorporaters; hence the terms can no more be interpreted in a way that investigates the incorporaters purpose (Erdogan Moroglu, *Anonim Ortaklik Anasozlesmesi ve Hukuki Niteligi, Makaleler II* 19, 20 (2006)). On the other hand, the general rule laid down by Delaware courts is that courts look to general principles of contract construction in construing certificates of incorporation in general (Benchmark Capital Partners IV, L.P. v. Vague, 2002 WL 1732423 (2002)). [↑](#footnote-ref-409)
410. “…some courts and commentators analogize close corporation shareholders to partners…” (Art, p.384). [↑](#footnote-ref-410)
411. Jaffe Commercial Finance Co. v. Harris, 119 III.App.3d 136 (1983): “By definition, a close corporation is one in which the stock is held in a few hands, or in a few familis, and wherein it is not at all, or only rarely, bought or sold.” [↑](#footnote-ref-411)
412. See, Bank of New York Mellon v. Commerzbank Capital Funding Trust II, 65 A.3d 539 (2013), applying the reasonable expectations theory for the benefit of the holders of public securities. [↑](#footnote-ref-412)
413. “For publicly traded corporations, there is an obvious difficulty in determining whether the shareholders got what they bargained for” (Terry A. O’Neill, p.658). [↑](#footnote-ref-413)
414. Rather than making a simple retail – institutional investor distinction, the following can be stated: “Investors can be divided into four major types: (1) the small individual investor…, (2) the large individual investor and family investor, (3) the institutional investor, (4) the program trader.” (John H. Matheson, Brent A. Olson, *Publicly Traded Corporations, Governance, Operation & Regulation* Chap. 2- Page 10 (1995)) [↑](#footnote-ref-414)
415. Terry A. O’Neill*, Self- Interest and Concern For Others in the Owner- Managed Firm: A Suggested Approach to Dissolution and Fiduciary Obligation in Close Corporations*, 22 Seton Hall L. Rev. 646 at 664. [↑](#footnote-ref-415)
416. Terry A. O’Neill, p. 663. [↑](#footnote-ref-416)
417. Exadaktilos v. Cinnaminson Realty Co., Inc., 167 N.J. Super. 141 (1979): “Large corporations are usually formed as a means of attracting capital through the sale of stock to investors, with no expectation of participation in corporate management or employment. Profit is expected through the payment of dividends or sale of stock at an appreciated value.”. [↑](#footnote-ref-417)
418. Terry A. O’Neill, p. 664. [↑](#footnote-ref-418)
419. Terry A. O’Neill uses this analogy for managers in publicly traded corporations as follows: “Thus, shareholders and managers in the publicly traded corporation are not directly connected in relationship, but rather are linked through the medium of the market. In such a context, separation and self-interest will predominate. A sense of responsibility on the part of the managers is present, but it is not responsibility in the sense of responsiveness to the needs of others; it is, rather, a personal commitment to contractual obligation.” (Terry A. O’Neill, p. 667) [↑](#footnote-ref-419)
420. Moll, Shareholder Oppression & Reasonable Expectations: Of Change, Gifts, and Inheritances, p.766. [↑](#footnote-ref-420)
421. Cheffins, Company Law, p. 53 and 63. [↑](#footnote-ref-421)
422. Moll, Shareholder Oppression & Reasonable Expectations: Of Change, Gifts, and Inheritances, p.767. [↑](#footnote-ref-422)
423. Argo Data Resource Corp. v. Shagrithaya, 380 S.W.3d 249 (2012): “Specific expectations require proof of specific facts giving rise to the expectation in a particular case and a showing that the expectation was reasonable under the circumstances of the case as well as central to the minority shareholder's decision to join the venture. Examples of possible specific reasonable expectations are employment in the corporation or a say in management. In contrast, general reasonable expectations are expectations that arise from the mere status of being a shareholder. These expectations belong to all shareholders and, absent evidence to the contrary, are both reasonable and central to the decision to invest in the corporation. Examples of general reasonable expectations are the right to proportionate participation in the earnings of the company, the right to any stock appreciation, the right (with proper purpose) to inspect corporate records, and the right to vote if the stock has voting rights.” [↑](#footnote-ref-423)
424. “Certainly the interest of the stockholder is a capital interest, and his certificates of stock are but the evidence of it…They show… that he is entitled to a corresponding interest proportionate to the whole, entitled to have the property and business of the company devoted during the corporate existence to attainment of the common objects…” (Eisner v. Macomber, 252 U.S. 189 (1920)) [↑](#footnote-ref-424)
425. Terry A. O’Neill states that the business judgment rule can be rationalized by the reasonable expectations theory (Terry A. O’Neill, p. 681). See, Joy v. North, 692 F. 2d 880 (1982): “…shareholders to a very real degree voluntarily undertake the risk of bad business judgment. Investors need not buy stock…Nor need investors buy stock in particular corporations. In the exercise of what is genuinely a free choice, the quality of a firm’s management is often decisive and information is available from professional advisors. Since shareholders can and do select among investments partly on the basis of management, the business judgment rule merely recognizes a certain voluntariness in undertaking the risk of bad business decisions.” [↑](#footnote-ref-425)
426. Boehringer v. Konkel, 404 S. W. 3d 18 (2013). [↑](#footnote-ref-426)
427. For a similar analogy, see, Boilermakers Local 154 Retirement Fund v. Chevron Corp., 73 A.3d 934 (2013): “…stockholders have assented to a contractual framework established by DGCL and the certificates of incorporation that explicitly recognizes that stockholders will be bound by bylaws adopted unilaterally by their boards. Under that clear contractual framework, the stockholders assent to not having ti assent to board- adopted bylaws.” [↑](#footnote-ref-427)
428. TCC Article 340: “The articles of incorporation cannot deviate from the provisions of this Statute unless the Statute explicitly permits the deviation...”. [↑](#footnote-ref-428)
429. Schaad v. Hotel Easton Co., 369 Pa. 486 (1952): “In the present instance the contract was embodied in the by-laws of the company, the resolutions under which the stock was issued, and the provisions set forth in the stock certificates themselves; also entering into the contract were the statutes then in existence, for ‘no principle is more firmly established than that the laws which were in force at the time and place of the making of the contract enter into its obligation with the same effect as if expressly incorporated in its terms'.” [↑](#footnote-ref-429)
430. Chittur states the following: “Investment in a public corporation carries with ait an implicit power of attorney, permitting management to use the money invested for corporate purposes. This grant the close corporation does not involve same “standard form” contract, or the consequential grant of power. This grant is made on the clear understanding that it will not be revoked. Corporation statutes normally prohibit a ‘put option’ on common stock…The close corporation does not involve the same ‘standard form’ contract, or the consequential grant of power.” (Chittur, p. 159). [↑](#footnote-ref-430)
431. Clark, Corporate Law, p.156. “Shareholder expectations are likely to reflect the governing legal regime. If that regime mandates pure- profit mazimization, shareholders will expect pure profit- maximization.” (Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest,* 80 N.Y.U. L. Rev. 733 (2005), at 788). This analogy is stated in other contexts as well, see; Lynn M. LoPucki, Elizabeth Warren, *Secured Credit: A Systems Approach* 718 (2d ed. 1998) (“It is possible to view these expectations as the product of law.... But it may be more useful to view the law as a product of those expectations.”) and Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. Legal Stud. 165 (1974), at 204 (“Rules determine expectations as much as expectations determine rules”). [↑](#footnote-ref-431)
432. Kuklin, p.33-34. [↑](#footnote-ref-432)
433. “Corporations with more than fifty, thirty- five, or even twenty- five shareholders are not as likely to encompass the close relationships creating expectations different from the the expectations envisioned by the statutory norm.” (Thompson, Corporate Dissolution, p. 226). [↑](#footnote-ref-433)
434. Schautteet v. Chester Bank, 707 F.Supp. 885 (1988): “The array of rights possessed by any particular shareholder may well vary from one corporation to the next, because shareholder rights may spring from many sources: (1) the corporations organic documents, (2) agreements between shareholders or beteween the corporation and shareholders, (3) statutory corporation law, and (4) decisional law governing the operation of corporations.” [↑](#footnote-ref-434)
435. This notion is also accepted in English law for the determination of members’ interests under the unfair prejudicial conduct, which is the equivalent concept to oppression in the U.S.: “…there is no easy checklist of interests which are universally applicable to all members. Instead, one can merely identify a number of different sources. The first and most obvious source will be the shareholders’ personal rights. These will include relevant provisions from the company’s Mem~randuma~nd~ Articles of Association, thus repeating the members’ own constitutional contract. Such rights will also be drawn from provisions in the Companies Act 1985, thereby incorporating terms which, whether or not ‘agreed to,’ are mandatory already.” (Riley, p.793) [↑](#footnote-ref-435)
436. Terry A. O’Neill, p.681. [↑](#footnote-ref-436)
437. Okutan opines that the rules on the basic structure of the corporation, such as limited liability, represent rules concerning public policy and cannot be regarded as components of the shareholders’ rights (Okutan, Shareholders’ Agreement, p. 119). [↑](#footnote-ref-437)
438. Michaud v. Morris, 603 So. 2d 886 (1992). [↑](#footnote-ref-438)
439. Boehringer v. Konkel, 404 S.W. 3d 18 (2013). [↑](#footnote-ref-439)
440. Argo Data Resource Corp. v. Shagrithaya, 380 S.W.3d 249 (2012). [↑](#footnote-ref-440)
441. Christos Ravanides, *Arbitration Clauses in Public Company Charters: An Expansion of the Adr Elysian Fields or A Descent Into Hades,* 18 Am. Rev. Int’l Arb. 371 (2007), at 412. [↑](#footnote-ref-441)
442. After all Del. Gen. Corp. L. Sec. 141(a) has the following language: “If any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation”. In Zion v. Kurtz, 50 N.Y.2d 92 (1980), the court, applying Delaware law, upheld a provision of a shareholders’ agreement that intervenes with management function of the directors, even though all formal steps required by the statute- amending articles of incorporation- have not been taken. In addition to this, the expectation regarding board’s management power will only be a “reasonable” one in Delaware if the corporation is one that did not elect the “close corporation” status and became one that is permitted to be managed by its stockholders under its articles of incorporation (Del. Code. Tit. 8 Sec. 351: “The certificate of incorporation of a close corporation may provide that the business of the corporation shall be managed by the stockholders of the corporation rather than by a board of directors.”). [↑](#footnote-ref-442)
443. “…it is agreed that the rights of a shareholder rest on contract; and if the contract, as expressed in the charter, the by- laws, or a statute, plainly requires the construction that in certain circumstances dividends must be paid, the court will, as it must, adopt that construction and establish the obligation of the directors to declare a dividend, for there is no positive rule of law forbidding such a provision” (Crocker v. Waltham Watch Co., 315 Mass. 397 (1944)). [↑](#footnote-ref-443)
444. “The most important pecuniary right that a shareholder of a corporation has is the right to dividend. This right, in a broader meaning, in the first place, represents the shareholder’s right to have the corporation work to procure profit” (Veliye Yanli*, Anonim Ortakliklarda Karin Tamamen Devrine Iliskin Bir Tasarruf Yapilabilir mi?,* IHFM C. LV – S 4 (1997), at 201). A similar notion is also accepted in the U.S. law, see: Eisner v. Macomber, 252 U.S. 189 (1920): “They show that he or his assignors, immediate or remote, have contributed capital to the enterprise, that he is entitled to a corresponding interest proportionate to the whole, entitled to have the property and business of the company devoted during the corporate existence to attainment of the common objects…” [↑](#footnote-ref-444)
445. Accordingly, it is stated that a corporate policy, materialized in a general assembly resolution, to not to declare any dividends or only in small amounts will be void (Unal Tekinalp, *Yeni Anonim ve Limited Ortakliklar Hukukuku ile Tek Kisi Ortakliginin Esaslari* 203 (2011)). [↑](#footnote-ref-445)
446. The conventional approach to protect the minority from the majority’s oppressive acts is to request annulment of general assembly resolutions based on the duty of good faith (İsmail Doğanay, *Türk Ticaret Kanunu Şerhi C. 1* (1990), s. 990).The same petition, using the same grounds, can be presented to the court for the resolutions passed by the board of directors pursuant to Article 460 of TCC in corporations elected to have the authorized capital system and in publicly traded corporations that the board of directors uses the power to declare dividend in advance pursuant to Article 20 (2) of the CML. [↑](#footnote-ref-446)
447. For a detailed analysis of this principle, see, Feyzan Hayal Şehirali Çelik, *TTK m. 408.2 Dışında Düzenlenen Genel Kurul Yetilerinin Devredilmezliği Kural mı, İstisna mı?*, Prof. Dr. Hikmet Sami Türk’e Armağan (2017), p. 643- 667. [↑](#footnote-ref-447)
448. Brian M. McCall, *The Corporaton as Imperfect Society*, 36 Del. J. Corp. L. 509 (2011) at 535. Baltimore & P.R. Co. v. Fifth Baptist Church, 108 U.S. 317 (1883): “Private corporations are but associations of individuals united for some common purpose, and permitted by the law to use a common name, and to change its members without a dissolution of the association.” [↑](#footnote-ref-448)
449. Geddes v. Anaconda Copper Mining Co., 254 U.S. 590 (1921). [↑](#footnote-ref-449)
450. As noted in the seminal case U.S. case, Dodge v. Ford Motor Co. 204 Mich. 459 (1919), “A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed fort hat end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself…”. [↑](#footnote-ref-450)
451. McCall, p.545. [↑](#footnote-ref-451)
452. Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990). [↑](#footnote-ref-452)
453. “People who invest in business corporations, as opposed to contributors to ideological non- profits of the sort that Citizens United itself represented, don’t typically intend thereby to authorize the managers and directors of those corporations to use the money invested in their businesses to help some candidates win election to federal office or to hinder the efforts of others vying for positions of federal authority. Talking about a business corporation as merely another way that individuals might choose to organize their association with one another to pursue their common expressive aims is worse than unrealistic; it obscures the very real injustice and distortion entailed in the phenomenon of some people using other people’s money to support candidates they have made no decision to support, or to oppose candidates they have made no decision to oppose.” (Laurence H. Tribe, “*Laurence Tribe on Citizens United v. Federal Election Commission”*, Harvard Law Today January 25, 2010, <http://today.law.harvard.edu/laurence-tribe-on-citizens-united-v-federal-election-commission/>, Last visited: 10/10/2016) [↑](#footnote-ref-453)
454. Yargitay 11. H.D. E. 2005/10060 K. 2006/13738 T. 21/12/2006. [↑](#footnote-ref-454)
455. Yanli, Anonim Ortakliklarda Karin Tamamen, p.210. [↑](#footnote-ref-455)
456. Poroy/Tekinalp/Camoglu, p.212. [↑](#footnote-ref-456)
457. Sevilay Uzunallı, Anonim Şirkette İşletme Konusu (2013), p. 7. [↑](#footnote-ref-457)
458. Pulasli, p.826. [↑](#footnote-ref-458)
459. Consitution of the Republic of Turkey, Article 48(2): “The State shall take measures to ensure that private enterprises operate in accordance with national economic requiremnts and social objectvies and in security and stability.” [↑](#footnote-ref-459)
460. Commentators express that the “economic purpose” requirement reflects legislators’ view that the corporation should play an active role in the economic life and act as one of the most important vehicles helping accumulation of capital (Gul Okutan Nilsson, *Anonim Ortakliklarda Paysahipleri Sozlesmeleri* 69 (2001)). [↑](#footnote-ref-460)
461. See, Uzunallı, p. 143. [↑](#footnote-ref-461)
462. Miner v. Belle Isle Ice Co., 17 L.R.A. 412 (1892): “…that the ultimate object of every ordinary trading corporation is the pecuniary gain of its stockholders; that it is for this purpose, and no other, that the capital has been advanced…” [↑](#footnote-ref-462)
463. Alan R. Palmiter, Frank Partnoy, *Corporations: A Contemporary Approach* 678 (2nd Ed., 2014). See generally; Lyman Johnson, David Millon, *Corporate Law after Hobby Lobby*, Business Lawyer 70.1. (Nov. 2014). [↑](#footnote-ref-463)
464. “Shareholder primacy permeates state corporate codes and case law in the form of fiduciary duties owed by corporate managers to the corporation” (Kevin V. Tu, *Socially Conscious Corporations and Shareholder Profit*, 84 Geo. Wash. L. Rev. 121 (2016), at 132). [↑](#footnote-ref-464)
465. Palmiter/Partnoy, P. 679. [↑](#footnote-ref-465)
466. D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. Corp. L. 277 (1998) at 278. [↑](#footnote-ref-466)
467. McCall, p.521. [↑](#footnote-ref-467)
468. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 (2010). [↑](#footnote-ref-468)
469. Del. Code Title 8 Chapter 1 Sec. 361. [↑](#footnote-ref-469)
470. A.P. Smith Mfg. Co. v. Barlow, 13 N.J. 145 (1953): “On the contrary, it was made to a preeminent institution of higher learning, was modest in amount and well within the limitations imposed by the statutory enactments, and was voluntarily made in the reasonable belief that it would aid the public welfare and advance the interests of the plaintiff as a private corporation and as part of the community in which it operates.” [↑](#footnote-ref-470)
471. Colgate v. Disthene Group, 85 Va. Cir. 286 (2012): “There is no per se duty to maximize shareholder value in the short term.” Moreover, U.S. Supreme Court recently even legitimazed donations or any other policy which does not have a connection with the company’s long- run profitability (Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014)), and opined that any abuse arising from this evaluation can be controlled by the “procedures of corporate democracy” (Citizens United v. FEC 588 U.S. 310 (2010)). However, scholars underline the negative affects of this constitutional evaluation can have on corporate law and stated that this recognition can contravene with the corporate purpose of earning money (Robert M. Ackerman, Lance Cole, *Making Corporate Law More Communitarian,* 81 Brook. L. Rev. 895 (2016) at 927). [↑](#footnote-ref-471)
472. For example, TCC Article 523(3) states that even if there is no explicit term in the articles of incorporation, a corporation can form legal reserves to help the formation of associations working for its employee’s benefits and to make other donations. [↑](#footnote-ref-472)
473. Burcak Yildiz, *Sirketlerin Ehliyetine Iliskin Olarak Ozellik Arz Eden Bazi Hukuki Islem ve Sozlesmeler*, Ankara Barosu Dergisi 2006/2 (2006) at 74. Still, there are statutory limitiations concerning donations arising from political campaign finance law. That field of law impose monetary limits to corporation’s political donations to political parties (2820 numbered and 22/04/1983 dated Political Parties Law, Article 66) and bans corporate donations to presidential candidates (6721 numbered and 19/01/2012 dated President Election Law, Article 14(1)), but does not include any measure that tracks concealed (i.e., indirect) donations (Ozlem Celik, *Turk Anayasa Hukukunda Siyasi Partilerin Gelir ve Giderlerinin Mali Denetimi,* <http://hukuk.deu.edu.tr/dosyalar/dergiler/dergimiz-12-ozel/3-kamu/5-ozlemcelik.pdf> (Last visited: 10/10/2016) at1327). [↑](#footnote-ref-473)
474. Communique on Dividends, Article 6(3). [↑](#footnote-ref-474)
475. Yargitay 11. H.D. E. 2005/10060 K. 2006/13738 T. 21/12/2006. [↑](#footnote-ref-475)
476. Quadrant Structured Products Co., Ltd. v. Vertin, 102 A.3d 155 (2014): “…conduct for directors requires that they strive in good faith and on an informed basis to maximize the value of the corporation for the benefit of its residual claimants, the ultimate beneficiaries of the firm's value.’ In a solvent corporation, the residual claimants are the stockholders. Consequently, in a solvent corporation, the standard of conduct requires that directors seek prudently, loyally, and in good faith to “to manage the business of a corporation for the benefit of its shareholder owners.’” [↑](#footnote-ref-476)
477. Eisner v. Macomber, 252 U.S. 189 (1920): “The stockholder has the right to have the assets employed in the enterprise, with the incidental rights mentioned; but, as stockholder, he has no right to withdraw, only the right to persist, subject to the risks of the enterprise, and looking only to dividends for his return.” [↑](#footnote-ref-477)
478. Fix v. Fix Material Co., Inc., 538 S.W.2d 351 (1976). [↑](#footnote-ref-478)
479. Geoffrey Morse, Enid A. Marshall, Richard Morris, *Charlesworth’s Company Law* 585, 586 (13th Ed. 1987). [↑](#footnote-ref-479)
480. See generally; Balotti/Finkelstein, Foreword. [↑](#footnote-ref-480)
481. In Delaware, no corporation can pay dividends except in accordane with the statute (Del. Code Title 8 Sec. 173), and the statute permits dividends to be paid out of surplus or if there is no surplus, out of net profits in the same or preceding year (Del. Code Title 8 Sec. 170). [↑](#footnote-ref-481)
482. Gabelli & Co., Inc. v. Liggett Group Inc., 479 A.2d 276 (1984). [↑](#footnote-ref-482)
483. “With respect to the economic rights, dividends are simply far less significant than the right to sell shares. Because the decision to pay dividends is withi the discretion of the board of directors, the legal ‘right’ to dividends is illusory.” (Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. Davis L. Rev. 407 (2006) at 424). [↑](#footnote-ref-483)
484. Veliye Yanli, *Yeni Ticaret Kanunu ve Anonim Sirketlerde Kar Dagitimi*, BATIDER Issue XXX No.1, Ankara 2014, at 30. In the context of publicly traded corporations, this authority is explicitly underlined in the Article 4(2)(a) of the Dividend Comminique, which states that the “dividend distribution policy” of the corporation should contain information on “whether dividend will be distributed or not, and if so, rates of distribution”. On the other hand, this principle is subject to debate for non- publicly traded corporations (See generally, Yanli, Yeni Ticaret Kanunu), and the authority to freely determine the dividend rates is also limited: For example, Article 7 of the Dividend Comminique states that non- publicly traded corporations’ rate of distribution of dividends cannot be less than twenty percent of the net distributable profits. Also, some courts opine that a non- publicly traded corporation should declare at least five percent of the profits as dividends, when the statutory reserves are filled up (Sayistay 7. D. K. 100 T. 14.4.2016). [↑](#footnote-ref-484)
485. Yargitay 11. HD E. 2012/13234 K. 2014/3514 T. 25/02/2014. [↑](#footnote-ref-485)
486. TCC Article 509(2) states that dividends can be paid out of only net profit and free statutory reserves. It can be said that, by requiring satisfaction of certain conditions for accumulating funds in the reserves, TCC article 523 protects and guarantees shareholders’ right to divindend. For a similar analogy concerning German law, see, Berger, p.714. [↑](#footnote-ref-486)
487. Wabash R. Co. v. Barclay, 280 U.S. 197 (1930): “When a man buys stock instead of bonds he takes a greater risk in the business. No one suggests that he has a right to dividends if there are no net earnings. But theinvestment presupposes that the business is to go on, and thereforeeven if there are net earnings, the holder of stock, preferred as well as common, is entitled to have a dividend declared only out of such part of them as can be applied to dividends consistently with a wise administration of a going concern.” [↑](#footnote-ref-487)
488. Argo Data Resource Corp. v. Shagrithaya, 380 S.W.3d 249 (2012): “Therefore, a shareholder's general reasonable expectations are limited to sharing in the company's earnings through an appreciation in the value of his shares or receiving a proportional share of any dividend the board of directors may choose to issue.” [↑](#footnote-ref-488)
489. Dodge v. Ford Motor Co., 204 Mich. 459 (1919): “If a majority of the shareholders or the directors of a corporation refuse to declare a dividend and distribute profits earned by the company, any shareholder feeling aggrieved may obtain relief in a court of equity…To hold the entire profits merely to enlarge the capacity of the company’s business would defeat their just expectations.”. [↑](#footnote-ref-489)
490. Baker v. Commercial Body Builders, Inc., 264 Or. 614 (1973). [↑](#footnote-ref-490)
491. See, Kemal Bahriyeli, *Kar Payı Ödenmemesi Nedeniyle Anonim Şirketin Haklı Sebeple Feshi*, 11 TAAD 387 (2020). [↑](#footnote-ref-491)
492. A commentator, writing on Australian law, mentions the following; “First, courts have found oppressive conduct where directors of a company take actions which are not in the best interests of that company but which are for the benefit of related companies. The best-known of these cases are those involving the Independent Resources group of companies. In these cases, the directors of the companies improperly channeled the funds of the companies to the controlling shareholder in a way that was held to constitute oppression of minority shareholders.” (Ramsay, p.353) [↑](#footnote-ref-492)
493. An activity against law or morals is viewed as a reason for involuntary dissolution, see, Uzunallı, p. 158. [↑](#footnote-ref-493)
494. Yet the historical origins of the board of directors show the opposite: “Significantly, the rationale for corporate boards most favored by modern scholars—that boards exist to monitor management on behalf of passive investors—is the rationale that finds the least support in the historical origins of the corporate board. This is because the board-centered model of corporate governance did not originate in the joint stock company with its passive investors. Instead, it was a form of governance that the joint stock company inherited when it evolved out of the regulated companies, like the Merchant Adventurers or Merchants of the Staple. In such regulated companies, the members each conducted their own businesses, and, hence, hardly needed the protection of a board to monitor the managers running the company. Instead of having an oversight function, the role of the board in these earliest trading companies was legislative (passing ordinances to regulate the membership) and adjudicative (hearing disputes involving the members). Of course, the fact that the original boards did not have a monitoring function on behalf of passive investors does not mean that the board did not evolve into this primary responsibility as the regulated companies evolved into the joint stock companies. History and biology are replete with institutions and organisms that originated with one purpose and then successfully migrated into a different function.” (Franklin A. Gevurtz, *The Historical and Political Origins of the Corporate Board of Directors*, <http://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=2341&context=hlr>, Last Visited: 10/10/2016, at 169) [↑](#footnote-ref-494)
495. CA, Inc. v. AFSCME Employees Pension Plan, 953 A.2d 227 (2008). [↑](#footnote-ref-495)
496. For type strictness principle, Abuzer Kendigelen/İsmail Kırca, Şirketler Hukuku Cilt 1 (2021), p. 2- 4. [↑](#footnote-ref-496)
497. Velasco, p. 418. [↑](#footnote-ref-497)
498. Velasco, p. 418. [↑](#footnote-ref-498)
499. Velasco, p. 419. [↑](#footnote-ref-499)
500. Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34 (1993). [↑](#footnote-ref-500)
501. When statutes specifically authorize “others” to run the corporation, management’s responsibility to exercise its powers in accordance with his duties is excused. The primary example of this in Delaware is Del. Code Title 8 Chapter 1 Sec. 351 (Sec.351(2); “Unless the context requires otherwise, the stockholders of the corporation shall be deemed to be directors for the purposes of applying provisions of this chapter…”), and in Turkey is TCC Article 205 (“Board of directors, managers and other responsible parties shall not be liable to the corporation and the shareholders for the compliance with the instructions in accordance with Article 203 and 204.”). [↑](#footnote-ref-501)
502. CA, Inc. v. AFSCME Employees Pension Plan, 953 A.2d 227 (2008): “This Court has previously invalidated contracts that would require a board to act or not act in such a fashion that would limit the exercise of their fiduciary duties. In Paramount Communications, Inc. v. QVC Network, Inc., we invalidated a “no shop” provision of a merger agreement with a favored bidder (Viacom) that prevented the directors of the target company (Paramount) from communicating with a competing bidder (QVC) the terms of its competing bid in an effort to obtain the highest available value for shareholders.” [↑](#footnote-ref-502)
503. It is important the note that the statutory norm on board- decision making is not a norm that should be construed as that every stockholder in a corporation is entitled to have the benefit of the judgment of every other stockholder in the selection of a board of directors, because this part of the norm has been rendered obsolete because of the modern business being conducted by large corporations with many shareholders who generally does not exercise any independent judgment in these elections (Hart v. Bell, 222 Minn. 69 (1946)). [↑](#footnote-ref-503)
504. “However, as the number of shareholders grows larger, they are likely to expect that all business decisions will be made by management, whether in or out of the ordinary course…When that point is reached, statutory norms for decisionmaking, although based in whole or in part on shareholder expectations, should not be made subject to variation by sharehoder agreement, that is, decisionmaking rules should be mandatory rather than suppletory.” (Melvin Aaron Eisenberg, *The Legal Roles of Shareholders and Management in Modern Corporate Decisionmaking,* 57 CAL. L. Rev. 1 (1969), at 54) [↑](#footnote-ref-504)
505. Gidwitz v. Lanzit Corrugated Box Co., 20 III.2d 208 (1960). [↑](#footnote-ref-505)
506. Matter of Smith, 154 A.D.2d 537 (1989): “The fact that the petitioner’s attempt to become a member of the board of directors was frustrated cannot by itself amount to “oppressive actions” toward him. A stockholder has no vested right to become a director.” [↑](#footnote-ref-506)
507. Perlman v. Feldman, 219 F.2d 173 (1955), Swan, J. (dissenting): “The power to control the management of a corporation, that is, to elect directors to manage its affairs, is an inseparable incident to the ownership of a majority of its stock…” [↑](#footnote-ref-507)
508. Velasco, p.408. [↑](#footnote-ref-508)
509. Voeller v. Neilston Warehouse Co., 311 U.S. 531 (1941). [↑](#footnote-ref-509)
510. Bernard S. Sharfman, *Shareholder Wealth Maximization and Its Implementation Under Corporate Law*, 66 Fla. L. Rev. 389 (2015) at 402. [↑](#footnote-ref-510)
511. Bainbridge, Director Primacy, footnote 52. [↑](#footnote-ref-511)
512. Ballantine, p.123. Aransas Pass Harbor Co. v. Manning, 94 Tex. 558 (1901): “A majority of the stockholders, even all save one, cannot authorize a sale of the corporate assets, for the reason that every stockholder has the right to require the action of the legally constituted agency-the board of directors- in the management of its business.” [↑](#footnote-ref-512)
513. Del. Code. Title 8 Sec. 141(a): “…the powers and duties conferred or imposed upon the board of directors by this chapter…” [↑](#footnote-ref-513)
514. McCall, p.516. Burrill v. Nahant Bank, 2 Metcalf 163 (1840): “…they do not exercise a delegated authority, in the sense in which the rule applies to agents and attorneys, who exercise the powers especially conferred on them and no others.” [↑](#footnote-ref-514)
515. Lamb v. Lehmann, 110 Ohio St. 59 (1924). [↑](#footnote-ref-515)
516. Simon v. Sevier County Co- operative Ass’n, 54 Ark. 58 (1890). [↑](#footnote-ref-516)
517. Eclairs Group Ltd v. JKX Oil & Gas plc [2015] UKSC 71: “The statutory duty of the directors is to exercise their powers “only” for the purposes for which they are conferred. That duty is broken if they allow themselves to be influence by any improper purpose.” [↑](#footnote-ref-517)
518. TCC Article 369 imposes a “duty of care” on the board of directors and uses the “cautious manager” standard, which replaced the “prudent businessman” standard of the prior statute, rather than the business judgment rule to evaluate (i.e., review) the duty (Pulasli, p.643 and Official Comment to TCC Article 369(1)). Commentators opine that the “cautious manager” standard is one that imposes a higher duty than the business judgment rule but less than the “prudent businessman” rule (Sibel Hacımahmutoğlu, *The Business Judgment Rule: İşadamı Kararı Mı Yoksa Ticari Muhakeme Kuralı Mı?,* BATIDER C.XXX S.4, Aralık 2014, at 138). [↑](#footnote-ref-518)
519. MM Companies, Inc. v. Liquid Audio, Inc., 813 A.2d 1118 (2003): “The business judgment rule, as a standard of judicial review, is a common-law recognition of the statutory authority to manage a corporation that is vested in the board of directors.”; Aronson v. Lewis, 473 A.2d 805 (1984): “It is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interest of the company…Absent an abuse of discretion, that judgment will be respected by courts. The burden is on the party challenging the decision to establish facts rebutting the presumption…However it should be noted that the business judgment rule operates only in the cotnext of director action. Tehcnically speaking, it has no roe where diretors have either abdicated their functions, or absent a conscious decision, failed to act.” [↑](#footnote-ref-519)
520. Grimes v. Donald, 20 Del. J. Corp. L. 757 (1995). [↑](#footnote-ref-520)
521. Omer Korkut, *Anonim Sirketlerde Inancli Yonetim Kurulu Uyeligi ve Inancli Uyeye Verilebilecek Talimatlarin Siniri*, Ankara Barosu Dergisi 65/3 (2007) at 135. [↑](#footnote-ref-521)
522. Triggs v. Trigss, 46 N.Y.2d 305 (1978) (Gabrielli, J., dissenting) [↑](#footnote-ref-522)
523. Clark v. Dodge, 269 N.Y. 410 (1936): “That is the statutory norm…Where the directors are the sole stockholders, there seems to be no objection to enforcing an agreement among them to vote for certain people as officers. There is no direct decision to that effect in this court, yet there are strong indications that such a rule has long been recognized…’The rule that all the stockholders by their universal consent may do as they choose with the corporate concerns and assets, provided the interests of creditors are not affected, because they are the complete owners of the corporation, cannot be invoked here.’ That was because all the stockholders were not parties to the agreement there in question. So, where the public was not affected, ‘the parties in interest, might, by their original agreement of incorporation, limit their respective rights and powers,’ even where there was a conflicting statutory standard.” [↑](#footnote-ref-523)
524. A commentator points this issue on the question whether the corporation can contract not to exercise its statutory powers as follows: “The concern with regard to future shareholders has at least two aspects: first, the general question whether there are circumstances in which investors’ expectations that the company has the powers which are conferred by statute should be defeasible…” (Ferran, The Decision of the House of, p.358). [↑](#footnote-ref-524)
525. Tekinalp, Yeni Anonim, p.106. [↑](#footnote-ref-525)
526. The only case in which the statute implicitly permits the exercise of the unalienable and nondelegable duties in accordance with another party’s directions is the situations in which law of corporate groups apply (Yanli, Dominion Agreements, p.9). [↑](#footnote-ref-526)
527. Commentators opine that board of directors of a corporation hold by only one shareholder or corporate groups can be deemed as agents or personal fiduciaries of the controlling shareholder, and the shareholder will be indirectly liable for the damages arising caused by this relationship (Pulasli, p. 899). [↑](#footnote-ref-527)
528. Ravanides, p.412. [↑](#footnote-ref-528)
529. Del. Code. Tit. 8 Sec. 351: “The certificate of incorporation of a close corporation may provide that the business of the corporation shall be managed by the stockholders of the corporation rather than by a board of directors.” [↑](#footnote-ref-529)
530. Del. Gen. Corp. L. Sec. 141(a) has the following language: “If any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation”. In Zion v. Kurtz, 50 N.Y.2d 92 (1980), the court, applying Delaware law, upheld a provision of a shareholders’ agreement that intervenes with management function of the directors, even though all formal steps required by the statute- amending articles of incorporation- have not been taken. In addition to this, the expectation regarding board’s management power will only be a “reasonable” one in Delaware if the corporation is one that did not elect the “close corporation” status and became one that is permitted to be managed by its stockholders under its articles of incorporation (Del. Code. Tit. 8 Sec. 351: “The certificate of incorporation of a close corporation may provide that the business of the corporation shall be managed by the stockholders of the corporation rather than by a board of directors.”). [↑](#footnote-ref-530)
531. Adams v. Clearance Corp., 35 Del. Ch. 459 (1956): “To the extent that the voting trust statute permits the delegation of the directors’ duty to vote stock, it is therefore an exception to the general rule of non- delegation, carved out by the statute itself.” [↑](#footnote-ref-531)
532. TCC Article 205: “Dependent company’s directors, managers and responsible parties cannot be held liable against the company and shareholders for their compliance with the instructions given in accordance with Article 203 and 204.” [↑](#footnote-ref-532)
533. Official Comment to CML, p.15. [↑](#footnote-ref-533)
534. Omer Korkut, *Anonim Sirketlerde Inancli Yonetim Kurulu Uyeligi* 16, Doctoral Dissertation (2006). [↑](#footnote-ref-534)
535. It must be underlined that TCC does not prohibit a director to cut all ties with a shareholder, rather it requires the director to not to harm the remaining shareholders’ interests (Korkut, p.10). In fact, the concept of “independent director” shows that all other directors are deemed dependent somehow. On the other hand, the independence of the “independent” directors, and if so for how long, is also questionable (OECD (2012), Related Party Transactions and Minority Shareholder Rights, OECD Publishing, at 13). [↑](#footnote-ref-535)
536. In re H.R. Harmer Ltd. [1959] 1 W.L.R. 62 (Romer L.J.): “Members are entitled to expect that their board shall perform its functions as a board, and that the proceedings of the directors shall be carried out in a normal and orthodox manner. They are entitled to the benefit of the collective experience of the directors and to expect that the directors and each of them can freely express their views at board meetings, and that regard shall be had to what they say and to resolutions properly passed.” [↑](#footnote-ref-536)
537. White v. Perkins, 213 Va. 129 (1972): “Oppression as a ground for corporate dissolution would appear to be of fairly recent origin.” [↑](#footnote-ref-537)
538. Carol L. Kline, *Protecting Minority Shareholders in Close Corporations: Modeling Czech Investor Protections on German and the United States Law*, 23 B.C. Int’l & Comp. L. Rev. 229 (2000) at 243. [↑](#footnote-ref-538)
539. Model Business Corporation Act, Official Text with Official Comment and Statutory Cross- References Revised through June 2005 (2005), p.xix. [↑](#footnote-ref-539)
540. The MBCA Sec. 14.30(a)(2)(ii) (2010) states that the court may dissolve a corporation a proceeding by a shareholder if it is established that “the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent”. [↑](#footnote-ref-540)
541. See: Simeon E. Baldwin, *Voting- Trusts*, 1 Yale L. J. 1 (1891) at 14 and Hayden v. Official Hotel R.B. & D. Co., 42 F.875 (1890). [↑](#footnote-ref-541)
542. Coffee, p. 1620. [↑](#footnote-ref-542)
543. The general rule laid down by U.S. courts had been to refuse to recognize a common- law cause of action under tort law (Ritchie v. Rupe, 443 S.W.3d 856 (2014)) or grant dissolution (F. Hodge O'Neal*, Oppugnancy and Oppression in Close Corporations: Remedies in America and Britain*, 1 B.C. INDUS. & COM. L. REV. 1, (1959) at 18-19) for shareholder oppression. Still, it was also claimed by number of courts that “the general common law- rule is that courts of equity possess an inherent power to protect a minority shareholder from oppressive or abusive conduct” (MacDonald, p.168.). Even when it is statutory, involuntary dissolution of a corporation is seen fundamentally equitable in nature by some courts (In re Lakeland Development Corp., 277 Minn. 432 (1967) and Madugula v. Taub, 496 Mich. 685 (2014)). [↑](#footnote-ref-543)
544. Robert B. Thompson, *The Shareholder’s Cause of Action For Oppression,* 48 Bus. Law. 699 at 711. [↑](#footnote-ref-544)
545. Thompson, Corporate Dissolution, p. 206. [↑](#footnote-ref-545)
546. Kline, p.244. [↑](#footnote-ref-546)
547. For example, in Balvik v. Sylvester, 411 N.W.2d 383 (1987), the North Dakota court acknowledged that the state’s corporation statute was derived from the MBCA, in which the oppressive conduct is not defined, the court referred to New York’s “reasonable expectations” standard for the evaluation of the case. [↑](#footnote-ref-547)
548. Reget v. Paige, 242 Wis. 2d 278 (2001). “Under the oppression remedy…the judges only had a widely worded, open- ended statute…However, gradually the courts began to fashion coherent guidelines for the shaping of the discretion provided to them…” (John J. Chapman, *Corporate Oppression: Structuring Judicial Discretion,* 18 Advoc. Q. 170 (1996) at 189). [↑](#footnote-ref-548)
549. Ritchie v. Rupe, 443 S.W.3d 856 (2014). [↑](#footnote-ref-549)
550. Art, p.373. [↑](#footnote-ref-550)
551. Kiriakides v. Atlas Food Systems & Services, Inc., 343 S.C. 587 (2001), citing the official comment to S.C. Code Ann. Sec. 33- 18- 400 (1990). [↑](#footnote-ref-551)
552. Bruno, Reasonable Expectations, p. 434. [↑](#footnote-ref-552)
553. Scott v. Trans- System, Inc., 148 Wash.2d 701 (2003). [↑](#footnote-ref-553)
554. Gimpel v. Bolstein, 477 N.Y.S.2d 1014 (1984) [↑](#footnote-ref-554)
555. O’Brein v. Pearson, 449 Mass. 377 (2007): “The fiduciary duty of ‘utmost good faith and loyalty’ that shareholders in a close corporation owe to one another is derived from the strict standard of behavior applied to partnerships.” [↑](#footnote-ref-555)
556. MacDonald, p.170. [↑](#footnote-ref-556)
557. For example, California’s enactment of two separate provisions to cover both approaches: “In enacting the two separate provisions of subdivision (b)(4) and (b)(5), the Legislature clearly distinguished between a cause of action for involuntary dissolution based on the controlling shareholders' misconduct, and one based specifically on protection of the rights, interests and expectations of complaining minority shareholders.” (Bauer v. Bauer, 46 Cal.App.4th 1106 (1996)) [↑](#footnote-ref-557)
558. Ragazzo, p.1106. [↑](#footnote-ref-558)
559. Robert C. Art, *Shareholder Rights and Remedies in Close Corporations: Oppression, Fiduciary Duties, and Reasonable Expectations*, 28 J. Corp. L. 371 at.418. [↑](#footnote-ref-559)
560. Some commentator opine that the difference in definitions, in most instances, would not effect the outcome: “The approach to defining oppression as breach of fiduciary duty is nearly identical, except for phraseology, to the definition of oppression as “wrongful conduct.” Both approaches focus on the conduct of the majority or controlling shareholders, asking whether it had adequate justification, as opposed to focusing on the consequences to the minority shareholders.” (Art, p. 378); “Interestingly, many examples of oppression under the reasonable expectations method are also violations under the fiduciary method. Consequently, oppressed holders of minority interests ought to be able to obtain relief even if subject to a contract that bars the application of the reasonable expectations standard. Many cases use the reasonable and fiduciary approaches interchangeably, leading commentators to describe them as “not contradictory, as conduct that violate some may well also violate the other.”” (Morris, p.101- 102) [↑](#footnote-ref-560)
561. When the definition of publicly traded corporations is traced in U.S. law, no such precise definition can be found. Delaware law does not define these corporations, however by eliminating the usage of appraisal rights and close corporation section remedies in some corporations, Delaware signals its view. According to Del. Gen. Corp. L. Sec. 262, appraisal right is not available for shares of stock listed on a national securities exchange or held by more than 2000 holders. This being said, as expressed above, Del. Gen. Corp. L. Sec. 342 definition of “close corporations” refers to ones whose stock is not hold by more than 30 shareholders and shares were not subject to a public offering. Hence, Delaware law does not give a hand for a definition. On the other hand, MBCA and federal securities laws are giving a hand for the description of publicly traded corporations (Some other States, like California, define publicly traded corporations. California Corporations Code Sec. 1502.1.(b)(1) defines it as follows: "Publicly traded corporation" means a corporation, as defined in Section 162, that is an issuer as defined in Section 3 of the Securities Exchange Act of 1934, as amended (15 U.S.C. Sec. 78c), and has at least one class of securities listed or admitted for trading on a national securities exchange, on the OTC Bulletin Board, or on the electronic service operated by Pink OTC Markets Inc.”). MBCA defines publicly traded corporations (using “public corporations” term) as “a corporation that has shares listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national securities association” in Section 1.40. (18A). In it’s Official Comment to this article, it is written that “the term ‘public corporation’….is used to distinguish publicly held corporations from other corporations”. In this sense, MBCA chooses the term “public corporation” and does not recognize the distinction between publicly held corporations and publicly traded corporations that this study makes. Nevertheless, the approach that MBCA has, is consistent with the U.S. view that makes no distinction between corporations and chooses to deal generally with corporations that offer securities to public (Schlesinger, p.422.). Without making any distinction between corporations, U.S. federal securities laws prohibits any person from publicly offering any security unless a registration statement is filed with the related government authority, U.S. Securities and Exchange Commission (SEC), and is in effect as to the security (Sec.5, Securities Act of 1933) (SEC explains the reason of this requirement as follows: “Often referred to as the ‘truth insecurities law’, the Securities Act of 1933 has two basic objectives: To require that investors receive financial and other significant information concerning securities being offered for public sale; and to prohibit deceit, misrepresentations, and other fraud in the sale of securities. The SEC accomplishes these goals primarily by requiring that companies disclose important financial information through the registration of securities…This information enables investors, not the government, to make informed judgments about whether to purchase a company’s securities” (SEC, <http://www.sec.gov/answers/regis33.htm>).). Still, these laws “have been drafted for primary application to larger corporations issuing their securities to the public” (Henn, p. 405) and exemptions for issues of smaller corporations are included (Securities Act of 1933, Sec. 3 and 4). Laws require some larger corporations to register with the SEC even though they have not issued securities under a registration statement (Securities Exchange Act of 1934, Sec. 12(g)(1)). Accordingly, Securities Exchange Act of 1934 defines publicly held corporations and publicly traded corporations, without using those terms explicitly. Section 3(a)(8) defines “issuer” as “any person who issues or proposes to issue any security…” and defines “person” in Section 3(a)(9) as “a natural person, company, government, or political subdivision, agency or instrumentality of a government”, thus, a corporation is an issuer under this statute. Firstly, section 12(b) requires that securities (equity or debt) that will be registered on a national securities exchange be registered with the SEC. Secondly, section 12(g)(1) requires issuers, which has total assets exceeding 10 million USD and a class of equity security held of record by either 2000 persons or 500 unaccredited investors shall register such security by filing with the SEC (Note that pursuant to the JOBS Act, SEC implemented exceptions to this rule. “The rule provides that securities issued pursuant to an offering made under Section 4(a)(6) are exempted from the record holder count under Section 12(g)…Section 12(g) registration will be required only if, on the last day of the fiscal year the company has total assets in excess of the $25 million total asset threshold, the class of equity securities is held by more than 2,000 persons or 500 persons who are not accredited investors.” SEC Final Rule: Crowdfunding (p.330-331), <https://www.sec.gov/rules/final/2015/33-9974.pdf> (Last visited: 10/12/2016)). According to SEC, legislative intent behind this rule was to make sure that investors of over-the-counter securities with a significant shareholder base are provided ongoing information about their investment (SEC Final Rule: Crowdfunding, p.332). In this study’s view, Section 12(g)(1) is defining publicly held corporations (thus, corporations under the triggering threshold are “non-public corporations”), whereas Section 12(b) is defining publicly traded corporations. It must also be noted that, recently, by using the title “Private Company Flexibility and Growth” for the article amending Securities Act of 1934’s Sec. 12(g)(1) in Jumpstart Our Business Startups Act, U.S. legislature showed its view of classifying companies that stay under the triggering threshold as “private” ones. [↑](#footnote-ref-561)
562. Douglas K. Moll*, Shareholder Oppression in Texas Close Corporations: Majority Rule Isn’t What It Used to Be*, 9 Hous. Bus. & Tax L.J. 33 (2001) at 13. [↑](#footnote-ref-562)
563. Brenner v. Berkowitz, 134 N.J. 488 (1993). [↑](#footnote-ref-563)
564. F. Hodge O’Neal, Ronald R. Janke*, Utilizing Rule 10b-5 for Remedying Squeeze-Outs or Oppression of Minority Shareholders*, 16 Boston College Industrial and Commercial Law Review (1975) at 327. [↑](#footnote-ref-564)
565. Ballard v. Roberson, 399 S.C. 588 (2012): “The concern and focus in shareholder oppression cases is that the minority ‘faces a trapped investment and an indefinite exclusion from participation in business returns’”. [↑](#footnote-ref-565)
566. Moll, Employment at Will, p. 546. [↑](#footnote-ref-566)
567. Moll, Employment at Will, p. 551. [↑](#footnote-ref-567)
568. Moll, Employment at Will, p. 552. [↑](#footnote-ref-568)
569. Moll, Shareholder Oppression in Texas, p.13. “It may be defined as the use of corporate control vested in the statutory majority of shareholders or the board of directors to eliminate minority shareholders from the enterprise or to reduce to relative insignificance their voting power or claims on corporate assets…Furthermore, it implies a purpose to force upon the minority shareholder a change which is not incident to any other business goal of the corporation” (Gabhart v. Gabhart, 267 Ind. 370 (1977)). [↑](#footnote-ref-569)
570. Moll, Shareholder Oppression in Texas, p.14. [↑](#footnote-ref-570)
571. Muellenberg v. Bikon Corp., 143 N.J. 168 (1996). [↑](#footnote-ref-571)
572. O’Neal, Oppression of Minority Shareholders, p.131. [↑](#footnote-ref-572)
573. Garry D. Justis, *Avoiding a Minority Shareholder Oppression Claim in a Close Corporation in Missouri: The Impact of the New Close Corporation Statutes*, 56 Mo. L. Rev. (2011) at 274. [↑](#footnote-ref-573)
574. Yanow v. Teal Industries, Inc., 178 Conn. 262 (1979). [↑](#footnote-ref-574)
575. Moll, Shareholder Oppression in Texas, p.14. [↑](#footnote-ref-575)
576. Davis v. Sheerin, 754 S.W.2d 375 (1988). [↑](#footnote-ref-576)
577. Moll, Dividend Policy, p. 848-849. Gunzberg v. Art- Lloyd Metal Products Corp., 112 A.D.2d 423 (1985): “As a result of their long history of taking an active part in the running of the corporation, petitioners demonstrated that they had a reasonable expectation that they would continue to be employed by the company, and have input into its management. In Matter of Kemp & Beatley (Gardstein) (supra), the Court of Appeals acknowledged that such expectations, if not realized, amount to oppression because the major part of the earnings of a close corporation are distributed in the form of salaries, bonuses and retirement benefits.” [↑](#footnote-ref-577)
578. Matter of Brach, 135 A.D.2d 711 (1987): “However, conduct will not be deemed oppressive ‘simply because the petitioner's subjective hopes and desires in joining the venture are not fulfilled. Disappointment alone should not necessarily be equated with oppression’…Here, the petition merely sets forth the petitioner's dissatisfaction with the management of the corporation by Ludmir. Such allegations do not support a finding of oppressive action by the majority shareholders which substantially defeated the petitioner's reasonable expectations.” ; Application of Dubonnet Scarfs, Inc., 105 A.D.2d 339 (1985): “Needless to say, the mere fact that a closely held corporation may have substantial liquid assets, and a stockholder has personal financial problems totally unrelated to the corporation do not, in and of themselves, state grounds for judicial dissolution within the meaning of the BCL sections… The petitioners present no legal authority that holds that a shareholder in a close corporation, who is in personal financial difficulty, which is unrelated to that corporation, can demand to be bought out, because he or she needs the cash to satisfy personal creditors, and that if such demand is not complied with, then such shareholder can seek the dissolution of that corporation.” [↑](#footnote-ref-578)
579. Brenner v. Berkowitz, 134 N.J. 488 (1993). [↑](#footnote-ref-579)
580. Smith v. Atlantic Properties, Inc., 12 Mass. App. Ct. 201 (1981): “In the Donahue case, 367 Mass. at 593 n. 17, 328 N.E.2d 505, the court recognized that cases may arise in which, in a close corporation, majority stockholders may ask protection from a minority stockholder. Such an instance arises in the present case because Dr. Wolfson has been able to exercise a veto concerning corporate action on dividends by the 80% provision (in Atlantic's articles or organization and by-laws) already quoted. The 80% provision may have substantially the effect of reversing the usual roles of the majority and the minority shareholders. The minority, under that provision, becomes an ad hoc controlling interest.”; J Bar H, Inc. v. Johnson, 822 P2d 849 (1991): “Although in this case, Joanna Johnson could not technically be considered a “minority shareholder,” since she held fifty percent of the shares, and although the corporation was not technically a statutory close corporation, since its Articles of Incorporation did not say that it was, Johnson's position as detailed in the shareholders' agreement, the restrictions placed on sale of her shares, and her lack of business acumen relative to that of Don Harger allowed the Hargers to practice just the sort of oppression described in the treatise.” [↑](#footnote-ref-580)
581. Courts are critical to dissolution actions initiated by majority shareholders, see, In re Security Finance Co., 49 Cal.2d 370 (1957): “Shareholders representing fifty per cent of the voting power do not have an absolute right under section 4600 to dissolve a corporation. Thus, they have no right to dissolve a corporation to defraud the other shareholders to ‘freeze out’ minority shareholders.” [↑](#footnote-ref-581)
582. Note that these requirements may change depending on the definition that the jurisdiction have adopted for oppression. For example, Mississippi law accepts that the “corporate freeze out is an intentional tort that is committed with willful and wanton disregard for the right of shareholder who is frozen out” (Missala Marine Services, Inc. v. Odom, 861 So.2d 290 (2003)), and courts opine that the traditional elements for an intentional tort claim, which includes the “intentional or wilfull breach of the duty” element, should be established by the plaintiff (Brothers v. Winstead, 129 So.3d 906 (2014)). [↑](#footnote-ref-582)
583. Reget v. Paige, 242 Wis. 2d 278 (2001). [↑](#footnote-ref-583)
584. Mardikos v. Arger, 457 N.Y.S.2d 371 (1982): “Here, where the petitioner alleges unfair conduct on the part of the majority stockholders, his son, unknown to the majority, while employed by the majority, secretly organized his own corporation with his father's endorsement, with the intent that the company would compete with the company which is the subject of this lawsuit. Though not a controlling factor in determining fairness, the petitioner, in the traditional words of the law should approach the court with “clean hands”.” [↑](#footnote-ref-584)
585. Fix v. Fix Material Co., Inc., 538 S.W.2d 351 (1976). [↑](#footnote-ref-585)
586. Gray v. Hall, 10 III.App.3d 1030 (1973): “As we read this definition, actions which might be oppressive under one set of circumstances would not be oppressive under others. For instance, the paying of large salaries to corporate officers might be justified where a corporation has large retained earnings. This same behavior might be oppressive where the corporation is unable to pay dividends to minority stockholders, due to large salaries drawn by officer-majority stockholders. Similarly, the non-payment of dividends might indicate oppressive behavior where the corporation retains large amounts of earnings for no apparent reason except to ‘freeze out’ minority stockholders. The non-payment of dividends by a corporation cannot be determined to be oppressive except when viewed in the backdrop of the corporation's overall financial picture. In this case, to obtain a view of the overall picture is impossible without a thorough and complete accounting of the Corporation's books.” [↑](#footnote-ref-586)
587. F. Eric Fryar, *Shareholder Oppression: Is It a Cause of Action,* 11th Annual Advanced Business Law Course, Nov. 7-8 2013, Chapter 19, <http://cdn2.hubspot.net/hubfs/201401/PDFs/19_Fryar.pdf?t=1471562380688> (Last visited: 10/10/2016) at 61. [↑](#footnote-ref-587)
588. Application of Topper, 433 N.Y.S.2d 359 (1980). [↑](#footnote-ref-588)
589. Jaffe Commercial Finance Co. v. Harris, 119 III.App.3d 136 (1983): “Without question, the burden is on the plaintiff to prove by a preponderance of evidence all of the material terms of an alleged [oral] contract”. [↑](#footnote-ref-589)
590. O’Neal, Oppression of Minority Shareholders, p. 140. [↑](#footnote-ref-590)
591. Fox v. 7L Bar Ranch Co., 198 Mont. 201 (1982). [↑](#footnote-ref-591)
592. See, New York Business Corporation Law, Sec. 1104-a(c): In addition to all other disclosure requirements, the directors or those in control of the corporation, no later than thirty days after the filing of a petition hereunder, shall make available for inspection and copying to the petitioners under reasonable working conditions the corporate financial books and records for the three preceding years. [↑](#footnote-ref-592)
593. “Some statutes employ the similar language of ‘persistent unfairness’, ‘unfairly prejudicial’, or ‘willfully unfair’” (Moll, Employment at Will, footnote 41). [↑](#footnote-ref-593)
594. Robert B. Thompson, *Allocating the Roles for Contracts and Judges in the Closely Held Firm,* 33 W. New Eng. L. Rev. 369 (2011) at 389. [↑](#footnote-ref-594)
595. Moll, Shareholder Oppression in Texas, p.15. Hollis v. Hill, 232 F.2d 460 (2000): “Hill's contentions that no such duty existed in the present case are not persuasive. That Nevada does not list oppression among its bases for statutory dissolution under NEV.REV.STAT. § 78.650 does not preclude the existence of a fiduciary duty. The dissolution statutes do not provide the exclusive remedies for oppressed shareholders; courts have equitable powers to fashion appropriate remedies where the majority shareholders have breached their fiduciary duty to the minority by engaging in oppressive conduct. In addition, a number of states have found breaches of fiduciary duty on bases which would not support dissolution under their statutes.” [↑](#footnote-ref-595)
596. Estes v. Idea Engineering & Fabrications, Inc., 250 Mich. App. 270 (2002). [↑](#footnote-ref-596)
597. There are two views that are used to distinguish between direct and derivative actions: According to the first view, if only the interest of the corporation is directly damaged than the suit must be derivative. Under the second view, a direct action may be brought when it is based upon a primary or personal right belonging the plaintiff- shareholder, on the other hand, it is derivative when the action is based upon a primary right of the corporation but which is asserted on its behalf by the stockholder because of the corporation’s failure to act upon the primar right (G & N Aircraft, Inc. v. Boehm, 743 N.E.2d 227 (2001)). [↑](#footnote-ref-597)
598. MacDonald, p.169. [↑](#footnote-ref-598)
599. Fought v. Morris, 543 So.2d 167 (1989): “The traditional view that shareholders have no fiduciary duty to each other, and transactions constituting “freeze outs” or “squeeze outs” generally cannot be attacked as a breach of duty of loyalty or good faith to each other, is outmoded.” [↑](#footnote-ref-599)
600. Hollis v. Hill, 232 F.3d 460 (2000): “The opinions make clear, however, that shareholders do not enjoy fiduciary- rooted entitlements to their jobs. Such a result would clearly interfere with the doctrine of employment- at-will. Rather, the courts have limited relief to instances in which the shareholder has been harmed as shareholder.” [↑](#footnote-ref-600)
601. Exadaktilos v. Cinnaminson Realty Co., Inc., 167 N.J.Super. 141 (1979). While some state statutes, such as New Jersey’s, specify that relief may be granted if the shareholder becomes subject to oppressive conduct in their capacities as shareholders, directors, officers or employees, courts recognize that the oppressive conduct covers actions taken against these capacities even without an additional language in the statute (Thompson, Corporate Dissolution, p.210). [↑](#footnote-ref-601)
602. In a U.K. case, the Re Leeds United Holdings plc. [1997] B.C.C. 131 noted the following: “In my judgment, the legitimate expectation which the court has held in other cases can give rise to a claim for relief under s. 459 must, having regard to the purpose of the section as expressed in s. 459(1) , be a legitimate expectation relating to the conduct of the company's affairs, the most obvious and common example being an expectation of being allowed to participate in decisions as to such conduct. An expectation that a shareholder will not sell his shares without the consent of some other or other shareholders does not relate in any way to the conduct of the company's affairs and, therefore, cannot, in my judgment, fall to be protected by the court under s. 459 .” [↑](#footnote-ref-602)
603. Brooks v. Hill, 717 So.2d 759 (1998) (Maddox, J., dissenting). [↑](#footnote-ref-603)
604. Kirley v. Kirley, 25 Mass.App.Ct. 651 (1988). [↑](#footnote-ref-604)
605. In Brooks v. Hill, 717 So.2d 759 (1998), the court stated that breach of fiduciary duty by a director should be viewed as tort, rather than a breach of an implied contract. In In re U.S. Eagle Corp., 484 B.R. 640 (2012) case in which the Court applied the internal affairs doctrine to choose the substantive law that will be used to resolve the shareholder oppression claim. Similarly, see: Conway v. DialAmerica Marketing, Inc., No. BER- C-116-08 (N.J. Super. Ct. Ch. Div. Sept. 30, 2008) [↑](#footnote-ref-605)
606. Ca. Corp. Code Sec. 2115(b). On the other hand, there are foreign jurisdictions, such as Hong Kong (see, Companies Ordinance (Cap. 622), Sec. 722(1)), that apply their own oppression law to foreign corporations establishing a place of business in their jurisdiction, and apply the oppression statute to foreign corporations listed in their stock exchanges through this channel (For Hong Kong’s situation, see, David C. Donald, A Financial Centre for Two Empires, Cambridge 2014, p. 156). However, this aspect of the oppression statutes in such jurisdictions should be seen as the topics connection with public policy, rather than a notion that effects its contractual nature. [↑](#footnote-ref-606)
607. Means, p. 464. [↑](#footnote-ref-607)
608. In re U.S. Eagle Corp., 484 B.R. 640 (2012). [↑](#footnote-ref-608)
609. Kirley v. Kirley, 25 Mass. App. Ct. 651 (1988). [↑](#footnote-ref-609)
610. See, Ritchie v. Rupe, 443 S.W.3d 856 (2014), evaluating the creation of a common-law shareholder oppression claim under tort law. [↑](#footnote-ref-610)
611. Kirley v. Kirley, 25 Mass. App. Ct. 651 (1988). [↑](#footnote-ref-611)
612. Brooks v. Hill, 717 So. 2d 759 (1998). [↑](#footnote-ref-612)
613. Woods v. Fox Broadcasting Sub., Inc., 129 Cal. App. 4th 344 (2005): “…our courts have allowed contract intereference claims to be stated against owners, officers, and directors of the company whose contract was subject of the litigation.” [↑](#footnote-ref-613)
614. Brothers v. Winstead, 129 So.3d 906 (2014). [↑](#footnote-ref-614)
615. Dooley/Goldman, p.749. [↑](#footnote-ref-615)
616. J.A.C. Hetherington, Michael P. Dooley, *Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem*, 63 Va. L. Rev. 1 (1977) at 9. [↑](#footnote-ref-616)
617. Mary Siegel, *Fiduciary Duty Myths in Close Corporate Law,* 29 Del. J. Corp. L. 377 (2004) at 447. [↑](#footnote-ref-617)
618. Hirsch/Sheppard, p.11. [↑](#footnote-ref-618)
619. Garza v. TV Answer, Inc., 19 Del. J. Corp. L. 290 (1993): “I do not read Litle as establishing an independent cause of action for “oppressive abuse of discretion” distinct from a cause of action based on breach of fiduciary duty” [↑](#footnote-ref-619)
620. “Moreover, although not explicitly addressing the doctrines of “oppression” or “reasonable expectations,” Nixon's admonition that only the legislature, and not courts, can create different standards for close corporations is an implicit rejection of those doctrines because the Delaware corporate statute does not address either of them.” (Siegel, p.411) [↑](#footnote-ref-620)
621. Leonard I. Rotman*, Debunking the “End of History” Thesis for Corporate Law*, 33 B.C. Int’l & Comp. L. Rev. 219 (2010), Footnote 229. The notion of “race to the bottom” is explained in the Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933) as follows: “Companies were early formed to provide charters for corporations in states where the cost was lowest and the laws least restrictive. The states joined in advertising their wares. The race was one not of diligence but of laxity.” [↑](#footnote-ref-621)
622. Siegel, p. 467. [↑](#footnote-ref-622)
623. Thompson, Allocating the Roles, p.386. [↑](#footnote-ref-623)
624. Reserve Solutions Inc. v. Vernaglia, 438 F. Supp. 2d 280 (2006). [↑](#footnote-ref-624)
625. Joe W. and Dorothy Dorsett Brown Foundation v. Frazier, 889 F.Supp.2d 893 (2012): “Delaware does not recognize a cause of action for minority shareholder oppression.” [↑](#footnote-ref-625)
626. Clemmer v. Cullinane, 62 Mass. App. Ct. 904 (2004). [↑](#footnote-ref-626)
627. Riblet Products Corp. v. Nagy, 683 A.2d 37 (1996). [↑](#footnote-ref-627)
628. John H. Matheson, R. Kevin Maler, *A Simple Statutory Solution to Minority Oppression in the Closely Held Business,* 91 Minn. L. Rev. 657 (2007), p.684. [↑](#footnote-ref-628)
629. Nixon v. Blackwell, 626 A.2d 1366 (1993). [↑](#footnote-ref-629)
630. Siegel, p. 405. [↑](#footnote-ref-630)
631. At 1381: “The entire fairness test, correctly applied and articulated, is the proper judicial approach.” [↑](#footnote-ref-631)
632. Ragazzo, p. 1126 and 1127. Refer to Chapter 4.3. for the explanation of the entire fairness test. [↑](#footnote-ref-632)
633. At 1380-1381: “It would do violence to normal corporate practice and our corporation law to fashion an ad hoc ruling which would result in a court-imposed stockholder buy-out for which the parties had not contracted…One cannot read into the situation presented in the case at bar any special relief for the minority stockholders in this closely-held, but not statutory “close corporation” because the provisions of Subchapter XIV relating to close corporations and other statutory schemes preempt the field in their respective areas. It would run counter to the spirit of the doctrine of independent legal significance, and would be inappropriate judicial legislation for this Court to fashion a special judicially-created rule for minority investors when the entity does not fall within those statutes, or when there are no negotiated special provisions in the certificate of incorporation, by-laws, or stockholder agreements. [↑](#footnote-ref-633)
634. At 1380: “A stockholder who bargains for stock in a closely-held corporation and who pays for those shares (unlike the plaintiffs in this case who acquired their stock through gift) can make a business judgment whether to buy into such a minority position, and if so on what terms. One could bargain for definitive provisions of self- ordering permitted to a Delaware corporation through the certificate of incorporation or by-laws by reason of the provisions in 8 Del.C. §§ 102, 109, and 141(a). Moreover, in addition to such mechanisms, a stockholder intending to buy into a minority position in a Delaware corporation may enter into definitive stockholder agreements, and such agreements may provide for elaborate earnings tests, buy-out provisions, voting trusts, or other voting agreements.” [↑](#footnote-ref-634)
635. Ragazzo, p. 1129. [↑](#footnote-ref-635)
636. See generally, Greta M. Fund, *A Common Goal From Two Different Paths: Protection of Minority Shareholders in Delaware and Canada,* 57 Alb. L. Rev. 41 (1993). [↑](#footnote-ref-636)
637. Allied Chemical & Dye Corporation v. Steel & Tube Co. of America, 14 Del.Ch.1 (1923): “When, in the conduct of the corporate business, a majority of the voting power in the corporation join hands in imposing its policy upon all, it is beyond all reason and contrary, it seems to me, to the plainest dictates of what is just and right, to take any view other than that they are to be regarded as having placed upon themselves the same sort of fiduciary character which the law impresses upon the directors in their relation to all the stockholders. Ordinarily the directors speak for and determine the policy of the corporation. When the majority of stockholders do this, they are, for the moment, the corporation. Unless the majority in such case are to be regarded as owing a duty to the minority such as is owed by the directors to all, then the minority are in a situation that exposes them to the grossest frauds and subjects them to most outrageous wrongs.” [↑](#footnote-ref-637)
638. 683 A.2d 1049 (1996). [↑](#footnote-ref-638)
639. Hirsch/Sheppard, p. 6. [↑](#footnote-ref-639)
640. Ragazzo, p.1151. On the other hand, it can also provide some advantages to the complaining shareholders, see Condec Corp. v. Lunkenheimer Cp., 43 Del. Ch. 353 (1967): “As a starting point it must be conceded that action by majority shareholders having as its primary purpose the ‘freezing out’ of a minority interest is actionable without regard to the fairness of the price”. [↑](#footnote-ref-640)
641. Ragazzo, p. 1148. Delaware courts are critical about the power of the court to dissolve the corporation, see Hall v. John S. Isaacs & Sons Farms, Inc., 39 Del. Ch. 244 (1960): “These corporations for which plaintiffs ask the appointment of liquidating receivers are all solvent. Under some circumstances courts of equity will appoint liquidating receivers for solvent corporations, but the power to do so is always exercised with great restraint and only upon a showing of gross mismanagement, positive misconduct by the corporate officers, breach of trust, or extreme circumstances showing imminent danger of great loss to the corporation which, otherwise, cannot be prevented… Mere dissension among corporate stockholders seldom, if ever, justifies the appointment of a receiver for a solvent corporation. The minority's remedy is withdrawal from the corporate enterprise by the sale of its stock.” [↑](#footnote-ref-641)
642. John E. Davidian, *Corporate Dissolution in New York: Liberalizing the Rights of Minority Shareholders*, St. John’s Law Rev. Vol. 56 Iss.1 Article 2 at 33. [↑](#footnote-ref-642)
643. Davidian, p.28. It is important to note that while the New York Legislature had before it several options to provide relief to unfairly treated shareholders, such as using the Connecticut’s “any good and sufficient reason” ground for dissolution, the Legislature elected to provide relief on a narrower ground requiring a showing of oppression (Mardikos v. Arger, 457 N.Y.S.2d 371 (1982)). [↑](#footnote-ref-643)
644. Sec. 1104-a. Petition for judicial dissolution under special circumstances:

     (1) The directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders;

     (2) The property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by its directors, officers or those in control of the corporation.

     (b) The court, in determining whether to proceed with involuntary dissolution pursuant to this section, shall take into account:

     (1) Whether liquidation of the corporation is the only feasible means whereby the petitioners may reasonably expect to obtain a fair return on their investment; and

     (2) Whether liquidation of the corporation is reasonably necessary for the protection of the rights and interests of any substantial number of shareholders or of the petitioners.

     (c) In addition to all other disclosure requirements, the directors or those in control of the corporation, no later than thirty days after the filing of a petition hereunder, shall make available for inspection and copying to the petitioners under reasonable working conditions the corporate financial books and records for the three preceding years.

     (d) The court may order stock valuations be adjusted and may provide for a surcharge upon the directors or those in control of the corporation upon a finding of wilful or reckless dissipation or transfer of assets or corporate property without just or adequate compensation therefor.

     Sec. 1118. Purchase of petitioner’s shares; valuation:

     (a) In any proceeding brought pursuant to section eleven hundred four-a of this chapter, any other shareholder or shareholders or the corporation may, at any time within ninety days after the filing of such petition or at such later time as the court in its discretion may allow, elect to purchase the shares owned by the petitioners at their fair value and upon such terms and conditions as may be approved by the court, including the conditions of paragraph (c) herein. An election pursuant to this section shall be irrevocable unless the court, in its discretion, for just and equitable considerations, determines that such election be revocable.

     (b) If one or more shareholders or the corporation elect to purchase the shares owned by the petitioner but are unable to agree with the petitioner upon the fair value of such shares, the court, upon the application of such prospective purchaser or purchasers or the petitioner, may stay the proceedings brought pursuant to section 1104-a of this chapter and determine the fair value of the petitioner's shares as of the day prior to the date on which such petition was filed, exclusive of any element of value arising from such filing but giving effect to any adjustment or surcharge found to be appropriate in the proceeding under section 1104-a of this chapter. In determining the fair value of the petitioner's shares, the court, in its discretion, may award interest from the date the petition is filed to the date of payment for the petitioner's share at an equitable rate upon judicially determined fair value of his shares.

     (c) In connection with any election to purchase pursuant to this section:

     (1) If such election is made beyond ninety days after the filing of the petition, and the court allows such petition, the court, in its discretion, may award the petitioner his reasonable expenses incurred in the proceeding prior to such election, including reasonable attorneys' fees;

     (2) The court, in its discretion, may require, at any time prior to the actual purchase of petitioner's shares, the posting of a bond or other acceptable security in an amount sufficient to secure petitioner for the fair value of his shares. [↑](#footnote-ref-644)
645. In re Dissolution of Clever Inovations, Inc., 94 A.D.3d 1174 (2012). [↑](#footnote-ref-645)
646. Sec. 1104. Petition in case of deadlock among directors or shareholders:

     (a) Except as otherwise provided in the certificate of incorporation under section 613 (Limitations on right to vote), the holders of shares representing one-half of the votes of all outstanding shares of a corporation entitled to vote in an election of directors may present a petition for dissolution on one or more of the following grounds:

     (1) That the directors are so divided respecting the management of the corporation's affairs that the votes required for action by the board cannot be obtained.

     (2) That the shareholders are so divided that the votes required for the election of directors cannot be obtained.

     (3) That there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders.

     (b) If the certificate of incorporation provides that the proportion of votes required for action by the board, or the proportion of votes of shareholders required for election of directors, shall be greater than that otherwise required by this chapter, such a petition may be presented by the holders of shares representing more than one-third of the votes of all outstanding shares entitled to vote on non-judicial dissolution under section 1001 (Authorization of dissolution).

     (c) Notwithstanding any provision in the certificate of incorporation, any holder of shares entitled to vote at an election of directors of a corporation, may present a petition for its dissolution on the ground that the shareholders are so divided that they have failed, for a period which includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the election and qualification of their successors. [↑](#footnote-ref-646)
647. In re Quail Aero Service, Inc., 300 A.D.2d 800 (2002). [↑](#footnote-ref-647)
648. Orloff v. Shulman, 31 Del. J. Corp. L. 740 (2005) [↑](#footnote-ref-648)
649. Matter of Kemp & Beatley, Inc., 64 N.Y.2d 63 (1984): “True to the ancient principle that equity jurisdiction will not lie when there exists a remedy at law, the courts have not entertained a minority's petition in equity when their rights and interests could be adequately protected in a legal action, such as by a shareholder's derivative suit. Supplementing this principle of judicially ordered equitable dissolution of a corporation, the Legislature has shown a special solicitude toward the rights of minority shareholders of closely held corporations by enacting section 1104-a of the Business Corporation Law.”; Lewis v. Jones, 107 A.D.2d 931 (1985): “Finally, we cannot agree with defendants’ position that the third action commenced by plaintiff seeking common-law dissolution is precluded by the pendency of the shareholder's derivative suit. It is well recognized that a derivative suit by a shareholder seeks to recover on behalf of the corporation for the waste of corporate assets. Where the damage claimed is primarily to the shareholder as a result of fiduciary breaches by corporate management, the shareholder may properly sustain a direct action against the corporate defendants. In such a situation, a direct action by a shareholder for judicial dissolution of the corporation may be a proper remedy to protect the shareholder's personal stake in the corporation.” [↑](#footnote-ref-649)
650. Application of Taines, 444 N.Y.S.2d 540 (1981). [↑](#footnote-ref-650)
651. John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 Colum. L. Rev. 1618 (1989), at 1697. [↑](#footnote-ref-651)
652. Lewis v. Jones, 107 A.D.2d 931 (1985). [↑](#footnote-ref-652)
653. Sec. 1104-a(a)(1) and (2). [↑](#footnote-ref-653)
654. Sec. 1104-a(b)(1) and (2). [↑](#footnote-ref-654)
655. Matter of Kemp & Beatley, Inc., 64 N.Y.2d 63 (1984). Muller v. Silverstein, 92 A.D.2d 455 (1983): “There is also no indication in the record that the trial court ever considered whether liquidation was the only feasible means by which the respondents could reasonably expect to receive a fair return on their investment or whether liquidation was reasonably necessary in order to protect the shareholders. If the trial court believed that a dividend should have been declared, it could have made an order to that effect. Dissolution of the corporation was, however, unjustified.” [↑](#footnote-ref-655)
656. Markidos v. Arger, 457 N.Y.S.2d 371 (1982). [↑](#footnote-ref-656)
657. Burack v. I. Burack, Inc., 137 A.D.2d 523 (1988): “However, the doctrine of ‘unclean hadns’ is not an automatic bar to relief under Business Corporation Law Sec. 1104-a.” “Specifically, the doctrine of unclean hands requires that a plaintiff ‘shall have acted fairly and without fraud or deceit as to the controversy in issue.” (Northbay Wellness Group, Inc. v. Beyries, 789 F.3d 956 (2015)) [↑](#footnote-ref-657)
658. Burack v. I. Burack, Inc., 137 A.D.2d 523 (1988). [↑](#footnote-ref-658)
659. Matter of Harris, 118 A.D.2d 646 (1986). [↑](#footnote-ref-659)
660. Matter of Cristo Bros., Inc., 64 N.Y.2d 975 (1985). [↑](#footnote-ref-660)
661. Sec. 1118(1). [↑](#footnote-ref-661)
662. Sec. 1118(2). [↑](#footnote-ref-662)
663. Matter of Pace Photographers, Ltd., 71 N.Y.2d 737 (1988). [↑](#footnote-ref-663)
664. Matter of Pace Photographers, Ltd., 71 N.Y.2d 737 (1988). Minnesota’s statute gives a similar effect to a shareholders’ agreement by stating that if shares are subject to a share purchase agreement, the court shall order the sale of the shares at the price written in the agreement unless the price is unreasonable under the circumstances (Minn. Stat. Ann. Sec. 302A.751(2)). [↑](#footnote-ref-664)
665. Davidian, p. 46. [↑](#footnote-ref-665)
666. Davidian, p. 47. [↑](#footnote-ref-666)
667. Moll, Dividend Policy, p. 890- 891. [↑](#footnote-ref-667)
668. Mardikos v. Arger, 457 N.Y.S.2d 371 (1982), footnote 2: “Petitioner's argument that *Weiss v. Gordon* (32 A.D.2d 279, 301 N.Y.S.2d 839) and *Application of Surchin* (55 Misc.2d 888, 286 N.Y.S.2d 580) which held that when a court is considering whether to exercise its discretion to grant dissolution to a “deadlocked” corporation, pursuant to Section 1104 of the BCL, the court should treat close corporations as partnerships, has established a rule that close corporations in other judicial dissolution proceedings are to be treated as partnerships is misplaced. These cases merely set forth the guidelines which should be followed in deciding whether to exercise its discretion in “deadlock” situations, and thus are wholly inapplicable to a proceeding involving a contest between minority and majority under the provisions of section 1104-a of the BCL.” [↑](#footnote-ref-668)
669. For a 2017 dated recent decision using the standard, see, In re Gould Erectors & Rigging, Inc., N.Y.S.3d (2017). [↑](#footnote-ref-669)
670. Murdock, p.465. [↑](#footnote-ref-670)
671. Application of Topper, 433 N.Y.S.2d 359 (1980): “…and a cover letter, dated May 30, 1979, from Assemblyman Edward H. Lehner, another legislative co-sponsor to the Governor's Counsel enclosing a memorandum prepared by Counsel to the Assembly Committee in which specific reference is made, at P. 15, to O'Neal's article in 33 The Business Lawyer and to his ”reasonable expectations test“ for ”oppression“ therein.” [↑](#footnote-ref-671)
672. Commentators opine that a “rights of interests” phrases lends itself particularly well to a broad interpretation in the minority’s favor (Julia Rider, *Dissolution under the California Corporations Code: A Remedy for Minority Shareholders,* 22 UCLA L. Rev. 595 (1974) at 615). [↑](#footnote-ref-672)
673. Id at 366. [↑](#footnote-ref-673)
674. Id at 365. [↑](#footnote-ref-674)
675. Id at 366. [↑](#footnote-ref-675)
676. Moll, Dividend Policy, p. 850. [↑](#footnote-ref-676)
677. Ragazzo, p. 1118- 1119. [↑](#footnote-ref-677)
678. Masinter v. WEBCO Co., 164 W.Va. 241 (1980). [↑](#footnote-ref-678)
679. O’Brein v. Pearson, 449 Mass. 377 (2007). [↑](#footnote-ref-679)
680. Colgate, et. al. v. The Disthene Group, Inc., 85 Va. Cir. 286 (2012). [↑](#footnote-ref-680)
681. Moll, Dividend Policy, p. 851. [↑](#footnote-ref-681)
682. Thompson, Corporate Dissolution, p.228. [↑](#footnote-ref-682)
683. Brenner v. Berkowitz, 134 N.J. 488 (1993) [↑](#footnote-ref-683)
684. Muellenberg v. Bilkon Corp., 143 N.J. 168 (1996): “The statute thus plainly allows the minority to seek a court order for the sale of the stock of “any other shareholder.” In most situations, oppressed minority shareholders will lack the resources to buy out the interests of controlling shareholders. As a result, claims of oppression are typically remedied by arranging for the corporation or the majority shareholders to buy out the interests of the minority shareholder… Thus, while a minority buy-out of the majority is an uncommon remedy, it was the appropriate one here. The trial court acted within its discretion in ordering Muellenberg and Adda to sell their shares in BNJ to Burg. This remedy is authorized by N.J.S.A. 14A:12–7(8) and is consistent with decisions holding that courts are not limited to statutory remedies, but have a wide variety of equitable remedies also available to them.” [↑](#footnote-ref-684)
685. Minn. Stat. Ann. 302A.751. Subd. 3a. [↑](#footnote-ref-685)
686. North Dakota Business Corporation Act, Chapter 10- 19. 1-115. 5 [↑](#footnote-ref-686)
687. “No court has yet adopted the reasonable expectations test without the assistance of a statute. The test, however, does not require such a restriction. In addition, the involuntary dissolution statutes in virtually every state allow a court to order dissolution or other relief in its discretion. The connection between the language of the New York and North Carolina statutes and the concept of reasonable expectations is not unique.” (Peeples, p.505) [↑](#footnote-ref-687)
688. Kiriakides v. Atlas Food Systems & Services, Inc., 343 S.C. 587 (2001): “Unlike the North Carolina statute in Meiselman, section 33–14–300 does not place the focus upon the “rights or interests” of the complaining shareholder but, rather, specifically places the focus upon the actions of the majority, i.e., whether they “have acted, are acting, or will act in a manner that is illegal, fraudulent, oppressive, or unfairly prejudicial either to the corporation or to any shareholder. Given to the language of our statute, a ‘reasonable expectations’ approach is simply inconsistent with our statute”. [↑](#footnote-ref-688)
689. Grato v. Grato, 272 N.J. Super. 140 (1994): “Simply put, judicial consideration of a claim of majority oppression or freeze-out in a closely held corporation is guided by considerations broader than those espoused in defendants’ version of the ‘business judgment rule’…As we have recently said, the business judgment rule ‘is a rebuttable presumption, and the burden shifts to the defendant to show the intrinsic fairness of the transaction in question upon the showing of self- dealing or other disabling factor’.” [↑](#footnote-ref-689)
690. Moll, Dividend Policy, p.867. [↑](#footnote-ref-690)
691. Moll, Dividend Policy, p.870. [↑](#footnote-ref-691)
692. Douglas K. Moll, *Shareholder Oppression and the New Louisiana Business Corporation Act*, 60 Loy. L. Rev. 461 (2014) at.487. [↑](#footnote-ref-692)
693. Cooke v. Fresh Exp. Foods Corp., Inc., 169 Or. App. 101 (2000). [↑](#footnote-ref-693)
694. Application of Topper, 433 N.Y.S.2d 359: “Whether the controlling shareholder discharged petitioner for cause or in their good business judgment is irrelevant.”; Ralph A. Peeples*, The Use and Misuse of the Business Judgment Rule in the Close Corporation,* 60 Notre Dame L. Rev. 456 (1985) at 509: “Thus, the reasonable expectations analysis could displace the business judgment rule as the method to review facially neutral corporate transactions” (p.502) and “Among the present alternatives to the business judgment rule, the reasonable expectations analysis offers the most protection for minority shareholders in close corporations.”; Exadaktilos v. Cinnaminson Realty Co., Inc., 167 N.J. Super. 141 (1979): “Thus, the statutory language embodies a legislative determination that freeze-out maneuvers in close corporations constitute an abuse of corporate power. Traditional principles of corporate law, such as the business judgment rule, have failed to curb this abuse. Consequently, actions of close corporations that conform with these principles cannot be immune from scrutiny.” [↑](#footnote-ref-694)
695. “As such, it is a more appropriate standard. In jurisdictions that have adopted the shareholder oppression doctrine, it should be deemed that such adoption hast, in the close corporation context, displaced the case law representing the traditional approach…Because the reasonable expectations standard avoids reliance on the business judgment rule, it is a more appropriate standard…” (Moll, Dividend Policy, p. 871). [↑](#footnote-ref-695)
696. “Specifically, the minority shareholders’ claim should be viewed as a claim that the majority's behavior violates the agreement that the parties would have reached at the time the business was formed if they had negotiated a solution to the disputed point. This “hypothetical bargain” approach to contract interpretation is used by courts in filling gaps in all kinds of contracts. As O’Neal saw it, courts should “’imply’ or construct additional terms for the contract to give effect to the underlying assumptions of the parties at the time they entered into it and should protect reasonable expectations generated by the business relationship which the contract created” (DeBow, p.128). [↑](#footnote-ref-696)
697. Peeples, p. 502. [↑](#footnote-ref-697)
698. Haley v. Forcelle, 669 N.W.2d 48 (2003): “The fact that the Stellar shareholders did not have a shareholder-control agreement assuring the rights of minority shareholders seems important to note.Thus, it may be argued that, as minority shareholders without the protection of a shareholder agreement, the Haleys had no right to reasonably expect continued employment, or continued participation in Stellar's management. But, in close corporations, the expectations of shareholders are not always encompassed in written agreements and written agreements are not always dispositive of shareholder expectations.” [↑](#footnote-ref-698)
699. Application of Topper, 433 N.Y.S.2d 359 (1980). For example, a resolution taken pursuant to a directors’ meeting can deem an expectation both reasonable or unreasonable (Royals v. Piedmont Elec. Repair Co., 137 N.C. App. 700 (2000): “Although Glenn’s initial expectation with respect to fair value might have been less than book value linked with a subsidized annual compensation or consulting fee, this expectation changed following the 10 February 1994 director’s meeting, at which time PERCO cut off Glenn’s compensation altogether. Following this meeting, defendants cannot claim that the parties had the same expectations as before.”). [↑](#footnote-ref-699)
700. Schautteet v. Chester State Bank, 707 F.Supp. 885 (1988). [↑](#footnote-ref-700)
701. Madugula v. Taub, 496 Mich. 685 (2014). The same rationale is also applicable for states which remedy oppression through fiduciary duty doctrine (See, Fought v. Morris, 543 So.2d 167 (1989), stating that shareholders’ agreement is one guide for corporate policy; and Walta v. Gallegos Law Firm, P.C., 131 N.M. 544 (2001), opining that breach of a shareholders’ agreement may be a breach of fiduciary duties under certain circumstances). [↑](#footnote-ref-701)
702. Moll, Dividend Policy, p. 873. [↑](#footnote-ref-702)
703. Edwin J. Bradley*, An Analysis of the Model Close Corporation Act and a Proposed Legislative Strategy*, 10 J. Corp. L. 817 (1985) at 840. [↑](#footnote-ref-703)
704. Moll, Dividend Policy, p.879. [↑](#footnote-ref-704)
705. Moll, Dividend Policy, p. 876. [↑](#footnote-ref-705)
706. Moll, New Louisiana, p. 488. [↑](#footnote-ref-706)
707. Wilkes v. Sprinside Nursing Home, Inc., 370 Mass. 842 (1976): “Therefore, when minority stockholders in a close corporation bring suit against the majority alleging a breach of the strict good faith duty owed to them by the majority, we must carefully analyze the action taken by the controlling stockholders in the individual case. It must be asked whether the controlling group can demonstrate a legitimate business purpose for its action… In asking this question, we acknowedge the fact that the controlling group in a close corporation must have some room to maneuver in establishing the business policy of the corporation. When an asserted business purpose for their action is advanced by the majority, however, we think it is open to minority stockholders to demonstrate that the same legitimate objective could have been achieved through an alternative course of action less harmful to the minority's interest.” [↑](#footnote-ref-707)
708. Moll, New Louisiana, p. 488. [↑](#footnote-ref-708)
709. Brenner v. Berkowitz, 134 N.J. 488 (1993) [↑](#footnote-ref-709)
710. Royals v. Piedmont Elec. Repair Co., 137 N.C. App. 700 (2000): “Next, we consider whether the frustration of these expectations occurred without the fault of the complaining shareholders… By including a fault-based inquiry within the reasonable expectations analysis, Meiselman essentially requires a court to ask whether the complaining shareholder's own conduct was the cause behind the frustration. Thus, in order for fault to be a bar to dissolution, there must be some causal connection between the frustration of the shareholder's reasonable expectations and his faulty behavior. For example, a shareholder with an expectation in management cannot seek dissolution based upon a frustration of this expectation if he never learns the business nor attends corporate management meetings. Likewise, a shareholder with an expectation in secure employment would be barred from seeking dissolution if he embezzled money from the company. [↑](#footnote-ref-710)
711. Harris v. Testar, Inc., 777 S.E.2d 776 (2015): “For plaintiff to obtain relief under a “reasonable expectations” analysis, he must prove that (1) he had one or more substantial reasonable expectations known or assumed by the other participants; (2) the expectation has been frustrated; (3) the frustration was without fault of plaintiff and was in large part beyond his control; and (4) under all of the circumstances of the case, plaintiff is entitled to some form of equitable relief.” [↑](#footnote-ref-711)
712. Gidwitz v. Lanzit Corrugated Box Co., 20 III.2d 208 (1960). [↑](#footnote-ref-712)
713. Central Standard Life Ins. Co. v. Davis, 10 III.2d 566 (1957): “The word ‘oppressive’ does not carry an essential inference of imminent disaster; it can, we think, contemplate a continuing course of conduct”. [↑](#footnote-ref-713)
714. In re Quail Aero Service, Inc., 300 A.D.2d 800 (2002): “Moreover, dilution of the value of the minority shareholder's stock will not amount to oppressive conduct when the minority shareholder is given an opportunity to supply capital and thereby maintain its percentage interest in the corporation.” [↑](#footnote-ref-714)
715. Matter of Kemp & Beatley, Inc., 64 N.Y.2d 64 (1984), at 72. [↑](#footnote-ref-715)
716. Id. at 73. [↑](#footnote-ref-716)
717. Minn. Stat. Ann. 302A.751. Subd. 3a. [↑](#footnote-ref-717)
718. Meiselman v. Meiselman, 309 N.C. 279 (1983): “…based on an examination of the entire history of the participants' relationship-an examination not only of the “expectations generated by the participants' original business bargain,” but also of the “history of the participants' relationship as expectations alter and new expectations develop over the course of the participants' cooperative efforts in operating the business.”” [↑](#footnote-ref-718)
719. Meiselman v. Meiselman, 309 N.C. 279 (1983): “The key is “reasonable.” In order for plaintiff's expectations to be reasonable, they must be known to or assumed by the other shareholders and concurred in by them. Privately held expectations which are not made known to the other participants are not “reasonable.” Only expectations embodied in understandings, express or implied, among the participants should be recognized by the court.” [↑](#footnote-ref-719)
720. The four- step requirement that another influential decision, Meiselman v. Meiselman, 309 N.C. 279 (1983), puts forward is similar to the New York court’s analysis: “Specifically, Meiselman outlines a four- step requirement for relief under the reasonable expectations analysis. First, the complaining shareholder must prove he had one or more substantial reasonable expectations that were known or assumed by the other shareholders. Examples of such expectations might include ongoing participation in the management of the company or secure employment with the company. Second, he must demonstrate that the expectation or expectations have been frustrated. Next, the complaining shareholder must show that this frustration of expectations was not the product of his own fault and was largely beyond his control. Finally, he must show that the specific circumstances warrant some form of equitable relief.” (Royals v. Piedmont Elec. Repair Co., 137 N.C. App. 700 (2000)) [↑](#footnote-ref-720)
721. D. Charles MacDonald, Corporate Behaviour and the Minority Shareholder: Contrasting Interpretations of Section 10- 19.1 -115 of the North Dakota Century Code, 62 N.D.L. Rev. 155 (1986), p.176. [↑](#footnote-ref-721)
722. MacDonald, p.176. [↑](#footnote-ref-722)
723. Kiriakides v. Atlas Food Systems & Services, Inc., 343 S.C. 587 (2001). [↑](#footnote-ref-723)
724. Peeples, p. 504. [↑](#footnote-ref-724)
725. MacDonald, p.177. [↑](#footnote-ref-725)
726. Douglas K. Moll, *Reasonable Expectations v. Implied-in-fact Contracts: Is the Shareholder Oppression Doctrine Needed*?, 42 B.C. L. Rev. 989 (2001), at 1006. [↑](#footnote-ref-726)
727. Moll, Implied-in-fact, p. 1009. [↑](#footnote-ref-727)
728. Cooke v. Fresh Exp. Foods Corp., Inc., 169 Or. App. 101 (2000): “The existence of one or more of these characteristic signs of oppression does not necessarily mean that the majority has acted oppressively…” [↑](#footnote-ref-728)
729. Michigan’s statutory oppression provision states that the “willfully unfair and oppressive conduct” terms do “not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure” (M.C.L.A. 450. 1489). [↑](#footnote-ref-729)
730. Skierka v. Skierka Bros., Inc., 192 Mont. 505 (1981). [↑](#footnote-ref-730)
731. “While oppressive conduct is more easily found in the context of a close corporation, we are aware of no case law expressly limiting it to such a context.” (Redmon v. Griffith, 202 S.W.3d 225 (2006)) [↑](#footnote-ref-731)
732. Thompson, Corporate Dissolution, p.225. For example, Texas Business Organizations Code provides for an oppression action against the “governing persons of the entity,” which would appear to be applicable to most business forms (Tex. Bus. Orgs. Code sec. 11.404(a)(1)(C); *and see.* Sec. 1.002 (18), (21), (35), (37) (defining “domestic entity,” “entity,” “governing authority,” and “governing person”). There is also another side of this issue: “Notably, the idea that controlling shareholders owe fiduciary duties to the minority has been extended into public corporations as well, and case law describing that duty harkens back nearly a century. Still, Courts have not generally wielded the fiduciary duty with the same vigor in public corporations as in the close corporate context. This may be because there are simply fewer cases in which a single shareholder or group of shareholders is able to acquire control within a public corporation.” (Morris, p.92) [↑](#footnote-ref-732)
733. Harry J. Haynsworth, *The Effectivesness of Involuntary Dissolution Suits as a Remedy for Close Corporation Dissension*, 35 Clev. St. L. Rev. 25 (1987), <http://engagedscholarship.csuohio.edu/clevstlrev/vol35/iss1/5> (Last visited: 10/10/2016) at 37. [↑](#footnote-ref-733)
734. Kaplan v. First Hartford Corp., 484 F.Supp.2d 131 (2007). [↑](#footnote-ref-734)
735. Costa rava Partnership III, L.P., et al. Plainitffs v. Telos Corporation, et al., Defendants, 2006 WL 4476413 (Md. Cir. Ct. 2006). [↑](#footnote-ref-735)
736. Themadel Foundation v. Third Canadian Investment Trust Ltd., 1995 7040 (ON SC). [↑](#footnote-ref-736)
737. Tottenham Hotspur Plc, Re [1994] 1 B.C.L.C. 655 (Ch D). [↑](#footnote-ref-737)
738. Latimer Holdings Ltd. and Powell-v-Sea Holdings Ltd. [2004] NZCA 226. [↑](#footnote-ref-738)
739. Luck Continent Ltd. v. Cheng Chee Tock Theodore & Ors [2013] 5 HKC 442. [↑](#footnote-ref-739)
740. Annuity & Life Reassurance Ltd. v. Kingboard Chemical Holdings Limited [2015] SC (Bda) 76 Comm (10 November 2015). [↑](#footnote-ref-740)
741. Gunzberg v. Art- Lloyd Metal Products Corp., 112 A.D. 2d 423 (1985); Ferber v. American Lamp. Corp., 503 Pa. 489 (1983); Matter of Smith, 154 A.D.2d 537 (1989); In re Smith, 546 N.Y.S.2d 382 (1989). [↑](#footnote-ref-741)
742. Taking the issue one point further, it can be claimed that a reasonable expectation can also be transferred by contract. It can be said that a party can also acquire a “reasonable expectation” tied to the share he purchases from a corporation’s shareholder, if he acquires the share in the corporation through a contract of sale and assignment of the seller shareholder’s contractual rights and obligations arising from the shareholders’ agreement that binds all shareholders and the corporation. This analogy can be found in Nordin v. Kaldenbaugh, 7 Ariz. App. 9 (1967) decision, in which court held that the incoming shareholder purchased the share through a contract of sale and an assignment regarding the shareholders’ agreement that binds both the shareholders and the corporation, and so took the share subject to the agreement which in return obtained all the rights and liabilities of the outgoing shareholder arising therefrom, and can initiate an legal action upon the contracts breach. [↑](#footnote-ref-742)
743. See, Bank of New York Mellon v. Commerzbank Capital Funding Trust II, 65 A.3d 539 (2013). [↑](#footnote-ref-743)
744. Murat Can Pehlivanoğlu, *Involuntary Dissolution: Theory and Operation in Publicly Traded Corporations*, 23 Annual Survey of International & Comparative Law 1 (2019) at 2. [↑](#footnote-ref-744)
745. Ian M. Ramsay, *Models of Corporate Regulation: The Mandatory/Enabling Debate, Corporate Personality in the 20th Century* 237, Ed. Charles E. F. Rickett, Ross B. Grantham (1998). [↑](#footnote-ref-745)
746. Fox v. 7L Bar Ranch Co., 198 Mont. 201 (1982) (citing O’Neal, Oppression of Minority Shareholders): “Although dividend withholding is used as a squeezeout technique and is used in corporations of all sizes, this technique (indeed practically all squeeze techniques) is applied most frequently in close corporations”; “In any corporation with a majority shareholder, the minority is at risk that the majority shareholder will engage in self- dealing and appropriate to itself a disproportionate share of the corporation’s income stream....the majority...often employs self- dealing as a complement to a financial and participatory freezeout of the minority.” (Ragazzo, p.1115-1116) [↑](#footnote-ref-746)
747. After all, law presumes that shareholders are competent to buy share in the first place (Chesapeake Corp. v. Shore, 771 A.2d 293 (2000)) . If stockholders are presumed competent to buy stock in the first place, why are they not presumed competent to decide when to sell in a tender offer after an adequate time for deliberation has been afforded them?”). [↑](#footnote-ref-747)
748. Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 Colum. L. Rev. 1403, at 1412. In this sense, there is also a “market for articles of incorporation”. [↑](#footnote-ref-748)
749. “If shareholders buy into corporations knowing that they are run by managers and controlling shareholders who can temper profit-maximization, then shareholders will have bought in at lower stock prices that reflect that fact and can claim no tax or injury when the tempering occurs.” (Einer Elhauge*, Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. Rev. 733 (2005), at 787); “Under a law and economics framework, it is assumed that the price of publicly traded shares reflects understanding about the quality of management and potential for oppressive conduct. In other words, a shareholder is compensated before the fact for any abusive conduct that may occur through a lower purchase price.” (Mohamed F. Khimji, Jon Viner, *Oppression- Reducing Canadian Corporate Law to a Muddy Default*, 47 Ottowa L. Rev. 123, at 153). [↑](#footnote-ref-749)
750. Riley, p.784. [↑](#footnote-ref-750)
751. Brudney, p. 1420. In close corporations context, the argument that both the “overtrust” of the shareholders for eachother and their “unsophistication” diminishes the sense that a contractual protection is needed, so they do not make such things a bargaining issue (Moll, New Louisiana Business, p.491), provides a justification for many unconventional measures. For example, justification for oppression remedy is supported by the empirical evidence showing that only a small percentage of close corporations elect to be covered by special statutory provisions on oppression in U.S. states requiring an election (Robert B. Thompson, *Corporate Dissolution and Shareholders’ Reasonable Expectations*, 66 Wash. U. L. Q. 193, at 226). [↑](#footnote-ref-751)
752. “Under modern contract law, a contract term that is unfairly surprising is unenforceable even if the term is impounded in the contract price. For example, the courts routinely hold that unclear or inconspicuous terms in insurance contracts that violate the insured's fair expectations are unenforceable, without regard to whether the terms lowered the insured's premiums.” (Eisenberg, The Structure of Corporation Law, p. 1519) [↑](#footnote-ref-752)
753. Re Mediavision Ltd. [1992] 2 HKC 629: “That management may change, that management could indeed change its own mind.” See, Goshen, p. 423: “Yet, the effectiveness of even an efficient capital market as a protective mechanism is limited. In the United, for example, most public corporations fund their activities by rolling over undistributed profits rather than by raising capital from the public. Thus, if the corporation does not have to turn to the capital market to raise funds, the market cannot control the majority’s ability to expropriate minority shareholders.” [↑](#footnote-ref-753)
754. “On the other hand, if shareholders buy their shares expecting pure profit-maximization, then they will have bought at prices that reflect that expectation and thus will suffer a loss if profits are sacrificed. Nor can they avoid the economic loss that results when a corporation embarks on a course of sacrificing profits by just selling their shares because the now-expected decline in future earnings will be capitalized into the market price at which they can sell their shares.” (Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest,* 80 N.Y.U. L. Rev. 733 (2005), at 787) [↑](#footnote-ref-754)
755. After all, the market price of shares traded on well- developed markets reflects all publicly available information including any misrepresentations, see: Basic Inc. v. Levinson 485 U.S. 224 (1988). [↑](#footnote-ref-755)
756. A Canadian case, Westfair Foods Ltd. v. Watt, 1991 ABCA 122, while applying the oppression provision to a publicly traded corporation, expressed this point as follows: “It is curious, and unusual, for shareholders in a public company to ask a court to order the company buy shares they can sell on the public market. The shares in question are listed on the Winnipeg stock exchange. Particularly if the only complaint is a lack of confidence, the quick, cheap, and simple solution is to sell them. I believe the Court can ask what is really going on here. The shareholders obviously consider the public market to be grossly under-valued. They seem to believe that the learned Chief Justice has uncovered a valuable right of which the market has been unaware: the right to force purchase at break-up value. At no point in his Reasons did the learned Chief Justice say that the shareholders could force a purchase at break-up value. But he did say that there was oppression, and he did say that the shareholders had a reasonable expectation in the maintenance of a high break-up value.” [↑](#footnote-ref-756)
757. Douglas K. Moll, *Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective*, 53 Vand. L. Rev. 749, at 759. [↑](#footnote-ref-757)
758. Moll, Employment at Will, at 543, claiming market can protect shareholders’ reasonable expectations. [↑](#footnote-ref-758)
759. Allen B. Afterman, *Statutory Protection for Oppressed Minority Shareholders: A Model for Reform*, 55 VA. L. REV. 1043 (1969), p. 1067. [↑](#footnote-ref-759)
760. “The purpose of the oppression statute is different. It does not seek to give the parties greater freedom to plan their relationship as much as it seeks to provide a statutory means to resolve conflicts unlikely to be the subject of advance planning. A statute designed to protect minority shareholders who find themselves denied effective participation and return in a close corporation should not be conditioned on an election which, in effect, assumes that minority shareholders will foresee the evils that might befall them.” (Thompson, Corporate Dissolution, p.226) [↑](#footnote-ref-760)
761. “In much the same way, variations of core fiduciary or structural rules might be both unfairly surprising and inefficient even if impounded into the price. What will be impounded into the price is the average likelihood that managers will exploit such a provision in a manner that will significantly decrease shareholder wealth. This average may be quite small, but many investors may well have preferred not to invest in a corporation whose stock was subject to significant losses as a result of substantial nonbusiness risks” (Eisenberg, The Structure of Corporation Law, p. 1521). Also, a custom or common practice cannot be a defense for violating people’s unwaived rights. Still, this issue is sometimes used as a defense by defendants, see, U.S. v. Brookshire, 514 F.2d 786 (1975): “Defendant's lament is that the statute has not been used to prosecute others for the actions which are here admitted. If the conduct is proscribed by [s 656](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS656&originatingDoc=Ibedaebe5909711d98e8fb00d6c6a02dd&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), the prosecution is within the ambit of the congressional authorization. The record does not show a general banking practice to use interbank deposits as compensating balances for personal loans to officers of the depositing bank. Even if it did, custom and usage involving criminality do not defeat a prosecution for violation of a federal criminal statute.” [↑](#footnote-ref-761)
762. “Furthermore, even if variations in core fiduciary and structural rules were known, shareholders would not meaningfully consent to them. Recall that even in closely held corporations, where true bargaining can occur, variations in core fiduciary rules should not be and are not enforceable, because consent to such variations would be systematically underinformed. The quality of the consent to such variations would be even weaker in publicly held corporations, where true bargaining is almost impossible, and knowledge of the variation, let alone its meaning and implications, would typically be lacking. In publicly held corporations, the problem of systematically underinformed consent would apply not only to core fiduciary rules, but to core structural rules, because just as core fiduciary rules govern traditional conflicts of interest, so core structural rules govern positional conflicts…Persons who proposed to buy stock in a publicly held corporation therefore would either have to expend resources to determine whether the corporation was subject to all the core rules that constrain unfair self-dealing, shirking, and positional conflicts by top managers, or assume that all corporations had adopted variations of those core rules. Either course of action would render capital markets less efficient, because investors would either put less of their money \*1523 into corporate securities or demand a higher return from such securities, than would otherwise be the case.” (Eisenberg, The Structure of Corporation Law, p. 1522) [↑](#footnote-ref-762)
763. However, see Khimji/Viner, p. 159, arguing that “in the minority shareholder- public corporation context, these default terms are sufficient and the oppression action is neither an efficient not fair default term.” [↑](#footnote-ref-763)
764. Khimji/Viner, p.142. [↑](#footnote-ref-764)
765. For a similar evaluation in the context of fiduciary duties, see, Walta v. Gallegos Law Firm, P.C., 131 N.M. 544 (2001): “We pause to note that the fiduciary duty we define here is a default standanrd applicable in the absence of a contrary agreement between shareholders. Shareholders are free to agree to different standards as long as the essence of right conduct is preserved.”. [↑](#footnote-ref-765)
766. Morris, p. 102. [↑](#footnote-ref-766)
767. For example, Sec. 7.32 of the MBCA (2011) states that a shareholders’ agreement will be effective among the shareholders (and their transferees) and the corporation, even though it is inconsistent with certain “mandatory” provisions of the Act, provided that it is approved by all persons who are shareholders at the time of the agreement, and the agreement is made known to the corporation or set forth in the articles of incorporation or bylaws, but it will cease to be effective after 10 years or when the corporation becomes a publicly traded corporation. [↑](#footnote-ref-767)
768. “On the other hand the agreements may have a role in establishing what the 'legitimate expectations' of shareholders are in a particular company and so bear upon the issue of whether such 'legitimate expectations' are being met or are being thwarted.” (Michael J. Duffy, *Shareholders Agreements and Shareholders’ Remedies: Contracts Versus Statute?* 20 Bond. L. Rev. 1 (2008), at 2) [↑](#footnote-ref-768)
769. CML is promulgated under the authority given by Article 167(1) of the Constitution, which states that “the State shall take the measures to ensure and promote the healthy and orderly functioning of the markets for… capital… ”. In this sense, the objective of the CML is not to regulate mere private law activities but has a public law aspect (Erdogan Moroglu, *Sermaye Piyasasi Kanunu ve Turk Ticaret Kanunu, Makaleler I* 280 (2001)), and this notion shows that the subjects of the CML is dealt with a public policy concern. [↑](#footnote-ref-769)
770. According to Constitutional Court of Republic of Turkey, legal status of some corporations differs from other corporations due to their capacity, arising from their level of capital, to affect social and economic texture of the society widely (Judgment of the Constitutional Court, Registration No: 2010/10 Judgment No: 2011/110 Date: 06/30/2011). [↑](#footnote-ref-770)
771. It argued that the price of a company’s shares serves as a public tool for dispersed shareholders to monitor and discipline the company and its participants (Pepper D. Culpepper, *Quite Politics and Business Power, Corporate Control in Europe and Japan* 25 (2011)). Culpepper expresses how prices work in the context of disciplining corporate managers as follows: “Markets ay close attention to the ability of a company to meet earnings expectations in each quarter, and a failure to meet those expectations causes some owners to sell their shares and the share price of the company to fall. If the share price falls too far, company can be taken over by new owners, who will replace the management team and attempt to reallocate the company’s resources more efficiently. In this first first scenario, public information and the threat of hostile takeover discipline a managerial team. Thus, the market for controlling the corporation is said to be an active constraint on the ability of managers to misuse the company’s asssets” (Culpepper, p.25- 26). However, when a corporation is dominated by “patient capital”, meaning that the shareholders are not focusing on short- term performance but on long- term strategies; the price declines will not effect their agenda (Culpepper, p. 26). Culpepper states Microsoft and Google as two American examples of suppliers of patient capital for managers (Culpper, p. 27). Writer also expresses that ownership concentration as one important indicator of patient capital (Culpper, p.28). [↑](#footnote-ref-771)
772. O'Neal, Oppugnancy, p.4. [↑](#footnote-ref-772)
773. For a similar analogy in insider trading context, see: U.S. v. O’Hagan, 521 U.S. 642 (1997). [↑](#footnote-ref-773)
774. Chittur, p. 159. [↑](#footnote-ref-774)
775. Clark, Corporate Law, p. 513. [↑](#footnote-ref-775)
776. See, Eisenberg, The Legal Roles, p.84; stating that appraisal rights in publicly traded corporations serves as a check on management. [↑](#footnote-ref-776)
777. Moll, Employment at Will, footnote 117: “Thus, if the involuntary dissolution statute protected something other than the value of the investment, the presence of a market would arguably be insufficient protection, and one would expect the dissolution statute to be available to public as well.” [↑](#footnote-ref-777)
778. Sahin, p. 212. [↑](#footnote-ref-778)
779. Cal. Corp. Code. Sec. 300(c). A similar rationale can also be stated for states remedying oppression through fiduciary duties doctrine (See, Walta v. Gallegos Law Firm, P.C., 131 N.M. 544 (2001): “We pause to note that the fiduciary duty we define here is a default standanrd applicable in the absence of a contrary agreement between shareholders. Shareholders are free to agree to different standards as long as the essence of right conduct is preserved.”). [↑](#footnote-ref-779)
780. Tugrul Ansay*, Cagdas Anonim Sirketlerin Sorunlari ve Turk Anonim Sirketleri* 52 (1971). [↑](#footnote-ref-780)
781. Ansay, Cagdas Anonim, p.52. [↑](#footnote-ref-781)
782. Article 35: “Everyone has the right to own and inherit property. These rights may be limited by law only in view of public interest. The exercise of the right to property shall not contravene public interest. [↑](#footnote-ref-782)
783. Article 2: “The Republic of Turkey is a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble.” [↑](#footnote-ref-783)
784. “The significant role for nonpecuniary benefits of control has macroeconomic effects that impact a country as a whole” (Gilson, p. 1667). [↑](#footnote-ref-784)
785. “An ill-defined doctrine of "fraud on the minority" possibly applied to extreme misbehavior. The minority shareholder could also petition the court to wind up the corporation on the ground that it was "just and equitable" to do so. Short of the drastic winding up remedy, minority shareholders were likely to be without recourse. Other procedural inhibitors, such as the rule in *Foss v. Harbottle,* which barred shareholder derivative actions and other shareholder actions arising from breaches of duty ratifiable by a majority of shareholders, greatly reduced the number of minority shareholder actions.' English courts held that they lacked jurisdiction to interfere in the internal management of companies; some English opinions posited that shareholders, having elected weak-willed, incompetent, or foolish directors, were at fault when the consequences of their poor selections became evident!" The English Companies Act of 1948 included an oppression statute that permitted the court to order remedies other than an order to wind up the company.” (Deborah Demott, *Oppressed but Not Betrayed: A Comparative Assessment of Canadian Remedies for Minority Sharehlders and Other Corporate Constituents*, Law and Contemporary Problems Vol. 56 No. 1 (1993) at 192) [↑](#footnote-ref-785)
786. See, F. Hodge O’Neal, Ronald R. Janke, *Utilizing Rule 10b-5 for Remedying Squeeze-Outs or Oppression of Minority Shareholders*, 16 Boston College Industrial and Commercial Law Review (1975), discussing the alternative options under U.S. federal securities law. [↑](#footnote-ref-786)
787. Demott, p.222. [↑](#footnote-ref-787)
788. Voeller v. Neilston Warehouse Co., 311 U.S. 531 (1941). [↑](#footnote-ref-788)
789. Joy v. North, 692 F. 2d 880 (1982): “…the seemingly more risky alternatives may well be the best choice since great losses in some stocks will over time be offset by even greater gains in others. Given mutual funds and similar forms of diversified investment, courts need not bend over backwards to give special protection to shareholders who refuse to reduce the volatility of risk by not diversifying. A rule which penalizes the choice of seemingly riskier alternatives thus may not be in the interest of shareholders generally.” [↑](#footnote-ref-789)
790. “Some controlling shareholders’ preferenes may simply reflect misjudgment or overconfidence. To the extent that the controlling shareholder or her heirs wish to go on directly managing the company, there may be a powerful inclination to overinvest int the company’s existing businesses- those with which the family manager is more comfortable- even though other opportunities that require different managerial skills may offer higher returns. Alternatively, the controlling shareholder may prefer to enter new businesses about which she knows little but that are alluring personally… To the extent these actions are motivated by nonpecuniary benefits of control, the fact that they reduce value may matter a great deal to the country as a whole even if minority shareholders accurately predict the controlling family’s preferences and abilities.” (Gilson, p.1667) [↑](#footnote-ref-790)
791. For a similar analogy in the context of director’s political spending, see; Kwak, p. 263. [↑](#footnote-ref-791)
792. Ragazzo, p. 1116. [↑](#footnote-ref-792)
793. Cheffins, p. 797. [↑](#footnote-ref-793)
794. Thompson, Corporate Dissolution, p.226. [↑](#footnote-ref-794)
795. An English court stresses this point as follows: “Outside investors were entitled to assume that the whole of the constitution was contained in the articles, read, of course, together with the Companies Acts. There is in those circumstances no room for any legitimate expectation founded on some agreement or arrangement between the directors and kept up their sleeves and not disclosed to those placing the shares with the public through the USM.” (Re Blue Arrow plc (1987) 3 B.C.C. 618). [↑](#footnote-ref-795)
796. “In large publicly held corporations there will… be a marked tendency to view the parties as arm’s- length players, each entitled to rely upon the strict wording of their contract.” (Chapman, p.207). [↑](#footnote-ref-796)
797. Boehringer v. Konkel, 404 S.W.3d 18 (2013): “Specific expectations will require proof of specific facts giving rise to the expectations in a particular case and a showing that the expectation was reasonable under the circumstances of the case as well as central to the minority shareholder's decision to join the venture… General reasonable expectations are expectations that arise from the mere status of being a shareholder.” [↑](#footnote-ref-797)
798. “…specific reasonable expectations are personal in nature. As mentioned, under the investment model, a specific reasonable expectation represents an individually tailored investment bargain that a majority shareholder entered into with a particular minority shareholder.” (Moll, Shareholder Oppression & Reasonble Expectations: Of Change, Gifts, and Inheritances, p. 773) [↑](#footnote-ref-798)
799. “Under the investment model's view of, a specific only exists if a majority and minority shareholder both assent to a bargain that provides for a specific benefit such as employment. It is hard to argue that the requisite assent is present in this hypothetical, as the situation is not one where the employment “terms” of the arrangement are bargained for between the majority and minority themselves. Instead, the terms are more or less injected into the shareholders' relationship without any form of bargaining at all.” (Moll, Shareholder Oppression & Reasonble Expectations: Of Change, Gifts, and Inheritances, p.784) [↑](#footnote-ref-799)
800. Royals v. Piedmont Elec. Repair Co., 137 N.C. App. 700 (2000): “Although Glenn’s initial expectation with respect to fair value might have been less than book value linked with a subsidized annual compensation or consulting fee, this expectation changed following the 10 February 1994 director’s meeting, at which time PERCO cut off Glenn’s compensation altogether. Following this meeting, defendants cannot claim that the parties had the same expectations as before.”). [↑](#footnote-ref-800)
801. Although not discussed in U.S. law, Canadian law accepts that public announcements of a publicly traded corporation are “promises” that can create reasonable expectations. See: Themadel Foundation v. Third Canadian Investment Trust Ltd., 1995 7040 (ON SC) (“It strikes me that once the “promise” has been made (in a corporate/securities legislation sense as we have here through the information circulars and press releases which are to be translated into the issuer bids), then this promise becomes a reasonable expectation which deserves protection through the oppression provisions…   I think it reasonable that shareholders be entitled to rely on written and public pronouncements of what corporations in which they hold shares will do. This is especially so in the case of corporations which offer their shares to the public as it is an offence for such corporations to be other than truthful in public pronouncements.”), and Ford Motor Company of Canada, Ltd. v. Ontario Municipal Employees Retirement Board, 2006 CanLII 15 (ON CA). Similar grounds are also asserted in some U.K. law cases by claimants (Bradman v. Trinity Estates plc [1989] BCLC 757: “One of the grounds of the application under sec. 459 is said to be that the transaction is prejudicial to members in that it represents a departure from what was held out to them in the prospectus…”) and the courts (Re Leeds United Holdings plc. [1997] B.C.C. 131: “It may be that in certain cases the court can find a relevant legitimate expectation outside the company's constitution that can be relied on for s. 459 purposes even in the case of a public company, but such circumstances must, it seems to me, be rare.”). [↑](#footnote-ref-801)
802. Oğuz İmregün, Kara Ticareti Hukuku Dersleri (1987), p. 446; Ünal Tekinalp, Sermaye Ortaklıklarının Yeni Hukuku (2020), p. 124. For a brief summary of commentary on the legal nature of articles of incorporation, see, Esra Hamamcıoğlu, Aile Tipi Limited Şirketlerde Şirket Sözleşmesi (2022), p. 23- 31. [↑](#footnote-ref-802)
803. For a brief explanation of CML regime’s disclosure system and how it requires corporations to operate, see, Murat Can Pehlivanoğlu, Halka Açık Anonim Şirket Statüsündeki Futbol Kulüplerinde Sporcuların Covid- 19 Test Sonuçları, Özel Durum Açıklamaları ve Yönetim Kurulunun Sorumluluğu, 1. Ticaret Hukuku Kongresi (Ed. Mehmet Bahtiyar et. al.) 711 (2021). [↑](#footnote-ref-803)
804. While the fact that there is a shareholders’ agreement among certain shareholders would be a material event, the disclosure of these agreements would, in most instances, lead to no reasonable expectations in the context of publicly traded corporations in Turkey. After all, a corporation cannot disclose an agreement that it is not aware of (given that its not a party to the agreement) during the public offering or as a part of ongoing disclosure obligations. In this regard, the only explicit measure that CML brings is requiring the disclosure of a shareholders’ agreement if it is the legal basis which triggers the disclosure obligation on parties who acquire or dispose the specified percentages (%5, %10, %15, %20, %25, %33, %50, %67, %95) of total share capital or voting rights (Comminuque on Material Events Disclosure, Article 12 and 13). Even in this case, only the mere presence or related part of the agreement would be disclosed and not the whole (Comminuque on Material Events Disclosure, Article 15). Therefore, shareholders’ agreement would be an unlikely basis for investors of publicly traded corporations to build an expectation on. [↑](#footnote-ref-804)
805. For the description of the theory, see; Christopher Paul Saari, *The Efficient Capital Market Hypothesis, Economic Theory and the Regulation of the Securities Industry*, 29 Stan. L. Rev. 1031 (1977). [↑](#footnote-ref-805)
806. Basic Inc. v. Levinson, 485 U.S. 224 (1988). [↑](#footnote-ref-806)
807. While one may assert that relying on a provision that has an administrative remedy, rather than civil remedy as a basis in oppression claim, can mean that a civil remedy is created for the the provisions violation through judiciary (See, Chapman, p. 213: “The expensive wording of the oppression remedy raises the question as to whether the oppression remedy can be used as a means of civil enforcement of the continuous disclosure provisions”), this is not the case. The securities law provisions are added to the oppression equation through the contractual theory and does not by its own establish a civil liability. Besides, plaintiff’s right to initiate private actions against violators of the securities law is not incompatible with the nature of this law (See, Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994): “It is envisioned that the SEC would enforce the statutory prohibiton through administrative and injuctive actions. Of course, a private plaintiff now may bring suit against violators of Sec. 10(b). But the private plaintiff may not bring a 10b-5 suit against a defendant for acts not prohibited by the text of Sec. 10(b)). [↑](#footnote-ref-807)
808. The Swissair/Wibru decision, represents an example of liability that a shareholder can have due to advertisements or coincidental communications. In that case, the court opined that the advertisement and project announcement letters created a legitimate expectation for the consumers who engage in a contractual relationship with a subsidiary, and the parent should be liable for the breach of trust in corporate groups (See, Hasan Pulasli, *Turk Ticaret Kanunu Tasarisina Gore Sirketler Toplulugunun Temel Nitelikleri ve Hakim Sirketin Guven Sorumlulugu,* Gazi Universitesi Hukuk Fakultesi Dergisi C. XI, Sa. 1-2, Y. 2007, at 270- 275). [↑](#footnote-ref-808)
809. “The articles may not be the only contractual terms of the relationship between the company and a shareholder. The company and a shareholder may establish additional contractual arrangements governing their relationship. These additional agreements are typical where a different class of shares created and issued, such as preference shares or redeemable shares. The terms of issue of these shares, typically contained in the issue document, supplement the provisions in the articles.” (McLaughlin, p. 148) [↑](#footnote-ref-809)
810. However, this does not mean that these communications do not give rise to civil and criminal liability under securities laws’ market manipulation rules. [↑](#footnote-ref-810)
811. Markus Roth, *Shareholders’ Agreements in Listed Companies: Germany*, <https://www.unibocconi.eu/wps/wcm/connect/703b0434-4b96-435f-b52e-92ff838c8716/WP+12+Pollicino-Lubello-Bertolini.pdf?MOD=AJPERES> (Last Visited: 10/12/2016) at 2. [↑](#footnote-ref-811)
812. Sahin, p. 210. [↑](#footnote-ref-812)
813. Sahin, p. 210. [↑](#footnote-ref-813)
814. A corporation which wishes to have its shares listed on a stock exchange has to enter into a listing agreement with the stock exchange, and the terms of this agreement includes the conditions (requirements or standards) in which the shares will be listed and traded (“The first ‘standards’ were no more than terms insterted in a given listing agreement.” (Douglas C. Michael, *Untenable Status of Corporate Governance Listing Standards Under the Securities Exchange Act*, 47 Bus. Law. 1461 (1992), at 1465)). In essence, the relationship between the corporation and the stock exchange is contractual and not a part of the company law (J.M. Gullick, *Ranking & Spicer’s Company Law* 380 (12.Ed.,1981)). Hence, violation of listing rules does not invalidate any transactions or give rise to specific liabilities in terms of corporate law, but can lead to administrative sanctions imposed by the stock exchange (Eddy Wymeersch, *“Do we need a law on groups of companies?”, Capital Markets and Company Law* 589, Ed. Klaus J. Hopt/Eddy Wymeersch (2003)) and the violating corporation can be liable to shareholders in the market under tort law (L. Timmerman, A. Doorman, *Rights of the Minority Shareholders in the Netherlands,* <http://www.rug.nl/research/portal/files/3038170/minorityshh.pdf> (Last visited: 10/10/2016) at 49), if there is no specific private rights of action provided by the securities law legislation (Jablon v. Dean Witter & Co., 614 F.2d 677 (1980): “The Securities Exchange Act does not expressly authorize private actions for stock exchange rule violations.” Howeve, stock exchanges may be held liable against the investors for the corporation’s violation of the exchange rules, on the ground that the exchange had failed to exercise due care to halt the manipulative conduct of its members (Deaktor v. L.D. Schreiber & Co., 479 F.2d 529 (1973)).). However, in the course of history, the listing agreement and the capital market law became so interwoven that listing requirements no longer preserve its pure contractual nature (CML expresses this notion by stating that “without prejudice to the provisions of this Law, exchanges are subject to private law provisions and shall independently fulfill the duties and exercise the authorities granted by this Law under their own responsibilitiy” (Article 65(10))). Today, stock exchanges’ listing rules are under securities regulators’ scrutiny; changes in the listing rules are subject to regulators’ approval in both Turkey (CML Article 67) and US (Securities Exchange Act Sec. 19(b)). This is due to listing rules’ function to serve as a mechanism that provides protection for shareholders through the requirements they impose on issuers (Arthur R. Pinto, *“The United States”, Public Companies and the Role of Shareholders* 48, Ed. Sabrina Bruno/Eugenio Ruggiero (2011)). Hence, listing standards are seen suitable to be used as a back door for adopting corporate governance standards by regulators (This issue is widely debated in US, see: Business Roundtable v. SEC, 905 F. 2d 406 (D.C. Circuit 1990)). Generally, stock exchanges set their own listing requirements (or listing standards) and they have the discretion in approving the listing of the corporation or not. Listing standards are “usually intended to facilitate an efficient and continuous auction market” (Michael, p.1464), implemented with the understanding that the “standards are good for the business” and provides competitive advantage (Michael, p. 1468). The initial listing requirements may include both financial and non-financial standards, varying from total market value to corporate governance standards. A corporation must satisfy these conditions to be listed and publicly traded on a stock exchange. Even after initial listing, stock exchanges may require other sets of standards for the corporation to satisfy during their secondary offerings. Also, failing to meet certain standards can cause a corporation’s delisting from the stock exchange. Therefore, listing requirements occupy an important place within the regulations that corporations should comply with. [↑](#footnote-ref-814)
815. As mentioned above, some jurisdictions, such as Hong Kong, has oppression statutes that specificially pulls non- Hong Kong companies within its ambit, and the local law and local standards are applied to foreign companies through this statute, which ties the foreign companies into Hong Kong law so as to reduce the risks of them importing poor governance rules into Hong Kong through their listing in the exchange (Donald, p. 157). [↑](#footnote-ref-815)
816. TCC Article 531 (1): “In the occurrence of just causes, shareholders of shares representing at least ten percent, and at least twenty percent in publicly held corporations, of the outstanding shares of a corporation may present a petition of dissolution of the corporation to the commercial court where the corporation is headquartered. The Court may, rather than dissolving the corporation, order the buy- out of the shares of the complaining shareholders with an appraisal value determined on the day closest to the court order, or order a convenient and acceptable alternative remedy.” [↑](#footnote-ref-816)
817. Halit Eker, *Anonim ve Limited Sirketlerde Ortaklik Sifatinin Sona Ermesi ve Ozellikle Hakli Sebeple Fesih Davasina Iliskin Bazi Degerlendirmeler*, 32 Banka Huk. Dergisi 63 (2016) at 108. [↑](#footnote-ref-817)
818. Aytekin Celik*, Turk Ticaret Kanunu Tasarisi’na Gore Anonim Sirketlerin Hakli Sebeple Feshi, 25 Banka Huk. Dergisi 559 (2009*), at 564- 565. [↑](#footnote-ref-818)
819. Fusun Nomer Ertan, *Anonim Ortakligin Hakli Sebeple Feshi Davasi- TTK m. 531 Uzerine Dusunceler*, IUHFM C. LXXIII, S.1 (2015) at 422. [↑](#footnote-ref-819)
820. Unal Tekinalp, Yeni Anonim, p.191. [↑](#footnote-ref-820)
821. Sahin, p.61. [↑](#footnote-ref-821)
822. Sahin, p. 141. [↑](#footnote-ref-822)
823. Taylor v. Holmes, 14 F. 498 (1882): “A corporation possesses strong and tenacious principles of vitality, derived from its charter bestowed by sovering authority, and does not cease to exist until its dissolution is accomplished in a manner provided by law. A corporation may surrender its charter to the sovereign power that created it, and thus determine its existence, but there must be some definite act of surrender, and an acceptance by the sovereign or its duly- authorized agent.” [↑](#footnote-ref-823)
824. In re Dissolution of Chris Kole Enterprises, 188 Misc.2d 207 (2001). [↑](#footnote-ref-824)
825. Lichens Co. v. Standard Commercial Tobacco Co., 28 Del. Ch. 220 (1944): “Originally, jurisdiction to appoint a receiver, in order to wind up a solvent corporation, was largely denied on the theory that it was equivalent to a decree for dissolution, which was generally within the sole province of the legislative body. Particularly when corporate charters are granted by law, as in this State, there seems to be little reason for the application of that rule.” [↑](#footnote-ref-825)
826. Official Comment to TCC Article 531. [↑](#footnote-ref-826)
827. Bonavita v. Corbo, 300 N. J. Super. 179 (1996): “The thrust of Subsection (1)(c) of the statute is protection from the abusive exercise of power.” [↑](#footnote-ref-827)
828. See, Douglas K. Moll, *Shareholder Oppression and “Fair Value”: Of Discounts, Dates, and Dastardly Deeds in the Close Corporation*, 54 Duke L.J. 293 (2004), at 300- 301, explaining how this happens in close corporation context: “Conventional corporate law norms of majority rule and centralized control can lead to serious problems for the close corporation minority shareholder. Traditionally, most corporate power is centralized in the hands of a board of directors. In a close corporation, the board is ordinarily controlled “by the shareholder or shareholders holding a majority of the voting power.” Through this control of the board, the majority shareholder has the ability to take actions that are harmful to the minority shareholder's interests. Such actions are often referred to as “freeze-out” or “squeeze-out” techniques that “oppress” the close corporation minority Common freeze- out techniques include the refusal to declare dividends, the termination of a minority employment, the removal of a minority shareholder from a position of management, and the siphoning off of corporate earnings through high compensation to the majority shareholder. Quite often, these tactics are used in combination. For example, a investor generally looks to salary more than dividends for a share of the business returns because the “[e]arnings of a \*302 often are distributed in major part in salaries, bonuses and retirement benefits.” When actual dividends are not paid, a minority shareholder who is discharged from employment and removed from the board of directors is effectively denied any return on his investment as well as any input into the management of the business. Once a minority shareholder faces this “indefinite future with no return on the capital he or she contributed to the enterprise,” the majority often proposes to purchase the shares of the minority shareholder at an unfairly low price.” [↑](#footnote-ref-828)
829. Celik, p.562- 563. [↑](#footnote-ref-829)
830. Sahin, p. 587. [↑](#footnote-ref-830)
831. Sahin, p. 3. [↑](#footnote-ref-831)
832. Yargitay 11. HD E. 2005/2750 K. 2006/2644 T. 14/03/2006. [↑](#footnote-ref-832)
833. Hetherington/Dooley, p.3. [↑](#footnote-ref-833)
834. Jones v. H.F. Ahmanson & Co., 1 Cal.3d 93 (1969). [↑](#footnote-ref-834)
835. Howard v. Shay, 1998 WL 526577. [↑](#footnote-ref-835)
836. Hetherington/Dooley, p.7. [↑](#footnote-ref-836)
837. In Jones v. H.F. Ahmanson & Co., 1 Cal.3d 93 (1969), the court concluded that the majority’s action (which is to control the corporation for the purpose of promoting a marketing scheme that benefits themselves alone to the detriment of the minority) damaged the minority by destroying the “potential public market” for the stock. [↑](#footnote-ref-837)
838. Jones v. H.F. Ahmanson & Co., 1 Cal.3d 93 (1969): “Here the exchange was an integral part of a scheme that the defendants could reasonably foresee would have as an incidental effect the destruction of the potential public market for Association stock. The remaining stockholders would thus be deprived of the opportunity to realize a profit from those intangible characteristics that attach to publicly marketed stock and enhance its value above book value. Receipt of an appraised value reflecting book value and earnings alone could not compensate the minority shareholders for the loss of this potential. Since the damage is real, although the amount is speculative, equity demands that the minority stockholders be placed in a position at least as favorable as that the majority created for themselves.” [↑](#footnote-ref-838)
839. Hetherington/Dooley, p.45. [↑](#footnote-ref-839)
840. Pinar Altinok Ormanci, *Surekli Borc Iliskilerinin Hakli Sebeple Feshi* 115-188, Doctoral Dissertation (2011). [↑](#footnote-ref-840)
841. Official Comment to TCC Article 531. [↑](#footnote-ref-841)
842. Turkish Civil Code, Article 2: “Everyone shall act in accordance with the rules of good faith in the exercise of his or her rights and obligations. Law does not protect an outright abuse of a right.” This article is also used as the source of any duty of loyalty that the shareholders may have towards other shareholders in Turkish legal scholarship: Some commentators state that the duty of loyalty is an outcome of the “duty of good faith” obligation imposed on parties due to and shareholders’ duty of loyalty does not go further than this general obligation; but the existence of a shareholders’ agreement in close corporations might establish a partnership between shareholders and this partnership relationship can create a duty of loyalty obligation amon them (Nilsson, Paysahipleri Sozlesmeleri, p.36, 260 and 261). [↑](#footnote-ref-842)
843. Ayse Sumer, *Turk Ticaret Kanunu Tasarisinda Anonim Ortakliklarin Hakli Nedenle Feshi,* IIBF Dergisi Cilt XXVIII S.1. (2010), at 172. [↑](#footnote-ref-843)
844. Yargitay IBGK E. 1987/2 K. 1988/2 T. 30/09/1988. [↑](#footnote-ref-844)
845. “The legal basis of the just cause conception is Turkish Civil Code Article 2, and it is merely the application of the Article to long- term contracts” (Eker, p. 85). [↑](#footnote-ref-845)
846. Sahin, p. 9- 11. [↑](#footnote-ref-846)
847. Commentators that analogize the nature of the corporations to simple partnerships opine that its partnership nature underlines the corporations “long- term contract” character (Hasan Pulasli, *Turk, Isvicre ve Alman Hukukuna Gore “Iktisadi Amac” Kavraminin Sirket ve Dernekler Bakimindan Degerlendirilmesi*, 32 Banka Huk. Dergisi 21 (2016), at 30). During the times of the abolished TCC, the relationship between shareholders of a corporation before incorporation was accepted as a simple partnership, see, Yargitay HGK E. 1991/13-76 K. 1991/199 T. 10/04/1991 (Guroglu, J., dissenting). [↑](#footnote-ref-847)
848. Courts acknowledge that the relationship between partners in simple partnerships is of trust and good faith, and the personality of partners matters for the partners in this firm cooperation (Yargitay 3. HD E. 2016/9450 K. 2016/9672 T. 22/06/2016). [↑](#footnote-ref-848)
849. Yargitay 3. HD E. 2014/8681 K. 2015/932 T. 19/01/2015. [↑](#footnote-ref-849)
850. Yargitay 11. HD E. 1979/2160 K. 1979/3061 T. 07/06/1979. [↑](#footnote-ref-850)
851. Tekinalp, p. 336. [↑](#footnote-ref-851)
852. Hetherington/Dooley, p.3. [↑](#footnote-ref-852)
853. Coffee, footnote 5. [↑](#footnote-ref-853)
854. Brooks v. Hill, 717 So. 2d 759 (1998) (Maddox, J., dissenting) [↑](#footnote-ref-854)
855. Coffee, p. 1619. [↑](#footnote-ref-855)
856. Yargitay 11. HD E. 1979/2160 K. 1979/3061 T. 07/06/1979. [↑](#footnote-ref-856)
857. Yargıtay İBGK E. 1983/3 K. 1984/1 T. 25/01/1984. “Continuing contract” term is used in English to refer to the “Dauerschuldverhaltnis” term used in German law (Michael H. Whincup, *Contract Law and Practice, The English System, with Scottish, Commenwealth and Continental Comparisons* 162 (5th Ed. 2006), which is the equivalent of the Turkish concept “sürekli borç ilişkisi”. [↑](#footnote-ref-857)
858. Murat Oruc, *6102 Sayili Yeni Ticaret Kanunu’na Gore Anonim Ortakliktan Hakli Sebeple Fesih Istemine Bagli Cikarilma,* 27 Banka Huk. Dergisi 209 (2011), at 212. [↑](#footnote-ref-858)
859. Nil Karabağ Bulut, *Medeni Kanunun 23. Maddesinin Sozlesme Ozgurlugune Getirdigi Sinirlamalar* 80, Doctoral Dissertation (2012). [↑](#footnote-ref-859)
860. Ormanci, p. 113 and 121. [↑](#footnote-ref-860)
861. Means, p.459. [↑](#footnote-ref-861)
862. Means, p. 460. [↑](#footnote-ref-862)
863. DeBow, p. 128. [↑](#footnote-ref-863)
864. Ersin Camoglu, *Anonim Ortakligin Hakli Sebeple Feshinde Hakimin Takdir Yetkisi*, 31 Banka Huk. Dergisi 5 (2015), at 9. [↑](#footnote-ref-864)
865. Celik, Turk Ticaret Kanunu, p. 570. [↑](#footnote-ref-865)
866. Sahin, p. 111. [↑](#footnote-ref-866)
867. Hanagasi, p.212 and 215. [↑](#footnote-ref-867)
868. Hanagasi, p. 222. In a case concerning a mandatory share purchase offer under the CML, the court ruled that only minority shareholders who own the shares of the corporation at the time of the share purchases which give raise to a mandatory share purchase offer, can initiate a lawsuit against the purchase offer (Yargitay 11. HD E. 2005/923 K. 2006/1567 T. 20/02/2006). [↑](#footnote-ref-868)
869. Official Comment to TCC Article 531 and Article 166. [↑](#footnote-ref-869)
870. Tolga Ayoglu, *Anonim Ortakliklarin Hakli Nedenle Feshi*, Galatasaray Universitesi Hukuk Fakultesi Dergisi 2013/2 (2013), p. 223 (Ayoğlu, 2013). [↑](#footnote-ref-870)
871. Ian M. Ramsay, p.237. [↑](#footnote-ref-871)
872. Celik, Turk Ticaret Kanunu, p. 571. [↑](#footnote-ref-872)
873. Camoglu, Anonim Ortakligin Hakli Sebeple, p. 7. [↑](#footnote-ref-873)
874. Yargitay 11. HD E. 2014/11752 K. 2014/20346 T. 24/12/2014. [↑](#footnote-ref-874)
875. Celik, Turk Ticaret Kanunu, p. 571. [↑](#footnote-ref-875)
876. Sahin, p. 115. Likewise, in U.S. law, only a few state statutes impose an irreparable injury requirement for “deadlock among shareholders”, which is a ground that authorizes dissolution of the corporation (Thompson, Corporate Dissolution, p. 203). [↑](#footnote-ref-876)
877. Celik, Turk Ticaret Kanunu, p. 574. [↑](#footnote-ref-877)
878. Celik, Turk Ticaret Kanunu, p. 575. [↑](#footnote-ref-878)
879. Yargitay 11. HD E. 2014/11752 K. 2014/20346 T. 24/12/2014. [↑](#footnote-ref-879)
880. After all, when exercising their rights, shareholders need to act in forbearance due to the duty of good faith, see, Necla Akdağ Güney, *Anonim Şirketlerde Hakların Sakınılarak Kullanılması İlkesi ve Uygulaması*, Prof. Dr. Hikmet Sami Türk’e Armağan (2017), p. 45. [↑](#footnote-ref-880)
881. Eker, p. 121. [↑](#footnote-ref-881)
882. Nomer, p. 427. [↑](#footnote-ref-882)
883. Eker, p. 125. [↑](#footnote-ref-883)
884. Official Comment to TCC Article 339. This being said, some commentators argue that TCC Article 340 explicitly expresses the mandatory nature of the Turkish corporate law, and this fact undermines the contractual nature of the corporations (Ali Pasli, *Yeni Turk Ticaret Kanunu Anonim Ortaklik Hukumlerinin Tanitilmasi (II) YTK Kitap 2- Kisim 4- Bolum 1 “Kurulusa Iliksin Sisteme Yonelik Temel Degisiklikler ve Kurulus Islemleri”,* 28 Banka Huk. Dergisi 141 (2012), at 170). Some others state that the fact that corporations can be established by just one shareholder undermines the contractual nature, at least for those kinds of corporations (Feyzan H. Sehirali Celik, *Hukukun Ekonomik Gerceklige Yaniti: Tek Kisilik Sirketler,* 24 Banka Huk. Dergisi 163 (2008) p. 175). [↑](#footnote-ref-884)
885. Karasu, p. 116. [↑](#footnote-ref-885)
886. Eker, p. 115. [↑](#footnote-ref-886)
887. For the validity of shareholders’ agreement restricting a corporation’s exercise of statutory powers, see generally; Ferran, The Decision of the House of Lords in Russell v. Northern Bank Development Corporation Limited. [↑](#footnote-ref-887)
888. Oruc, p. 217. [↑](#footnote-ref-888)
889. For a general evalution of the mandatory nature of TCC, see, Karasu, p.117- 118. [↑](#footnote-ref-889)
890. As case law suggests, statutory provisions that deal with minority shareholders’ appraisal rights in publicly traded corporations has a public policy aspect (Yargitay 11. HD E. 2003/3498 K. 2003/10556 T. 07/11/2003). [↑](#footnote-ref-890)
891. Tekinalp, p. 336. [↑](#footnote-ref-891)
892. However, the Official Comment to TCC Article 531 states that it can be lowered. For the debates on this issue, see, Emel Hanagasi*, Anonim Ortakligin Hakli Sebeple Feshi Davasinin Medeni Usul Hukuku Perspektifinden Degerlendirilmesi*, 32 Banka Huk. Dergisi 199 (2016), at 212. [↑](#footnote-ref-892)
893. This “frivolousness” do contain the concerns of both minority’s abuse of power and the initation of the lawsuit rather than exercising other shareholders which can easily cure the dissension (Oruc, p.215 and 218). [↑](#footnote-ref-893)
894. Yargitay 11. HD E. 1979/2160 K. 1979/3061 T. 07/06/1979. [↑](#footnote-ref-894)
895. Ayoglu, 2013, p. 226. [↑](#footnote-ref-895)
896. Celik, Turk Ticaret Kanunu, p.570. [↑](#footnote-ref-896)
897. Articles of incorporation can include a term regarding dissolution on just cause, see, Yargitay 11. HD E. 1979/2160 K. 1979/3061 T.07/06/1979. [↑](#footnote-ref-897)
898. TTK Article 529. [↑](#footnote-ref-898)
899. Yargitay H.G.K. E. 2013/752 K. 2013/752 T. 22/05/2013: “Whether a contract is in violation of mandatory rules would be determined considering the whole legal system. Consequently, while an unlawfulness might appear as a violation of criminal law statutes or statutes that prohibit actions that may injure others, it might also appear as a violation of a statutory provision in the field of private law.” [↑](#footnote-ref-899)
900. California statutorily bars shareholders’ agreements from waiving involuntary dissolution rights of the shareholders, see Cal. Corp. Code. Sec. 300(c). On the other hand, in Arizona; although the Arizona Revised Statutes Title 10 (Corporations and Associations) accepts oppression as a ground for judicial dissolution in Sec. 10-1430, it also permits shareholders’ agreements modifying oppression proceedings: “An agreement among shareholders of a corporation that complies with this section if effective among shareholders and the corporation even though it is inconsistent with one or more other provisions of chapters 1 through 17 of this title if it meets any of the following conditions: …Otherwise governs the exercise of the corporate powers or the management of the business and affairs of the corporation, its liquidation and dissolution or the relationship among the shareholders, the directors and the corporation, or among any of them.” (Sec. 10- 732(A)). Accordingly, in Gries v. Plazza Del Rio Management Corp., 236 Ariz. 8 (2014), the Arizona court upheld the Superior Court’s decision to stop an involuntary dissolution proceeding due to the exercise of a buy- out right of the shareholders’ agreement which set the buy- out price as well. [↑](#footnote-ref-900)
901. Tolga Ayoğlu, Sermaye Şirketleri Özelinde Şirketler Hukuku Uyuşmazlıklarının Çözümünde Tahkim (2018) 145. [↑](#footnote-ref-901)
902. Yargitay 11. HD E. 2014/141 K. 2014/6951 T. 09/04/2014. [↑](#footnote-ref-902)
903. See, Matter of Validation Review Associates, Inc., 223 A.D.2d 134 (1996), expressing this rationale: “A shareholders’ agreement is a contract and is to be construed pursuant to general contract principles. In general, parties may incorporate into their contracts any provisions that are not illegal, unconscionable, restricted by legislation, or violative of public policy… Public policy may be found, inter alia, “by the expression of the will of the legislature contained in statutory enactments”…However, while there is clearly no absolute prohibition against the parties entering into some form of agreement as to how the dissolution of a corporation might be effected, e.g., through buy- out provisions or an arbitration agreement, such a goal cannot be accomplished, as here, by an absolute prohibition against judicial dissolution of a corporation under any circumstances. Further, the anti-judicial dissolution provision at issue cannot be saved by construing it to compel a voluntary or negotiated dissolution of VRA. Such a construction would entail an impermissible judicial rewriting of the parties' contract. In sum, the anti-judicial dissolution provision of the shareholders agreement is unenforceable as against public policy.” [↑](#footnote-ref-903)
904. A shareholders’ agreement that includes a term that disputes arising from the agreement shall be first negotiated among the parties and then submitted to an arbitration tribunal would be valid (Yargitay 11. HD. E. 2012/17087 K. 2013/749 T. 15/01/2013). However, if the consequences of this contractual term would be altering the protection that the judicial dissolution provision is providing to shareholders, the term should be accepted invalid as against public policy, and the tribunal’s decision should be annulled as against public policy pursuant to Article 439(2)(ğ) of 6100 numbered Civil Procedure Code (Official Gazette Date: 12/01/2011 Number: 27836) [↑](#footnote-ref-904)
905. See, the New York decision Schimel v. Berkun, 264 A.D.2d 725 (1999): “…we adhere to our rationale that a provision in a shareholders’ agreement which purports to prohibit judicial dissolution of a corporation violates public policy as expressed by the Legislature and under the common law (see, Matter of Validation Review Assocs., 223 A.D.2d 134, 137, 646 N.Y.S.2d 149). Accordingly, we find that reinstatement of the four causes of action which seek damages for breach of the anti-judicial dissolution provision is not warranted pursuant to CPLR 5015(a)(5).” [↑](#footnote-ref-905)
906. Ayoglu, 2013, p. 232. [↑](#footnote-ref-906)
907. Eker, p.115. [↑](#footnote-ref-907)
908. Deborah Demott, Oppressed but Not Betrayed, p.188. [↑](#footnote-ref-908)
909. Camoglu, Anonim Ortakligin Hakli Sebeple, p. 6. [↑](#footnote-ref-909)
910. Camoglu, Anonim Ortakligin Hakli Sebeple, p.6. [↑](#footnote-ref-910)
911. Kendigelen/Kırca, p. 7. [↑](#footnote-ref-911)
912. Sumer, Turk Ticaret Kanunu, p. 176. [↑](#footnote-ref-912)
913. Nomer, p. 425. One of the most comprehensive provisions dealing with the “just cause” concept in Turkish law is TCC Article 245, which is for general partnerships (Eker, p.111). However, a direct application of the definition provided in this provision would not be appropriate in the context of publicly traded corporations, because the rationale of the provision is based on the personal relationship among members (Eker, p.118). [↑](#footnote-ref-913)
914. Esra Kaşak, *Anonim Şirketlerin Haklı Sebeple Feshinde Şahsi Sebeplerin Değerlendirmeye Alınıp Alınamayacağı Hususunun Hakimin Takdir Yetkisi Bakımından Değerlendirilmesi*, 23 Ankara Hacı Bayram Veli Üniversitesi 161 (2019), p. 187. [↑](#footnote-ref-914)
915. Winden, p. 893. [↑](#footnote-ref-915)
916. Nomer, p. 426. [↑](#footnote-ref-916)
917. Yargitay 11. HD E. 2014/3669 K. 2014/10238 T. 02/06/2014 and Sahin, p. 294. [↑](#footnote-ref-917)
918. Sahin, p. 291 and 295. [↑](#footnote-ref-918)
919. Sahin, p. 193. [↑](#footnote-ref-919)
920. Tekinalp, p. 341. For a list of examples, see, Tekinalp, p. 343. [↑](#footnote-ref-920)
921. See, Thompson, Corporate Dissolution, p.205; classifying oppression under the “dissolution based on misconduct by those in control of the corporation”. [↑](#footnote-ref-921)
922. Brenner v. Berkowitz, 134 N.J. 488 (1993): “Moreover, as the Appellate Division observed, the legislative history supports a determination that the Legislature drafted the new statute in the disjunctive “to enumerate additional separate causes of action, independent of oppression”; and therefore “ ‘illegality’ and ‘fraud’ as used in the statute are not meant to be synonymous with ‘oppression.’”…Illegality and fraud may also frustrate a shareholder's reasonable expectations for a company but nonetheless not qualify as oppression.” [↑](#footnote-ref-922)
923. Bonavita v. Corbo, 300 N.J. Super. 179 (1996). [↑](#footnote-ref-923)
924. A commentator, writing on the “wichtige Grund” (substantial basis) concept in German close corporation law concerning judicial dissolution, states the following: “Wichtige Grund addresses a wide range of personal factors and may arise from circumstances that involve the company or the shareholders personally. It does not require an element of fault, and thus, it is much broader than the U.S. concept of fiduciary duty, which comprises factors such as disloyalty, self-dealing, oppression, and bad faith.” (Hugh T. Scogin, Jr., *Withdrawal and Expulsion in Germany: A Comparative Perspectie on the “Close Corporation Problem*”, 15 Mich. J. Int’l L. 127 (1993), at 135) [↑](#footnote-ref-924)
925. Camoglu, Anonim Ortakligin Hakli Sebeple, p. 6. [↑](#footnote-ref-925)
926. Camoglu, Anonim Ortakligin Hakli Sebeple, p. 6. [↑](#footnote-ref-926)
927. Sahin, p.12 [↑](#footnote-ref-927)
928. Ormanci, p. 137. [↑](#footnote-ref-928)
929. Yargitay HGK E. 2013/22- 1881 K. 2015/1124 T. 01/04/2015. [↑](#footnote-ref-929)
930. Same standard is also used in German close corporations law: When they attempt to articulate the standards by which their test is to be applied, German courts and commentators have generally relied on vague formulations. The most common is that the presence of the shareholder in question must be unbearable (unerträglich or untragbar) to the others. In underscoring the fact that expulsion is a remedy of last resort, courts usually require that the substantial basis be so severe that it is impossible for the company to achieve its purposes. Although this aspect of the test resembles the U.S. practice, the examples of wichtige Grund listed above clearly demonstrate that the unbearableness standard embraces a wider range of issues than the concepts of deadlock and oppression found in U.S. law.” (Scogin, p. 160- 161) [↑](#footnote-ref-930)
931. Sahin, p.12. [↑](#footnote-ref-931)
932. Camoglu, Anonim Ortakligin Hakli Sebeple, p.9. [↑](#footnote-ref-932)
933. Sahin, p.110. [↑](#footnote-ref-933)
934. Tekinalp, p. 193. [↑](#footnote-ref-934)
935. Sahin, p. 116. [↑](#footnote-ref-935)
936. Tekinalp, Yeni Anonim, p.191. In general, use of a foreign jurisdiction for reference is no stranger to Turkish law, see, Herbert J. Liebesny, *The Law of the Near & Middle East* 78- 85 (1975). [↑](#footnote-ref-936)
937. Eser Ruzgar, *Anonim Sirketin Azlik Tarafindan Feshine Iliskin Dava ile Ilgili Isvicre Federal Mahkemesi Kararlarinin Degerlendirilmesi*, TAAD Yil:5 Sayi: 16 (2014), at 340- 341. [↑](#footnote-ref-937)
938. Sahin, p. 139. [↑](#footnote-ref-938)
939. Yargitay 11. HD E. 2015/6768 K. 2015/10302 T. 12/10/2015. [↑](#footnote-ref-939)
940. Camoglu, Anonim Ortakligin Hakli Sebeple, p. 7. [↑](#footnote-ref-940)
941. Sahin, p. 213- 214. [↑](#footnote-ref-941)
942. Sahin, p. 217. [↑](#footnote-ref-942)
943. Yargitay 11. HD E. 2004/8765 K. 2004/9790 T. 14/10/2004. [↑](#footnote-ref-943)
944. Sahin, p. 237. [↑](#footnote-ref-944)
945. Sahin, p. 246- 247. [↑](#footnote-ref-945)
946. See, Chapter 2.1.1. [↑](#footnote-ref-946)
947. For the costs that legal standards generate for legal environment, see, Kaplow, p. 568- 571. [↑](#footnote-ref-947)
948. Bagdon v. Bridgestone/Firestone, Inc., 916 F.2d 379 (1990): “Whether to incorporate entails a choice of many formalities. Commercial rules should be predictable; this objective is best served by treating corporations as what they are, allowing the investors and other participants to vary the rules by contract if they think deviations are warranted.” [↑](#footnote-ref-948)
949. Tekinalp, p. 344. [↑](#footnote-ref-949)
950. Lola Cars Intern. Ltd. v. Krohn Racing, LLC, 2009 WL 4052681. [↑](#footnote-ref-950)
951. Katz v. Oak Industries Inc., 508 A.2d 873 (1986). [↑](#footnote-ref-951)
952. See, Veliye Yanlı, *Anonim Ortaklıklarda Karın Tamamen Devrine İlişkin Bir Tasarruf Yapılabilir mi?,* 55 İÜHFM 201 (1997). [↑](#footnote-ref-952)
953. However, this does not mean that such transactions are legitimate. For example, concealed distribution of dividend to specific shareholders would be regarded as violation of the equal treatment principle under TCC Art. 357 (Setenay Yağmur, *Anonim Şirketlerde Eşit İşlem İlkesi* (2020), p. 135). Accordingly, the board of directors would be held liable for the losses such concealed distribution of dividend causes on the corporation and other shareholders based on TCC Art. 553 (Güzin Üçışık/Aydın Çelik, *Anonim Ortaklıkta Finansal Tablolar Yedek Akçeler ve Kar Dağıtımı* (2018), p. 532). [↑](#footnote-ref-953)
954. Sahin, p. 167. [↑](#footnote-ref-954)
955. Sinan H. Yüksel, *Anonim ve Limited Şirketlerde Mahkemenin Kar Dağıtımına Karar Verip Veremeyeceği Sorununa Yargıtay’ın Yaklaşımı*, XXXIII. Ticaret Hukuku ve Yargıtay Kararları Sempozyumu 217 (2021), p. 247. [↑](#footnote-ref-955)
956. Sahin, p. 167. [↑](#footnote-ref-956)
957. A wide interpretation of TCC Art. 512 would make it suitable to be used against concealed distribution of corporate income, see, Emek Toraman Çolgar, Şirkete Borçlanma Yasağı, İstanbul 2019, at 261. However, as only limited set of transactions are articulated in TCC Art. 512, its function in application is very limited (Sinan Sarıkaya, *Çağın Gerisinde Kalmış Bir Hüküm Olarak TTK m. 512*, Ed. Havva Karagöz et. al., Tüzel Kişilik Penceresinden Anonim Ortaklık Sempozyumu (2021), p. 604). [↑](#footnote-ref-957)
958. Brodie v. Jordan, 447 Mass. 866 (2006). [↑](#footnote-ref-958)
959. Camoglu, Anonim Ortakligin Hakli Sebeple, p. 9-10. [↑](#footnote-ref-959)
960. Sahin, p. 490 and 498. [↑](#footnote-ref-960)
961. Yargitay 11. HD E. 2014/3669 K. 2014/10238 T. 02/06/2014. [↑](#footnote-ref-961)
962. Sahin, p. 123. [↑](#footnote-ref-962)
963. Tekinalp, p. 193. [↑](#footnote-ref-963)
964. Hanagasi, p. 250. [↑](#footnote-ref-964)
965. Hanagasi, p. 251. [↑](#footnote-ref-965)
966. Eker, p. 133. [↑](#footnote-ref-966)
967. See, Lumley v. Wagner, 42 Eng. Rep. 687 (1852). [↑](#footnote-ref-967)
968. Tekinalp, p. 192. [↑](#footnote-ref-968)
969. For example, see, Yargitay 23. HD E. 2011/2569 K. 2012/1627 T. 05/03/2012; on contrary, see, Yargitay 11. HD E. 1989/3337 K. 1990/4327 T. 29/05/1990. [↑](#footnote-ref-969)
970. For contrary view under judicial dissolution remedy, see, Tekinalp, p. 346. [↑](#footnote-ref-970)
971. Sahin, p. 516. [↑](#footnote-ref-971)
972. Camoglu, Anonim Ortakligin Hakli Sebeple, p. 14. [↑](#footnote-ref-972)
973. Camoglu, Anonim Ortakligin Hakli Sebeple, p. 14. [↑](#footnote-ref-973)
974. Camoglu, Anonim Ortakligin Hakli Sebeple, p. 19. [↑](#footnote-ref-974)
975. Eker, p. 136. [↑](#footnote-ref-975)
976. Camoglu, Anonim Ortakligin Hakli Sebeple, p. 11. [↑](#footnote-ref-976)
977. Camoglu, Anonim Ortakligin Hakli Sebeple, p. 13. [↑](#footnote-ref-977)
978. Eker, p. 137. [↑](#footnote-ref-978)
979. Yargitay 11. HD E. 2015/6768 K. 2015/10302 T. 12/10/2015. [↑](#footnote-ref-979)
980. Camoglu, Anonim Ortakligin Hakli Sebeple, p. 14. [↑](#footnote-ref-980)
981. Sahin, p. 523. [↑](#footnote-ref-981)
982. CML Article 1. [↑](#footnote-ref-982)
983. Lynch v. Patterson, 701 P.2d 1126 (1985). [↑](#footnote-ref-983)
984. deHaas v. Empire Petroleum Co., 435 F.2d 1223 (1970). [↑](#footnote-ref-984)
985. See, Sahin, p. 290, stating that once the judicial dissolution lawsuit is initiated, the share prices will go down dramatically, and the corporation will have business losses. [↑](#footnote-ref-985)
986. In publicly traded corporations, it is said that the corporation’s policy to declare dividends or not (i.e., to retain earnings within the corporation) does not effect the shareholders much because because the overall value of the firm will increase once the earnings are retained and this will translate into increase in the value of the shares; after all, it is assumed that the retained funds are reinveted at the corporation’s cost of capital (Moll, Dividend Policy, p. 858). In this regard, when a compensation is awarded to the corporation, the wrongdoer will definitely benefit from it directly. [↑](#footnote-ref-986)
987. Glenn v. Hoteltron Systems, Inc., 74 N.Y.2d 386 (1989). [↑](#footnote-ref-987)
988. Yargitay 17. HD E. 2009/1166 K. 2009/1241 T. 09/03/2009. [↑](#footnote-ref-988)
989. Hanagasi, p. 253. [↑](#footnote-ref-989)
990. Hanagasi, p. 223. [↑](#footnote-ref-990)
991. Hanagasi, p. 253. [↑](#footnote-ref-991)
992. Muellenberg v. Bikon Corp., 143 N.J. 168 (1996): “Thus, while a minority buy- out of the majority is an uncommon remedy, it was the appropriate one here.” [↑](#footnote-ref-992)
993. Ayoglu, 2013, p. 248. [↑](#footnote-ref-993)
994. Eker, p. 136- 137. [↑](#footnote-ref-994)
995. Hanagasi, p.202. [↑](#footnote-ref-995)
996. TCC includes provisions that are normally articulated under civil procedure law, such as Article 448(3) and 449(1). Accordingly, the judicial dissolution provision may also be viewed as a hybrid provision including procedural aspects. [↑](#footnote-ref-996)
997. Cowin v. Bresler, 741 F. 2d 410 (1984). [↑](#footnote-ref-997)
998. Sahin, p. 204. [↑](#footnote-ref-998)
999. Hanagasi, p. 260. [↑](#footnote-ref-999)
1000. Hetherington/Dooley, p.27. [↑](#footnote-ref-1000)
1001. In re H. R. Harmer Ltd. [1959] 1 W.L.R. 62 (Jenkins L.J.). [↑](#footnote-ref-1001)
1002. See, Chapter IV. [↑](#footnote-ref-1002)
1003. According to case law database lexpera.com.tr, the total number of all cases associated with TCC Article 531 is 399; but this number is not enough to say that Turkish judiciary has reached to a conclusive approach about the matter. Likewise, courts’ handling of the matter is continuingly criticized by commentators, see, Tekinalp, p. 341. [↑](#footnote-ref-1003)