Abubaker Musbah Imsayib Jeeballah

LL.M Corporate Law, (Pass with Distinction) Nottingham Trent University, England 2009

Post Graduate Diploma in Private Law, Tripoli University, Tripoli Libya 2005

LL.B in Law (Hons), Benghazi University, Benghazi Libya 2002

To What Extent Does the Libyan Shareholder Protection Regime Offer Equivalent Protection to That Found in Similar Selected Corporate Law Systems?

A thesis submitted for the degree of Ph.D in Law

January 2016

Lancaster University, Law School

Declaration

I Abubaker Jeeballah declare that this thesis is my own work and has not been submitted in substantially the same form for the award of a higher degree elsewhere.

Acknowledgement

First and foremost all thanks and praise are due to Almighty Allah who has given me the strength to present this work; it would not been possible to complete it without his guidance and blessing. I cannot fully express my heartfelt gratitude to the exceptional supervision team Professor David Milman and Philip Lawton for their patience, motivation, and immense knowledge. Their guidance helped me in all the time of research and writing of this thesis. I could not have imagined having better advisors and mentors for my Ph.D study. I owe a debt of gratitude to my parents, wife, sisters, brothers and friends who have always encouraged me to go further in my higher studies. Last but not the least, sincere thanks also goes to everyone who assisted me in completing my Ph.D.

I dedicate this thesis to my wife Eman and my sons Musbah and Ahmed.

Abubaker Musbah Imsayib Jeeballah

LL.M Corporate Law, (Pass with Distinction) Nottingham Trent University, England 2009

Post Graduate Diploma in Private Law, Tripoli University, Tripoli Libya 2005

LL.B in Law (Hons), Benghazi University, Benghazi Libya 2002

To What Extent Does the Libyan Shareholder Protection Regime Offer Equivalent Protection to That Found in Similar Selected Corporate Law Systems?

A thesis submitted for the degree of Ph.D in Law, January 2016

Abstract

The application of "majority rule" within the company has the potential to lead to unfair results either for the minority shareholders or for the company itself, hence, it is the task of the legislature to provide minority shareholders with a matrix of rules that seek to protect them from misguided managerial behaviour. In that regard, this thesis set out to examine to what extent the Libyan shareholder protection regime offers equivalent protection to that found in the English and Moroccan corporate law regimes. It evaluates the current level of protection that is offered to minority shareholders in Libya in comparison with that available in England and Morocco in order to participate in a reform programme aimed at establishing a sufficient system of corporate governance in Libya via enhancing the rules that protect the minority shareholder. The reliance on a comparative study in this thesis is based on an assumption that law should be assessed from a wide perspective and the experience of other jurisdictions should be taken into account in order to reform the current law by establishing a high standard level of protection for the minority shareholders. Such reform would grant shareholders a degree of confidence which is considered a necessary step to attract investments and develop the economic strength of the whole country.

The conclusion of this work reveals several weaknesses and serious shortcoming in the Libyan corporate law regime, thereby it provides a basis for suggestions on how to improve minority shareholder protection in Libya based on the English and Moroccan experience. In that process, some suggestions and recommendations are provided which is the purpose of this work and the hope is that they will be taken on board in any proposal for reform in Libya. The study recommends a reform in the existing rules of minority shareholder protection in order to create an effective system of safeguards for the minority shareholders. Such reforms promise domestic and foreign investors that all companies under Libyan laws are managed, directed and controlled by upright, truthful, honest and efficient managers. This work will also pave the way for further studies that might be conducted in order to further enhance a robust system of corporate governance in Libya which would contribute to the growth of the national economy.

Table of Contents

Chapter 1 Introduction

1.1 Setting the scene

It is logical for those who contribute the majority capital to the company and spend more time and effort in relation to its affairs to have greater authority and power that enable them to favour their interests and rights in the company's decisions.[1] However, it is irrational and against the principles of fairness and justice for those who are in actual control, and more involved in the decisions and affairs of the company to utilize their position to maximise their benefits with no regard to the interests of other shareholders, who are powerless to prevent these kinds of actions as a result of the application of the doctrine of majority rule.[2] In other words, though, the law of majority rule is considered a fundamental democratic principle in the governing and running of companies,[3] its mechanical implementation, without any constraint grants the majority shareholders a wide authority and significant power that may affect the overall direction of the company which leads to negative consequences not only for the minority shareholders but also for the company and the whole national economy.[4] The application of majority rule grants majority shareholders a power to issue decisions that misuse the interests of other shareholders and prevents multiplicity of suits against the controllers of such companies.[5] Via this power the majority shareholders would breach the reasonable expectations of minority shareholders within the company thereby placing them in a powerless position where he or she would not be able to protect his own interests.

---

[1] K Kim, J Nofsinger and P Kitsabunnarat-Chatjuthamard, 'Large Shareholders, Board Independence, and Minority Shareholder Rights: Evidence from Europe' (2007) 13(5) Journal of Corporate Finance 859, at 862.

[2] The majority rule principle is the system of giving the largest group in a particular place or area the power to make decisions for everyone. See Cambridge Dictionaries Online http://dictionary.cambridge.org/dictionary/english/majority-rule accessed 13/10/2015.

[3] H Rajak, *Sourcebook of Company Law* (2nd edn, Jordans, Bristol 1995), at 529.

[4] Such an application would in particular affect the small business enterprises which are usually encouraged by the policy of the law in order to enhance the role of private sector.

[5] H Rajak, *Sourcebook of Company Law* (2nd edn, Jordans, Bristol 1995), at 531.

Based on this fact, corporate law has to provide a matrix of rules that seek to protect minority shareholders from the abusive conduct of the controllers (majority shareholders and directors) of the company.[6] Such rules should force the controllers of a company to take into account the interests of remaining shareholders in all actions and decisions of the company.[7] Moreover, policy makers and legislatures have to give consideration to the effective devices that prevent the majority shareholder from such kind of actions and which ensure that the minority shareholders are granted a right to commence litigation in order to obtain an appropriate remedy.[8] In this regard, Sealy and Worthington, claim that the law should not allow the majority shareholders to hold complete and ultimate power without corresponding accountability, in addition, the law should furnish remedies for the minority shareholders in cases whenever their rights and interests have been violated.[9] In line with this view, Goddard has emphasized that as long as the principle of majority rule remains fundamental to the operation of company law, the minority shareholders are vulnerable, then, statutes and contractual self-help must offer effective rules which protect them from the exploitation by the majority shareholders.[10] Most importantly, the long-time success of the company would not be achieved unless some sort of balance between the majority power and the minority right to participate in the company's management and to have their interests considered was adopted. Such a balance would grant the minority shareholders sufficient tools by which the wide authority of majority shareholders can be restricted.[11]

---

[6] D Milman, 'Shareholder Law: Recent Developments in Practice' (2015) 378 Company Law Newsletter 1, at 2.
[7] See for example; T Lazarides, 'Minority Shareholder Choices and Rights in the New Market Environment' (2010) 7(1/2) Journal of Corporate and Securities Law 7.
[8] Organisation for Economic Co- Operation and Development (OECD), 'OECD Principles of Corporate Governance' [2004] http://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf. Accessed 09/11/2013, at 40.
[9] L Sealy and S Worthington, *Cases and Materials in Company Law* (10th edn, Oxford University Press, Oxford 2013), at 636-637.
[10] R Goddard, 'Enforcing the Hypothetical Bargain: Sections 459-461 of the Companies Act 1985' (1999) 20(3) Company Lawyer 66, at 70.
[11] M Tibar, 'The Abusive Conduct of Minority Shareholders in Joint Stock Companies, Study in the Law No 23/ 2010' (2012) 1 Journal of Legal Sciences 92, at 92.

Based on these considerations, this study will focus on the protection of minority shareholders to examine to what extent the Libyan shareholder protection regime offers equal level of protection to that found in English and Moroccan laws.

1.2 Research objective and importance

After the establishing of United Kingdom of Libya in 1953 until the earlier part of Gaddafi Regime (1970s) the contribution of private sector to investment exceeded 30% of the investment.[12] However, as the latter regime adopted the socialist policy, the Libyan government from the late 1970s until the beginning of 2000s became the major controller of the Libyan economic system.[13] However, it was obviously seen in the last decade of the Gaddafi era that the Libyan economic system was being transitioned into a free-market economy. In so doing, many privatisation policies were adopted during the 2000s to encourage such transition.[14] After the fall of the Gaddafi Regime in August 2011, a comprehensive revision of economic legislation became a key task for the Libyan legislature so as to adopt effective rules that may contribute to the development of the commercial environment in Libya. The relevant rules need to be adjusted to boost the role of private sector in the economy via attracting both domestic and foreign investors.

Such a business environment has to provide a robust system that offers a degree of confidence to all investors who wish to set up their business in Libya. One group of investors who require such protection are minority shareholders. This is a result of the application of the majority rule principle wherein the majority shareholders might extract private benefits at the expense of the

[12] S Ganous, *Libyan Revolution in 30 Years, Political, Economic and Social Transformations, 1969-1999* (1st edn, Dar Al Jamahiriya for Publication, Distribution and Advertising, Libya 1999), at 225.
[13] M Tibar, 'The Abusive Conduct of Minority Shareholders in Joint Stock Companies, Study in the Law No 23/ 2010' (2012) 1 Journal of Legal Sciences 92, at 93.
[14] 4845 companies were privatised under this policy see H Shernanna and S Elfergani, 'Privatisation and Broaden Ownership Base "A Step towards the Application of the People's Socialist' [2006] International Centre for Studies and Research 4, at 7.

minority shareholders. In that process, the Libyan legislature needs to reform the current relevant laws in order to offer a sufficient system of protection to the minority shareholders so that this reform would contribute to the growth of national economy. Such rules promise domestic and foreign investors that the companies incorporated under Libyan law are managed and controlled by honest and efficient managers.[15] Furthermore, these rules not only serve the interests and rights of minority shareholders, but also offer a comprehensive system of benefits for all related parties who are dealing with the company.[16]

In so doing, the Libyan Ministry of Economic Affairs in the interim government that was formed by the General National Congress[17] has issued a decision to form a committee to amend the Business Activities Act 2010 which regulates companies and partnerships and the whole range of business activities in Libya.[18] The above committee has suggested a separate Companies Act such as that available in the UK and it is expressly stated that new Act would follow the Anglo American route for corporate law. Furthermore, a draft of that Bill was posted to me to make some suggestions regarding some topics.[19] However, as this Bill has not became an Act by the date of submitting this thesis, the focus of this study will be on the current provisions in the Business Activities Act 2010 and other relevant laws such as the Civil Codes 1953.[20]

To participate in this developing scenario this thesis is targeted at examining the level of minority shareholder protection that is provided by the Libyan corporate law system in

[15] See for example; K Raja, 'Corporate Governance and Minority Shareholders' Rights and Interests in Pakistan: a Case for Reform' (2012) 23(10) International Company and Commercial Law Review 347.
[16] That includes; employees, customers, suppliers, creditors, community etc.
[17] The first elected legislature after 2011 revolution which was elected by popular vote on 7 July 2012.
[18] The above Act issued on 21/08/2010, Act No 23, 2010. Referred to hereinafter as the Business Activities Act 2010.
[19] On December 2014 I received a phone call from Muhammed Abbadwai and Alhabeeb Ajboda, Professors of Private Law at Tripoli University who are members of the above committee, they posted to me a draft of that bill to make some suggestions regarding some topics.
[20] The Libyan Civil Code which was issued on 23/11/1953.

comparison with that existing in other comparable jurisdictions (English and Moroccan systems).[21] It discusses how the English and Moroccan laws deal with the issue and what lessons can be taken up by Libyan policy makers in order to find ways to enhance minority shareholder protection in Libya. In dealing with such questions, the thesis has to tackle other important tools of protection that are available in other comparable jurisdictions, such as Tunisia and Egypt. This analysis will reveal several weaknesses in Libyan corporate law, thereby providing a basis for suggestions on how to improve minority shareholder protection in Libya based on the English and Moroccan experience. Furthermore, the variation between Morocco and England, as civil and common law systems, would enhance the study as it shows how the <u>two</u> various legal systems deal with the issues and it provides a valuable model for upcoming reform of Libyan minority shareholder protection regime.

The protection of minority shareholders is widely and reasonably argued to be the starting-point of having a blameless corporate governance system.[22] Therefore, the significance of undertaking such research is apparent in jurisdiction such as Libya where the economic system is moving towards the free market economy. As the adoption of sufficient tools of protection to the minority shareholders would enhance the level of confidence so that domestic and, most importantly, external investors become more interested to set up their business under this jurisdiction. Giving minority shareholders sufficient methods of protection via robust systems of corporate governance would help a country such as Libya to develop its infancy free market economy. Therefore, the intrinsic purpose of this work is to participate in establishing a sufficient system of corporate governance in Libya via enhancing the rules that protect the minority shareholder. Furthermore, it is fairly argued that giving the minority shareholders such kind of effective roles within the company does not only decrease the power of majority

---

[21] The reasons behind choosing these two jurisdictions are explained on page 15.

[22] A Almarini, 'The Power of Majority Shareholders within Joint Stock Companies under Moroccan Law' (Ph.D Thesis, Mohammed V University, Rabat 1997), at 376-393.

shareholders, but also the majority shareholders will be more active and more cautious toward taking of decisions that aim to promote the interests of the company as a whole.[23]

Theoretically, as there is a lack of research on Libyan minority shareholder protection and corporate governance in general, thus, discussing the protection of minority shareholders in Libya under this thesis would contribute to the limited literature in this area. Moreover, this work would help other researchers with any future argument of other corporate governance issues such as directors' duties and their enforcement, the majority power, creditors' protection and so on. What adds to the importance of examining the protection of minority shareholders under Libyan law in comparison with English and Moroccan laws is the fact that such work is the first effort that deals with the protection of minority shareholders in Closed Joint Stock Companies under Libya laws in a comparison with these two jurisdictions therefore it fills a notable gap in the literature.[24]

1.3 The scope of this research

Since the Libyan Stock Market was established in 2006[25] and the Act of Market was issued in 2010[26] there are only 13 companies listed in this market,[27] therefore, non-listed small companies form the overwhelming majority of companies in Libya and most of these

---

[23] A Almarini, 'The Power of Majority Shareholders within Joint Stock Companies under Moroccan Law' (Ph.D Thesis, Mohammed V University, Rabat 1997), at 376-393.

[24] A different model of minority shareholder protection was adopted by M Abdou, in his Ph.D thesis which is the self- enforcing model as an alternative tool to the judicial solution to deal with the majority-minority shareholders problem. This system is based on the adoption of the voting mechanism and transitional rights (the rule of one share one vote, confidential voting, etc.) which may reduce the abusive conduct of majority shareholders. See; M Abdou, 'Towards a New Solution of Minority Shareholder Protection in Libya: Letting the Minority Shareholders Have a Voice' (Ph.D thesis, University of Glasgow 2015).

[25] Decision No. (134) of the General People's Committee. In this regard the Authority of Stock Market has issued the Libyan Corporate Governance Code in 2007, however its provisions are not mandatory and not applicable to non-listed companies, see s. 2 (a) (b) of the Libyan Corporate Governance Code, 2007.

[26] Libyan Stock Market Act, 2010.

[27] In 2006 there were only three listed companies in the banking and insurance sectors, however this number increased to 6 in 2007. In 2008, there were 8 companies listed in the Market. Then, in 2009, the number of companies increased to 10 on the main list, and 14 on the sub-list of the market. In 2010, the number of listed companies increased to 12 on the main list and 13 on the sub-list of the market. In 2013, the companies decreased to 10 companies on the main list and 10 companies on the sub-list of the market. See available reports of Libyan Stock Market, available at http://www.lsm.ly/Arabic/Media/Pages/PeriodicReports.aspx. Accesses 03/08/2015.

companies are Joint Stock Companies. To that regard, this thesis will examine the protection of minority shareholders in Closed Joint Stock Companies with only some references to Public Joint Stock Companies. In this manner, our interests under the English law focus on Private Companies with only some passing reference to Public Companies. In Closed Joint Stock Companies a shareholder expects an active participatory role in the company usually through employment and a meaningful role in management,[28] whereas in traditional public companies a shareholder is normally a passive investor who neither participates in the management nor contributes labour to it. In both kind of companies, majority shareholders have power to elect the managers and control the affairs of the company, therefore minority shareholders are particularly vulnerable if there is a falling out with the majority. By such power the minority shareholders may be excluded from participating in the management, contributing to the company with labour and prevented from having any dividends. However, in public companies minority shareholders can escape abusive majority conduct by selling their shares onto the market by correspondingly recovering the value of their investment as there is a ready market for their shares.[29] On the other hand, the minority shareholders in Closed Joint Stock Companies can be locked into their investment, as there is no ready market for their shares,[30] the only buyer that may find is the majority shareholder which in most cases is willing to offer a discounted price.[31] So the minority shareholders in Closed Joint Stock Companies can simply be "locked-in" to the company, yet "frozen-out" from any business returns.[32]

Based on these considerations, this work examines the protection of minority shareholders in the closed joint stock company in Libya as compared with the level of protection that is offered

[28] D Moll 'Shareholder Oppression in Texas Close Corporations: Majority Rule (Still) Isn't What it Used to Be' (2008) 9(1) Houston Business and Tax Journal 33, at 34.
[29] Ibid, at 38.
[30] E Rock and M Wachter, 'Waiting for the Omelet to Set: Match Specific Assets and Minority Oppression in the Close Corporation' (1999) 24(4) Journal of Corporation Law 913.
[31] L Sealy and S Worthington, *Cases and Materials in Company Law* (10th edn, Oxford University Press, Oxford 2013).
[32] D Moll 'Shareholder Oppression in Texas Close Corporations: Majority Rule (Still) Isn't What it Used to Be' (2008) 9(1) Houston Business and Tax Journal 33, at 39.

by the selected comparative jurisdictions. The Libyan Law was chosen since the central goal of this thesis is to establish an adequate system of minority shareholders protection in Libya which is the home country of the researcher. While English law was chosen for many reasons, first and foremost, having said that it is expressly stated by members of the committee that formed to reform the companies laws in Libya that the new proposed Act would follow the Anglo American route for corporate law. To that regard, the English system with its early experience of minority protection would offer various tools of protection to the minority shareholders. However, as some of the Anglo American rules might not be applicable in Libya due to the limitations of transplanting foreign rules into domestic law, [33] the Moroccan jurisdiction was used to provide another style of protection and overcome the limitation of the legal transplantation theory taking into account the fact that a country such as Morocco may be a rival for inward investment. Moreover, both countries, Libya and Morocco, have a Civil Law system which is influenced by Islamic law, so that they share similar cultural, political, economic and legal background. Most importantly, it appears to the researcher that the Moroccan system of corporate law is the most developed corporate law system in the MENA[34] region with its significant changes in that last fifteen years. In addition to the above selected jurisdictions (English and Moroccan systems), there will be some references to other MENA Jurisdictions (Egypt and Tunisia) in some cases wherein it seems that they might offer a better solution to see what lessons Libya can take from their experience.

Finally, it has to be pointed out that creating an efficient system of protection for the minority shareholder emanates from several sources, such as the ethics of shareholders and directors, the provisions of the law, the judicial system, internal control systems, and voluntary adoption

---

[33] Under the concept of legal transplantation, the cultural, political, economic and legal background have to be considered whenever new ideas are being taken from foreign jurisdictions, see for example M Siems, *Comparative Law* (1st edn, Cambridge University Press, Cambridge 2014), at 4-23.

[34] The term MENA stands for Middle East and North African Countries.

of effectual codes of corporate governance.[35] However, due to the limitation of this work as a Ph.D thesis, it would not be possible to cover all the above factors, therefore, it only focuses on the present legal provisions that deal with the minority shareholder protection with a proposal to reform these provisions, leaving the other issues to other following up studies.

1.4 Research methodology

Methodology has been described as a route to follow in order to achieve a result,[36] therefore, this study will embark on a comparative route to examine to what extent the Libyan shareholder protection regime offers a sufficient level of protection similar to that found in the selected comparative jurisdictions. However, it should be borne in mind that the researcher **is not** writing a traditional comparative law thesis which aims to show the similarities and differences that existing between these legal systems,[37] rather than using a comparative approach to evaluate the current level of minority shareholder protection that the Libyan corporate law system is offering and to propose a law reform based on the lessons that are taken from those jurisdictions. In this manner, Legrand describes a comparative law as presenting a new perspective which will allow one critically illuminate a legal system.[38]

This thesis will use the comparative methodology to provide the Libyan legislator with a model of how well different sets of legal rules work in addressing a particular problem or in pursuing a particular policy.[39] The reliance on a comparative study in this work is based on an assumption that law should be assessed from a wide perspective, and the experience of other jurisdictions should be taken into account in order to develop the current law. This in line with

---

[35] T Lazarides, 'Minority Shareholder Choices and Rights in the New Market Environment' (2010) 7(1/2) Journal of Corporate and Securities Law 7.
[36] G Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing, Oxford 2014), at 2.
[37] R Sacco, 'La Comparasion Juridique au Service de la Connaissance du Droit' (1991a) (Economica), cited in G Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing, Oxford 2014), at 45.
[38] P Legrand, 'Comparative Legal Studies and Commitment to Theory' (1995) 58(2) Modern Law Review 263, at 364.
[39] M Siems, *Comparative Law* (1st edn, Cambridge University Press, Cambridge 2014), at 4.

the opinion that one cannot understand a place without seeing how it varies from others.[40] Thus adopting such a comparative methodology gives the researcher a chance to understand the problem and see how other jurisdictions (English and Moroccan laws) deal and solve such kind of legal issues. Nevertheless, as the foreign laws will not always be suitable to be translated into different socio- economic context, the suggested law reform in this thesis would consider the limitations of transplanting foreign rules into domestic law.[41] That is to say, this study would take into account the concept of legal transplantation wherein the cultural, political, economic and legal backgrounds have to be considered whenever new ideas are being taken from foreign jurisdictions.[42] In this regard, it has to be pointed out that in modern company law a global model of robust system of corporate governance has emerged that countries are expected to follow.[43] For instance, the rules on derivative actions, independent directors and audit committees have been popular transplants between various jurisdictions.[44] Therefore, it is said that in the area of company law countries have converged in number of dominant legal policies, thus the legal transplants in this area of law are now more often voluntary than in the past.[45]

Due to the current difficult circumstances in Libya the researcher was not able to carry out an empirical study, therefore: this thesis uses doctrinal research to achieve its goals [46]. In so doing an examination of literature on the subject will be considered to reach the result. This literature

[40] F Lawson, *Selected Essays, the Comparison*, (volume II Amsterdam, 1997), at 73. Cited in M Siems, *Comparative Law* (1st edn, Cambridge University Press, Cambridge 2014), at 97.
[41] M Siems, *Comparative Law* (1st edn, Cambridge University Press, Cambridge 2014), at 4-23.
[42] See for example, A Watson, *Legal Transplants: An Approach to Comparative Law* (2nd end, University of Georgia Press, Athens 1993), at 111. Those who challenge the transplantation between one legal system to another often work within a cultural paradigm which consider legal knowledge as being rooted and defined merely by the cultural in which it operates, while the proponents of such legal transplantation see law like any other science or human activity is cable of being transferred from culture to another. See G Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing 2014), at 176-177.
[43] M Siems, *Comparative Law* (1st edn, Cambridge University Press, Cambridge 2014), at 235.
[44] Ibid, at 236.
[45] Ibid, at 220.
[46] Under such doctrine one of the main activities of the researcher is interpreting texts and arguing about a choice among diverging interpretations. See for example; M McConville and W Chui, *Research Methods for Law* (Edinburgh University Press, Edinburgh 2007), at 4.

includes primary sources such as Laws, cases (judicial opinions) and Regulations in Libya, England and Morocco. In addition to the primary sources, secondary sources such as books, journals and law reviews are examined to evaluate the position in those jurisdictions. In that process the author has made research trips to Morocco, Tunisia and Egypt to collect such sources and make certain that all relevant materials are considered.[47] That is to say, this study will use the "law in books" doctrine which is different from law in action; in law in books the researcher focuses on legal rules rather than the application of these rules in practice.[48] Such a method of research has many advantages, including the exploration of interesting jurisprudential questions allowing law makers to sharpen and deepen their understanding of legal topics.[49] On the other hand, in law in action doctrine, law forms only one part among many of indeterminate relevant factors varying by factual, economic, social, and legal contexts, therefore, examining any legal issues would very much depend on legal practice, empirical research and social science theory.[50] Based on the fact that law in action is often different to law in books, as Pound made clear in 1910,[51] this thesis will conduct a comparative methodology via a doctrine based research model in order to suggest reform in the substantive law on minority shareholder protection, taking into account that the current governance problems in the Libyan state would negatively affect the application of these rules, as it is

[47] My research trip to Morocco was from January 1st to February 6th 2014. Whereas I have visited Tunisia twice, in August 2014 and February 2015. Also prior to starting my Ph.D I visited some Egyptian universities in 2012 and I collected some data from there. Moreover, as a part of my active research I have attended two conferences in the UK and participated in one conference in Libya. These conferences are; 1- Comparative Research in Commercial Law: Challenges and Opportunities, Durham Law School, Durham University, 25th June 2013. 2- How to get a PhD in Law: What Legal Research Skills Will I Need? Literature Reviews, Qualitative and Quantitative Research and Comparative Legal Research. Institute of Advanced Legal Studies, School of Advanced Study, University of London, 07 March 2015. 3- Improving the Company Law in Libya; Providing a Flexible Framework that Allows Companies to Compete and Grow. Law School, Sabha University, 08 April 2013. In that conference I presented a paper which is titled; The Weak Position of Minority Shareholder under Libyan Company Law.
[48] See R Pound, 'Law in Books and Law in Action' (1910) 44 American Law Review 12.
[49] J Halperin, 'Law in Books and Law in Action: The Problem of Legal Change' (2011) 64(1) Maine Law Review 45.
[50] Ibid. For more details in a law in action in the context of corporate governance see P Lawton 'Berle and Means, Corporate Governance and Chinese Family Firm' (1996) 6 Australian Journal of Corporate Law 348.
[51] R Pound, 'Law in Books and Law in Action' (1910) 44 American Law Review 12.

critical for the legal institutions (such as the legislature and the courts) to operate effectively under these circumstances. Therefore this work will provide suggestions to law makers to reform the substantive law leaving the application issues to other empirical studies that might be carried out in the future when the Libyan state's governance problems are sorted out.[52]

Although this study adopts the doctrine approach method, however it also promises to be a critical study and would not restrict itself to a kind of descriptive approach. Therefore, it shall critically examine the compatibility of the Libyan laws against the selected comparable jurisdictions. Lastly, it has to be mentioned here that due to the lack of sources in the area of minority shareholders protection and the corporate governance in general in the Libyan jurisdiction, the focus of the Libyan side in this thesis will be mainly on the current Act (the Business Activities Act 2010) with references to the relevant materials whenever they existed.

1.5 Structure of the thesis

Being conducted in this manner, the thesis should be able to reach its conclusions regarding the examination of the current Libyan system of minority shareholder protection and provide a proposal of reform which is based on lessons that are taken from the selected comparable jurisdictions. In so doing, the thesis is designed in a way that should enable it to achieve its objectives, it is divided into four main chapters preceded by an introduction and followed by a conclusion. To embark on this kind of study chapter one expands on this introduction by explaining how the majority shareholders' power can be abused wherein such majority further their own interests with no consideration to the interests of minority shareholders and the company as a whole. It also explains the importance of protecting the minority shareholders

[52] On December 17th, 2015 and after more than a year long national dialogue sponsored by the UN, the world witnessed the signing of a Libyan Political Agreement that has established a government of national accord (GNA). Wisely, the GNA has announced that its three priorities are: security, economy and national reconciliation.

and the effects of this protection on the whole economic sector. The last section of the first chapter illustrates two main ways of protecting minority shareholders.

Since the main purpose of this thesis is to participate in a reform programme aimed at enhancing the level of minority shareholder protection in Libya, the examination of the Libya system is left to be discussed separately in Chapter five, where the extrapolated lessons that are taken from the English system (Chapter three) and the Morocco system (Chapter four) are being recommended for the law makers in Libya. To that regard, chapter three examines and assesses the English style of minority shareholder protection. It aims to demonstrate the different tools of protection under this system and what changes were introduced by the Companies Act 2006. As the English system heavily relies on the judicial authority (the remedial approach) the English chapter, after a brief mention to certain statutory rights which offer a type of precautionary protection to the minority shareholder, will examine in turn the personal action, derivative claim, the unfair prejudice remedy and the winding up solution.

Chapter four focuses on the minority shareholders under Moroccan law. Since this study is mainly focused on the protection of minority shareholders in the private company (Closed Joint Stock Company) the protection of minority shareholders are examined under the Joint Stock Companies Act 1996 and its amendment in 2008. In the first section of this chapter, a general introduction is introduced which summarises the history of company law in Morocco and presents kind of companies and partnerships that exist under Moroccan laws. The second section is allocated to discuss relevant rights and supervision tools which enable minority shareholders to participate in the management of the company and practice a sort of supervision over the majority shareholders (the preventative mechanisms). The third section of chapter four is about shareholders' actions against the controllers of the company (the remedial route). In the last section a conclusion and comparative view is provided which compares and evaluates the English and Moroccan means of minority protection in order to take lessons for the Libyan system of minority shareholders protection.

Chapter five examines the protection of minority shareholders under Libyan law. It attempts to achieve two aims; an examination of the current rules in addition it provides a basis for suggestions on how to improve minority shareholder protection in Libya based on the English and Moroccan experience. This chapter starts with a brief introduction to the company law in Libya which also illustrates the type of companies and partnerships that are available under Libyan law. The second section discusses rights and instruments that are offered by Libyan Laws to prevent or reduce the possibility of abusive conduct of the company's controllers. Section three is allocated to assess the function of judicial authority to protect the minority shareholder in Libyan. In the final section a conclusion is drawn and comparative lessons are suggested to reform the current law.

Chapter six represents the conclusion of this study. It summarises the main arguments and the outcome of each chapter of the thesis. It concludes that the Libyan system suffers from serious shortcoming and weakness and it **does not** provide a sufficient level of protection to the minority shareholders. In that process, legislative changes become indispensable to amend the current system, therefore, some suggestions and recommendations are provided which is the purpose of this work and the hope is that they will be taken on board in any proposal for reform in Libya. Last but not least, areas of further studies are suggested in order to further enhance a robust system of corporate governance in Libya.

Chapter 2 Theoretical issues concerning minority shareholder protection: comparative insights

2.1 Introduction

A minority shareholder is an equity holder who does not have voting control in his or her company, that is an individual shareholders or group of shareholders who hold less than a 50% voting interest in a company.[53] Under such circumstances, minority shareholders would not be able to control the affairs of the company either by voting alone or in coalition with others,[54] and they are dependent to a certain extent on the wishes and the actions of majority shareholders.[55] On the other hand, majority shareholders with their control of more than half of the votes exercise a significant power within the company, consequently they are able to control the board of directors and the general meetings which manage the business of the company. This substantial power can be used to benefit the majority shareholders and cause a detriment to minority shareholders.[56] In other words, the power of the majority shareholders can be used to further their own interests with no regard to the interests of the other stakeholders, which include; employees, creditors, suppliers, customers, and the minority shareholders. Furthermore the abusive conduct of majority shareholders would negatively

---

[53] Z Sharar, 'Minority Shareholders' Remedies in Public Shareholding Companies: Comparing the State of Qatar and Australia' [2010] Corporate Governance eJournal 3.

[54] See M Almadani, *Protecting Minority Shareholders in Private Companies in Saudi Arabia and Dubai, Does the UK Company Law 2006 Offer a Way Forward?* (1st edn, Dar Almadani, Jeddah 2012).

[55] D Szentkuti, *Minority Shareholder Protection in Germany, France, and the United Kingdom: A Comparative Overview* (VDM Verlag Dr, Germany 2008), at 8. It should be noted here that there are different types of minority shareholders. For instance, if A is a minority shareholder with 26% of shares, he or she actually is in a good position, as he or she can prevent any change in the constitution of the company: this is often referred to as **negative control**. On the other hand, if B is a minority shareholder with 8% he or she is in fact in a very weak position, as a company's decisions are normally taken by majority vote, and the minority shareholder is usually bound by the decisions of majority shareholders.

[56] A Rahmani, 'Majority Rule and Minority Shareholder Protection in Joint Stock Companies in England and Iran' (Ph.D Thesis, University of Glasgow, UK 2007).

affect the interests of the company and the whole economy.[57] To that regard, on the one hand, a comprehensive system for the protection of minority shareholders needs to establish a legal framework which guarantees that the controlling shareholders of the company do not misuse their corporate powers, on the other hand, that legal framework should always provide the minority shareholders with a means to gain sufficient remedy whenever it is warranted.[58]

Based on these considerations, this chapter is designed to demonstrate the following theoretical issues regarding the protection of minority shareholders. The first section explains how the application of "majority rule" within the company has the potential to lead to unfair conduct either for the minority shareholders or for the company itself. In so doing, it illustrates how the unrestricted power of majority shareholders can be misused to harm the interests and rights of non-controlling shareholders[59] which puts the minority shareholder in an exposed position and prevents them from taking any action on behalf of the company against the directors or the majority shareholders.[60] The second section discusses the economic considerations of minority shareholder protection where it is shown that having an adequate system of minority shareholder protection would not only benefit the minority shareholders but also it contributes to the development of an efficient and well commercial environment. Last, but not least, the third section will discuss the two main approaches of protecting the minority shareholder.

2.2 The law of majority shareholder power; use and misuse

As a consequence of applying voting procedures and corporate democracy, majority shareholders legitimately have the power to control the company, and consequently ignore the interests and rights of the minority shareholders via lawful democratic decisions either through

[57] See A Almosawi, 'The Protection for the Minority from the Abuse Resolutions in Iraqi Company Law' (2011) 26(1) Journal of Science for Law 101, at 101.
[58] A Boyle, J Birds and Others, *Boyle & Birds' Company Law* (9th edn, Jordans, Bristol 2014), at 351-356.
[59] L Miles and M He, 'Protecting the Rights and Interest of Minority Shareholders in Listed Companies in China: Challenges for the Future' (2005) 16(7) International Company and Commercial Law Review 275.
[60] See for instance s. 184 of the Business Activities Act, 2010.

of the board of directors or through decisions in shareholder meetings.[61] It is within the majority shareholders' power via general meetings to appoint members of the board of directors,[62] therefore the minority shareholders normally will not be on the board of directors, and if they are on the board, they will be very much in a vulnerable position, as they do not have voting control.[63] By this power the majority shareholders are able to appoint the directors who they prefer to work with, and determine how the company performs its business operations. In addition to that, the majority shareholders, when they have the intention to abuse the minority shareholder, they will select the directors whom they believe may have the same way of thinking and they know that he or she will assist them in any kind of mistreatment or unfairness they want to commit.[64] Furthermore, by such power the majority shareholders may replace the board with other members who are more compliant to their wishes.[65] Most importantly, the majority shareholders by their ultimate power and their control of the board of directors are able to prevent the minority from starting any legal action that aims to redress the wrongdoings which may have been committed by the controller of the company,[66] since in most cases the minority shareholders cannot get the required quorum that is necessary to obtain the permission to start the proceedings.[67]

Under these circumstances, the majority shareholders by means of their influence, and collaboration with the board of directors they can exploit the financial resources of the

[61] L Miles and M He, 'Protecting the Rights and Interest of Minority Shareholders in Listed Companies in China: Challenges for the Future' (2005) 16(7) International Company and Commercial Law Review 275.
[62] See for example s. 173 of the Libyan Business Activities Act 2010 which provides that it's the right of the general meeting to appoint the board members if they were not appointed by the memorandum of association.
[63] A Hamdawi, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013), at 210.
[64] K Kim, J Nofsinger and P Kitsabunnarat-Chatjuthamard, 'Large Shareholders, Board Independence, and Minority Shareholder Rights: Evidence from Europe' (2007) 13(5) Journal of Corporate Finance 859, at 861.
[65] H Rajak, *Sourcebook of Company Law* (2nd edn, Jordans, Bristol 1995), at 529.
[66] D French, S Mayson & C Ryan, *Mayson, French & Ryan on Company Law* (32th edn, Oxford University Press, Oxford 2015-2016).
[67] See for example; A Reisberg, *Derivative Actions and Corporate Governance: Theory and Operation* (1st edn, Oxford University Press, Oxford 2007), at 76.

company to their own benefit.[68] Thus, the resolutions issued by the majority shareholders must be accepted by the minority shareholders, and they must also acknowledge, as a fact of business life, that the power is lawfully enjoyed by those holding more shares.[69] On the other hand, the minority shareholders by their individual vote will not be able to carry sufficient weight to influence decisions, and accordingly they are unable by themselves, to block certain decisions and actions.[70] That is due to the fact that, for an ordinary resolution to be passed, only a simple majority of the vote is required (i.e 50.01%),[71] whereas a special resolution needs a higher percentage (usually 75.01%). For that reason, the majority shareholders will control the ordinary resolution, moreover, in some cases when the majority hold 75% or more they control the special resolution as well.[72] Accordingly, the minority shareholders have no power to impose their wish,[73] unless the minority shareholders formulate a coalition of shareholders in the situation where a controlling shareholder who has a high proportion of the shares holds less than 50% overall.[74]

Furthermore, such directors usually seek to satisfy the majority without regard of the minority's interests, as the only votes that count to create an ordinary resolution to remove a director are effectively in the hands of the majority shareholders.[75] In this context, it is provided under s. 168(1) of the Companies Act 2006 that "A company may by ordinary resolution at a meeting remove a director before the expiration of his period of office, notwithstanding anything in any agreement between it and him". However, it should be noted that the ability to remove directors

---

[68] L Miles and M He, 'Protecting the Rights and Interest of Minority Shareholders in Listed Companies in China: Challenges for the Future' (2005) 16(7) International Company and Commercial Law Review 275.
[69] A Hicks and S Goo, *Cases and Materials on Company Law* (7th edn, Oxford University Press, Oxford 2011).
[70] A Boyle, J Birds and Others, *Boyle & Birds' Company Law* (9th edn, Jordans, Bristol 2014), at 351.
[71] See s. 164 of The Business Activities Act, 2010.
[72] A Keay, 'Company Directors Behaving Poorly: Disciplinary Option for Shareholders' [2007] Journal of Business Law 656, at 664.
[73] M Bennedsen and D Wolfenzon, 'The Balance of Power in Closely Held Corporations' (2000) 58(1) Journal of Financial Economics 113, at114.
[74] A Keay, 'Company Directors Behaving Poorly: Disciplinary Option for Shareholders' [2007] Journal of Business Law 656, at 664.
[75] D Schlimm, L Mezzettiand B Sharfman, 'Corporate Governance and the Impact of Controlling Shareholder' (2010) 18(1) Corporate Governance Advisor 1, at 3.

by ordinary resolution which is provided by s. 168 can be avoided by inserting in the articles a provision usually known as a "*Bushell v Faith clause* ". Such a provision confers enhanced voting rights on the director who is going to be removed, as it was established in *Bushell v Faith* that a clause which provides enhanced for voting rights on such a resolution for the director whose removal is sought will be effective.[76] However, this clause can only protect a director who is also a shareholder in the company. In contrast, s. 174 of the Libyan Business Activities Act 2010 provides that a director can be dismissed before the expiration of the period of appointment once an ordinary resolution is passed by the majority shareholders, such a resolution might remove all the board members or some of them. The above mentioned exception which is known as a "*Bushell v Faith clause*" is not available under Libyan law so that shareholders would not able to restrict the power of the general meeting regarding removing the board members.

As the directors are monitored by the controlling majority shareholders, the controlling shareholders with the help and support of the directors can divert resources from the company to pursue private benefits at the expense of the minority shareholders.[77] As a result of such conduct the company certainly has the potential of reaching the most awful scenario, where the majority shareholders simply see the company as a mere extension of their interests, and use every opportunity to abuse their power and authority to impose their will on the corporation in order to achieve their own goals with no regard of the other stakeholders' interests.[78] On this point, La Porta and others pointed out that the protection of minority shareholders is important, hence the expropriation of minority shareholder by the controlling shareholders is widespread. This expropriation may have different forms; for example the controlling shareholders might

[76] [1970] AC 1099. This decision is not applicable to listed companies, since the London Stock Exchange would refuse listing if restrictions existed on removing the board of directors.
[77] A Cesari, 'Expropriation of Minority Shareholders and Pay-out Policy' [2012] British Accounting Review 207.
[78] D Schlimm, L Mezzetti and B Sharfman, 'Corporate Governance and the Impact of Controlling Shareholder' (2010) 18(1) Corporate Governance Advisor 1, at 5.

just take the profits alone, or selling additional shares in the company to another corporation they own at below market prices, or they may derive corporate opportunities to another company which they control or in which they have substantial interests.[79] Similarly, it was stated by Lord Davey in *Burland v Earle*[80] that the majority shareholders abused their power when they endeavour directly or indirectly to appropriate to themselves money, property or advantages which belong to the company or in which other shareholders are entitled to participate.[81] To this regard, s. 76 of the Egyptian Companies Act 1981 provides that abusive conduct might take one of the following forms; a resolution which furthers the interests of specific group of shareholders; a decision which harms the interests of other shareholders, and finally a resolution which only benefits the member of the board of directors. In the same way, s. 290 of the Tunisian Companies Act 2000 providers that any resolution may further the interests of a shareholder or group of shareholders or harm the interests of the company is considered an abusive and could be nullified.[82] Moreover, in some jurisdictions, as the minority shareholders' ability to access information may be denied, and their involvement in the company's management is usually undermined, the majority shareholders can make false report which appears less than the actual profits the company earned, so that they can distribute a smaller amount of those sums.[83] In this context, s. 224 of the Libyan Business Activities Act 2010 does not give minority shareholder a right to ask for the financial statements of the company nor the minutes of the board of directors. Such a section would make it easier for the controllers of the company to make false financial statements and not distribute dividends.

[79] R La Porta, and Others, 'Investor Protection and Corporate Governance' (2000) 58(1-2) Journal of Financial Economics 3, at 4.
[80] [1902] AC 83, 93.
[81] In this context see also *Rolled Steel Products Ltd v British Steel Corporation* [1985] 2 WLR 908 (CA).
[82] See A Alwarfaly, *Law of Commercial Companies* (2nd edn, Matbahat Alatrash leeallketab Almoktas, Tunis 2010), at 276-277.
[83] C Leuz, D Nanda and P Wysocki, 'Earnings Management and Investor Protection: An International Comparison' (2002) 69 Journal of Financial Economics 505.

Following the foregoing introduction on the majority shareholders' power, it clearly appears that the majority shareholders via their entire power can simply harm the interests and rights of the minority shareholder, as well as the company' interests. Therefore, the next sub-sections of this chapter will discuss how the majority shareholder use their power in ways that harm the interests of minority shareholders and the company as a whole.

2.2.1 Majority shareholders may exercise their power in ways that disadvantage the minority shareholders' interests

The oppression of minority shareholders highlights one of the possible situations where the company's controllers take advantage of their corporate power in order to achieve their own interests.[84] Such an oppression or unfair prejudice relates to the way by which a company is run, where that way of running leads to unfair consequences for the minority shareholders rather than for the company.[85] In these circumstances there is no wrongdoing that has been perpetrated by the majority towards the company, rather than the personal rights and interests of the minority shareholders have been unfairly prejudiced by the majority shareholders, thus the minority shareholders should be allowed to litigate the majority in order to remedy the unfair conduct.[86] For instance, minority shareholders should have a right to sue the controllers of the company where they prevent distributing dividends to those shareholders with no logical reasons or they restrict their priority right to buy new shares.

To that regard, s. 353 of the JSC Act 1996 in Morocco allows a shareholder or group of minority shareholders to go to the court to protect their own rights and interests whenever they realise that controllers of the company act in ways that further the interests of some shareholders with no regard to the interests of other shareholders. Moreover s. 166 the same

[84] A Boyle, J Birds and Others, *Boyle & Birds' Company Law* (9th edn, Jordans, Bristol 2014), at 549.
[85] M Almadani, *Protecting Minority Shareholders in Private Companies in Saudi Arabia and Dubai, Does the UK Company Law 2006 Offer a Way Forward?* (1st edn, Dar Almadani, Jeddah 2012).
[86] A Boyle, J Birds and Others, *Boyle & Birds' Company Law* (9th edn, Jordans, Bristol 2014), at 685- 688.

Act provides that it is also the job of the statutory auditor to ascertain that all shareholders are treated equally and any resolution that breach this rule has to be nullified. In the UK, this type of unfair action was regulated in s. 210 of Companies Act 1948, under the term of "oppression".[87] However this term was replaced by another expression in the Companies Act 1980 which is "unfair prejudice". Under this new term, the minority shareholders have a right to bring an action whenever the company's affairs have been conducted in a manner which is unfairly prejudicial to members' interests.[88] In the implementation of this expression the House of Lords in *O'Neill v Phillips*,[89] established that shareholders have the right to complain when:

"…some breach of the terms on which are members agreed that the affairs of the company should be conducted; or some use of the rules in a manner which equity would regard as contrary to good faith i.e cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal power ".[90]

In general, it is said that whenever the majority shareholders violated the minority shareholder's interests and rights the minority shareholders are entitled to complain, yet, there are different types of misconduct which may cause unfairness and oppression. For example, majority shareholders through the board of directors might increase the company's capital in order to enhance their power without giving the minority a chance to buy new shares, therefore, minority shareholder is entitled to complain to the court and nullify such conduct.[91] It is also considered as abusive conduct wherein the majority shareholders sold their controlling shareholding to a third party without giving the minority shareholder any chance to participate in or to object to the decision to sell.[92] In this context, although the court in the case of

[87] The UK Companies Act, 1948.
[88] See s. 994 of the UK Companies Act, 2006.
[89] [1999] 2 BCLC 1.
[90] [1999] 2 BCLC1.
[91] A Almosawi, 'The Protection for the Minority from the Abuse Resolutions in Iraqi Company Law' (2011) 26(1) Journal of Science for Law 101, at 125.
[92] Ibid.

Weinberger v UOP, Inc[93] did not consider this conduct as minority oppression, however it ordered the acquirer of the shares to give the minority shareholders the opportunity to sell their shares at the same price as the majority did.[94] In contrast, there is no such restriction under s. 135 of the Business Activities Act 2010 or s. 771 of the Companies Act 2006, therefore, shares are presumed to be capable of transfer, even in a private company, unless the company's article or the shareholder agreement contains some restrictions on the transfer of shares.[95] Another form of abusive conduct might be perpetrated by the company controllers where they reject the declaration of dividends over a period of time without real justifications.[96] In this regard, the Supreme Court of Morocco has nullified the general assembly's resolution which delayed distribution of dividends to shareholders without justified reasons.[97] Similarly, in *Re Sam Weller & Sons Ltd*[98] the court regarded that the failure to pay proper dividends to shareholders, over a long period of time without explanation an unfairly prejudicial act, and accordingly the minority shareholder was entitled to bring an action and they were successful for relief. In *Patton v Nicholas,*[99] the minority claimed the majority shareholders had refused to declare a dividend, the court found that the majority shareholders without a doubt had wrongfully controlled the board as to prevent the declaration of dividends, moreover the court found that the majority shareholders did that in order to prevent the minority shareholder from sharing in the profits. The court ordered a mandatory injunction requiring the majority shareholder to pay reasonable dividends at the earliest practical date, as well as in future years. An example of this situation of oppression was also found in the Texas case of *Pinnacle Data Services, Inc v*

[93] 457 A2d 701 (Del 1983) 1641.
[94] R Szudoczky, *Takeover Regulation and Protection of Minority Shareholders: A Comparison Between The European and US Approach* (Lambert Academic Publishing, Koln 2009), at 16.
[95] See s. 771 of the UK Companies Act, 2006, and The Companies (Model Articles) Regulation 2008, Art 26.
[96] *Patton v Nicholas* 279 SW 2d 848 (Tex 1955).
[97] The Supreme Court of Morocco, file No 209/03/2003, issued on 07/06/2006, (2008) 68, Journal of Supreme Court 118, at 121.
[98] [1989] 3 WLR 923.
[99] 279 SW 2d 848 (Tex 1955).

Gillen, [100] where the majority shareholder had engaged in oppression by withholding profit distribution, terminating employment and paying for individual legal fees with corporate funds. However, their claim was refused as there was not enough evidence which supported the minority shareholder's claim. Such conduct, which oppresses the minority shareholders usually lead them to either hold on their shares without any expected profits or sell these shares for whatever the majority, or the market (in the case of public company) is willing to offer.[101]

The abusive conduct of majority shareholders may take another form where such majority shareholder via their control of the board of directors prevents the minority shareholders from obtaining any important information regarding the company's management.[102] By such information minority shareholders would be able to practice some sort of supervision during the meetings of the general assembly and give their vote with full knowledge of facts. Furthermore, the minority shareholders in their claims either against the company or the majority shareholder, would need to obtain some information as supporting evidence in order to get success in their claim, otherwise the claim may fail. To that regard, the Commercial Court of Appeal of Casablanca has annulled the minutes of a shareholders' meeting and its decisions which were taken without giving the minority shareholders a right to see documents that relate to some resolutions in that meeting.[103] To restrict this kind of conduct, a legislature would adopt some provisions which obligate either the board of directors and the general meeting to grant minority shareholders easy access to documents related to shareholders meetings, inventory, financial statements, consolidated accounts, reports of the board of

[100] 104 SW 3d 188 191 92 (Tex.App.-Texarkana 2003 no pet).
[101] D Moll, 'Shareholder Oppression & 'Fair Value': Of Discounts, Dates, and Dastardly Deeds in the Close Corporation' (2004) 54(2) Duke Law Journal 8.
[102] Ibid.
[103] The Commercial Court of Appeal of Casablanca, case No 12/1010/4421, issued on 23/06/2011, cited in T Albakti, 'The role of judicial authority to protect the minority shareholders in the Joint Stock Company' (2013) 110 The Moroccan Journal of Local Management and Development 139, at 142, see also Gomirah A, *The Abusive Conduct of Shareholders in the Joint Stock Company* (1st edn, Matbat Alomnia, Rabat 2011), at 220.

directors, the draft resolution submitted to the general assembly and related subjects.[104] However, as will be discussed later in much detail, ss. 223-224 of the Libyan Business Activities Act 2010 has not given sufficient effect to this right, so that under s. 224 of this Act minority shareholders are only able to access the register of the shareholders and the minutes of the shareholders' meetings and their decisions. The Libyan Business Activities Act 2010 does not allow those shareholders to ask for the financial statements nor the minutes of the board of directors and its decisions, also it is not allowed for those shareholders to see the minutes of the supervisors' committees.[105]

What is more, particularly in Closed Joint Stock Companies as this research focuses, although most of what is agreed upon between shareholders goes into the articles of association or the shareholder agreement, there are always some matters of understanding which result from discussions and have not been stated formally in their agreement.[106] These unstated understandings might contain the reasonable expectations which each shareholders may have. For example reasonable expectations can be found when each shareholder who has subscribed to the company's capital expects that he or she will be allowed to be involved in the company's management and receive a return on his/her investment partly or totally in the form of salary rather than dividends.[107] If the majority shareholders have ignored the legitimate expectations of the minority shareholders, or they acted in a way which is contrary to it, the minority have the right to make a claim, as this form of conduct has been classified as oppressive conduct.[108]

---

[104] S Ghumidh, *Bahraini Commercial Companies Law, Provisions and Explanations* (1st edn, University of Bahrain, Bahrain 2014), at 184.
[105] M Tibar, 'The Abusive Conduct of Minority Shareholders in Joint Stock Companies, Study in the Law No 23/ 2010' (2012) 1 Journal of Legal Sciences 92, at 101.
[106] See for example; E Rock and M Wachter, 'Waiting for the Omelet to Set: Match Specific Assets and Minority Oppression in the Close Corporation' (1999) 24(4) Journal of Corporation Law 913.
[107] It is said that the concept of legitimate expectations is less important in widely- held companies, where the expectations of members do not generally go beyond the wish of receiving a return on their investment, therefore, this concept in more important in the private company where there are usually close relationships between its members.
[108] E Rock and M Wachter, 'Waiting for the Omelet to Set: Match Specific Assets and Minority Oppression in the Close Corporation' (1999) 24(4) Journal of Corporation Law 913.

It was stated in *Re Saul D Harrison & Sons Plc*[109] that legitimate expectations often arise out of a fundamental understanding between the shareholders which formed the basis of their association, but which was not put into contractual form. In this case the minority shareholder claimed that directors had acted in a way which contrary to the minority shareholder's legitimate expectations by not acting in the best interests of the company in deciding whether to pay dividends and how much to pay.[110]

The concept of reasonable expectations, which was created to recognise wider application of minority shareholders' interests, has been adopted by the UK law. As s. 994 of Companies Act 2006, which replaced s. 459 of CA 1985, states that a: a member …. may apply to the court…. for an order on the ground that the company' affairs are being …unfairly prejudicial to the *interests* of its members or at least himself. It appears from the provision that the legislature has used the word "interests" instead of "rights", and it is agreed that the word "interests" is wider than "rights", therefore it offers extra advantages to shareholders. In other words, rights of shareholders come exclusively from the statute or the shareholders' agreement or articles, while the word interests might include other unstated legitimate expectations even if there is no explicit terms agreed between the shareholders.[111] In this manner, the court in *Re BC&G Care Homes Ltd: Crowley v Bessell*[112] held that the exclusion from management of a one- third shareholder without a reasonable offer to buy the petitioner out in circumstances where there

[109] [1995] 1 BCLC 14, at 19.
[110] To provide a ground or legal description to the concept of legitimate expectations the approach of Quasi-contractual has been offered, under this model there is difference between two types of contractual approaches which exist in unfair claim. The contractual approach means that parties can make a claims where there are breaches of the explicit terms agreed between the shareholders in the contract. on the other hand, the quasi-contractual approach means that shareholders are allowed to make claim whenever they found that their legitimate expectations have been violated, even if these reasonable expectations were not put into contractual form. That is to say, claims relating to reasonable expectations are acceptable, as shareholders or members might have some promises or understandings between each other but is not subject to express contractual provision, for more details see: P Paterson, 'A Criticism of the Contractual Approach to Unfair Prejudice' (2006) 27(7) Company Lawyer 211.
[111] J Lowry, 'The Pursuit of Effective Minority Shareholder Protection: s459 of the Companies Act 1985' (1999) 17(3) Company Lawyer 67, at 70.
[112] [2015] EWHC 1518 (Ch).

is legitimate expectation of participation in management is generally regarded as one example of unfairly prejudicial conduct.[113]

In Libya there is no mention to the concept of reasonable expectations in the relevant Acts and regulations, however, there is nothing prevents the courts from accepting an actions which are based on breaching the legitimate expectations of some shareholders. Identifying the legitimate expectations is matter of fact which differs from case to case, therefore, the court when deciding whether any or all of those expectations should be honoured, needs to take into account the parties' actual understanding, whether at the time of investment or as they might evolve. In this sense, the court in *R & H Electric Ltd v Haden Bill Electrical Ltd*[114] had found that the minority shareholder had a legitimate expectation to be involved in the company's management as long as he remained a significant shareholder of the company. When the majority prevented him from this participation, the court ordered the majority shareholder to buy the minority' shares and repay as soon as possible the loans made to the company by the minority shareholder. That is to say, violating the reasonable expectations of the minority shareholder is another form of misconduct which the majority shareholder might perpetrate, therefore whenever this violation takes place the minority shareholder have the right to bring a legal action to seek a relief.

In brief, the majority shareholders via their voting power, can approve self-interested transactions, direct managers of the company, refuse to declare dividends, force the purchase of the shares of minority shareholders below their value and breach the reasonable expectations of the minority shareholder.[115] Moreover, by this power not only the rights and interests of minority shareholders would be affected but also the whole the interests of the company.

[113] See D Milman, 'Shareholder Law: Recent Developments in Practice' (2015) 378 Company Law Newsletter 1 at, 4.
[114] [1995] 2 BCLC 280.
[115] L Miles and M He, 'Protecting the rights and interest of minority shareholders in listed companies in China: challenges for the future' (2005) 16(7) International Company and Commercial Law Review 275, at 276.

Therefore, the next sub-section will illustrate how the majority shareholders can use their power to abuse the company's interests when they merely favour their own interests.

2.2.2 Majority shareholders may exercise their power to disadvantage the interests of the company as a whole.

The unrestricted power of the majority shareholders allows them to commit all kind of wrongdoings to the detriment of the company and consequently vote to prevent the company or the minority shareholder from taking any legal action to gain a remedy. This kind of vote usually takes place at board meetings or in the general assembly, wherein the majority shareholders are able directly or indirectly to control voting.[116] The majority shareholders in most cases are free to manage the company in a way that they prefer, and by their controlling authority they can prevent minority shareholder from starting this litigation. In this regard, under s. 184 of the Libyan Business Activities Act 2010 an individual shareholder or group of minority shareholders are not allowed to bring a derivative action on behalf of the company against the wrongdoer directors if the company itself via its general meeting has not passed such a resolution.

Furthermore, the courts in some jurisdictions would refrain from interference in the internal affairs of the company as long as the majority are acting within their legitimate power.[117] In this sense it was stated by Lord Eldon in *Carlen v Drury*[118] that "the court is not required on every occasion to take over the management of every playhouse and brew house in the kingdom". Therefore, courts became hesitant to get involved in the company's management, instead leaving the majority shareholder to manage the company as they prefer. These

[116] T Lazarides, 'Minority Shareholder Choices and Rights in the New Market Environment' (2010) 7(1-2) Journal of Corporate and Securities Law 7.
[117] J Abugu, 'A Comparative Analysis of the Extent of Judicial Discretion in Minority Shareholder Protection Litigation: the United Kingdom and United States' (2007) 18(5) International Company and Commercial Law Review 181, at 183.
[118] [1812] 35 ER 61.

restrictions which prevent minority shareholders from starting liability actions as courts are most often reluctant to interfere in the internal management of the company. This often allows the majority to act to obtain their own advantage with little or no regard to the company's interests.

The utilisation of the controlling authority by the majority shareholder can take many different forms, for instance, the majority shareholders can simply utilise the concept of ratification to restrict the scope of any litigation by the minority shareholders.[119] The unrestricted authority for the majority shareholders allows them to engage in wrongdoings, and vote to get ratification of that kind of misconduct they perpetrated, subsequently prevent any potential action which can be taken by the court as a legal entity against them.[120] In this context, Vinelott J stated in *Taylor v National Union of Mineworkers (Derbyshire Area)*[121] that "….it is open to a majority of the members, if they think it is right in the interests of the corporate body to do so, to resolve that no action should be taken to remedy the wrong done to the corporate body and such a resolution will bind the minority". Therefore, it is stated that the majority shareholder is authorised by the law to engage in wrongdoings and detriment the interests of the company and eventually the minority shareholders.[122]

Moreover, the board members either majority shareholders or other directors who represent the majority shareholder, have the power to modify or increase their remuneration to gain personal benefits at the expense of the company,[123] therefore, they can misuse their dominance to obtain higher remuneration to the detriment of the shareholders and consequently the company as a

[119] Although the Companies Act 2006, as will be discussed in much detail later, has facilitated the action for the minority shareholder, this approach remains applicable in many other jurisdictions.
[120] H Hirt, 'The Company's Decision to Litigate Against its Directors: Legal Strategies to Deal with the Board of Directors' Conflict of Interest' [2005] Journal of Business Law 159, at 185.
[121] [1985] BCLC 237.
[122] H Hirt, 'The Company's Decision to Litigate Against its Directors: Legal Strategies to Deal with the Board of Directors' Conflict of Interest' [2005] Journal of Business Law 159, at 185.
[123] Z Sharar, 'Minority Shareholders' Remedies in Public Shareholding Companies: Comparing the State of Qatar and Australia' [2010] Corporate Governance eJournal 3, at 8-9.

whole.[124] To restrict such kind of abusive conduct s. 162 of the Jordanian Companies Act 1997 provides that remuneration of the chairman of the board of directors and its members shall not exceed a rate of 10% of the net profit which can be distributed as dividends to shareholders, after deducting all taxes and reserves therefrom.[125]

Another example of the utilisation of the controlling authority is found in *Cook v Deeks*[126] where the company (A) had built up considerable goodwill with the Canadian Railway Company as a result of the satisfactory performance of contracts. Nevertheless, when the two parties reached the final step of negotiations, they majority shareholder of the company (A) passed a resolution to the effect that their company had not interests in the contract. And they granted the contact to another company which they had incorporated rather that company (A), the Privy Council held that the resolution was unfair, and the majority shareholder were not allowed to abuse their voting power to advance their own business and ultimately gain from this for themselves.[127]

The risk of abusing the interests of the company becomes higher where the company has only two shareholders, one a majority and one a minority; in this case if the majority shareholder is also the directors there is a possibility that fiduciary duty will be breached.[128] Moreover, in this circumstances the fiduciary duty will be directly owed to the minority shareholder. For example, in *Redmon v Griffith*[129] there were two shareholders in the company and the majority had preached the fiduciary duty since he used the corporate funds to pay personal expenses. The minority's claim was successful as the court found out that the majority' conduct was

[124] Z Sharar, 'Minority Shareholders' Remedies in Public Shareholding Companies: Comparing the State of Qatar and Australia' [2010] Corporate Governance eJournal 3, at 8-9.
[125] The Jordanian Companies Act, 1997 and its amendments in 2006, see also s.188 of the Egyptian Companies Act, 1981.
[126] [1916] 1 AC 554.
[127] [1916] 1 AC 554.
[128] D Moll, 'Shareholder Oppression in Texas Close Corporations: Majority Rule Isn't What It Used to Be' (2008) 9(1) Huston Business and Tax Law Journal 33.
[129] 202 SW 3d 225 (Tex App - Tyler 2006).

oppressive. In contrast with this decision, it was established in English Law in *Percival v Wright* that directors only owe duties to the company, and not to shareholders individually (s.170 Companies Act 2006).[130] More recently Nugee J in *Sharp v Blank*[131] has confirmed that directors as a general rule do not owe fiduciary duties to individual shareholders. However, exceptional circumstances resulting from a special relationship are required for fiduciary duties to be owed by directors to individual shareholders.[132]

In short, the unlimited power of the majority shareholder if not constrained can harm both the interests of the minority shareholder and the company as whole, therefore, the minority shareholder as investors should have more effective means to protect their rights. This protection gives shareholders a degree of confidence which is considered a necessary step to attract investments and develop the economic strength of the whole country, therefore, it is the job of next section to look into the effect of the protection of minority shareholders on the whole economic system.

2.3 Having a robust system of minority shareholders protection would benefit the economic sector as a whole.

Having said that Libya is moving toward a free market economy following the change from socialism to capitalism in the early of 2000s, there was a marked trend towards a free market policy that requires a move towards a new corporate system. Therefore, adopting an effective rule of minority shareholders protection would give domestic and foreign investors a degree of

---

130 [1902] 2 Ch 401, see s. 170 of the Companies Act 2006 which provides that" … (1) the general duties specified in sections 171 to 177 are owed by a director of a company to the company… (3) The general duties are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director. (4) The general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties. (5) The general duties apply to shadow directors where, and to the extent that, the corresponding common law rules or equitable principles so apply.

131 [2015] EWHC 3220 (Ch).

132 See D Milman, 'Shareholder Law: Recent Developments in Practice' (2015) 378 Company Law Newsletter 1 at 3.

confidence which considers a necessary step to attract investments and advance the Libyan economic system. Based on these considerations, the abusing of majority shareholders' position in the company would have a negative impact on the proper functioning of market economy and consequently for the economic growth as whole. In today' world companies play a crucial role in our economies as each company provides mutual benefits for different group of stakeholders, and we increasingly rely on private sector institutions to manage personal savings and secure retirement incomes.[133] A well-functioning company serves not only the interests of the owners, either as a group or individually, it also serves the interests of the public, as, it provides services for people and employment opportunity for its employee also, it creates tax income for central redistribution in society.[134] Consequently, the abuse of the advantageous position of majority shareholders or directors leads in many cases to destroy the company, which means losing a functioning economic unit from the economy.[135] Having an improved control over the management of the company, which respects all rights and interests of all shareholders, will not only benefits the minority shareholders, rather it benefits the company via monitoring and rectifying the breaches of duties by this management,[136] as well as it strengthen the economic growth in the company by creating an attractive atmosphere for local

[133] Organisation for Economic Co- Operation and Development (OECD), 'OECD Principles of Corporate Governance' [2004]. http://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf. Accessed 07/09/2013.

[134] Organisation for Economic Co- Operation and Development (OECD), 'OECD Principles of Corporate Governance' [2004]. In this context see; s. 172 of the Companies Act 2006, which provides that : "(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—(a)the likely consequences of any decision in the long term, (b) the interests of the company's employees,(c) the need to foster the company's business relationships with suppliers, customers and others,(d)the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and(f)the need to act fairly as between members of the company".

[135] D Szentkuti, *Minority Shareholder Protection in Germany, France, and the United Kingdom: A Comparative Overview* (VDM Verlag Dr, Germany 2008), at 7.

[136] W He, 'Improving the Protection of Minority Shareholders in Chinese Company Law' (LL.M thesis at McGill University, Canada 2005).

and foreign investors.[137] For these reasons, the topic of protection of minority shareholders has become a central issue of analysis not only for lawyers but also for economists.

Based on these considerations, it is the function of the policy makers and legislature to impose some rules which compel the controller of the company to preserve a balance among the conflicts arising out of the dissension of shareholders.[138] It follows that countries have become more interested in creating rules which protect the different interests group within a company, as they found that this protection is considered to be an important element in underpinning the stability of economic growth.[139] In other words, effective protection rules for the minority shareholders are essential, as these rules maintain the balance between the conflicting interests under which a company was created, further, such rules will encourage foreign investors to carry out business activity in these countries, as they believe that there are effective rules which protect their interests and prohibit the majority shareholders or main investors from abusing their economic power to the minority investor's detriment. [140]

In line with this notion, it is claimed that the applicability of effective rules which protect the minority shareholders is a sign of having a complete and strong economic system where the interests of all related parties are fully considered (majority shareholders, minority shareholders, creditors, employees, suppliers, and, foremost, the interests of the company as whole). [141] Such a high level of protection will increase confidence of investors and transparency level within the company, therefore, managers and majority shareholder are

---

[137] Organisation for Economic Co- Operation and Development (OECD), 'OECD Principles of Corporate Governance' [2004] http://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf. Accessed 07/010/2013, at 9.

[138] D Szentkuti, *Minority Shareholder Protection in Germany, France, and the United Kingdom: A Comparative Overview* (VDM Verlag Dr, Germany 2008), at 3.

[139] M Almadani, *Protecting Minority Shareholders in Private Companies in Saudi Arabia and Dubai, Does the UK Company Law 2006 Offer a Way Forward?* (1st edn, Dar Almadani, Jeddah 2012).

[140] D Szentkuti, *Minority Shareholder Protection in Germany, France, and the United Kingdom: A Comparative Overview* (VDM Verlag Dr, Germany 2008), at 5.

[141] See for example L Sealy and S Worthington, *Cases and Materials in Company Law* (10th edn, Oxford University Press, Oxford 2013).

obliged to act in way which benefits the company and economic as whole.[142] On the other hand, it is stated that having no protective rules for the minority shareholders or adopting a low standard of minority protection makes the majority shareholders more careless toward their duties and obligations, which negatively affects the interests of the minority shareholders and the whole economy.[143] Moreover, having a comprehensive system which protects the minority shareholders encourages the development of financial markets and make small investors more interested in buying shares of stock companies,[144] as foreign investors and small shareholders tend to put their investment into a system where there they feel that there is a high level of protection from any kind of expropriations and they are away from other misconduct actions. Indeed, it is rational for those who contributed to the capital of the company to be treated fairly as investors, and to avoid being in a weak position in a company. Also it is reasonable for them to expect a *pro rata* return for their contribution, regardless of the amount of contribution. This is to say, foreign investors are interested in investing into a system where there are minority protection rules which increase the possibility of reaching the largest possible benefits with the smallest possible risk, and which ensure to these categories that their rights and interests are fully protected. [145]

A number of studies have confirmed that reaching a specific stage of confidence which provides at least the minimum level of minority shareholders protection is a necessary step to improve the economic strength of companies and for the proper functioning of a market economy.[146] For instance, Enriques stated that, as the UK and the USA are applying effective

---

[142] S Judge, *Company Law* (3rd edn, Oxford University Press, Oxford 2012).
[143] See for example; W He, 'Improving the Protection of Minority Shareholders in Chinese Company Law' (LL.M thesis at McGill University, Canada 2005).
[144] D Szentkuti, *Minority Shareholder Protection in Germany, France, and the United Kingdom: A Comparative Overview* (VDM Verlag Dr, Germany 2008).
[145] Ibid, at11.
[146] R Levine and S Zervos, 'Stock Market, Banks and Growth' (1999) 88 American Economic Review 537. See also Organisation for Economic Co- Operation and Development (OECD), 'OECD Principles of Corporate Governance' [2004] http://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf. Accessed 19/10/2013.

rules for minority shareholders, consequently their accounting rules and standards are stronger than those in Continental European countries which suffer more manipulation of accounts as a result of having a weak level of minority shareholder protection.[147] Also La Porta and others have claimed that the minority shareholder protection rules influence economic growth in three ways, firstly, it enhances saving, and this saving will be transferred into real investment, and finally it promotes more productive uses of capital, and thereby improves the efficiency of money.[148] Therefore, those countries which protect the minority shareholders have more valuable stock markets, large numbers of listed shares and higher rates of capital demands in the market. On the other hand, countries with no or with weak minority shareholder protection lack to financial stability certainty, trust and confidence in their markets.[149] Moreover they found that countries with poor investor protection, particularly with regard to private companies, have significantly less liquidity and smaller markets.[150] However, this study (La Porta & others) which reveals that there is a positive relationship between dispersed ownership and good legal minority shareholder protection and consequently strong securities market, has not escaped heavy criticism, as the latest empirical studies have partly overruled such a presumption. For instance the empirical study of corporate political connection as a determinant of corporate governance in Hong Kong,[151] has shown that other countries such as Hong Kong which remained an economy of very concentrated ownership has very effective system of minority shareholder protection.[152] Moreover, other study has found that there is no real relationship between shareholder protection and stock market development as La Porta has

[147] L Enriques, 'The Law on Company Directors' Self-Dealing: A Comparative Analysis' (2000) 2(3) International & Comparative Corporate Law Journal 297.
[148] R La Porta, and Others, 'Investor Protection and Corporate Governance' (2000) 58(1-2) Journal of Financial Economics 3, at 16.
[149] Ibid.
[150] Ibid, at 17.
[151] B Yung, P Lawton, 'Corporate political connection as a determinant of corporate governance in Hong Kong' (2013) 63(4) Northern Ireland Legal Quarterly 449, at 474-475.
[152] Ibid.

claimed.[153] Abdulwahab Almarini, claims that giving the minority shareholders such kind or effective roles within the company does not only decrease the power of majority shareholders, rather than making the company's controllers more active so that companies would provide better service to all stakeholders and the whole economic system.[154]

To conclude, companies are organised in order to provide mutual benefits for the different groups of interests, therefore it is necessary in order to maintain a balance between these interests to have effective rules for the protection of the minority shareholders.[155] These rules would offer a much higher level of stabilisation in the commercial environment, as these rules restrict the actual control position of majority shareholders and limit the possibility of manipulating the company's affairs to use it exclusively in their favour. Furthermore, these rules guarantee that any kind of misconduct or unfairness which has been committed by the controller of the company toward the minority shareholders is the subject of effective redress. Based on the above considerations, adopting a sufficient level of minority shareholders protection in Libya would increase the level of confidence, trust and consequently the standards of investment, which contribute to the development of an efficient and healthy economy.

To enhance the level of protection given to minority shareholders countries rely on two main approaches (the remedial route and the preventative approach). Under the remedial approach minority shareholders are granted wide grounds to ask courts to interfere and bring justice. Whereas under the preventative route minority shareholders are granted specific rights which enable each shareholder to participate in the management of the company and practice a sort of supervision over the majority shareholders. In addition to these rights, supervisory organs

[153] See for example; J Armour, and Others 'Shareholder Protection and Stock Market Development: An Empirical Test of the Legal Origins Hypothesis' 2009 6(2) Journal of Empirical Legal Studies 343.
[154] A Almarini, 'The Power of Majority Shareholders within Joint Stock Companies under Moroccan Law' (Ph.D Thesis, Mohammed V University, Rabat 1997), at 376-393.
[155] D Szentkuti, *Minority Shareholder Protection in Germany, France, and the United Kingdom: A Comparative Overview* (VDM Verlag Dr, Germany 2008), at 5.

are created inside the company in order to reduce the abusive conduct of majority shareholder and ensure that all shareholders are treated equally. Therefore, the last section of this chapter will discuss these two main approaches of minority shareholders protection.

2.4 Two main ways of protecting the minority shareholders

Countries differ in their own setting, history, social and political culture, and local traditions, such a variation plays major role in the task of shaping any minority shareholder protection system (Path dependency theory).[156] Therefore, a country's model of minority shareholder protection at any point in time depends to some extent on the pattern it had previously.[157] Moreover, the early pattern of ownership structures have an influence on the chosen legal rules to protect these shareholders.[158] However, having pointed out in the previous chapter that in the area of company law countries have converged in number of dominant legal policy,[159] therefore, in modern company law a global model of healthy system of corporate governance has emerged that countries are expected to follow.[160] In this regard, most of these different systems of minority shareholder protection are sharing the same goal which is creating a system which ensures that all shareholders are treated fairly and equitably, regardless of the size of their shareholding.[161] Under such a system the board of directors and seniors managers would be accountable to all stakeholders, in particular the minority shareholders.[162]

[156] Under this theory the past plays an important role in legal development and influences the process of legal change in any legal system. See O Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' [2003] John M, Olin Centre for Studies in Law, Economics, and Public Policy Working Papers, Paper 270.<http://digitalcommons.law.yale.edu/lepp_papers/270> accessed 17 February 2013.
[157] L Bebchuk and M Roe, 'A Theory of Path Dependence in Corporate Ownership and Governance' (1999) 52 Stan LR 127 <http://papers.ssrn.com/paper.taf?abstract_id=192414> accessed 19 February 2013.
[158] B Better, *Company Law* (2nd end, Pearson Education Limited, Edinburgh 2005), at 104.
[159] Ibid, at 220.
[160] M Siems, *Comparative Law* (1st edn Cambridge University Press, Cambridge 2014), at 235.
[161] K Raja, 'Corporate Governance and Minority Shareholders' Rights and Interests in Pakistan: a Case for Reform' (2012) 23(10) International Company and Commercial Law Review 347.
[162] F Almajid, 'A Conceptual Framework for Reforming the Corporate Governance of Saudi Publicly Held Companies: A Comparative and Analytical Study from a Legal Perspective' (Ph.D Thesis, University of Manchester, UK 2008), at 11.

A functional protective system should empower the minority shareholder to approach and participate in the management of the company, and distribute accountabilities and responsibilities among all shareholders.[163] Furthermore, this system must clarify rights and interests of minority shareholders and guarantee that minority shareholders are treated fairly.[164] In addition, in the case of wrongdoing or oppression such a system must make clear that there are effective procedures and mechanisms by which minority shareholders can obtain their appropriate remedies such as ensuring that the minority shareholders have right to sell their shares for a fair value whenever they want to leave the company.[165] In other words, an effective system of minority shareholder protection requires that the interests and rights of all stakeholders, particularly minority shareholders are fully considered (the preventative mechanism). Additionally, there is an obligation on legislature, policymakers and courts to furnish legal mechanisms to remedy any wrongdoing or unfairness that has been committed by the controllers of the company (the remedial approach). Consequently, this section explores in turn the **two** mechanisms which work together to put forward a high standard level of protection for the minority shareholders, the preventive mechanism will be examined firstly, while the second sub-section will discuss the remedial approach where minority shareholders are granted a right to commence litigation in order to obtain an appropriate remedy.

2.4.1 The preventative mechanism

The protection of minority shareholders is defined as the procedures that are being been taken to administer the company in a way which considers the interests of all shareholders.[166] In so

---

[163] Organisation for Economic Co- Operation and Development (OECD), 'OECD Principles of Corporate Governance' [2004] http://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf. Accessed 14/12/2014, at 29.
[164] Ibid, at 40.
[165] See for example; K Raja, 'Corporate Governance and Minority Shareholders' Rights and Interests in Pakistan: a Case for Reform' (2012) 23(10) International Company and Commercial Law Review 347.
[166] Ali Almosawi, 'The Protection for the Minority from the Abuse Resolutions in Iraqi Company Law' (2011) 26(1) Journal of Science for Law 101, at 101.

doing minority shareholders are granted legal rights and tools that enable them to impose effective supervision over the controllers of the company. Such rights and means would make a necessary balance that reduce the abusive misconduct of majority shareholders. In general, a shareholder is an investor who pays a sum of money into a company with hope of earning return,[167] therefore, the amount of money that has been paid by this shareholder is turned into a financial interest in the company itself, [168] which belong to the company as a separate legal entity.[169] Thus the shareholder's contribution to the capital of the company will be swapped for rights, interests and power that can be exercised in relation to the company's capital and affairs. Nevertheless, the issue that arises in this area is what are these rights and interests that are attached to each share attained by shareholders including a minority shareholder. The Organisation for Economic Co-operation and Development (OECD) in its report which is entitled Principles on Corporate Governance, [170] listed the basic shareholder rights as follows:

"(1) secure methods of ownership registration; 2) to convey or transfer shares; 3) to obtain relevant and material information on the corporation on a timely and regular basis; 4) to participate and vote in general shareholder meetings; 5) to elect and remove members of the board; and 6) share in the profits of the corporation."[171]

Although these rights and interests are connected automatically with each share, it is important to make sure that there are no contrary provisions either in the article of association or in the memorandum of association when the shares are issued. In addition, it is within the power of a

[167] E Ferran, *Company Law and Corporate Finance* (1st edn, Oxford University Press, Oxford 1999), at 315.
[168] Ibid.
[169] *Salomon v Salomon Co Ltd* [1897] AC 22.
[170] Organisation for Economic Co- Operation and Development (OECD), 'OECD Principles of Corporate Governance' [2004] http://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf. Accessed 07/08/2013, at 19.
[171] It also stated in this report that minority shareholders have a right to litigate majority shareholders or directors for any suspected expropriation against the shareholder or the company, and should have effective means of redress, as well as in the worst circumstances the minority shareholder must have a clear mechanism to leave the company at fair price, such right will be discussed in the next sup section under the remedial approach. See Organisation for Economic Co- Operation and Development (OECD), 'OECD Principles of Corporate Governance' [2004] http://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf. Accessed 12/09/2013 at 20.

company to issues share with alternative rights and interests, unless there is a contrary provision in its memorandum or article of association.[172] On the other hand, although, there are some[173] who support the view that there are some rights, such as the right to access to company's information, which need to be controlled, or should be left to the court to decide whether this information should be restricted or not. However this claim cannot be accepted as it will restrain the minority shareholder's ability to exercise their other rights.[174] Moreover, these kind of restrictions will prevent the minority shareholders from exercising their rights as any shareholder within the company. Accordingly, such rights should not be ignored or left to the majority or even to the court, and must be provided for in the statute, so that such rights allow the minority shareholders to have the required information on regular basis.[175] Additionally, an absence of effective and reserved rights and interests could motivate majority shareholders and directors to advance their own interests on the expense of the rights and interests of minority shareholders.[176]

In fact, the reservation of the rights and interests of minority shareholders in statutory list will simplify the process of protection,[177] as they would have a better understanding of what kind of remedy to seek if one of these rights was breached. This classification makes a shareholder aware of his rights and interests, and consequently takes out the practical difficulties and confusion that face the minority shareholders in determining that conduct maybe considered as against the personal interests of the minority shareholder or against the company as whole.

---

[172] See M Almadani, *Protecting Minority Shareholders in Private Companies in Saudi Arabia and Dubai, Does the UK Company Law 2006 Offer a Way Forward?* (1st edn, Dar Almadani Jeddah 2012).
[173] E Rock and M Wachter, 'Waiting for the Omelet to Set: Match Specific Assets and Minority Oppression in the Close Corporation' (1999) 24(4) Journal of Corporation Law 913.
[174] R La Porta, and Others, 'Investor Protection and Corporate Governance' (2000) 58(1-2) Journal of Financial Economics 3.
[175] Ibid.
[176] Ibid.
[177] Ibid.

For instance, in the case of *Clark v Cutland and Others*,[178] where the majority shareholders had misappropriated funds and taken remuneration from the company when they were not authorised to do so, it was not easy for the minority shareholder to determine whether the rights that were breached were personal rights or corporate rights, consequently, it was unclear whether he should seek to enforce personal interests or corporate interests. This confusion forced the minority shareholder to start two claims, as it was ambiguous whether the acts complained of were to be considered a violation of the personal interests of the shareholder or to be regarded as a breach of the company' interests, so they left that to the court to decide. Similarly, the minority shareholder in *Anderson v Hogg*[179] made a claim to seek a remedy on the ground of the violations of the personal interests of the minority shareholder, however, the Lord Ordinary dismissed the claim on the basis that there was not enough evidence which confirmed that there was unfairness under s. 459 of the Companies Act 1985. What is more, the same judge confirmed that the action would have succeeded if it was brought on behalf of the company itself.[180] However in the appeal the Inner House held that there was violation of the personal interests of the minority shareholder as well as the company's interests, therefore, the judge was wrong in dismissing the claim.[181]

It seems that the principle of no reflective loss which judicially originated in *Prudential Assurance Co Ltd v Newman Industries Ltd*[182] has been applied in the above case, under this principle if a shareholder suffers loss in respect of a wrong done to the company due to a breach of duty owed to it, such loss is considered to be a reflective loss, and has to be recovered by the company itself, as a shareholder does not suffer any personal loss.[183] Therefore, a

[178] [2003] EWCA Civ 810.
[179] *Anderson v Hogg* [2002] SLT 354.
[180] *Anderson v Hogg* [2002] SLT 354.
[181] *Anderson v Hogg* [2002] BCC 923.
[182] [1982] Ch 204.
[183] [1982] Ch 204, for more details see for example; J Mukwiri, 'The no Reflective Loss Principle' (2005) 26(10) Company Lawyer 304.

shareholder can only bring a derivative action for losses of the company, even if the shareholder can show that the wrongdoer has affected his personal rights.[184] In other words, a shareholder in a personal claim will not be able to recover loss that is reflective of the loss suffered by the company.[185] In this regard, it was stated in *Johnson v Gore Wood & Co* that the no reflective loss principle is based on the need to prevent double recovery and to protect the creditors of the company.[186]

It should be borne in mind here that although the rights and interests of each shareholder cannot be listed exhaustively in the statute, a non-exhaustive list of shareholders' rights and interests should be introduced which contain the most important ones, so that each shareholder can clearly understand his or her main rights and in what circumstances he or she will be able to start litigation. Moreover, such a list would provide the courts with the minimum level of knowledge that make judges aware of types of rights and interests of each shareholder so that judges can be more qualified to bring justice in such kind of actions. In this regard ss. 140-141 of the JSC Act 1996 in Morocco provide that it is a right of each shareholder to have all the required information from the day of calling the meeting or at least in fifteen days before the next schedule meeting. Section 141 listed the information that need to be obtained by each shareholders such as; the agenda of the next meeting and the reasons for having such agenda, the financial statements, the members of board of directors and the supervisory board and the candidate shareholders to the board, the reports of the statutory auditors, the supervisory board and so on.[187] In this manner also, ss. 223-224 of the Libyan Business Activities Act 2010 allow a shareholder to see the register of the shareholders and the minutes of the shareholders'

[184] *Prudential Assurance Co Ltd v Newman Industries Ltd* [1982] Ch 204, see also *Johnson v Gore Wood & Co* [2002] 2 AC 1.
[185] J Mukwiri, 'The no Reflective Loss Principle' (2005) 26(10) Company Lawyer 304.
[186] [2002] 2 AC 1, there are some limited exceptions to the reflective loss principle, for more details on these exceptions see *Giles v Rhind* [2002] EWCA Civ 1428, *Gardner v Parker* [2004] EWCA 781, and *Johnson v Gore Wood & Co* [2002] 2 AC 1.
[187] See ss. 142-142 of the Moroccan JSC Act 1996 and its amendments in 2008.

meetings and their decisions. However as will be discussed later the above sections do not give a shareholder a right to ask for the financial statements nor the minutes of the board of directors and its decisions, also a shareholders is not allowed to see the minutes of the supervisors' committees.[188] Likewise, a shareholder under the Companies Act 2006 has a right to receive notice of general meeting (s.310), and right to inspect minutes of general meetings (ss. 248, 355 and 358), furthermore, s. 431 entitles any shareholder to demand a copy of the company's last annual accounts and directors' report and a copy of the audit report.

Therefore, laws should clarify to the shareholders all rights related to the share, including the rights of shareholders concerning the general meeting, voting rights, facilitate the exercise of shareholder rights and access to information, and restrict the majority shareholders and directors' power by holding them accountable for their oppression or misconduct.[189]

In this context, it stated in the Organisation for Economic Co- Operation and Development (OECD) in its Principles of Corporate Governance, (2004) that it is the fundamental principle for corporate governance to provide a framework which protects and facilitates the exercise of shareholders' rights. What is more, having explicit provisions in the corporate governance code which confirm the rights and interests of minority shareholders gives the court the power to apply them and bring justice, therefore, in the case of *Wheeler v Pullman Iron & Steel Co,* [190] the court avoided ordering winding up of the company on the ground that this order must be organised statutorily before the court can deliver such remedy.[191] Moreover, as it has been mention earlier in this chapter the concept of legitimate reasonable expectations should be

[188] M Tibar, 'The Abusive Conduct of Minority Shareholders in Joint Stock Companies, Study in the Law No 23/ 2010' (2012) 1 Journal of Legal Sciences 92, at 101.
[189] F Almajid, 'A Conceptual Framework for Reforming the Corporate Governance of Saudi Publicly Held Companies: A Comparative and Analytical Study from a Legal Perspective' (Ph.D Thesis, University of Manchester, UK 2008).
[190] III 197 32 N E 420.
[191] J Abugu, 'A Comparative Analysis of the Extent of Judicial Discretion in Minority Shareholder Protection Litigation: the United Kingdom and Untied States (2007) 18(5) International Company and Commercial Law Review 181.

considered in addition to the expressed rights and interests of each shareholders. Namely, there are several rights and interests which are not listed either in the statute or in the company's constitutions (memorandum of association & articles of association), therefore, legislature and judges should recognise and respect the reasonable expectations of each shareholder.[192]

In addition to illustrating minority shareholders' rights the precautionary approach relies on adopting a sufficient system of corporate governance which creates internal and external organs which imply a sufficiently robust supervision over the company. However, as this study focuses on the Private Companies, our concern in this part is on the internal institutions inside the company, which provide appropriate supervision over the company. In this regard, a sufficiently protective system should provide various regulations, laws, institutions and enforcement tools as defensive methods to ensure that a company as a productive organisation is managed effectively in pursuit of its objective.[193] Such a system should adopt good model of corporate governance where the interests of all related parties are considered.

Although there is no consensus about the definition of this term "corporate governance", as researchers and academics view this term from various perspectives (legal, political, financial and managerial),[194] however, the corporate governance concept generally means the system by which companies are directed and controlled, (paragraph 2.5 of the Cadbury Committee 1992),[195] this definition is also adopted in the UK Corporate Governance Code (2014). Furthermore, it is defined as the concept that refers to the rules and processes by which firms are regulated and controlled, and which ensures that the board and management act in the best

[192] For more details in the doctrine of Legitimate Expectations see for example; *O' Neill v Philips* [1999] 1 WLR 1092.
[193] F Almajid, 'A Conceptual Framework for Reforming the Corporate Governance of Saudi Publicly Held Companies: A Comparative and Analytical Study from a Legal Perspective' (Ph.D Thesis, University of Manchester, UK 2008), at 11.
[194] In the academic literature corporate governance has been used firstly by Richard Eells in 1960s to denote "the structure and the functioning of corporate polity" see; R Eells, *The Meaning of Modern Business: An Introduction to the Philosophy of Large Corporate Enterprise* (Columbia University Press, New York 1960), at 108.
[195] The UK Cadbury Report [1992] http://www.ecgi.org/codes/documents/cadbury.pdf, accessed 16/10/2012.

interests of the company.[196] A more appropriate and comprehensive definition has been offered by Du Plessis, which attempts to include all aspects and functions of corporate governance:

"It is the process of regulating and overseeing corporate conduct and of balancing the interests of all internal stakeholders and other parties…. who can be affected by the corporation's conduct in order to ensure responsible behaviour by the corporation and to achieve the maximum level of efficiency and profitability for the corporation".[197]

It seems from the definition that the central feature of an efficient corporate governance framework is the appropriate protection, and respect for, the rights and interests of shareholders, especially those of minority shareholders.[198] Thus, one of the most important principles in corporate governance is the protection of minority shareholders, those who are unable to exercise any significant form of control within the company as a result of applying the majority rule principle by taking a company's decision via majority vote. This framework would provide those shareholders with some exclusive rights, create supervision tools inside the company which ensures that reports and financial information are regularly published, and that all shareholders are treated equally, fairly and equitably.[199] These rights and supervision tools increase the degree of transparency and disclosure within the company which consequently compels the directors of the company to respect the legal rights of creditors, employees, customers, and most importantly, minority shareholders.[200] In Morocco the JSC Act 1996 creates a new system of management where there are two types of Joint Stock

[196] R McNally, 'Corporate Governance: A Growing Concern in the MENA Region' [2011] http://www.menacitylawyers.com/uploaded/pdf/13d6e02f-a487-4212-b2df-6f767686dfd0_.pdf accessed 16/10/1012.
[197] Jean J and d Plessis, 'Corporate Law and Corporate Governance Lessons from the Past: Ebbs and Flows: But Far from "The End of History…." Part 1' (2009) 30(2) Company Lawyer 71.
[198] L Miles & M He, 'Protecting the Rights and Interests of Minority Shareholders in Listed Companies in China: Challenges for the Future' [2005] 16(7) International Company and Commercial Law Review 275.
[199] See for example; K Raja, 'Corporate Governance and Minority Shareholders' Rights and Interests in Pakistan: a Case for Reform' (2012) 23(10) International Company and Commercial Law Review 347.
[200] F Almajid, 'A Conceptual Framework for Reforming the Corporate Governance of Saudi Publicly Held Companies: A Comparative and Analytical Study from a Legal Perspective' (Ph.D Thesis, University of Manchester, UK 2008), at 36.

Companies; first the joint stock company which is managed by one board of directors (ss. 39 to 76). Second, the joint stock company that is managed by two different boards (ss. 77- 106 based on the German model which in turn was taken from France). In the second type there are two boards, the executive board formed by natural persons (maximum of 5 or 7 if the company is listed) which principally in charge of the management of the company, and the Supervisory Board[201] (minimum 3 persons) which is principally in charge of the supervision and control of the executive board's management.[202] The aim of having such an organ is to impose a sort of supervision over the board of directors, however as the members of the supervisory board are usually appointed and isolated by the general meeting[203] they become under the control of the majority shareholders. In this regard, Rabia Gait claimed that this innovation has not worked well in Morocco as most of the joint stock companies are owned by small numbers of shareholders, therefore the members of the supervisory board are themselves the members of other institutions.[204] In Morocco as well, s. 166 of the JSC Act provides that it is the job of the statutory auditors to observe on a permanent basis the accounting documents of the company and check the accuracy of the information contained in the company's financial reports and so on. Moreover, it clearly stated by this section that it is also the job of the statutory auditor to ascertain that all shareholders are treated equally. In line with this, s. 200 of the Libyan Business Activities Act 2010 establishes that the supervisors' committee has to monitor the controllers of the company and make certain that there is no breach to the memorandum of association. Furthermore, it is the function of this committee to fulfil an important financial and technical control over the company to assure that the controllers of the company act in

[201] S. 84 of the JSC Act 1996 provides that each member of this board has to be a shareholder in the company.
[202] S. 1 of the JSC Act provides that the minimum numbers of shareholders are five. Also s. 6 of the same Act provides that; the minimum capital stock is three Million Moroccan Dirham for listed companies and three hundred thousand for non-listed companies.
[203] See s. 80 of the JSC Act 1996. For more details see R Gait, 'Shareholder's Position in the Joint Stock Company' (Ph.D thesis, Mohammed V University, Rabat 2004), at 181-182.
[204] R Gait, 'Shareholder's Position in the Joint Stock Company' (Ph.D thesis, Mohammed V University, Rabat 2004), at 190.

accordance with their authorised power.

The above mentioned organs would prevent to some extent the majority shareholders and directors of the company from expropriation and abuse of rights and interests of the minority shareholders, as well as providing the minority shareholders with the necessary resources to supersede the desires of the controller of the company.[205] Furthermore, as minority shareholder protection is a fundamental issue in corporate governance, an effectual system of corporate governance should provide sufficient mechanisms which prevent the controlling shareholders from using their authority to transfer the resources of the company to themselves or harm the company's business.[206] These preventative rules should grant the minority shareholders sufficient rights and means which preclude the majority shareholder or the directors of the company from diverting the company's assets and its profits to themselves.[207] Once the majority shareholders realise that laws grant the minority shareholders rights and legal devices that allow them to sue any wrongdoer or oppressor they will avoid to engage in any kind of misconduct and they will be more likely to comply with the law.[208] Moreover, it is stated that when a corporate system provides the minority shareholders with the required rights and mechanisms that offer clear litigation remedies in the case of wrongdoing or oppression, the likelihood that the majority shareholders could relieve offender directors from liability on some personal and self-interested grounds at the expense of the company and its minority shareholders will be reduced.[209] However, it should always be borne in mind that such rights and means should not curb the long term success of the company and should not empower the

[205] K Raja, 'Corporate Governance and Minority Shareholders' Rights and Interests in Pakistan: a Case for Reform' (2012) 23(10) International Company and Commercial Law Review 347.
[206] D Schlimm, L Mezzetti and B Sharfman 'Corporate Governance and the Impact of Controlling Shareholders' (2010) 18(1) Corporate Governance Advisor 1, at 6.
[207] A Rahmani, 'Majority Rule and Minority Shareholder Protection in Joint Stock Companies in England and Iran' (Ph.D Thesis, University of Glasgow, UK 2007), at 12.
[208] D Schlimm, L Mezzetti L. and B Sharfman, 'Corporate Governance and the Impact of Controlling Shareholder' (2010) 18(1) Corporate Governance Advisor 1, at 6.
[209]A Rahmani, 'Majority Rule and Minority Shareholder Protection in Joint Stock Companies in England and Iran' (Ph.D Thesis, University of Glasgow, UK 2007), at 12.

minority to make decisions for the corporation or to vest in them the controlling position, consequently, this framework should aims to make a proper balance between the adequate protection of minority shareholders and interests and rights and of majority shareholders and the company as a whole. In this regard, this system must prevent the vexatious interference from the minority shareholders which may have harmful consequences either for the company or other shareholders.[210]

There is no doubt that the adoption of precautionary means would reduce the possibility of having oppressive conduct against the minority shareholders, nonetheless, this system would not reach the required level of protection, Therefore, it is necessary to have statutory provisions that allow the judicial authority to interfere in the affairs of the company upon the request of the minority shareholders and grant the appropriate remedy.

2.4.2 The role of the judicial authority to protect minority shareholders (the remedial approach)

The logical consequences of applying the principle of majority rule via corporate democracy is that the majority shareholders hold unlimited power and authority to run the company,[211] so that they have the ability to oppress the minority shareholders and the company as a whole. Under such circumstances, it becomes obligatory for legislation to provide the minority shareholders with external effective means under which the minority shareholders can take legal actions against the majority shareholders and the directors in the case of the abuse of their interests and rights. By these means either courts (or the other chosen body in the case of arbitration) should be granted a wider authority and power to deal with such kind of actions

[210] F Ma, 'A Comparative Analysis of Minority Shareholders' Remedies in Anglo-American Law and Chinese Law: Lessons to be learnt' (Ph.D Thesis, University of the West of England, Bristol 2009), at 293.

[211] J Abugu, 'A comparative analysis of the extent of judicial discretion in minority shareholder protection litigation: the United Kingdom and the United States' (2007) 18(5) International Company and Commercial Law Review 181.

and disputes. Such kind of provisions may in theory prevent the controller of the company from acting without having regard to the interests and rights of minority shareholders.

Via the remedial approach, courts are required to interfere and exercise their discretion to consider whether the claim of the minority shareholders is justified or not.[212] To obtain this goal, courts and judges should have the discretionary power to investigate the conduct of the controllers of the company and to consider to what extent if any the minority shareholders have been expropriated. In this regard, as will be discussed in more detail in the next chapters, the subject jurisdictions (Libya, Morocco and England) allow the minority shareholders to ask the judicial authority to interfere and enforce some rights. In England for instance, s. 306 of the Companies Act 2006 grants a shareholder a right to ask the court to call a general meeting. Similarly, s. 155 of the Business Activities Act 2010 provides that if neither the board of director nor the supervisors 'committee have called the general meeting to take place the president of the primary court upon a request from shareholders owning not less than 10% of the company's capital will convene the general meeting to be held and the court in its order has to determine the chairman of that meeting. In Morocco, s. 116 of JSC Act 1996 enables a shareholder or groups of shareholders who hold at least 10% of the shares or less than this percentage in the case of urgency to go to the court to appoint a judicial proxy to invite the general meeting to be convened.[213]

Furthermore, minority shareholders are given several grounds under which they can start proceedings against either the majority shareholders or directors. For instance, it is well known that each shareholder has what are so-called personal rights, so that these provisions should allow the minority shareholder to bring a personal claim whenever one of these rights is

---

[212] D French, S Mayson & C Ryan, *Mayson, French & Ryan on Company Law* (32th edn, Oxford University Press, Oxford 2015-2016).

[213] S Belmris, 'The Protection of Minority Shareholders' Rights in Joint Stock Companies' (unpublished dissertation, High Judicial Institute, Rabat 2011), at 13.

infringed.[214] As a result, minority shareholders can bring a personal claim if the majority shareholders have altered the articles of association in a manner which might be considered oppressive to the personal interest of minority shareholders.[215] However, some jurisdictions adopt the personal action in their laws with difficult procedures which restrict this way of protection. For instance, although s. 186 of the Libyan Business Activities Act 2010 allows an individual shareholder or group of shareholders to bring a personal action against the board members to remedy damages that affected the personal interests of those shareholders. Yet claimant shareholders have to prove that the conduct of the board members of the company has *directly* harmed the interests of such shareholder. This is in addition to proving that such damages were a result of *fraud* or *negligence* of the board members.

In some circumstances the minority shareholders might find themselves affected by a wrong done to the company even thought their personals rights and interests have not been violated, thus, an effective system should allow them to start claims of behalf of the company. In other words, statutes should allow the minority to bring a derivative claim on behalf of the company against the controllers of the company either a majority shareholder or directors in respect of a wide range of misconduct and wrongdoing.[216] Under s. 353 of the Moroccan JSC Act 1996, each shareholder or group of shareholders has a right to start a derivative claim[217] against; the controller of the company, the general director of the company and the delegated general director or the member of the tow tier boards in order to get a remedy.[218] In England, as will be discussed in more details in the next chapter minority shareholder is allowed to litigate on

[214] See for example; *Prudential Assurance Co Ltd v Newman Industries Ltd* (No2) [1982] Ch 204, also; *Sidebottom v Kershaw Leese and Co Ltd* [1920] 1 Ch 154.
[215] *Sidebottom v Kershaw Leese and Co Ltd* [1920] 1 Ch 154.
[216] See for example; ss. 260-264 of the Companies Act, 2006.
[217] The derivative claim is created to ensure that a wrong is remedied by individual shareholder or group of minority shareholders on behalf of the company, Lord Davey in *Burland v Earle* [1902] AC 83.
[218] See s. 103 of the Egyptian Companies Act No 159, 1981) allows each shareholder to sue the controllers of the company if the reprehensive of that company has not used that right, see E Ramadan, *Minority Shareholders Protection in Joint-Stock Companies* (1st edn, Dar alkoteb Alkanonia, Cairo 2008).

behalf of his company whenever it seems that the interests of his company are affected by the conduct of its controllers (ss. 260-264 of Companies Act 2006). Moreover, minority shareholder under s. 994 of Companies Act 2006 has a right to not be unfairly prejudiced, wherein a shareholder may apply to the court by petition on the ground that the company's affairs are being or have been conducted in manner which is unfairly prejudicial to the member's interests. In these circumstances courts are usually requested to make an order of purchase by other members or by the company itself, or in some cases to require the company to refrain from such kind of misconduct.[219]

However, in some cases the above mentioned forms of court interference would not offer enough protection to minority shareholders, in particular where there is breakdown in the shareholders' relationship and the minority shareholders realise that their trust and confidence is lost. Under such conditions many jurisdictions grant minority shareholders right to have the company wound up. An implementation of such remedy is available in England under s. 122 (1)(g) of the Insolvency Act 1986 where a shareholder has a right to go to the court to request an order to wind up the company if it appears to the court that it is just and equitable to wind up the subject company. In Libya also, s. 30 of the Business Activities Act 2010 grants a shareholder a right to go to the court and ask for winding up its company in the cases; where the other shareholders breach their duties, there are continues disagreements between the shareholders or where the court finds serious reasons justifying such dissolution.

Briefly, protecting the minority shareholders via external institutions such as courts necessitate that these institutions should be given the discretionary power to guide, monitor, direct, resolve, enforce the law to grant the minority shareholders the entitled remedies. Also, since such kind of disputes are usually related to commercial and business activity, certain criteria should be introduced to the courts which enhance the judge's ability to make fair judgments.

[219] See for example; ss. 994-999 of the Companies Act, 2006.

2.5 Conclusion

In light of the foregoing, it is clear that minority shareholders are facing various forms of abusive conduct by both the directors and majority shareholders, therefore, the law must provide sufficient mechanisms and means to protect them. This protection not only brings benefits to shareholders themselves but also to the company and the state's economy as well. However, this system of protection should not curb the long term success of the company. In this regard, a successful protection regime should adopt an effective system which start with preventative tools that clearly present the rights and interests of all shareholders, in addition to adopting internal and external organs which apply appropriate supervision over the company's controllers. Yet, in the case where the minority shareholders are being, or have been, subject to mistreatment and oppression, this system should allow such aggrieved shareholders to bring an action in order to obtain their entitled remedies.

Having stated that this thesis is using the comparative approach to provide the Libyan legislature with lessons that can be used to establish sufficient system of minority shareholders protection. Therefore, it is the task of the next chapter to examine the level of minority shareholders protection under English law in order to find ways to enhance minority shareholder protection in Libya.

Chapter 3 Protection of minority shareholders under English law

3.1 Introduction and general background

The historical development of minority shareholders' remedies in English law shows that both the common law rules and statutes have participated in providing a system that offered redress to the minority shareholder in the case of abuse. Derivative claims which were governed by the rule in *Foss v Harbottle*[220] and its exceptions were not providing adequate protection to the minority shareholders, therefore, aggrieved minority shareholders were not able to get their supposed remedies under these rules. Under these circumstances, it was necessary to offer other tools that provide minority shareholders with safeguards against possible abuse of power by the controllers of the company and to fill the gap left by common law rules. In that process, another two statutory remedies had been introduced and developed for the minority shareholder in English law which are the oppression concept (s. 9 of the Companies Act 1947) (and later the unfair prejudice remedy) which was developed through many legislative reforms,[221] and the winding up option under s. 122 (1) (g) of the Insolvency Act 1986 (IA 1986).[222]

As stated above, the derivative claim in England was left for a period of time to the common law rules, particularly the rule of *Foss v Harbottle* and the development of its exceptions. The main principle of the rule of *Foss v Harbottle* is that "a wrong done to the company must be redressed by the company itself, as the company is the proper plaintiff.[223] Therefore, an

---

[220] (1843) 2 Hare 461.

[221] This is an old remedy going back many years and it was adopted under the term of oppression remedies in s. 9 of the Companies Act of 1947 which was superseded by s. 210 of the Companies Act 1948, this section had used the word 'oppressive' which gave rise some uncertainty and vagueness therefore, it was recommended that it is better to use the term 'unfairly prejudicial' instead of oppressive which the Parliament adopted in s. 75 of the Companies Act 1980.

[222] The winding up remedy goes back to 19C- long before the negative effect of *Foss v Harbottle* was appreciated and it is originated from partnership law under which the equity courts could dissolve a partnership if the relationship between its members had broken down, see Law Commission Consultation Paper, at 7.1-7.2.

[223] See for example, H Rajak, *Sourcebook of Company Law* (2nd edn, Jordans, Bristol 1995), at 532. See also D Kershaw, 'The Rule in Foss v Harbottle is Dead: Long Live the Rule in Foss v Harbottle' [2015] Journal of Business Law 274.

individual shareholder or group of minority shareholders do not have the right to commence a legal action on behalf of the company without its permission. Under such rules minority shareholders were not allowed to use the derivative claim to remedy a wrong done to the company or to complain of irregularities regarding its internal affairs as the proper plaintiff is the company itself.[224] The *Foss v Harbottle* rule was divided into two main principles: "the proper claimant principle" and the internal irregularity principle.[225] The former principle is based on the separate legal personality of the company, as a result, the company itself is the proper plaintiff to litigate for a wrong done to it and no other individual shareholder or group of minority shareholders can represent the company in such actions, unless there was a previous consent.[226] Whilst, the second principle the "internal irregularity" considers that the majority shareholders are in a better position than the court to choose what the company should do, consequently, matters of internal management are conclusively settled by majority decision and court should stand away from the companies' day to day business.[227] Under such kind of rules the minority shareholders were not able to complain of internal irregularity for various reasons, first and foremost, there was unrestricted power offered to the controllers of the company via the *Foss v Harbottle* rule, which granted them the ability to ratify their conduct.[228] Secondly, it was difficult for the shareholder to start a derivative claim since of the rules governing such procedural are too complex, incoherent and restrictive.[229] In addition to that, the court was extremely reluctant to become involved in disputes over the internal affairs of the company's business as they consider such kind of disagreement as internal affairs which

[224] *MacDougall v Gardiner* (1875) 1 Ch D 13, 25.
[225] See *Edwards v Halliwell* [1950] 2 All ER 1064, see also Lord Davey in *Burland v Earle* [1902] AC 83.
[226] *Edwards v Halliwell* [1950] 2 All ER 1064.
[227] *Mozley v Alston* (1847) 1 Ph 790.
[228] K Wedderburn, 'Shareholder Rights and the Rule in *Foss v Harbottle'* [1957] Cambridge Law Journal 194, the acts of the controllers of company can be validated if the company's general meeting decided that such conduct is ratified either by an ordinary resolution which needs more than 50% of the votes or by a special majority by more than 75% of the votes.
[229] D Kershaw, 'The Rule in Foss v Harbottle is Dead: Long Live the Rule in Foss v Harbottle' [2015] Journal of Business Law 274, at 274.

should be solved inside the company.[230] Although *Foss v Harbottle* aimed to prevent the minority shareholder from bringing vexatious actions in respect of wrongs done to the company; however, it enhanced the majority shareholders with a full power of decision making over the company's affairs, which entitled them to ratify their conduct even that type of behaviour that clearly harmed the interests of the minority shareholder.

In these circumstances, there were significant demands which required adjustment of the common law rule in *Foss v Harbottle*. These demands led to certain exceptions to *Foss v Harbottle* as were set out by the Court of Appeal in *Edwards v Halliwell*[231] in order to curb the majority shareholders' power and allow the minority shareholder to use the derivative claim and litigate on behalf of the company in certain situations. These exceptions are; First: the individual shareholder can bring a derivative claim when the company was engaged in or about to carry on an ultra vires[232] or illegal act.[233] Second: where it was alleged that so –called the personal rights[234] of the shareholder have been infringed. Third: when the act complained of did not have the sanction of a required special or extraordinary resolution (usually more than 75%).[235] As in such cases it is not enough for directors to obtain ratification by virtue of an ordinary resolution. Fourth: when the controllers of the company were committing fraud on

[230] See *Carlen v Drury* [1812] 1 Ves & B 154.
[231] [1950] 2 All ER 1064.
[232] The act is considered as an ultra vires; where it is beyond the company purposes as set out in its constitutions, where such act was in a way prohibited by statue and where the act was through the agency of someone who lacks the requisite authority. See H Rajak 'Judicial Control: Corporations and the Decline of Ultra Vires' (1995) 26 The Cambrian Law Review 9, at 9.
[233] Illegal include all kind of acts which plainly illegal as the abuse of power by the director (*Australian Agricultural Co v Oatmont Pty Ltd* [1992] 8 ACSR 225 CA) or the other acts which contrary to company law or general law, see A Boyle, J Birds and others, Boyle *& Birds' Company Law* (9th edn, Jordans, Bristol 2014).
[234] Although, there is no exhaustive or non-exhaustive list of personal rights, however, such kind of rights derive from the statutory legislations or by the company's constitutions. For instance, the shareholder's right to share of the company's profits, or to receive a copy of the company's annual account and his right of being a member of a company which is run lawfully, therefore, a shareholder is allowed to sue the controllers of the company if his personal right to attend general meeting and vote or to receive dividends was infringed.
[235] See also *Edwards v Halliwell* [1950] 2 All ER 1064.

minority shareholders. In this case the majority could not justify the minority being the victim of fraud, therefore, majority shareholders are not entitled to ratify their conduct.[236]

However, this rule and its exceptions have been criticised over many years for its limitations, uncertainty and the procedures involved were very complicated,[237] therefore it led to a low level of protection for minority shareholders. For instance, in the case of fraud on a minority which is regarded as the most important exception to the rule *in Foss v Harbottle,* the aggrieved shareholder was obliged to prove that the wrongdoers were themselves in actual control of the company and perpetrated fraud.[238] In addition a shareholder has to show prima facie case that the company was entitled to the relief sought in order to get permission to start a derivative action. Moreover, minority shareholders were facing difficulty in proving fraud as the meaning of fraud was very restrictive and there was no clear definition to the concept of wrongdoer control.[239] Additionally, there was a problematic doctrine in the issue of ratification, since it was not possible for a shareholder to bring a derivative claim against the wrongdoers if such acts were ratified or capable of ratification,[240] and it was never clear at common law which kinds of conduct were capable of being ratified and which acts were not ratifiable. In this regard, it was claimed that the issue of ratification was a bar to the use of derivative action and had never been governed by a consistent rule.[241]

[236] There was an argument as to whether a fifth exception existed in English law under which a shareholder is allowed to bring a derivative claim if the interests of justice required it, see for example *Estmanco (Kilner House) Ltd v Greater London Council* [1982] 1 WLR 2.
[237] Law Commission, *Shareholder Remedies* (Law Com No 246, Cm 3769, 1997), para 6.4.
[238] *Prudential Assurance Co Ltd v Newman Industries Ltd* [1982] Ch 204. Even a shareholder succeeded to prove the fraud and wrongdoer control he or she still had not absolute right to start a derivative claim as the decision of an independent organ became very important condition to initiate such action, under the independent organ condition an independent organ should decide whether it is in the commercial interests of the company to bring this action or not, see for example *Smith v Croft (No 2)* [1987] 3 WLR 405.
[239] *Pavlides v Jensen* [1956] Ch 565.
[240] See for example; *Edwards v Halliwell* [1950] 2 All ER 1064, *Burland v Earle* [1902] AC 83.
[241] B Cheffins, 'Reforming the Derivative Action: The Canadian Experience and British Prospects' (1997) 1(2) Company Financial and Insolvency Law Review 227, at 254.

Such restrictive procedural rules prevented not only vexatious cases to be initiated but well-grounded cases were not pursued to avoid such kind of complexity.[242] Besides, the minority shareholders were facing many problems regarding the cost of litigation and the complexities in getting the cost indemnity order. In short, the derivative claims under common law rules was based on difficult procedures to work through, therefore, it lacked the flexibility and accessible criteria that help minority shareholders to use this way of protection to get their remedy. As a result, minority shareholders have used such claims in rare circumstances. Such kind of limitations and complications on the minority shareholders' right to bring derivative claims against the controller of the company made the change of the common law rules essential. In this context, it was clearly agreed in the Law Commission's report in 1997 (Shareholder Remedies, Cm 3769) and the Company Law Review (Company Law Review, Developing the Framework 2000) that the common law rule in *Foss v Harbottle* and its exceptions was very complicated, uncertain and not sufficiently wide to cover all kinds of misconduct that majority shareholders might commit. Consequently, adequate methods should be provided to the aggrieved shareholders with flexible and accessible criteria for determining whether a shareholder can pursue an action or not.[243] The new statutory protections have been introduced via the Companies Act 2006.[244] These provisions which replaced the common law rules[245] aim

[242] See for example; *Edwards v Halliwell* [1950] 2 All ER 1064, *Burland v Earle* [1902] AC 83.
[243] Law Commission, *Shareholder Remedies* (Law Com No 246, Cm 3769, 1997) para 6.15.
[244] It has to be mentioned here that on March 26, 2015 **two** important bills that affect company law received the Royal Assent which are; the Deregulation Act 2015 (primarily ss.17-18-19) and Small Business, Enterprise and Employment Act 2015 (primarily ss. 3-15-16-38- and 81 to 91). However, no major change was introduced to minority shareholder protection law by these Acts. For more details, see P Bailey, 'Deregulation Bill and Small Business, Enterprise and Employment Bill Enacted to Amend Company Law' Legislative Comment (2015) 370 Company Law Newsletter 1, at 1.
[245] In this regard Professor Davies claimed that the common law derivative action rules have been consigned to the dustbin. However, others like D Kershaw believes that there is continued application of common law proper plaintiff rule and of the wrongdoer control requirement. In line with this view, Mr Richards J in *Abouraya v Sigmund & Ors* [2014] EWHC 277 (Ch) stated that some aspects of the common law derivative action live side by side with the statutory derivative action. Also Mr Justice Briggs in *Fort Gilkicker Ltd* [2013] EWHC 348 (Ch) stated that the UK Parliament did not implicitly or otherwise abolish the whole of the common law derivative action. The same position was taken in *Bhullar v Bhullar & Ors* [2015] EWHC 1943 (Ch) where the court confirmed that common law principles on a double derivative action are still applicable and have not been taken away by sections 260 to 264 of the Companies Act 2006. For more details, see P Davies, *Gower and Davies'*

to offer a wide range of misconduct and wrongdoing under which the minority shareholder can start litigation against the controller of the company. Under the Companies Act 2006 (ss. 260-264), each shareholder has a right to start derivative actions on behalf of companies on widened grounds of conduct and the court is empowered with free discretion to deal with such kind of claims.[246] Additionally, this Act offers the minority shareholders a statutory right to petition on the grounds of oppression that was already introduced in the Companies Act 1948 to offer means that are more effective to the minority shareholders. This means was replaced in 1980 by what became the right of members to petition against unfairly prejudicial conduct in CA 1985 s. 459.[247] This approach has also been adopted by the Companies Act 2006 ss. 994-999, thus, if the affairs of the company are being or have been conducted in a manner which is unfairly prejudicial to the member's interests, such member can petition the court for various orders: regulate the conduct, require the company to refrain from action, authorise the member to bring a derivative action and finally the court is authorised to issue an order which ask the other members or the company itself to purchase the minority shareholder's shares. In addition to those forms of protection, a minority shareholder can petition to the court for a winding up order on just and equitable ground (Insolvency Act 1986, s. 122(1)(g)).

Since the English model of minority shareholder protection heavily relies upon the judicial protection, this chapter will primarily focus on these legal actions, (personal and derivative action, unfair prejudice action and the winding up remedy). However, a shareholder under the Companies Act 2006 has certain statutory rights which offer a type of precautionary protection to the minority shareholder, therefore, it would be worth to mention briefly to these rights as protective means prior to start evaluating the remedial route. These rights include for example;

Principles of Modern Company Law (9th edn, Sweet and Maxwell, London 2012), at 654. D Kershaw, 'The Rule in Foss v Harbottle is Dead: Long Live the Rule in Foss v Harbottle' [2015] Journal of Business Law 274, at 276.

[246] S. 263 (1) (2) (3) of the Companies Act, 2006.

[247] S Judge, *Company Law* (3rd end, Oxford University Press, Oxford 2012 & 2013), at 149.

shareholder's right to ask the court to call a general meeting (s. 306), the right to receive notice of any general meeting (s. 310), the right to have a copy of the annual account (s. 431), the right to inspect minutes of general meetings (ss. 248, 355 and 358), the right to inspect the register of members and index of members' name without charge (s. 116(2)) and the right to require a copy of the register of shareholders within 10 days of the request subject to charge (s. 116(2)).[248] In addition to the above rights which are given to each shareholder, shareholders with at least 10% of the voting rights (5% if no shareholders' meeting has been held for more than 12 months) have a right to call a general meeting (s. 303), also shareholders with 5% of the voting rights have a right to circulate a written statement (s. 314), additionally, shareholders with 10% of the voting rights have a right to have the company's annual accounts audited.[249] Most importantly, shareholders with more than 25% of shares have a right to block a special resolution (this is called negative control),[250] such a resolution are required, for example, to amend a company's articles of association.[251] Last but not least, variety of rights are granted to minority shareholders to apply to the court in specific circumstances eg, s. 721 allows a member of a company to apply to the court to object to payment out of capital for purchase or

---

[248] S. 117 of the Companies Act 2006 provides that a company receiving such a request should either comply with the request within five working days or apply to the court under s. 117 (3). If the court is satisfied that the inspection or copy is not sought for a proper purpose it shall direct the company not to comply with the request. In this regard Mr Registrar Briggs in *Burberry Group Plc v Fox-Davies* [2015] EWHC 222 (Ch) found that the purpose was improper within the meaning of s. 117 and he directed the company shall not comply with the request. Fore a detailed discussion regarding the concept of proper purpose see *Burry v Knight Ltd* [2014] EWCA Civ 604.
[249] S. 476 of the Companies Act, 2006.
[250] S. 283 of the Companies Act, 2006.
[251] For more details, see the leading case on amendment of the article; *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656 where it was held that alterations could not be interfered with by the court unless a change was made that was not bona fide for the benefit of the company as a whole. Recently in *Arbuthnott v Bonnyman & Ors* [2015] EWCA Civ 536 the court held that a company is free to amend its articles. However, it is the job of the court to observe this alteration to ensure that this power is exercised in good faith and in the interests of the company. Furthermore, it was held that it is the shareholders and not the court to determine what constitutes what is a benefit to the company, unless no reasonable persons would consider it as such. The Court of Appeal in *Arbuthnott v Bonnyman & Ors* considered the insertion of the "drag along" provisions which require minority shareholders to sell their stake if the majority shareholder exited the company as being primarily for the benefit of the company, even if it also benefitted the majority shareholders themselves as there was no evidence of bad faith or improper motive. See D Milman, 'Shareholder Law: Recent Developments in Practice' (2015) 378 Company Law Newsletter 1, at 2.

redemption of the company's own shares, likewise s. 633 grants shareholders owning not less 15% of the company's shares a right to apply to the court to have the variation cancelled.[252]

Having said that the English model of minority shareholder protection is largely dependent on the remedial tools, therefore, this chapter will discuss the English law regarding the protection of minority shareholders and will evaluate whether the Companies Act 2006 has put forward some improvements in this area. Examining such a developed system would give important lessons to other jurisdictions particularly Libya where the level of protection is very low and new protective tools and mechanisms have to be adopted.

3.2 The personal action

A share is a property entitlement and naturally certain rights personal to the shareholder are generated by virtue of share ownership,[253] therefore, it is the right of a shareholder to start a personal action whenever he or she believes that a wrong has been done to the shareholder and his or her personal interest was harmed. However, in practice as there is no definite list of shareholder's personal rights, it is not always easy to distinguish between personal wrongs which are acceptable as a ground for personal claims and corporate wrongs which do not gives the shareholder a right to bring such kind of action. Furthermore, in some case there is an overlap between these wrongs, as the same act might be considered a wrong to both the company and to the individual shareholder.

Generally speaking, shareholders are entitled to bring proceedings when he or she thinks that his or her personal rights have been infringed, whether was that right conferred on the shareholder by a statute such as the right to inspect the company's records and to receive

---

[252] In addition to these rights a shareholder under s. 125 of the Companies Act 2006 may apply to the court for rectification of the register. See *Re Hoicrest Ltd* [2000] BCLC 194.

[253] D Milman, 'Shareholder Law: Recent Developments in Practice' (2015) 378 Company Law Newsletter 1, at 3.

dividends or his or her right of attending shareholder meeting or was that right awarded by the company's constitutions. However, the difficulty facing the minority shareholder is that there are concerns that the courts have given a narrow interpretation to the concepts of personal wrongs, while at the same time the corporate wrongs notion have been interpreted very generously.[254] This way of interpretation which categorises many kind of misconducts as corporate wrongs restricts the efficacy and effectiveness of personal actions. For instance; if the articles of association of the company have been altered via an ordinary resolution when an extraordinary resolution is required, the minority shareholder has the right to bring a personal claim as his personal right to have the article of association observed has been infringed, moreover he or she can bring a derivative action under the special majority exception to the rule in *Foss v Harbottle*.[255] In such circumstances the courts tended to consider such kind of dispute as internal irregularities, and classified the acts as corporate wrongs, consequently, preventing an individual shareholder from disrupting the company's business and preventing the shareholder from bringing a personal claim. Such generous interpretation to the corporate wrong restricted the scope and function of personal actions which was created to address shareholders' personal wrongs.[256] In this regards, the court in *MacDougall* v *Gardiner*[257] held that the right awarded to the shareholder to a poll vote by the company's constitution was not enforceable as it deemed the infringement of shareholder's right to vote as an internal irregularity, therefore personal action was not allowed. On the other hand, in *Pender v Lushington*[258] where the chairman rejected to recognise the vote of nominee shareholder the

[254] See for example; *Bentley Stevens v Jones* [1974] 2 All ER 653 when a failure to notify a director of a general meeting was considered as a corporate wrong.
[255] J Poole and P Roberts 'Shareholder Remedies- Corporate Wrongs and the Derivative Action' [1999] Journal of Business Law 99.
[256] Ibid.
[257] *MacDougall* v *Gardiner* (1875) 1 Ch D 13, at 25.
[258] (1877) 6 Ch D 70.

court held the shareholders' personal right to have their vote recorded in writing had been infringed, therefore, they were entitled to bring a personal action.

Although the Law Commission in 1997 recommended that there should be clear line between personal and corporate actions,[259] however, it was stated in that report that there is no real need to reform the current law, as there was no apparent hardship in identifying the personal rights of each shareholder. Moreover, the Commission rejected the suggestion of having a list of enforceable non-exhaustive personal rights under the company's constitutions. The Law Commission justified this rejection by claiming that the adoption of such kind of list is arbitrary and will not be useful and significant considering the wide scope of the unfair prejudice remedy.[260] This uncertainty has not been touched by the Companies Act 2006 and no changes have been introduced on this point, therefore, it is the function of the court to find out the clear line between personal and corporate wrongs, and consequently grant shareholders the ability to start a personal action if their personal rights were infringed. In this regard, it was argued by Lord Wedderburn that the minority shareholders' difficulties in bringing derivative actions could be overcome if there is a greater willingness to interpret wrongs as personal wrongs.[261]

It seems clear that the scope of personal claims as a means of minority shareholder protection is very restricted, particularly in the cases where there is an overlap between corporate and personal wrongs. What is more, this kind of action is blocked by the so called "no reflective loss" principle which prevents a shareholder from recovering compensation for loss that merely reflects the loss suffered by the company.[262] Under this principle if the individual shareholder or group of shareholders suffer loss in respect of a wrong done to the company due to a breach

[259] Law Commission, *Shareholder Remedies* (Law Com No 246, Cm 3769, 1997) para 6.11.
[260] Law Commission, *Shareholder Remedies* (Law Com No 246, Cm 3769, 1997) paras 7.10 -7.12.
[261] K Wedderburn, 'Shareholder Rights and the Rule in Foss v Harbottle' [1957] Cambridge Law Journal 194.
[262] D Milman, 'Shareholder Law: Recent Developments in Practice' (2015) 378 Company Law Newsletter 1, at 3-4.

of duty owed to it, such kind of loss is considered to be a reflective loss, and has to be recovered by the company itself, as a shareholder does not suffer any personal loss.[263] In such cases a shareholder cannot usually have success with a personal claim to recover a reflective loss from a corporate wrong, and therefore, a shareholder can only bring a derivative action for losses of the company, even if the shareholder can show that the wrongdoer has affected his personal rights.[264] In *Prudential Assurance Co Ltd v Newman Industries Ltd*[265] the Court of Appeal held that a shareholder was not allowed to recover a sum equal to the diminution in the market value of his shares or equal to the diminution in dividend, as this loss is merely a reflection of loss suffered by the company. Lord Bingham in *Johnson v Gore Wood & Co* attempted to differentiate the reflective loss and loss that is separate and distinct from that suffered by the company. He claimed that a shareholder could bring a personal action to recover the loss that is separate and distinct from that suffered by the company.[266] However, the question that arises is to what extent it is easy to determine whether the loss claimed by a shareholder is a separate and distinct or reflective loss. It was held in *Stein v Blake*[267] that a shareholder is prevented from claiming as long as the company has a right to claim even if the company refuses or fails to use that right. Consequently, if a company suffered loss and failed to recover for whatever reason a shareholder is not allowed to bring a personal a claim, as preventing such kind of claim in this circumstances avoids the possible conflict of interests. [268]

Although it is stated in *Johnson v Gore Wood & Co* that the no reflective loss principle is based on the need to prevent double recovery and to protect the creditors of the company. It seems obvious that this principle favours the interests of the company over the interests of the minority

[263] [1982] Ch 204, for more details see for example; J Mukwiri, 'The no Reflective Loss Principle' (2005) 26(10) Company Lawyer 304.
[264] *Prudential Assurance Co Ltd v Newman Industries Ltd* [1982] Ch 204, see also; *Johnson v Gore Wood & Co* [2002] 2 AC 1.
[265] [1982] Ch 204.
[266] *Johnson v Gore Wood & Co* [2002] 2 AC 1.
[267] [1998] 1 All ER 724.
[268] C Mitchell 'Shareholders' Claim for Reflective Loss' (2004) 120 Law Quarterly Review 457, at 470.

shareholders, which is rational; nevertheless, this principle may put the minority shareholders in a difficult position, particularly in small Closed Joint Stock Companies where such kind of company loss is considered a personal loss to each shareholder.[269] To strike a proper balance between these conflicting interests the Court of Appeal in *Giles v Rhind* introduced some exceptions to the no reflective loss principle.[270] Under such exceptions if the company itself has no cause of action or it was forced to discontinue its action as a result of the defendant's wrongdoing, the no reflective loss principle did not prevent a shareholder from starting a claim for the diminution in the value of his or her shareholding, even if that loss was merely reflective of the company's loss. Therefore, in the above case the diversion of one business source of the company was sufficient cause to prevent it from starting its claim. There is a concern that those exceptions might open the door of a lot of cases which disrupt the company's business and court's work. This possibility led the court in *Gardner v Parker*[271] to reject the application of the *Giles* exception, as this exception should be confined to the facts and not considered as a general exception to the no reflective loss principle .[272] However, the position in *Rehman v Jones Lang La Salle* [273] and *Malhotra v Malhotra*[274] was more in tune with the Court of Appeal in *Giles v Rhind* where the courts admit of exceptions to the general rule of no reflective loss.

In brief, even though the application of the personal claim has enhanced the minority shareholder protection in England, however, this way of protection does not work as it ought to as the principles of internal irregularity and no reflective loss restrict such kind of action. The no reflective loss principle allows a corporate claim to prevent a shareholder from

[269] B Hannigan, *Company Law* (3rd edn Oxford University Press, Oxford 2012).
[270] [2002] 4 All ER 977.
[271] [2004] 2 BCLC 554.
[272] J Mukwiri, 'The no Reflective Loss Principle' (2005) 26(10) Company Lawyer 304, for more details on these exceptions see for instance; *Giles v Rhind* [2002] EWCA Civ 1428, *Gardner v Parker* [2004] EWCA 781, and *Johnson v Gore Wood & Co* [2002] 2 AC 1.
[273] [2013] EWHC 1339 (QB). In this case the court confirmed that the general principle of no reflective loss is not applicable where the company itself has no cause of action.
[274] [2014] EWHC 113 (Comm), at 53.

recovering compensation for loss that merely reflects the loss suffered by the company. Furthermore, under the internal irregularity principle generous interpretation is given to the corporate wrong which restricts the scope and function of personal actions.

3.3 The derivative claim

A derivative claim is a claim brought by a shareholder to remedy a wrong done to the company resulting most often from a breach of duty by a company's directors.[275] By such a claim, a member could institute proceedings on behalf of the company where the company itself cannot bring action against those running that company.[276] The derivative action under common law was surrounded by group of restrictions that prevented the minority shareholder from bringing such claims in many circumstances. In most situations, these restrictions encouraged the minority shareholder to use alternative ways to get their remedies. Therefore, it was recommended by the Law Commission and the Company Law Review that there was a real need to have a new statutory derivative action that grants the minority shareholder more protection under flexible and accessible criteria. The Law Commission in 1997 concluded that; the derivative claim at common law was insufficient to provide a method of enforcement for the aggrieved shareholder.[277] As a result, a new statutory derivative action was introduced in 2006, which should have offered simple and flexible rules and consequently better protection for the minority shareholders.

The new statutory derivative claim gave rise many important issues, such as the scope of the statutory derivative action with particular reference to the following questions; to what extent does the statutory right of members to bring a derivative claim in respect of a company mirror

[275] D Milman, 'Shareholder litigation in the UK: the Implications of Recent Authorities and Other Developments' (2013) 342 Company Law Newsletter 1, at 1.
[276] See for example; J Birds and others, *Annotated Companies Legislation* (3rd edn, Oxford University Press, Oxford 2013).
[277] Law Commission, *Shareholder Remedies* (Law Com No 246, 1997) paras 4.35- 4.36, Law Commission, *Shareholder Remedies: A Consultation Paper* (Law Com No. 142, 1996).

the derivative claim evolved at common law rule in *Foss v Harbottle* and its exceptions. In other words, what are the solutions if any that have been offered by the new statutory derivative action to the underlying problems. Another major question arises after 2006 which is whether the 2006 Act replaced the old common law rules totally or whether the rules of *Foss v Harbottle* still applied. To answer these questions this section will be divided into two sub-sections; the first sub section discusses the establishment of the statutory derivative action and the required conditions to obtain permission to continue this claim. While the second sub-section evaluates whether the statute has really removed or eliminated the barriers that prevent the minority from using this way of protection.

3.3.1 Establishing a derivative claim under the Companies Act 2006

Under the Companies Act 2006, a derivative action can be brought under Part 11 ss. 260-264 (or in pursuance of a court order in proceedings for unfair prejudice, (CA s. 994).[278] Under s. 260 that came into force on 1 October 2007 a derivative claim might be brought in respect of a cause of action arising from an actual or proposed acts or omission involving negligence, default, breach of duty or breach of trust by directors of the company.[279] It seems that the provision grants the minority shareholders a remedy relating to wide range of wrongdoings and misconducts under which their claim can be founded. In terms of negligence, the Act has changed the common law position where the pure negligence by directors was not accepted as a ground of a derivative claim, unless the directors has obtained some benefits from his own incompetence.[280] Whereas, under the Companies Act 2006 pure negligence constitutes a sufficient ground to bring a derivative claim against that director,[281] moreover the Companies

[278] As will be discussed later the common law principles on a double derivative action are still applicable and have not been taken away by sections 260 to 264 of the Companies Act 2006. See *Universal Project Management v Fort Gilkicker Ltd* [2013] EWHC 348 (Ch), *Abouraya v Sigmund & Ors* [2014] EWHC 277 (Ch) and *Bhullar v Bhullar & Ors* [2015] EWHC 1943 (Ch).
[279] S. 263 of the Companies Act, 2006.
[280] See *Pavlides v Jensen* [1956] Ch 565 and *Daniels v Daniels* [1978] All ER 89.
[281] J Birds and others, *Annotated Companies Legislation* (3rd edn, Oxford University Press, Oxford 2013).

Act 2006 does not require the claimant to prove that the acts or omission have been already committed as long as it is proved that it is proposed for the future. In that regard, any member of a company or any person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law is eligible to be a derivative claimant.[282] That member is entitled to take action even though the cause of action arose before he or she became a member of that company.[283] The action can be taken against the company's directors or any involved party.[284] The term "director" includes the current and former directors, de jure directors, de facto directors[285] and the shadow directors.[286]

A two-stage procedure was introduced by the Act for the applicant to get permission to continue the action as a derivative action.[287] Firstly, a member of a company who is bringing a derivative action has to apply to the court and prove that the case in question is a *prima facie* case[288] in order to consider whether such a claim should be allowed to proceed to trial.[289] The court's response is one of these points: if the applicant was not able to satisfy the court that there is a prima *facie case* the court must dismiss the application and it might make any consequential

---

[282] Such a person might be a personal representative of the deceased members' estate or member's trustee in bankruptcy, see The Explanatory Notes of the CA 2006, para 494.
[283] See s. 265 The Companies Act, 2006. Under English law former shareholder is not allowed to bring a derivative claim as the Law Commission justified that there is no point in allowing former shareholders to bring such action as long as current shareholders could always initiate proceedings, also allowing the former member using such claim increase the possibility of having vexatious claims. For different position see s. 238 (a) of the Canadian Business Corporations Act 1985, under which a former member of a company can bring a derivative action.
[284] S. 260 (30) of the Companies Act, 2006.
[285] S. 250 of the Companies Act.
[286] S. 260 (5) (c) of the Companies Act, 2006. See J Birds and others, *Annotated Companies Legislation* (3rd edn, Oxford University Press, Oxford 2013). It has to be pointed out here that under ss. 89-91 of the Small Business, Enterprise and Employment Act 2015 the position on shadow directors is changed whereby greater clarity both in terms of definition and the range of duties owed by shadow directors were adopted. See D Milman, 'Revisiting the Core Principles of Modern Corporate Law' (2015) 371 Company Law Newsletter 1, at 4. And P Bailey Deregulation Bill and Small Business, Enterprise and Employment Bill Enacted to Amend Company Law' Legislative Comment (2015) 370 Company Law Newsletter 1.
[287] A new Practice Direction (19C) was inserted to the Civil Procedure Rule 1998 in order to incorporate this two-stage procedure.
[288] The standard of a prims facie is established by the judgment of the Court of Appeal in *Prudential Assurance v Newman Industries* [1982] Ch 204 at 221H-222B.
[289] D Milman, 'Shareholder Law: Recent Developments in Practice' (2015) 378 Company Law Newsletter 1, at 3.

order it considers appropriate.[290] In this regard, the court in *Bridge v Daley* [291] refused to grant permission to continue derivative on the ground that there is no *prima facie* case and court should not compel the company to continue such litigation. Moreover, the claimant shareholder was ordered to pay the costs of litigation, in addition to that, indemnity costs were awarded by the court against the claimant in respect of those costs incurred after the date of a previous hearing.[292] By comparison, in *Cullen Investment Ltd v Brown*[293] a *prima facie* case was proved and a derivative claim was allowed to proceed to trial.

The court has a discretionary power to grant permission to continue the derivative claim, or refuse the application, and it may adjourn the proceedings on the application and gives such directions as it thinks fit.[294] Moreover, to grant such permission the court might ask for more information to be provided either by the company or by the claimant shareholder. At the first stage the court only considers the claimant's evidence to examine whether the planned action is serious and desirable to be brought, or whether it is a vexatious claim which aims to disrupt the company' business, where the court should stop such claims without involving the defendant director or the company. The court may adjourn its decision to obtain some evidence or give some directions to make that decision. Such information might help the minority shareholder as they are usually not allowed to get some evidences which may support their claim. However, the court should bear in mind that the controllers of the company are against such kinds of actions, therefore, they will not provide any kind of information which might make them liable for the conduct in question.[295]

---

[290] S. 261(1) (2) of the Companies Act, 2006.
[291] [2015] EWHC 2121 (Ch). The unusual feature of this case is that it featured a public company and indemnity costs awarded against claimant.
[292] D Milman, 'Shareholder Law: Recent Developments in Practice' (2015) 378 Company Law Newsletter 1, at 3.
[293] [2015] EWHC 473 (Ch).
[294] S. 261 (3) (4) of the Companies Act, 2006.
[295] See s. 261 of the Companies Act, 2006 which provides that (1) A member of a company who brings a derivative claim under this Chapter must apply to the court for permission (in Northern Ireland, leave) to continue it. (2) If

The decision of whether permission should be given or not depends on most cases on whether that claim was in the interests of the company as a whole or not, taking into account in particular to the matters identified in s. 172(1) (a-f), of the Companies Act 2006, in addition to the other additional factors as specified by s. 172(2), or in some circumstances the interests of the company's creditors (s. 172(3)). However, permission must be refused if the act or omission has been already authorised in advance or ratified later on by the company, whether that act or omission has already happened or it is proposed to be done.[296]

It seems from the above conditions that in order to obtain permission to continue a derivative claim a shareholder is no longer required to prove fraud on minority and the wrongdoers were in control of the company. An implementation of the condition was applied in *Bamford v Harvey*[297] where the Roth J confirmed that it is not essential under Part 11 of the Companies Act 2006 for a claimant shareholder to prove the wrongdoer control in order to obtain permission to continue the claim as derivative claim.[298] Prior to the above case, the Inner House of the Court of Session in Scotland in *Wishart v Castlecroft Securities Ltd,*[299]dismissed the first instance decision once they asked the minority shareholder to prove that the wrongdoer was in control of the company to get permission to continue the derivative claim.[300] David Cabrelli claimed that the Inner House in the above case applied the real purpose of the UK Parliament which is giving the court the discretionary power that allows it to grant permission to

---

it appears to the court that the application and the evidence filed by the applicant in support of it do not disclose a prima facie case for giving permission (or leave), the court-(a) must dismiss the application, and (b) may make any consequential order it considers appropriate. (3) If the application is not dismissed under subsection (2), the court— (a) may give directions as to the evidence to be provided by the company, and (b) may adjourn the proceedings to enable the evidence to be obtained. (4) On hearing the application, the court may— (a)give permission (or leave) to continue the claim on such terms as it thinks fit, (b)refuse permission (or leave) and dismiss the claim, or (c)adjourn the proceedings on the application and give such directions as it thinks fit.

[296] s. 263 (b) (c) of the Companies Act, 2006.

[297] [2012] EWHC 2858 (Ch).

[298] See D Milman, 'Shareholder Litigation in the UK: the Implications of Recent Authorities and Other Developments' (2013) 342 Company Law Newsletter 1, at 1.

[299] [2009] CSIH 65.

[300] D Cabrelli, 'Statutory Derivative Proceedings: the View from the Inner House' (2010) 14(1) Edinburgh Law Review 116.

commence the derivative action even though the wrongdoer was not in control of that company.[301] Furthermore, it is no longer required for a shareholder to prove that the wrongdoers have obtained some benefits from their conduct.[302]

More significantly, the court is allowed to give permission to start a derivative claim even if it is proved by the directors or the majority shareholders that conduct was committed in good faith, as the court in such circumstances prioritises the company's interests over any other interests. What is more, s. 263(2) and (3) empowered the court with free discretion to be more involved and becomes a hypothetical reasonable board in such disagreements. By such power the court examines whether a reasonable independent board will grant the minority permission to continue their claim or not. In this context, in *Stainer v Lee and others*[303] the court put itself in the position of a reasonable independent board and granted the minority shareholder permission to continue their claim. However, it might be argued that it is not always easy for the court to become an expert body and examine whether the reasonable independent board in these circumstances will allow the derivative action to be brought or not.[304]

In light of the foregoing, it seems obviously that the Companies Act 2006 has changed the organ (the controlling shareholders) who is allowed to grant permission to sue on behalf of the company and continue the derivative claim. Under common law rules it was left to those controlling the company to decide whether permission should be given or not, unless the wrongdoing was one of the exceptions to *Foss v Harbottle*. Permission is no longer granted by those managing the company, since under the new Act an application to obtain permission to constitute the derivative claim is considered by the court which is considered an independent

[301] D Cabrelli, 'Statutory Derivative Proceedings: the View from the Inner House' (2010) 14(1) Edinburgh Law Review 116.
[302] D, Lightman 'The Companies Act 2006: A Nutshell Guide to the Changes to the Derivative Claim' [2007] Civil Justice Quarterly 37.
[303] [2010] EWHC 1593 (Ch).
[304] J Sykes, 'The Continuing Paradox: A Critique of Minority Shareholder and Derivative Claims under the Companies Act 2006' (2010) 29(2) Civil Justice Quarterly 205.

external body that has no interest to stop such claim as long as it is desirable to be brought.[305] To grant such permission the court is required to take into account many factors which are listed by the Act. However, it should be borne in mind that, the court is obligated to strike a balance between the protection of the minority shareholder and the protection of the interests of the company as whole, therefore; nonsense claims that disrupt the company's business should be refused.[306] For example, the court should refuse the application if the conduct has been authorised or ratified by the company,[307] or where the action considered being against the duty to promote the success of the company in accordance with s.172 of the Companies Act 2006.[308]

The free discretion of the court empowers it to consider other relevant factors that may affect its decision, such as; the alternative remedies available, the view of the non-interested members, the board's decision not to sue, the good faith of claimant, the success needs of the company and the potential to ratify that conduct.[309] In this regards, it was stated in the Law Commission report that these criteria grant the shareholders and their advisor the necessary information that are needed in such claims, moreover, courts will take advantage of these criteria in considering such applications.[310] However, as will be discussed in more detail in the following sub-section, it is argued that the adoption of these criteria reflects the complex common law rules and makes the statutory derivative action more problematical.

Having seen that the claimant firstly has to prove a prima facie case, if that was proved the court should start the second step by opening the case to further hearing to determine whether

---

[305] J Sykes, 'The Continuing Paradox: A Critique of Minority Shareholder and Derivative Claims under the Companies Act 2006' (2010) 29(2) Civil Justice Quarterly 205.
[306] A Keay and J Loughrey 'Derivative Proceedings in A Brave New World for Company Management and Shareholders' [2010] Journal of Business Law 151, at 162.
[307] S. 263 (2) of the Companies Act, 2006.
[308] S. 263 (2) of the Companies Act, 2006.
[309] S. 263 (3) (4) of the Companies Act, 2006. There is no clear definition to the terms of "good faith" and "success of the company" therefore it is a matter for the courts to weight on the facts of each case.
[310] Law Commission, *Shareholder Remedies* (Law Com No 246, 1997).

permission should be given or not.[311] At the second stage the court is also authorised to dismiss the application and adjourn the proceeding for further evidences or give some directions such as asking the general meeting to take place.[312] The application can be refused for various reasons, since there are no specific rules that the court can rely on its decision. Some of these criteria were investigated in *Franbar Holdings Ltd v Patel,*[313] such as the potential of success, the cost of proceedings, the damage that would be caused to the company in the case of failure and the value of the compensation recovered.[314] That is to say, the court might refuse the application if it thinks the action is unlikely to succeed at a full hearing or the cost of litigation is higher than the compensations that might be obtained by the applicant shareholder.[315] Moreover, the application might be refused if it would not benefit the interests of the company even though there is high chance that the derivative applicant will win the claim.[316] Additionally, the court should take into account whether there is ability to use s. 994 of the Companies Act 2006 instead of the derivative claim under s. 260. In this manner, Cabrelli claimed that the English Courts are not prepared to give permission to continue a derivative claim whenever it was realised that a remedy under s. 994 is prima facie available.[317] Cabrelli supported his claim by the decision in *Franbar Holdings Ltd v Patel* when the permission was

[311] The two-stage procedure was heavily criticized by the Law Commission, *Shareholder Remedies* (Law Com No 246, 1997). In contrast, the position of Australian courts is much more realistic. See for example *Hurlwy v BGH Nominees Pty Ltd* (1983) 31 SARS 250, at 253 where it was stated that "in many cases a hearing to determine whether there was a prima facie case would be almost as long as a full trial and a good deal less satisfactory. In such cases the only reasonable course may be to determine the issue of standing, if raised as a preliminary issue, on the assumption that the allegation in the statement of claim are correct".

[312] A Steinfeld, *Blackstone's Guide to The Companies Act 2006* (Oxford University Press, Oxford 2007), at 13-20.

[313] [2008] EWHC 1534 (Ch).

[314] J Sykes, 'The Continuing Paradox: A Critique of Minority Shareholder and Derivative Claims under the Companies Act 2006' (2010) 29(2) Civil Justice Quarterly 205.

[315] A Boyle, J Birds and Others, *Boyle & Birds' Company Law* (9th edn, Jordans, Bristol 2014).

[316] Yet the question that might be asked is to what extent courts are able to involve and discuss the business activities of the company and decide whether such conduct is considered against the company's interests or vice versa. The court at this early stage does not have a complete picture regarding the application and minority shareholders do not have the enough evidences that support their claim. Therefore, it could be argued that the court should grant the permission on the availability of the *prima facie* condition only and regardless of other conditions. See J Sykes, 'The Continuing Paradox: A Critique of Minority Shareholder and Derivative Claims under the Companies Act 2006' (2010) 29(2) Civil Justice Quarterly 205.

[317] D Cabrelli, 'Statutory Derivative Proceedings: the View from the Inner House' (2010) 14(1) Edinburgh Law Review 116, at 120.

refused on the ground that the minority shareholder was able to use the unfair prejudice remedy instead of the derivative action.[318] More recently in *Bridge v Daley* [319] permission to proceed a derivative claim was refused, furthermore, HH Judge Hodge felt that the complaints would have been more appropriate to have been tested in the context of a s. 994 petition rather than by dragging the company into a derivative claim.[320]

In addition to the double procedure obstacle, s. 263 reintroduced the ratification bar which was applied at the common law rules, under this rules the court must refuse permission if the cause of action arises from an act or omission that has been authorised or ratified by that company. The issue of ratification was one of the main problems at common law, therefore it will be discussed in more details to consider whether the Companies Act 2006 has removed or at least eliminated such bar or whether the old common law rule was re-established.

3.3.2 Ratification issues:

Ratification was defined as the process by which "those to whom duties are owed may release those who owe the duties from their legal obligations….prospectively or retrospectively".[321] The ratification bar was the most important barrier that has been used to restrict the implementation of derivative claim under common law, since under these rules it was the right of all shareholders to participate in such a decision. A decision to enforce a derivative claim or not was taken by all shareholders even those who alleged wrongdoers or those who are under their influence,[322] so that the power of the controlling shareholders will affect such ratification.

---

[318] D Cabrelli, 'Statutory Derivative Proceedings: the View from the Inner House' (2010) 14(1) Edinburgh Law Review 116, at 120.
[319] [2015] EWHC 2121 (Ch).
[320] D Milman, 'Shareholder Law: Recent Developments in Practice' (2015) 378 Company Law Newsletter 1, at 3.
[321] P Davies, *Gower and Davies' Principles of Modern Company Law* (9th edn, Sweet and Maxwell, London 2012), at 619.
[322] Company Law Review, (Final Report 2001) para 7.46.

To avoid such kind of ratification it was recommended by the Company Law Review[323] that a decision to ratify conduct of alleged wrongdoers should be taken by other members of the company without reliance on the votes in favour of the accused directors or any connected person. This recommendation was adopted by the Companies Act 2006 where directors and any connected members with the act or mission in question shall not be counted in the voting on that ratification.[324] However, as it was applied at the common law there are certain kinds of acts which are incapable to be ratified, such acts might be ultra vires acts, or it is clear that there is a fraud on the minority shareholders.[325]

It seems that the Companies Act 2006 preserves the previous common law on ratification with one vital alteration; under this change a decision to ratify conduct by directors amounting to default, negligence, breach of duty and breach of trust in relation to the company must be taken without reliance on the votes of the directors or any connected person with a personal interests in the ratification.[326] Accordingly, barriers that prevent the minority from starting such claim have been reduced. That is to say, the possibility of ratifying directors' conduct has been significantly tightened and consequently the former bar to derivative claims was diluted.[327] However, the question that arises here is to what extent the wrongdoers are still able to ratify their conduct even though they are prevented from the participation in this ratification. As the court is allowed to consider the alleged wrongs and consequently examine the possibility of

---

[323] Company Law Review *Developing the Framework*, 2000, Company Law Review *Completing the Structure*, 2000, Company Law Review *Final Report* 2001.

[324] Members with personal interests are allowed to attend and vote however their votes will be disregarded, see s. 239 which provides that :(3)Where the resolution is proposed as a written resolution neither the director (if a member of the company) nor any member connected with him is an eligible member.(4)Where the resolution is proposed at a meeting, it is passed only if the necessary majority is obtained disregarding votes in favour of the resolution by the director (if a member of the company) and any member connected with him. This does not prevent the director or any such member from attending, being counted towards the quorum and taking part in the proceedings at any meeting at which the decision is considered.

[325] The principle of non-ratifiable acts is based on that wrongs done to the company cannot be ratified, for more details see for example; *Franbar Holding Ltd v Patel* [2008] EWHC 1534 (Ch).

[326] The term of connected person is defined in s. 252 of the CA 2006, see J Birds and others, *Annotated Companies Legislation* (3rd edn, Oxford University Press, Oxford 2013), at 241.

[327] See J Birds and others, *Annotated Companies Legislation* (3rd edn, Oxford University Press, Oxford 2013), at 241.

ratification of such conduct by the company, it is claimed that there is no real change in the statute as long as the alleged wrongs can be ratified.[328] In other words, the statute does not offer much difference to the ratification issue that available in common law, as when the court deciding whether to grant permission to continue the derivative action or not it is depending on whether the alleged wrongs have been ratified or not.[329] Keay and Loughrey, supported the above view and they claimed that the position that has been taken in *Franbar Holdings Ltd v Patel*[330] clearly showed that common law rule of ratification has not been amended by the legislation.[331] In *Franbar Holdings Ltd v Patel,* the judge refused the application to grant permission to continue the derivative claim on the ground that the common law rule of ratification has not been changed by s. 239 of the Companies Act 2006.[332] In this context, the court in *Re Singh Brothers Contractors (North West) Ltd*[333] refused to grant permission to continue a derivative action on the ground that the alleged conduct either had been authorised by the company or had later been ratified.[334] Moreover, the new ratification principle has not escaped criticism, as in some situations it prevents many shareholders from practicing their right to vote without having real interests to that alleged conduct. More importantly, there is a question that might be asked here which is how easy for the court to determine the shareholder who is in favour of the wrongdoing and who is not? That difficulty appears in particular in large companies where there are a huge number of shareholders and the alleged wrongdoers might be in de facto control. On the other hand, it could be argued that this view has ignored

---

[328] D Lightman, 'The Companies Act 2006: A Nutshell Guide to the Changes to The Derivative Claim' (2007) 26(1), see also A Keay and J Loughrey 'Derivative Proceedings in a Brave New World for Company Management and Shareholders' [2010] Journal of Business Law 151.
[329] Ibid.
[330] [2008] EWHC 1534 (Ch).
[331] A Keay and J Loughrey 'Derivative Proceedings in A Brave New World for Company Management and Shareholders' [2010] Journal of Business Law 151, at 164-165.
[332] *Franbar Holdings Ltd v Patel* [2009] 1 BCLC 1.
[333] [2013] EWHC 2138 (Ch).
[334] D Milman, 'Shareholder Litigation in the UK: The Implications of Recent Authorities and Other Developments' (2013) 342 Company Law Newsletter 1.

that reality that the statute has made actual change in this issue as it will be difficult to get the ratification without the wrongdoers' votes.

3.3.3 An evaluation of the statutory derivative action

There is no doubt that having a statutory derivative claim is considered a great achievement for various reasons.[335] First and foremost, this codification offered efficient guidance to all who are involved in such kind of litigation, such as shareholders, directors, lawyers and judges.[336] Secondly this codification grants the minority shareholders a wider ground under which a derivative action can be founded, for instance, the scope of derivative claim has been expanded to include the breach of duty of skill and care. The Act has filled a gap in the common law when it allows the minority shareholder to use the derivative claim on the ground of negligence, consequently, the complex distinction between mere negligence and self-benefit negligence at common law in this regard was eliminated.[337] Furthermore, a claimant shareholder is no longer required to prove fraud and wrongdoing control. In addition to that, the Act offers the court the required power with free discretion to be reasonable directors to grant permission to continue the derivative claim and deter vexatious actions that annoying the company's business.[338] By

[335] The opponents of the new statutory derivative claim have criticised it on the ground that it opens floodgates of litigations against the company, which disturb the business of the company. In this regard, it claimed that under this Act it becomes very easy to make an allegation of negligence, default, breach of duty or breach of trust by a director of the company and start the proceeding of a derivative claim that increases the risk of directors. Sykes claimed that the new statutory derivative action is totally anti-business environment and it creates a society of litigation culture just like in the US. This view could be argued on the ground that although the Act makes the starting of a derivative claim an easy step, however, the act itself provides some other stages under which the application of getting permission to continue a derivative claim can be dismissed. As Davies stated, the Act contains some stages under which claims can be stopped without even having to involve the company. Moreover, he emphasised that such stages protect the company from having claims which disturb the company's commercial matters, these certain stages provided filtering processes which decrease the possibility of having nonsense claims. For more details, see C Wild and S Weinstein, *Smith & Keenan's Company Law* (16th edn, Harlow: Pearson Education 2013), J Sykes, 'The continuing paradox: a critique of minority shareholder and derivative claims under the Companies Act 2006' (2010) 29(2) CJQ 205, at 222 and P Davies, *Principles of Modern Company Law* (9th edn Sweet & Maxwell, London 2012), at 653-655.

[336] J Sykes, 'The Continuing Paradox: A Critique of Minority Shareholder and Derivative Claims under the Companies Act 2006' (2010) 29(2) Civil Justice Quarterly 205.

[337] In this regard, see *Daniels v Daniels* [1978] Ch 406.

[338] See s. 263 (2) of the Companies Act, 2006. See also A Alcock, J Birds and S Gale, *Companies Act 2006* (1st edn, Jordans, Bristol 2009).

such a codification and clarification minority shareholders have a better understanding of the derivative action which may increases their chance to obtain permission to continue the claim. Moreover, cases decided over the previous year show that there is noteworthy increase in the number of reported litigation after the enactment of Companies Act 2006 which is considered a good indication regarding the evolution of the judicial authority in such kind of actions.[339]

On the other hand, it is claimed that the efficiency of the new statutory derivative action is likely to be the same as it was at common law, since the act has adopted the same substantive and procedures rules that were applied at common law. Moreover, as long as the common law difficulties are available, the minority shareholders prefer to get their remedies by more popular ways which provide more broad scope and flexible choice of remedies.[340] Indeed, the effectiveness of the statutory derivative action depends on the courts' attitude toward such action, if the courts are more willing to involve in such cases there will be wide use of it, whereas if the courts keep to the old position and are still reluctant to interfere in such actions, it is doubted whether the new statutory action will be more effective than the common law one.[341] Furthermore, although, the statute empowered the court with free discretion to deal with such kind of actions, however, it is still difficult for judges to be involved in such disagreement, as judges in most cases lack business expertise which enables them to make the suitable decisions that affect the company's interests. Therefore, a considerable dilemma is facing the judges to use their discretion, as they believe that they are disturbing the company's day-to-day business.[342] Additionally, courts will find some difficulties in defining some related terms

[339] D Milman, 'Shareholder Litigation in the UK: the Implications of Recent Authorities and Other Developments' (2013) 342 Company Law Newsletter 1. See for example *Cullen Investment Ltd v Brown* [2015] EWHC 473 (Ch); [2015] B.C.C 539 where Mark Anderson QC granted permission to proceed a derivative claim.
[340] As will be discussed in the following section, it easy for the aggrieved shareholder to use s. 994 of the Companies Act, 2006.
[341] J Poole and P Roberts 'Shareholder Remedies- Corporate Wrongs and the Derivative Action' [1999] Journal of Business Law 99, at 101.
[342] H Hirt 'The Company's Decision to Litigate Against its Directors: Legal Strategies to Deal with the Board of Directors' Conflict of Interest' [2005] Journal of Business Law 159.

such as the success of the company and good faith that may result in inconsistent exercise of their discretionary power.

The Act has mentioned many factors which courts should take into account when deciding to grant permission or not, there is no doubt that such factors will introduce great guidance to those who are involved in such actions, particularly judges and minority shareholders. However, these factors will create more obstacles in front of the aggrieved shareholder, in addition to increasing the cost of litigation and lengthening the time required for the court to grant permission.[343] Moreover, it stated that the old restrictive attitudes by judges toward such kind of action at common law will continue, as such criteria which set out by the Act reflect the way the common law has developed.[344] These criteria have been heavily criticised at common law as they never become clear, for example; the factor of the board's decision not to sue is not clear to be applied, as it was required that such a decision should have been taken in good faith and for the benefit of the company, therefore, it would be the job of the court to examine whether such a decision was valid and taken under these conditions or not.[345] Although, the court is not bound by such a decision, however, the question that arises around this is how much weight the court can give to the board's decision not to sue. One other factor is considered when the court deciding the likelihood of granting permission which is the view of the members of the company with no personal interests, so it is for the court to define that term and find out such kind of shareholders. Recent cases showed that there are no clear criteria for the shareholder to obtain permission to continue the derivative claim. For instance in *Mission Capital plc v Sinclair*[346] although the applicant has proved that the application was in good faith and the question of whether a director was acting in accordance with duties imposed

[343] Law Commission Report, para 6-79.
[344] J Poole and P Roberts 'Shareholder Remedies- Corporate Wrongs and the Derivative Action' [1999] Journal of Business Law 99, at 102.
[345] See *Smith v Croft (No 2)* [1988] Ch 114.
[346] [2008] BCC 866.

by s.172 was not seen as a bar to the claim, however the permission was refused on the ground that a notional director would not have attached much importance to the claim and it would be better for the claimant to get such remedy on an application under s. 994 (the unfair prejudice remedy).[347] Also in *Fanmailuk.com v Cooper*[348] where the court refused the permission on the basis that there were linked proceedings which if successful would make the derivative claim superfluous.[349] In a similar vein, in *Kleanthous v Paphitis*[350] the court refused to grant permission as it considered the existence of a possible alternative remedy a main reason to prevent the derivative claim. However, in contrast to that, the claimant shareholder in *Hughes v Weiss*[351] was given permission to continue a derivative claim, and it was clearly stated in that case that the availability of alternative remedy did not necessarily bar a derivative a claim.

It clearly appears that the Act provided a long procedure to obtain permission to continue a derivative claim and as stated by the law commission these currently stages are not practical and slow down the procedures of getting that permission which makes such way of protection ineffective and unusable.[352] This criticism is shared by Keay and Loughrey when they stated that the condition of clean hands to bring the derivative claim was considered one of the major problems in the common law, as it was the main reason for refusing many cases, and unfortunately this condition was not removed by the new statutory regime.[353] The majority shareholders will misuse this condition by claiming that there are no clean hands behind that claim, therefore, it is stated that the derivative action should be accepted if it is believed that it is for the company's interests, even though there were was not clean hands behind that

[347] J Birds and others, *Annotated Companies Legislation* (3rd edn, Oxford University Press, Oxford 2013).
[348] [2008] BCC 877.
[349] J Birds and others, *Annotated Companies Legislation* (3rd edn, Oxford University Press, Oxford 2013).
[350] [2011] EWHC 2287 (Ch).
[351] [2012] EWHC 2363 (Ch).
[352] The Law Commission *Shareholder Remedies* (Law Com 1997) para 6-4.
[353] A Keay and J Loughrey 'Derivative Proceedings in A Brave New World for Company Management and Shareholders' [2010] Journal of Business Law 151.

action.[354] In line with this view, Lord Glennie stated that it was not clear why a company could not benefit from a claim just because there were not clean hands behind that claim.[355] What is more, the Companies Act 2006 has not defined the personal rights of the shareholders in the company, as this clarification and guidance will remove the confusion that faces shareholders in situations where there is an overlap between the personal and corporate wrongs. Since in some circumstances a shareholder might find an uncertainty whether the personal action should be brought or the derivative action instead to remedy the wrongdoing that has been committed. For instance, if the wrongdoing is an ultra vires act,[356] it is not clear for that shareholder whether to bring a derivative a claim for breaching the s.171 duty to observe the company's constitution or bring a personal claim under common law.[357] However, it is said that in practice, the grounds of personal rights might be better served by other remedies such as the unfair prejudice remedy under s. 994 of the Companies Act 2006 and therefore, such confusion may gradually disappear.[358]

In terms of ratification, on the one hand, it is admitted that the Companies Act 2006 has provided a better ratification procedure rather than common law rule, as under this Act the decision of giving a right to the company to constitute litigation is in hands of the court rather than the controllers of the company, furthermore a potential claimant is allowed to start his or her derivative a claim with no need to consider whether ratification is possible or not, as the court is the body that is responsible to examine the likelihood of ratification, moreover the

[354] J Poole and P Roberts 'Shareholder Remedies- Corporate Wrongs and the Derivative Action' [1999] Journal of Business Law 99.
[355] Lord Glennie in *Wishart v Castlecroft Securities* Ltd [2009] CSIH 65.
[356] See for example; *Rolled Steel v British Street Corporation* [1984] 2 WLR 908. According to the doctrine of ultra vires a company is limited to acting within the objects set out in its memorandum of association, therefore, this doctrine applies to transaction that are beyond the company's power which are determined in its memorandum of association. However, it should be noted that from 1.10.2009, the common law rule is subject to CA 2006, s. 31(1), which provides that, unless a company's articles specifically restrict the objects of a company, its objects are unrestricted.
[357] L Talbot, 'A Contextual Analysis of the Demise of the Doctrine of Ultra Vires in English Company Law and the Rhetoric and Reality of Enlightened Shareholders' (2009) 30(11) Company Lawyer 323.
[358] B Hannigan, *Company Law* (3rd edn, Oxford University Press, Oxford 2012), at 465.

court is not bound by such possibility rather it has to take into account such possibility. On the other hand, the Act was criticised as the old common law was being reintroduced in a different way. That is to say, since effective ratification still has an important role therefore, the difficulty of determining the effective ratification is still facing the courts.[359] Likewise, the Act adopted the vague common law position regarding the capable and incapable acts with no more clarification,[360] under which it was really difficult for the court to differentiate between ratifiable and non-ratifiable conduct.[361] Under such rule, if the wrongdoings have been ratified by a valid resolution the court has to accept such ratification and refuse permission to continue the claim. What is more, the court is allowed to adjourn the hearing of granting permission for some reasons, during that period the controllers of that company are being given an ample of time to ratify their conduct. More significantly, breaching the duty of skill and care by the directors of the company is still capable of being ratified in the new rule which presents more difficulties for minority shareholders to obtain permission even though the directors has breached those duties.[362]

In terms of codifying the duties of directors it is obvious that this codification has a positive effect on the statutory derivative actions however, as s. 170(4) of the Companies Act 2006 mentioned to the complex directors' duties at common law in interpreting and applying the general duties, the court will find the same difficulties to deal with such issue. Similarly, the codification of directors' duty to promote the success of the company does not have much impact of the efficacy of derivative claim, as this duty was drafted in vague and ill-defined language.[363] Having said that, there are no clear criteria for the court to follow when dealing

[359] See *Franbar Holdings Ltd v Patel* [2009] 1 BCLC 1.
[360] S. 239 (7) of the Companies Act, 2006 where it is stated that (This section does not affect any…….. or any rule of law as to acts that are incapable of being ratified by the company.
[361] A Keay and J Loughrey 'Derivative Proceedings in A Brave New World for Company Management and Shareholders' [2010] Journal of Business Law 151, 164-165.
[362] A Boyle, J Birds and Others, *Company Law* (6th edn, Jordans, 2007), at 686.
[363] D Attenborough, 'The Company Law Reform Bill: An Analysis of Directors' Duties and the Objective of the Company (2006) 27 Company Lawyer 162.

with s. 172 of the Companies Act 2006 in the case of derivative claim, as the court finds difficulties to measure the manner at which directors have acted to see whether that act was for the long term success of the company or not, as this section is considered one of the most complicated sections in that law.[364] As a result there is no clear guidance, framework, or definite standards for the court to follow at which controllers of a company can be held accountable for decision making processes. However, it might be argued here that the Act left that door open for the court so that its discretion and power can be practised and developed which can bring the required justice whenever it is needed.

In terms of the financial barriers, on the one hand, the cost of litigation will prevent many malicious derivative actions that aim to disrupt the company's business. On the other hand there is generally agreement that the cost of such litigation is considered a significant bar that prevents not only vexatious cases, but also well-grounded cases are stopped because of this obstacle. Additionally, the financial barrier encourages the controllers of the company to misuse the interests of the minority shareholders as they are sure that such kinds of shareholder are usually facing a financial problem. Such a barrier makes the directors and majority shareholders more confident in their actions as they know that there is a small risk of proceedings being brought against them.[365] Furthermore, it is really important for the claimant shareholder to consider whether the outcome of the action is justified in comparison with the costs that are going to be paid, bearing in mind that the outcomes of such litigation will not be taken by the claimants shareholders as he or she claim on behalf of the company, therefore, the obtained recovery goes to the company and the claimant shareholder will only get his or her

[364] A Keay, 'Section 172 (2) of the Companies Act 2006: An Interpretation and Assessment' (2007) 28(4) Company Lawyer 106.

[365] J Sykes, 'The Continuing Paradox: A Critique of Minority Shareholder and Derivative Claims Under the Companies Act 2006' (2010) 29(2) Civil Justice Quarterly 205, at 222.

share pro rata.[366] In order to alleviate this problem the Court of Appeal in *Wallersteiner v Moir*[367] created a restrictive procedure by which a claimant shareholder can obtain a cost indemnity order as long as his claim was based on reasonable ground and good faith.[368] This restrictive attitude by the court toward granting the indemnity orders appeared in many other cases such as *Smith v Croft* where it was stated by Walton J that it is necessary for the claimant shareholder who is seeking an indemnity order to prove that this order is genuinely needed.[369] For these reasons the common law position regarding the indemnity costs order and the restrictive attitude by the judge toward granting such order was heavily criticised.[370] In this regard Reisberg stated that this bar existed under common law which was against the interests of the company and which prevented the minority from starting their reasonable actions.[371] In line with this, part 19.9E of the Civil Procedure Rules 1999 provides that "the court may order the company, body corporate or trade union for the benefit of which a derivative claim is brought to indemnify the claimant against liability for costs incurred in the permission application or in the derivative claim or both". As mentioned above, although the indemnity orders existed however courts made such an order in certain and limited cases.[372] For instance; the indemnity order was applied in *Iesini v Westrip Holdings Ltd*[373] when Lewison J has stated "once the court has reached the conclusion that the claim ought to proceed for the benefit of the company, it ought normally to order the company to indemnify the claimant against his costs." Also in *Kiani v Cooper*[374] the court granted the claimant shareholders a pre-emptive

[366] B Cheffins, 'Law as Bedrock: The Foundations of an Economy Dominated by Widely Held Public Companies' (2003) 23(1) Oxford Journal of Legal Studies 1.
[367] [1975] QB 373, in this case at 391G-392F there is a detailed discussion as to the court's power to award an indemnity to a minority shareholder who brings a derivative claim.
[368] See Buckley L.J in *Wallersteiner v Moir* [1975] QB 373, at 404.
[369] [1986] 1 WLR 580.
[370] A Boyle, *Minority Shareholders' Remedies* (Cambridge University Press, Cambridge 2011).
[371] A Reisberg, 'Derivative Actions and Funding Problem: The Way Forward' [2006] Journal of Business Law 445.
[372] See for example *Wallersteiner v Moir* [1976] QB 373 and *Smith v Croft* [1986] 1 WLR 580 cited in J Birds and others, *Annotated Companies Legislation* (3rd edn, Oxford University Press, Oxford 2013).
[373] [2009] EWHC 2526 (Ch).
[374] [2010] EWHC 577 (Ch), see also *Stainer v Lee* [2010] EWHC 1539 (Ch).

indemnity as to costs out of the assets of the company in relation to the claimant's own costs but not in relation to any adverse order for costs. On the other hand, the claimant in *Hughes v Weiss*[375] failed to obtain a pre-emptive indemnity as to costs, more recently in *Bhullar v Bhullar*[376] although Morgan J granted permission to continue derivative claim, however he refused to order an advance indemnity by the company to the claimant against his liability in costs which reflects a cautious approach towards the granting of such orders.[377] Furthermore, in *Bridge v Daley,*[378] having been refused permission to continue a derivative claim, the claimant shareholder was ordered to pay the costs of litigation, in addition to that, indemnity costs were awarded by the court against the claimant in respect of those costs incurred after the date of a previous hearing.[379] In this context, it is argued that the uncertainty at common law regarding the court's power to make a cost indemnity order was adopted by the Act, therefore, the minority shareholders are still facing difficulties and uncertainties in obtaining that order. Therefore, the Act should have should have granted the court more power to give such order.[380] Yet, it might be claimed that giving such order under easy process to the minority shareholder encourages groundless actions against the company which disturb the company business.[381] However, this could be overcome when the court examined the good faith of the claimant and was satisfied that claimant was in the best interests of the company. In this regard it was stated in *Wallersteiner v Moir*[382] that an order should be granted whenever the permission to continue the claim was obtained.

---

375 [2012] EWHC 2362 (Ch).
376 [2015] EWHC 1943 (Ch).
377 D Milman, 'Shareholder Law: Recent Developments in Practice' (2015) 378 Company Law Newsletter 1, at 3
378 [2015] EWHC 2121 (Ch).
379 D Milman, 'Shareholder Law: Recent Developments in Practice' (2015) 378 Company Law Newsletter 1, at 3.
380 D Lightman, 'The Companies Act 2006: A Nutshell Guide to the Changes to the Derivative Claim' (2007) 26(1) Civil Justice Quarterly 37. A Reisberg, 'Derivative Actions and Funding Problem: The Way Forward' [2006] Journal of Business Law 445.
381 D Cabrelli, 'Statutory Derivative Proceedings: the View from the Inner House' (2010) 14(1) Edinburgh Law Review 116.
382 [1975] QB 373.

Briefly, the costs of litigation still form the big obstacle that prevents the abused shareholder from using such a claim, as the Act has made no actual change to the issue of obtaining an indemnity costs order, and the old uncertain common law rules regarding granting the indemnity order are still applied.[383] Reisberg has gone further than the current idea of an indemnity costs order when he suggested that a claimant shareholder should be rewarded with a portion of the proceeds of successful claims for his persistence in pursuing the derivative action.[384] The Law Commission has refused this suggestion on the ground that the benefits in derivative action should go to the company and no individual shareholder or group of shareholders are allowed to take any part of those benefits.[385] Reisberg, has supported his view by saying that the company remains the body taking the benefits, however it is necessary to encourage shareholders by such kind of protection of the rewards otherwise there will be no incentive to use the derivative action.

Last but not least, the Act has been heavily criticised as it creates uncertainty and much academic debate as to whether the Act has removed the multiple derivative action[386] which was a part of the common law, or such kind of action is still available under English law after the enactment of the Companies Act 2006.[387] The recent decisions in *Universal Project*

[383] It should be noted here that a claimant in a derivative claim as in any civil proceedings is allowed to use the conditional fee agreement under s. 58 and 58A of the Courts and Legal Services Act 1990 (Conditional fee agreements are regulated by the Conditional Fee Agreements Order 2000 (SI 2000/ 823) and the Conditional Fee Agreements Regulations 2000 (SI 2000/692)) , under such agreement a lawyer will not charge his claimant or reduce that amount if they lost the case, however if they win their case the lawyer might charge an extra fee up to 100 percent. It is claimed that such way will not solve this problem as lawyers will not take any case unless there is a high chance to win that case, furthermore, the right of the company to obtain all the proceeds of a successful action will be affected by this agreement, for more details see for example; A Boyle, J Birds and Others, *Boyle & Birds' Company Law* (9th edn, Jordans, Bristol 2014).

[384] A Reisberg, 'Funding Derivative Actions: A Re-examination of Costs and Fees as Incentives to Commence Litigation' (2004) 4(2) Journal of Corporate Law Studies 345.

[385] Law Commission, *Shareholder Remedies: A Consultation Paper* (Law Com No CP 142, 1996) para 16-48.16-50.

[386] A double or multiple derivative action potentially arises where the proposed claimant is not a member of the wronged company but is a member of the ultimate holding company, see for example; J Bailey and J Mugerwa, 'Multiple Derivative Actions in Company Law: Can You or Can't You?'(2013) 34(10) Company Lawyer 302, at 302.

[387] T Mascarenhas, 'Multiple Derivative Actions under English Law, Case Comment' (2013) 24(9) International Company and Commercial Law Review 336.

Management v Fort Gilkicker Ltd,[388]*Abouraya v Sigmund & Ors*[389] and *Bhullar v Bhullar & Ors*[390] were contrary to the view of most academic commentators [391] who believed that the common law derivative claim was entirely abolished by the Companies Act 2006 and the double derivative action no longer existed under English law.[392] Mr Justice Briggs in the first case came to the conclusion that the multiple derivative action had been known to English common law and continues to be available in our day. Moreover, he further held that as the provisions of part 11 of the Companies Act 2006 did not apply to double derivative actions and the UK Parliament did not implicitly or otherwise abolish the whole of the common law derivative action. Therefore the common law rules of derivative actions continued to apply to the double derivative claims and courts are still allowed to entertain such actions.[393] In the same manner, Richards J in *Abouraya v Sigmund & Ors*[394] stated that some aspects of the common law derivative action live side by side with the statutory derivative action. To avoid such kind of uncertainty and to stop the mess of the common law derivative claim it was suggested that Parliament should take the other common law countries' position where the scope of the statutory derivative action extended to include the double derivative actions.[395] Such kind of

---

388 [2013] EWHC 348 (Ch).

389 [2014] EWHC 277 (Ch).

390 [2015] EWHC 1943 (Ch).

391 See for example; S Goo, 'Multiple Derivative Action and Common Law Derivative Action Revisited: A Tale of Two Jurisdictions' (2010) 10(1) Journal of Corporate Law Studies 255, and A Reisberg and D Prentice, ' Multiple Derivative Actions Case Comment' (2009) 125 Law Quarterly Review 209, for different view see D Lightman 'Two Aspect of The Statutory Derivative Claim' (2011) 1 Lloyd's Maritime and Commercial Law Quarterly142 , where he stated that although the Law Commission's recommendation was to abolish the common law derivative claims where such claim fall outside the s. 260 (1) definition, however the Parliament did not take that recommendation.

392 This approach was taken by Lord Millett in the Hong Kong Court of Final Appeal in *Waddington Ltd v Chan Chun Hoo Thomas* [2008] HKCU 1381, they have come to this conclusion from the wording of section 260 (2) which provided that: A derivative claim may only be brought (a) under this chapter (b) in pursuance of an order of the court in proceedings under s. 994.

393 See T Cheng-Han, 'Multiple Derivative Actions Case Comment' (2013) 129 Law Quarterly Review 337.

394 [2014] EWHC 277 (Ch).

395 In Australia See s. 236 of the Corporations Act 2001, in Canada see ss. 238 and 239(1) of the Canadian Business Corporations Act 1985, in New Zealand See s. 165(1)(a) of the New Zealand Companies Act 1993.
In Singapore see s. 216A (1) of the Companies Act (Cap. 50, Statutes of Singapore), in Hong Kong see *Waddington Ltd v Chan Chun Hoo Thomas* [2008] HKCU 1381 cited in J Bailey and J Mugerwa, 'Multiple Derivative Actions in Company Law: Can You or Can't You?' (2013) 34(10) Company Lawyer 302, at 304.

reform will provide a procedural mechanism by which the court could ensure that injustice would not be done without a remedy.[396]

3.3.4 Conclusion

Although the codification of the derivative claim has clarified many complicated and uncertain issues at common law rule in *Foss v Harbottle* and its exceptions, however, the Companies Act 2006 has made no major change to the common law which may make the derivative claim as a first option for the abused shareholders. Under the above circumstances obtaining permission to continue a derivative claim depends very much on the courts' attitude towards their judicial discretion, if the court applied such power properly and allowed the claimant shareholder to continue his or her desirable claim the old common law attitude will be overcome, otherwise the old approach will be reintroduced. Furthermore, the obstacles of ratification and litigation costs remain a considerable hurdle that prevents a minority shareholder from using the derivative claim, particularly in light of the availability of alternative remedies such as the unfair prejudice remedies. In other words, as long as the above difficulties are available the minority shareholders prefer to get their remedies via more popular and simple way which provide more broad scope and flexible choice of remedies. As would be discussed in the next section it would be much simpler for a shareholder to go through s. 994 than the derivative claim, as the issue of ratification and the two stages procedures to get permission are not applied. More importantly, under s. 994 the court has various options to remedy the petitioner. Therefore, as Sugarman has stated, with the availability of these provisions the unfair prejudice remedy is likely to remain the remedy of first choice for the minority shareholder as it has many advantages over derivative claims.[397] Similarly, it was stated in the Law Commission that

[396] Briggs J in *Universal Project Management v Fort Gilkicker Ltd* [2013] EWHC 348 (Ch).
[397] D Sugarman, 'Reconceptualising Company Law: Reflections on the Law Commission's Consultation Paper on Shareholder Remedies' Part 1 (1997) 18 (8) Company Lawyer 226, at 242.

unless major changes were made to the unfair prejudice remedy it would continue to offer advantages over the derivative action. Therefore, the following section is allocated to examining the unfair prejudice remedy to consider to what extent this way of protection is effective in comparison with the derivative action.

3.4 Unfairly Prejudicial conduct

3.4.1 Introduction

In addition to the above remedies that are offered to the aggrieved shareholder (i.e. derivative claim and personal actions) English law grants minority shareholders another significant remedy. Under such remedy a member of a company can apply to the court by petition where;

"(a) the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or some part of the members (including at least himself), or (b) that any actual or proposed act or omission of the company (including any act or omission on its behalf) is or would be so prejudicial."[398]

The origin of this method of protection can be traced back to the Cohen Committee [399] which clearly identified the vulnerability of minority shareholders, particularly in private company, to oppression by the majority shareholders.[400] The above Report led to the introduction of s. 210 of the Companies Act 1948 where the aggrieved shareholder was allowed to seek redress in the case of 'oppression'.[401] Yet, up to 1980 the figures showed that there were only a handful of successful cases, therefore, s. 210 of the 1948 Act did not succeed to fulfil an effective role in protecting minority shareholders.[402] The concept of oppression under s. 210 of 1948 Act was not clear enough in addition to the deficiency of the 'oppression' term to cover many types

[398] S. 994 of the Companies Act 2006, (formerly s. 459 of the Companies Act 1985).
[399] Report of the Committee on Company Law Amendment (Cmnd 6695, 1945).
[400] H Rajak, *Sourcebook of Company Law* (2nd edn, Jordans, Bristol 1995), at 571.
[401] Ibid.
[402] Ibid.

of misconduct, such as the infringement of legitimate expectations to participate in management or to have the dividends distributed on a regular basis.[403] What is more, an order under s. 210 was only permitted if the facts constituted a ground for a winding up remedy on the just and equitable grounds. The above restrictions alongside with the judicial timidity [404] led Parliament to amend the Companies Act in 1980 where a major change was made in this area in the form of s. 75 of the Companies Act 1980 as the term oppression was superseded by the concept of 'unfair prejudice'.[405] That provision was then consolidated as s. 459 of the Companies Act 1985 which was later extended by the Companies Act 1989. Section 994 of the Companies Act 2006 made no significant changes in this issue except some insignificant stylistic modifications. However, it should be borne in mind that the developed case law under s. 459 is directly applicable to s. 994.[406]

After 1985, the numbers of cases brought under s. 459 increased, as the wording of this section was wide and unrestricted; furthermore, the courts departed from their traditional stance to keep themselves away from the internal affairs of the company.[407] Therefore, not only the complaint of unfair prejudice to the petitioner but also to shareholders in general is allowed to be pursued under this section to obtain redress. As a result, many cases were brought which made such remedy oppressive towards the majority shareholders and for the company as a whole. That position necessitated the policy makers and the courts to produce some restrictions under which the quantity of cases coming before the courts and disturbing the company's business could be reduced.[408]

[403] A Hicks and S Goo, *Cases and Materials on Company Law* (7th edn, Oxford University Press, Oxford 2011).
[404] H Rajak, *Sourcebook of Company Law* (2nd edn, Jordans, Bristol 1995), at 571.
[405] See the recommendations of the Report of the Company Law Committee (Jenkins Committee, 1962).
[406] J Birds and others, *Annotated Companies Legislation* (3rd edn, Oxford University Press, Oxford 2013), at 972.
[407] A small change was made by the Companies Act in 1989 to make clear that the unfairly prejudicial conduct could affect all members.
[408] See *Saul v Harrison* [1994] BCC 475.

In line with these demands the Law Commission recommended that some limitations and restrictions need to be placed to decrease a number of cases that coming to the court.[409] Thus the House of Lords in *O'Neill v Phillips*[410] took the opportunity to express the view that this jurisdiction has to be tightly controlled, so that some significant curbs were adopted which restricted the exploitation of that provision. Therefore, after *O'Neill v Phillips* an aggrieved and disappointed shareholder has no automatic exit option according to s. 994, as it has to be shown that the shareholder's legitimate rights were trampled upon or ignored in order to obtain redress.[411] Moreover, Lord Hoffmann in this case redefined the concept of legitimate expectations when he stated that if there was no conclusive agreement between shareholders, then there could be no reasonable legitimate expectations. That is to say, *O'Neill v Phillips* has damped down the fires of litigation, leading to criticism against that judgment on the ground that the minority shareholder protection was reduced, therefore, the Company Law Review asked for statutory reversal of this authority but its demands fell on deaf ears.[412] However, it appears recently that this remedial jurisdiction is coming back to prominence, as many cases are coming before the courts. Therefore, this part of this chapter is intended to analyse and examine the protection that is offered under the unfair prejudice remedy with particular reference to the following points: first the scope of the unfair prejudice remedy (especially the nature of the protected interests), and second the types of relief that are offered by succeeding with such remedy.

---

[409] Law Commission, *Shareholder Remedies* (Law Com No 246, 1997).
[410] [1999] 1 WLR 1092.
[411] J Birds and others, *Annotated Companies Legislation* (3rd edn, Oxford University Press, Oxford 2013), at 972.
[412] This view has faced criticism on the ground that this restriction of legitimate expectation concept causes different outcomes from those on which previous cases were based, see eg B Clark., 'Unfairly Prejudicial Conduct: A Pathway through the Maze' (2001) 22(6) Company Lawyer 170, at 173, and H, Hirt, 'In What Circumstance Should Breaches of Directors' Duties Give Rise to a Remedy Under ss.459-461 of the Companies Act 1985?' (2003) 24(4) Company Lawyer 100, at 101-102.

3.4.2 The scope of the unfair prejudice remedy

Section 994 of the Companies Act 2006 grants shareholders a strong tool of protection by which a shareholder is allowed to petition to the court to obtain a remedy whenever it seems to that member that the company's affairs are being, or have been, conducted in a manner which is unfairly and prejudicial to the member or some part of the members. Thus, the discussion of the scope of this remedy raises the following issues: To which companies and other entities does the section apply, and who can apply for such kind of remedy? Most importantly, as there is no comprehensive definition of the concept of unfair prejudice it is the function of the court to determine the circumstances under which conduct is regarded as unfairly prejudicial conduct. The scope of the section should first be clarified in terms of its implementation, as it shows which kind of entities the section applies to. It apparently seems from the provision that s. 994 applies to all kind of companies as defined by s. 1 of the Companies Act 2006,[413] although, most of the successful petitions under this section in practice show that all instances of successful petitions relate to private companies as opposed to public companies.[414]

A petition can only be brought by a member of a company or someone to whom shares in the company have been transferred or transmitted by operation of law.[415] The shareholder to whom shares in the company have been transferred or transmitted is allowed to petition even if the name of that shareholder does not appear on the register of member as long as it is proved that the controllers of the company have refused such registration.[416] In that regard in *Blunt v*

---

[413] It should be noted here that the section is applicable to Limited Liability Partnerships unless it was excluded by its members by an unanimous agree, such an agreement must be recorded in writing , see the Limited Liability Partnerships (Applications of Companies Act 2006) Regulations 2009, SI 2009/1804, Pt 12, regs 48-49. For general discussion on the potential application of s. 994 to LLPs, see also the discussion in *Eaton v Caulfield* [2001] EWHC 173 (Ch).

[414] It was revealed by the Law Commission that out of 233 unfairly prejudicial petitions logged in 1994 and 1996 in the High Court in London, and 97% of the cases related to private companies; 82% of these companies had up to five shareholders, see Law Commission Report, para 3.13, Consultation Paper, Appendix E.

[415] S. 994(1) (2) of the Companies Act, 2006.

[416] In most cases the petitioner is claiming against other shareholders and not against the company, so the company is subject matter of the dispute and not an involved party, consequently, its monies must not be used to fund such kind of petitions. Moreover, using the company's monies in such petition could be considered as an unfairly

Jackson[417] where the petitioner was never entered in the register of the company and indeed no register existed Roth J applied s. 125 which entitles the court in appropriate cases to order that the registration should be retrospective.[418] Roth J concluded that the petitioner has suffered unfair prejudice within the terms of s. 994 and it was necessary to give him permission to ask for rectification of the register. In addition, it was shown in *Re Brightview Ltd; Atlasview Ltd v Barton*[419] that a person who holds shares as nominee might be entitled to get remedy under this jurisdiction if it was proved that the interests of that shareholder are capable of including the economic and contractual interests of the beneficial owner of the shares.

It seems that the former and prospective shareholders are not allowed to seek redress under this section.[420] In this context, it has to be borne in mind that a petition should be refused if there is an arbitration clause which states such disagreements among members of the company are to be solved by arbitration. The Court of Appeal in *Fulham FC v Richards* [421] has clarified the uncertain position[422] of whether a petitioner is allowed to obtain relief under s. 994 if the parties have agreed that disputes should be referred to arbitration where the Court of Appeal confirmed that an arbitration clause can exclude the s. 994 jurisdiction.[423] Having said that, such petition is based on the allegation that the company's affairs are being or have been conducted in a

---

prejudicial conduct and it would be simply further ground of unfair prejudice petition of which the petitioner could institute claim and get relief. However, in some situations it is indispensable for the company to involve and fund such proceedings. For instance, the company will involve if the petitioner is seeking disclosure from the company, or where an order is sought that the company should buy the petitioner's shares. See Re *a Company (No 1126 of 1992)* [1994] 2 BCLC 146 and *Re Grossmore Electrical and Civil Engineering Ltd* [1989] BCLC 137.

[417] [2013] EWHC 2090 (Ch).

[418] See *Re Sussex Brick Company* [1904] 1 Ch 598, see also *Re a Company* [1986] BCLC 391, *Re McCarthy Surfacing Ltd; Hecquet v McCarthy* [2006] EWHC 832 (Ch), in such circumstances proceedings under s. 994 could be coupled with a claim for rectification of the company's register of members under s. 125 of the Companies Act 2006, the court may in such cases order a stay of a s. 994 petition to enable a claim for rectification to be brought under s. 125 where retrospective rectification is sought to a date ante-dating the issue of the petition, see *Re Starlight Developers Ltd* [2007] EWHC 1660 (Ch).

[419] [2004] EWHC 1056 (Ch).

[420] *Re a Company (No. 00330 of 1991)* [1991] BCLC 597, although in some circumstances the former shareholder does suffer losses however allowing such shareholder to bring a petition under s. 994 will open floodgate of cases which destroy the business activity.

[421] [2011] EWCA Civ 855.

[422] See *Exeter City AFC v The Football Conference* [2004] BCC 498; *Re Vocam (Europe) Ltd* [1998] BCC 396 for the previous position.

[423] J Birds and others, *Annotated Companies Legislation* (3rd edn, Oxford University Press, Oxford 2013), at 972.

manner that is unfairly prejudicial to the petitioner shareholders, however, the question that arises here is in what circumstances a conduct is considered as unfairly prejudicial conduct.

3.4.2.1 Determining the unfairly prejudicial conduct

In terms of the conduct being complained of, the petitioner has to establish that the conduct forms the basis of the petition is both prejudicial to the petitioner's interests and unfair.[424] Therefore, the Court of Appeal in *Rock Ltd v RCO plc*[425] refused to grant a remedy on the ground that although the fiduciary duties were breached by the directors when they sold the minority shareholder's share at an undervalue which was clearly seen as improper and unfair conduct, however such conduct was not considered as prejudicial within s. 459. The Companies Act 2006 has not provided a comprehensive definition to the concept of unfair prejudice, therefore, it is left to the court to determine whether the petitioner was the subject of unfairly prejudicial conduct or not. In such circumstances it is well known that whenever the legislature leaves such issues without a definition the courts usually avoid to limit their wide discretion, then, the unfair prejudice term remains a wide term and it is within the power of the court to determine whether the conduct was unfairly prejudicial or not. In this vein, it was set out in *Anderson v Hogg*[426] that the unfairness test is the criterion on which the court should rely and decide whether the conduct was unfairly prejudicial.[427] Hoffmann LJ in *Re Saul D Harrison & Sons Plc* confirmed that the test of unfairness is determined from the consequence of the conduct so that a conduct is considered unfair and prejudicial if its impact was so regardless of its nature.[428] Furthermore, the good faith conduct could be unfairly prejudicial as the central point is the result of the conduct and not its motive, in addition, the petitioner is not obliged to

[424] See *Re Macro v Thompson* [1994] 2 BCLC 354.
[425] [2004] EWCA Civ 118.
[426] [2002] SC 190.
[427] M Hemraj, 'Maximising Shareholder's Wealth: Legitimate Expectation and Minority Oppression' (2006) 27(4) Company Lawyer 125.
[428] [1995] 1 BCLC 14, at 31.

prove the bad faith of the respondent as it does not have to be established. The petitioner who seeks a remedy is not lawfully required to show that the petition is based on clean hands, as the court in determining such unfairness is not taking into account the clean hands principle, however, if the contrary is proved and the court found that the petition was based on unclean hands, it might consider the petitioner's behaviour either in deciding unfairness or choosing the proper relief,[429] moreover, it might consider the petitioner has not been unfairly prejudiced,[430] or refuse to grant a remedy even where the unfair prejudice conduct was established.[431]

In Lord Hoffmann's view the unfairness needs to be tested from a commercial context where the relationships are based on "keeping of promises and honouring agreements".[432] Therefore, in such agreements the relationships among the shareholders are governed by the relevant company laws, articles of association and shareholder agreement. Therefore, it is recommended for the court to start its investigations by asking whether the complained of conduct is in accordance with articles of association and shareholder agreement or not.[433] In this regard, the Court of Appeal in *Arbuthnott v Bonnyman & Ors*[434] has rejected an appeal against the dismissal of a petition under s. 994 of the Companies Act 2006 wherein the majority shareholders altered the articles of association to include "drag along" provisions requiring minority shareholders to sell their stake if the majority shareholder exited the company.[435] The claimant Mr Arbuthontt claimed that the amendment to the articles of association was unfairly prejudicial to him as it forced him to sell his shares at a gross undervalue. The Court of Appeal

[429] See *Re A Noble & Sons (Clothing) Ltd* [1983] BCLC 237.
[430] *Eg Kelly v Hussain* [2008] EWHC 1117 (Ch).
[431] *Re London School of Electronics Ltd* [1986] Ch 211; *Richardson v Blackmore* [2006] BCC 276.
[432] *Re Saul D Harrison & Sons Plc* [1995] 1 BCLC 14, at 18.
[433] However, an alteration to a company's article of association, even if passed by the requisite majority of shareholders, might be challenged as invalid in certain circumstances, see for example; *Allen v Gold Reefs* of *West Africa Limited* [1900] 1 Ch 656.
[434] [2015] EWCA Civ 536.
[435] D Milman, 'Shareholder Law: Recent Developments in Practice' (2015) 378 Company Law Newsletter 1, at 2.

in this case made a significant review of the law on this matter and dismissed the appeal on the ground that the original shareholders' agreement already contained drag along provisions therefore, the alteration of the articles to contain a drag along was only an adjustment of an existing contractual right, rather than the introduction of new provisions. Besides, the Court of Appeal affirms that an amendment which harmfully affects one or more minority shareholders could not be nullified as long as it is proved that the alteration was made in good faith and in the interests of the company.[436] Yet, It should be noted that providing enough evidence which confirms that the conduct was in accordance the company's constitution and the relevant company laws is not a decisive evidence of the conduct being not "unfair", as conduct could be a basis of unfair prejudice allegation even though it was lawful conduct.[437] Such conduct is considered as unfair conduct and it can be unfairly prejudicial even if the Companies Act was not technically infringed by that conduct.[438]

In *O'Neill v Philips* Lord Hoffmann confirmed that unfairness is present where there is breach of the rules or using the rules in a manner which equity would regard as contrary to good faith.[439] Consequently, unfairness occurs where the equitable considerations regard the conduct as unfair even though it was proved by the respondents that the terms on which they agreed that the affairs of the company should be run have not been breached, or that breach has happened when they were using their legal power.[440]

It seems fair to conclude that determining whether conduct is unfair is a matter of fact which is considered along with the legal background of the relevant corporate structure which contains company's articles of association and any shareholders' agreements, hence, if that

[436] See for example; D Crone, 'Court of Appeal Rejects Unfair Prejudice Claim Based on Amendment to Drag-Along Rights'[2015] Corporate Briefing 9.
[437] *Re Saul D Harrison & Sons Plc* [1995] 1 BCLC 14, at 19.
[438] See *McGuinness v Bremner Plc* [1988] BCLC 673.
[439] [1999] 1 WLR 1092.
[440] *O'Neill v Philips* [1999] 1 WLR 1092.

conduct is inequitable for the articles and the shareholders agreement that conduct is acceptable as a ground of petition. Furthermore, the unfairness can arise even if the conduct was in accordance with the articles and the shareholders agreement however it was enforced inequitably or it was proved that the articles and the shareholders agreement can be subject to the equitable principles. [441] Additionally, the court considers the conduct as an unfair conduct even if it is not acceptable as a ground of winding up remedy on the just and equitable basis under s. 122 of the Insolvency Act 1986.[442]

Having seen that the right to petition under s. 994 is permissible whenever the petitioner's legal rights were ignored or abused, moreover, the petition is allowed if such rights were not infringed but there was unfair use of power which abuses the enjoyment of those legal rights. What is more, s. 994 gives the shareholder a right to petition if the conduct was unfairly prejudicial to his or her "interests", and its well-known that the interests is a wide expression that not only include the legal rights that are offered by the constitution of the company and the relevant company laws but also the legitimate expectations of each shareholder.[443] In this context, it was stated in *Re Saul D Harrison & Sons Plc* that the legitimate expectations rights arise out of a fundamental understanding among shareholders which formed the basis of their association, however, such understanding was not put into contractual form.[444] By way of example, infringing the legitimate expectations of the shareholder to have a role in the management of the company grants him a right to seek relief under s. 994.[445] Lord Wilberforce in *Ebrahimi v Westbourne Galleries*[446] stated that such expectations are usually found in small companies (quasi-partnership companies) as these kinds of companies are generally based on

---

[441] J Birds and others, *Annotated Companies Legislation* (3rd edn, Oxford University Press, Oxford 2013), at 975.
[442] In contrast see s. 210 of the Companies Act 1984, under which a conduct has to be such as would justify the making of a winding up order on the just and equitable ground.
[443] See Hoffmann J *in Re a Company (No 007623 of 1984)* [1986] BCLC 362 and Vinelott J in *Re Blue Arrow Plc* [1987] BCLC 585, at 590.
[444] [1995] 1 BCLC 14, at 18-19.
[445]J Birds and others, *Annotated Companies Legislation* (3rd edn, Oxford University Press, Oxford 2013), at 972.
[446] [1973] AC 360.

trust and mutual confidence.[447] On the contrary, such expectations are less likely to be found in large public companies where the rights of each shareholder are contained in the company's constitution and the relevant laws and there is less scope for legitimate expectations rights.

The wider interpretation that was given to the term unfairly prejudicial conduct which encouraged the number of cases under s. 459 of the Companies Act 1985 to grow exponentially has been narrowed down by the House of Lords in *O'Neill v Phillips* where it was held that the concept of legitimate expectation is a concept which should be strictly interpreted and in accordance with traditional equitable principle.[448] It was confirmed in the above case that a shareholder is not allowed to obtain remedy under s. 459 if the claim was only based on the fact that the relations between shareholders had broken down and they lost their mutual trust and confidence.[449] Furthermore, it is claimed that it was clear from *O'Neill v Phillips* that the concept of legitimate expectation cannot stand alone as the basis of an application under s. 994.[450]

It seems understandable that 'unfair prejudice' is a wide term which includes the legitimate expectations in addition to strict legal rights, therefore, the courts in determining such conduct will not apply some open-ended notion of justice. Rather the surrounding circumstances in each case indicate whether the exercise of power or rights in question would involve a breach of an understanding or agreement between the parties which is considered against the concept of fairness.[451] Such decisions by the courts should take into account the significant principles

---

[447] The term of a quasi-partnership is not always clear, however, generally speaking the company is in a quasi-partnership where there is a mutual trust and confidence in the relationship among its shareholders such as the relationship between member of a partnership, see Lord Wilberforce in the *Ebrahimi* case where he listed three typical elements of quasi-partnership companies; personal relationship and mutual confidence as the basis of their business association , understanding that all or certain shareholders will participate in management, and restriction on transfer member's interests.

[448] [1999] 1 WLR 1092.

[449] [1999] 1 WLR 1092.

[450] C Wild and S Weinstein, *Smith and Keenan's Company Law* (16th edn, Harlow: Pearson Education 2013).

[451] J Birds and others, *Annotated Companies Legislation* (3rd edn, Oxford University Press, Oxford 2013), at 975.

according to the developed and established equitable rules. The shareholders agreement or understanding could be a word or a conduct and do not have to be contractually binding in order to found the fairness.[452] By way of example, non-payment of dividends and preventing a shareholder from receiving any return on his investment without acceptable justification is regarded as unfairly prejudicial conduct, particularly where some shareholders who are sitting as directors are taking monies for themselves by inflated fees.[453] Likewise if there is a legitimate expectation of the shareholder to participate in the company's management and that shareholder was excluded from such participation that exclusion is considered as unfairly prejudicial conduct.[454] For instance, in *Re BC&G Care Homes Ltd: Crowley v Bessell*[455] it was held that the exclusion from management without a reasonable offer to buy the claimant out in circumstances where there is legitimate expectation of participation in management is generally regarded as one example of unfairly prejudicial conduct.

In some cases the breach of a director's fiduciary duties may constitute a ground for unfair prejudice where the controllers of the company diverted its business to another company which was controlled by the same majority or lined their pockets at the expense of the company and the petitioner.[456] It is not enough for the petitioner to show that the company is under mismanagement unless it is prolonged and coupled with exceptional circumstances.[457] Other kinds of misconduct which may form the basis of a successful petition where the company is not really in need of further funds however, new shares were issued in an improper way to certain shareholders in order to squeeze out some other shareholders. Similarly, a shareholder

---

[452] See *O'Neill v Philips* [1999] 1 WLR 1092, *Re Guidezone Ltd* [2000] BCLC 321.
[453] *Grace v Biagioli* [2006] 2 BCLC 70, *Re McCarthy Surfacing Ltd* [2009] BCC 464.
[454] See *Oak Investment Partners XII, Limited Partnership v Bougthwood* [2009] 1 BCLC 453, upheld by the Court of Appeal [2010] EWCA Civ 23.
[455] [2015] EWHC 1518 (Ch).
[456] See eg *O'Donnell v Shanahan* [2009] EWCA Civ 751.
[457] *Re Macro (Ipswich) Ltd* [1994] 2 BCLC 354, compare *Re Saul D Harrison and Son plc* [1995] 1 BCLC 14, where the court was supportive of the managerial prerogative and in particular the duty to have regard to employee interests even at the expense of certain shareholders.

who has a legitimate right to be notified and may consulted on how the company's business is run is entitled to petition if he or she was prevented from getting such information.[458] In this regard, subsection (1) (a) of s. 994 has provided a detailed statutory ground of unfair prejudice arising from the inappropriate removal of a company's auditor.[459] The Law Commission also has listed some conduct which they considered as the most common ground of unfair prejudice allegations, which are; the diversion or misappropriation of the assets of the company, exclusion from management, the payment of excessive remuneration to directors and inadequate dividends to shareholders, failure by the majority to provide information regarding the way by which the company is run and the attempt by the majority to amend the articles of association for improper reasons.[460]

In brief, in order to have a successful petition the petitioner has to persuade the court that the complained of conduct is both unfair and prejudicial.[461] In so doing the court have to consider from an objective prospective the relevant circumstances in each individual case to satisfy the test of unfair prejudice.[462] However, the fact the wrongdoer does not have the intention to act unfairly and prejudicially is not decisive of the matter, similarly, it is not sufficient to prove that the relationship between the parties has irretrievably broken down and the company has become deadlocked and is unable to carry on its activity as trust and confidence between the shareholders no longer exists. As a result a petitioner must show that such breakdown was a result of unfairly prejudicial conduct.[463] Such a petition can be based on past, present and future

[458] J Birds and others, *Annotated Companies Legislation* (3rd edn, Oxford University Press, Oxford 2013), at 977.
[459] See *Re Sunrise Radio Ltd* [2009] EWHC 2893 (Ch).
[460] Law Commission, *Shareholder Remedies: A Consultation Paper* (Law Com No CP 142, 1996) para 7.2.
[461] See *Nicholas v Soundcraft Electronics Ltd* [1993] BCLC 360, *Sikorski v Sikorski* [2012] EWHC 1613 (Ch) para 55 Per Briggs J.
[462] See *Re R A Noble v Sons Ltd* [1983] BCLC 273, *Fisher v Cadman* [2006] 1 BCLC 499, *Wilson v Jaymarke Estates Ltd* [2007] UKHL 29, which shows that acquiescence in unfairly prejudicial conduct can be brought to an end thereby justifying a petition, conversely, passive behaviour on the part of the respondent may be relevant in establishing unfair prejudice. For more details, see the discussion in *Whillock v Henderson* [2009] BCC 291.
[463] See *O'Neill v Philips* [1999] 1 WLR 1092, where Lord Hoffman asserted that if it was proved that the company has become deadlocked the remedy of winding up on the just and equitable ground under s. 122 (1) (g) of the Insolvency Act 1986 may be available, see the Court of Appeal's discussion on the relationship between the

misconduct,[464] however, in the case of future conduct the proposed misconduct must be at an early stage.[465] In *Re Kenyon Swansea Ltd*,[466] an injunction to restrain a shareholder meeting was issued by the court as the resolutions tabled at the meetings endeavoured to alter articles of association which would have been unfairly prejudicial to the minority shareholders of the company. Nonetheless, convincing the court that the respondents' conduct was unfairly prejudicial is not sufficient to gain the required remedy, as it was clear from s. 994(1)(a) that in order to obtain such remedy a petitioner has to prove that the conduct committed was conduct of the company's affairs therefore it is the task of the next point to clarify such affairs.

3.4.2.2 The affairs of the company

The conduct complained of must be conduct in the affairs of the company, which is a proposed act or omission by or on behalf of that company;[467] such conduct does not have to be a continuing act or omission as long as it is apparent from the appropriate circumstances that the single conduct was unfairly prejudicial. No clear definition was produced to enlighten the concept of company's affairs, however the case law has identified the term as "the acts done by the company or those authorized to act as its organs in the course of the company's business".[468] Consequently the "company's affairs" include not only the board's decisions and resolutions of shareholders but also any conduct by the directors where they are acting on behalf of the company. Therefore, wrongdoings which are committed in the wrongdoer's personal capacity beyond the course of the company's business would not be considered as within a company's affairs.[469] In the case of a group situation, conduct of the affairs of company

remedies under s. 122 the Insolvency Act and s. 994 of the Companies Act 2006 in *Hawkes v Cuddy (No2*) [2009] EWCA Civ 291.

464 Law Commission, *Shareholder Remedies: A Consultation Paper* (Law Com CP No 142 1996) para 73.

465 *Re a Company (No 004475 of 1982)* [1983] Ch 178.

466 [1987] BCLC 514.

467 *Re Legal Costs Negotiators* Ltd [1999] 2 BCLC 171, *Gross v Rackind* [2004] EWCA Civ 815, for further discussion see *Hawkes v Cuddy (No2)* [2009] EWCA Civ 291.

468 *Re Kenyon Swansea Ltd* [1987] BCLC 514, 520, *Re Legal Costs Negotiators* Ltd [1999] 2 BCLC 171.

469 *Re a Company (No 00176 of 1986)* [1987] BCLC 141.

can in appropriate circumstances be a conduct of the affairs of another company for the purpose of the section. By way of example, the affairs of the subsidiary are considered the affairs of the parent and vice versa.[470] In this context, it is important to distinguish between shareholders' disputes concerning dealing with their shares in the sense of their private position as shareholders and acts or omissions which are unfair conduct in the company's business. David Richards J in *Re Coroin Ltd*[471] made the point that in general terms, disputes between shareholders personally cannot be characterised as relating to the company's affairs. So that the courts should differentiate between shareholders' disputes concerning dealings with their shares in the sense of their private position as shareholders which are not accepted as ground of such petition and the acts or omissions which are unfair conduct in the company's business.[472]

The unfair prejudice petition was traditionally created to provide redress for personal wrongs, as corporate wrongs are remedied by the derivative action.[473] In this vein, it was held in *Re Charnley Davies Ltd (No 2)* that corporate wrongs were not appropriate to be reviewed under the unfair prejudice petition,[474] however it seems that the broad wording of the provisions and the wide discretion granted to the court made such a remedy more inclusive to cover the corporate wrongs as well. Therefore, it is discussed in the next point whether a member of a company can apply to the court by petition to obtain a substantive remedy for the company in relation to corporate wrongs.

[470] See *Sikorski v Sikorski* [2012] EWHC 1613 (Ch) per Briggs J at para 56.
[471] [2012] EWHC 2343 (Ch) para 626 upheld by the Court of Appeal at [2013] EWCA Civ 781 where it was confirmed that transfers of shares or transfers of control of shares may not amount to unfairly prejudicial conduct unless specifically prohibited by agreement between the shareholders.
[472] See *Grace v Biagioli* [2006] 2 BCLC 70, *Fowler v Gruber* [2010] 1 BCLC 563.
[473] *Re Charnley Davies Ltd (No.2)* [1990] BCLC 760, at 784.
[474] Ibid.

3.4.2.3 The unfair prejudice remedy and corporate wrongs

As the expression of interests includes not only the personal wrongs but also corporate wrongs that may affect all members of the company.[475] And since s. 996 grants the court the power to initiate a derivative claim and made the corporate relief a presumable consequence of an unfair prejudice petition,[476] it was held in *Clark v Cutland*[477] by the Court of Appeal that there was a wide discretion under s. 461 CA 1985 (s 996, CA 2006) to grant a substantive remedy for the company in relation to corporate wrongs based on directors' breach of duties. So the unfair prejudice petition can be used to obtain either a personal or corporate relief.[478] The same view was taken in *Gamlestaden Fastigheter AB v Baltic Partners Ltd*[479] where the minority shareholder brought a petition under s. 994 regarding a corporate wrong and the court accepted the petition and ordered the majority to pay damages to the company. Moreover, it was stated by Arden L.J in *Clark v Cutland* that as the petitioner sought corporate relief it is open to him to seek an order against the company for the costs that were incurred in proceedings.[480] Reisberg's view does differ from that but he argued that granting an indemnity order to the petitioner should be available in the cases where it is proved that alleged conduct was a corporate wrong and the remedy sought is for the benefit of the company.[481] Under such conditions, unless the scope of s. 994 is restricted to the personal wrongs only the complaints of corporate wrong would chose the unfair prejudice petition in order to save money and time and avoid the derivative action with its difficult procedures.[482] Moreover, it is argued that it is

---

[475] Law Commission, *Shareholder Remedies* (Law Com No 246, 1997) para 16.3.
[476] It will be discussed later in this section that it is within the court power to make an order and initiate derivative action under s. 996 of the Companies Act 2006.
[477] [2003] 4 All ER 733.
[478] See also *Lowe v Fahey* [1996] 1 BCLC 262 where it was held that where…. the unfairly prejudicial conduct involves the diversion of company funds; a petitioner is entitled as a matter of jurisdiction to seek an order under s 461 for payment to the company itself.
[479] [2007] UKPC 26.
[480] [2004] 1 WLR 783 para 35.
[481] A Reisberg, 'Indemnity Costs Order under S.4 59 Petition' (2004) 25(4) Company Lawyer 116, at 117.118.
[482] J Poole and P Roberts 'Shareholder Remedies- Corporate Wrongs and the Derivative Action' [1999] Journal of Business Law 99, at 99.

unreasoned to keep these two separate remedies if they provide the same remedies for corporate wrongs.[483] However, this view is criticised as each of these remedies has its own role and scope and they both exist to protect different interests.[484] The use of the unfair prejudice remedy against corporate wrongs faced another criticism since it makes the classic distinction between the personal and corporate wrongs in such circumstances vague.[485] Furthermore, allowing corporate wrongs to be remedied under s. 994 casts down the issue of having a lot of vexatious cases that only aim to curb the company's business. Thus if the unfair prejudice petition is used to remedy corporate wrongs a filtering system should be applied by which malicious petitions would be avoided. Such a system would strike a balance between the interests of the shareholder and the interests of a company as a whole, and consequently prevents the abuse of unfair prejudice petition in the case of corporate relief.

Under the unfair prejudice petition the court is given discretionary power to provide the aggrieved shareholders with a sufficient remedy. In that process, a shareholder is allowed to exit from the company by asking his shares to be bought at fair value. Furthermore, the buyout options not only the remedy that a court can offer to the aggrieved shareholder, as s. 996 gives the court a wide discretion to grant whatever relief it thinks appropriate. As a result, these sections considered to be the most critical sections that deal with the issues of shareholders rights and remedies in the Companies Act 2006. Thus the offered remedies under this way of protection are discussed in the following sub-section.

---

[483] A Reisberg, 'Shareholders' Remedies: In Search of Consistency of Principle of English Law' (2005) 16(5) European Business Law Review 1065, at 1077.
[484] See eg A Boyle, J Birds and Others, *Boyle & Birds Company Law* (6th edn, Jordans, Bristol 2007), at 700-701.
[485] D Sugarman, 'Reconceptualising Company Law: Reflections on the Law Commission's Consultation Paper on Shareholder Remedies: Part I' (1997) 18(8) Company Lawyer 226, at 239.

3.4.3 Remedies available under this jurisdiction

No major changes were produced by s. 996 of the Companies Act 2006 (which replaced s. 461 of the Companies Act 1985) in terms of the kinds of relief that are available to the petitioner who has been successful in petitioning the court alleging unfairly prejudicial conduct.[486] However, it should be borne in mind that the developed case law under s. 461 is directly applicable to the existing section. Firstly, although there is no mention in s. 996 to the possibility of interim relief for the petitioner, nevertheless, it seems that it is within the power of the court to grant such a relief; hence, a petitioner should ask for such relief to hold the ring through the period that the claim arrives to the trial.[487] In so doing the petitioner may ask the court to preserve his right of access to information or restore the status quo ante in respect of conduct of which the petition was based. However, as stated above it is within the power of the court to grant the interim relief or refuse it.[488]

At the final stage s. 996 (2) gives the court the discretionary power to grant the petitioner the appropriate relief it thinks fit. Under subsection (2) the courts may;

"regulate the conduct of the company's affairs in the future; require the company to refrain from doing or continuing an act complained of, or to do an act that the petitioner has complained it has omitted to do; authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct; require the company not to make any, or any specified, alterations in its articles without the leave of the court; provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly".[489]

---

[486] J Birds and others, *Annotated Companies Legislation* (3rd edn, Oxford University Press, Oxford 2013), at 980.
[487] In this regards it should be borne in mind that a petitioner who seeks for compensation to be paid to him personally and not to the company should bear in mind that he is not infringing the principle of reflective loss. See eg *Clark v Cutland* [2004] 1 WLR 783, *Re Chime Corporation Ltd* [2004] 3 HKLRD 922, *Gamlestaden Fastigheter AB v Baltic Partners Ltd* [2007] UKPC 26.
[488] J Birds and others, *Annotated Companies Legislation* (3rd edn, Oxford University Press, Oxford 2013), at 980.
[489] S. 996 (2) of the Companies Act, 2006, for more discussion on the possibility of bespoke remedies see Brigge J in *Sikorski v Sikorski* [2012] EWHC 1613 (Ch) para 75.

It should be noted that the above named remedies are just for example and it is not an exhaustive list, as the court is given the discretionary power to grant the petitioner the appropriate relief it thinks fit. Moreover, some of the above named remedies have not been used and some are less common and they were utilized in only exceptional cases. It seems from the above that the minority shareholder is allowed to commence a derivative action under s. 996, however as Hannigan argued it is less likely that an aggrieved shareholder who is able to obtain a direct personal remedy through s. 994 would ask the court for permission to commence a derivative action.[490] Therefore, this alternative remedy has not been used to any great extent as separate proceedings need to be commenced with pleadings, harsh procedural hurdles and costs. Under these circumstances if a shareholder claims that a wrong done to the company it is better for him to establish a derivative claim instead of starting two sets of proceedings (unfair prejudice petition and derivative action) to obtain such a relief.[491] The remedy of redirect the petition to initiate a derivative action in not practical remedy and has faced ruthless criticism, however, theoretically, it is within the discretion of the court to grant such remedy.

As the main goal of such remedy is to bring justice to the petitioner, it was stated in *Re Bird Precision Bellows Ltd*[492] that the court must assess the appropriateness of any particular remedy as at the date of hearing and not at the date of presentation of the petition and it may even take into account conduct which have happened between those dates. Therefore, the court is entitled to look at the reality and practicalities of the whole situation, past present and future. However, according to the Law Commission' s survey, which was based on unfair prejudice cases, the most common and practical remedy is the exit option,[493] where the court will issue an order by which the shares of the petitioner have to be purchased at fair value by the respondent or, in

[490] B Hannigan, *Company Law* (3rd edn, Oxford University Press, Oxford 2012).
[491] J Mukwiri, 'Using S 459 as An Instrument of Oppression' (2004) 25(9) Company Lawyer 282, at 283.
[492] [1986] Ch 658, see also *Grace v Biagioli* [2005] EWCA Civ 1222.
[493] Law Commission, *Shareholder Remedies: A Consultation Paper* (Law Com No CP 142, 1996) para 6.11.

some exceptional cases, by the company itself.[494] On the other hand, in some exceptional cases it might be unfair to force the shareholder to leave the company therefore, it is within the power of the court to ask the respondent to sell his shares to the petitioner where it appears to the court that is the most appropriate remedy.[495] In this regard, the court in *Thomas v Dawson*[496] granted the petitioner an option to acquire the defendant's single share in their quasi-partnership company.[497]

The remedy of buying out the petitioner's shares at fair value either by the other shareholders or by the company raises some important issues which are essential to obtain the required justice. For instance, the valuation of shares for s. 996 Companies Act 2006 casts down the issue of whether the purchase will be in accordance with the articles, taking into account that several case suggest that the right to sell one's shares under the articles is an alternative remedy when considering a just and equitable winding up petition under s.122 of the Insolvency Act 1986. Another significant matter is considered in the shares' valuation which is the fair value of the shares, as the shares in question have to be purchased at fair value. It is clear that the court is the body that determinates the fair value of the share in question taking into account that each case hinges very much upon its individual facts. The court will value the petitioner's shares either on a pro rata basis where value of assets divided by percentage of shares held (*Re Bird Precision Bellows*)[498] or at a discount basis (*Grace v Biagioli*)[499], and the difference between these two ways of share valuation may be very substantial.[500]

[494] *Grace v Biagioli* [2005] EWCA Civ 1222.
[495] *Re Bird Precision Bellows Ltd* [1984] Ch 419, at 429.
[496] [2015] EWCA Civ 706.
[497] See *Re Nuneaton Borough FC Ltd* [1991] BCC 4, *Re Brenjield Squash Racquets Club Ltd* [1996] 2 BCLC 184, *Oak Investment Partners XII, Limited Partnership v Boughtwood* [2009] 1 BCLC 453 upheld by the Court of Appeal at [2010] EWCA Civ 23.
[498] [1984] BCLC 195, Nourse J fixed the price of a 26 per cent shareholding on a pro rate basis without discount for the fact that the shareholding was a minority shareholding.
[499] [2006] BCLC 70, at 96-97.
[500] J Birds and others, *Annotated Companies Legislation* (3rd edn, Oxford University Press, Oxford 2013), at 980.

The unfettered discretion that is given to the court should be correctly exercised by the judges to fix a price to become fair in the all circumstances and in the exercise of its discretion it could take into account the merits of the case.[501] In so doing the court will generally apply the pro rata formula if the company was a 'quasi-partnership',[502] and will not discount the value of the shares on the ground that they are a minority shareholdings, even the market would apply such discount.[503] On the other hand, if the quasi-partnership element was not seen in the company and the petitioner was a normal investor in the company the court will ignore the pro rata basis and apply the discount.[504] Yet, it should be noted here that in some circumstances although the case of quasi-partnership is not existed, however, the surrounding facts and the principles of justice require that the valuation of the petitioner shares should be made on pro rate basis rather than applying the discount basis and vice versa.[505] In this regard, it was confirmed by Robin Hollington QC in *Re Blue Index Ltd* that in valuing a petitioner shareholder's shares the fundamental principle was that it would be prejudicial to treat a wronged petitioner as a willing seller and discount the price accordingly, it would substantially defeat the purpose of this

[501] See for example *Thomas v Dawson & Anor* [2015] EWCA Civ 706 where the petitioner appealed against the judge's grant of an option to acquire the defendant's single share in their quasi-partnership company for the sum of 55,000 in his claim for unfair prejudice. However, the court has dismissed the appeal on the ground that the judge has not departed from the broad scope of the statutory discretion afforded to him.

[502] See *CVC/Opportunity Equity Partners Ltd v Demarco Almeida* [2002] 2 BCLC 108 where the Privy Council gave some guidance to the quasi-partnership company, in this case it is noted that the characteristics of such companies will typically include (i) that there is a business association formed or continued on the basis of a personal relationship of mutual trust and confidence;(ii) that there is an understanding or agreement that all or some of the shareholders should participate in the management of the business; and(iii) that there restrictions on the transfer of shares so that a member cannot realise his stake if he excluded from the business, see also *Re Bird Precision Bellows Ltd* [1986] Ch 658; and compare *Fowler v Gruber* [2009] CSOH 36 where a company had ceased to be a quasi-partnership at relevant time.

[503] See *Re BC&G Care Homes Ltd: Crowley v Bessell* [2015] EWHC 1518 (Ch) where no minority discount was applied and the valuation date applied was before the claimant was excluded from management.

[504] See *Strahan v Wilcock* [2006] 2 BCLC 555, where a discount was applied as the company is not a quasi-partnership and there are no exceptional circumstances to require pro rate valuation, also *Re McCarthy Surfacing Ltd* [2009] BCC 464 where a quasi-partnership has ceased prior to the application therefore, the discount was applied.

[505] See *Re Sunrise Radio Ltd* [2009] EWHC 2893 (Ch).

remedy if the wrongdoer majority shareholders were routinely rewarded by a discount for a minority shareholding.[506]

The share valuation issue raises another critical question which is the time of valuation, in this regard, it is noted that much the latest case law on share buyouts is focused on the appropriate date of valuation,[507] for example, whether shares should be valuated as at prior to the conduct complained of or the time of the court order. The Court of Appeal in *Profinance Trust SA v Gladstone*[508] has provided a comprehensive view on the appropriate time of shares valuation, and it made clear principle by which the proper time of valuation is the date of sale, however if it appears to the court that there is more appropriate date to value the share the court has the power to do so. By way of example, if it was proved that the business of the company has been reconstructed or the petition has been on foot for long period and there has been a general collapse in the market, the court in such circumstances might choose another earlier date to make an appropriate valuation. In this context, it was stated in *Re OC (Transport) Services Ltd* that the court may order a valuation of shares on the date on which the unreasonable conduct occurred.[509]

In this situation where the respondent has offered an effective offer at fair value to buy the petitioner's share and the petitioner has unjustifiable refused that offer the court has the power to strike out that petition. It is noted that the offer is an effective offer if; it offers a fair value (in quasi-partnerships it has to be basis on pro rata without and discount), if the parties have not agreed on the value, the respondent should offer to submit to a valuation by an independent expert acting as expert and not as arbitrator, the offer should provide for both parties to have

[506] [2014] EWHC 2860 (Ch), at 26. This a view was further confirmed by Edward Bartley Jones QC in *Re Addbins Ltd* [2015] EWHC 3161 (Ch).
[507] See *Re Phoenix Contracts (Leicester*) Ltd [2010] EWHC 2375 (Ch), *Groly v Good* [2010] EWHC 1 (Ch), *Re Sctoitec Group Ltd* [2010] EWHC 1830 (Ch) and *DiGrade v D'Angelo (Re Abbington Hotel Ltd)* [2011] EWHC 635 (Ch).
[508] [2002] 1 BCLC 141, see also *Re Sunrise Radio Ltd* [2009] EWHC 2893 (Ch).
[509] [1984] BCLC 251.

equal rights to information about the company and to make submission to the expert, and in the case where the court has slowly responded to the petitioner's complaints , the court's claim should contain an offer to pay the costs incurred by the petitioner is pursuing the complaints.[510] However, it could be argued that in some circumstances even where the above conditions were present the respondent's offer will not be an effective offer.[511] For instance, the offer will not be effective where the petitioner does not want to leave the company and prefer to buy the respondent' share rather than selling his shares and being forced out from the company.[512] In this context, in *O'Neill v Philips* Lord Hoffmann has confirmed that if the petitioner was complaining that he was prevented from using the right of participating in the company's management and the respondent has offered the petitioner a rational offer, then the exclusion as such is not considered as unfair conduct and the responded has the right to ask for a striking out the petition.[513] Having said that the aim of such remedy is to bring justice, therefore parties are allowed to settle the unfair prejudice outside the court. However, such settlements do not always end litigation as one party might be unhappy with the value that determined by the expert, therefore he or she will go to court to get that valuation set aside. For example in *Begum v Hossain*[514] the valuation of the expert was set aside as the valuer had not followed his mandate in that he failed to consider relevant information given to him.[515] As a final point, although s. 996 of the Companies Act has not referred to the winding up remedy under such a petition however, more recently Hildyard J in *Apex Global Management Ltd v FI Call Ltd*[516] has confirmed the willingness of the court to have recourse to the winding up remedy on just and

[510] *O'Neill v Philips* [1999] 1 WLR 1092.
[511] *Isaacs v Belfield Furnishing Ltd* [2006] EWHC 183 (Ch).
[512] *Oak Investment Partners XII, Limited Partnership v Boughtwood* [2010] EWCA Civ 23.
[513] *O'Neill v Philips* [1999] 1 WLR 1092, 110, In the case of appointing an independent expert to make the valuation, the court should not place too many restrictions which curb the valuer from exercise his discretion properly see *Oak Investment Partners XII, Limited Partnership v Boughtwood* [2010] EWCA Civ 23.
[514] [2015] EHCA Civ 717.
[515] D Milman, 'Shareholder Law: Recent Developments in Practice' (2015) 378 Company Law Newsletter 1, at 4.
[516] [2015] EWHC 3269 (Ch).

equitable grounds in an appropriate set of circumstances.[517] In short, the unfair prejudice remedy has come to be a 'way out' or 'exit' remedy and ensures that the aggrieved shareholders have the right to seek a buyout order to leave the company with proper compensation.[518]

3.4.4 Conclusion

A remedy under s. 210 of the Companies Act was hard to attain, as it was only permitted in a very limited situations, therefore, many demands were made for removing such artificial limitations that prevented shareholders from obtaining appropriate relief.[519] In the late 1980s and early 1990s a wider interpretation was given to the term of unfairly prejudicial conduct which not only meant rights enjoyed strictly qua member in the narrow sense of a term but also the legitimate expectations of a shareholder to participate in management. This wider view made the number of cases under s. 459 of the Companies Act 1985 (s. 994 Companies Act 2006) grow exponentially, however, the House of Lords in *O'Neill v Phillips* narrowed down this concept again and it was decided that the legitimate expectations is concept which should be strictly interpreted and in accordance with traditional equitable principle.[520] It has been seen that no substantial change was made in this issue by s. 994 of the Companies Act 2006 except some minor stylistic modifications. The Companies Act 2006 like the previous Companies Acts has not provided a clear explanation of the concepts of unfairness and prejudice therefore, the uncertainties that faced the related parties and courts under s. 459 of the 1985 Companies Act remain under s. 994.[521] It is argued that a clear guidance and criteria should have been adopted which would remove the deficiency and uncertainties and would develop the law in

[517] D Milman, 'Shareholder Law: Recent Developments in Practice' (2015) 378 Company Law Newsletter 1, at 4.
[518] The judiciary's reliance on exit option in s. 994 has not escaped criticisms as the company and other shareholder will not be protected from the harm of the wrongdoing majority, see eg R Redmond-Cooper, 'Management Deficiencies and Judicial Intervention: A Comparative Analysis' (1988) 9(8) Company Lawyer 169.
[519] See *Re A Company (No 004475 of 1982)* [1983] Ch 178.
[520] 1999] 1 WLR 1092.
[521] R Goddard, 'The Unfair Prejudice Remedy' (2008) 12(1) Edinburgh Law Review 94.

this area. On the other hand, with the broad scope of the unfair prejudice remedy and the wide discretion given to the courts to grant the remedy that they think fit such as; regulating the affairs of the company, or require the company to refrain from action, or ordering an injunction or derivative action, or most significantly providing buyout order, and with the problems associated with the derivative action the unfair prejudice remedy continues to be the most popular and powerful means that minority shareholders can use to obtain their relief under English laws. The unfair prejudice remedy is considered to be an intermediate remedy as it does not involve the winding up of the company in contrast with the winding up remedy under s. 122(1)(g) of the Insolvency Act 1986 where the live of the company will be ended by such extreme remedy.

3.5 Just and Equitable winding up remedy and its relationship with the unfair prejudice remedy

In addition to above mentioned remedies, minority shareholder under English law has a right to go to the court to request an order to wind up the company if it is just and equitable that the company be wound up (s. 122(1)(g) of the Insolvency Act 1986).[522] Under this remedy dissatisfied shareholder can seek an order to have the company wound up if it is proved that the so-called substratum of its business no longer existed.[523] However, it is within the discretion of the court to examine whether it is just and equitable to have the company be wound up or refused such request. The House of Lords in *Ebrahimi v Westbourne Galleries*[524] stated the company was based on personal relationship (Quasi Partnership), therefore preventing Mr Ebrahimi from using his legitimate expectations to participate in the management of the

[522] This right was derived from the common law of partnership, see for example H Rajak, *Sourcebook of Company Law* (2nd edn, Jordans, Bristol 1995), at 534.
[523] It should be noted that there is no need to such an order if the dissatisfied shareholders are the majority shareholder as s. 84 of the Insolvency Act 1986 grants them a right to pass a special resolution for voluntary winding up.
[524] [1973] AC 360.

company makes the winding up of the company is just and equitable. More recently in *Harding v Edwards*[525] as there was no other solution Rose J has granted a petition to wind up the company on the ground that it is just and equitable to do so.[526] On the other hand, in *Re Quiet Moments Ltd*[527] the court refused to grant a winding up remedy on the just and equitable ground as it could not be said that the first respondent was to blame for the breakdown of trust and confidence within the company.[528]

As such a remedy is drastic remedy which breaks up the live of the company, s. 125 (2) of the Insolvency Act provided that if the court of the opinion that the petitioners have another remedy to pursue or the petitioner was acting inappropriately in seeking such remedy the petition should be refused. What is more, in practice, it is not easy for the petitioner to convince the court that he or she was behaving reasonably to have the company wound up instead of seeking any other remedy.[529] In that process, the petitioner has to prove that there is no other remedy available and it is just and equitable to wind up this entity, whereas granting a remedy under s. 994 is dependent on whether the petitioner has succeeded to show that the unfair prejudice conduct was established or not.[530] Under s. 210 of the Companies Act 1948 in order for the petitioner to obtain relief against oppression he had to establish that it would have been just and equitable to wind up the company. However, the above condition is no longer required as s. 75 of the Companies Act 1980 removed that requirement. Consequently, as discussed above, a petitioner shareholder who seeks a relief under s. 994 is not required to show that it is just and equitable to wind up the company. Likewise, winding up the company under s. 122 (1) (g) for just and equitable reasons is permissible even if the shareholder failed to satisfy the unfair

[525] [2014] EWHC 247 (Ch).
[526] Two other grounds for the just and equitable winding up remedy which are: Oppression and Deadlock see *Lock v John Blackwood* [1924] AC 783, *Re Yenidie Tobacco Co Ltd* [1935] All ER Rep 803.
[527] [2013] EWHC 3806 (Ch).
[528] D Milman, 'Shareholder Law: Recent Developments in Practice' (2015) 378 Company Law Newsletter 1, at 5.
[529] A Boyle and J Birds and Others, *Boyle & Birds' Company Law* (9th edn Jordans, Bristol 2014).
[530] J Birds and others, *Annotated Companies Legislation* (3rd edn, Oxford University Press, Oxford 2013), at 977.

prejudice test.[531] In this regard, the court should bear in mind that the winding up remedy is a drastic remedy which ends the company's existence. Therefore, such remedy should be refused in the circumstances where it appears to the court that there is no a deadlock in the company's affairs and the petitioner shareholder is acting unreasonably in seeking to have the company wound up instead of asking for other less extreme remedy either under s. 994 or using the derivative claim tool.[532] To avoid the overlap between the unfair prejudice remedy and the winding up remedy, which has created some uncertainties, the Law Commission in 1997 suggested that the winding up remedy should be added to the s. 459 of the CA 1985 (s. 994 CA 2006).[533] However, this proposal was refused on the ground that such reform would make the winding up remedy an easy option that damaging the company's business and reputation, furthermore opening such door for the shareholder would have adverse effect of the business activities as a whole.[534] It seems that there is a reluctance to apply this extreme remedy as the court prefers to order a minority shareholder to be bought out, rather than a company being wound up.

3.6 Conclusion

This chapter was allocated to assess the protection of minority shareholder under English law. It seems obvious that the minority shareholders were facing many difficulties in the common law rule (*Foss v Harbottle* and its exceptions) as such rules were so complicated. Therefore there were high demands which requested the reform of these tools of protection. A new statutory derivative action was introduced in the Companies Act 2006 under which the court is allowed to accept the claim in broad scope of misconduct and not only the fraud, moreover,

---

[531] J Birds and others, *Annotated Companies Legislation* (3rd edn, Oxford University Press, Oxford 2013), at 977.
[532] S. 125 of the Insolvency Act, 1986. see also *Shah v Shah* [2010] EWHC 313 (Ch), for more discussion in the interface between the unfair prejudice jurisdiction and the winding-up jurisdiction see the Court of Appeal's decision in *Hawkes v Cuddy* (No 2) [2009] EWCA Civ 291.
[533] Law Commission, *Shareholder Remedies* (Law Com No 246, 1997) paras 4.24-4.49.
[534] DTI, *Shareholder Remedies: A Consultation Document* (DTI URN 98/994 Nov 1998) paras 4.26-4.27.

under this Act it is within the power of the court to grant permission to proceed an action after the filtering system to ensure the desirability of the claim. On the other hand, it is also notably that the new statutory derivative action is not the most preferred action for the minority shareholder as its long procedures, costs and time made the unfair prejudice remedy prevail over the derivative action. Furthermore, it was seen that the common law derivative claim was not entirely abolished by the Companies Act 2006 as recent decisions affirmed that Part 11 of the Companies Act 2006 did not apply to double derivative actions. Therefore, the common law rules of derivative actions continued to apply to the double derivative claims. To avoid such a kind of uncertainty and to stop the messiness of the common law derivative claim it was suggested that Parliament should take the other common law countries' position where the scope of the statutory derivative action extended to include the double derivative actions.

In terms of the unfair prejudice remedy, although the *O'Neill v Phillips* has restricted the scope of such a remedy, however it remains the most favoured remedy with its easier requirements to meet and with its effectiveness to remedy a broad scope of wrongs. The courts are given extensive discretion in determining the unfair prejudice conduct and due to the broad interpretation was granted to it to contain not only the unlawful conduct but also the lawful inequitable conduct, therefore, the unfair prejudice remedy has developed in English law and become the most popular remedy for minority shareholder, in particular for those in quasi-partnership companies. That is to say, due to the broad scope of this remedy and due to the complex procedures in derivative action and the extremist result of winding-up remedy the unfair prejudice remedy is the most practical remedy that shareholder can pursue to obtain a relief. Having said that the main goal of this work is to examine to what extent the Libyan regime of minority shareholder protection provides an equal level of protection to that found in the other selected regimes (English and Moroccan Laws), therefore, following an examination of the main tools of protection under English laws, it is the job of the next chapter to study the position under Moroccan laws to consider the protection tools that are available under such regime. The examination of these systems would grant the researcher a chance to extrapolate lessons that can be adopted by the Libyan law makers in any upcoming reforms.

Chapter 4 Protection of minority shareholders in Morocco

4.1 Introduction

Libya and Morocco are both North African Countries and their legal systems are considered as Civil Law Systems as their laws have been influenced *inter alia* by Roman law through the modern French Civil Code (Code Napoleon). Moreover, since the above countries are Islamic countries and Islam is the official religion of the nations, their legal systems have been influenced by the principles of Islamic law. In Morocco it was noticeable from the early 1990s that the area of company law has been given a great attention by the Moroccan legislature therefore, many Acts that govern the business activities in Morocco were reformed.[535] Such Acts were introduced to encourage domestic and foreign investors to set up their businesses in Morocco. Furthermore it was claimed that the focus has mainly been on creating a business environment where the interest of all shareholders is respected and where all shareholders inside those companies are treated equally.[536] In so doing, the latest Companies Acts have devoted a remarkable level of attention to the interests of minority shareholders and tools that protect their interests.[537] For the above reasons, the Moroccan Law was chosen as one of the comparator jurisdictions to examine the level of protection that is provided under this jurisdiction and to provoke thought about what can be learned from Morocco's experience by the Libyan legislature.

However, for the purpose of illustration, and before proceeding any further, it would be useful to have a brief introduction regarding Companies laws in Morocco and presents types of

---

[535] See for example, The Joint Stock Companies Act, (JSC Act) which was issued on 2 June 1996 (Act No 17.95). Act No 5.96 which was issued on 7 January 1997 which relates to the General Partnership, Limited Partnership, Limited Partnership by Shares, with Limited Liability Companies, and the Participation in Association.

[536] A Fahad, 'The Protection of Minority Shareholders' Rights in the Joint Stock Company' (2012) 24 October http://www.marocdroit.com accessed 11 March 2014.

[537] Ibid.

Companies and partnerships that are allowed to undertake business activities in that jurisdiction.

4.2 General background

As Morocco was under The French Protectorate,[538] the French Companies Act that was issued on 24 July1876 (and its adjustments in 1893, 1903, 1913 and 1943) was applied in Morocco by the Act issued on 11 August 1922. Under ss. 30-51 and 52 of the above Act the types of companies and partnerships that were allowed to undertake business activities in Morocco are; General Partnership *(Sharikat Tadhamun)*, Limited Partnership *(Sharikat Tawsiyah Baseeth),* Participation in Association or Joint venture *(Sarikat Almahasa),* Joint Stock Company *(Sharikat al Mosahamh)* and Limited Partnership by Shares *(Sharikat Tawsiyah Belashum*).[539] In addition to the above kinds of Companies and Partnerships, the Moroccan legislature adopted another kind of company in September 1926 which is the Limited Liability Company (*Sharikat that Massoliyah Mahdoda)* which also was governed by the French Act that was issued on 7 of March 1925.[540]

The above Acts that governed business activities in Morocco for long period of time (1922-1996) were abolished when new Acts were introduced in 1996 and 1997. These Acts are; the Joint Stock Companies Act, (JSC Act 1996) which was issued on 2 June 1996 (Act No 17.95), and Act No 5.96 which was issued on 7 January 1997 which relates to the General Partnership, Limited Partnership, Limited Partnership by Shares, with Limited Liability Companies, and

[538] The French Protectorate in Morocco was established by the Treaty of Fez which existed from 1912, when a protectorate was formally established, until Moroccan independence (1956), and consisted of the area of Morocco between the Corridor of Taza and the Draa River.
[539] It should be borne in mind that prior to that time Morocco, as Islamic country knew all kind of Islamic Commercial companies such as Sharikat Almozara, Sharikat Almodarba, Sharikat Alkrad and so on. For more details, see A Alsbaii, *Companies and Economic Interest Groups (Deep Study in the New Companies Acts No 5.96 and 17.95 and the Adjustments Made by 13.97 Act that Relates to Economic Benefit Groups* (2nd edn, Part 1, Dar Nashar Almarefa Rabat 2009), at 12. See also F Zakani, *Joint Stock Companies in Sharia and law* (1st edn, Dar Alnefas, Amman 2012).
[540] As will be discussed in the Libyan chapter the Libyan Business Activities Act 2010 has the same kinds of these Companies and Partnerships.

the Participation in Association. The JSC Act was amended on May 2008 by the Act No 20.05,[541] also the Act No 5.96 amended by the Act No 21.05 on 14 February 2006. As a result, these two Acts and their amendments govern companies and partnerships in Morocco. However, it should be borne in mind that the Act of Contracts and Obligations 1913[542] is applied to such companies and partnerships where the provisions of the above Acts are not applicable.[543]

Generally speaking, companies in Morocco are classified into three main types; the first type are the Civil Companies, in this regard, a company is considered as a civil company if its purpose is to pursue non trade activities, furthermore, such companies should not take one of the six provided forms of trading companies. Second; the joint venture (association in participation),which is classified as trading company when it makes trading activities, while it is considered as a civil company if its activities are none trade activities.[544] Thirdly, the trading companies, which are the five provided forms that mentioned above, and they are considered as trading companies even if their purpose is to make non-trade activities. These forms are the General Partnership (ss. 3-18 Act No 5.96), Limited Partnership (ss. 19-30 Act No 5.96), Limited Partnership by Shares (ss. 31-43 Act No 5.96), Limited Liability Company (ss. 44 -87 Act No 5.96) and the Joint Stock Companies (ss. 1- 454 of Act No 17.95 which was amended by the Act No 20.05 in 2008).[545]

Having said that, the law determines forms of commercial companies; therefore, any commercial company should take one of the above named corporate or partnership forms. In

[541] See, *Law of Commercial Companies* (1st edn, Dar Alenmaa Altakafi Rabat 2010).
[542] The Contracts and Obligations Act, 1913.
[543]See A Alsbaii, *Companies and Economic Interest Groups (Deep Study in the New Companies Acts No 5.96 and 17.95 and the Adjustments Made by 13.97 Act that Relates to Economic Benefit Groups* (2nd edn, Part 1, Dar Nashar Almarefa, Rabat 2009), at 36.
[544] Act No 5.96, ss. (2) (89).
[545] See A Alsbaii, *Companies and Economic Interest Groups (Deep Study in the New Companies Acts No 5.96 and 17.95 and the Adjustments Made by 13.97 Act that Relates to Economic Benefit Groups* (2nd edn, Part 2, Dar Nashar Almarefa Rabat 2009), at 288-289.

this vein, it should be borne in mind that the Moroccan legislature does not differentiate between partnerships and corporations, therefore, *all commercial associations that are mentioned in the Above Acts are called companies and all these forms of companies and partnerships enjoy a legal personality except the joint venture*.[546]

It is clear that the most important species out of these commercial companies and partnerships is the Joint Stock Company, since it is the purest type of capitalized company that stands at the other end of scale from the partnership. The Joint Stock Company is defined as a company whose capital is divided into shares and the liability of its shareholders is limited to the par value of their shares.[547] It is a legal entity (juristic person) created under statutory authority and has the powers, limitations, and characteristics provided for in the statutes. It is entirely separate from its shareholders, directors and employees. The liability of each shareholder is limited to the value of the shares to which he has subscribed. Consequently, shareholders are not liable for the debts or obligations of the company beyond the said value of their share. This separate existence is the basis of the most important attraction of the corporate form for joint investment. Therefore, the Moroccan legislature gives it a separate Act and more than four hundred sections.

The Joint Stock Company in Morocco as in many Civil Law countries, may be either a public company (listed company) which offers its shares and debt securities to the public through public subscription,[548] or a private company (closed Joint Stock Company, non-listed company), where its shares are entirely subscribed by its promoters and cannot offer its shares for public subscriptions. Since this study is examining the protection of minority shareholder

[546] S. 7 of the JSC Act 1996 and s. 2 of the Act No 5.96.
[547] This concept is very common and well known in most current legal systems. For example, s. 2 of the Egyptian Act No 159/1981 defines a joint stock company as a:"*Company whose capital is divided into shares of equal values; such shares being transferable in the manner provided for in the law*".
[548] Ss. 6. 9. 29. 140-158 of the JSC Act (No 17.95) with considerations to its amendment by the Act No 20.05 in 2008.

in such kind of firms, this chapter will examine the protection of minority shareholders in the Closed Joint Stock Company in Morocco in order to consider the level of protection under such a jurisdiction in order to extrapolate lessons that might enhance the Libyan level of minority shareholder protection.

Having illustrated that such kind of companies are controlled by the majority shareholders via the general meeting and the board of directors, therefore, the Moroccan legislature in the JSC Act 1996 tried to adopt an effective system that maintain good relationships among the shareholders and protect the interests of the minority shareholders. Such a system and protection aim to create a business environment that allows local and foreign investors pursue their role within the company. In this regard, minority shareholders are given legal rights and tools that enable them to impose effective supervision over the controllers of the company. Such mechanisms would create a necessary balance that reduces the potential for abusive misconduct by majority shareholders and offer an appropriate remedy to minority shareholders.

The protection of minority shareholders under the JSC Act 1996 takes many different forms, such as strengthening the rights of minority shareholders, and grants them some mechanisms to boost the supervision tools. For instance, the statutory auditors have been given sufficient power to make certain that the board of directors and the majority shareholders do not further their own interest and to ensure that all shareholders are treated equally.[549] Additionally, in terms of corporate governance and management, the above Act adopts a new structure of management where there are two types of Joint Stock Companies; first the joint stock company which is controlled by one board of directors (ss. 39 to 76). Second, the joint stock company that is managed by two different boards (ss. 77- 106 based on the German model which was

[549] S. 166 of the JSC Act 1996. See A Alsbaii, *Companies and Economic Interest Groups (Deep Study in the New Companies Acts No 5.96 and 17.95 and the Adjustments Made by 13.97 Act that Relates to Economic Benefit Groups* (2nd edn, Part 3, Dar Nashar Almarefa Rabat 2012), at 48.

adopted in France[550] and consequently in Morocco). In the second type there are two boards, the executive board formed by natural persons (maximum of 5 or 7 if the company is listed) which principally in charge of the management of the company, and the Supervisory Board[551] (minimum 3 persons) which is principally in charge of the supervision and control of the executive board's management.[552] The aim of having such organ is to impose some sort of supervision over the board of directors, however as the members of the supervisory board are usually appointed and isolated by the general meeting[553] they fall under the control of the majority shareholders. Moreover, Rabia Gait claimed that this innovation has not worked well in Morocco as most of the joint stock companies are owned by small numbers of shareholders, therefore the members of the supervisory board are themselves the members of the board of directors.[554] In other words, as long as the majority shareholders control the general meeting they still have the power to take decisions that might damage the interests of other shareholders and the company as a whole.[555] Consequently, it becomes necessary for a minority shareholder to find a way to invoke judicial authority to ensure that the interest of minority shareholders is considered and to obtain a remedy in the case of misuse.[556] That is to say, although strengthening minority shareholders' rights and creating effective supervision tools inside the company enhances the level of protection to the minority shareholders, however these

[550] In France, since 1966 companies are allowed to choose between a one-tier or a two-tier board structure which consists of a management board that manages the firm's operations, plus a separate supervisory board that excludes managers and is charged with overseeing the firm's activities, including the appointment and monitoring of corporate managers. See F Belot and others, 'Freedom of Choice between Unitary and Two-Tier Boards: An Empirical Analysis' (2014) 112 (3) Journal of Financial Economics 364, at 364.
[551] S. 84 of the JSC Act 1996 provides that each member of this board has to be a shareholder in the company.
[552] S. 1 of the JSC Act provides that the minimum numbers of shareholders are five. Also s. 6 of the same Act provides that; the minimum capital stock is three Million Moroccan Dirham for listed companies and three hundred thousand for non-listed companies.
[553] See s. 80 of the JSC Act, 1996. For more details see R Gait, 'Shareholder's Position in the Joint Stock Company' (Ph.D thesis, Mohammed V University, Rabat 2004), at 181-182.
[554] R Gait, 'Shareholder's Position in the Joint Stock Company' (Ph.D thesis, Mohammed V University, Rabat 2004), at 190.
[555] A Admolod, 'the Protection of Minority Shareholders' Right in the Joint Stock Company' (2013) 19 November http://www.marocdroit.com accessed 11 March 2014.
[556] T Albakti, 'The Role of Judicial Authority to Protect the Minority Shareholders in the Joint Stock Company' (2013) 110 The Moroccan Journal of Local Management and Development 139, at 139.

preventative tools are not sufficient as there are other kinds of misconduct which cannot be expected by the minority shareholders. Furthermore, some kinds of disagreements among the shareholders reach a deadlock which makes the winding up of that company necessary.[557] Therefore, remedial mechanisms have to be adopted either by granting the minority shareholders the appropriate relief or by liquidating the subject company. In this regard, this chapter will consider the protection tools that are offered to the minority shareholders in Morocco in order to propose a reform in the Libyan law of minority shareholder protection. It is divided into two main sections; the first section focuses upon the preventative mechanisms by which specific rights and supervision tools are given to serve the interests of minority shareholders and limit the possibility of misuse by the majority shareholders. The second section deals with the remedial approach when actions are proceeded with by the minority shareholder to stop the abusive conducts, or to obtain an appropriate relief.[558] This section examines to what extent the rules governing the remedial approach are able to offer sufficient relief to the aggrieved minority shareholders. Such a discussion will be concluded by a brief overview which represents similarities and differences between the Moroccan and English systems of minority shareholders protection.

4.3 The protection of minority shareholder via specific rights and supervision tools (the preventative mechanism)

The Moroccan legislature, as with other legislatures, provides the minority shareholders with some rights and tools that enable them to exercise some sort of supervision over the board of

[557] A Gomirah, *The Abusive Conduct of Shareholders in the Joint Stock Company* (1st edn, Matbat Alomnia, Rabat 2011), at 110.
[558] Some of the Moroccan scholars divide the protection of minority shareholders into a statutory protection (as we call it a preventative mechanism) and a judiciary protection (which we call a remedial route) the reason behind adopting such a division, it is believed that both types of protections are statutory protection as both came from the statute and it is believed that this division is more sensible.

directors, the general meetings and the statutory auditors.[559] The aim of giving such rights and supervision tools is to decrease the risk of expected abusive conduct instead of a remedy that regulates conduct later on. In addition to that, these ex ante legal tools and mechanisms would allow the minority shareholders to participate in the company's day to day management.[560] This sort of protection applies through specific rights that are granted to each shareholder, so that he or she is able to monitor the activity of the company. However, as shareholders do not always have the time and experience to make an effective supervision, it was necessary to have other organs such as the statutory auditors to do such a job. Furthermore, the JSC Act 1996 has created a new form of supervision where a shareholder is allowed to ask the court to appoint a **judicial expert** to consider one or some issues that may affect the interests of such a shareholder. To examine the preventative approach under Moroccan law this section is divided into two subsections; the first examines how some specific rights strengthen the position of the minority shareholders inside the company, while the second discusses the effectual tools that control the majority power within the company.

4.3.1 Strengthening the position of minority shareholder by enhancing their rights

To increase the level of protection the Moroccan Legislature has provided the minority with some rights such as having enough information regarding the company's decision and their right to attend and call the general meetings.

4.3.1.1 Shareholder's right to obtain information

First and foremost, to ensure that a shareholder participates in the company's decisions he or she has right to attend the general meetings of that company, therefore, s.122 of the JSC Act

---

[559]A Fahad, 'The Protection of Minority Shareholders' Rights in the Joint Stock Company' (2012) 24 October http://www.marocdroit.com accessed 12 March 2014.
[560] A Hamdawi, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013), at 225.

1996 asks the controllers of the company to inform shareholders for the next general meeting in at least fifteen days before that meeting. Furthermore, s. 125 provides that; it is within the discretion of the court to render void a general meeting that was called without such processes, unless all the shareholders have attended that meeting.[561] In this regard, the Court of Appeal in Paris[562] has set aside a general meeting that was called without inviting the claimant shareholder. In its judgment the court considered that the shareholder's right to attend and participate in the company's decision was breached therefore that meeting was void.[563] However, it is not enough to give a shareholder a right to be informed or to attend the general meeting without having sufficient information regarding the agendas of that meeting. Thus, a shareholder should have a right to see the relevant documents on a timely and regular basis, by which means he or she would be able to participate in the company's management.

In that process, ss. 140 and 141 of the JSC Act provide that it is a right of each shareholder to have all the required information either from the day of calling the meeting or at least fifteen days before the next scheduled meeting. Section 141 lists the information that needs to be obtained by each shareholder such as; the agenda of the next meeting and the reasons for having such agenda, the financial statements, the members of board of directors and the supervisory board and the candidate shareholders to the board, the reports of the statutory auditors, the supervisory board and so on.[564] Determining the agendas of the general meeting prevents the controllers of the company from adding or dropping out any new points in that meeting. If the controllers of the company are allowed to discuss new agenda points some abusive decisions might be taken with no consideration to the interests of other absence shareholders. In the

[561] A Hamdawi, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013), at 238.
[562] Having seen in the introduction of this chapter that French company law is influential in Morocco.
[563] Paris 26/ March 1986 cited in A Hamdawi, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013), at 241.
[564] See ss. 142-142 of the JSC Act, 1996 and its amendments in 2008.

private joint stock company this obligation is on the organ who called the meeting while in the public joint stock company it is compulsory for the controllers of the company in thirty days before the called general meeting to publish in the *Official Gazette* a summary of the statutory auditor's report and all the required information.

In addition to the shareholders' right to have information before the general meetings, s. 146 of the JSC Act 1996 grants each shareholder a right to have all the information that is listed in s.141 at any time. Such right allows each shareholder to have all information that related to the last three financial years in addition to the information that relates to the general meeting of the past year. Moreover, s. 147 allows a shareholder to take a copy of those documents as he might need to consult a specialized person regarding one or some issues, also s. 157 grants a shareholder a right to delegate a proxy to practice the right that is given by ss. 141-145-146. If a shareholder was prevented from such information either totally or partially, s. 148 grants that shareholder a right to petition the Presiding judge of the Commercial Court to issue an order that obligates the company to give the petitioner shareholder all the required information.[565] With such an order, the court issues a daily fine for the delay in granting the shareholder the listed information.[566] Moreover, s. 392 of the JSC Act 1996 imposed a fine on the controllers of the company from 8000 to 40000 Moroccan Dirham (equivalent to 540 to 2704 GBP) if they do not comply with the above sections.

However, it should be noted here that the petition in such circumstances is conditioned on proving that the petitioner shareholder has tried to get that information from the subject company, nevertheless he or she failed to obtain that information. In this regard, the President of the Commercial Court of Rabat stated that as there was no evidence which confirmed that

[565] S Belmris, 'The Protection of Minority Shareholders' Rights in Joint Stock Companies' (unpublished dissertation, High Judicial Institute, Rabat 2011), at 28.
[566] S. 148 of the JSC Act, 1996.

the petitioner and his consultant have tried to obtain that information, therefore this petition had to be refused.[567]

It seems that the aim of the above sections is to protect the minority shareholders, as the majority shareholders are usually the controllers of the company (or in a good relationship with those controllers), therefore, they are able to obtain that information at any time. Furthermore, no specific percentage is required therefore each shareholder can petition the court for the above reason. The right to obtain information is a public policy right, thus any previous agreement that denies the shareholder's right to have that information is deemed a void agreement.

4.3.1.2 Shareholder's right to call the general meetings or to include specific items on the agenda

The general meeting is the organ that makes the strategy of the company and that makes most of decisions to implement such strategies. Such a meeting is usually called by an invitation from the board of directors or the supervisory board. Yet, to allow a shareholder to participate in the company's decisions he or she has to be granted a right to attend and call the general meeting. In these circumstances, if neither the board of directors nor the supervisory board have invited the general meeting, s. 116 of JSC Act enables a shareholder or groups of shareholders who hold at least 10% of the shares or lees than this percentage in the case of urgency to go to the court to appoint a judicial proxy to invite the general meeting to be convened.[568] Prior to the enactment of the JSC Act 1996, the Commercial Court of Agadir has

[567] See the Commercial Court of Rabat, an urgent case No 278, file No 250/9/2011, issued on 11/04/2011, (unpublished), see also the same court in the urgent case No 151, file No 126/09/2010 issued on 22/02/2010, cited in S Belmris, 'The Protection of Minority Shareholders' Rights in Joint Stock Companies' (unpublished dissertation, High Judicial Institute, Rabat 2011), at 28, see also T Albakti, 'The role of judicial authority to protect the minority shareholders in the Joint Stock Company' (2013) 110 The Moroccan Journal of Local Management and Development 139, at 148.
[568] S Belmris, 'The Protection of Minority Shareholders' Rights in Joint Stock Companies' (unpublished dissertation, High Judicial Institute, Rabat 2011), at 13.

appointed a judicial proxy according to a minority shareholder's request who asked the general meeting to take place and listed his required points on its agenda.[569] In this case, it was clear from the company's documents that the company had not been invited to hold a general meeting for more than one year; therefore, the court decided that it is the right for those shareholders to petition the court to protect their rights.[570]

After 1996, under s.116 of the JSC Act a shareholder is allowed to petition the Presiding judge of the Commercial Court as judge sitting in chambers to deal with matters of urgency to appoint a **judicial proxy** who invites the general meetings to take place. To apply this section the court has to ascertain that the board of directors and the supervisory boards were not willing to invite the general meeting to such an event and the number of claimant shareholders forms at least 10 percent of the company's capital unless it is proved that it is an urgent case.[571] In this context, the Commercial Court of Appeal in Fez upheld the decision of the Commercial Court of Tangier, [572] when it had appointed a judicial proxy to invite the general meeting to take place. The Court of Appeal justified its decision by saying that s. 116 of the JSC Act provided that it is a right for a shareholder to petition the court to appoint a proxy who will invite the general meeting in the case where neither the board of directors nor the supervisory board have invited the general meeting to take place.[573] Section 116 of the JSC Act has not escaped criticism as it is not easy to muster 10% percent of shareholders practically in the company with large number of shareholders, although this figure is not applied in the case of urgency, however it is also

[569] The Commercial Court of Agadir, case No 38/98 issued on 17/09/1998, (2004) (1) Journal of Commercial Courts 113, at 115.
[570] A Fahad, 'The Protection of Minority Shareholders' Rights in the Joint Stock Company' (2012) 24 October http://www.marocdroit.com accessed 12 March 2014.
[571] See the decision of the Commercial Court of Casablanca, case No 89/449, issued on 18/08/1998 (2000) 82 Journal of Moroccan Courts 209, at 213.
[572] The commercial court of Tangier, an urgent case No 161/1/2006, issued on 28/06/2006 http://adala.justice.gov.ma/AR/Jurisprudence/JPC_fes_2008.aspx accessed 24 March 2014.
[573] The Commercial Court of Appeal in Fez, file No 716/2008, issued on 16/07/2008, http://adala.justice.gov.ma/AR/Jurisprudence/JPC_fes_2008.aspx accesses 21 March 2014.

not easy to prove that the case is an urgent case.[574] In Egypt, s. 61 of the Egyptian Companies 1981[575] has adopted a different system, as it is the job of the president of the board of directors to call the general meeting, and the statutory auditor and shareholders who hold at least 5% percent of the capital are allowed to ask the board of directors to invite the general meeting, yet their request has to be based upon serious reasons, and it is within the power of that board to accept their request or not. It seems that that board of directors is not the right organ to examine the request of a shareholder to have a general meeting as in most cases such a request would be rejected by the board; therefore, the Moroccan position which allows the judicial authority to interfere is recommended.

The question that arises here is whether such a right allows that shareholder to ask the court to cancel or at least delay the organized general meeting. The above provision does not provide such a right, yet the Moroccan courts have adopted a principle by which the judge of the Commercial Court as an urgent judge is allowed to delay the general meeting wherever it seems that there are justifiable reasons.[576] Therefore, the Commercial Court of Casablanca has issued an order to stop a general meeting when it was found that such a meeting would have negative effects on the claimant shareholders. In this case, the minority shareholders petitioned the Commercial Court of Appeal of Casablanca which upheld the first instance decision to postpone the exceptional general meeting that aimed to merge the Moroccan Banks of Africa and East with the National Bank of Economic Development. The Commercial Court of Casablanca had listened to the minority shareholders' petition and stopped the exceptional

[574] See for example; Z Abujana, 'Some Aspects of Minority Shareholders Protection in Morocco' (2007) 13 October Moroccan Journal of Business Law 121, at 126.
[575] Act No 159, 1981.
[576] The Commercial Court of Appeal in Casablanca, decision No 1630, file No 83/1113, issued on 13/12/1983, in this case the court grounded its judgment on s. 149 of the Civil Procedural Law which allows the president of the Primary Court to work as an urgent judge in these circumstances, cited in A Hamdawi, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013), at 271. See also H Zoair, 'Protection of Minority Shareholder by the Judicial Authority' (unpublished dissertation, High Judicial Institute, Rabat 2009), at 35.

general meeting until the company complied with legal procedures that were provided in ss. 232-233.[577] Furthermore, in the above case, the respondent appealed the first instance decision on the ground that the petitioner shareholders did not hold the required percentage to make such claim. However, the Court of Appeal rejected the appeal on the ground that s. 116 of JSC Act and s. 21 of the Commercial Court Act allows the courts to interfere in the case of urgency without the availability of such percentage.[578]

To enhance the role of the minority shareholders inside the company it is not sufficient to grant them a right to call the general meeting rather than giving them a chance to include their suggestions on the agenda of such a meeting. Therefore, s. 117 of the JSC Act gives a shareholder or group of shareholders who hold at least 5% percent of the capital (or 2% if the company's capital is five Millions Dirham) to ask for the listing some specific items on the agenda. The importance of this section is that it allows the minority shareholder to recommend some persons to hold positions in the board of the directors; consequently they would have some representatives inside that board.[579]

Additionally, s.118 of the JSC Act prevents general meetings from discussing any point unless it was already added to that agenda. This prevention grants the minority shareholder guarantee that there will not be new points in the coming general meetings.[580] In this context, the Commercial Court of Agadir has removed some items from the agenda of the next general meeting on the ground that such points are being under consideration by the court of first

[577] The Commercial Court of Appeal in Casablanca, file No 4/99/2535, issued on 04/01/2000 http://adala.justice.gov.ma/AR/Jurisprudence/JPC_fes_2008.aspx accessed 21 March 2014.
[578] The Commercial Court Act No1.97.65, issued on 12/02/1997.
[579] A Hamdawi, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013), at 289.
[580]A Fahad, 'The Protection of Minority Shareholders' Rights in the Joint Stock Company' (2012) 24 October http://www.marocdroit.com accessed 13 March 2014.

instance and it is against the interest of the company to have such items prior to having them solved by the court. [581]

It appears that the legislature attempts to protect the minority shareholders by giving them a right to call the general meeting and schedule any agenda item and prevents the controllers from discussing any point which was not listed in that schedule. By such rights they are able to play an effectual role in the company's decisions, in particular where the board of directors is under the controller of the majority shareholders. In addition, other supervision organs have been created to make sure that the majority shareholders are not abusing the interests of other shareholders; these organs are the statutory auditors and the appointed expert.

4.3.2 The tools that control the majority power within the company.

It is not always easy for a shareholder to realize that the conduct of the controllers of the company is against his own interests or it only serve the interests of majority shareholders, therefore professional organs are created inside the company to control the majority power and to make certain that all shareholders are treated equally. Therefore, it is the job of this sub-section to examine the function of statutory auditor and the judicial appointee and their role in protecting the minority shareholder.

4.3.2.1 The supervision role of the statutory auditor and shareholder's right to make a complaint about such organ.

The importance of the Joint Stock Company necessitates the creation of a professional organ that observes the controllers of the company and provides its shareholders with the necessary information that relates to such a company. In this manner s. 166 of the JSC Act provides that it is the job of the statutory auditors to oversee on permanent basis the accounting documents

---

[581] The Commercial Court of Agadir, case No 38/98, issued on 17/09/1998, (2004) 1 Journal of Commercial Courts 113, at 115.

of the company and check the accuracy of the information contained in the company's financial reports and so on. Moreover, it clearly stated by this section that it is also the job of the statutory auditor to ascertain that all shareholders are treated equally. Consequently, the statutory auditor is the legal effective device that is created to keep an eye on the controllers of the company and their functions. By such device the minority shareholders would be able to get the relevant information that relates to the business activities of the company and by which shareholders know about the financial statements of their company. To do this job, such an organ should be independent from the shareholders, and majority shareholders should not control the statutory auditors. On the other hand, the minority shareholder should use this organ in way that does not cause a disturbance to the company's business.[582]

In that process, section 159 of the JSC Act provides that each company has to appoint at least one statutory auditor and in the case of listed companies, the minimum number is <u>two</u>.[583] This statutory auditor has to be a registered expert, moreover to ensure that such an organ remains independent and do its job objectively, s. 161 of the JSC Act prevents any shareholder who have some privileges and the members of the board of directors, members of the supervisory boards from holding such a position.[584] If this statutory auditor left the company for whatever reason, he or she cannot be appointed within the next five years as a member of the board of the director and cannot be appointed as a general director.

In terms of protecting the minority shareholders, if the general meeting has not appointed a statutory auditor s. 165 allows each shareholder to petition the Presiding judge of the Commercial Court as judge sitting in chambers to appoint the statutory auditor.

---

[582]A Fahad, 'The Protection of Minority Shareholders' Rights in the Joint Stock Company' (2012) 24 October http://www.marocdroit.com accessed 13 March 2014.

[583] S. 163 of the JSC Act provides that it is the job of the general meeting to appoint the statutory auditor. However, if no statutory auditor was appointed by this organ it the job of the president judge of the court to appoint one upon a request from any shareholder.

[584] S. 161 of the JSC Act, 1996.

To make the role of the statutory auditor more effective s. 170 of the JSC Act allows the general meeting and the board of directors to invite the statutory auditors to attend their meetings, although this attendance is not compulsory, however, s. 178 considers void all decisions that were taken by these organs in the absence of the statutory auditor who was appointed in correct way.[585]

Furthermore, section 176 grants the statutory auditor the right in the case of urgency to invite the general meeting, so if it is believed that the minority's interests are disregarded a general meeting has to be called to inform such shareholders of this conduct.[586] It might be claimed that the minority shareholders themselves have a right to call such a meeting; therefore, this provision would not benefit the minority shareholders. Nevertheless, such a claim can be rebutted by stating that the minority shareholders need the 10% support to call a general meeting unless an urgent case was proved, furthermore, the statutory auditor by his oversight role would always have a higher chance to discover the abusive conduct.

Although, it is the role of the statutory auditor to ascertain that all shareholders are treated equally, however, it is still possible to have statutory auditors who work with the majority shareholders and undermining their role as an independent and neutral organ. Therefore, s. 164 of the JSC Act allows a shareholder or group of shareholders who hold at least 5% of the capital to complain about the statutory auditors to the Presiding judge of the Commercial Court as judge sitting in chambers to deal with matters of urgency. The petition has to be well founded and has to be submitted within 30 days from the happening date of the conduct complained of. The Presiding judge of the Commercial Court will appoint another statutory auditor until the

[585] This attendance in Egypt is obligatory, as s. 106 of the Egyptian Companies Act 1981 obligates the statutory or his representative to be present at those meetings as the attendance of the statutory auditor with their reports will enable each shareholder to see those reports in a direct way and have questions about those reports
[586] The JSC Act, 1996.

general meeting appoints another statutory auditor or auditors.[587] The court is given the discretion to examine whether the petition is well founded or not, in other words, the Presiding judge of the Commercial Court has the discretionary power to consider whether the request is justifiable or not. Yet, the issue that arises here is how easy is it for the minority shareholder to prove that the statutory auditor was not objective in his job. In particular, the Moroccan legislature has not provided any guidance on such conduct, which leaves the minority shareholders facing difficulties to prove their complaints. The Court of Appeal in Paris considered the complaint against the statutory auditor was justifiable whenever it is proved that it aims to protect the interest of the company and it is proved that the statutory auditor was unqualified or he is working with the controllers of the company.[588]

Having seen that s. 164 of the JSC Act 1996 grants a shareholder a right to petition within 30 days from the happening date of the conduct complaint of, therefore this section faces some criticism, as in most cases it is challenging for such shareholders to justify their claim within that period. Moreover, this period is a short period as in most cases the reasons for the impeachment will not appear within it. Therefore, it is stated that the 30 days period opens a very narrow door to the minority shareholders which very difficult to go through.[589] In this context, some scholars suggested that this period should start from the date when the shareholder knows the reason for the complaint.[590] Such an amendment would make this way of protection sufficient and would not increase the number of nonsense claims as the courts have a discretion to accept or refuse this kind of claim. In addition to the claim of impeachment,

---

[587]A Fahad, 'The Protection of Minority Shareholders' Rights in the Joint Stock Company' (2012) 24 October http://www.marocdroit.com accessed 14 March 2014.

[588] 11 June 1969 cited in A Hamdawi, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013), at 395, see also Gait R, 'Shareholder's Position in the Joint Stock Company' (Ph.D thesis, Mohammed V University, Rabat 2004), at 135.

[589] See for example; R Gait, 'Shareholder's Position in the Joint Stock Company' (Ph.D thesis, Mohammed V University, Rabat 2004), at 98.

[590] See R Gait, 'Shareholder's Position in the Joint Stock Company' (Ph.D thesis, Mohammed V University Rabat 2004), at 98.

if the statutory auditor has made mistakes or it is seen that some obstacles were facing him, s. 179 allows the board of directors, the supervisory board, a shareholder or group of shareholders who hold at least 5% of the capital to petition the court to remove the statutory auditor and appoint another auditor. Though the Moroccan legislature grants the minority a chance to remove the statutory auditor by this section, however, the concept of mistake and obstacles are broad and have not been clarified. Some scholars consider that, such kind of mistake has to be a professional mistake such as providing the general meeting with false information regarding the financial state of the company.[591] In this regard, The Court of Appeal in Paris considered the frequent omission of the statutory auditor as justifiable reason to remove him from such a position.[592]

It seems that the legislature in Morocco grants minority shareholders a right to petition to remove the statutory auditor in order to avoid the cases where the majority shareholders (or the general meeting, board of directors or the supervisory board) disregard the role of this organ or where it seems that the statutory auditor is working with the majority shareholders.[593] In Egypt the legislature has adopted a different system, although s. 103 of their Companies Act 1981 allows a complainant to suggest substituting the statutory auditor without any minimum percent of shareholders; however this request is considered by the general meeting which takes its decision by the majority shareholders. Therefore, it is said that if the statutory auditor is in a good relationship with the majority shareholder such substitution would not take place, thus the Moroccan position is more appropriate.[594]

---

[591] A Fali, 'the Concept of Capital in the Joint Stock Company' (Ph.D thesis, Mohammed V University Rabat 2007), at 184.

[592] Cited in S Belmris, 'The Protection of Minority Shareholders' Rights in Joint Stock Companies' (unpublished dissertation, High Judicial Institute, Rabat 2011), at 41.

[593] Issued on 11/06/2000, cited in H Zoair, 'Protection of Minority Shareholder by the Judicial Authority' (unpublished dissertation, High Judicial Institute, Rabat 2009), at 25.

[594] It should be borne in mind that the statutory auditor even after his removal from the company for whatever reason he might be liable toward the company and other shareholders for his mistakes. In this regard, the French Supreme Court asked the previous statutory auditor to pay an amount of money to other shareholders, as his last

Briefly, it is fair to conclude that the statutory auditor organ would prevent, or at least reduce, any abusive conduct of the controllers of the company if its functions were carried out objectively. However, as it is still possible to have a statutory auditor who is working with majority shareholders and who pays no attention to the minority shareholders' interests. Additionally, it was noted that there is difficulty in proving mistakes of this organ which makes such a way of protection not effective, therefore, no court decisions that removed the statutory auditors for these reasons were found.[595] In these circumstances, it is recommended that some examples of the concepts of mistakes and obstacles needs to be provided to activate this method of protection. To complement the role of the internal organs that reduce the offensive acts of controllers of the company minority shareholders are given a right to ask the court to appoint a judicial expert to examine one or some issues that relate to the company's day to day business, therefore the function of this tool is going to be discussed in the next point.

4.3.2.2 Appointing an expert to report on issues

Prior the enactment of the JSC Act 1996 the Supreme Court of Morocco classified the minority petition to appoint an expert as a facet of the right to have information about the company's affairs, which is allowed to each shareholders under s. 141.[596] However, after the above Act, s. 157 authorises a shareholder or group of shareholders representing 10% of the capital, to petition the Presiding judge of the Commercial Court as judge sitting in chambers to deal with matters of urgency to appoint an expert or experts to make a report regarding one or more issues relating to the company's business. The job of the appointed expert is to write a report regarding that issue and examine whether the decisions that relate to such an issue serve the company's

---

report about the financial state of the company was incorrect. See A Hamdawi, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013), at 293.

595 S Belmris, 'The Protection of Minority Shareholders' Rights in Joint Stock Companies' (unpublished dissertation, High Judicial Institute, Rabat 2011), at 41-42.

596 The Supreme Court of Morocco, file No 1406/1996, issued on 30/07/1997, (1998) 21 (53-54) Journal of Supreme Court 227, at 227.

interests or only the interest of the majority shareholders. Copies of such a report have to be sent to the board of directors, the supervisory boards, the statutory auditors and the petitioner. Moreover, the following general meeting has to consider the issued report with another report to be provided by the statutory auditors. The remuneration of the appointed expert have to be paid by the company unless it was proved that the petition was abusive and it aimed to harm the company.[597]

There is no doubt that such a supervisory tool would complement the role of the statutory auditors as it imposes internal supervision over the board of directors. Furthermore, as the statutory auditors are not allowed to interfere in the company's decisions, the appointed expert with his qualifications and experience would be able to increase the level of protection as he or she would be able to provide a shareholder with the necessary information regarding the issue that he or she was appointed to examine. The importance of this way of protection appears where it seems to some shareholders that the statutory auditors are not fulfilling their function as ought to be, or they are standing with one side within the company. In Aizaldden Bastanni's view the appointed expert plays a significant role in protecting the minority shareholders as he provides them with important information that is relevant to the company's management.[598] In this manner, the Commercial Court of Rabat has appointed an expert in relation to one issue that was reported by the petitioner shareholder.[599] Nevertheless, such a petition was refused in many cases where the petitioner had asked the court to make a comprehensive report regarding the company's activities.[600] Such refusals were grounded on the basis that s. 157 allows a

[597] A Fahad, 'The Protection of Minority Shareholders' Rights in the Joint Stock Company' (2012) 24 October http://www.marocdroit.com accessed 14 March 2014.
[598] A Bastanni, *Companies in Morocco Laws and Comparative Jurisdictions, Comparative study* (2nd edn, part 1, Matbat Alnajah Aljadeda 1998), at 205.
[599] An urgent case No 600, file No 530/03/2006, issued on 12/07/2010, (unpublished), cited in S Belmris, 'The Protection of Minority Shareholders' Rights in Joint Stock Companies' (unpublished dissertation, High Judicial Institute, Rabat 2011), at 33.
[600] See for example The Commercial Court of Marrakech, decision No 310, file No 190/01/06, issued on 06/06/2006, cited in Z Abujana, 'Some Aspects of Minority Shareholders Protection in Morocco' (2007) 13 October Moroccan Journal of Business Law 121, at 131.

shareholder to petition regarding one or some specific issues regarding the management of the company, therefore, a petitioner has to specify one or two issues in his petition otherwise the petition would to be refused.[601] The reasons for rejecting such a comprehensive petition is that such kind of petition will disturb the business life of the company and this job was already granted by s. 166 of the JSC Act to the statutory auditors.[602] In France, a shareholder' s petition is not accepted in the court unless it is proved that he or she has asked the board of directors and the supervisory board to clarify such issue and no clear answer was given.[603] The Court of Appeal in Paris considered this section as a weapon handed to the minority shareholders to protect their interests. However, such a petition should be refused whenever it is proved that petition is against the interests of the company.[604] If the expert's report shows that there is some misleading by the controllers of the company, minority shareholders are allowed to go to the court to ask the general meeting to make an urgent call, moreover, if the court found that such a misconduct harmed the minority shareholders an order to remedy the situation for those shareholders might be issued.[605]

It seems that this tool imposes a restriction over majority power and provides the minority shareholder with the necessary information therefore it plays an important role in protecting the minority shareholders. However, the job of the appointed expert usually relates to one or some specific issues and it is not for the whole activities of the company. Additionally, it is not

---

[601] See also The Commercial Court of Casablanca, decision No 333/99, file No 1482/01/1998, issued on 02/03/1999, cited in S Belmris, 'The Protection of Minority Shareholders' Rights in Joint Stock Companies' (unpublished dissertation, High Judicial Institute, Rabat 2011), at 35, see also see also A Hamdawi, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013), at 275.

[602] S Belmris, 'The Protection of Minority Shareholders' Rights in Joint Stock Companies' (unpublished dissertation, High Judicial Institute, Rabat 2011), at 34.

[603] H Zoair, 'Protection of Minority Shareholder by the Judicial Authority' (unpublished dissertation, High Judicial Institute, Rabat 2009), at 30.

[604] See the Court of Appeal in Paris, issued on 22/03/1986, cited in S Belmris, 'The Protection of Minority Shareholders' Rights in Joint Stock Companies' (unpublished dissertation, High Judicial Institute, Rabat 2011), at 34.

[605] H Zoair, 'Protection of Minority Shareholder by the Judicial Authority' (unpublished dissertation, High Judicial Institute, Rabat 2009), at 31.

always easy to recruit 10% of the company shareholding, therefore it is recommended that such a percentage level needs to be reduced.

In light of the foregoing, it obviously appears that the Moroccan legislature has attempted to offer sufficient protection to minority shareholders, either by strengthening their rights to become more involved with the company's activities or via creating supervision tools which introduced to control the power of the majority shareholders. However, these preventative means do not offer the required standard of protection as majority shareholders still have the power to take decisions that further their own interests and ignore the interests of other shareholders. Therefore, corporate law in Morocco grants minority shareholders a right to sue the company's controllers and ask the judicial authority to deliver the required justice.

4.4 The shareholders' actions against the controllers of the company (the remedial route)

It has been seen that the controllers of the company might abuse their power to further their own interests and pay no attention to the interests of others. Furthermore, they might intentionally harm the interests of other shareholders and the interests of the company as a whole. To prevent or at least reduce these kinds of misconduct, the Moroccan laws allow the minority shareholder to sue the controllers of the company whenever they believe that the majority shareholders or the company's controllers are not running the business properly. In so doing, the Moroccan legislature provided different tools by which appropriate remedies might be obtained, so that minority shareholder has a right to bring the nullity action by which the abusive conduct could be voided.[606] However such a remedy would not remove the damage caused by those decisions, therefore, minority shareholders are allowed to start liability actions against the controllers of the company as such shareholders have suffered financial losses thus they are eligible for compensation. In addition to the above actions, in some cases it seems to

[606] A Almarini, 'The Power of Majority Shareholders within Joint Stock Companies under Moroccan Law' (Ph.D thesis, Mohammed V University Rabat, Morocco 1997).

some shareholders the controllers of the company are not only disregarding the interests of other shareholders, but also it becomes apparent to those shareholders that there is a real indication that the relationship between the shareholders has reached the deadlock, consequently the Moroccan courts are granted a power to wind up this company. Last but not least, the judicial authority in France has created another way of minority protection under which a temporary controller of the subject company might be appointed by the court.[607] Therefore, the last sub-section of this chapter will examine the petition of appointing provisional manger and the possibility of applying such petition by Moroccan courts.

4.4.1 The nullity of the act

There is no doubt that abusive decisions of the controllers of the company can lead to improper consequences among the shareholders of that company, thus it a necessary for the continuation of the company to reconsider such kind of acts and decisions. In terms of voiding, it is clear from ss. 337-348 of the JSC Act 1996 that the Moroccan legislature has adopted the main principal of "*no nullity without provision*",[608] which states that the company's constitution or its conduct could not be set aside except where the law clearly provides that, or where it seems that such conduct is against the public policy. Therefore, the provision is clear in preventing nullity without a provision, this prevention aims at protecting the business live of the company, however, an alternative system of nullity was created which called *La nullite virtuelle*, and under such system of nullity the court is offered free discretion power to void such acts.[609]*La nullite virtuelle* system aims to cover the point where the statutory nullity does not apply. In this context, s. 338 of the JSC Act 1996 enables each shareholder, who had suffered damage

[607] A Hamdawi, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia 2013), at 387.
[608] The policy behind such principle is to prevent the nullity of companies as important part of the national economy and such nullity will increase the number of the job seekers.
[609]A Almarini, 'The Power of Majority Shareholders within Joint Stock Companies under Moroccan Law' (Ph.D thesis, Mohammed V University, Rabat 1997), at 830.

from the company's decisions to start a nullity action against those decisions. There is no minimum percentage of shareholders required so that each shareholder is allowed to bring a nullity action regardless of the number of shares he or she owns, and no other restrictions prevent shareholder from starting that claim.[610] Therefore, a general meeting's decision which delays the distribution of allocated dividends, or which takes on the debts of another company can be nullified on the ground that such decisions are against the interests of minority shareholders and the company as a whole. However, the question posed here is whether a shareholder who voted for the decision in question is able to bring a nullity action against that decision. The French jurisprudence allows a shareholder to ask for the voiding of a decision even though he or she voted for that decision, as it might be difficult at the time of voting to realise whether it was abusive decision or not.[611] In contrast with this, s. 76 of the Egyptian Companies Act allows only shareholders who voted against the decision or who had not attended the general meeting for justifiable reasons to make an action that aims to set aside such a decision.[612] As no clear provision prevents any shareholders from starting this claim in Morocco, it is argued that this right is granted to the whole body of shareholders even for those who voted for the decision or who did not attend that meeting.[613] This view could be supported by claiming that in some cases it would not appear to a shareholder at the issuing date whether a decision is abusive or not, therefore it is fair to give a shareholder a chance to reconsider his position regarding that decision.

Prior to taking its decision in the nullity suit, s. 340 of the JSC Act grants the court the power to ask the defendants to withdraw or obviate their decision and the court cannot make a

[610] A Hamdawi, *Majority Shareholders Abuses in the Joint Stock Company, Comparative* Study (1st edn, Dar Alafag Almagribia, Rabat 2013), at 360.
[611] Ibid, at 361.
[612]The Egyptian Companies Act 1981.
[613] A Hamdawi, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia 2013), at 360-361.

judgment of invalidity only after at least two months from the date when the claim was brought. Therefore if the controllers of the company withdrew their decision the action has to be withdrawn, however, if no solution appeared in the above period that court has to go through the action and gives its decision regarding the claim.[614]

In this manner, the Court of Appeal in Casablanca (Commercial Division) had nullified a decision of the general meeting on the ground that the private privilege given by the general meeting to the shareholders was not justifiable; thus, the Court of Appeal considered it as an abusive decision since it was designed for the self-interest of those shareholders.[615] In line with this judgment, the Commercial Court of Appeal in Marrakech nullified the special general meeting's decision which was taken without the attendance of the claimant shareholders. In this case, the court stated that as it is a right of each shareholder to participate in the special general meeting, and chapter 28 of the articles of association of the company says that the general meeting is formed from the whole shareholders regardless of the percentage of the shares they hold, therefore the decision of the general meeting was void.[616]

More recently, the Commercial Court of Rabat has rendered void a general meeting on the ground that the controllers of the company had not invited the claimant shareholder to such meeting which is contrary to s. 71[617] of the JSC Act.[618] The court has applied s.71, which stated that in the case of having such meeting without inviting each shareholder to such a meeting is considered void.

---

[614] A Gomirah, *The Abusive Conduct of Shareholders in the Joint Stock Company* (1st edn, Matbat Alomnia, Rabat 2011), at 207-208.
[615] Decision No 3101, issued on 15/11/1994, (1995) 75 Journal of Moroccan Courts 60, at 60.
[616] Decision No 322, file No 429/99, issued on 03/06/2000, (2002) (93) Journal of Moroccan Courts 151, at 154.
[617] This section obligates the controllers of the company to invite each shareholder to attend the next meeting at least in fifteen days before the called meeting take place.
[618] Decision No 3118, file No 295/08/2007, issued on 27/11/2007, unpublished, cited in S Belmris, 'The Protection of Minority Shareholders' Rights in Joint Stock Companies' (unpublished dissertation, High Judicial Institute, Rabat 2011), at 61.

The Supreme Court of Morocco[619] has invalidated the decision of a general meeting that delayed the distribution of dividends on the ground that such a decision was against the interests of some shareholders. Furthermore, The Commercial Court of Appeal in Casablanca considered the meeting that took place without a legal invitation to the claimant shareholders as voided meeting and voided all the decisions that were taken in that meeting.[620] In France, the French Supreme Court considered the decision of general meeting as an abusive decision when it seemed to the court that the majority shareholders had abused their voting right to issue that decision.[621]

In brief, the Moroccan legislature has adopted the nullity action as way of protecting the interest of minority shareholders and interests of the company as a whole, however, it appears that the courts are applying such a remedy in restricted situations as there are many obstacles that prevent shareholders from starting that claim. First and foremost it is not enough for the claimant shareholder to prove that conduct was offensive rather than proving that the subject decision was against the interests of the company and only serves the interests of the controlling shareholders.[622] Therefore, it is not always easy for those shareholders who are not able to obtain information regarding the company's decision to prove that this decision is an abusive one, particularly where the decision affects the minority interests in an indirect way. In so doing, a shareholder has to convince the court that the decision breaches the principle of equal treatment of all shareholders and aims to further the interests of some shareholders rather than

[619] Decision No 620, file No 209/03/2003, issued on 07/06/2006, (2008) (68) The Journal of Supreme Court 118, at 121.
[620] Decision No 3065/2011, file No 4421/12/2010, issued on 23/06/201, unpublished, cited in Zoair H, 'Protection of Minority Shareholder by the Judicial Authority' (unpublished dissertation, High Judicial Institute, Rabat 2009), at 33. See also T Albakti, 'The Role of Judicial Authority to Protect the Minority Shareholders in the Joint Stock Company' (2013) 110 The Moroccan Journal of Local Management and Development 139, at 142.
[621] Cited in T Albakti, 'The Role of Judicial Authority to Protect the Minority Shareholders in the Joint Stock Company' (2013) 110 The Moroccan Journal of Local Management and Development 139, at 142.
[622] A Hamdawi, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013), at 363.

the interests of the company.[623] To make this action more effective it is suggested that instead of asking the minority shareholders to prove that the conduct was abusive, the burden of proof should be moved to the majority shareholders and they have to convince the court that the decision is not breaching the equal treatment principle and it was taken for the interest of the company. If it is claimed that such an idea restricts the power of the controllers of the company, it is suggested that majority decisions that may affect the interests of other shareholders have to be issued with their justifications which would assist the court in considering whether the decision was abusive or not.

In addition to the above obstacles, as the costs indemnity order is not applicable in Morocco the claimant shareholder is required to pay the fees of such an action; therefore, the cost of this litigation forms a significant bar that prevents any shareholder from using this claim. Having seen under s. 157 of the JSC Act that the cost of appointing an expert will be paid by the company, unless it was proved that a petition to appoint an expert was abusive, therefore, the cost of such litigation should be paid by the company unless it was proved by the controllers of the company that the minority action is a malicious action. That principle is adopted in Egypt where the costs of such claims are paid by the company if the minority action was based on serious reasons.[624]

Furthermore, the nullity system has faced a different kind of criticism as it has negative effects on the financial and economic status of the company therefore; it affects the national economy as a whole. The minority shareholders might use their right in an abusive way which affects the business life of the company, moreover, the nullity remedy in some cases is not a sufficient remedy for the minority shareholder as the conduct of majority shareholders causes financial

---

[623] A Hamdawi, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013), at 363.
[624] S. 76 of the Egyptian Companies Act, 1981.

losses to the minority shareholders, thus it would be better for the minority shareholders to seek compensation from the controllers of the company. In that regards, it is stated that the appropriate method toward the abusive conduct of the majority shareholder is to make the controllers of the company personally liable for their abusive conduct, so that such controllers are responsible to compensate the affected minority shareholders from those decisions.[625] Additionally, it is said the compensation is considered to be a very important remedy since it preserves a balance among the conflicts arising out of the dissension of shareholders which is not achieved by the nullity relief[626]. Therefore, it is the task of the next sub-section to discuss liability actions under Moroccan law.

4.4.2 The liability actions

The minority shareholders' right to go to the court to protect their interests benefits not only the minority shareholders but also the company's interests and consequently affects the national economy. In this regard, the minority shareholders are allowed to start a liability action either by the Personal Action (*Individual lawsuit*) or the Derivative Action (*Ut Singuli lawsuit)* to obtain an appropriate remedy.[627] The Commercial Court of Fez distinguished between these two actions when it stated that the derivative action is proceeded with on behalf of the company by its representative or some shareholders to protect the interests of this company, while an action is classified as personal action where one shareholder or more goes to the court to protect their own interests.[628] Hence, when a shareholder brings a derivative action his personality merges with the company's personality and he will be a representative of the company aiming to protect its interests. While in the personal action a shareholder is bringing action whenever

[625] T Albakti, 'The Role of Judicial Authority to Protect the Minority Shareholders in the Joint Stock Company' (2013) 110 The Moroccan Journal of Local Management and Development 139, at 154.
[626] Ibid.
[627]A Fahad, 'The Protection of Minority Shareholders' Rights in the Joint Stock Company' (2012) 24 October http://www.marocdroit.com accessed 17 March 2014.
[628] The Commercial Court of Fez, decision no 428 file No 904/05 and 147/06 issued on 17/03/2009 http://adala.justice.gov.ma/AR/Jurisprudence/JPC_fes_2008.aspx accesses 27 March 2014.

he or she believes that his or her personal interest was harmed and he aims to protect his own interests.[629]Accordingly, personal and derivative claims under Moroccan Laws are considered in this sub-section by examining their procedures and the appropriate remedy that could be granted to the aggrieved shareholders.

4.4.2.1 The Personal Action

Under s. 353 of the JSC Act 1996 each shareholder or group of shareholders is allowed to go to the court to protect their own interest, so that the board of directors' decision which prevents distributing dividends to the shareholders with no logical reasons or which restricts a shareholder's priority right to buy new shares would affect the personal interests of a shareholder and allows that shareholder to sue the controllers of that company. As the JSC Act 1996 has not provided many details of such an action, jurisprudence in Morocco[630] defines the personal action as a claim brought by one shareholder or more by his or her name to obtain a remedy in respect to a misconduct already established by the controllers of the company.[631] Such an action is like any other tort action where it is necessary for a claimant to prove three conditions, the mistake, damage and the causal connection.[632] The mistake could be an act that is against the interest of the claimant shareholder or any actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by directors of the company. Therefore, this action could be founded if articles of association and the relevant laws have been infringed or where it seems to some shareholders that the controllers of the company are

---

[629] S Algadi, 'The Commercial Judiciary in Morocco and Companies' Actions' (Ph.D thesis, Mohammed V University, Rabat 2009), at 395.
[630] See for example, See A Alsbaii, *Companies and Economic Interest Groups (Deep Study in the New Companies Acts No 5.96 and 17.95 and the Adjustments Made by 13.97 Act that Relates to Economic Benefit Groups* (2nd edn, Part 4, Dar Nashar Almarefa, Rabat 2013).
[631] T Albakti, 'The role of judicial authority to protect the minority shareholders in the Joint Stock Company' (2013) 110 The Moroccan Journal of Local Management and Development 139, at 148.
[632] See AFahad, 'The Protection of Minority Shareholders' Rights in the Joint Stock Company' (2012) 24 October http://www.marocdroit.com accessed 17 March 2014.

not properly managing the company [633] The claimant in this action does not aim to protect the interests of the company but rather the personal interests of that claimant. However, since the interest of each shareholder is a part of the company's interests and there is a duty on each shareholder to protect the interest of the company even via the judicial authority, s. 353 of JSC Act 1996 allows a shareholder to combine the personal action with the derivative action. The reason behind that is that in some cases the majority conduct harms the personal interest of the shareholder and the interests of the company as well. In this regard, the French Supreme Court confirmed that there is nothing that prevents a shareholder or group of shareholders from using the personal action and the derivative action at the same time. The Supreme Court stated that if the representative of the company did not brought such an action, a shareholder who already started a personal action to protect his personal interests is allowed to bring a derivative action to protect the interests of his company.[634]

Section 352 of the JSC 1996 determines the possible defendants in this action, which are; the controller of the company, the general director, or in some cases the delegated general director and the member of the two tier boards. It seems that the above section did not mention the company as a defendant, however some scholars believe that there is nothing that prevents the aggrieved shareholder from suing the company as a legal entity to become responsible for the damage that caused by its controllers.[635] Furthermore, s. 352 does not prevent a shareholder from bringing an action against the company under the general rules that are provided in the Law of Contacts and Obligations. However, as a shareholder in such a claim acting independently he or she is responsible for the fees of such litigation therefore, the cost of such

[633] M Almashishi, 'Shareholder's Right to Sue the Company' (2001) 91 Journal of Moroccan Courts 13, at 17.
[634] Cass, Com. Rendu Le 03/11/1980, Bull Joly, 1980, at 698. Cited in T Albakti, 'The role of judicial authority to protect the minority shareholders in the Joint Stock Company' (2013) 110 The Moroccan Journal of Local Management and Development 139, at 149.
[635] A Hadayataallah, 'Shareholder's Right to Sue His Company and to Obtain a Remedy' (2001) 91 Journal of Moroccan Courts 27, at 27.

legal action is considered a significant bar that prevents many shareholders from using this claim.

4.4.2.2 The Derivative Action

Section 353 of the JSC Act 1996 provides that in addition to the personal action each shareholder or group of shareholders is granted a right to start a derivative claim[636] against; the controller of the company, the general director of the company and the delegated general director or the members of the two tier boards, in order to get a remedy.[637] Moreover, s. 354 of the JSC 1996 allows a shareholder or group of shareholders on behalf of the company to start such an action without any minimum percent of the capital, furthermore, no previous permission is needed to start the claim and any previous agreement that prevents a shareholder from using such an action or puts some restrictions on the shareholder's right to use this actions is deemed void. Namely, neither the board of directors nor the general meeting have the power to stop or withdraw the proceeding action against the company even by special resolution.[638]

Such a claim can be brought either by a shareholder or by the representative of the company,[639] however, as Alsbaii claimed, it is very rare to have such an action brought by the representative of the company, the representative is usually in a good relationship with the controllers of the company, moreover in some circumstances the representative himself is involved with the

[636] Different position was taken by the Tunisian Companies Act No 93 that issued in 2000 where 5% of the capital is required to start this action if the company is private company and 3% in the case of public companies, it stated that the reason beyond such a condition is to avoid the malicious claim that disrupt the company's business. See the Tunisian Companies Act, 2000, s. 220 (4). This Act was amended in 2009 by the Act No 16 2009. See for example; K Alaiari, *The Controllers of the Joint Stock Company* (1st edn, Mojamah Allatrash, Tunis 2011) at 282-283.
[637] The Commercial Court of Casablanca in 1938 considered that it is a right of each shareholder to sue its controllers on behalf of the company if such an action was not proceeded by the representative of the company. Decision No 783 issued on 03/02/1938. Cited in T Albakti, 'The role of judicial authority to protect the minority shareholders in the Joint Stock Company' (2013) 110 The Moroccan Journal of Local Management and Development 139, at 146. In this context see s. 103 of the Egyptian Companies Act No 159, 1981) allows each shareholder to sue the controllers of the company if the representative of that company has not used that right, see E Ramadan, *Minority Shareholders Protection in Joint-Stock Companies* (1st edn, Dar alkoteb Alkanonia, Cairo 2008).
[638] S. 354 (4) of the JSC Act, 1996 and its Amendments in 2008.
[639] S. 353 of the JSC Act, 1996.

abusive conduct.[640] This claim is brought when it seems to the shareholders that the controllers of the company are breaching the laws and regulations or they are infringing the articles of association or they are furthering their own interests with no regard to the interests of others shareholders and the company as a whole. This claim is brought on behalf of the company and by its name as a legal entity against those who cause damages to it, hence, it is the company and not the claimant shareholder who obtains relief from this action.[641]

As mentioned above, a shareholder or group of shareholders do not need to obtain permission from the general meeting to pursue their claim. Furthermore, the decisions of the general meeting cannot prevent or stop the derivative action against the controllers of the company, [642] so that the general meeting's decision to stop a derivative action against the controllers of the company has no effect on such a claim.[643] The previous shareholder is not allowed to take this action even if it was proved that the disputed conduct happened when he was a shareholder. The limitation of this action is five years from the date of discovering that conduct unless the conduct was classified as crime then such period will be extended to twenty years.[644]

There is no doubt that the derivative claim in Morocco constitutes a significant tool of protection to the minority shareholder as this right is not restricted by the general meeting's decision to bring or to stop this claim. However, it has not escaped criticism since there are some barriers that prevent a shareholder from using this action. First and foremost, the claimant shareholder would not gain any direct personal benefit from such proceeding. Second as the

[640] A Alsbaii, *Companies and Economic Interest Groups (Deep Study in the New Companies Acts No 5.96 and 17.95 and the Adjustments Made by 13.97 Act that Relates to Economic Benefit Groups* (2nd edn, Part 4, Dar Nashar Almarefa Rabat 2009).
[641] A Darwish, 'Does a Shareholder Have a Right to Sue His Company to Get a Remedy?'(2001) 91 Journal of Moroccan Courts 17, at 22.
[642] S. 355 of the JSC Act 1996.
[643] See for example, Y Banona, 'The Legislative and Judicial Protection of Minority Shareholders' (2003) 148 Journal of Judiciary and Law 107, at 115.
[644] The JSC Act 1996, s.355. In this regard see also The Commercial Court of Fez, decision No 428 file No 904/05 and 147/06 issued on 17/03/2009 http://adala.justice.gov.ma/AR/Jurisprudence/JPC_fes_2008.aspxaccessed 27 March 2014.

costs of this litigation are paid by the claimant shareholder and not by the company, therefore, it is stated that the derivative action with its barriers has not formed an adequate pressure mechanism on the majority shareholders.[645] However, it could be argued that the Moroccan system of derivative claims is more appropriate as no minimum percentage of shareholders is required to start the proceeding. In addition to that the company's controllers would not be able to prevent such proceeding. Furthermore, the ratification bar that prevents minority shareholders from starting a claim in England is not applicable. However, financial risks for shareholders in the pursuit of derivative claims prevent many shareholders from starting this claim. To eliminate this bar, the indemnity costs order has to be adopted in Morocco where the claimant shareholder would not be required to pay the fees of such an action as he or she is litigating on behalf of the company and not for his or her own interests.

4.4.2.3 The court's power in liability actions

There is no doubt that the compensation is considered to be a very important remedy since it preserves a balance among the conflicts arising out of the dissension of shareholders which is not achieved by the nullity relief.[646] Although there is no clear provision to determine the rules of reimbursing the minority shareholders in the liability actions under the JSC Act 1996 and in its origin the French Commercial Code 1966, however that does not prevent the courts in France and Morocco from adopting the general principle of civil liability under s. 1382 of the French Civil Code 1804 (s.77 of the Law of Obligations and Contract in Morocco) which provides that "*any act of man, which causes damages to another, shall oblige the person by whose fault it occurred to repair it"*

[645] A Gomirah, *The Abusive Conduct of Shareholders in the Joint Stock Company* (1st edn, Matbat Alomnia, Rabat 2011), at 195-196.
[646] Ibid.

In these circumstances, unless a member proved that he voted against that conduct,[647] the controllers of the company would be liable for decisions that caused damage to the other shareholders or the interests of their company. Furthermore, an absent member will be also liable of that conduct if he or she is not able to prove that his or her absence was justified.[648] Although there are some difficulties in determining the responsible shareholder of the abusive conduct particularly in the big joint stock companies, however, these difficulties fade in the case of closed joint stock companies where there is only a small number of shareholder and some of those shareholders form the majority shareholders.[649] Such responsibility will reduce the possibility of abusive conduct as the controllers of the company know that they might have to pay compensation to the affected shareholders. In this regard the Supreme Court of Paris upheld the decision of the first instance which asked the majority shareholders to remedy the minority shareholders as the interests of the minority were affected by the abusive conduct of the majority shareholders.[650]

Though the compensation relief offers suitable remedy to some shareholders, however, in some cases it only offers a provisional solution to such problems, since when a shareholder feels that there is significant disagreement inside the company that affects the interests of the company and its shareholders it is insufficient for such a shareholder to obtain the compensation remedy. Specifically, when it becomes clear to the shareholders that relationship among shareholders reaches a deadlock the Moroccan law allows that shareholder to ask not only for suitable

[647] A Gomirah, *The Abusive Conduct of Shareholders in the Joint Stock Company* (1st edn, Matbat Alomnia, Rabat 2011), at 208.
[648] A Hadayataallah, 'Shareholder's Right to Sue His Company and to Obtain a Remedy' (2001) 91 Journal of Moroccan Courts 27, at 33.
[649] A Gomirah, *The Abusive Conduct of Shareholders in the Joint Stock Company* (1st edn, Matbat Alomnia, Rabat 2011), at 211.
[650] The French Supreme Court, issued on 06 June 1990 cited in A Alshhab, 'The Judge's role in the Joint Stock Company' (High Diploma Dissertation, Mohammed V University, Rabat 2004), at 53.

compensation but also to liquidate the company' life and have the winding up remedy. Therefore, the winding up relief will be discussed in the next sub-section.

4.4.3 The winding up remedy

The previously discussed remedies would not always offer an appropriate remedy to the minority shareholders, since when the majority shareholders repeated their abusive conduct or it seems to the minority shareholders that their relationship with other shareholders is broken completely, it becomes rational to allow them to ask for a winding up of their company. Therefore, the winding up remedy is considered one of the available weapons that minority shareholders can use to face the offensive conduct of the controllers of the company, such a remedy ends the relationship among the shareholders and breaks up the company's life.

Though there was no mention of such kind of remedy in the JSC Act 1996, however, s. 1056 of the Contracts and Obligations Act 1913[651] gives each shareholder a right to ask the court to wind up the company whenever it seems that there are significant disagreements amongst the shareholders, or it appears to the court that the contract terms of the relationship are being breached. A shareholder's right to seek the winding up of the company is a public policy right, therefore any previous agreement that prevents any shareholder from using such right is deemed void. This right was confirmed by the Moroccan Supreme Court on 14/02/1990[652] where it was declared that whenever it seems to the court that a deadlock has been reached and the continuance of the company will harm the interests of the shareholders or the company as a whole, such company has to be wound up. Along with the same line, the Primary Court of Casablanca has wound up the company on the ground that there were no indications appears to

[651] Issued on 12 August 1913 and was amended in 22 September 2011.
[652] Decision No 377, file No 1247/89, issued on 14/02/1990, cited in S Belmris, 'The Protection of Minority Shareholders' Rights in Joint Stock Companies' (unpublished dissertation, High Judicial Institute, Rabat 2011), at 64.

the court that such agreement among shareholders would be solved.[653] More recently, on 11/10/2011, the Commercial Court of Appeal in Casablanca issued a decision to wind up a company when it was clear to the court that there were critical disagreements among the shareholders.[654] The same decision was taken by the Commercial Court of Appeal in Fez where it is confirmed that each shareholder has a right to wind up the company whenever that shareholder satisfies the court that there are justifiable reason to that result.[655]

That is to say, if the interests of the company necessitate winding up it is the role of the court to wind up that company, however the question that arises here is what kind of disagreements are considered as deadlock points. It is said that the critical disagreements are disputes among shareholders that disrupt the company's business and which destroy the relationship among those shareholders.[656] Therefore, it is within the discretion of the first instance court to examine the significance of the disagreement, which may justify the winding up of the company or not, and it is the task of the Supreme Court to review the first instance justifications. In this context, the Supreme Court in Morocco in 22/12/2004[657] confirmed that it is within the power of the first instance court to examine whether a company has reached a deadlock or not. In other words, the reasons for winding up the company that are provided by s. 1056 are only examples therefore, by way of analogy the court has a discretion to wind up a company for other reasons as long as its decision was based on serious grounds, taking into account the interests of the

[653] Decision No 2159, issued on 29/07/ 1987 cited in A Hamdawi, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013), at 404.
[654] Decision No 4084/2011, file No 474/12/2011 cited in T Albakti, 'The role of judicial authority to protect the minority shareholders in the Joint Stock Company' (2013) 110 The Moroccan Journal of Local Management and Development 139, at 155, see also A Hamdawi, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013), at 272.
[655] Decision No 364, file No 1484/2002, issued on 25/03/2005, cited in A Gomirah, *The Abusive Conduct of Shareholders in the Joint Stock Company* (1st edn, Matbat Alomnia, Rabat 2011), at 217. See also T Albakti, 'The role of judicial authority to protect the minority shareholders in the Joint Stock Company' (2013) 110 The Moroccan Journal of Local Management and Development 139, at 155.
[656] A Almarini, 'The Power of Majority Shareholders within Joint Stock Companies under Moroccan Law' (Ph.D thesis, Mohammed V University, Rabat, 1997), at 832.
[657] Decision No 1408, file No 713/01/2001, issued 22/12/2004, (2005) 8 Moroccan Journals of Law and Business 89, at 91.

company and other shareholders. That position was confirmed by the Court of Appeal in Fez[658] where it stated that it is a right of each shareholder to petition the court to wind up his company if serious and justifiable reasons were available, such as critical disagreement between shareholders or breaching the shareholders' obligations. The court in this case has also confirmed that these reasons are just for illustration, so that the court has the power to wind up the company whenever it seems that there are justifiable reasons for that result, however, it is the function of the Supreme Court to examine the reasons on which the first instance court has relied when it took that decision.[659]

In brief, although, the winding up remedy is an extreme remedy, however it is the appropriate remedy in the case where the claimant shareholder convinces the court that the relationship among the shareholders is broken. However, such winding up should not contrary with interests of the company and courts should consider carefully the reasons at which the claim is based. Furthermore, even it is proved that such relationship was broken it is still within the discretion of the judge to grant such relief or not. Since the winding up relief has negative effects on the company and on the whole economy, therefore courts tend not to grant such remedy unless it was proved that the relationship among shareholders has broken down and there is no alternative relief that can keep this company alive. In these circumstances the judicial authority in France has created another tool of protection under which minority shareholders are allowed to petition the court to appoint a provisional controller of the subject company. Therefore, the possibility of applying such tool in Morocco is discussed in the next sub-section.

[658] Decision No 346, file No 1484/2002, issued on 25/03/2005, cited in A Gomirah, *The Abusive Conduct of Shareholders in the Joint Stock Company* (1st edn, Matbat Alomnia, Rabat 2011), at 217.

[659] The French Supreme Court has discussed the issue and stated that; the general disagreements are not sufficient reason to wind up the company, particularly when the financial state of the subject company has not reached the deadlock. Cass. Com 11/05/1960, Dalloz 1960 Som. St 31, cited in S Belmris, 'The Protection of Minority Shareholders' Rights in Joint Stock Companies' (unpublished dissertation, High Judicial Institute, Rabat 2011), at 65, see also A Hamdawi, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013), at 399.

4.4.4 The interim controller petition

The institute of a provisional controller of the company was created by the Judicial Authority in France when the French courts applied s. 1961 of the Civil Code in cases where it is claimed that the company's constitutional organs are unable to do their functions, or in the cases where there is disagreement among shareholders of the company that prevents such company from doing its business. Under s. 1961 the court has a power to interfere where there is an immovable or movable thing whose ownership or possession is in contest between two or several persons.[660] The application of this section was only used in cases where it seems to the court the company's constitutional organs (the board of director and general assembly) are no longer able to run the business, or when it appears that there is critical disagreement between these constitutional organs, therefore, an interim controller has to be appointed to replace the company's controllers. However, the courts have extended this section and it was applied in situations where there is abusive conduct by the controllers of the company, therefore, it became a means to protect the interests of the minority shareholders.[661] In this regard, the Court of Appeal in Paris[662] has appointed a provisional controller of the subject company on the ground that the majority shareholders have entirely disregarded the interests of the company and other shareholders.[663] The French judicial authority has not only applied the provisional controller in the situations where the company's constitutions are unable to manage the company but also this controller was appointed in the cases where the interests of other

[660] A Gomirah, *The Abusive Conduct of Shareholders in the Joint Stock Company* (1st edn, Matbat Alomnia, Rabat 2011), at 229.
[661] See for example the Court of Appeal in Amiens, issued on 11 February 1964, cited in A Hamdawi, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013), at 388-389.
[662] Issued on 22 May 1965, cited in A Hamdawi, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013), at 394, see also A Gomirah, *The Abusive Conduct of Shareholders in the Joint Stock Company* (1st edn, Matbat Alomnia, Rabat 2011), at 228.
[663] The same decision was taken by the Court of Appeal in Rouen in 25 September 1969. Cited in A Hamdawi, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013), at 395.

shareholders were ignored. Yet such an appointment was rejected by the Supreme Court in France when it was found that the minority petition was not based on serious reasons.[664]

In Morocco many scholars such as Abdoalwhed Hamdawi[665] and Amina Gomirah[666] believe that there is nothing that prevents the Moroccan Court from applying such a principle as long as s.149 of the Moroccan Civil Procedural Act 1974 grants the president judge of the primary courts the same discretionary power. They support their view by a decision of the Court of Appeal in Agadir when a provisional controller was appointed when it was clear to the court that a critical disagreement among the shareholders existed.[667] They claimed that although the petitioner in the above action was not a minority shareholder, however, by way of analogy it seems that the court would appoint such a manager if the petition brought by minority shareholders.[668] Gait also support this opinion and stated that each shareholder has a right to petition the court to appoint a provisional manager in the case where is seems to that shareholder that the controllers of the company are furthering their own interest or ignoring the interests of other shareholders.[669]

The job of the appointed a provisional manager is to solve the current problems, therefore, the manger's authority differs from case to case. It is the function of the court to determine in its decision the power of the interim manager taking into account the reasons beyond that appointment. Nevertheless, it should be borne in mind that the interim manager was appointed

[664] Issued on 25/March 1974, cited in A Hamdawi, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013), at 396.
[665] A Hamdawi, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013), at 396.
[666] A Gomirah, *The Abusive Conduct of Shareholders in the Joint Stock Company* (1st edn, Matbat Alomnia, Rabat 2011), at 211.
[667] Decision No 1487 issued on 25/06/1992 cited in R Gait, 'Shareholder's Position in the Joint Stock Company' (Ph.D thesis, Mohammed V University Rabat Morocco 2004), at 287, See also A Gomirah, *The Abusive Conduct of Shareholders in the Joint Stock Company* (1st edn, Matbat Alomnia, Rabat 2011), at 211.
[668] A Gomirah, *The Abusive Conduct of Shareholders in the Joint Stock Company* (1st edn, Matbat Alomnia, Rabat 2011), at 226.
[669] R Gait, 'Shareholder's Position in the Joint Stock Company' (Ph.D thesis, Mohammed V University, Rabat 2004), at 282.

under exceptional circumstances consequently, the power of such institution should be restricted on solving the present issues that led to this conflict,[670] then, the court has to observe whether the appointed manager is acting as has to be or not.[671]

Prior to concluding this chapter we must mention the buy-out relief which is applied in Morocco by s. 1057 of Obligations and Contracts Act[672] on Civil Companies and Partnerships. This remedy has to be granted to a minority shareholder in the Joint Stock Companies to complement the minority protection regime. Although s. 221 of the JSC Act 1996 adopts this remedy, however it is just applied in the case of conversion. In this regard, s. 221 allows in the case of conversion the shareholders to withdraw from this company and they will get the amount of money that is equal to their rights in company's capital. The determining of this amount in the case of disagreement will be fixed by an expert appointed by President of the Court.[673] This relief was recently adopted in Tunisia in 2009 where s. 290 of the Law No 16 which adjusted the Companies Act 2000[674] allows a shareholder or group of shareholders in a non-listed company who hold a percentage which does not exceed 5% of the capital to sell-out their shares and leave the company. These shares have to be purchased by another shareholder or group of shareholders who hold the rest of the shares. These shares have to be purchased at fair value, which is decided by an expert appointed by the court, and if the other shareholders refuse to accept such a value, the court within one month will issue an order that values the shares and asks the other shareholders to purchase them.[675] It seems that the above section (s. 209 of the Tunisian Companies Act 2000) grants the buy-out remedy only to a shareholder or

[670] A Darwish, 'Does a Shareholder Have a Right to Sue His Company to Get a Remedy?' (2001) 91 Journal of Moroccan Courts 17, at 26.
[671] See the Court of Appeal in Rouen, issued on 25 September 1969, cited in A Hamdawi, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013), at 395.
[672] Issued on 12 August 1913 and was amended in 22 September 2011.
[673] See A Gomirah, *The Abusive Conduct of Shareholders in the Joint Stock Company* (1st edn, Matbat Alomnia, 2011), at 236.
[674] Issued on 16 March 2009
[675] K Alaiari, 'The Minority Right to Leave the Company' (2009) 51(7) Journal of Judiciary and Legislation 25, at 31.

group of shareholders who hold a small percentage (not exceeding 5% of the capital), therefore it does not provide any protection to the minority shareholder who holds more than this percentage. Thus, this relief should be granted to each shareholder whereby minority shareholders should always have the right to leave the company and sell their shares at fair value. Adopting this remedy would increase the level of protection in Morocco and save shareholders the cost and time of litigation in addition to avoiding its negative effect on the company and its reputation.

4.5 Conclusion and comparative view

Minority shareholders under Moroccan laws are granted specific rights to participate in the management of the company. In addition to that, independent organs inside the company were created to ensure that the interests of the company and all shareholders are being taken into account in the controllers' decisions. In that regard, the minority shareholders have rights to call a general meeting and schedule any point on its agenda and to prevent the controllers from discussing any point which was not listed in that schedule. Furthermore, such rights are protected by the judicial authority where s. 148 of the JSC Act grants each shareholder a right to petition the Presiding judge of the Commercial Court to issue an order that obligates the company to give the petitioner shareholder all the required information. Also shareholders who hold 10% of the shares (or less than this percentage in the case of urgency) are allowed to go to the court to appoint a judicial proxy to call the general meeting or to delay or stop such meeting. Furthermore, the Moroccan Courts have the ability to remove some items from the agenda of the next general meeting. Beside these rights, the preventative mechanism contains two other means which are the statutory auditor and the appointed judicial expert. In this vein, it was apparent that such organs aim to protect the interests of the minority shareholders, therefore, if the general meeting has not appointed a statutory auditor a shareholder is allowed to petition to the Presiding judge of the Commercial Court to appoint a statutory auditor.

Additionally, a shareholder or group of shareholders who hold at least 5% of the capital are able to complain about the statutory auditors to the Presiding judge of the Commercial Court as judge sitting in chambers to deal with it as a matter of urgency. In the case of having some mistakes by the statutory auditor or where it was clear that he faces some obstacles, the board of directors, the supervisory board, a shareholder or group of shareholders who hold at least 5% of the capital are able to petition the court to remove the statutory auditor and appoint another auditor.

As the statutory auditors are not allowed to interfere in the company's decisions, or in some circumstances it seems to some shareholders that the statutory auditors are not doing their function, or they are standing with one side within the company, a shareholder or group of shareholders who hold 10% of the capital, is given a right to petition the court to appoint an expert or experts to make a report regarding one or more issues relating to the company's business. The appointed expert with his qualifications and experience would be able to increase the level of protection as he or she would be able to give the shareholders the necessary information regarding the issue that he or she is appointed to examine. If misleading conduct by the controllers of the company is found by such a report, minority shareholders are allowed to go to the court to ask the general meeting to make an urgent call, an order to remedy those might be issued if it was proved that such misconduct harmed the interests of minority shareholders. Most importantly, the costs of such an appointment are paid by the company unless it was proved the petition to appoint an expert was abusive. However, the minority shareholders with less than 10% of the shares would not be able to use this method, therefore this right has to be granted to each shareholder or at least to shareholders who hold 5% of the shares. In terms of the statutory auditor organ, it was argued that the period of 30 days from the date of the conduct complained against the statutory auditors that determined by s. 164 is too short for the minority shareholders, as it is very rare to know of conduct within this period.

Thus, it is suggested that such time should start from the date where the minority shareholders know the reason for the complaint.

On the other hand, under the remedial mechanism, minority shareholders have a right to litigate against the controllers of the company, either by the nullity action where the subject conduct would be voided, or by the liability actions (personal and derivative claim) where the appropriate remedy could be obtained. No previous permission from the company is required to start such proceedings. Furthermore, any agreement that prevents a shareholder from using such actions or puts some restrictions on the shareholder's right to use this actions is deemed void. Neither the board of directors nor the general meeting has the power to stop or withdraw the action proceeding against the company even by special resolution. It is within the discretionary power of the court to consider the conditions of each case and grant the appropriate remedy. In the nullity action the court has a power to nullify the decision that affect the interests of minority shareholders whereas in liability actions they would ask the controller of the company to compensate them. In the case of critical disagreement or where it appears to the court that a deadlock has been reached and the continuation of the company will harm the interests of the shareholder, a shareholder or group of shareholders are granted a right to claim the winding up the company. To avoid the winding up result it was seen that the provisional manager petition, which was applied by the French courts, is adopted in Morocco and has increased the level of protection.

It was seen that the law No 20.05 that was issued on 23/05/2008 and amended the JSC (17-95) has strengthened the minority protection regime where it reduced the 10% requirement to complain about the statutory auditor to 5%. However, such percentage is still that same regarding the appointment of an expert and calling the general meeting to be held, therefore it needs to be reduced to in these levels as well. To enhance the level of minority protection in Morocco the buy-out relief which was adopted by Tunisian Law has to be adopted, as such relief would prevent the minority actions and their costs so that it would complement the available tools that protect the minority shareholders.

The aim of this work is to consider minority shareholder protection under English and Moroccan laws and to examine whether the Libyan shareholder protection regime offers equivalent protection to that found in the above systems. Following the discussing of this protection in these two systems it would be useful to any proposal for reform of the Libyan law of minority shareholder protection to have a brief comparison between the protection tools under Moroccan regime with those available under English laws. Such a comparison will illustrate the main means of protection that are available in England and Morocco and shows the differences and the similarities between these two regimes.

English law, like other common law countries, heavily relied on litigation as a main route that is used to protect the minority shareholder. Therefore, this study in relation to English law is primarily focused on these legal actions, (personal and derivative actions, unfair prejudice action and the winding up remedy). However, it was illustrated that minority shareholders under the Companies Act 2006 have certain statutory rights which offer a type of precautionary protection to the minority shareholder. Similarly, minority shareholders under Moroccan JSC Act 1996 are granted specific rights and tools to encourage their participation in the company's decisions. In addition to that, supervision organs were created inside the company to restrict the ultimate power of majority shareholders and reduce the abusive conduct of the controllers of the company. On the other hand, the Moroccan law allows minority shareholders to ask the court to interfere and grants the proper remedy.

In both systems (English and Moroccan) a shareholder is given a right to bring a personal and derivative claim to obtain a remedy. However, it was noted that the "no reflective loss" principle which restricts the personal action in England is not applied under the Moroccan laws.[676] Besides avoiding the non-reflective loss principle in the personal action, the Moroccan laws has provided more appropriate procedures of the derivative claim as the two-stage procedure that is introduced by the Companies Act 2006 for the applicant to get permission to continue the action as a derivative action and the ratification issue are not adopted in Morocco. Furthermore, the condition of clean hands to bring the derivative claim which considered one of the main reasons for refusing many claim in England is not recognized under Moroccan regime. In terms of litigation costs, the minority shareholders in English law have the ability to apply for an indemnity order which asks the company to indemnify the claimant against his costs whereas such a right is not available in Morocco. Therefore, it was apparent in Morocco that minority actions were used in rare cases and it is claimed that the financial bar was the main reason that prevents many shareholders from starting such claims.

The Moroccan legislature has not adopted the unfair prejudice petition which is considered the key distinctive feature of the English regime and which has very much advanced the level of protection and overshadow the use of derivatives action in England. Under such a petition the English courts are given a discretionary power to grant the appropriate relief, however, the buy-out remedy is the most common remedy under the unfair prejudice petitions.[677] The other remedies that offered under the unfair prejudice petition such regulating the affairs of the company, or require the company to refrain from action are applicable in Morocco under the personal and derivative actions.

A shareholder under Moroccan law is allowed to start a petition in order to wind up the company whenever it seems that there are significant disagreements amongst the shareholders, or it appears to the court that the contract terms are being breached. Such a remedy is also

[676] Under such principle the individual shareholder or group of shareholders suffer loss in respect of a wrong done to the company due to a breach of duty owed to it, this kind of loss is considered to be a reflective loss, and has to be recovered by the company itself, as a shareholder does not suffer any personal loss.
[677] Law Commission, *Shareholder Remedies: A Consultation Paper* (Law Com No CP 142, 1996) para 6.11.

applied by English law (s. 122 of the Insolvency Act 1986) where it seems to the court that it is just and equitable to wind up the subject company. Finally, the petition of appointing an interim manager of the company which is available in Morocco is not replicated under English company law, however the procedure of appointing a caretaker receiver can achieve the same result[678]. In this regard, it is provided by s. 37(1) of the Senior Courts Act 1981 that "High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so". [679] In this regard, it was stated in the Law Commission Report that; in order to preserve the position during the inevitable delay between the presentation of a petition and the final hearing, petitioners will frequently seek interlocutory injunctions.[680] In short, except the unfair prejudice petitions, it is clear that there is much under Morocco law that mirrors the position in English Law, such as the personal and derivative actions, the winding up remedy and to some extent the caretaker remedy which tells that there is much convergence in this area of law and there is a limited scope for novelty. Having considered the English and Moroccan systems of minority shareholder protection it is the job of the next chapter to assess to the minority shareholder protection under the Libyan regime in comparison with the rights and tools that presented in the above jurisdictions.

[678] For the use of the receivership remedy in cases where disputes have arisen see *BAT Industries plc v Windward Prospects Ltd* [2013] EWHC 3612 (Comm) and *Catch a Ride Ltd v Gardner* [2014] EWHC 1220 (Ch).
[679] The power to appoint a receiver repeats the terms of predecessor provisions going back to s. 25 (8) of the Judicature Act 1873. Nevertheless, despite the fact that the power to appoint a receiver where it is just and convenient is a long standing remedy there is a considerable paucity of law in relation to its use by shareholders. See P Willcocks, *Shareholders' Rights and Remedies* (1st edn, The Federation Press, Australia 1991), at 67.
[680] Law Commission, *Shareholder Remedies: A Consultation Paper* (Law Com No CP 142, 1996) para 10.7. Examples of cases where interlocutory injunctions have been granted are; *Re a Company (No 19002612 of 1984)* [1985] BCLC 80; *Malaga Investments Ltd & Others, Petitioners* (1987) 3 BCC 569; *Re Mountforest Ltd* [1993] BCC 565; and *Safinia v Comet Enterprises Ltd* [1994] BCC 883.

Chapter 5 The protection of minority shareholders under Libyan Law

5.1 Introduction

Libya has a civil law system, influenced to some extent by Islamic law. Most of its laws were deeply influenced by French laws [681] via the transplantation of Egyptian laws. [682] The Companies Law is not an exception; therefore, the overall structure of Libyan Companies Law is similar to that found in the MENA[683] region where the French laws are prevalent.

In Libya the first Commercial Code was issued in 1953, however this Act has been abolished and it was thoroughly revised in 2010 where a new Business Activities Act was passed (Act No 23/2010), which came into force in 21/08/2010. The above Act covers most of companies law aspects relating to incorporation, regulation, merger liquidation and dissolution of the organised associations. In addition to the Business Activities Act 2010, the Civil Code 1953 is regulating various aspects of the Company law in particular the Civil Companies.[684]

As with other Libyan legislation the first sections[685] of this Act set out the following hierarchy of legal sources: Legislative provisions of the Business Activities Act No 23/2010; Legislative provisions of the Civil Code where there is no applicable section in the Business Activities Act; Case Law, and the Custom of merchants.

[681] The French Commercial Code of 1807 was the historical source of the Egyptian Commercial Code which, in turn, was the historical source of the Libyan Commercial Code. See M Albadawi, *Law of Economic Activities: General Principles and Rules* (3rd edn, part 1 Aljameha Almaftoha, Tripoli 2013), at 31- 32. It has to be mentioned here that the previous Criminal Law was affected by the Italian Law, however most of its provisions were adjusted to comply with Islamic law.
[682] In these systems there is distinction between Private Law and Public Law; Private Law rules govern the legal relations between individuals or private juristic persons, whereas, Public Law rules are applicable to the legal relations to which the state, as a sovereign power is a party. Private law includes: Civil Law, Commercial Law, Civil and Commercial Procedure Law, Labour Law (Employment Law), International Private Law, Property Law and so on. See for example A Abodah, *Basics of Libyan Law: Theory of Law* (1st edn, Part 1 Naser University, Tripoli 1993).
[683] The term MENA stands for Middle East and North African Countries.
[684] Libyan Civil Code which was issued on 23/11/1953.
[685] Ss. 2-3- 4 of the Business Activities Act, 2010.

Companies and partnerships under Libyan Laws are governed by ss. 12- 408 of the Business Activities Act 2010 and ss. 494-536 of the Libyan Civil Code 1953. In addition to the participation firm (association in participation) or what is locally in Libya called "*Sharikt al Mahasa*", there are five forms of commercial business organizations in which commercial association could be established. Three of these are partnerships and the other three are companies. The partnerships are: General partnership (ss. 51-76), Limited or Simple Partnership (ss. 77-90) and the Participation in Association (ss. 91-97). They are known by their Arab names which are respectively***: Sharikat Tadhamun*** **(شركات التضامن),** ***Sharikat Tawsiyah Baseeth*** **(شركات التوصية البسيطة)** and ***sharikat al mahasa*** **(شركات المحاصة).** The three corporations are: the Joint Stock Company (ss. 98-260), Limited Partnership by Shares (ss. 261-270) and the With Limited Liability Company (ss. 271-291). Their Arab names respectively are: ***Sharikat al Mosahamh. (*****شركة المساهمة*****) Sharikt Tawsiyah Belashum (*** **شركة التوصية بالأسهم)** ***and Sharikat that Massoliyah Mahdoda (*****شركة ذات المسئولية المحدودة).** All the above mentioned companies and partnerships are constituted by contract and enjoy legal personality except the association in participation.[686]

Section 13 of the Libyan Commercial Law provides that; “A company shall be considered a trader as long as it takes one of the five forms stipulated in the Business Activities Act 2010 whatever the purpose that the company is formed for”. It is quite clear that the legislature adopted a formal criterion to distinguish between commercial and civil companies. However, the participation firm (association in participation) and what is locally in Libya called "*Sharikt al Mahasa* is considered a trading entity if it makes business activities and a civil entity when it makes civil activities.[687]

---

[686] S. 24 of the Business Activities Act, 2010.

[687] Commercial associations are classified under new Libyan Business Activities Act 2010 into three main divisions: partnerships and corporations, and third category comes in between (the mixed entities) .The distinction is not based on differences of objectives; rather the relative importance of the identities and the personal

Although the Libyan Civil Code contains provisions applicable to all companies and partnerships regardless of their type, nature or activities, the Business Activities Act 2010 deems that all partnerships and companies are commercial. In fact, any entity formed in one of the five provided forms is considered a commercial company regardless of its purposes, and in such cases, provisions of both the Business Activities Act 2010 and Civil Code 1953 and are applicable. If there is any conflict between the codes, the provisions of the Business Activities Act 2010 will prevail.[688] In this regard, it has to be pointed out that in Libya and Morocco most of statutes have influenced to some extent by Islamic law, therefore companies and partnerships in Libyan and Morocco are not allowed to carry on activities that contradict Sharia principles or fundamental foundations of their society. So that if the object of the company opposes to public order or moral such as gambling or drugs, or the object is forbidden for any reason such as white slavery, the contract should be deemed null and void.[689]

The Libyan Business Activities Act 2010 like most Arab Company Laws[690] does not differentiate between partnerships and corporations, therefore, all commercial associations which are mentioned in the Above Act are called companies. In contrast, under English Law and the Commonwealth a company is a body corporate or corporation registered under the Companies Act 2006 or similar legislation; therefore, the "company" term does not include partnership or any other unincorporated group of persons, although such entities may be loosely described as a company.[691]

---

considerations of the partners, as well as, the role of the contract in the legal organization. See ss. 50-98-261 of the Business Activities Act, 2010.

688 S. 2 of the Business Activities Act, 2010.

689 See S Ghumidh, *Bahraini Commercial Companies Law, Provisions and Explanations* (1st edn, University of Bahrain, Bahrain 2014), at 33. And M Made, and f Alzahwi, *The Commercial Companies in Libyan Law* (University of AlJabal Algharbi. Libya 1997), at 29-30.

690 See for example; The Egyptian Companies Act, 1981, The Tunisian Companies Act, 2000 and in Morocco the Act No 5.96 1997 which relates to the General Partnership, Limited Partnership, Limited Partnership by Shares, with Limited Liability Companies, and the Participation in Association.

691 A Cahn and D Donald, *Comparative Company Law: Text and Cases on the Laws Governing Corporation in Germany, UK and USA* (Cambridge University Press, Cambridge, UK & New York, 2010), at xxii.

The Libyan Business Activities Act 2010 comprises general provisions which are applied to all companies and partnerships and certain provisions for each association in particular. The Business Activities Act 2010 heavily regulates joint stock companies as compared to others bodies. In this regard s. 98 provides that shareholders of such company should be liable for the company's debts and obligations only to the extent of the value of their shares. Joint Stock Company under Libyan Law may be either a public company which offers its shares and debt securities to the public through public subscription,[692] or a private company (Closed Joint Stock Company which is the main subject of this research), where its shares are entirely subscribed by its promoters,[693] and it cannot offer its shares for public subscriptions. The number of shareholders must not be fewer than ten, and the company's capital must not be less than 100,000 Libyan dinars (LD).[694] In the light of the democratic management and the control system of the joint stock company, the majority shareholders via the board of directors (which is based on the **unitary board model,** s. 172 of the Business Activities Act 2010)[695] and the general meetings play the role of the executive power since they are responsible for the day to day affairs. Such power has to be used in the benefit of the company and the whole shareholders. Directors of the company have to act within the powers and purpose of the company that set out in its memorandum and articles of association "the ultra vires principal" (s.14 of the Business Activities 2010). Under the ultra vires principle, a company is formed only for limited purposes and it is limited to acting within the objects that are determined in its constitutions. So that the company cannot carry on any activities which is not authorised by its

---

692 S. 107 of the Business Activities Act, 2010.

693 S. 99 of the Business Activities Act, 2010.

694 The Libyan Government's Decree No 186, issued on 22/04/2012.

695 The United States and the United Kingdom provide examples of the unitary board structures, while some other jurisdictions such as Germany, Netherland, Denmark, France and Morocco have adopted a two-tier board model, under such model there is a management board that runs the business and a supervisory board that appoints and supervises the management board. Having seen in the previous chapter that in Morocco that a firm can choose between having a one tier or two tier board model. See R Gait, 'Shareholder's Position in the Joint Stock Company' (Ph.D thesis, Mohammed V University, Rabat 2004), at 181-182.

constitutions and any act undertaken outside those limitations is ultra vires and may be challenged in the courts.[696]

Having shown that controllers of the company may have misused their power where they further their own interests or take decisions that harm the interests of minority shareholders and the company as a whole. Therefore, it is the task of the legislature to develop some rules that enhance the confidence of minority shareholders by promoting transparency and accountability inside the company in addition to providing remedial mechanisms which either grant the minority the appropriate relief or end the company's business. Having illustrated that the English and Moroccan laws enable the minority shareholders with various tools under which the power of majority shareholders might be controlled and the abusive conduct are being remedied. Some of these instruments allow those shareholders to bring litigation against the controllers of the company either to stop the abusive action or to obtain an appropriate remedy. Therefore, this chapter will shed light on the level of protection that offered to minority shareholders under the Libyan regime in comparison with the protection tools that available in England and Morocco, and examines to what extent the Libyan shareholder protection regime would benefit from the long commercial experience in England and the new adopted means in Morocco. The suggested reform would take into account that there is no workable ready-made system of protection for the minority shareholder that can be wholly adopted by Libyan corporate law.

However, before proceeding any further, it has to be pointed out that after the establishing of United Kingdom of Libya on 1953 until the earlier part of Gaddafi' Regime (1970s) the contribution of the private sector to investment exceeded 30% of the investment. [697]

[696] In contrast see s. (31) (1) of the Companies Act 2006 which provides that; unless a company's articles specifically restrict the objects of a company, its objects are unrestricted.
[697] S Ganous, *Libyan Revolution in 30 Years, Political, Economic and Social Transformations, 1969-1999* (1st edn, Dar Al Jamahiriya for Publication, Distribution and Advertising 1999 Libya), at 225.

Nonetheless, as the latter regime adopted the socialist policy the Libyan government during the 1980s and 1999s became the major controller of the Libyan economic system.[698] However, it was clearly seen in the last decade of the Gaddafi era that the Libyan economic system is being relatively transitioned into a market economy and a functioning capitalistic regime. In this regard, many privatisation policies were adopted during the 2000s to encourage this transition.[699] After the fall of this regime in August 2011, a comprehensive review of economic legislation became a key task for the future Libyan legislatures so as to adopt effective rules that complete such a transition and contribute to the development of the commercial environment in Libya. In that process, new rules need to be adopted which offer a sort of protection to all investors who wish to set up their business in Libya. One group of investors who need this protection are minority shareholders as result of the application of the majority rule principle. Taking these considerations into account this chapter will focus mainly on the existing provisions in the Business Activities Act 2010, the Civil Code 1953 and other related laws. This study aims at finding out the weak and inefficient aspects of laws dealing with the protection of minority shareholders and what lessons can be learned from the English and the Moroccan jurisdictions in order to minimise the possibility of abusive conduct by the controllers of the company. To reach such a conclusion the protection of minority shareholders under the Libyan regime will be discussed in two main points, the first part deals with rights and instruments that could prevent or reduce the possibility of abusive conduct by the majority shareholders (the preventative approach) while the second part will shed light on the

[698] M Tibar, 'The Abusive Conduct of Minority Shareholders in Joint Stock Companies , Study in the Law No 23/ 2010' (2012) 1 Journal of Legal Sciences 92, at 93.
[699] 4845 companies were privatised under this policy see Hesham Shernanna and S Elfergani, *Privatisation and Broaden the Ownership Base "A Step towards the Application of the People's Socialist* (International Centre for Studies and Research 2006).

shareholder’s right to ask the judicial authority to protect the minority shareholder and what types of remedies that could be obtain by such litigation (the remedial route).[700]

5.2 Rights and instruments offered by Libyan Law to prevent or reduce the possibility of abusive conduct by the company’s controllers

The Libyan Business Activities Act 2010 grants each shareholder essential rights that cannot be touched by the controllers of the company via the board of directors or the general assembly. Such rights enable each shareholder to participate in the management of the company and practice a sort of supervision over the majority shareholders and the other institutions inside the company. In spite of the essential rights that are granted to each shareholder, there are other rights that are exclusively given to the minority shareholders whose own specific percentage of the company’s capital. Through such rights the abusive conduct of majority shareholders might be stopped at an early stage and by which the minority shareholders would be able to participate in the management of the company.[701]

5.2.1 Shareholders’ right to obtain documents and have information about the company

In most cases the majority shareholder either control the company or have a good relationship with those controllers, therefore, they usually have easy access to those documents, however, this is not the case with the powerless shareholder who is in real need of all information to protect his own interests. Therefore, each shareholder should be allowed to have documents and information relating to his or her company, by such information and documents a shareholder becomes able to practice effectively his role of participation during the meetings of the general assembly and giving his vote with full knowledge of facts. Such a right serves the interests of minority shareholders rather than the interests of the majority one. What is

[700] M Tibar, ‘The Abusive Conduct of Minority Shareholders in Joint Stock Companies, Study in the Law No 23/ 2010’ (2012) 1 Journal of Legal Sciences 92, at 93.
[701] Ibid.

more, the majority shareholder would usually attempt to prevent the minority shareholder from getting any information that may lead such a minority curtailing their actions or start litigation against the majority. To obtain such information the legislature puts some obligations on the board of directors and other institutions inside the company to enable the shareholders to access documents related to shareholder meetings, inventory, financial statements, consolidated accounts, reports of the board of directors, draft resolutions submitted to the general assembly and related subjects.[702] Obtaining such information would make the general meetings for the minority shareholder more effective.

Although, the right to obtain certain information can be exercised at any time, however, it is seen from ss. 223-224 of the Business Activities Act 2010 that the Libyan Legislature does not give enough effect to such right as s. 224 allows a shareholder only to see the register of the shareholders and the minutes of the shareholders' meetings and their decisions. The above sections do not give a shareholder a right to ask for the financial statements nor the minutes of the board of directors and its decisions, also a shareholders is not allowed to see the minutes of the supervisors' committees.[703] In contrast with the Libyan position, having seen in the previous chapter that ss. 140 and 141 of the JSC Act in Morocco grant each shareholder a right to have all the required information from the day of calling the meeting or at least in fifteen days before the next scheduled meeting.[704] Giving a shareholder a right to have the agenda of the next meeting would prevent the controllers of the company from adding or dropping out any new points in that meeting. If the controllers of the company are allowed to discuss new points some abusive decisions might be taken with no consideration to the interests of other

[702] S Ghumidh, *Bahraini Commercial Companies Law, Provisions and Explanations* (1st edn, University of Bahrain, Bahrain 2014), at 184.
[703] See F Ahmouda, 'Transparency in Companies Law' (2014) 3 Journal of Legal Sciences 65, at 87-97. See also M Tibar' 'The Abusive Conduct of Minority Shareholders in Joint Stock Companies, Study in the Law No 23/ 2010' (2012) 1 Journal of Legal Sciences 92, at 101.
[704] Such information is listed by s. 141 of JSC Act 1996, for more details see Chapter Four (4.3.1.1), at 131-132.

absent shareholders. A shareholder under Moroccan law is also allowed to have the information that is listed by s. 141 upon his or her request as s. 146 of the JSC Act 1996 provides that each shareholder has a right to have all the information that is listed in s. 141 at any time.[705] If a shareholder is prevented from gaining that information either entirely or partly, s. 148 of JSC Act 1996 in Morocco grants that shareholder a right to petition the Presiding judge of the Commercial Court to issue an order that obligates the company to give the petitioner shareholder all the required information.[706] Under English law a shareholder is given a variety of rights which ensure that he obtains the necessary information regarding his or her company. For instance, under s. 431 of the Companies Act 2006 a member of an unquoted company has a right to be provided, on demand and without charge, with a copy of (a) the company's last annual accounts, (b) the last directors' report, and (c) the auditor's report on those accounts (including the statement on that report).[707] In addition to that a shareholder under s. 310 of the Companies Act 2006 has a right to receive notice of any general meeting, and to inspect minutes of general meeting (ss. 248-355-358 CA 2006).[708] In this regard, s. 740 of the Hong Kong Companies Ordinance 2012 (Cap 622) confers either shareholders holding at least 2.5% of the voting rights, or at least 5 shareholders of the company a right to apply to the court for an order requiring the company to disclose its records or documents. The court under s. 740 (2) has a discretion to order inspection of a company's records or documents if it is satisfied that the application is made in good faith and the inspection is for a proper purpose. Moreover if the court issues such an order a shareholder or group of shareholders are allowed to make

[705] A shareholder is allowed by s. 147 of the JSC 1996 to take a copy of those documents as he or she might need to consult a professional person regarding one or some issues, moreover s. 157 of the JSC Act 1996 grants a shareholder a right to delegate a proxy to practice the right that is given by ss. 141-145-146, for more details see Chapter Four (4.3.1.1), at 131-132.
[706] With such an order, the court issues a daily fine for the delay in granting the shareholder the listed information. Moreover, s. 392 of the JSC Act imposed a fine on the controllers of the company from 8000 to 40000 Moroccan Dirham if they do not comply with the above sections. For more details, see Chapter Four (4.3.1.1), at 131-132.
[707] See Chapter Three (3.1), at 66.
[708] See Chapter Three (3.1), at 66.

copies of the records or documents.[709] In this context, the claimant shareholders in the recent case of *Artan Investments Ltd & Ors v The Bank of East Asia Ltd & Ors*[710] succeeded in convincing the court that the claim was in good faith and it is for a proper purpose therefore the court issued an order requiring the company to disclose its records and related documents. The above section confers the minority shareholders with quite broad right of access to company records which is considered as a power weapon for minority shareholders to seek discovery and inspection of records and documents of companies therefore it should be adopted in Libya.

In short, the shareholders' right to obtain documents and have information about the company under Libyan law is not well organised as shareholders have only limited access to some non-important documents (the minutes of the shareholders meetings and their decisions) with no ability to have the financial statements, the minutes of the board of directors and its decisions. Therefore, a shareholder under Libyan company law should have a right of access to all important information such as that provided by s. 141 of the JSC and a shareholder should be allowed to obtain this information upon their request with the ability to have a copy of those documents to consult an expert or grants a shareholder a right to delegate a proxy to exercise the right. Furthermore, enhancing the role of minority shareholders in Libya regarding this right necessitates the adoption of s. 740 of the Hong Kong Companies Ordinance 2012 which grants minority shareholders a right to apply to the court for an order requiring the company to disclose its records or documents if the claimant satisfy that court that the application is made in good faith and the inspection is for a proper purpose. Moreover the Libyan legislature needs to the adopt the policy of s. 392 of the JSC Act 1996 in Morocco by which the Libyan courts

[709] S. 740 (3) of the Hong Kong Companies Ordinance, 2012.
[710] [2015] HKCU 1268.

would be able to issue a daily fine on the controllers of the company for the delay in granting the claimant shareholder the records or the related documents.

5.2.2 Minority shareholder's right to convene general meetings or to include specific items on the agenda

Shareholders in their general assembly[711] are the supreme body of the company where most of the company's decisions are taken. Attending those meetings allows minority shareholders to participate in appointing and removing directors, appoint the members of the supervisors 'committee, decide the compensation for directors, and make decisions on the liability of directors and member of the supervisors' committee.[712] That is to say, via such meetings shareholders will exercise their rights to vote and consequently have an opportunity of taking part in running the affairs of the company by questioning the directors regarding their management of the company's business.[713] Thus the shareholders' meeting plays a critical role in the company's life.

In this manner s. 154 of the Libyan Business Activities Act 2010 authorises the board of directors to summon the general meeting and publication of such notice shall be given at least 15 days before the meeting is held. As regards the minority shareholder, s. 155 provides that the board of directors is obliged to call the general meeting whenever shareholders owning not less than 10% of the company's capital request the general meeting to be convened. In their request the minority shareholders have to list any point that needs to be discussed in that meeting. However, if the board of directors has not called the general meeting to be convened it is the job of the supervisors' committee to make such an invitation. If neither the board of

[711] S. 153 of the Business Activities Act 2010 provides two types of general meeting; the ordinary general meeting and special general meeting.
[712] See L Segato, 'A Comparative Analysis of Shareholder Protections in Italy and the United States: Parmalat as a Case Study' (2006) 26(2) Northwestern Journal of International Law & Business 373, at 391.
[713] S Ghumidh, *Bahraini Commercial Companies Law, Provisions and Explanations* (1st edn, University of Bahrain, Bahrain 2014), at 232.

directors nor the supervisors 'committee have called the general meeting to take place the president of the primary court upon a request from those shareholders will convene the general meeting to be held and the court in its order has to determine the chairman of that meeting. By such rights the minority shareholders have not only a chance to have a general meeting upon their request, but also impose their points on the majority shareholders as this general meeting will discuss the requested points by the minority shareholders.[714] Having discussed in chapter four that, s.116 of JSC Act in Morocco enables a shareholder or groups of shareholder who hold at least 10% of the shares or lees than this percentage in the case of urgency to go to the court to appoint a judicial proxy to invite the general assembly to be convened.[715] In England, shareholders with at least 10% of the voting rights (5% if no shareholders' meeting has been held for more than 12 months) have a right to call a general meeting (s. 303 CA 2006). Furthermore, s. 306 of the Companies Act 2006 confers each shareholder a right to ask the court to call a general meeting.

Section 155 of the Libyan Business Activities Act 2010 (like s. 116 of the JSC Act in Morocco and s. 303 CA 2006) has not been immune from criticism as it is not always easy in practice to muster 10% of shareholders in the company with large number of shareholders. However, it was seen that s. 166 of JSC 1996 in Morocco disregarded this percentage in the case of urgency, and s. 303 of Companies Act 2006 reduced this percentage to 5% if no shareholders' meeting has not been held for more than 12 months), whereas Libyan Law has not adopted such exceptions. Additionally, having seen that under s. 306 of Companies Act 2006 that each shareholder has a right to ask the court to call a general meeting, therefore, such rule needs to be adopted in Libya. Although this right is not widely used in England, however, having such

[714] M Tibar, 'The Abusive Conduct of Minority Shareholders in Joint Stock Companies, Study in the Law No 23/ 2010' (2012) 1 Journal of Legal Sciences 92, at 112.
[715] S Belmris, 'The Protection of Minority Shareholders' Rights in Joint Stock Companies' (unpublished dissertation, High Judicial Institute, Rabat 2011), at 13.

a statutory right would make the controllers of the company more cautious and it enables an individual shareholder to ask the court to call a meeting where the 10% level could not be obtained. In Egypt, s. 61 of the Egyptian Companies 1981[716] grants a number of shareholders representing at least 5% of the company's capital a right to ask the board of directors to invite the general assembly, however their request has to be based upon serious reasons, and it is within the discretionary power of that board to accept their request or not. It undoubtedly appears that that board of directors is not the right organ to examine the shareholders' request, as in most cases such a request would be rejected. Therefore, the English and Moroccan position that allows the judicial authority to interfere and order a general assembly to take place is recommended. However, the Egyptian position of granting only 5% of the shareholders this right is suggested for both Libyan and Moroccan jurisdictions. It has to be pointed out here that s. 519 of the former Libyan Commercial Code 1953 allows a number of shareholders representing at least 20% of the capital to practise this right so such a percentage was reduced and it is recommended for the Libyan legislature to reduce this percentage again to 5% of company's capital.[717] To prevent nonsense claims the courts have to ascertain that the board of director or the supervisory boards were not willing to invite the general meeting to such an event and the number of claimant shareholders forms the required percent of the company's capital unless it is proved that it is an urgent case.[718]

Since the above provision establishes only the right of calling the general meeting with no mention to whether a shareholder would be able to cancel or at least delay the next general meeting, having illustrated in chapter four that the Moroccan courts have adopted a principle by which the judge of the Commercial Court as an urgent judge is allowed to delay the general

[716] Act No 159, 1981.
[717] The Commercial Code, 1953.
[718] See the decision of the Commercial Court of Casablanca, case No 89/449, issued on 18/08/1998 (2000) 82 Journal of Moroccan Courts 209, at 213.

meeting wherever it seems that there are justifiable reasons.[719] Therefore, such a principle needs to be adopted by Libyan laws and shareholders should have a right to invite and cancel or at least delay the next general meetings.

In addition to the minority right to summon the general meeting in some circumstances they need to discuss specific points at those meetings, so that it is significant for those shareholders to partake in the management of the company and to have their viewpoints considered. In this regard, s. 154 of Business Activities Act 2010 allows a number of shareholders representing at least 10% of the company's capital to ask the board of directors to list some points on the agenda of the general meeting. This request has to be submitted at least 5 days before the date of the meeting. The chairman of the general meeting has to mention these points at the beginning of the meeting and the consent of the majority of the present shareholders is required to discuss these points. We saw in chapter four that s. 117 of the Moroccan JSC Act 1996 gives a shareholder or group of shareholders who hold at least 5% of the capital (or 2% if the company's capital is five Millions Dirham) a right to ask for listing some specific items on the agenda of the general meeting.[720] It is apparent that following the Moroccan position of reducing the percent to 5% would offers a better chance to the minority shareholders to participate in the management of the company. The importance of this section is that it allows the minority shareholder to have their opinions considered and recommend some persons to hold positions in the board of the directors; consequently they would have some representations on that board.[721] Furthermore, sub (6) of s. 163 of the Libyan Business Activities Act 2010 provides that the general meeting shall not consider any matters not listed on the agenda,

[719] The Commercial Court of Appeal in Casablanca, decision No 1630, file No 83/1113, issued on 13/12/1983, in this case the court grounded its judgment on s. 149 of the Civil Procedural Law which allows the president of the Primary Court to work as an urgent judge in these circumstances, cited in A Hamdawi, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013), at 271.
[720] For more details, see Chapter Four (4.3.1.2.), at 134-135-136.
[721] A Hamdawi, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia 2013), at 289.

however, if a number of shareholders representing 10% of the capital discover some prejudicial acts after the agenda has been prepared or during the meeting it is possible for the general meeting to discuss these points upon their request. Though, the Libyan legislature has not provided any guidance for determining the prejudicial actions therefore whenever the minority shareholders realise that some acts might affect their own interests or may affect the interests of the company as a whole they are allowed to ask the general meeting to discuss such points in the subject general meeting.[722] Likewise, s.118 of the JSC 1996 in Morocco prevents the general meeting from discussing any point unless it was already added to that agenda, but it has not given the minority shareholders the chance to discuss any new actions.

Briefly, the Libyan legislature attempts to protect the minority shareholders by giving them rights to call the general meeting and schedule any points on its agenda; by such rights they are able to play effectual role in the company's decisions, in particular where the board of directors is under the control of the majority shareholders. However, such rights would not serve the minority shareholders who hold less than 10% of the voting rights therefore this percentage needs to be reduced to 5% either for the minority shareholder's right to call the general meeting or to list some point on its agenda. Having seen that s. 306 of Companies Act 2006 allows each shareholder to ask the court to call a general meeting, therefore, such policy needs to be adopted in Libya.

It was discussed in the previous chapter that the JSC Act 1996 in Morocco provides other supervision organs such as the statutory auditors and the appointed expert which are created to make sure that the majority shareholders are not abusing the interests of other shareholders, In Libya this role was given to the supervisors' committee and the external auditor therefore, the

[722] M Tibar, 'The Abusive Conduct of Minority Shareholders in Joint Stock Companies, Study in the Law No 23/ 2010' (2012) 1 Journal of Legal Sciences 92, at 113.

function of such organs in protecting the minority shareholders will be discussed in the next two sub-sections.

5.2.3 The supervisors' committee as a means of protection to minority shareholders

Legislation contained in different statutes performs various kinds of oversight over companies to prevent any diversion from the company's goals.[723] To control the company's activities in Libya s. 196 of the Business Activities Act 2010 provides that each joint stock company has a supervisors' committee[724] that is composed from three main persons; one of them needs to have a high accounting qualification and one has to hold a high law degree. Such a committee has to be held at least once every three months.[725] The members of this committee should not be a relative of a fourth degree to the chairman or members of board of directors or general directors.[726] The policy behind these conditions is to ensure that the members of this committee are independent members and they are not under the influence of the controllers of the company. However, as the same provision provides that it is the role of the general meeting to appoint the members of the supervisors' committee and to fix their remuneration, there is a high possibility of having members who are in close relationship with them in disregarding the interests of minority shareholders.[727]

To play an important role in preventing the controllers of the company from abusing their power and to ensure that managerial actions are not based on personal whims s. 200 of the

[723] S Ghumidh, *Bahraini Commercial Companies Law, Provisions and Explanations* (1st edn, University of Bahrain, Bahrain 2014), at 275.

[724] However, it is possible for the commercial banks that are under the supervision of the Libyan Central Bank to provide in their Article of Association another tool of control instead of the supervisor's committee. S. 196 of the Business Activities Act, 2010.

[725] S. 201 of the Business Activities Act, 2010.

[726] See s. 197 of the Business Activities Act to have more details regarding who is qualified to be appointed as a member of the Supervisors' Committee.

[727] If the members of this committee were not appointed in the memorandum of association, promoters of the company may appoint those members to carry out their jobs until the constituent general meeting is held, s. 198 of the Business Activities Act, 2010. See M Madi, and F Alzahwi, *Commercial Companies in Libyan Law* (University of AlJabal Algharbi, Libya 1997).

Business Activities Act 2010 establishes that the supervisors' committee has to monitor the controllers of the company and make certain that there is no breach to the memorandum of association. Besides, it is the function of this committee to fulfil an important financial and technical control over the company to assure that the controllers of the company act within their authorised power. It is obligatory for the supervisors' committees to attend meetings of the general assembly and the board of directors,[728] also it is obligatory for this committee to summon the general meeting to be convened if the board of directors has not done this task.

In addition to the indirect protection that is offered to the minority shareholders by the supervisors' committee as described above, the Libyan Business Activities Act 2010 provides some tools that give the minority shareholders the power to protect themselves directly via this organ. In this context, each shareholder can file a complaint with the supervisors' committee concerning acts he deems censurable, and the committee has to take the complaint into account and mention to it in its report to the general meetings with its suggestions and recommendations regarding this issue.[729] Furthermore, if a shareholder or group of shareholders representing 5% of the company's capital complain to the above committee, it is compulsory for the committee to carry out without delay an urgent investigation and submit a report with its findings and recommendations to the general assembly. The supervisors' committee might invite the general meeting to be convened if it seems that there are serious reasons to justify the complaint.[730] It has to be mentioned here that there is a high possibility that members of supervisors' committees are in close relationship with members of the board of directors so that they might not give such complaint any attention. Furthermore, even where the supervisors' committees reports it to the general meeting such complaint would have no effect where the board of directors forms the majority of that general meeting.

[728] S. 202 of the Business Activities Act, 2010.
[729] S. 205 of the Business Activities Act, 2010.
[730] S. 205 of the Business Activities Act, 2010.

As regards to the board of directors' decisions, s. 181 of the Business Activities Act 2010 grants the supervisors' committees a right to file the nullity action if such decisions harm the interests of the company within three months from the issuing date of the subject decision. Such action is more effective than action taken by minority shareholder as the supervisors' committee has the power to see and examine the whole documents of the company and it is authorised to request the board of directors and the general assembly to provide the committee with any information or documents that relate to that complaint.[731] Last but not least, in the case of dismissing the chairman or any member of the supervisors' committee the general meeting has to rely on reasonable reasons, furthermore, s. 198 of Business Activities Act 2010 provides that the decision of dismissing members or chairman of the supervisors' committee would not be valid unless it is approved by the primary court after hearing their opinions.[732] In these circumstances, it would not be easy for the controllers of the company to terminate the office of the member of the supervisor's' committee so that they have a suitable environment to make effective control over the company.

5.2.4 The role of the external auditor under Libyan law

There is no doubt that having internal supervisory mechanisms inside the company plays an important role in preventing the controllers of the company from any deviation. Having said that, the Moroccan legislature gives the statutory auditor sufficient power to ensure that the interests of the whole shareholders are considered. Likewise, s. 18 of the Libyan Business Activities Act 2010 requires each company to have at least one external statutory auditor to exercise some sort of control over the controllers of the company. However, the role of such auditor under Libyan law is only to exercise financial review over the company's financial

[731] See M Madi, and F Alzahwi, *Commercial Companies in Libyan Law* (University of AlJabal Algharbi. Libya 1997). See also M Tibar, 'The Abusive Conduct of Minority Shareholders in Joint Stock Companies, Study in the Law No 23/ 2010' (2012) 1 Journal of Legal Sciences 92, at 107.
[732] The Business Activities 2010.

statements prior to submit them to the annual general meeting.[733] In addition to that ss. 208-209 require the external auditor to provide a report regarding the financial and accountant affairs of the company, and the board of directors is required to provide this auditor with the final financial statements in order to examine them.

5.2.5 Evaluating the role of the supervisor's committee and the external auditor

It obviously appears that the external auditor under Libyan law does not offer the minority shareholders any real protection in particular if it is compared with the role of the statutory auditor in Moroccan law. However, it may well be argued that the role of the statutory auditor under Moroccan law is replicated by the supervisors' committee under the Business Activities Act 2010, therefore it is worthless to give the same role to two different organs. For instance, s.166 of the JSC Act in Morocco allows the statutory auditors to observe on permanent basis the accounting documents of the company and check the accuracy of the information contain in the company's financial reports. Likewise, s. 200 of the Business Activities Act 2010 in Libya establishes that the supervisors' committee has to monitor the controllers of the company and make certain that there is no breach to the memorandum of association. It is also the function of this committee to fulfil an important financial and technical control over the company to ensure that the controllers of the company act within their authorised power. It is mandatory under s. 202 of the Business Activities Act 2010 for supervisors' committees to attend the meetings of the general assembly and the board of directors.[734] Furthermore, it is obligatory for this committee to summon the general meeting to be convened if the board of directors has not done that task. The same role is applied in Morocco by the statutory auditors, as the board of directors and the general meeting are required by s. 170 of the JSC 1996 to invite the statutory auditors to attend their meetings, similarly, s. 178 of the JSC 1996

[733] S. 208 of the Business Activities Act, 2010.
[734] S. 202 of the Business Activities Act, 2010.

considered as void all decisions that were taken by these organs in the absence of the statutory auditor.[735] If the general meeting has not appointed a statutory auditor, s. 165 of the JSC Act 1996 in Morocco allows each shareholder to petition to the Presiding judge of the Commercial Court as a judge sitting in chambers to appoint the statutory auditor. Section 176 of the JSC Act in Morocco grants the statutory auditor a right in the case of urgency to invite the general meeting, consequently, if it is believed that the minority's interests are being disregarded, a general meeting has to be called to inform such minority of this conduct. The minority shareholders need 10% of company's capital to call a general meeting unless an urgent case was proved. Moreover, the statutory auditor by his observation role would always have a higher chance to discover any abusive conduct. A shareholder (or group of shareholders) who holds at least 5% of the capital is allowed by s. 164 of the JSC Act to complain about the statutory auditors to the Presiding judge of the Commercial Court as judge sitting in chambers to deal with matters of urgency. Such a petition has to be well founded and has to be submitted within 30 days from the happening date of the conduct complained of. When the statutory auditor has made mistakes or it is seen that some obstacles were facing him, s. 179 allows the board of directors, the supervisory board, a shareholder or group of shareholders who hold at least 5% of the capital to petition the court to remove the statutory auditor and appoint another auditor. The minority shareholder is granted a right to petition to remove the statutory auditor in order to avoid the cases where the majority shareholders (or the general meeting, board of directors or the supervisory board) disregard the role of this organ or where it seems that the statutory auditor is working with the majority shareholders.[736] Similarly, under s. 205 of the Business Activities Act 2010 each shareholder can file a complaint with the supervisors' committee

[735] In the same manner s. 106 of the Egyptian Companies Act 1981 obligates the statutory auditor or his representative to be present at those meetings as the attendance of the statutory auditor with their reports will enable each shareholder to see those reports in direct way and have questions about those reports.

[736] Issued on 11/06/2000, cited in H Zoair, 'Protection of Minority Shareholder by the Judicial Authority'(unpublished dissertation, High Judicial Institute, Rabat 2009), at 25.

concerning acts he deems censurable, and the committee has to take the complaint into account and mention to it in its report to the general meetings with its suggestions and recommendations regarding this issue. Furthermore, if a shareholder or group of shareholders representing 5% of the company's capital complain to the above committee, it is compulsory for the committee to carry out without delay an urgent investigation and submit a report with its findings and recommendations to the general assembly. The supervisors' committee might invite the general meeting to be convened if it seems that there are serious reason justify their complaint.[737] What is more, (as will be discussed in the next section) s. 206 of the Business Activities Act 2010 allows shareholders owning not less than 10% of company's capital to file a complaint with the primary court if they noticed that the acts of the supervisors' committee is deemed censurable or they violated their duties.

It is apparent that the role of the statutory auditor under Moroccan law is fulfilled by the supervisors' committee under the Libyan Business Activities Act 2010, nonetheless, it has to be pointed out here that s. 166 of JSC Act 1996 establishes clearly that it is the duty of the statutory auditor to make certain that all shareholders are treated equally. However, it is worthy to indicate that there is no mention to the principal of equal treatment in the Libyan Business Activities Act 2010, therefore it is recommended for the policy maker to establish a duty on the supervisors' committee to ascertain that all shareholders are treated equally. In addition to the above discussed rights and organs which offer a sort of preventative approach to the minority shareholders, the Libyan law grants such shareholders a right to go to the court and ask for judicial protection therefore, it is the function of the second part of this chapter to examine the right of minority shareholders to start proceedings against the controllers of the company in order to obtain a sufficient remedy.

[737] S. 205 of the Business Activities Act, 2010.

5.3 The function of judicial authority to protect the minority shareholder under Libyan law

There is no doubt that the level of protection of minority shareholders would be increased once they are given specific rights that grant such a minority a chance to participate in the management of their company. By these rights the minority shareholders might impose some sort of supervision over the controllers of the company so that the power of those controllers is restricted. There is no doubt also that the abusive conduct of majority shareholders might be reduced by these rights, however, that majority still have enough control to further their own interests and ignore the interests of minority shareholders. Therefore minority shareholders under Libyan Business Activities Act 2010 are allowed to go to the judicial authority either to nullify conduct of the controllers of the company or to obtain an appropriate remedy.[738] In this context, the first section would shed a light on the minority shareholders' right to bring a complaint to the court, while the second sub-section examines the nullity action and its application under Libyan law. Whereas, the last two sub-sections discuss the other actions that can be brought by the minority shareholders to obtain the appropriate remedy such as the liability actions (the personal action and the company liability action) and the winding up petition.

5.3.1 The minority shareholders' right to bring a complaint to the court

A company as a juristic entity can only act through its controllers who are the agents of that company; those controllers are under a duty to act as best as they can to further the interest of the company. Yet, those controllers might abuse their authority and pay no attention to the interests of other shareholders, therefore, s. 206 the Business Activities Act 2010 allows shareholders owning not less than 10% of company's capital to file a complaint to the primary

[738] See M Madi, and F Alzahwi, *Commercial Companies in Libyan Law* (University of Aljabal Algharbi, Libya 1997).

court if they believed that the acts of the members of the board of directors or the supervisors' committee are deemed censurable or they violated their duties. Such a right grants a self-defence mechanism for shareholders which is much stronger and more effective as a number of shareholders representing 10% of the company's capital are allowed to go to the primary court and complain about such conduct without any previous permission. So, this complaint is not restricted by the consent of the general assembly or the board of director.[739] The court has to listen to the member of the board or the supervisors' committee within eight days from the date when the complaint was brought.[740] It is within the discretion of this court to carry out an investigation over the management of the company at the expense of those shareholders and the court might appoint an expert or experts to make such an investigation. Moreover, it is the right for those shareholders to ask the court to appoint an expert to have the investigation done properly.[741] Ii is also within the power of the court to ask those shareholders to provide a financial guarantee if it deems that it is necessary. This condition was adopted to prevent a shareholder from bringing a vexatious complaint, however, it is argued that such costs would prevent a shareholder from initiating even a well-grounded complaint.

If the court deems that the evidence produced constitutes a well-founded basis of suspicion, it is within the power of that court after hearing the members of the board and supervisors' committees in chambers to order an investigation on the company's management at the expense of the petitioning shareholders. The court may order whatever it thinks fit from the precautionary measures and call the general meeting to hold an urgent meeting in order to take the needed decisions.[742] Furthermore, in the most serious cases where collusion is clearly

[739] As will be discussed later it is difficult for a shareholder to start a liability action against the member of the board of the directors and the member of the supervisors' committee as such action needs permission from the general meetings.
[740] S. 83 of the Civil and Commercial Procedures Act, 1953.
[741] S. 201 of the Civil and Commercial Procedures Act, 1953.
[742] S. 206 of the Business Activities Act, 2010.

proved between the majority of the shareholders and the directors, who acted with the conscious tolerance, if not the incitement, of certain shareholders s. 207 grants the court a power to discharge the board of directors and the supervisors'' committee and appoint a judicial administrator and determines the scope of job and time for which he will hold office. It is within the power of such a director (the appointed judicial administrator) to start a liability action against the board of directors and the supervisors' committee, and prior to the end of his mission he has to invite the general meeting to be convened under his presidency in order to appoint new board of directors and new supervisors' committee. Moreover, s. 207 indicates that it is within the remit of the appointed judicial administrator to suggest a winding up of the company if there were serious reasons. However, the winding up suggestion needs be considered by the general meeting to see whether to accept or refuse this suggestion. To avoid a malicious application, the court empowered with full discretion to accept or refuse such a petition, in so doing the court will hear members of the board and the supervisors' committee to give them a chance to have their opinion regarding that conduct. However, it is reasonably argued that although giving the court a power to ask the petitioner to provide financial guarantee, would reduce the possibility of having malicious petitions, however, such a condition would form a financial barrier which makes this mode of protection less effective.[743]

In the same way, it was illustrated in the previous chapter that s. 157 of the JSC Act 1996 in Morocco empowers a shareholder or group of shareholders holding 10% of the capital, to petition the Presiding judge of the Commercial Court to appoint an expert or experts to provide a report regarding one or more issues relating to the company's business. The appointed expert would examine whether the decisions that relate to such issue serve the company's interests or only the interest of the company's controllers. Copies of the expert's report have to go to the

[743] See M Tibar, 'The Abusive Conduct of Minority Shareholders in Joint Stock Companies, Study in the Law NO 23/ 2010' (2012) 1 Journal of Legal Sciences 92, at 110.

board of directors, the supervisory boards, the statutory auditors and the petitioner. However, and most importantly, under Moroccan law the remuneration of the expert or experts have to be paid by the company, unless it was proved that the petition was abusive and it aimed to harm the company.[744] Having said above that the financial bar would prevent a shareholder from starting this claim under Libyan law, therefore the Moroccan policy of paying the cost of such petition by the company itself would eliminate this hurdle, at the same time, putting a condition that the company would not pay the malicious petition would reduce an action that only aim to disturb the company's business.

In both jurisdictions (Libya and Morocco), if the expert's report shows that there is some misleading by the controllers of the company, minority shareholders are allowed to go to the court to ask the general meeting to make an urgent call, moreover, if the court found that such misconduct harmed the minority shareholders an order to remedy those shareholders might be issued.[745] Nonetheless, the job of the appointed expert in Morocco is usually related to one or more specific issues and it is not for the whole activities of the company while there is no such a restriction under Libyan Law. Having argued above that it is not always easy to have 10% of shareholder, therefore it recommended that such a percentage level needs to be reduced.

In terms of appointing a judicial administrator although s. 157 of the JSC 1996 Act does not empower the court to appoint judicial administrator such as s. 207 of the Business Activities Act 2010, however, having discussed earlier that many Moroccan scholars such as Abdoalwhed Hamdawi[746] and Amina Gomirah[747] believe that there is nothing preventing the Moroccan

---

[744]A Fahad, 'The Protection of Minority Shareholders' Rights in the Joint Stock Company' (2012) 24 October http://www.marocdroit.com accessed 14 March 2014.
[745] H Zoair, 'Protection of Minority Shareholder by the Judicial Authority' (unpublished dissertation, High Judicial Institute, Rabat 2009), at 31.
[746] A Hamdawi, *Majority Shareholders Abuses in the Joint Stock Company, Comparative* Study (1st edn, Dar Alafag Almagribia, Rabat 2013), at 388-389.
[747] A Gomirah, *The Abusive Conduct of Shareholders in the Joint Stock Company* (1st edn, Matbat Alomnia, Rabat 2011), at 226.

Court from applying such principle as long as s.149 of the Moroccan Civil Procedural Act 1974 grants the president judge of the primary courts this discretionary power.[748] The petition of appointing an interim manager of the company which is available in Libya and Morocco is not replicated under English Law however the procedure of appointing a caretaker receiver can achieve the same result. In this regard, s.37 (1) of the Senior Courts Act 1981[749] provides that "the High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so".[750]

From what has been discussed above, it seems that there is much convergence in this area of law regarding the complaint of controllers' conduct and the appointment of a judicial administrator, such a mechanism in the above systems would restrict the power of majority shareholders and bestow the minority shareholders opportunities to prevent or reduce the offensive acts of the controllers of the company at early stage, furthermore, such a petition would make members of supervisors' committees in Libya more observant as they fear of facing this kind of petition.

5.3.2 The nullity action

Under ss. 160-161 of the Libyan Business Activities Act 2010, a resolution passed by the general assembly can be rendered void if such a resolution is in contravention of the law, memorandum or articles of associations.[751] The action to have a decision set aside can be initiated by the board of directors, supervisors' committee, shareholders whose objection to the resolution has been put in the meeting's minutes, or any shareholders who did not attend that meeting. In this regard, s. 159 of the Business Activities Act 2010 provides that a shareholder

[748] See Chapter Four (4.4.4), at 161-162-163.
[749] Formerly the Supreme Court Act 1981.
[750] For the use of the receivership remedy in cases where disputes have arisen see *BAT Industries plc v Windward Prospects Ltd* [2013] EWHC 3612 (Comm) and *Catch a Ride Ltd v Gardner* [2014] EWHC 1220 (Ch).
[751] Such nullification is not prejudicing the rights of bona fide third parties. See M Madi, and F Alzahwi, *Commercial Companies in Libyan Law* (University of Aljabal Algharbi, Libya 1997).

shall not vote for himself or for whomsoever he presents in matters which he has a direct or indirect interests and which conflict with the company's interests. The same section provides that any resolution passed in contravention of this rule is to be nullified if it is proved that such resolution harms the company and there is evidence that the vote of the interested shareholders was necessary to issue that resolution. The action to have the decision declared void must be filed within 60 days from the date when the decision was taken.[752] It is within the power of the court to issue an order which suspends the implementation of the subject resolution if it is requested by the petitioner and it is proved that there are serious reasons for such a delay in implementation.

Under these conditions minority shareholders would avoid such kind of action since they would find a difficulty in proving that the resolution was against the law or the company's constitutions. Furthermore, the decisions that the court can make in relation to the nullity action are limited to either confirming the resolution or nullifying it. What is more, s. 161 allows the president of the primary court to ask the shareholder who filed the nullity action to provide appropriate financial guarantee in order to remedy any damage that might happened, such a condition would put up extra bar that discourages a shareholder from using such kind of costly action.

In terms of the board of directors' decisions, s. 181 of the Business Activities Act 2010 establishes that the president of the board of directors and its members are not entitled to vote on matters which they have a direct interest or which have interests for their relatives of a fourth degree or for whomsoever they represent if such a decision in contrary to the interests of the company. The above section gives a member of the board who did not attend the meeting or who voted against the decision and the supervisors' committees a right to file the nullity action

[752] S. 161 of the Business Activities Act, 2010.

if such decisions harm the interests of the company within three months from the issuing date of the subject decision. The above section establishes that any complaint has to be effective as the supervisors' committee has granted the power to see and examine the whole documents of the company and it is authorised to ask the board of directors and the general meeting to provide the committee with any information or documents that relate to that complaint.[753] In the same manner, s. 338 of the JSC Act 1996 in Morocco has adopted the nullity action as a way of protecting the interest of the minority shareholders and the interests of the company as a whole, however, under Moroccan law each shareholder has a right to bring this action while the nullity action under Libyan law can only be initiated by the board of directors, supervisors' committee, shareholders who did not attend the meeting or who voted against that decision. Moreover, in Morocco, a shareholder has a right to bring this claim if the principle of equal treatment to all shareholders was breached whereas under Libyan law the court may overrule a resolution merely when it is proved that such a resolution is contrary to the law or to the articles or memorandum of association.[754] In this context, it could be reasonably argued that majority shareholders could issue some decisions which is not contrary to the law or the company's constitution however, such decisions breach the principle of equal treatment of shareholders. Therefore, Libyan law should give each shareholder a right to bring an action to nullify a resolution that may harm the interest of those shareholders even if that decision was not contrary to the law or the company's constitution.

Having pointed out earlier that the minority shareholders would not find easy access to obtain the required information which proves that the subject resolution is contrary to the law or to the articles or memorandum of association, therefore, it is suggested that instead of asking the minority shareholders to prove that the conduct was so, the burden of proof should be moved

[753] M Tibar, 'The Abusive Conduct of Minority Shareholders in Joint Stock Companies, Study in the Law No 23/ 2010' (2012) 1 Journal of Legal Sciences 92, at 107.
[754] See ss. 160-161 of the Business Activities Act, 2010.

to the majority shareholders whereby they have to convince the court that a decision is not against the law nor the articles or memorandum of association, and it has not breach the equal treatment principle. In this regard, it is suggested that majority decisions that may affect the interests of other shareholders have to be issued with their justifications which would assist the court in considering whether the decision was abusive or not. In terms of the cost of such an action, the Egyptian position is highly recommended where the cost of such claims has to be paid by the company itself if the minority action was based on serious reasons.[755] Yet the nullity action is not always the most suitable remedy as in some cases the minority shareholders would ask the controllers to reimburse their losses therefore they would rather bring the liability action.

5.3.3 The liability actions

Two different actions are provided by the Libya legislature in favour of the shareholders against the controllers of the company; these are the company liability action and the shareholder's individual action, so the Business Activities Act 2010 does not recognize the derivative action that was adopted in Morocco and England. The aim of the company liability action is to cover the company's damage, whereas the personal action is meant to cover shareholder's direct damage.[756]

5.3.3.1 The company liability action

The directors as controllers of the company are responsible for their actions towards the company and its shareholders, therefore if those controllers harmed the company by their acts or omission it is the right for the company to sue them in order to obtain a relief. In this regard, s. 184 of the Libyan Business Activities Act 2010 provides that "it is within the general

[755] S. 76 of the Egyptian Companies Act, 1981.
[756] S Bruno and E Ruggiero, *Public Companies and the Role of Shareholders: National Models towards Global Integration* (Kluwer Law International, the Netherland 2011), at 88.

meeting's power to pass a resolution to bring an action of liability by the company against the board members, and if such a decision was taken by the majority whose represent at least 20% of the company's capital the board members are directly dismissed". Under the above section the company is granted a power to withdraw its action or make conciliation by a resolution passed by the general meeting as long as a number of shareholders representing 20% of the capital have not voted against such a decision.[757] It should be pointed out here that s. 184 of the Libyan Business Activities Act 2010 has only mentioned to the company right to litigate against the board of directors without providing grounds of such action such as actual or proposed acts or omission involving negligence, default, breach of duty or breach of trust by directors of the company. Therefore, it is recommended for the Libyan legislature to adopt such grounds as those grounds introduce great guidance to those who are involving in such actions particularly judges and minority shareholders

It seems from that above section that the general principle under Libyan law is that the company liability action against the board members can only be brought by a resolution passed by the general assembly of the subject company. Consequently, an individual shareholder or group of minority shareholders have no chance to bring a derivative action on behalf of the company against the wrongdoer directors unless the company itself via its general meeting has passed such a resolution. The minority shareholders can merely invite the general meeting to take place by applying s. 155 of the Libyan Business Activities Act 2010; under this section the board of director is obliged to call a general meeting if a number of shareholders owning not less than 10% of the company's capital request the general meeting to be convened. The minority shareholders in their request can ask for a resolution to start an action against the board of directors, if neither the board of directors nor the supervisors 'committee have called the general meeting to take place, the president of the primary court upon a request from those

[757] S. 184 of the Libyan Business Activities Act, 2010.

shareholders will convene the general meeting to be held and will determine the chairman of that meeting.[758] In these circumstances, s. 159 provides that members of the board of directors are not allowed to vote on a resolution that relates to their liability. However, it is well known that the members of the board are usually appointed by the majority shareholders of that company who would not give the consent of the general meeting therefore such directors are rarely being sued. So that the application of majority rule would prevent the general meeting from passing a resolution that allows a minority shareholder to start litigation on behalf of his company.[759] In contrast, we saw in chapters three and four that under the English and Moroccan laws an individual shareholder or group of shareholders are allowed to litigate on behalf of their company whenever the interests of their company were affected by the conduct of its controllers. Although the aim of this action is to remedy the company as a legal entity and not the claimant shareholder, however a shareholder by such a mechanism would make the member of the board of directors more careful towards their company. In addition to that a shareholder by such an action would remedy a wrong done to the company and subsequently protect his own investment.[760] Under s. 353 of the JSC Act 1996 in Morocco each shareholder is allowed to start a derivative action against; the controller of the company, the general director of the company and the delegated general director or the member of the two tier boards in order to get a remedy.[761] Likewise, the minority shareholders in England under the Companies Act 2006 (ss. 260-264), have a right to commence a derivative action on behalf of companies on widened grounds of conduct and the court is empowered with free discretion to deal with such kind of actions.[762] The minority shareholders under ss. 260-264 of the Companies Act 2006 can found their action on actual or proposed act or omission involving negligence, default breach of duty

[758] M Tibar, *The Theory of Shareholders' Rights in Joint Stock Companies; Comparative Study Between Libya, Egypt and France* (Part 2, Matbaha Alwahda Alarbia, Alzawya Libya 1998), at 956.
[759] Ibid.
[760] Ibid, at 957.
[761] See Chapter Four (4.4.2.2), at 154-155.
[762] S. 263 (1) (2) (3) of the Companies Act, 2006.

or breach of trust by directors of the company. Thus, the scope of derivative claim has been expanded to include the breach of duty of skill and care.[763] Although a shareholder is allowed to start a derivative action under English law however it is the decision of the court to grant permission to continue the derivative claim, or refuse the application.[764] Such permission is dependent on various factors such as the existence of a prima *facie case* and whether that claim was in the interests of the company as whole or not and the good faith of claimant, taking into account in particular to the matters identified in s. 172(1)(a-f), of the Companies Act 2006. Moreover, if the wrongdoings are ratified by a valid resolution the court has to accept this ratification and refuse permission to continue the action. In this regard, it is claimed that the Companies Act 2006 presents a long and cumbersome two stage procedure to obtain permission to continue a derivative action which makes such a way of protection ineffective and unusable.[765] By the same token, s. 220 of the Tunisian Companies Act 2000 allows a shareholder or group of shareholders representing 5% of the capital to start this action if the company is private company and 3% in the case of public companies.[766] Such a remedy ought to be adopted in Libya as in some cases the aggrieved shareholder is not willing to exit from the company; rather he prefers to stay and get his remedy or recover the lost assets of the company.

It apparently seems that the Libya legislature has prevented the minority shareholders from having a significant tool by which an individual shareholder or group of shareholders could litigate against the controllers of their company. Therefore, a shareholder would not be able to obtain a remedy whenever a wrong was done to the company, consequently he or she is not

[763] S. 263 (1) (2) of the Companies Act, 2006.
[764] S. 263 (3) (4) of the Companies Act, 2006. Having seen that the Companies Act, 2006 has changed the common law rules where the controlling shareholders was the organ that used to grant permission to sue on behalf of the company and continue the derivative claim.
[765] The Law Commission *Shareholder Remedies* (Law Com 1997) para 6-4.
[766] The Tunisian Companies Act, 2000, s. 220 (4). This Act was amended in 2009 by the Act No 16 2009. See for example; K Alaiari, *The Controllers of the Joint Stock Company* (1st edn, Mojamah Allatrash, Tunis 2011), at 282-283.

able to protect his or her own investment. This unrestricted power might harm not only the interests of minority shareholders but also the company as a whole. The Libyan style of a company liability action is inefficient in comparison with its counterparts in England and Morocco as a minority shareholder would not be able to sue the controllers of the company when the conduct of those controllers only harms the interests of such a company. Based on these considerations, it is necessary for the Libyan legislature to adopt a practical and modern model of a derivative action such as found in other comparative jurisdictions, so that each shareholder or group of shareholders becomes able to sue the controllers of the company and protect their own interests. Having seen that the Companies Act 2006 presents a long and cumbersome two stage procedure to obtain permission to continue a derivative action which makes such way of protection ineffective and unusable, it seems that the Moroccan style of derivative action is more workable and more appropriate therefore it is recommended to be adopted in Libya. However, if there is a fairness of adopting the Moroccan position the English style could be adopted with some adjustments in its procedures in order to prevent many vexatious claims from being seen by the court, as the court is considered an independent external organ that has no interest to stop such claim as long as it is desirable to be brought. In addition to that, the Libyan policy makers are advised to overcome the “clean hands” condition which is considered one of the major problems in the English law, as it was the main reason for refusing many cases.[767] There are many other lessons which can be taken from the English law experience regarding the derivative claim, for instance, the new English law position regarding pure negligence as a sufficient ground of starting a derivative action which overcame the common law position is recommended.[768] Furthermore it is also recommended for the Libyan legislature to adopt the policy that is adopted by the Companies Act 2006 where the

[767] A Keay and J Loughrey ‘Derivative Proceedings in A Brave New World for Company Management and Shareholders’ [2010] Journal of Business Law 151.
[768] J Birds and others, *Annotated Companies Legislation* (3rd edn, Oxford University Press, Oxford 2013).

Act does not require the claimant to prove that the acts or omission have been already committed as long as it is proved that it is proposed for the future. Besides, in order to obtain permission to continue a derivative claim a shareholder under English laws is no longer required to prove fraud on minority and that the wrongdoers were in control of company.

In terms of the subject of types of directors, Libyan law has not mentioned de jure directors, de facto directors[769] and the shadow directors,[770] so it is arguable that the term "director" should include all these kind of directors. It was seen that a derivative action in England can be taken against the company's directors or any involved third party, while the company liability action in Libya could only be taken against the board members. Having shown that some shareholders have sufficient power to control the company without being member of its board, therefore the wording of s. 353 of JSC 1996 in Morocco and 260 of the Companies Act 2006 is more appropriate as it not only includes the members of the board but also the controllers of the company even if they are not members of the company board. In terms of the costs of such litigation which forms a big obstacle that prevents many shareholders from using the derivative action, the indemnity cost order which applied under English law would overcome such bar. To remove this bar the principle adopted in Egypt is recommended where the cost of such claims has to be paid by the company if it is proved by the minority shareholder that the action was based on serious reasons.[771] In addition to the company liability action the Business Activities Act 2010 grants each shareholder a right to start litigation to protect his own interest, as the conduct of the controllers of the company might not harm the company's interests rather infringe the personal rights and interest of other shareholder.

[769] S. 250 of the Companies Act, 2006.
[770] S. 260 (5) (c) of the Companies Act, 2006, see J Birds and others, *Annotated Companies Legislation* (3rd edn, Oxford University Press, Oxford 2013).
[771] S. 76 of the Egyptian Companies Act, 1981.

5.3.3.2 The shareholder's individual action (the personal action)

The majority shareholders with their unlimited power are able to take abusive decisions which not only harm the interest of their company but also damage the interests and rights of an individual shareholder.[772] In this context, the controllers of the company might prevent some shareholders from receiving their entitled dividends or preventing a shareholder from practising his pre-emption right where new shares are issued.[773] Such an aggrieved shareholder has to be given a tool to protect his own interests, therefore, it is established by s. 186 of the Business Activities Act 2010 that a company's right to sue its controllers does not affect the right to reimburse for damage done to an individual shareholder. So that an individual shareholder or group of shareholders have a right to bring a personal action against the board members to remedy damages that have affected the personal interests of those shareholders. However, it is also established by the same section that the claimant shareholder has to prove that the conduct of the board members of the company has <u>*directly*</u> harmed the interests of such a shareholder. Furthermore, the claimant shareholder has to prove that this damage was a <u>*result of fraud or negligence*</u> of the board members.

In this regard, if the shareholder was illegitimately excluded from a share of the profits, he or she has a right to start this action. However, as s. 186 required the direct damage for the aggrieved shareholder to start this action, therefore, a shareholder who is indirectly affected by a wrong done to the company due to a breach of duty owed to it would not be allowed to bring such an action to recover a reflective loss from a corporate injury, as this kind of damage has

[772] Such kind of rights and interests derive from the statutory legislations, the company's constitutions or from the legitimate expectations of each shareholder. For instance, the shareholder's right to share of the company's profits, or to receive a copy of the company's annual account and his right of being a member of a company which is run lawfully, therefore, a shareholder is allowed to sue the controllers of the company if his personal right to attend general meeting and vote or to receive dividends was infringed.
[773] I Alsagair, *Monitoring the Controllers of the Joint Stock Company under Libyan and Moroccan Laws* (1st edn, Part 2, Akadimiat Alfkr Aljamahiry, Tripoli 2006), at 118.

to be recovered by the company itself. That is to say, the no reflective loss principle which is applied by English law is also applicable under Libyan Law, so that, if the director's conduct damaged the interests of the company and a shareholder showed that such conduct has indirectly affected his personal interests, that shareholder would not be able to start a personal action and those directors could only be held liable by the liability action under s.184.

The above principle would restrict the minority shareholders' right to use the personal action particularly in small private companies where the loss of such entity is considered a personal loss to each shareholder.[774] Furthermore, s. 186 of the Business Activities Act 2010 puts another condition on the claimant shareholders as he needs to prove that the damage was a result of fraud or negligence of the company's directors. Under the above conditions it would very difficult to see many individual actions coming before the courts. In contrast, s. 353 of the JSC Act in Morocco enables each shareholder or group of shareholders to bring a personal claim to protect their own interest and has not adopted the "no reflective loss" principle. Furthermore, the claimant shareholder is not required to prove that such damage was a <u>*result of fraud or negligence*</u> of the board members, therefore the Moroccan system of personal action needs to be adopted in Libya. What is more, the personal action under Libyan law can only be brought against the company's board members as s. 186 has not referred to de jure directors, de facto directors and the shadow directors, while under English and Moroccan laws this action can be brought against any involved shareholders who have sufficient power to control the company without being member of its board. Therefore, the wording of the section needs to be amended and the term "directors" should be replaced by the term "controllers" in order to include any complicit shareholders or directors who have sufficient power to control the company without being a member of its board. Briefly, the rule introduced by the Business Activities Act 2010 regarding the personal action cannot be considered a decisive remedy

[774] B Hannigan, *Company Law* (3rd edn Oxford University Press, Oxford 2012).

principally since it is difficult to meet the conditions of negligent and fraud in addition to the no reflective loss bar. The difficulty of proving the direct damage inflicted on the minority shareholders presents a substantial obstacle to success in a personal claim against the controlling shareholder.

5.3.4 The winding up remedy

The winding up is the process of putting an end to the life of a company and the giving up of its business. This extreme action should not take place unless it becomes apparent to some shareholders that trust and confidence among the company members is no longer existent. In this manner, s. 30 of the Business Activities Act 2010 allows each shareholders to go to the court and ask for the winding up of a company in the cases where the other shareholders breach their duties, there are continues disagreements between the shareholders or where the court finds serious reasons justifying such a dissolution. This right is a public policy right so that any agreement that restricts this right is void. Moreover neither the general assembly nor the board of director could prevent a shareholder form using this right.[775] It is within the power of the court to examine to what extent the existing disagreement is serious enough to wind up the subject company. However, s. 30 of the Business Activities Act 2010 has not provided any guidance and criteria to the court in dealing with such a petition in order to simplify its application, therefore, it is the job of the court to examine to what extent that the existing disagreement is serious enough to destroy the relationship among the shareholders.[776] In this context, the French Supreme Court has discussed the issue and stated that general disagreement is not a sufficient reason to wind up the company, particularly when the financial state of the

[775] M Tibar, *The Theory of Shareholders' Rights in Joint Stock Companies; Comparative Study Between Libya, Egypt and France* (Part 2, Matbahat Alwahda Alarbia, Alzawya, Libya 1998), at 1004.
[776] A Almarini, 'The Power of Majority Shareholders within Joint Stock Companies under Moroccan Law' (Ph.D thesis, Mohammed V University, Rabat 1997), at 832.

subject company has not reached the deadlock point.[777] In England, having said that s. 122(1)(g) of the Insolvency Act 1986 enables a shareholder to pursued an action where there is a breakdown in the relationship or the trust and confidence between shareholders and it seems that it is just and equitable to wind up the company. However, it is within the discretion of the court to examine whether it is just and equitable to have the company wound up or refuse such a request. In this regard s. 125(2) of the Insolvency Act 1986 provides that if the court of the opinion that the petitioner has another remedy to pursue or the petitioner was acting inappropriately in seeking such a remedy the petition should be refused. The aims adopting of putting such a condition is to ensure that such an extreme remedy would not be ordered unless there are sufficient reasons. By the same token, s. 1056 of the Contracts and Obligations Act 1913[778] in Morocco grants the court a power to wind up the company if it is proved that there are significant disagreements amongst shareholders, or it appears to the court that the contract terms are being breached.[779] The Moroccan courts considered that the reasons for winding up the company that are provided by s. 1056 are only examples therefore, by way of analogy the court has a discretion to wind up a company for other reasons as long as its decision was based on serious grounds.[780] In the same manner, Libyan courts are invited to take the same position as the court is given a discretion power to wind up the company where the other shareholders breach their duties, there are continues disagreements between the shareholders or where the court finds serious reasons justifying such a dissolution. What can be seen here is that, the Moroccan and Libyan laws grant the court a wider ground to wind up the company where shareholders breach their duties, such a ground was not adopted by s. 122(1)(g) of Insolvency Act 1986 in England where a shareholder has to prove that there is a breakdown in the

[777] Cass. Com 11/05/1960, Dalloz 1960 Som. St 31, cited in S Belmris, 'The Protection of Minority Shareholders' Rights in Joint Stock Companies' (unpublished dissertation, High Judicial Institute, Rabat 2011), at 65.
[778] Issued on 12 August 1913 and was amended in 22 September 2011.
[779] See Chapter Four (4.3.3), at 158-159.
[780] See Chapter Four (4.3.3), at 158-159.

relationship or the trust and confidence between shareholders. However, it may well be argued that the winding up remedy is an extremist remedy therefore, it should only be granted in limited cases.

Last of all, the buy-out relief which becomes the most important relief under the unfair prejudice remedy under English law needs to be implemented by the Libyan regime. Such a remedy is applied in Morocco under s. 1057 of Obligations and Contracts Act[781] on the Civil Companies and Partnerships and by s. 221 of the JSC Act 1996 only in the case of conversion. This remedy was also adopted in Tunisia in 2009 where s. 290 of the Law No 16 which adjusted the Companies Act 2000[782] allows a shareholder or group of shareholders in a non-listed company who hold a percentage which does not exceed 5% of the capital to sell out their shares and leave the company.[783] Having criticised s. 209 of the Tunisian Companies Act 2000 as it grants this remedy only to a shareholder or group of shareholders who hold a percent does not exceed 5% of the capital, therefore it does not provide any protection to the minority shareholder who holds more than this percentage. Therefore, the Libyan legislature is advised to grant the buy-out relief to any shareholder regardless of its percentages of shares. Such a remedy would ensure that minority shareholders under Libyan company law have always the right to leave and sell their shares at fair value. The English law experience regarding the buy-out remedy is recommended where the court will generally apply the pro rata formula if the company was a ‘quasi-partnership’,[784] and will not discount the value of the shares on the ground that they are a minority shareholdings, even the market would apply such a discount. However, in some circumstances although the case of quasi-partnership is not existed, yet, the surrounding facts and the principles of justice require that the valuation of the petitioner shares

---

781 Issued on 12 August 1913 and was amended in 22 September 2011.
782 Issued on 16 March 2009.
783 See Chapter Four (4.4.4), at 163.
784 See *CVC/Opportunity Equity Partners Ltd v DemarcoAlmeida* [2002] 2 BCLC 108.

should be made on pro rate basis rather than applying the discount basis and vice versa.[785] In this regard, Robin Hollington QC in *Re Blue Index Ltd* affirmed that in valuing a petitioner shareholder's shares the fundamental principle was that it would be prejudicial to treat a wronged petitioner as a willing seller and discount the price accordingly, it would substantially defeat the purpose of this remedy if the wrongdoer majority shareholders were routinely rewarded by a discount for a minority shareholding.[786] Also in determining the suitable time of share valuation the English law position is highly recommended where the Court of Appeal in *Profinance Trust SA v Gladstone*[787] has provided comprehensive a view on the appropriate time of shares valuation, and it made clear principle by which the proper time of valuation is the date of sale, however if it appears to the court that there is more appropriate date to value the share the court has the power to do so. For instance in Re *BC&G Care Homes Ltd: Crowley v Bessell*[788] the valuation date applied by the court was before the claimant was excluded from management, therefore no minority discount was applied. In short, the adoption of the buy-out remedy would increase the level of protection in Libya and prevents the shareholders the cost and lengthy litigation which also has negative effect on the company and its business.

5.4 Conclusion

The protection of minority shareholders under the Libyan regime was discussed in relation to two main points. The first part dealt with rights and instruments that aim to prevent or reduce the possibility of abusive conduct by majority shareholders, (the preventative approach), while the second part focused on shareholder’s right to ask the judicial authority to protect the minority shareholders (the remedial route). Under the preventative approach a shareholder under the current Libyan law is only allowed seeing some documents relate to the general

[785] See *Re Sunrise Radio* Ltd [2009] EWHC 2893 (Ch).
[786] [2014] EWHC 2860 (Ch), at 26.
[787] [2002] 1 BCLC 141, see also *Re Sunrise Radio Ltd* [2009] EWHC 2893 (Ch).
[788] [2015] EWHC 1518 (Ch).

meetings and the minutes and decisions of such meetings. Though such a shareholder has no authorised access to the documents that relate to the board of directors or the supervisors' committee and their minutes. The minority shareholders are given a right to call the general meeting and schedule any points on its agenda; by such rights they are able to play effectual role in the company's decisions, in particular where the board of directors is under the control of the majority shareholders. However, such a right would not serve the minority shareholders who hold less than 10% of the voting rights. In addition to these rights, the Libyan Business Activities Act 2010 provides other supervision organs (the supervisors' committee and the external auditor) which are created to ensure that the majority shareholders are not abusing the interests of other shareholders.

On the other hand, under the remedial approach, once the company's controllers committed wrongdoings toward the company or other shareholders the Libyan law does not offer a proper legal remedy that allows the aggrieved minority shareholders to bring a direct action against the wrongdoers in order to recover the damages suffered by such abusive conduct. Minority shareholders in Libya **are not** granted a right to bring the unfair prejudice petition that is applied under English law, or the simple procedure actions (derivative and personal actions) that are adopted in Morocco. The only action that could be brought by the aggrieved shareholder is the complicated personal action, where the aggrieved shareholder has to establish that he or she was directly affected by the conduct of the company's controllers, furthermore, such a shareholder has to give an evidence of the fraud or negligence perpetrated by the board members. Additionally, the "no reflective loss" principle which restricts the personal action in England is also adopted by the Libyan law in addition to other conditions, so that it would not be easy to start a personal action under the current Libyan law. Whereas minority shareholders under the Moroccan law is allowed to bring the personal claim without the no reflective loss principle and claimant shareholder is not required to give an evidence of the fraud or negligence perpetrated by the board members. These barriers and conditions that are adopted by the Libyan law need to be removed or eliminated so that minority shareholder can bring a personal action under flexible and accessible criteria. In England, although English law adopts the no reflective losses principle however, a shareholder is granted a right to petition under s. 994 if the affairs of the company are being or have been conducted in a manner which is unfairly prejudicial to the member’s interests.

In terms of the derivative claim, having seen that under the comparative jurisdictions (England and Morocco), a shareholder is granted a right to litigate on behalf of the company by the derivative action. however, the Libyan shareholder protection regime does not recognise such a claim, an action of liability against company directors under s. 184 of the Business Activities Act 2010 can only be brought be the company itself via its general meeting, so that the minority would not be able to bring the company liability action against the board members unless they succeeded in passing a resolution by the general meeting. Beside the above obstacles, the wording of Libyan section has only mentioned to the action against the board members while it was seen that offensive conduct might be committed by non-member of the board of directors. Therefore, the wording of s. 184 should be amended to include as defendants all controllers of the company, even they are not members of the board of directors. The above conditions would not make the litigation an attractive solution for the minority shareholder as both the company liability action and the personal actions under Libyan law would not offer an effectual recovery to the oppressed minority shareholders. Under such complicated conditions to bring either the company liability action or the personal action, it seems that the minority shareholders can only file a complaint with the supervisory committee or by reporting alleged irregularities in the management of the directors to the tribunal because of management's statements about the financial situation of the company.

To sum up, this comparison has revealed the deficiencies of the Libyan rules of protecting minority shareholders and it apparently shows that the rules governing this protection are somewhat insufficient and complicated. The Libyan legal system lacks effective protections and remedies for minority shareholders when an abusive act has been perpetrated. The Business Activities Act 2010 in comparison with its equivalents in England and Morocco fails to offer a contemporary regime which provides sufficient statutory devices, remedies and recognition of specific rights for the minority shareholders. Therefore, some other rules need to be adopted in order to guarantee an adequate recovery of damages for aggrieved minority shareholders.

Chapter 6 Conclusion, recommendations and future work

6.1 Introduction

As a result of the adoption of the socialist policy by the Gaddafi regime the Libyan government from the late 1970s until the beginning of 2000s became the major controller of the Libyan economic system.[789] However, it was clearly seen in the last decade of the Gaddafi era that the Libyan economic system was being transitioned from a socialist policy into a free-market economy.[790] After the fall of this regime in August 2011, a comprehensive review of economic legislation became a key task for the future Libyan legislatures so as to adopt effective rules that complete such a transition and contribute to the development of the commercial environment in Libya. In so doing, new rules need to be adopted which offer a level of protection to all investors who wish to set up their business in Libya. One group of investors who need this protection are minority shareholders as result of the application of the majority rule principle. In this regard, it is argued that having a robust system of minority shareholder protection is considered to be the starting-point for having a solid corporate governance regime and consequently a strong economic environment.[791]

Based on these considerations, this research set out to determine to what extent does the Libyan shareholder protection regime offer equivalent protection to that found in comparable corporate law systems, such as England and Morocco, taking into account the fact that a country such as Morocco may be a rival for inward investment. In pursuit of this aim, the thesis considers the protection of minority shareholders in the above comparative jurisdictions, which leads us to examine how these systems deal with this issue and to what extent they have had success in

[789] See M Tibar, 'The Abusive Conduct of Minority Shareholders in Joint Stock Companies, Study in the Law No 23/ 2010' (2012) 1 Journal of Legal Sciences 92, at 93.
[790] See footnote 14.
[791] A Almarini, 'The Power of Majority shareholders within Joint Stock Companies under Moroccan law' (Ph.D Thesis, Mohammed V University, Rabat 1997), at 376-393.

adopting sufficient mechanisms that may offer a fair level of protection to minority shareholders in Libya. In so doing, the English and Moroccan systems were critically evaluated in order to extrapolate lessons that can be adopted by the Libyan law makers in the forthcoming reforms. Yet, a political point of view might be raised here: to what extent in country such as Libya, where governance in the state itself is a problem, is able to provide a good system of corporate governance and consequently minority shareholder protection? This view brings us back to the "law in the books" doctrine, where it is affirmed that law researchers are only advising law makers to make changes in the substantive law whilst leaving the issue of implementation to other studies that might be carried out by other researchers. Therefore, it is recognised by the author of this thesis that under these circumstances where the governance of the state is a fundamental problem it is critical that the legal institutions (such as the legislature and the courts) can operate effectively. However, it could be fairly argued that such circumstances will settle down one day and researchers and policy makers should not put off their task until that happens. So this study provides suggestions and recommendations to reform the current law of minority shareholder protection. In this regard, this thesis has managed to find out the shortcomings and weaknesses of the Libyan system of minority shareholder protection, consequently it was able to answer its main research question by stating that the Libyan shareholder protection regime **does not** offer a sufficient level of protection equivalent to that found in the English and Moroccan corporate law systems. It illustrates that the Libyan rules on minority shareholder protection are incomplete, insufficient and in some cases too complicated, thus the Libyan system of minority shareholder protection should be reformed in order to enhance the level of confidence among investors. This concluding chapter provides a summary of the main findings of the thesis which are followed by recommendations and proposals of possible amendments and reform. Last, but not least, some suggestions for follow up studies are also included.

6.2 Summary of the thesis's findings

This study embarked on a comparative route to examine to what extent the Libyan shareholder protection regime offers a sufficient level of protection similar to that found in the selected comparative jurisdictions. Applying such a comparative methodology enables the author to conclude that minority shareholders have very weak protection under Libyan corporate law in contrast with the English and Moroccan regimes. The main body of the thesis was divided into four chapters in addition to the introduction. Chapter two was focused upon the current problems where the majority shareholders misuse their unrestricted power to further their own interests and ignore the interests of other shareholders and the interests of the company as a whole. Such kind of conduct would consequently have negative effects on the minority shareholders, the company itself and national economy.[792] It showed that minority shareholders are facing various forms of exploitation by the company's controllers (either the directors or the majority shareholders), therefore, the law must provide sufficient mechanisms to prevent such conduct and protect minority shareholders.[793] Section two of the second chapter illustrated that protection of minority shareholders would not only bring benefits to shareholders themselves, but also to the company and the state's economy as well.[794] Lastly this chapter discussed two main forms of protecting the minority shareholders, which are described as the <u>preventative</u> and <u>remedial</u> approaches. In this manner, corporate law should provide minority shareholders with rights and means that enable them to exercise some sort of control over the controllers of the company in order to reduce the abusive conduct of the majority shareholders. However, in the case where minority shareholders are being, or have been, subject to neglect, or oppression caused by the controllers of the company (majority rule and the managerial

[792] See Chapter Two (2.2.1 and 2.2.2).
[793] See Chapter Two (2.2.1 and 2.2.2).
[794] See Chapter Two (2.3).

power), this system should provide sufficient means and mechanisms by which appropriate remedies can be obtained.[795]

Having identified these theoretical issues in Chapter two, this thesis explained in chapters three and four how the English and Moroccan laws restrict the power of those controllers and how minority shareholders are able to obtain an appropriate remedy in the case of misconduct. Chapter three started with a historical background regarding the common law system and explained to what extent the position in England law was changed after the Companies Act 2006. To evaluate the new rules under this Act it was a necessary to compare this regime with the common law rules where it was clarified that the minority shareholders were facing many difficulties in the common law rule (*Foss v Harbottle*[796] and its exceptions) as such rules were so complicated.[797] Therefore a new statutory derivative claim was adopted in the Companies Act 2006, where minority shareholders have a right to bring such an action to remedy a broad scope of misconduct and not only fraud.[798] The English court under this Act is given a power to grant permission to permit a claim to proceed as part of a filtering system to ensure the desirability of the derivative claim. Most importantly, in terms of litigation costs, the minority shareholders in English law have the ability to apply for an indemnity order which asks the company to indemnify the claimant against his costs.[799] Nevertheless, it was concluded that the Companies Act 2006 has not made major changes to the common law rules of derivative claim, as the adoption of two stages procedures in addition to the obstacles of ratification and litigation costs remain a considerable hurdle that prevents a minority shareholder from using the derivative claim.[800] Such hurdles would not make the derivative claim as a first option to the

---

[795] See Chapter Two (2.4).
[796] (1843) 2 Hare 461.
[797] See Chapter Three (3.1).
[798] SS. 260-264 of the Companies Act, 2006.
[799] See for example *Iesini v Westrip Holdings Ltd* [2009] EWHC 2526 (Ch), *Kiani v Cooper* [2010] EWHC 577 (Ch), see also *Stainer v Lee* [2010] EWHC 1539 (Ch).
[800] For more details, see chapter Three (3.3.1, 3.3.2 and 3.3.3).

abused minority shareholders particularly in light of the availability of the unfair prejudice remedy.[801] Furthermore, it was seen that the common law derivative claim was not completely abolished by the Companies Act 2006 as recent decisions have affirmed that Part 11 of the Companies Act 2006 did not apply to double derivative actions.[802] Therefore the common law rules of derivative actions continued to apply to double derivative claims. To avoid such uncertainty and to stop the complexity of the common law derivative claim reappearing it was suggested that Parliament should take the other common law countries' position where the scope of the statutory derivative action is extended to include the double derivative actions.[803]

Besides the derivative claim, a minority shareholder under English law is allowed to bring a personal claim to protect their own interest.[804] Yet the principles of internal irregularity [805] and "no reflective loss" restrict such kind of action.[806] Therefore, neither the statutory derivative claim nor the personal action have become the most preferred action for the minority shareholder in particular with the availability of the unfair prejudice remedy which prevail over those actions in terms of popularity. Although *O'Neill v Phillips*[807] has restricted the scope of the unfair prejudice remedy, however, it remains the favoured remedy with its easier requirements to meet and with its effectiveness to remedy a broad scope of wrongs. In other words, the complex procedures in derivative and personal actions and the extremist result of the winding-up remedy makes the unfair prejudice remedy the most practical remedy that a

---

801 See Chapter Three (3.3.4).
802 See for example *Bhullar v Bhullar & Ors* [2015] EWHC 1943 (Ch), *Abouraya v Sigmund & Ors* [2014] EWHC 277 (Ch) and *Universal Project Management v Fort Gilkicker Ltd* [2013] EWHC 348 (Ch).
803 In Australia See s. 236 of the Corporations Act 2001, in Canada see ss. 238 and 239(1) of the Canadian Business Corporations Act 1985, in New Zealand See s. 165(1)(a) of the New Zealand Companies Act 1993.
In Singapore see s. 216A (1) of the Companies Act (Cap. 50, Statutes of Singapore), in Hong Kong see *Waddington Ltd v Chan Chun Hoo Thomas* [2008] HKCU 1381 cited in J Bailey and J Mugerwa, 'Multiple derivative actions in company law: can you or can't you?' (2013) 34 (10) Company Lawyer 302, at 304.
804 See Chapter Three (3.2).
805 See Lord Davey in *Burland v Earle* [1902] AC 83, and *Edwards v Halliwell* [1950] 2 All ER 1064.
806 See *Assurance Co Ltd v Newman Industries Ltd* [1982] Ch 204, and *Gardner v Parker* [2004] 2 BCLC 554. For the exceptions of the no reflective rule principle see *Giles v Rhind* [2002] 4 All ER 977, *Rehman v Jones Lang La Salle* [2013] EWHC 1339 (QB) and *Malhotra v Malhotra* [2014] EWHC 113 (Comm) [2015] 1 BCLC 428.
807 [1999] 1 WLR 1092.

shareholder can pursue to obtain a remedy.[808] In addition to above mentioned remedies, a minority shareholder under English law is granted a right to go to the court to request an order to wind up the company if it is just and equitable that the company be wound up, however it seems that there is a reluctance to apply this extreme remedy as the court prefers to order a minority shareholder to be bought out, rather than a company being wound up.[809] Under these circumstances, the unfair prejudice remedy has developed in English law and become the most prevalent remedy for minority shareholder.[810] Besides the examination of the remedial approach (derivative and personal actions, unfair prejudice remedy and winding up remedy) of minority shareholder under English law, it was briefly mentioned at the beginning of the English chapter that a shareholders under the Companies Act 2006 have certain statutory rights which offer a type of precautionary protection to the minority shareholder. These rights comprise for example: shareholder's right to ask the court to call a general meeting,[811] the right to inspect minutes of general meetings.[812] In addition, shareholders with at least 10% of the voting rights (or 5% if no shareholders' meeting has been held for more than 12 months) have a right to call a general meeting.[813] Also shareholders with 10% of the voting rights have a right to have the company's annual accounts audited.[814] In brief, the examination of the English regime of minority shareholder protection with its long experience and knowledge has proffered beneficial lessons that can be taken up by the Libyan policy makers in any upcoming reform.

---

[808] See Chapter Three (3.4.2, 3.4.3 and 3.4.4).
[809] See Chapter Three (3.5).
[810] Having seen in this study that the recent minority shareholder actions show that there have been a considerable number of cases dealing with unfair prejudice remedy whereas there have been relatively reported instances of derivative claims beating trial.
[811] S. 306 of the Companies Act, 2006.
[812] SS. 248-355 and 358 of the Companies Act, 2006.
[813] S. 303 of the Companies Act, 2006.
[814] S. 476 of the Companies Act, 2006.

Having said that the aim of this work is to provide a basis for suggestions on how to improve minority shareholders protection in Libyan based on the English and Moroccan experience, therefore, after the consideration of such a protection under the English law, chapter four examined the protection of minority shareholders under Moroccan laws. Under this jurisdiction minority shareholders are given specific rights that allow them to participate in the management of the company, furthermore a supervisory organ inside the company was created to ensure that the interests of the company and all shareholders are being taken into account in the company's decisions. The minority shareholders under the Moroccan law have a right to call a general meeting and schedule any point on its agenda and prevent the controllers from discussing any issue which was not listed in that schedule.[815] In addition to these rights, the statutory auditor and the appointed judicial administrator are playing a supervision role over the controllers of the company, yet, the minority shareholders with less 10% of the capital would not be able to use this method.[816] Although the law No 20.05 that was issued on 23/05/2008 and which amended the JSC (17-95) has strengthened the minority protection regime where it reduced the 10% holding of the capital that was required to complain about the statutory auditor to 5%,[817] however, such a percentage figure is still that same regarding the appointment of an expert and calling a general meeting to be held.

On the other hand, under the remedial mechanism minority shareholders have a right to litigate against the controllers of the company either by the nullity action[818] where the subject conduct would be rendered void or by liability actions (personal and derivative claims)[819] where an appropriate remedy could be obtained. No previous permission from the company is required to start such proceedings and any agreement that prevents a shareholder from using such

[815] SS .116-117-118 of JSC Act, 1996.
[816] See s. 157 and ss.159 to 179 of the JSC Act, 1996.
[817] S. 179 of the JSC Act, 1996 after the amendment by the Law No 20.05 which was issued on 23/05/2008.
[818] SS. 337 to 348 of the JSC Act, 1996.
[819] See ss. 352-353-354 of the JSC Act, 1996.

actions or put some restrictions on the shareholder's right to use these actions is deemed void.[820] Furthermore, under the Moroccan rules of personal claim it was noted that the "no reflective loss" principle which restricts the personal action in England and Libya is not applied.[821] A shareholder under Moroccan law is also allowed to present a petition in order to wind up the company whenever it seems that there are significant disagreements amongst the shareholders, or it appears to the court that the contract terms are being breached.[822] To avoid the winding up result it was seen[823] that the provisional manager petition (which was applied by the French courts) is adopted in Morocco which has increased the level of protection.

Identifying these mechanisms and tools under English and Moroccan laws gave a wide understanding of how minority shareholders are being protected under other comparable jurisdictions. Such an evaluation made it possible for this thesis to develop its own arguments in chapters five where the Libyan regime of minority shareholder protection was considered in comparison with the level of protection that offered by the above systems. The protection of minority shareholders under Libyan regime was discussed in two main sections, the first section described the rights and instruments that aim to prevent or reduce the possibility of abusive conduct by majority shareholders, (the preventative approach), while the second part focused on the shareholder's right to ask the judicial authority to protect the minority shareholders (the remedial route). Under the first approach, it was seen that minority shareholders are only allowed to see some documents relating to the general meetings, minutes and decisions of such meetings. So minority shareholders are not authorised to access all the documents that relate to the board of directors or the supervisors' committee and their

[820] See ss. 352-353-354 of the JSC Act, 1996.
[821] See ss. 352-353-354 of the JSC Act, 1996.
[822] S. 1056 of the Contracts and Obligations Act, 1913.
[823] The Court of Appeal in Agadir Decision No 1487 issued on 25/06/1992. See also A Gomirah, *The Abusive Conduct of Shareholders in the Joint Stock Company* (1st edn, Matbat Alomnia, Rabat 2011), at 211.

minutes.[824] To enhance their role in the management of the company minority shareholders are given a right to call for a general meeting and schedule any points on its agenda; by this right they are able to play effectual role in the company's decisions, in particular where the board of directors is under the controller of the majority shareholders. Nonetheless, this right would not serve the minority shareholders who hold less than 10% of the voting rights.[825]

Besides these rights, the Libyan Business Activities Act 2010 provides for other supervisory organs (the supervisors' committee and the external auditor) which are created to play some sort of control over the company and to make sure that the majority shareholders are not abusing the interests of other shareholders.[826] However, even with the availability of these rights and supervision tools, majority shareholders still have the power to further their own interest and misuse the interests of other shareholders. Therefore, it is the function of law to provide aggrieved minority shareholders with a proper legal remedy that allows them to bring a direct action against the wrongdoers in order to recover the damages suffered by such abusive conduct. Ruefully, minority shareholders under the current Libyan law would not be able to sue the controllers of their company as they are not granted a right to bring the unfair prejudice petition that is applied under English law, or the simple procedure actions (derivative and personal actions) that are adopted in Morocco. The only action that could be brought by the oppressed minority shareholders is the overly-complicated individual action, where such a shareholder has to establish that he or she was *directly* affected by the conduct of the company's controllers, besides, the claimant shareholder needs to give an evidence of the fraud or negligence perpetrated by the board members.[827] It seems that the "no reflective loss" principle, which restricts the personal action under England law, is applicable by the Libyan law. In

[824] SS. 223-224 of the Business Activities Act, 2010.
[825] SS. 154-155-163 of the Business Activities Act, 2010.
[826] See ss. 196 to 211 of the Business Activities Act, 2010.
[827] S. 186 of the Business Activities Act, 2010.

contrast, having seen that minority shareholders under the Moroccan law is allowed to use the personal claim without the no reflective loss principle and claimant shareholder is not required to give an evidence of the fraud or negligence perpetrated by the board members.[828] In England, although English law adopts the no reflective loss principle however, a shareholder is granted a right to petition under s. 994 of the Companies Act 2006 if the affairs of the company are being or have been conducted in a manner which is unfairly prejudicial to the member's interests.[829] Under the above barriers and conditions that are applied by s. 186 of the Libyan Business Activities Act 2010 minority shareholders would not be able to commence a personal action against those who harm their personal rights and interests. Thus such a law needs to be eliminated so that the minority shareholder can bring a personal action under flexible and accessible criteria.

In terms of the derivative action, minority shareholders in the above comparative jurisdictions (England and Morocco), are granted a right to start proceedings on behalf of the company against those who mismanage the affairs of such a company. However, the Libyan shareholder protection regime does not provide minority shareholders with this claim, so that an action of liability against company directors under s. 184 of the Business Activities Act 2010 can only be commenced be the company itself via its general meeting. In other words, under the current Libyan law the minority shareholder is not allowed to start the company liability action against the board members unless they succeed in passing a resolution by the general meeting. Such a condition would prevent a company liability action from being heard by the court as the majority shareholders are usually the controllers of the company or in a good relationship with those controllers, therefore, they will not pass this kind of resolution. Together with the above obstacle s. 184 of the Business Activities Act 2010 has only provided for the action against the

[828] S. 353 of the JSC Act, 1996.
[829] S. 994 of the Companies Act, 2006.

board members while it was seen that offensive conduct might be committed by non-members of the board of directors. Therefore, the wording of this section should be amended to include the all controllers of the company even they are not members of the board of directors.

Under the above conditions either for the company liability action or the personal claim it would not be easy for the minority shareholders to litigate against the wrongdoer controllers in order to recover the damages suffered either by the company or by those shareholders. Such obstacles with the absence of the derivative claim would not make such litigation an attractive solution for the aggrieved minority shareholder. Under these complicated conditions, the minority shareholders can only file a complaint with the supervisory committee or by reporting alleged irregularities in the management of the directors to the tribunal because of management's statements about the financial situation of the company, as well as the auditing the firm's financial controls and reports, were completely false and misleading.[830]

The comparison conducted by this thesis obviously revealed that the Libyan Business Activities Act 2010 in contrast to its equivalents in England and Morocco fails to offer a contemporary system of minority shareholder protection which provides sufficient statutory devices, grounds, remedies and recognition of specific rights that protect the interests of minority shareholders. The Libyan rules are insufficient, ineffective and in some cases overly-complicated. To enhance the level of protection under such a jurisdiction the current rules of minority shareholder protection need to be adjusted and some other rules need to be adopted in order to guarantee that the level of protection of minority shareholders complies with international standards and produces a competitive business environment. In this regard, minority shareholders have to be granted sufficient rights and tools by which they would be able to participate in the management of their company and protect their interests. Besides,

[830] See s. 206 of the Business Activities Act, 2010.

these rules should grant aggrieved minority shareholders a right to start litigation either to remedy damage affecting his personal interests or the interests of the company.

6.3 Contribution and recommendations

The consideration of the level of minority shareholder protection under Libyan laws was based on the hypothesis that the Libyan law of minority shareholder protection should be assessed and reformed, if found to be unsatisfactory, according to the level of protection that is found in the other comparable jurisdictions. Examining such protective rights and tools illustrates that the Libyan shareholder protection regime suffers from major inadequacies and weaknesses; this fact becomes even clearer when this system is compared to other comparative jurisdictions. Therefore, this thesis will fill a gap in the very limited body of Libyan literature of corporate governance. Furthermore, to my knowledge this work provides the first study that has examined the level of minority shareholder protection in the Closed Joint Stock Companies under Libyan laws in comparison with the English and Moroccan laws. Consequently, the outcomes of this thesis are important for academic researchers, lawyers, policymakers and most importantly the law makers in Libya. In this manner, having stated in the introduction of this thesis that the Libyan Ministry of Economic Affairs in the interim government that formed by the General National Congress has decided to form a committee to adjust the Business Activities Act 2010 which regulates companies and partnerships in Libya. Furthermore, I was consulted by this committee to make suggestions regarding some topics in the proposed Libyan company law.[831] This comparison granted the researcher a chance to extrapolate lessons that can be adopted by the Libyan law makers in the upcoming reforms. Therefore, it is hoped that the following recommendations along with the previous suggestions that are given in chapter

[831] On December 2014 I received a phone call from Muhammed Abadwai and Alhabeeb Ajboda Professors of Private Law at Tripoli University who are members of the above committee, they asked about the position in the Companies Act 2006 regarding some issues, furthermore, they posted to me a draft of the new proposal companies law in order to extrapolate lessons from the English Law.

four will be taken into account. Such proposals would establish a strong level of protection to the minority shareholders and would make the Libyan regime of minority shareholder protection more in tune with the majority of other jurisdictions.

1. A shareholder’s right to obtain documents and have information about the company under Libyan law is not well organized, as a shareholder ss. 223-224 of the Business Activities Act 2010 has only limited access to some non-important documents (the minutes of the shareholder meetings and their decisions) with no ability to have financial statements, the minutes of the board of directors and its decisions. Therefore, a shareholder should have a right to access the company's important documents such as that provided by s. 141 of the JSC 1996 in Morocco. Furthermore, a shareholder should be allowed to obtain this information upon their request with the ability to have a copy of those documents as he or she might need to consult a professional person regarding one or more issues. In this regard, the Libyan legislature is advised to the adopt the policy that is taken by s. 740 of the Hong Kong Companies Ordinance 2012 (Cap 622) where shareholders holding at least 2.5% of the voting rights, (or at least 5 shareholders of the company) are given a right to apply to the court for an order requiring the company to disclose its records or documents. The court under s. 740 (2) has a discretion to order inspection of a company's records or documents if it is satisfied that the application is made in good faith and the inspection is for a proper purpose. If the court issues such an order a shareholder or group of shareholders are allowed to make copies of the records or documents.[832] This policy can be enhanced by the rule that was adopted by s. 392 of the JSC Act 1996 in Morocco where the courts are be able to issue a daily fine on the controllers of the company for the delay in granting the claimant shareholder the records or the related documents.

[832] S. 740 (3) of the Hong Kong Companies Ordinance, 2012.

2. Although minority shareholders owning 10% of the voting rights under s. 155 of the Libyan Business Activities Act 2010 are able to ask the board of directors to call a general meeting and list the points that need to be discussed in that meeting, however, minority shareholders with less that this figure would not be able to exercise such right. Having seen that s. 166 of JSC 1996 in Morocco disregarded this percentage in the case of urgency, and similarly, s. 303 of UK Companies Act 2006 reduced this percent to 5% if no shareholders' meeting has not been held for more than 12 months). Further, under s. 306 of Companies Act 2006 each shareholder has a right to ask the court to call a general meeting. The Libyan Business Activities Act 2010 has not adopted such an exception, therefore, this figure has to be reduced at least to 5% and to any shareholder in the case of urgency.[833] Furthermore, individual shareholders should have a right to ask the court to call a general meeting.[834] By such right a minority shareholder should not only be given a chance to call a meeting, but also to delay or stop a next meeting.[835] The same percentage needs to be reduced in s. 206 of the Business Activities Act 2010 where shareholders owning not less than 10% of company's capital are allowed to file a complaint to the primary court if the acts of the members of the board of directors or the supervisors' committee are deemed censurable or it is alleged they violated their duties.

3. In terms of the role of the judicial authority in protecting the minority shareholders, under ss. 160-161 of the Business Activities Act 2010, the nullity action can only be initiated by the board of directors, supervisors' committee and shareholders who did not attend the meeting or who voted against that decision.[836] Under this law minority shareholders need to prove that the

[833] See for example s. 303 of the Companies Act, 2006. Also s, 61 of the Egyptian Companies Act, 1981 and s. 166 of the Moroccan JSC Act, 1996.
[834] See s. 306 of the Companies Act, 2006.
[835] See The Commercial Court of Appeal in Casablanca, decision No 1630, file No 83/1113, issued on 13/12/1983, in this case the court grounded its judgment on s. 149 of the Civil Procedural Law which allows the president of the Primary Court to work as an urgent judge in these circumstances, cited in A Hamdawi, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013), at 271.
[836] See Chapter Five (5.3.2).

subject resolution was against the law or the company's constitutions. Furthermore, s. 161 allows the president of the primary court to ask the shareholder who filed the nullity action to provide appropriate financial guarantee in order to remedy any damage that might happened, such a condition would put up an extra bar that discourages a shareholder from using such kind of action. This position needs to be adjusted and the Moroccan position that is applied by s. 338 of the JSC Act 1996 is recommended wherein each shareholder has a right to bring a nullity action even those shareholders who have not voted against the decision or who had not attended the general meeting. Such a law would give a shareholder a chance to reconsider his position regarding that decision as it would not appear to that shareholder at the issuing date whether a decision is abusive or not. Moreover, a shareholder should be granted a right to bring an action to nullify a resolution that may harm the interest of such a shareholder even that decision was not in contravention of the law or the company's constitutions.[837] So that it should be enough for a shareholder to prove that the subject decision breaches the principle of equal treatment to some shareholders or it furthers the interests of some shareholders rather than the interests of the company.[838] Most significantly, having seen that the financial bar would prevent a shareholder from starting this claim, thus, the principle that is adopted in Egypt is recommended whereby the cost of minority shareholders' claims has to be paid by the company if it is proved that such an action was based on serious reasons.[839] To prevent vexatious actions that are proceeded with only to disturb the business of the company or to harm the interests of majority shareholders, the court should be given a discretion to penalize in costs the claimant whenever it is proved that the subject action was based on malicious reasons.

[837] The Supreme Court of Morocco, Decision no 620 issued on 07/06/2006, file no 209/03/2003, issued on 07/06/2006, (2008) (68) The Journal of Supreme Court 118, at 121.
[838] Ibid.
[839] S. 76 of the Egyptian Companies Act, 1981.

4. Having come up with a conclusion that under current Libyan law minority shareholders would not be able to sue the controllers of the company either by the complicated personal claim or by the company liability action, therefore the rules that regulate these actions need to be reformed. In terms of the company liability action, under s. 184 of the Libyan Business Activities Act 2010 an individual shareholder or group of minority shareholders have no chance to bring an action on behalf of the company against the wrongdoer directors as the company liability action against the board members could only be started by the company itself via a resolution passed by the company's general meeting. This law needs to be changed so that each shareholder should have a right to start a derivative claim against the controllers of the company (as in s. 260 of the UK Companies Act 2006 and s. 353 of the Moroccan JSC Act 1996) whether those controllers are board members or not.[840] Moreover, the company liability action under the current Libyan law can only be brought against the company's board member as s. 184 has not mentioned de jure directors, de facto directors and the shadow directors, while under English and Moroccan laws this action can be brought against any wrongdoing shareholders who have sufficient power to control the company without being a member of its board. Therefore, the wording of the section needs to be amended and the term "directors" should be replaced by the term "controllers" in order to include any wrongdoing shareholders or directors who have sufficient power to control the company without being member of its board. Besides, the policy employed by s. 354 of the Moroccan JSC Act 1996 needs to be adopted in Libya which allows a shareholders or group of shareholders on behalf of the company to start a derivative action without any previous permission either by the board or the general meeting, and neither the board of directors nor the general meeting should have the power to ratify their conduct in order to stop or withdraw the proceeding action against the

[840] See also s. 102 of the Egyptian Companies Act (No 159, 1981) which grants a shareholder the right to start such action against the controllers of the company without any permission from the general meeting.

company even by a special resolution. Some other lessons should be taken from the English law experience regarding the derivative claim, for instance, minority shareholders should have a right to base their action on an actual or proposed act, omission involving negligence, default, breach of duty, or breach of trust by directors of the company.[841] It is also recommended for the Libyan legislature to adopt the new English law position regarding pure negligence as a sufficient ground of starting a derivative action.[842] In terms of litigation costs, it was seen that such costs form a big obstacle that prevents many shareholders from using the derivative action, therefore, minority shareholders should have a right to apply for an indemnity order whenever it is proved that the subject action is not vexatious action and it is made in good faith and the for a proper purpose.[843]

5. Regarding the personal action, in order to start a personal action under the current rule (s. 186 of the Business Activities Act 2010) a minority shareholder needs to evidence that the damage has directly harmed the interests of such shareholder, moreover he or she needs to prove that such damage was a result of fraud or negligence of the board members. Under the above conditions it would be very difficult to see individual actions coming before the courts, therefore these restrictions need to be removed and the Moroccan position is recommended where s. 353 of the JSC Act 1996 enables each shareholder or group of shareholders to bring a personal claim to protect their own interest without any further complication such as the "no reflective loss" principle. Under Moroccan law the claimant shareholder is not required to prove that such damage was a *result of fraud or negligence* of the board members. Above and beyond, the personal action under s. 186 of Libyan Business Activities Act 2010 can only be brought against the company's board members, whereas under English and Moroccan laws this

[841] See s. 263 of the Companies Act, 2006.
[842] J Birds and others, *Annotated Companies Legislation* (3rd edn, Oxford University Press, Oxford 2013).
[843] To clarify these criteria law makers need to provide guidance to the court which provides examples for the terms of vexatious actions and a proper purpose.

action can be brought against any complicit shareholders who have sufficient power to control the company without being members of its board. Consequently, the wording of the section needs to be amended and the term “directors” should be substituted by the term “controllers” in order to include any wrongdoing shareholders who have sufficient power to control the company without being members of its board.

6. Under the English law, we showed that the above restrictions on personal and derivative claims have encouraged minority shareholders to use alternative methods to obtain their remedies. Under such a remedy a shareholder is granted a right to petition under s. 994 of the Companies Act 2006 if the affairs of the company are being or have been conducted in a manner which is unfairly prejudicial to the member’s interests. The petitioner shareholder could ask the court for various orders: regulate the conduct, require the company to refrain from action, authorise the member to bring a derivative action and finally the court is authorised to issue an order which ask the other members or the company itself to purchase the minority shareholder’s shares. The unfair prejudice remedy is considered the key distinctive feature of the English system of minority shareholder protection and it is highly recommended to be adopted by Libyan law makers.

7. Last but not least, the buy-out remedy which has become the most important relief under the unfair prejudice remedy under English law has to be adopted by the Libyan corporate law regime. This a remedy is applied in Morocco under s. 1057 of Obligations and Contracts Act[844] in the Civil Companies and Partnerships and by s. 221 of the JSC Act 1996 only in the case of conversion. Such a relief was also adopted in Tunisia in 2009 where s. 290 of the Law No 16 which adjusted the Companies Act 2000[845] allows a shareholders or group of shareholders in a non-listed company who hold a percentage which does not exceed 5% of the capital to sell out

[844] Issued on 12 August 1913 and was amended in 22 September 2011.
[845] Issued on 16 March 2009.

their shares and leave the company.[846] Although s. 209 of the Tunisian Companies Act 2000 adopts the buy-out relief, however such a remedy was only given to a shareholder or group of shareholders who hold a small percentage (not exceeding 5% of the capital), so it does not offer any protection to the minority shareholder who holds more than this figure. Therefore, the Libyan legislature is advised to grant the buy-out relief to any shareholder regardless of its percentages of shares. Such a remedy would ensure that minority shareholders under Libya company law have always a right to leave and sell their shares at fair value. The English law experience regarding the buy-out relief is recommended where the court will generally apply the pro rata formula if the company was a 'quasi-partnership',[847] and will not discount the value of the shares on the ground that they are a minority shareholdings, even the market would apply such discount. However, in some circumstances although a case of quasi-partnership is not existing, yet, the surrounding facts and the principles of justice require that the valuation of the petitioner shares should be made on pro rata basis rather than applying the discount basis and vice versa.[848] Also in determining the suitable time of share valuation the flexible English law position is highly recommended where the Court of Appeal in *Profinance Trust SA v Gladstone*[849] has provided comprehensive a view on the appropriate time regarding share valuation, and it made clear the principle by which the proper time of valuation is the date of sale, however if it appears to the court that there is more appropriate date to value the share the court has the power to do so.[850] Briefly, the adoption of the buy-out remedy would increase the level of protection in Libya and would prevent the shareholders from incurring the cost and lengthy litigation with its negative effect on the company and its reputation.

---

[846] See Chapter Five (5.3.4), at 209-210.
[847] See *CVC/Opportunity Equity Partners Ltd v DemarcoAlmeida* [2002] 2 BCLC 108.
[848] See *Re Sunrise Radio* Ltd [2009] EWHC 2893 (Ch). See also Robin Hollington QC in *Re Blue Index Ltd* [2014] EWHC 2860 (Ch), at 26.
[849] [2002] 1 BCLC 141, see also *Re Sunrise Radio Ltd* [2009] EWHC 2893 (Ch).
[850] For instance in *Re BC&G Care Homes Ltd: Crowley* v *Bessell* [2015] EWHC 1518 (Ch), the valuation date applied by the court was before the claimant was excluded from management, therefore no minority discount was applied.

6.4 Areas of further research

This work as a Ph.D thesis is restricted in its scope and time, therefore such limitations need to be acknowledged regarding the current research. Taking these considerations into account this study focuses on the most pressing issue that the author felt needed to be addressed, which is the level of minority shareholder protection that is provided by Libyan corporate law system and what can be done to enhance this level. In so doing the thesis examined the minority shareholder protection regime under the English and Moroccan jurisdictions in order to extrapolate lessons that can be adopted by the Libyan law makers in the upcoming reforms. After considering this issue it seems to the researcher that the protection of minority shareholder in the Closed Joint Stock Company in Libya forms only one part of having a good corporate governance system, therefore, the research that this thesis has carried out could be taken further by other following up studies which focus upon particular topics related to the corporate governance in Libya. First and foremost, due to the current political circumstances in Libya this research is based only on the doctrinal approach via examining primary and secondary resources such as laws, regulations, books and journal articles; hence when things settle down in Libya empirical studies of minority shareholders protection have to be carried out in order to have a complete picture regarding the topic. These empirical studies would investigate the doctrine of minority shareholder protection in practice which no doubt would add more value to the area. Besides, having stated that this thesis focuses on Closed Joint Stock Companies therefore, the protection of minority shareholders in the Public Joint Stock Companies needs to be undertaken, taking into account the late establishment of Libyan Stock Market which is established in 2007. Most of the 13 listed companies in the Libyan Stock Market are state owned companies therefore, such studies have to address the conflict between the State as controlling shareholder and the minority shareholders.

On the other hand, as many of the non-listed small companies in Libya and MENA countries are family owned enterprises, so it would be worthwhile to examine the governance of the family owned firms. Such studies should consider the following issues: the composition and independence of the board of directors in these firms, the role of the board of directors in protecting the minority shareholder and the duties of the board of directors' and the enforcement of these duties. Furthermore, in such countries, companies have strong, culturally based, characteristics which determine a particular type of hierarchical structure and often a tendency for a relatively short life cycle of two to three generations.[851] Such a life cycle model tends to indicate stress points at which family disputes and potential minority shareholder action may occur if not properly managed e.g. on succession and at cousins confederation stages. Therefore, there is a need to study the corporate governance problems associated with the life cycle in a sample of family dominated firms which examines the legal dimensions of modelling the life cycles of family firms and the governance aspects of small to medium sized enterprises. Additionally, when a conflict arises between the minority shareholders and the controllers of the company an alternative solution, such as arbitration, has to be considered, as it would be better to avoid litigation among the family members of such firms. In these kinds of firm the concepts of de facto and shadow directors are very common wherein the controller of the company is a person who is not a member of the board of directors and minority shareholders cannot bring an action against such controller. To that regard, further studies should be undertaken which examine the responsibilities of the de facto and shadow directors in the context of family owned enterprises and how minority shareholders could start an action against those controllers.

[851] P Lawton 'Berle and Means, Corporate Governance and Chinese Family Firm' (1996) 6 Australian Journal of Corporate Law 348, at 348.

Having stated that creating an effectual system of protection for the minority shareholder emanates from several sources, such as the ethics of shareholders and directors, the provisions of the law, the judicial system, internal control systems, and voluntary adoption of effectual codes of corporate governance therefore, this study suggests that follow up studies should consider these issues in order to provide a complete perspective of the whole problem. Last but not least, the protection of minority shareholders should not disturb the day to day business of the company; thus it is worthwhile to have further research which identifies this potential detriment and clarifies any abusive conduct of the minority shareholders.

Bibliography

1. Table of Cases

1.1 UK Cases

Abouraya v Sigmund & Ors [2014] EWHC 277 (Ch).

Allen v Gold Reefs of West Africa Ltd [1900] 1 Ch 656.

Anderson v Hogg [2002] SC 190.

Anderson v Hogg [2002] SLT 354.

Apex Global Management Ltd v FI Call Ltd [2015] EWHC 3269 (Ch).

Arbuthnott v Bonnyman & Ors [2015] EWCA Civ 536.

Atlasview Ltd v Brightview Ltd [2004] 2 BCLC 191.

Bamford v Harvey [2012] EWHC 2858 (Ch).

Barrett v Duckett [1995] 1 BCLC 243.

BAT Industries plc v Windward Prospects Ltd [2013] EWHC 3612 (Comm).

Begum v Hossain et alia [2015] EWCA Civ 717.

Bentley Stevens v Jones [1974] 2 All ER 653.

Bhullar v Bhullar [2015] EWHC 1943 (Ch).

Birdi v Specsavers Optical Group Ltd [2015] EWHC 2870 (Ch).

Blomqvist v Zavarco Plc [2015] EWHC 1898 (Ch).

Blunt v Jackson [2013] EWHC 2090 (Ch).

Bridge v Daley [2015] EWHC 2121 (Ch).

Burberry Group plc v Fox-Davies [2015] EWHC 222 (Ch).

Burland v Earle [1902] AC 83.

Burry v Knight Ltd [2014] EWCA Civ 604.

Bushell v Faith [1970] AC 1099.

Carlen v Drury [1812] 1 Ves & B 154.

Carlen v Drury [1812] 35 ER 61.

Catch a Ride Ltd v Gardner [2014] EWHC 1220 (Ch).

Clark v Cutland [2003] EWCA Civ 810, [2004] 1 WLR 783.

Cook v Deeks [1916] 1 AC 554.

Cullen Investment Ltd v Brown [2015] EWHC 473 (Ch).

CVC/Opportunity Equity Partners Ltd v Demarco Almeida [2002] 2 BCLC 108.

Daniels v Daniels [1978] Ch 406.

DiGrade v D'Angelo (Re Abbington Hotel Ltd) [2011] EWHC 635 (Ch).

Eaton v Caulfield [2001] EWHC 173 (Ch).

Eaton v Caulfield [2013] EWHC 2214 (Ch).

Ebrahimi v Westbourne Galleries [1973] AC 360.

Edwards v Halliwell [1950] 2 All ER 1064.

Estmanco (Kilner House) Ltd v Greater London Council [1982] 1 WLR 2.

Exeter City AFC v The Football Conference [2004] BCC 498.

Fanmailuk.com v Cooper [2008] BCC 877.

Farnbar Holdings Ltd v Patel [2008] EWHC 1534 (Ch).

Fisher v Cadman [2006] 1 BCLC 499.

Fowler v Gruber [2009] CSOH 36.

Foss v Harbottle (1843) 2 Hare 461.

Fulham FC v Richards [2011] EWCA Civ 855.

Gamlestaden Fastigheter AB v Baltic Partners Ltd [2007] UKPC 26.

Gardner v Parker [2004] 2 BCLC 554.

Gardner v Parker [2004] EWCA 781.

Giles v Rhind [2002] EWCA Civ 1428.

Grace v Biagioli [2005] EWCA Civ 1222.

Groly v Good [2010] EWHC 1 (Ch).

Gross v Rackind [2004] EWCA Civ 815.

Harding v Edwards [2014] EWHC 247 (Ch).

Hawkes v Cuddy (No 2) [2009] EWCA Civ 291.

Hughes v Weiss [2012] EWHC 2363 (Ch).

Iesini v Westrip Holdings Ltd [2009] EWHC 2526 (Ch).

Isaacs v Belfield Furnishing Ltd [2006] EWHC 183 (Ch).

Johnson v Gore Wood & Co [2002] 2 AC 1.

Kelly v Hussain [2008] EWHC 1117 (Ch).

Kiani v Cooper [2010] EWHC 577 (Ch).

Kleanthous v Paphitis [2011] EWHC 2287 (Ch).

Lock v John Blackwood [1924] AC 783.

Lowe v Fahey [1996] 1 BCLC 262.

MacDougall v Gardiner (1875) 1 Ch D 13.

Malaga Investments Ltd & Others, Petitioners (1987) 3 BCC 569.

Malhotra v Malhotra [2014] EWHC 113 (Comm), [2015] 1 BCLC 428.

McGuinness v Bremner Plc [1988] BCLC 673.

Mission Capital plc v Sinclair [2008] BCC 866.

Mozley v Alston (1847) 1 Ph 790.

Nicholas v Soundcraft Electronics Ltd [1993] BCLC 360.

O'Donnell v Shanahan [2009] EWCA Civ 751.

O' Neill v Philips [1999] 1 WLR 1092.

O'Neill v Phillips [1999] 2 BCLC 1.

Oak Investment Partners XII, Limited Partnership v Bougthwood [2009] 1 BCLC 453, [2010] EWCA Civ 23.

Pavlides v Jensen [1956] Ch 565.

Pender v Lushington (1877) 6 Ch D 70.

Percival v Wright [1902] 2 Ch 401.

Profinance Trust SA v Gladstone [2002] 1 BCLC 141.

Prudential Assurance Co Ltd v Newman Industries Ltd (No-2) [1982] Ch 204.

Quiet Moments Ltd, Re [2013] EWHC 3806 (Ch).

R & H Electric Ltd v Haden Bill Electrical Ltd [1995] 2 BCLC 280.

Re a Company (No 00176 of 1986) [1987] BCLC 141.

Re a Company (No 002612 of 1984) [1985] BCLC 80.

Re a Company (No 00330 of 1991) [1991] BCLC 597.

Re a Company (No 004475 of 1982) [1983] Ch 178.

Re a Company (No 004475 of 1982) [1983] Ch 178.

Re a Company (No 007623 of 1984) [1986] BCLC 362.

Re a Company (No 1126 of 1992) [1994] 2 BCLC 146.

Re a Company (No: 007623 of 1984) [1986] 2 BCC 99.

Re a Company [1986] BCLC 391.

Re A Noble & Sons (Clothing) Ltd [1983] BCLC 237.

Re Addbins Ltd [2015] EWHC 3161 (Ch).

Re BC&G Care Homes Ltd: Crowley v Bessell [2015] EWHC 1518 (Ch).

Re Bird Precision Bellows Ltd [1984] Ch 419, [1986] Ch 658.

Re Blue Arrow Plc [1987] BCLC 585.

Re Blue Index Ltd [2014] EWHC 2860 (Ch).

Re Brenfield Squash Racquets Club Ltd [1996] 2 BCLC 184.

Re Brightview Ltd; Atlasview Ltd v Barton [2004] EWHC 1056 (Ch).

Re Charnley Davies Ltd (No.2) [1990] BCLC 760.

Re Coroin Ltd [2013] EWCA Civ 781.

Re Elgindata Ltd [1991] BCLC 959.

Re Full Cup International Ltd [1998] BCC 58.

Re Grossmore Electrical and Civil Engineering Ltd [1989] BCLC 137.

Re Guidezone Ltd [2000] BCLC 321.

Re Hoicrest Ltd [2000] BCLC 194.

Re Kenyon Swansea Ltd [1987] BCLC 514.

Re Legal Costs Negotiators Ltd [1999] 2 BCLC 171.

Re London School of Electronics Ltd [1986] Ch 211.

Re Macro (Ipswich) Ltd [1994] 2 BCLC 354.

Re McCarthy Surfacing Ltd [2009] BCC 464.

Re McCarthy Surfacing Ltd; Hecquet v McCarthy [2006] EWHC 832 (Ch).

Re Mountforest Ltd [1993] BCC 565.

Re Nuneaton Borough FC Ltd [1991] BCC 4.

Re OC (Transport) Services Ltd [1984] BCLC 251.

Re Phoenix Contracts (Leicester) Ltd [2010] EWHC 2375 (Ch).

Re R A Noble v Sons Ltd [1983] BCLC 273.

Re Sam Weller & Sons Ltd [1989] 3 WLR 923.

Re Saul D Harrison & Sons Plc [1995] 1 BCLC 14.

Re Scitec Group Ltd [2010] EWHC 1830 (Ch).

Re Singh Brothers Contractors (North West) Ltd [2013] EWHC 2138 (Ch).

Re Starlight Developers Ltd [2007] EWHC 1660 (Ch).

Re Sunrise Radio Ltd [2009] EWHC 2893 (Ch).

Re Sussex Brick Company [1904] 1 Ch 598.

Re Vocam (Europe) Ltd [1998] BCC 396.

Re Yenidie Tobacco Co Ltd [1935] All ER Rep 803.

Rehman v Jones Lang La Salle [2013] EWHC 1339 (QB).

Richardson v Blackmore [2006] BCC 276.

Rock Ltd v RCO plc [2004] EWCA Civ 118.

Rolled Steel Products Ltd v British Steel Corporation [1985] 2 WLR 908.

Rolled Steel Products v British Street Corporation [1984] BCLC 466.

Safinia v Comet Enterprises Ltd [1994] BCC 883.

Salomon v Salomon Co Ltd [1897] AC 22.

Saul v Harrison [1994] BCC 475.

Shah v Shah [2010] EWHC 313 (Ch).

Sharp v Blank [2015] EWHC 3220 (Ch).

Sidebottom v Kershaw Leese and Co Ltd [1920] 1 Ch 154.

Sikorski v Sikorski [2012] EWHC 1613 (Ch).

Smith v Croft (No 1) [1986] 1 WLR 580.

Smith v Croft (No 2) [1988] Ch 114.

Stainer v Lee and others [2010] EWHC 1593 (Ch).

Stein v Blake [1998] 1 All ER 724.

Strahan v Wilcock [2006] 2 BCLC 555.

Taylor v National Union of Mineworkers (Derbyshire Area) [1985] BCLC 237.

Thomas v Dawson & Anor [2015] EWCA Civ 706.

Universal Project Management v Fort Gilkicker Ltd [2013] EWHC 348 (Ch).

Wallersteiner v Moir [1975] QB 373.

Whillock v Henderson [2009] BCC 291.

Wilson v Jaymarke Estates Ltd [2007] UKHL 29.

Wishart v Castlecroft Securities Ltd [2009] CSIH 65.

1.2 Moroccan Cases

The Commercial Court of Agadir, case No 38/98, issued on 17/09/1998, (2004) 1 Journal of Commercial Courts 113.

The Commercial Court of Appeal in Casablanca, decision No 1630, file No 83/1113, issued on 13/12/1983 (unpublished), cited in Hamdawi A, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013), at 271, see also Zoair H, 'Protection of Minority Shareholder by the Judicial Authority' (unpublished dissertation, High Judicial Institute, Rabat 2009), at 35.

The Commercial Court of Appeal in Casablanca, decision No 3065/2011, file No 4421/ 12/2010, issued on 23/06/2011 (unpublished), cited in Zoair H, 'Protection of Minority Shareholder by the Judicial Authority' (unpublished dissertation, High Judicial Institute, Rabat 2009), at 33, see also Albakti T, 'The Role of Judicial Authority to Protect the Minority Shareholders in the Joint Stock Company' (2013) 110 The Moroccan Journal of Local Management and Development 139, at 142.

The Commercial Court of Appeal in Casablanca, decision No 3101, issued on 15/11/1994, (1995) 75 Journal of Moroccan Courts 60.

The Commercial Court of Appeal in Casablanca, decision No 4084/2011, file No 474/12/2011, issued on 11/10/2011 (unpublished), cited in Albakti T, 'The role of judicial authority to protect the minority shareholders in the Joint Stock Company' (2013) 110 The Moroccan Journal of Local Management and Development 139, at 155, see also Hamdawi A, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013), at 272.

The Commercial Court of Appeal in Casablanca, file No 4/99/2535, issued on 04/01/2000 http://adala.justice.gov.ma/AR/Jurisprudence/JPC_fes_2008.aspx accessed 21 March 2014.

The Commercial Court of Appeal in Fez, decision No 364, file No 1484/2002, issued on 25/03/2005 (unpublished), cited in Gomirah A, *The Abusive Conduct of Shareholders in the Joint Stock Company* (1st edn, Matbat Alomnia, Rabat 2011), at 217, see also Albakti T, 'The role of judicial authority to protect the minority shareholders in the Joint Stock Company' (2013) 110 The Moroccan Journal of Local Management and Development 139, at 155.

The Commercial Court of Appeal in Fez, file No 716/2008, issued on 16/07/2008 http://adala.justice.gov.ma/AR/Jurisprudence/JPC_fes_2008.aspx. accesses 21 March 2014.

The Commercial Court of Appeal in Marrakech, decision No 322, file No 429/99, issued on 03/06/2000, (2002) 93 Journal of Moroccan Courts 151.

The Commercial Court of Appeal of Casablanca, file No 12/1010/4421, issued on 23/06/2011, (unpublished), cited in Albakti T, 'The role of judicial authority to protect the minority shareholders in the Joint Stock Company' (2013) 110 The Moroccan Journal of Local Management and Development 139, at 142. See also Gomirah A, *The Abusive Conduct of Shareholders in the Joint Stock Company* (1st edn, Matbat Alomnia, Rabat 2011), at 220.

The Commercial Court of Casablanca, case No 89/449, issued on 18/08/1998. (2000) 82 Journal of Moroccan Courts 209.

The Commercial Court of Casablanca, decision No 333/99, file No 1482/01/1998, issued on 02/03/1999 (unpublished), cited in Belmris S, 'The Protection of Minority Shareholders' Rights in Joint Stock Companies' (unpublished dissertation, High Judicial Institute, Rabat 2011), at 35, see also Hamdawi A, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013), at 275.

The Commercial Court of Casablanca, decision No 783, issued on 03/02/1938 (unpublished), cited in Albakti T, 'The role of judicial authority to protect the minority shareholders in the Joint Stock Company' (2013) 110 The Moroccan Journal of Local Management and Development 139, at 146.

The Commercial Court of Fez, decision No 428, file No 904/05 and 147/06, issued on 17/03/2009 http://adala.justice.gov.ma/AR/Jurisprudence/JPC_fes_2008.aspx accesses 27 March 2014.

The Commercial Court of Marrakech, decision No 310, file No 190/01/06, issued on 06/06/2006 (unpublished), cited in Abujana Z, 'Some Aspects of Minority Shareholders Protection in Morocco' (2007) 13 October Moroccan Journal of Business Law 121, at 131.

The Commercial Court of Rabat, an urgent case No 600, file No 530/03/2006, issued on 12/07/2010 (unpublished), cited in Belmris S, 'The Protection of Minority Shareholders' Rights in Joint Stock Companies' (unpublished dissertation, High Judicial Institute, Rabat 2011), at 33.

The Commercial Court of Rabat, an urgent case No 151, file No 126/09/2010, issued on 22/02/2010 (unpublished), cited in Belmris S, 'The Protection of Minority Shareholders' Rights in Joint Stock Companies' (unpublished dissertation, High Judicial Institute, Rabat 2011), at 28, see also Albakti T, 'The role of judicial authority to protect the minority shareholders in the Joint Stock Company' (2013) 110 The Moroccan Journal of Local Management and Development 139, at 148.

The Commercial Court of Rabat, an urgent case No 278, file No 250/9/2011, issued on 11/04/2011 (unpublished), cited in Belmris S, 'The Protection of Minority Shareholders'

Rights in Joint Stock Companies' (unpublished dissertation, High Judicial Institute, Rabat 2011), at 28.

The Commercial Court of Rabat, decision No 3118, file No 295/08/2007, issued on 27/11/2007 (unpublished), cited in Belmris S, 'The Protection of Minority Shareholders' Rights in Joint Stock Companies' (unpublished dissertation, High Judicial Institute, Rabat 2011), at 61.

The Commercial court of Tangier, an urgent case No 161/1/2006 issued on 28/06/2006 http://adala.justice.gov.ma/AR/Jurisprudence/JPC_fes_2008.aspx accessed 24 March 2014

The Court of Appeal in Agadir, Decision No 1487, issued on 25/06/1992 (unpublished), cited in Gait R, 'Shareholder's Position in the Joint Stock Company' (Ph.D thesis, Mohammed V University Rabat Morocco 2004), at 287, see also Gomirah A, *The Abusive Conduct of Shareholders in the Joint Stock Company* (1st edn, Matbat Alomnia, Rabat 2011), at 211.

The Moroccan Supreme Court, decision No 377, file No 1247/89, issued on 14/02/1990 (unpublished), cited in Belmris S, 'The Protection of Minority Shareholders' Rights in Joint Stock Companies' (unpublished dissertation, High Judicial Institute, Rabat 2011), at 64.

The Primary Court of Casablanca Decision No 2159, issued on 29/07/1987 (unpublished), cited in Hamdawi A, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013), at 404.

The Supreme Court in Morocco, decision No 1408, file No 713/01/2001, issued 22/12/2004 (2005) 8 Moroccan Journals of Law and Business 89.

The Supreme Court of Morocco, decision No 620 file No 209/03/2003, issued on 07/06/2006, (2008) 68 Journal of Supreme Court 118.

The Supreme Court of Morocco, file No 1406/1996, issued on 30/07/1997, (1998) 21 (53-54) Journal of Supreme Court 227.

1.3 Other cases

Artan Investments Ltd & Ors v The Bank of East Asia Ltd & Ors [2015] HKCU 1268.

Australian Agricultural Co v Oatmont Pty Ltd [1992] 8 ACSR 225.

Hurlwy v BGH Nominees Pty Ltd (1983) 31 SARS 250.

Patton v Nicholas 279 SW 2d 848 (Tex 1955).

Pinnacle Data Services, Inc v Gillen 104 SW 3d 188 191 92 (Tex App.-Texarkana 2003 no pet).

Re Chime Corporation Ltd [2004] 3 HKLRD 922

Redmon v Griffith 202 SW 3d 225 (Tex App - Tyler 2006).

The Court of Appeal in Paris, issued on 22 May 1965, cited in Hamdawi A, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013), at 394, see also Gomirah A, *The Abusive Conduct of Shareholders in the Joint Stock Company* (1st edn, Matbat Alomnia, Rabat 2011), at 228.

The Court of Appeal in Rouen in 25 September 1969, Cited in Hamdawi A, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013), at 395, see also Gait R, 'Shareholder's Position in the Joint Stock Company' (Ph.D thesis, Mohammed V University, Rabat 2004), at 135.

The French Supreme Court Cass, Com. Rendu Le 03/11/1980, Bull Joly, 1980, cited in Albakti T, 'The role of judicial authority to protect the minority shareholders in the Joint Stock

Company' (2013) 110 The Moroccan Journal of Local Management and Development 139, at 149.

The French Supreme Court in France Issued on 25/March 1974, cited in Hamdawi A, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013), at 396.

The French Supreme Court, Cass. Com 11/05/1960, Dalloz 1960 Som. St 31, cited in S Belmris, 'The Protection of Minority Shareholders' Rights in Joint Stock Companies' (unpublished dissertation, High Judicial Institute, Rabat 2011), at 65, see also Hamdawi A, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013), at 399.

Waddington Ltd v Chan Chun Hoo Thomas [2008] HKCU 1381.

Weinberger v UOP, Inc 457 A2d 701 (Del 1983) 1641.

2. Table of Legislation

2.1 UK Legislation

2.1.1 Statutes

The Companies Act 1948.

The Companies Act 1985.

The Companies Act 2006.

The Courts and Legal Services Act 1990.

The Deregulation Act 2015.

The Insolvency Act 1986.

The Senior Courts Act 1981.

The Small Business, Enterprise and Employment Act 2015.

2.1.2 Statutory Instruments

The Civil Procedure (Amendment No.2) Rules 2007 (2007 No. 3543 L. 31).

The Civil Procedure (Amendment) Rules 2000, (2000 No. 221 L.1).

The Civil Procedure Rules 1998, (1998 No. 3132 L.17).

The Companies (Model Articles) Regulations 2008, (2008 No. 3229).

The Companies (Unfair Prejudice Applications) Proceedings Rules 2009, (2009 No. 2469).

The Conditional Fee Agreements Order 2000, (2000 No. 823).

The Conditional Fee Agreements Order 2013. (2013 No. 689).

The Conditional Fee Agreements Regulations 2000, (2000 No. 692).

2.1.3 Codes

UK Stewardship Code 2012.

UK Corporate Governance Code 2014.

2.1.4 Practice Directions

The Practice Direction (winding up: petition by contributory) 1990, (Ch 1/90).

2.2 Libyan Legislation

2.2.1 Statutes

The Business Activities Act 2010.

The Civil and Commercial Procedures Act 1953.

The Libyan Civil Code 1953.

The Libyan Commercial Act 1953.

The Libyan Government's Decree No (186)2012.

The Libyan Stock Market Act 2010.

2.2.2 Codes

Corporate Governance Code 2007.

2.3 Moroccan legislation

Act No 5.96,1997 Concerning the General Partnership, Limited Partnership, Limited Partnership by Shares, with Limited Liability Companies, and the Participation in Association.

The Civil Procedural Act 1974.

The Commercial Court Act 1997.

The Contracts and Obligations 1913.

The Joint Stock Companies Act 1996.

2.4 Other legislation

The Australian Corporations Act 2001.

The Canadian Business Corporations Act 1985

The Egyptian Companies Act 1981.

The Hong Kong Companies Ordinance 2012.

The Jordanian Companies Act 1997.

The New Zealand Companies Act 1993.

The Singapore Companies Act (Cap. 50, Statutes of Singapore).

3. Books

Abodah A, *Basics of Libyan Law: Theory of Law* (1st edn, Part1 Naser University, Tripoli 1993).

Alaiari K, *The Controllers of the Joint Stock Company* (1st edn, Mojamah Allatrash, Tunis 2011).

Albadawi M, *Law of Economic Activities: General Principles and Rules* (3rd edn, part 1 Aljameha Almaftoha, Tripoli 2013)

Albadawi M, *The General Theory of Obligations: Sources of Obligations* (2nd end, Almarkez Alqawmi, Tripoli 2003).

Alcock A, Birds J and Gale S, *Companies Act 2006* (1st edn, Jordans 2009).

Almadani M, *Protecting Minority Shareholders in Private Companies in Saudi Arabia and Dubai, Does the UK Company Law 2006 Offer a Way Forward?* (1st edn, Dar Almadani Jeddah 2012).

Alsagair I, *Monitoring the Controllers of the Joint Stock Company under Libyan and Moroccan Laws* (1st edn, Part 1, Akadimiat Alfkr Aljamahiry, Tripoli 2006).

Alsagair I, *Monitoring the Controllers of the Joint Stock Company under Libyan and Moroccan Laws* (1st edn, Part 2, Akadimiat Alfkr Aljamahiry, Tripoli 2006).

Alsbaii A, *Companies and Economic Interest Groups (Deep Study in the New Companies Acts No 5.96 and 17.95 and the Adjustments Made by 13.97 Act That Relates to Economic Benefit Groups* (2nd edn, Part 1, Dar Nashar Almarefa Rabat 2009).

Alsbaii A, *Companies and Economic Interest Groups (Deep Study in the New Companies Acts No 5.96 and 17.95 and the Adjustments Made by 13.97 Act That Relates to Economic Benefit Groups* (2nd edn, Part 2, Dar Nashar Almarefa Rabat 2009).

Alsbaii A, *Companies and Economic Interest Groups (Deep Study in the New Companies Acts No 5.96 and 17.95 and the Adjustments Made by 13.97 Act That Relates to Economic Benefit Groups* (2nd edn, Part 3, Dar Nashar Almarefa Rabat 2012).

Alsbaii A, *Companies and Economic Interest Groups (Deep Study in the New Companies Acts No 5.96 and 17.95 and the Adjustments Made by 13.97 Act That Relates to Economic Benefit Groups* (2nd edn, Part 4, Dar NasharAlmarefa, Rabat 2013).

Alsbaii A, *Companies and Economic Interest Groups (Deep Study in the New Companies Acts No 5.96 and 17.95 and the Adjustments Made by 13.97 Act That Relates to Economic Benefit Groups* (1st edn, Part 5, Dar Nashar Almarefa Rabat 2005).

Alwarfaly A, *Law of Commercial Companies* (2nd edn, Matbahat Alatrash leeallketab Almoktas, Tunis 2010).

Bastanni A, *Companies in Morocco Laws and Comparative Jurisdictions, Comparative Study* (2nd edn, part 1, Matbat Alnajah Aljadeda 1998).

Better B, *Company Law* (2nd end, Pearson Education Limited, Edinburgh 2005).

Birds J and others, *Annotated Companies Legislation* (3rd edn, Oxford University Press, Oxford 2013).

Boyle A and Birds J & Others*, Boyle & Birds' Company Law* (9th edn, Jordans, Bristol 2014).

Boyle A, *Minority Shareholders' Remedies* (Cambridge University Press 2011).

Bruno S and Ruggiero E, *Public Companies and the Role of Shareholders: National Models towards Global Integration* (Kluwer Law International, the Netherland 2011).

Cahn A and Donald D*, Comparative Company Law: Text and Cases on the Laws Governing Corporation in Germany, UK and USA* (Cambridge University Press, Cambridge, UK & New York 2010).

Davies P, *Gower and Davies' Principles of Modern Company Law* (9th edn, Sweet and Maxwell, London 2012).

Davies P, *Introduction to Company Law* (2nd end, Oxford University Press, Oxford 2010).

Eells R, *The Meaning of Modern Business: an Introduction to the Philosophy of Large Corporate Enterprise* (Columbia University Press, New York 1960).

Ferran E, *Company Law and Corporate Finance* (1st edn, Oxford University Press, Oxford 1999).

French D, Mayson S & Ryan C, *Mayson, French & Ryan on Company Law* (31th edn, Oxford University Press, Oxford 2014-2015).

Ganous S, *Libyan Revolution in 30 Years, Political, Economic and Social Transformations, 1969-1999* (1st edn, Dar Al Jamahiriya for Publication, Distribution and Advertising 1999 Libya).

Ghumidh S, *Bahraini Commercial Companies Law, Provisions and Explanations* (1st edn, University of Bahrain, Bahrain 2014).

Gomirah A, *The Abusive Conduct of Shareholders in the Joint Stock Company* (1st edn, Matbat Alomnia, Rabat 2011).

Hamdawi A, *Majority Shareholders Abuses in the Joint Stock Company, Comparative Study* (1st edn, Dar Alafag Almagribia, Rabat 2013).

Hannigan B, *Company Law* (3rd edn, Oxford University Press, Oxford 2012).

Hicks A and Goo S, *Cases and Materials on Company Law* (7th edn, Oxford University Press, Oxford 2011).

Hirt H, *The Enforcement of Directors 'Duties in Britain and Germany- A Comparative Study with Particular Reference to Large Companies* (1st edn, Peter Lang 2004).

Judge S, *Company Law* (3rds edn, Oxford University Press, Oxford 2012).

Law of Commercial Companies (1st edn, Dar Alenmaa Altakafi, Rabat 2010).

Madi M, and Alzahwi F, *Commercial Companies in Libyan Law* (University of Aljabal Algharbi, Libya 1997).

McConville M and Chui W, *Research Methods for Law* (Edinburgh University Press, Edinburgh 2007).

Radin S, *The Business Judgement Rule – Fiduciary Duties of Corporate Directors* (5th edn, Volume I, Aspen Law and Business, New York 1998).

Rajak H, *Sourcebook of Company Law* (2nd edn, Jordans, Bristol 1995).

Ramadan E, *Minority Shareholders Protection in Joint-Stock Companies* (1st edn, Dar alkoteb Alkanonia, Cairo 2008).

Reisberg A, *Derivative Actions and Corporate Governance: Theory and Operation* (1st edn, Oxford University Press, Oxford 2007).

Samuel G, *An Introduction to Comparative Law Theory and Method*, (Hart Publishing, Oxford 2014).

Sealy L and Worthington S, *Cases and Materials in Company* Law (10th edn, Oxford University Press, Oxford 2013).

Siems M, *Comparative Law* (1st edn Cambridge University Press, Cambridge 2014).

Steinfeld A, *Blackstone's Guide to The Companies Act 2006* (Oxford University Press, Oxford 2007).

Szentkuti D, *Minority Shareholder Protection in Germany, France, and the United Kingdom: A Comparative Overview* (VDM Verlag Dr, Germany 2008).

Szudoczky R, *Takeover Regulation and Protection of Minority Shareholders: A comparison between the European and US approach* (Lambert Academic Publishing, Koln 2009).

Tibar M, *The Theory of Shareholders' Rights in Joint Stock Companies; Comparative Study Between Libya, Egypt and France* (Part 1, Matbahat Alwahda Alarbia, Alzawya Libya 1998).

Tibar M, *The Theory of Shareholders' Rights in Joint Stock Companies; Comparative Study Between Libya, Egypt and France* (Part 2, Matbahat Alwahda Alarbia, Alzawya Libya 1998).

Watson A, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press, Athens 1993).

Wild C and Weinstein S, *Smith & Keenan's Company Law* (16th edn, Harlow: Pearson Education 2013).

Willcocks P, *Shareholders' Rights and Remedies* (1st edn, The Federation Press Australia 1991).

Zakani F, *Joint Stock Companies in Sharia and law* (1st edn, Dar Alnefas, Amman 2012).

4. Articles

Abugu J, 'A Comparative Analysis of the Extent of Judicial Discretion in Minority Shareholder Protection Litigation: the United Kingdom and United States' (2007) 18(5) International Company and Commercial Law Review 181.

Abujana Z, 'Some Aspects of Minority Shareholders Protection in Morocco' (2007) 13 Moroccan Journal of Business Law 121.

Admolod A, 'the Protection of Minority Shareholders' Right in the Joint Stock Company' (2013) 19 November http://www.marocdroit.com. Accessed 11 March 2014.

Ahmouda F, 'Transparency in Companies Law' (2014) 3 Journal of Legal Sciences 65.

Alaiari K, 'The Minority Right to Leave the Company' (2009) 51(7) Journal of Judiciary and Legislation 25.

Albakti T, 'The Role of Judicial Authority to Protect the Minority Shareholders in the Joint Stock Company' (2013) 110 The Moroccan Journal of Local Management and Development 139.

Almadani M, 'Derivative Actions: Does the Companies Act 2006 Offer a Way Forward' (2009) 30(5) Company Lawyer 130.

Almashishi M, 'Shareholder's Right to Sue the Company' (2001) 91 Journal of Moroccan Courts 13.

Almosawi A, 'The Protection for the Minority from the Abuse Resolutions in Iraqi Company Law' (2011) 26(1) Journal of Science for Law 101.

Armour J, and Others 'Shareholder Protection and Stock Market Development: An Empirical Test of the Legal Origins Hypothesis' 2009 6(2) Journal of Empirical Legal Studies 343.

Attenborough D, 'How Directors Should Act When Owing Duties to the Companies' Shareholders: Why we Need to Stop Applying *Greenhalgh*' (2009) 20(10) International Company and Commercial Law Review 339.

Attenborough D, 'The Company Law Reform Bill: An Analysis of Directors' Duties and the Objective of the Company' (2006) 27 Company Lawyer 162.

Bailey J and Mugerwa J, 'Multiple Derivative Actions in Company Law: Can You or Can't You?'(2013) 34(10) Company Lawyer 302.

Bailey P, 'Deregulation Bill and Small Business, Enterprise and Employment Bill Enacted to Amend Company Law' Legislative Comment (2015) 370 Company Law Newsletter 1.

Banona Y, ‘The Legislative and Judicial Protection of Minority Shareholders’ (2003) 148 Journal of Judiciary and Law 107.

Bebchuk L and Roe M, ‘A Theory of Path Dependence in Corporate Ownership and Governance’ (1999) 52 Stan LR 127 <http://papers.ssrn.com/paper.taf?abstract_id=192414> accessed 19 February 2013.

Belot F and others, 'Freedom of Choice between Unitary and Two-tier Boards: An Empirical Analysis' (2014) 112(3) Journal of Financial Economics 364.

Bennedsen M and Wolfenzon D, ‘The Balance of Power in Closely Held Corporations’ (2000) 58(1) Journal of Financial Economics 113.

Boyle A, ‘The Minority Shareholder in the Nineteenth Century: A Study in Anglo-American Legal History’ (1965) 28(3) Modern Law Review 317.

Cabrelli D, ‘Statutory Derivative Proceedings: the View from the Inner House’ (2010) 14(1) Edinburgh Law Review 116.

Cesari A, ‘Expropriation of Minority Shareholders and Pay-out Policy’ [2012] The British Accounting Review 207.

Cheffins B, ‘Law as Bedrock: The Foundations of an Economy Dominated by Widely Held Public Companies’ (2003) 23(1) Oxford Journal of Legal Studies 1.

Cheffins B, ‘Reforming the Derivative Action: The Canadian Experience and British Prospects’ (1997) 1(2) Company Financial and Insolvency Law Review 227.

Cheng-Han T, ‘Multiple Derivative Actions Case Comment’ (2013) 129 Law Quarterly Review 337.

Clark B, 'Unfairly Prejudicial Conduct: A Pathway through the Maze' (2001) (22)6 Company Lawyer 170.

Crone D, 'Court of Appeal Rejects Unfair Prejudice Claim Based on Amendment to Drag-Along Rights' [2015] Corporate Briefing 9.

Darwish A, 'Does a Shareholder Have a Right to Sue His Company to Get a Remedy?' (2001) 91 Journal of Moroccan Courts 17.

Enriques L, 'The Law on Company Directors' Self-Dealing: A Comparative Analysis' (2000) 2(3) International & Comparative Corporate Law Journal 297.

Fahad A, 'The Protection of Minority Shareholders' Rights in the Joint Stock Company' [2012] 24 October http://www.marocdroit.com . Accessed 11 March 2014.

Goddard R, 'Enforcing the Hypothetical Bargain: Sections 459-461 of the Companies Act 1985' (1999) 20(3) Company Lawyer 66.

Goddard R, 'The Unfair Prejudice Remedy' (2008) 12(1) Edinburgh Law Review 94.

Goo S, 'Multiple Derivative Action and Common Law Derivative Action Revisited: A Tale of Two Jurisdictions' (2010) 10(1) Journal of Corporate Law Studies 255.

Hadayataallah A, 'Shareholder's Right to Sue his Company and to Obtain a Remedy' (2001) 91 Journal of Moroccan Courts 27.

Hemraj M, 'Maximising Shareholder's Wealth: Legitimate Expectation and Minority Oppression' (2006) 27 (4) Company Lawyer 125.

Halperin J, 'Law in Books and Law in Action: The Problem of Legal Change' (2011) 64(1) Maine Law Review 45.

Hathaway O, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System' [2003] John M, Olin Centre for Studies in Law, Economics, and Public Policy Working Papers, Paper 270.
http://digitalcommons.law.yale.edu/lepp_papers/270. Accessed 17 February 2013.

Hirt H, 'In What Circumstance Should Breaches of Directors' Duties Give Rise to a Remedy Under ss 459-461 of the Companies Act 1985?' (2003) 24(4) Company Lawyer 100.

Hirt H, 'The Company's Decision to Litigate Against its Directors: Legal Strategies to Deal with the Board of Directors' Conflict of Interest' [2005] Journal of Business Law 159.

Jean J and Plessis D, 'Corporate Law and Corporate Governance Lessons from the Past: Ebbs and Flows: But Far from "the End of History….." Part 1' (2009) 30(2) Company Lawyer 71.

Keay A and Loughrey J 'Derivative Proceedings in a Brave New World for Company Management and Shareholders' [2010] Journal of Business Law 151.

Keay A, 'Company Directors Behaving Poorly: Disciplinary Option for Shareholders' [2007] Journal of Business Law 656.

Keay A, 'Section 172 (2) of the Companies Act 2006: An Interpretation and Assessment' (2007) 28(4) Company Lawyer 106.

Kershaw D, 'The Rule in Foss v Harbottle is Dead: Long Live the Rule in Foss v Harbottle' [2015] Journal of Business Law 274.

Kim K, Nofsinger J and Kitsabunnarat-Chatjuthamard P, 'Large Shareholders, Board Independence, and Minority Shareholder Rights: Evidence from Europe' (2007) 13(5) Journal of Corporate Finance 859.

La Porta R, And Others, ‘Investor Protection and Corporate Governance’ (2000) 58(1-2) Journal of Financial Economics 3.

Lawton P ‘Berle and Means, Corporate Governance and Chinese Family Firm’ (1996) 6 Australian Journal of Corporate Law 348.

Lazarides T, ‘Minority Shareholder Choices and Rights in the New Market Environment’ (2010) 7(1/2) Journal of Corporate and Securities Law 7.

Legrand P, ‘Comparative Legal Studies and Commitment to Theory’ (1995) 58(2) Modern Law Review 263.

Leuz C, Nanda D and Wysocki P, ‘Earnings Management and Investor Protection: An International Comparison’ (2002) 69 Journal of Financial Economics 505.

Levine R and Zervos S, ‘Stock Market, Banks and Growth’ (1999) 88 American Economic Review 537.

Lightman D ‘Two Aspect of the Statutory Derivative Claim’ (2011) 1 Lloyd's Maritime and Commercial Law Quarterly 142.

Lightman D, ‘The Companies Act 2006: A Nutshell Guide to the Changes to the Derivative Claim’ (2007) 26(1) Civil Justice Quarterly 37.

Lowry J, ‘The Pursuit of Effective Minority Shareholder Protection: S459 of the Companies Act 1985’ (1999) 17(3) Company Lawyer 67.

Mascarenhas T, ‘Multiple Derivative Actions under English law Case Comment’ (2013) 24(9) International Company and Commercial Law Review 336.

McNally R 'Corporate Governance: A Growing Concern in the MENA Region' [2011] http://www.menacitylawyers.com/uploaded/pdf/13d6e02f-a487-4212-b2df-6f767686dfd0_.pdf accessed 16/10/1012.

Miles L and M He M, 'Protecting the Rights and Interest of Minority Shareholders in Listed Companies in China: Challenges for the Future' (2005) 16(7) International Company and Commercial Law Review 275.

Milman D, 'Shareholder Law: Recent Developments in Practice' (2015) 378 Company Law Newsletter 1.

Milman D, 'Revisiting the Core Principles of Modern Corporate Law' (2015) 371 Company Law Newsletter 1.

Milman D, 'Shareholder Litigation in the UK: The Implications of Recent Authorities and Other Developments' (2013) 342 Company Law Newsletter 1.

Mitchell C 'Shareholders' Claim for Reflective Loss' (2004) 120 Law Quarterly Review 457.

Moll D, 'Shareholder Oppression & 'Fair Value': Of Discounts, Dates, and Dastardly Deeds in the Close Corporation' (2004) 54(2) Duke Law Journal 8.

Moll D, 'Shareholder Oppression in Texas Close Corporations: Majority Rule Isn't What It Used to Be' (2008) 9(1) Huston Business and Tax Law Journal 33.

Mukwiri J, 'The no Reflective Loss Principle' (2005) 26(10) Company Lawyer 304.

Mukwiri J, 'Using S 459 as An Instrument of Oppression' (2004) 25(9) Company Lawyer 282.

Paterson P, 'A Criticism of the Contractual Approach to Unfair Prejudice' (2006) 27(7) Company Lawyer 211.

Poole J and Roberts P 'Shareholder Remedies- Corporate Wrongs and the Derivative Action' [1999] Journal of Business Law 99.

Poole J and Roberts P 'Shareholder Remedies- Efficient Litigation and the Unfair Prejudice Remedy' [1999] Journal of Business Law 38.

Pound R, 'Law in Books and Law in Action' (1910) 44 American Law Review 12.

Raja K, 'Corporate Governance and Minority Shareholders' Rights and Interests in Pakistan: a Case for Reform' (2012) 23(10) International Company and Commercial Law Review 347.

Rajak H 'Judicial Control: Corporations and the Decline of Ultra Vires' (1995) 26 The Cambrian Law Review 9.

Redmond-Cooper R, 'Management Deficiencies and Judicial Intervention: A Comparative Analysis' (1988) 9(8) Company Lawyer 169.

Reisberg A and Prentice D, 'Multiple Derivative Actions Case Comment' (2009) 125 Law Quarterly Review 209.

Reisberg A, 'Derivative Actions and Funding Problem: The Way Forward' [2006] Journal of Business Law 445.

Reisberg A, 'Funding Derivative Actions: A Re-examination of Costs and Fees as Incentives to Commence Litigation' (2004) 4(2) Journal of Corporate Law Studies 345.

Reisberg A, 'Indemnity Costs Order under S.4 59 Petition' (2004) 25(4) Company Lawyer 116.

Reisberg A, 'Judicial Control of Derivative Actions' (2005) 16(8) International Company and Commercial Law Review 335.

Reisberg A, ‘Shareholders' Remedies: In Search of Consistency of Principle of English Law’ (2005) 16(5) European Business Law Review 1065.

Rock E and Wachter M, ‘Waiting for the Omelet to Set: Match Specific Assets and Minority Oppression in the Close Corporation’ (1999) 24(4) Journal of Corporation Law 913.

Schlimm D, Mezzettiand L and B Sharfman B, ‘Corporate Governance and the Impact of Controlling Shareholder’ (2010) 18(1) Corporate Governance Advisor 1.

Segato L, ‘A Comparative Analysis of Shareholder Protections in Italy and the United States: Parmalat as a Case Study’ (2006) 26(2) Northwestern Journal of International Law & Business 373.

Sharar Z, ‘Minority Shareholders' Remedies In Public Shareholding Companies: Comparing the State of Qatar and Australia’ [2010] <http://epublications.bond.edu.au/cgej/18. Accessed 20 July 2014.

Shernanna H and Elfergani S, ‘Privatisation and Broaden the Ownership Base "A Step towards the Application of the People’s Socialist’ [2006] International Centre for Studies and Research 4.

Sugarman D, ‘Reconceptualising Company Law: Reflections on the Law Commission's Consultation Paper on Shareholder Remedies’ Part 1 (1997) 18(8) Company Lawyer 226.

Sykes J, ‘The Continuing Paradox: A Critique of Minority Shareholder and Derivative Claims under the Companies Act 2006’ (2010) 29(2) Civil Justice Quarterly 205.

Talbot L, ‘A Contextual Analysis of the Demise of the Doctrine of Ultra Vires in English Company Law and the Rhetoric and Reality of Enlightened Shareholders’ (2009) 30(11) Company Lawyer 323.

Tibar M, ‘The Abusive Conduct of Minority Shareholders in Joint Stock Companies , Study in the Law No 23/ 2010’ (2012) 1 Journal of Legal Sciences 92.

Wedderburn K, ‘Shareholder Rights and the Rule in *Foss v Harbottle’* [1957] Cambridge Law Journal 194.

Yung B, Lawton P, ‘Corporate Political Connection as A Determinant of Corporate Governance in Hong Kong’ (2013) 63(4) Northern Ireland Legal Quarterly 449.

5. Other resources

Abdou M, ‘Towards a New Solution of Minority Shareholder Protection in Libya: Letting the Minority Shareholders Have a Voice’ (Ph.D thesis, University of Glasgow 2015).

Algadi S, ‘The Commercial Judiciary in Morocco and Companies’ Actions’ (Ph.D thesis, Mohammed V University Rabat, Morocco 2009).

Almajid F, ‘A Conceptual Framework for Reforming the Corporate Governance of Saudi Publicly Held Companies: A Comparative and Analytical Study from a Legal Perspective’ (Ph.D Thesis, University of Manchester, UK 2008).

Almarini A, ‘The Power of Majority shareholders within Joint Stock Companies under Moroccan law’ (Ph.D Thesis, Mohammed V University Rabat 1997).

Alshhab A, ‘The Judge’s Role in the Joint Stock Company’ (High Diploma Dissertation, Mohammed V University Rabat, Morocco 2004).

Belmris S, ‘The Protection of Minority Shareholders’ Rights in Joint Stock Companies’ (unpublished dissertation, High Judicial Institute, Rabat 2011).

Fali A, ‘the Concept of Capital in the Joint Stock Company’ (Ph.D thesis, Mohammed V University Rabat Morocco 2007).

Gait R, ‘Shareholder’s Position in the Joint Stock Company’ (Ph.D thesis, Mohammed V University Rabat Morocco 2004).

He W, ‘Improving the Protection of Minority Shareholders in Chinese Company Law’ (LL.M thesis at McGill University Canada, 2005).

Ma F, ‘A Comparative Analysis of Minority Shareholders' Remedies in Anglo-American Law and Chinese Law: Lessons to be learnt’ (Ph.D Thesis, University of the West of England, Bristol 2009).

Rahman A, ‘Majority Rule and Minority Shareholder Protection in Joint Stock Companies in England and Iran*’* (Ph.D Thesis, University of Glasgow, UK 2007).

Zoair H, ‘Protection of Minority Shareholder by the Judicial Authority’ (unpublished dissertation, High Judicial Institute, Rabat 2009).

6. Reports and Consultation Papers

Company Law Review Steering Group, Modern Company Law for a Competitive Economy, “*Developing the Framework*”, 2000.

Company Law Review Steering Group, Modern Company Law for a Competitive Economy, “*Completing the Structure*”, 2000.

Company Law Review Steering Group, Modern Company Law for a Competitive Economy, “*Final Report*”2001.

Department of Trade and Industry's Consultation Paper: Summary of Responses Received to The DTI, "'Modern Company Law for a Competitive Economy", ((DTI URN 98/994 Nov, UK 1998).

Hampel Committee, "'The Combined Code: A Practical Guide", (October, UK 1999).

Jenkins Committee, Report of the Company Law Committee, (Cmnd. 1749, UK 1962).

Law Commission, “Shareholder Remedies: A Consultation Paper” (Law Com No. 142, 1996).

Law Commission, “Shareholder Remedies” (Law Com No 246, 1997).

Organisation for Economic Co- Operation and Development (OECD), ‘OECD Principles of Corporate Governance’ [2004] http://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf. Accessed 07/09/2013.

Reports of Libyan Stock Market, available at http://www.lsm.ly/Arabic/Media/Pages/PeriodicReports.aspx. Accesses 03/08/2015.

The UK Cadbury Report [1992] http://www.ecgi.org/codes/documents/cadbury.pdf .