

# HEINONLINE

Citation: 12 Minn. J. Global Trade 299 2003



Content downloaded/printed from  
HeinOnline (<http://heinonline.org>)  
Wed Nov 11 18:47:01 2015

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/cc/basicSearch.do?  
&operation=go&searchType=0  
&lastSearch=simple&all=on&titleOrStdNo=1944-0294](https://www.copyright.com/cc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=1944-0294)

## Comparative Essay

# The Internal Division of Powers in Corporate Governance: A Comparative Approach to the South Korean Statutory Scheme

Jae Yeol Kwon\*

### INTRODUCTION

A corporation is an artificial entity managed by designated natural persons.<sup>1</sup> The corporation's business is performed by specific groups. One of the most salient characteristics found in modern corporate statutes is the separation of corporate ownership from the company's managerial hierarchy.<sup>2</sup>

In the United States, under early common law, a board of directors was not necessary for a corporation.<sup>3</sup> Acting by a majority, shareholders retained all the corporate powers, unless

---

\* Assistant Professor of Law, College of Law, Soongsil University, Seoul, South Korea. LL.B. 1988, & LL.M. 1990, College of Law, Yonsei University; LL.M. 1991, School of Law (Boalt Hall), University of California at Berkeley; S.J.D. 1995, Georgetown University Law Center.

1. HARRY G. HENN & JOHN R. ALEXANDER, *LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES* 466 (1983). In an early federal case, former Chief Justice Marshall referred to the corporation as an "artificial being." *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819). Today, it is also viewed as a legal fiction. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Cost and Ownership Structure*, 3 J. FIN. ECON. 305, 311 (1976). The South Korean Commercial Code states that a *hoesa*, or a business corporation, is defined as "an association incorporated for the purpose of engaging in commercial activities and/or any other profit-making activities." COM. CODE art. 169 (S. Korea). As a juristic person under South Korean law, a corporation enjoys an independent personality separate from its owners. *Id.* at art. 171(1).

2. See generally JOHN CHARKHAM, *KEEPING GOOD COMPANY: A STUDY OF CORPORATE GOVERNANCE IN FIVE COUNTRIES* (1994); ROBERT A.G. MONKS & NELL MINOW, *CORPORATE GOVERNANCE* 265-326 (1995).

3. MELVIN A. EISENBERG, *THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS* 87 (1976).

they explicitly delegated these powers to management.<sup>4</sup> At present, a corporation in the United States is statutorily operated by three groups: shareholders, directors, and officers.<sup>5</sup> The relationship among and the legal responsibilities of these groups generally form an inverted pyramid.<sup>6</sup> The top of the inverted pyramid is occupied by shareholders, who have the authority to elect and monitor directors and approve fundamental or extraordinary changes, such as amending the articles of incorporation, merger, consolidation, sale of substantially all assets, and dissolution.<sup>7</sup> In the middle are the directors who run the corporation, formulate corporate policy, and select officers to carry out that policy.<sup>8</sup> In the United States, an audit committee is usually established under or within the board of directors.<sup>9</sup> Finally, officers who are responsible for the day-to-day operations of the corporation are normally at the bottom of the inverted pyramid.<sup>10</sup>

South Korean corporate law, which is directly applicable to corporate governance and is found in Book III of the South Korean Commercial Code,<sup>11</sup> does not adopt the same model of corporate structure in a *chusik hoesa* (stock corporation) as found in U.S. corporations.<sup>12</sup> The South Korean Commercial Code allocates power among three groups: shareholders, directors, and

---

4. *Id.*

5. JOHN E. MOYE, *THE LAW OF BUSINESS ORGANIZATIONS* 199-200 (5th ed. 1999).

6. WILLIAM L. CARY & MELVIN A. EISENBERG, *CASES AND MATERIALS ON CORPORATIONS* 241 (7th ed. unabr. 1995).

7. *Id.*

8. *Id.*

9. CHARKHAM, *supra* note 2, at 191.

10. *Id.*

11. Bernard Black et al., *Corporate Governance in Korea at the Millennium: Enhancing International Competitiveness, Final Report and Legal Reform Recommendations to the Ministry of Justice of the Republic of Korea*, 26 J. CORP. L. 537, 554 (2001) (noting that South Korean corporate law, composed of provisions affecting business organizations, is contained in the South Korean Commercial Code); Jae Y. Kwon, *An Isolation in Systems of Law: Differences Between the Commercial Codes of the United States and Korea*, 29 LOY. L.A. L. REV. 1095, 1098 (1996) (stating that "[m]ost South Korean corporate law is embodied in Book III, which makes up more than one half of the South Korean Commercial Code").

12. The concept and legal nature of the *chusik hoesa* is very similar to that of a stock corporation, the most popular corporation in many other countries, including the United States. See Craig Ehrlich & Dae-Seob Kang, *U.S. Style Corporate Governance in Korea's Largest Companies*, 18 UCLA PAC. BASIN L.J. 1, 34 (2000). For the major characteristics of a *chusik hoesa*, see Young-Moo Kim & Joel A. Silverman, *Legal Forms of Doing Business in Korea*, in *BUSINESS LAWS IN KOREA* 213, 215-22 (Chan-Jin Kim ed., 2d ed. 1988).

statutory auditors or audit committees.<sup>13</sup> The conceptual basis of South Korean corporate law generally adheres to the notion of separation of ownership and management.<sup>14</sup> Nevertheless, shareholders retain only limited rights, defined by the board of directors, related to control of the corporation.<sup>15</sup> As the ultimate owners of the corporation, however, shareholders can exercise rights to matters reserved for themselves in order to express their views on management and translate their dissatisfaction into action.<sup>16</sup> Ultimately, the right to vote at the general shareholders meeting combined with their non-voting rights gives shareholders influence over corporate affairs.<sup>17</sup>

Shareholders, directors, and audit committees are common both in the United States and South Korea. In both countries, shareholders own the corporation and directors manage the corporation.<sup>18</sup> However, the U.S. concept of corporate officers cannot find its exact counterpart in the South Korean Commercial Code,<sup>19</sup> while the South Korean concept of statutory auditors is foreign to U.S. law.<sup>20</sup>

This Essay explores the role and functions of intra-corporate bodies by statutorily comparing the corporate governance structures of South Korea and the United States.<sup>21</sup> Section

13. See generally COM. CODE BOOK III (S. Korea).

14. See generally COM. CODE arts. 288-435 (S. Korea).

15. Jooyoung Kim & Joongi Kim, *Shareholder Activism in Korea: A Review of How PSPD Has Used Legal Measures to Strengthen Korean Corporate Governance*, 1 J. Korean L. 51, 54 (2001).

16. See Ehrlich & Kang, *supra* note 12, at 35.

17. *Id.*

18. DONG-YOON CHUNG, HOESABOB [CORPORATE LAW] 172 (7th ed. 2001).

19. A counterpart to the U.S. definition of officers such as the president, vice president, treasurer, or secretary is not provided in the South Korean Commercial Code. The Code never attempts to classify persons who administer the day-to-day affairs of the corporation as officers. Kon Sik Kim, *Chaebol and Corporate Governance in Korea* 142 (1995) (unpublished Ph.D. dissertation, University of Washington) (on file with author) [hereinafter K. Kim]. Instead, the antitrust act of South Korea defines the term "officers" to include "a director, representative director, managing partner with unlimited liability, auditor or person holding a commercial employer such as manager who is authorized to administrate the general business of the main or branch office" of a corporation. MONOPOLY REGULATION AND FAIR TRADE ACT OF KOREA art. 2(5). In Japan, whose legal system is very similar to that of South Korea's, officers are not recognized as an intra-corporate organ. Curtis J. Milhaupt, *Creative Norm Destruction: The Evolution of Nonlegal Rules in Japanese Corporate Governance*, 149 U. PA. L. REV. 2083, 2117 (2001).

20. See Ehrlich & Kang, *supra* note 12, at 34.

21. Some preliminary points should be noted. First, South Korea has not yet established an official translation system of cases. Citations to South Korean judicial decisions do not reveal any party to a case. This Essay cites a case in the following order: the name of the deciding court, the exact date of the decision, and the docket

I examines the power and rights of shareholders. Section II provides a statutory understanding of the role and functions of directors in corporate governance in the United States and South Korea. Finally, Section III describes the unique features of statutory auditors and audit committees that are not found in U.S. corporate governance but are found in South Korean corporate governance.

## I. GOVERNANCE ROLE OF SHAREHOLDERS

### A. AN OVERVIEW

In the United States, a corporation “shall be managed by or under the direction of” the board of directors.<sup>22</sup> As the ultimate owners of the corporation, however, shareholders have the biggest stake in the management of corporate affairs.<sup>23</sup> Shareholders have the ultimate decision-making authority in U.S. corporations,<sup>24</sup> which they exercise at an annual general meeting.<sup>25</sup> At the meeting, shareholders have the right to elect directors and remove or refuse to re-elect directors that have engaged in mismanagement, misconduct, or self-dealing;<sup>26</sup> this is a means of disciplining directors.<sup>27</sup> Additionally, shareholders ask ques-

---

number. An example of such citation is “South Korean Supreme Court Decision of December 21, 1999, 99 Da 137.” Second, the *won* is the official monetary unit used in South Korea. In this Essay, *won* amounts are not converted into dollar amounts. It is reasonable to assume that 1,250 *won* has the same value of one U.S. dollar.

22. DEL. CODE ANN. tit. 8, § 141(a) (1974).

23. See Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 26 (1991); see also Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 440 (2001).

24. Hansmann & Kraakman, *supra* note 23, at 440 (stating that “ultimate control over the corporation should rest with the shareholder class”); Macey, *supra* note 23, at 26 (noting that “shareholders retain the ultimate authority to control the corporation because they have the biggest stake in the outcome of corporate decision-making”).

25. REV. MODEL BUS. CORP. ACT § 7.01(a) (1984).

26. See, e.g., REV. MODEL BUS. CORP. ACT § 7.21(a); DEL. CODE ANN. tit. 8, § 141(b).

27. See Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 531 (1990) (stating that the reason for the significance of the right of shareholders to elect directors is because “[e]lecting good directors is especially important for diversified institutions, who can’t watch any one company closely and probably aren’t competent to do so anyway”); Peter V. Letsou, *Shareholder Voice and the Market for Corporate Control*, 70 WASH. U. L.Q. 755, 763 (1992) (opining that “by nominating and electing a slate of directors that supports their position, sharehold-

tions, express their views, and vote,<sup>28</sup> theoretically making the general meeting the supreme body of authority in a corporation.<sup>29</sup>

Under the South Korean Commercial Code, shareholders are the corporation's residual claimants, whose interests are superior to all others.<sup>30</sup> Within the limits of the law and the articles of incorporation, all powers and various rights related to controlling the corporation lie with the shareholders.<sup>31</sup> Shareholders exercise power through a general meeting, which must be held at least once a year.<sup>32</sup> General shareholder meetings for South Korean corporations closely resemble their U.S. counterparts, in that shareholders may vote, gain information, and remove directors that have engaged in misconduct.<sup>33</sup>

## B. VOTING RULES

Both in the United States and South Korea, shareholders are in a statutory position to be involved in the control of the corporation. One of the primary vehicles for shareholders to participate in corporate governance is via their right to vote.<sup>34</sup> Because this right is an essential part of share ownership, it cannot be restricted without a change in the law.<sup>35</sup> The voting power of common shareholders is usually directly proportional to the percentage of their capital contribution.<sup>36</sup> In principle, the corporate law of both countries intends that majority rule shall govern the voting scheme and, thus, the minority shareholders are bound by the will of the majority.<sup>37</sup>

---

ers may attempt to force the corporation to adopt an alternative business plan").

28. See JAMES D. COX ET AL., *CORPORATIONS* 323-25 (1997).

29. See HENN & ALEXANDER, *supra* note 1, at 491 (stating that the shareholder meeting is a forum of owners of a corporation).

30. See COM. CODE art. 538 (S. Korea).

31. Cf. MARGARET M. BLAIR, *OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY* 69 (1995) (declaring that "[i]n principle, the law is intended to give shareholders a significant amount of control").

32. COM. CODE art. 365 (S. Korea).

33. *Id.* at arts. 369, 385.

34. Lucian A. Bebchuk & Marcel Kahan, *A Framework for Analyzing Legal Policy Towards Proxy Context*, 78 CAL. L. REV. 1071, 1073 (1990) (viewing voting rights of shareholders as "a major element in the structure of corporate law").

35. *Id.*

36. ROBERT C. CLARK, *CORPORATE LAW* 390 (1986) (stating that "voting rights should be proportional to one's share of the residual interest in the firm").

37. See, e.g., Catherine Habermehl & David R. Koepsell, *United States, in PROTECTION OF MINORITY SHAREHOLDERS* 259, 262 (Matthias W. Stecher ed., 1997) (stating that "[m]ajority mandate remains the norm in corporate governance"); 1 F.

U.S. corporate law provides various shareholder voting rules. In the United States, the right to vote can be exercised in person or by proxy.<sup>38</sup> Shareholders may also participate by means of "remote communication," which includes writing, telephone, and internet.<sup>39</sup> Both voting by proxy and remote communication allows physically absent shareholders to participate in the shareholders' general meeting.<sup>40</sup> The articles of incorporation, or when the articles do not specify, the board of directors, determine how the shareholders shall vote.<sup>41</sup>

Under U.S. corporate law, corporate voting usually takes place on a "one share, one vote" basis,<sup>42</sup> which is the universally accepted rule in corporate governance.<sup>43</sup> In addition to this rule, in some states, such as Delaware, shareholders are allowed to cumulate their votes to elect directors if the articles of incorporation specifically provide for cumulative voting.<sup>44</sup> In other states, cumulative voting is mandatory in an election of directors.<sup>45</sup> Generally, shareholders do not need to request cumula-

---

HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS: PROTECTING MINORITY RIGHTS IN SQUEEZE-OUTS AND OTHER INTRACORPORATE CONFLICTS § 1.02 (2d ed. 1985) (noting that "holders of a majority of the shares with voting power control the corporation").

38. See, e.g., REV. MODEL BUS. CORP. ACT § 7.22(a) (1984).

39. See, e.g., DEL. CODE ANN. tit. 8, § 211(a) (1974); Michael P. Dooley & Michael D. Goldman, *Some Comparisons Between the Model Business Corporation Act and the Delaware General Corporation Law*, 56 BUS. LAW. 737, 756-58, 766 n.100 (2001).

40. Dooley & Goldman, *supra* note 39, at 756-58.

41. See, e.g., DEL. CODE ANN. tit. 8, § 211(a).

42. See, e.g., Jeffrey Kerbel, *An Examination of Nonvoting and Limited Voting Common Shares - Their History, Legality and Validity*, 15 SEC. REG. J. 37, 48-50 (1987) (providing the history of "one share, one vote" standard); Henry G. Manne, *The "Higher Criticism" of the Modern Corporation*, 62 COLUM. L. REV. 399, 407 (1962) (observing that the rule of one-share-one-vote is almost as old as the corporation itself).

43. See, e.g., Jose W. Fernandez et al., *Corporate Caveat Emptor: Minority Shareholder Rights in Mexico, Chile, Brazil, Venezuela and Argentina*, 32 U. MIAMI INTER-AM. L. REV. 157, 165, 177, 188, 201, 210 (2001) (discussing the rule of "one-share-one-vote" in some Latin American jurisdictions); Yuwa Wei, *Seeking a Practicable Chinese Model of Corporate Governance*, 10 MSU-DCL J. INT'L L. 393, 402 (2001) (stating that "[t]he principle of one vote per share is firmly established" in China).

44. See, e.g., DEL. CODE ANN. tit. 8, § 214. Cumulative voting, unlike the one share one vote rule, does not require a shareholder to vote only one vote per share for a director. If a number of directors are up for election, the shareholder may combine these votes and use all of these combined votes to vote for a single director or may allocate these votes among the candidates. JESSE H. CHOPER ET AL., *CASES & MATERIALS ON CORPORATIONS* 597 (5th ed. 2000).

45. The six states that have mandatory cumulative voting are Arizona, Kentucky, Nebraska, North Dakota, South Dakota, and West Virginia. CHOPER ET AL.,

tive voting unless so specified by the articles of incorporation.<sup>46</sup>

Similarly, shareholders under South Korean law may exercise their right to vote either in person or by proxy at the general meeting.<sup>47</sup> They may execute their votes in writing in lieu of actually attending the meeting, as provided in the articles of incorporation.<sup>48</sup> This allows shareholders to express their views with substantial ease.<sup>49</sup>

In South Korea, each common shareholder is traditionally entitled to have one vote for each share.<sup>50</sup> The exception to this rule occurs when shareholders elect directors.<sup>51</sup> In the case where two or more directors are to be elected at the general meeting, shareholders who hold at least three percent of the total outstanding voting shares may request the implementation of cumulative voting, except as otherwise provided by the articles of incorporation.<sup>52</sup> Cumulative voting increases the possibility of minority representation on the board of directors.<sup>53</sup>

### C. MAJORITY REQUIREMENTS FOR SHAREHOLDERS' RESOLUTIONS

Shareholders are entrusted with all powers which have not been conferred either to the board of directors or to other intra-corporate bodies.<sup>54</sup> Under the statutory scheme of the United States and South Korea, there are many matters that require shareholder approval.<sup>55</sup> This statutory requirement prevents the board of directors from depriving shareholders of their

---

*supra* note 44, at 600.

46. See, e.g., DEL. CODE ANN. tit. 8, § 214.

47. COM. CODE art. 368(3) (S. Korea).

48. *Id.* at art. 368-3(1).

49. Joongi Kim, *Recent Amendments to the Korean Commercial Code and Their Effects on International Competition*, 21 U. PA. J. INT'L ECON. L. 273, 295 (2000) (stating that absentee voting makes it "substantially easier for shareholders to exercise their rights") [hereinafter J. Kim].

50. COM. CODE art. 369(1) (S. Korea).

51. Ehrlich & Kang, *supra* note 12, at 55.

52. COM. CODE art. 382-2 (S. Korea).

53. See, e.g., Bernard Black & Reiner Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911, 1916 (1996) (stating that cumulative voting "empowers large minority shareholders to select directors"); Whitney Campbell, *The Origin and Growth of Cumulative Voting for Directors*, 10 BUS. LAW. 3, 5-6 (1955).

54. In the United States, a majority of states have statutory provisions permitting the articles of incorporation to restrict the powers of the board and expand those of the shareholders. See, e.g., REV. MODEL BUS. CORP. ACT § 8.01 (1984); CAL. CORP. CODE § 300(a) (1990); DEL. CODE ANN. tit. 8, § 141(a) (1974); N.Y. BUS. CORP. LAW §§ 620(b)-(c) (1986).

55. See *supra* note 51 and accompanying text; see *infra* notes 62-77 and accompanying text.



rights for the sole benefit of directors or in a manner detrimental to the shareholders.<sup>56</sup>

State corporate law in the United States require shareholders to approve some matters. For example, an amendment of the articles of incorporation or bylaws is subject to shareholder approval.<sup>57</sup> Other matters that require shareholder approval may be set forth in the articles of incorporation.<sup>58</sup> Statutes in the United States require a quorum of shareholders, consisting of as few as one-third of the shareholders, to vote.<sup>59</sup> Of this quorum, most state statutes only require majority approval to adopt a resolution.<sup>60</sup> There are a few states, however, that have enacted statutes requiring a supermajority for resolutions effecting a "fundamental change" in the absence of a contrary provision in the articles of incorporation.<sup>61</sup>

Under the South Korean Commercial Code, shareholders can adopt three kinds of binding resolutions.<sup>62</sup> First, except as otherwise provided in the South Korean Commercial Code or set forth in the articles of incorporation, the majority of shareholders present at the general shareholder meeting and at least one-fourth of the total outstanding shares must approve the adoption of ordinary resolutions.<sup>63</sup> Ordinary resolutions usually address such matters as the election of directors and statutory auditors,<sup>64</sup> remuneration for directors and statutory auditors,<sup>65</sup> approval of financial statements,<sup>66</sup> approval of dividends,<sup>67</sup> and approval of a plan of liquidation.<sup>68</sup>

The second type of resolution is a special resolution, which

---

56. See Letsou, *supra* note 27, at 765.

57. See, e.g., REV. MODEL BUS. CORP. ACT §§ 10.03, 10.20(b); DEL. CODE ANN. tit. 8, § 109.

58. See, e.g., REV. MODEL BUS. CORP. ACT § 2.02(b); CAL. CORP. CODE § 204(a).

59. CHOPER ET AL., *supra* note 44, at 551. The Revised Model Business Corporation Act requires one-half of shareholders to be present to constitute a quorum. REV. MODEL BUS. CORP. ACT § 7.25. The articles of incorporation cannot require a quorum of less than one-third of shareholders, but the default is a quorum of one-half of shareholders. DEL. CODE ANN. tit. 8, § 216 (1974).

60. See, e.g., REV. MODEL BUS. CORP. ACT § 7.25 (1985); DEL. CODE ANN. tit. 8, § 216 (1974); CHOPER ET AL., *supra* note 44, at 551.

61. See, e.g., 805 ILL. COMP. STAT. 5/11-20 (1993) (requiring a supermajority for merger, consolidation, and exchange); CHOPER ET AL., *supra* note 44, at 551.

62. See COM. CODE arts. 368(1), 400, 434, 604(1) (S. Korea).

63. *Id.* at art. 368(1).

64. *Id.* at arts. 382(1), 409.

65. *Id.* at arts. 388, 415.

66. *Id.* at art. 449(1).

67. *Id.* at arts. 447, 447-2, 449.

68. COM. CODE art. 540 (S. Korea).

requires the approval of no less than two-thirds of the shareholders present at the general meeting and at least one-third of the total outstanding shares.<sup>69</sup> The voting requirement for this kind of resolution cannot be altered or eliminated by the articles of incorporation.<sup>70</sup> Matters of vital importance to the corporation require special resolutions.<sup>71</sup> Typical examples of such resolutions are amendment of the articles of incorporation;<sup>72</sup> reduction of capital;<sup>73</sup> and merger, consolidation, continuance, or dissolution of the corporation.<sup>74</sup>

Finally, the unanimous consent of all shareholders is necessary for the release of promoters, directors, or statutory auditors from their liability to the corporation.<sup>75</sup> Unanimous consent is also needed to change the corporate structure from a *chusik hoesa* into a *yuhan hoesa*,<sup>76</sup> which resembles a U.S. limited liability company.<sup>77</sup>

#### D. QUALIFIED MINORITY SHAREHOLDER RIGHTS

The protections available to minority shareholders under U.S. law include "investment rights, profit rights, corporate affairs rights, shareholder agreements, and derivative actions, all of which were created either as a means of protection or as a corporate weapon. These rights enable shareholders to advance their interests in a corporation."<sup>78</sup> Any one shareholder may bring a derivative suit against officers, directors, or shareholders that have committed a wrong against the corporation, so long as that shareholder was holding shares at the time of the

---

69. *Id.* at art. 434.

70. CHUNG, *supra* note 18, at 354.

71. *Id.*

72. COM. CODE arts. 433-434 (S. Korea).

73. *Id.* at art. 438.

74. *Id.* at arts. 518-19, 522.

75. *Id.* at arts. 324, 400, 415.

76. The *yuhan hoesa* is officially translated into "limited liability corporation" under the South Korean Commercial Code. It is defined as a hybrid corporation that has characteristics of both the *chusik hoesa* and the *hapmyong hoesa*. However, it is closer to the former than the latter and is thus regarded as a miniature of the *chusik hoesa*. The *hapmyong hoesa* bears resemblance to the modern U.S. general partnership, although it is a kind of a corporate entity enjoying the status of a legal person. INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF KOREA 855, 858 (Sang Hyun Song ed., 1983) [hereinafter INTRODUCTION].

77. *Id.*

78. Julian J. Garza, *Rethinking Corporate Governance: The Role of Minority Shareholders - A Comparative Study*, 31 ST. MARY'S L.J. 613, 636 (2000).

wrongdoing.<sup>79</sup> Under state statute, a single shareholder may also apply for judicial dissolution of a corporation.<sup>80</sup> Furthermore, the Revised Model Business Corporation Act authorizes shareholders who own at least ten percent of the outstanding shares to call a special meeting and have their issues considered at that meeting.<sup>81</sup> Some states, such as Delaware, however, leave this issue to be determined by the articles of incorporation.<sup>82</sup> Mandatory cumulative voting, available in some states, is another means of protecting minority shareholders.<sup>83</sup> Statutes further protect minority shareholders who have utilized cumulative voting to elect a director, by requiring that cumulative voting be used to remove a director when it was used to elect that director.<sup>84</sup>

Similarly, the South Korean Commercial Code grants special rights to qualified minority shareholders to protect their interests. As a safeguard against abuses by minority shareholders, however, the South Korean Commercial Code provides that minimum holding requirements should be satisfied to be classified as "qualified" and to exercise various shareholder rights.<sup>85</sup> In other words, some kinds of minority rights are available only to shareholders who have a specified minimum percentage of outstanding voting shares.<sup>86</sup> Any shareholder owning at least three percent of the outstanding voting shares usually has the right to demand the convocation of an extraordinary general meeting of shareholders,<sup>87</sup> request the corporation to adopt cumulative voting for director election,<sup>88</sup> and put matters on the agenda of the shareholders' meeting.<sup>89</sup> Shareholders holding one percent or more of the issued and outstanding voting shares are vested with the right to demand that directors halt an act con-

---

79. DEL. CODE ANN. tit. 8, §§ 325, 327 (1974); see discussion *infra* I.G.

80. See, e.g., REV. MODEL BUS. CORP. ACT § 14.30 (1984). See generally Habermehl & Koepsell, *supra* note 37.

81. REV. MODEL BUS. CORP. ACT § 7.02(a). See generally Habermehl & Koepsell, *supra* note 37.

82. DEL. CODE ANN. tit. 8, § 211(d).

83. See *supra* note 44 and accompanying text.

84. See generally CHOPER ET AL., *supra* note 44, at 599 (citing N.Y. BUS. CORP. LAW § 706(c) (1963)).

85. J. Kim, *supra* note 49, at 282.

86. See generally Boong-Kyu Lee, Note, *Don Quixote or Robin Hood?: Minority Shareholder Rights and Corporate Governance in Korea*, 15 COLUM. J. ASIAN L. 345 (2002).

87. COM. CODE art. 366(1) (S. Korea).

88. *Id.* at art. 382-2.

89. *Id.* at art. 363-2(1).

templated in violation of either the law or the articles of incorporation<sup>90</sup> and to bring a derivative suit against the directors,<sup>91</sup> statutory auditors,<sup>92</sup> or audit committee members.<sup>93</sup> Finally, a shareholder who represents at least one-tenth of the corporation's capital is qualified to apply to the court for the dissolution of the corporation when it is necessary.<sup>94</sup>

#### E. ACCESS TO CORPORATE INFORMATION

Information is a prerequisite to the effective exercise of shareholder rights. That is to say, without sufficient and good information, a shareholder can hardly be expected to vote intelligently, uncover managerial misconduct, or bring an action against corporate insiders.<sup>95</sup> One of the legal devices used to obtain information about the corporation's affairs is the right of inspection, found in both U.S. and South Korean law.<sup>96</sup>

In the United States, unless state law provides otherwise, any shareholder may inspect corporate books and records if he acts in good faith and for a "proper purpose."<sup>97</sup> Some states, though, have specific limitations on the ability of shareholders to inspect corporate documents.<sup>98</sup> For example, the state of New York permits the inspection of corporate books and documents by any shareholder who has held his shares for at least six months preceding the demand or to any shareholder who owns no less than five percent of all outstanding shares.<sup>99</sup>

Generally there are two types of statutory provisions regarding information access.<sup>100</sup> The first is promulgated by the

90. *Id.* at art. 402.

91. *Id.* at art. 403(1).

92. *Id.* at art. 415.

93. COM. CODE art. 415-2(6) (S. Korea).

94. *Id.* at art. 520(1). A dissolution of the corporation is necessary to bring a deadlock between majority and minority shareholders to an end. *Id.* It is also required when the company's existence is placed in danger by improper managing or disposing of the company's assets. *Id.*

95. Randall S. Thomas, *Improving Shareholder Monitoring and Corporate Management by Expanding Statutory Access to Information*, 38 ARIZ. L. REV. 331, 332-33 (1996) (noting that "[a] shareholder seeking to uncover corporate mismanagement or fraud may need access to the company's internal files").

96. COM. CODE art. 466 (S. Korea); CLARK, *supra* note 36, at 96-97; Manne, *supra* note 42, at 408.

97. See generally Fred S. McChesney, "Proper Purpose," *Fiduciary Duties, and Shareholder-Raider Access to Corporate Information*, 68 U. CIN. L. REV. 1199 (2000).

98. See, e.g., N.Y. BUS. CORP. LAW § 624(b) (1986).

99. *Id.*

100. See McChesney, *supra* note 97, at 1202-05 (discussing how the two types of statutes work the same in practice).

Model Business Corporation Act, which requires that certain general information be provided to shareholders if they comply with procedural requirements, most notably a notice requirement.<sup>101</sup> Shareholders must demonstrate a “proper purpose” in order to obtain access to any other information.<sup>102</sup> The second type of statutory provision is similar to the one found in Delaware, where shareholders are not entitled to any information without demonstrating a “proper purpose,” but upon this showing, they have complete access to sensitive information, such as lists of stockholders and business records.<sup>103</sup> If the shareholder complies with all the procedural requirements and requests access to the stock ledger or a list of shareholders, the burden shifts to the corporation to prove that the request is made for an improper purpose.<sup>104</sup>

Similarly, shareholders have the right to inspect corporate books and records under the South Korean Commercial Code.<sup>105</sup> Every shareholder has, irrespective of the extent of his holdings, a statutory right to inspect and copy financial statements, business reports, and the audit report kept at the principal office of the corporation.<sup>106</sup> However, corporations do not like to let their owners know much about their affairs because the production of information imposes costs on the corporation.<sup>107</sup> Also, secrecy is necessary to protect sensitive corporate information from disclosure and potential abuses by shareholders.<sup>108</sup> Therefore, the right to gain access to more sensitive materials, such as accounting books and documents, is granted only to shareholders who own three percent or more of the total outstanding shares.<sup>109</sup>

101. *Id.* at 1202 (citing MODEL BUS. CORP. ACT § 16.01(e) (1974)); *see also* REV. MODEL BUS. CORP. ACT §§ 16.01, 16.02(a) (1984).

102. McChesney, *supra* note 97, at 1202 (citing MODEL BUS. CORP. ACT § 16.02(c)(1) (1974)); *see also* REV. MODEL BUS. CORP. ACT § 16.02 (b)-(c) (requiring a showing of good faith and that the “proper purpose” be connected to the records that the shareholder requests).

103. McChesney, *supra* note 97, at 1202 (citing DEL. CODE ANN. tit. 8, § 220(b) (1974)).

104. *Id.*; DEL. CODE ANN. tit. 8, § 220(c).

105. 1 JU-CHAN SONN, SANGBOB [COMMERCIAL LAW] 989 (13th ed. 2002).

106. COM. CODE art. 448 (S. Korea) (cross-referencing arts. 447, 447-2, and 447-4).

107. McChesney, *supra* note 97, at 1207 (stating that “information is costly to produce”).

108. COX ET AL., *supra* note 28, at 307-09.

109. COM. CODE art. 466(1) (S. Korea). The rationale for this rule is that if any shareholder of ABC corporation, irrespective of how many shares the person owns, is allowed to gain corporate information obtained from the accounting books of ABC

Moreover, inspection may justifiably be denied in South Korea if the demand for such inspection is improper.<sup>110</sup> The corporation may refuse to allow inspection if there are grounds to believe that shareholders will use the information acquired in a manner that is not related to the business activities of the corporation and would be detrimental to its interests.<sup>111</sup> Because of the legal presumption that a demand is proper, the burden of establishing that the demand for inspection is improper falls on the corporation.<sup>112</sup> Should the inspection be inappropriately refused, shareholders can seek a court order to gain access to the information.<sup>113</sup> This is referred to as the "proper demand" requirement, the functions of which, at least theoretically, parallel those of the "proper purpose" requirement under U.S. law.<sup>114</sup>

#### F. PARTICIPATION IN CAPITAL INCREASES

Using the exclusive authority of the board of directors to issue additional shares could cause an unfair dilution of an individual shareholder's voting power and an unfair reduction of an individual shareholder's proportionate interest in dividends and corporate assets.<sup>115</sup> Such danger may be offset by the preemptive right, which is defined as a right to participate in capital increases in advance of all others, on specified terms.<sup>116</sup> This right was originally created as a means for maintaining the individual shareholder's proportionate interest in the corporation<sup>117</sup> and has become "recognized so universally as to have become axiomatic in corporation law."<sup>118</sup>

In the United States, the preemptive right is sometimes re-

---

corporation, DEF corporation, which competes with ABC corporation, will have the ability to get the corporate information of ABC corporation with ease whenever the corporation buys only one share of ABC corporation.

110. *Id.* at art. 466(2).

111. J. Kim, *supra* note 49, at 289.

112. COM. CODE art. 466(2) (S. Korea).

113. South Korean Supreme Court Decision of December 21, 1999, 99 Da 137.

114. Wi-Du Kang, *Hanguk Sangbobe Itseoseoui Yongmi Hoesabobui Gyesue Gwanhan Yongu* [Influence of the Anglo-American Legal Traditions on the Korean Commercial Law] 101-02 (1980) (unpublished Ph.D. dissertation, Dong-A University, South Korea) (on file with author).

115. Alexander H. Frey, *Shareholders' Pre-emptive Rights*, 38 YALE L.J. 563, 569-74 (1929).

116. Kerry S. Burke, *Regulating Corporate Governance Through the Market: Comparing the Approaches of the United States, Canada and the United Kingdom*, 27 J. CORP. L. 341, 358 (2002).

117. Frey, *supra* note 115, at 563-64.

118. *Fuller v. Krogh*, 113 N.W.2d 25, 31 (Wis. 1962).

served for shareholders in connection with capital increases.<sup>119</sup> The preemptive right allows for the subscription of a pro rata portion of the additionally issued shares to current shareholders, thus preventing a dilution of the percentage of share ownership.<sup>120</sup> In the United States, many state corporate statutes follow the "opt-in" model.<sup>121</sup> For example, the Revised Model Business Corporation Act provides that "[t]he shareholders of a corporation do not have a preemptive right to acquire the corporation's unissued shares except to the extent the articles of incorporation so provide."<sup>122</sup> In sharp contrast to this trend, some states have adopted an "opt-out" scheme.<sup>123</sup> For example, under New York corporate law, shareholders are deemed to have the preemptive right unless the articles of incorporation have a provision expressly denying it.<sup>124</sup>

Likewise, the South Korean Commercial Code contains provisions designed to ensure that every shareholder has the right of preemption over new issues of shares.<sup>125</sup> In the case of capital increases, therefore, the existing shareholders have a preferential right to subscribe to newly issued shares in the amount proportional to the number of their current shares.<sup>126</sup> However, this right is not absolute as the articles of incorporation may impose some restrictions on this right.<sup>127</sup> Under South Korean law, it is also lawful for a corporation to allot preemptive rights to particular third persons such as past or present employees and officers.<sup>128</sup>

## G. PROTECTION AGAINST DIRECTOR WRONGDOINGS

In the United States, a shareholder may bring an action directly against the corporation or corporate insiders on his own behalf for injury inflicted upon him.<sup>129</sup> This action is called a di-

119. CLARK, *supra* note 36, at 719. Abolished in most public corporations, however, the preemptive right draws attention only from some close corporations, "where [it] can serve both to protect some shareholders against unwanted changes in the balance of power and to frustrate those who think a change is needed." *Id.*

120. Frey, *supra* note 115, at 563-64.

121. COX ET AL., *supra* note 28, at 474; MOYE, *supra* note 5, at 214.

122. REV. MODEL BUS. CORP. ACT § 6.30(a) (1984).

123. COX ET AL., *supra* note 28, at 474; MOYE, *supra* note 5, at 214.

124. *See, e.g.*, N.Y. BUS. CORP. LAW § 622(b)-(c) (1986).

125. COM. CODE art. 418(1) (S. Korea).

126. *Id.*

127. *Id.*

128. *Id.* at art. 420(5).

129. HENRY W. BALLANTINE, BALLANTINE ON CORPORATIONS 333 (rev. ed. 1946);

rect suit.<sup>130</sup> Typical examples of a direct suit are actions to enforce an individual shareholder's voting rights or to recover or compel the payment of dividends.<sup>131</sup> In the United States, a minority shareholder is also entitled to bring a derivative suit, which is defined as a suit brought by the minority shareholder on behalf of the corporation to enforce the liability of the directors.<sup>132</sup> This suit is regarded as a method of deterring wrongdoings by corporate insiders and holding corporate insiders, particularly directors, accountable for harm to the corporation.<sup>133</sup> The United States applies the contemporaneous ownership rule, under which the plaintiff must have held shares at the time of the act complained of by him in order to bring suit.<sup>134</sup> Therefore, in the United States, every single shareholder can initiate a derivative suit.<sup>135</sup>

Before a shareholder may proceed with a derivative suit, however, adequate demand must be made of the directors to bring suit on behalf of the corporation, unless such demand would be futile.<sup>136</sup> Jurisdictions have taken two different approaches in determining whether demand is futile: the Delaware approach and the Universal Demand approach.<sup>137</sup> Delaware's two prong test establishes that demand is not futile if: "(1) the directors are disinterested and independent and (2) the challenged transaction was otherwise the product of a valid ex-

---

*see, e.g., Jones v. H.F. Ahmanson & Co.*, 460 P.2d 464, 470 (Cal. 1969) (distinguishing direct suits from derivative suits).

130. CARY & EISENBERG, *supra* note 6, at 1013.

131. Ehrlich & Kang, *supra* note 12, at 51-52.

132. CHOPER ET AL., *supra* note 44, at 804.

133. *Id.* (observing that "the derivative suit is considered to be an important remedial and deterrent device to police and prevent management abuses and to protect minority shareholders and others concerned with the welfare of the corporation").

134. The contemporaneous ownership rule is recognized in federal and most state courts of the United States. *See, e.g.,* FED. R. CIV. P. 23.1; REV. MODEL BUS. CORP. ACT § 7.41(1) (1984); CAL. CORP. CODE § 800(b)(1) (1990); DEL. CODE ANN. tit. 8, § 327 (1974).

135. *See* 2 A.L.I., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 7.02 (1994). The term "derivative suit" is therefore defined as an action brought by one or more individual shareholders in the name of and on behalf of the corporation against any particular party or parties who have injured the corporation. DEBORAH A. DEMOTT, SHAREHOLDER DERIVATIVE ACTIONS: LAW AND PRACTICE § 1.01 (1987). This suit is equitable in nature. *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984).

136. *Marx v. Akers*, 666 N.E.2d 1034, 1037 (N.Y. 1996) (citing N.Y. BUS. CORP. LAW § 626 (1986)).

137. *Id.*



ercise of business judgment."<sup>138</sup> Under the Universal Demand approach, however, demand would have to be made regardless of whether the demand would be futile, unless it would cause "irreparable injury" in some cases.<sup>139</sup> The Revised Model Business Corporation Act further requires that ninety days pass from the time of notice until the filing of suit unless such time would result in irreparable harm to the corporation or the directors reject the demand.<sup>140</sup> Other states only require that thirty days pass from the date of demand before a suit may be filed.<sup>141</sup>

Most U.S. jurisdictions also have a security-for-expenses provision whereby the shareholder-plaintiffs are required to post security for the anticipated amount of the defendants' expenses.<sup>142</sup> Some states only require that security be posted when the shareholders bringing the suit own a small percentage of the total shares of the corporation.<sup>143</sup> For example, New York requires that shareholders have at least five percent of the total shares in order to avoid posting security.<sup>144</sup> Others jurisdictions allow courts to award expenses upon dismissal of the suit, if the suit is found to be "without reasonable cause or for an improper purpose."<sup>145</sup>

In a derivative suit, the corporation receives the damages rather than the individual shareholders themselves.<sup>146</sup> This is because a derivative suit is brought on behalf of the corporation and the corporation is the entity that is alleging harm.<sup>147</sup> Nevertheless, the shareholder-plaintiff is awarded his expenses in bringing the suit.<sup>148</sup>

Under South Korean law, a minority shareholder may bring

138. *Id.* (citing Aronson, 473 A.2d at 814).

139. *Id.* at 125 (citing MODEL BUS. CORP. ACT § 7.42(1) (1974) (stating that universal demand must be made)); 2 A.L.I., *supra* note 135, § 7.03(b), at 53-54 (1992) (stating that universal demand is required unless demand would cause "irreparable injury to the corporation").

140. REV. MODEL BUS. CORP. ACT § 7.42 (1984).

141. *See, e.g.*, CAL. CORP. CODE § 800(c) (1990) (providing that defendant may make a motion for bond if there will be no benefit to the corporation or the shareholders).

142. *See, e.g., id.*

143. DEMOTT, *supra* note 135, §§ 3.01-3.02.

144. N.Y. BUS. CORP. LAW § 627 (1986).

145. *See, e.g.*, REV. MODEL BUS. CORP. ACT § 7.46(2).

146. CHOPER ET AL., *supra* note 44, at 804; *see* N.Y. BUS. CORP. LAW § 626(e) (stating "the court may award the plaintiff . . . reasonable expenses, including reasonable attorney's fees, and shall direct him or them to account to the corporation for the remainder of the proceeds so received by him or them").

147. CHOPER ET AL., *supra* note 44, at 804.

148. *Id.*; *see* N.Y. BUS. CORP. LAW § 626(e).

a direct suit against the corporation or its directors. Also, the shareholders may bring a derivative suit under the South Korean Commercial Code, which is very similar to U.S. law.<sup>149</sup> However, the requirements for bringing and maintaining a derivative suit under the South Korean Commercial Code are different from U.S. requirements. In South Korea, only shareholders with at least one percent of the total outstanding shares can initiate a derivative suit.<sup>150</sup> Moreover, South Korean law does not require the plaintiff to be a shareholder at the time of the act complained of by him.<sup>151</sup>

According to the South Korean Commercial Code, the qualified shareholder, before asserting a claim on the corporation's behalf, must first attempt to secure the desired action against the directors from the corporation itself.<sup>152</sup> If the corporation has failed to file an action within thirty days from the date of the receipt of the demand, the shareholder may immediately file such action on behalf of the corporation.<sup>153</sup> However, if irreparable damage may be caused to the corporation with the lapse of the thirty-day grace period allotted for a corporate response, the shareholder may immediately file such action.<sup>154</sup>

The so-called "security-for-expenses" provisions can also be found in the South Korean Commercial Code.<sup>155</sup> The purposes of security-for-expenses provisions are: (1) to discourage "strike suits," which are actions brought not to obtain recovery for the corporation but only to secure a nuisance value settlement,<sup>156</sup> and (2) to make it easier for directors to recover damages from shareholders if they win the suit.<sup>157</sup> Thus, if the director-defendant renders it credible that the action brought against him has a wrongful purpose, the court may order the shareholder-plaintiff to post security.<sup>158</sup>

149. Compare COM. CODE art. 403 (S. Korea), with REV. MODEL BUS. CORP. ACT § 7.40.

150. COM. CODE art. 403(1) (S. Korea).

151. CHUNG, *supra* note 18, at 468.

152. COM. CODE art. 403(1) (S. Korea).

153. *Id.* at art. 403(3).

154. *Id.* at art. 403(4).

155. *Id.* at art. 403.

156. DEMOTT, *supra* note 135, § 3.01. For a more detailed account of strike suit, see William M. Lafferty & W. Leighton Lord III, *Towards a Relaxed Summary Judgment Standard for the Delaware Court of Chancery: A New Weapon Against "Strike" Suits*, 15 DEL. J. CORP. L. 921, 924-28 (1990).

157. KIUN TSCHÉ, SIN HOESABRON [NEW TREATISE ON CORPORATE LAW] 642 (10th ed. 2000).

158. COM. CODE arts. 176(3)-(4), 403(7) (S. Korea).

Like in the United States, any recovery by a shareholder accrues not to the shareholder but to the corporation under South Korean law.<sup>159</sup> The corporation receives damages because, in a derivative suit, the shareholder's right to sue derives from his ownership.<sup>160</sup> In order to compensate the shareholder plaintiff, though, the shareholder-plaintiff is entitled to a sum sufficient to cover his legal expenses from the corporation.<sup>161</sup>

#### H. APPRAISAL REMEDY

In the United States, most states allow shareholders to have an appraisal right under the law.<sup>162</sup> This right is defined as the right to demand payment of the "fair value" or "fair market value" of shares owned by shareholders when they have dissented from a proposed merger, acquisition, or other corporate change.<sup>163</sup> Nevertheless, in the United States, there are states, such as California and Delaware, where appraisal rights are not available to shareholders of a publicly traded corporation in a stock-for-stock merger.<sup>164</sup>

Similarly, the South Korean Commercial Code grants shareholders the right to an appraisal.<sup>165</sup> This right enables shareholders to divest at a fair price.<sup>166</sup> It also protects shareholders against involuntary investment in a successor corporation and against other unfair treatment.<sup>167</sup>

## II. GOVERNANCE ROLE OF CORPORATE DIRECTORS

### A. AN OVERVIEW

The U.S. notion of the board as the supreme authority in the management of a corporation was first introduced into the

---

159. Mark D. West, *Why Shareholders Sue: The Evidence from Japan*, 30 J. LEGAL STUD. 351, 354 (2001) (explaining derivative-suit mechanics).

160. *Id.*

161. COM. CODE art. 405(1) (S. Korea).

162. Joel Seligman, *Reappraising the Appraisal Remedy*, 52 GEO. WASH. L. REV. 829, 831-32 (1984); see, e.g., REV. MODEL BUS. CORP. ACT § 13.02 (1984).

163. Seligman, *supra* note 162, at 833-35.

164. See CAL. CORP. CODE § 1300(b)(1) (1990); DEL. CODE. ANN. tit. 8, § 262(b)(1) (1974).

165. COM. CODE arts. 335-2, 335-6, 374-2, 522-3, 530-11 (S. Korea).

166. See K. Kim, *supra* note 19, at 166.

167. CHUNG, *supra* note 18, at 358.

South Korean Commercial Code of 1962.<sup>168</sup> Before the enactment of the Commercial Code, the general meeting of shareholders was the forum where unlimited power existed.<sup>169</sup> Directors were mere servants of the shareholders.

Now directors serve as members of the board of directors. In the statutory schemes of the United States and South Korea, the board is the original and supreme authority in matters of regular business management.<sup>170</sup> The board of directors has the duty to "supervise the performance of duties by the directors."<sup>171</sup> The rights and power of the board of directors to manage a corporation is a common feature both in the United States and South Korea.<sup>172</sup>

## B. NUMBER AND QUALIFICATIONS OF CORPORATE DIRECTORS

Historically, nearly all state statutes in the United States required a corporation to have three or more directors, but that is now rare.<sup>173</sup> For example, both Delaware law and the Revised Model Business Corporation Act provide that a board may consist of one or more members.<sup>174</sup> The number of directors of a corporation is usually specified either in the articles of incorporation or in the bylaws.<sup>175</sup>

In the United States, only "individuals" may serve as directors.<sup>176</sup> Unless the articles of incorporation or bylaws provide otherwise, shareholders elect or appoint persons as directors, regardless of whether the appointees are shareholders of the corporation or residents of the state of incorporation.<sup>177</sup> Other

168. Hyun Yoo, *To Form a Stock Corporation in Korea: A Comparative Study with American Law*, in BUSINESS LAWS IN KOREA 317, 323 (Chan-Jin Kim ed., 2d ed. 1988).

169. *Id.*

170. *Id.* In the United States, Californian commentators state that "[a] corporation requires some form of government, as does any entity composed of individuals. The government of a corporation is generally entrusted to a board of directors of the elected representatives of shareholders." 1 HAROLD MARSH, JR. & R. ROY FINKLE, MARSH'S CALIFORNIA CORPORATION LAW § 9.1 (3d ed. 1990).

171. COM. CODE art. 393(2) (S. Korea).

172. COX ET AL., *supra* note 28, at 154; CHUNG, *supra* note 18, at 400.

173. *See, e.g.*, REV. MODEL BUS. CORP. ACT § 8.03(a) (1984); DEL. CODE ANN. tit. 8, § 141(b) (1974). *See generally* E. George Rudolph, *Further Thoughts on the One and Two Director Statutes*, 20 BUS. LAW. 781 (1965).

174. REV. MODEL BUS. CORP. ACT § 8.03(a); DEL. CODE ANN. tit. 8, § 141(b).

175. HENN & ALEXANDER, *supra* note 1, at 552.

176. *See, e.g.*, REV. MODEL BUS. CORP. ACT § 8.03(a). By allowing only individuals to serve as directors, the statute intentionally disqualifies corporations or other entities from serving as directors. *See id.*

177. *See, e.g.*, REV. MODEL BUS. CORP. ACT § 8.02.

qualifications for directors may be prescribed in the articles of incorporation or bylaws.<sup>178</sup> The term of office of a director usually runs until the next annual meeting, unless the board is classified.<sup>179</sup> Like the Revised Model Business Corporation Act, many corporate statutes allow for a classified board of directors, so that the terms of directors are staggered, although each director still serves the same number of years.<sup>180</sup>

In South Korea, a *chusik hoesa* must have at least three directors who are appointed at a general meeting of the shareholders by a common or ordinary resolution.<sup>181</sup> However, in the case of a company with total capital of less than five hundred million *won*, the number of the directors may be one or two.<sup>182</sup> Either straight or cumulative voting may be employed in electing directors; it is dependent upon the articles of incorporation of the individual corporation.<sup>183</sup>

Unlike in the United States, there is no provision that only natural persons should be directors in South Korea. The academic view, however, is unsettled on whether a legal person such as a corporation is eligible to be a director under the South Korean Commercial Code.<sup>184</sup> Moreover, the South Korean Commercial Code does not have any provision that requires cor-

178. See, e.g., *McKee & Co. v. First Nat'l Bank*, 265 F. Supp. 1 (S.D. Cal. 1967) (upholding bylaws requiring qualifications for directors).

179. See, e.g., REV. MODEL BUS. CORP. ACT § 8.05(b).

180. See, e.g., *id.* § 8.06; DEL. CODE. ANN. tit. 8, § 141(d) (1974).

181. COM. CODE arts. 382(1), 383(1) (S. Korea).

182. *Id.* at art. 383(1).

183. See *id.* at art. 382-2.

184. At one extreme, some law professors have argued that as long as a legal person is a fiction created by law and a representative director selected among directors should be a natural person in terms of the nature of his responsibility under South Korean law, a legal person cannot be engaged in the management of the corporation and the supervision of directors. See, e.g., CHOL-SONG LEE, HOESABOB KANGEUI [LECTURES ON CORPORATE LAW] 510 (9th ed. 2001) [hereinafter C. LEE]; 1 KIUON TSCHÉ, SANGBOBHAK SINRON [NEW TREATISE ON THE COMMERCIAL LAW] 769-70 (13th ed. 2001). However, this interpretation is inconsistent with the time-honored prevailing view that a legal person can serve as a promoter. Furthermore, article 95 of the South Korean Corporate Reorganization Act allows any trust bank or other kinds of bank to be appointed as a trustee. At the other extreme, several commentators have concluded that a legal person can be elected as a director without difficulty. The rationale for this view is that a legal person such as a corporation usually has more financial resources than a natural person. See, e.g., CHUNG, *supra* note 18, at 387. An intermediate position is to divide the directors into managing directors and non-managing directors and then to explain that a legal person because of its artificiality is qualified to be only a non-managing director. See, e.g., SONN, *supra* note 105, at 810.

porate directors to be South Korean citizens or residents.<sup>185</sup> Nevertheless, the articles of incorporation may require that directors be selected from among the shareholders.<sup>186</sup> The South Korean Commercial Code also provides that a director cannot concurrently hold the office of a statutory auditor within a corporation.<sup>187</sup>

Furthermore, corporate directors may serve no more than three years under the South Korean Commercial Code.<sup>188</sup> This does not, however, prevent re-appointment.<sup>189</sup> The articles of incorporation may also extend a director's term to the close of the general shareholder meeting held for the purpose of the settlement of accounts comprised in the director's term.<sup>190</sup>

### C. REMOVAL OF CORPORATE DIRECTORS

In the United States, most states allow removal of directors with or without cause by a vote of the shareholders.<sup>191</sup> Through the articles of incorporation, however, the shareholders' power of removal may be limited to removal for cause.<sup>192</sup> Nevertheless, U.S. directors can claim damages upon early removal for a breach of contract between them and the corporation.<sup>193</sup> In the United States, a court also may have the power of removal for cause, specified in the state statutes, upon petition of a director or a designated percentage of the shareholders.<sup>194</sup> The court may bar a director removed by court action from re-election indefinitely or for a period to be determined by the court.<sup>195</sup> Additionally, the court may also issue a preliminary injunction, upon the motion of the petitioning shareholders or directors, enjoining

185. See generally COM. CODE (S. Korea).

186. COM. CODE art. 387 (S. Korea).

187. *Id.* at art. 411.

188. *Id.* at art. 383(2).

189. CHUNG, *supra* note 18, at 388.

190. COM. CODE art. 383(3) (S. Korea).

191. Under some state statutes, the board is permitted to remove a director for cause or specified reasons, among which the statute expressly includes conviction of a felony. See, e.g., REV. MODEL BUS. CORP. ACT § 8.08(a) (1984); CAL. CORP. CODE § 302 (1990); MASS. ANN. LAWS ch. 156B, § 51(c) (1996); *Everett v. Transnation Dev. Corp.*, 267 A.2d 627 (Del. Ch. 1970) (identifying shareholders' power to remove directors without cause).

192. See, e.g., REV. MODEL BUS. CORP. ACT § 8.08(a).

193. See, e.g., *Stott v. Stott Realty Co.*, 224 N.W. 623, 624 (Mich. 1929); *Nelson v. Pioneer Specialties, Inc.*, 325 S.W.2d 924, 926 (Tex. Civ. App. 1959).

194. See, e.g., REV. MODEL BUS. CORP. ACT § 8.09.

195. See, e.g., N.Y. BUS. CORP. LAW § 706(d) (1986).

a director from engaging in misconduct.<sup>196</sup>

Under the South Korean Commercial Code, shareholders may remove directors at any time by a special resolution at their general meeting.<sup>197</sup> Directors who have been removed before their set terms expire without due cause are entitled to claim damages caused by their removal from the corporation.<sup>198</sup> If shareholders at the general meeting refuse to remove directors who have engaged in dishonest conduct, violated laws, or violated the articles of incorporation, any shareholder who holds three percent of all the outstanding shares of the corporation may demand that a court remove them within one month after the date of such a resolution.<sup>199</sup> Finally, shareholders may also petition the court under Article 407(1) of the South Korean Commercial Code to remove directors or representative directors because of discord between the directors and shareholders.<sup>200</sup>

#### D. FILLING OF VACANCIES IN THE BOARD OF DIRECTORS

State corporate law statutes in the United States vary somewhat in their treatment of board vacancies. Roughly speaking, if any vacancy occurs on the board, it may be filled either by the shareholders or by the board, unless the articles of incorporation provide otherwise.<sup>201</sup> Moreover, the newly elected director has the same authority as that of a regular or normal director.<sup>202</sup>

Upon petition, a court may also appoint a provisional director under limited circumstances, notwithstanding the articles of incorporation.<sup>203</sup> These circumstances include instances where there is a deadlock of a board that has an even number of members and the result could cause harm to the corporation, the di-

196. See *Emerald Partners v. Berlin*, 726 A.2d 1215, 1227 (Del. 1998). "A plaintiff seeking a preliminary injunction must demonstrate i) a reasonable probability of success on the merits, and ii) that absent the injunction, some irreparable harm will occur, which harm outweighs the harm defendants will suffer if the relief is granted." *Id.* (citing *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1341 (Del. 1987)).

197. COM. CODE art. 385(1) (S. Korea).

198. *Id.*

199. *Id.* at art. 385(2).

200. *Id.* at art. 407(1).

201. See, e.g., REV. MODEL BUS. CORP. ACT § 8.10(a) (1984); DEL. CODE ANN. tit. 8, § 142(e) (1974).

202. See, e.g., DEL. CODE ANN. tit. 8, § 142(a) (1974).

203. See Terry A. O'Neill, *Self-Interest and Concern for Others in the Owner-Managed Firm: A Suggested Approach to Dissolution and Fiduciary Obligation in Close Corporations*, 22 SETON HALL L. REV. 646, 694 (1992).

rectors have acted illegally or fraudulently, there is corporate waste, or the shareholders are unable to elect successor directors.<sup>204</sup> A provisional director has the same powers and authority as a permanent director.<sup>205</sup>

Under the South Korean Commercial Code, if the number of directors drops below the number required by law or the articles of incorporation, the remaining directors convene a general meeting of shareholders to appoint a new director to fill the vacancy.<sup>206</sup> If the end of tenure or the resignation of a director results in a vacancy, he continues to hold "the rights and duties as a director until the newly elected director inaugurates office, if the directors remaining in office would otherwise become fewer than the minimum number provided by law or by the articles of incorporation."<sup>207</sup>

South Korean law provides an alternative method of filling a director vacancy through judicial appointment of a provisional or temporary director.<sup>208</sup> If it is deemed necessary, a court of competent jurisdiction may "appoint a person [as a provisional director] who is to temporarily perform the duties of a director, upon application by a director, auditor, or any other interested person."<sup>209</sup> A provisional director wields authority to the same extent as a regular director, unless the court imposes limitations on his authority.<sup>210</sup>

As noted in the previous section, shareholders may resort to Article 407(1) to remove a director.<sup>211</sup> Article 407(1) further provides that where an action has been brought to nullify or revoke a resolution by which a director has been appointed or to remove a director, the court may, upon the application by the parties concerned, suspend the exercise of the duties of such director by

204. See, e.g., CAL. CORP. CODE § 308 (1990); 805 ILL. COMP. STAT. 5/12-55 (1993); N.J. STAT. ANN. § 14A:12-7 (1988).

205. See, e.g., N.J. STAT. ANN. § 14A:12-7.

206. COM. CODE art. 382(1) (S. Korea).

207. *Id.* at art. 386(1).

208. South Korean Supreme Court Decision of April 28, 1964, 63 Da 518; see KOREAN CIV. CODE. art. 63 (providing that "[i]f a vacancy has occurred in the post of directors or there is no director, and there is reason to believe that damage will ensue therefrom, the court shall appoint a provisional director on the application of any person interested or of a public prosecutor").

209. COM. CODE art. 386(2) (S. Korea). Employees and creditors are typical examples of "any other interested person."

210. South Korean Supreme Court Decisions of May 22, 1968, 68 Ma 119. The same procedure may be used for appointing a provisional representative director.

211. See *supra* note 200 and accompanying text.



means of a provisional disposition<sup>212</sup> or may appoint an acting director.<sup>213</sup> The same provision is applicable in an emergency, even before a principal action is instituted.<sup>214</sup> Therefore, when directors breach their duty of care and loyalty or disobey shareholders, they might be forced out.

By a provisional disposition order, the director's power is suspended or an acting director is appointed.<sup>215</sup> An acting director, unlike a provisional director, has only the power to carry out those matters that arise within the ordinary course of business, unless otherwise provided in the provisional disposition order.<sup>216</sup> Because the court appoints an acting director, only the court can terminate an acting director's authority.<sup>217</sup>

#### E. POWERS OF THE BOARD OF DIRECTORS AND FORMALITIES FOR ITS ACTION

Under both U.S. state law and South Korean law, the board of directors may take action only by the vote of a majority of directors present at the meeting, not by individual action of the directors.<sup>218</sup> Furthermore, there are many similarities between U.S. and South Korean law with respect to the board's powers. Under both U.S. and South Korean law, the board of directors is responsible for managing the corporation and supervising the

212. Provisional disposition is a remedy similar to preliminary injunction under U.S. law. Yoo, *supra* note 168, at 353.

213. COM. CODE art. 407(1) (S. Korea).

214. *Id.*

215. The South Korean Civil Execution Act has the detailed procedure concerning provisional disposition. Its Article 300(2) states that "[p]rovisional disposition may also be granted for the purpose of setting a provisional state of affairs." CIV. EXECUTION ACT art. 300(2) (S. Korea).

216. See COM. CODE art. 408(1) (S. Korea). Beyond the scope of an acting director's authority are, for example, the convening of a special meeting of shareholders, the acknowledgement of a claim, the issuance of new shares and debentures, the delegation of all his authority by the acting representative director to another person, withdrawal of appeal against a judgment in the first instance, and the transfer of a substantial part of the business. South Korean Supreme Court Decisions of December 3, 1959, 4209 Minsang 669; October 26, 1965, 65 Da 1677; May 27, 1975, 75 Da 120; February 14, 1984, 83 Daka 875, 876, 877; and April 27, 1982, 81 Da 358. The burden of proving that an action of an acting director is within his authority is upon the third party who enters a transaction with the corporation. South Korean Supreme Court Decision of October 26, 1965, 65 Da 1677. An act of an acting director binds the corporation even if it is beyond his authority, provided that a third party acts in good faith. COM. CODE art. 408(2) (S. Korea).

217. See COM. CODE art. 407 (S. Korea).

218. See, e.g., CAL. CORP. CODE § 307(a)(8) (1990); COM. CODE art. 393(1) (S. Korea).

performance of directors, especially representative directors.<sup>219</sup> By formulating and voting for resolutions, directors take action as a body at duly convened board meetings at which a quorum is present.<sup>220</sup> Nevertheless, any directorial action beyond the board's authority has binding force between the corporation and a third party acting in good faith.<sup>221</sup>

In the United States, subject to procedures for board action, the president or the chairman of the board presides at the board meeting.<sup>222</sup> Since, in practice, the president is the chief executive officer in most corporations and has greater familiarity with the affairs of the business of the corporation than anyone else, he is in the best position to coordinate the operation of the corporation with the functions of the board.<sup>223</sup>

In the United States, although the Revised Model Business Corporation Act is silent on the point, directors generally may not vote by proxy.<sup>224</sup> However, some states do allow voting by proxy if the articles of incorporation so provide.<sup>225</sup> Also, most state statutes now allow action by the board to be taken by means of a telephone conference call or similar communications equipment.<sup>226</sup>

Unless otherwise provided in the articles of incorporation, no notice is required to be given to the directors regarding a regularly scheduled meeting, but at least two days advance notice is required for special meetings.<sup>227</sup> This notice is only required to provide the time and date of the meeting, but does not need to provide the purpose of the meeting, unless so specified

219. REV. MODEL BUS. CORP. ACT § 8.01 (1984); COM. CODE arts. 393(1), 393(2) (S. Korea).

220. Under both U.S. and South Korean law, the directors act as a collegial body. *See, e.g.*, COM. CODE arts. 391(1), 393(1) (S. Korea); *Stone v. Am. Lacquer Solvents Co.*, 345 A.2d 174 (Pa. 1975). The logic behind this requirement is that "the decision making process is likely to function better when the directors consult with and react to one another. A group discussion of problems is thought to be needed, not just a series of yea or nay responses." CLARK, *supra* note 36, at 110.

221. RESTATEMENT (SECOND) OF AGENCY § 267 (1958); *see, e.g.*, DEL. CODE ANN. tit. 8, § 102(b)(7) (1974); *see* COM. CODE art. 408(2) (S. Korea); *see also* *Billops v. Magness Constr. Co.*, 391 A.2d 196, 198 (Del. 1978).

222. CHARKHAM, *supra* note 2, at 182-84.

223. *See* HAROLD KOONTZ, THE BOARD OF DIRECTORS AND EFFECTIVE MANAGEMENT 201-06 (1967).

224. CLARK, *supra* note 36, at 110.

225. However, Louisiana has a provision that proxy voting is permitted if the articles of incorporation so provide. *See* LA. REV. STAT. ANN. § 12.81(E) (West 1969).

226. *See, e.g.*, REV. MODEL BUS. CORP. ACT § 8.20(b) (1984); CAL. CORP. CODE § 307(a)(6) (1990); DEL. CODE ANN. tit. 8, § 141(i) (1974).

227. REV. MODEL BUS. CORP. ACT § 8.22.

by the articles of incorporation.<sup>228</sup> At the meeting, a quorum is established when a majority of directors are present, unless the articles of incorporation specify the number required, which number shall not go below one-third.<sup>229</sup> The quorum may adopt a provision upon the vote of a majority, unless the articles of incorporation require a greater number of votes.<sup>230</sup>

No director is allowed to vote on a provision for which the director is self-interested.<sup>231</sup> However, if the self-interested director does vote, and a majority of the directors who are disinterested have voted for the provision, the contract or transaction is not void or voidable.<sup>232</sup> This is true even if there is no quorum after the interested directors are disqualified.<sup>233</sup>

The matters that directors are responsible for are the "business and affairs" of the corporation or those functions that are delineated by the articles of incorporation.<sup>234</sup> The directors may establish, by majority vote, committees consisting of as few as one director to take on these duties.<sup>235</sup> These committees may exercise the same authority as the full board of directors in the everyday running of the business, but may not make large decisions such as changes to the articles of incorporation or decisions regarding a merger.<sup>236</sup>

Minutes are to be taken and kept as permanent records of director meetings and for actions taken without a meeting.<sup>237</sup> The secretary of the corporation is usually the person responsible for recording and keeping the minutes.<sup>238</sup> A director that attends a meeting is assumed to assent to the actions taken by the board, unless that person objects at the beginning of the meeting, his dissent is entered in the minutes, or he delivers written notice of his dissent to the presiding officer.<sup>239</sup>

The South Korean Commercial Code assigns certain responsibilities to the board, a sovereign body, in making corpo-

228. *Id.*

229. REV. MODEL BUS. CORP. ACT § 8.24; DEL. CODE ANN. tit. 8, § 141(b) (noting that if the articles of incorporation provide for only one director, that director constitutes a quorum).

230. REV. MODEL BUS. CORP. ACT § 8.24(c); DEL. CODE ANN. tit. 8, § 141(b).

231. DEL. CODE ANN. tit. 8, § 144.

232. *Id.*

233. *Id.*

234. *Id.* § 141(a).

235. *Id.* § 141(c)(1).

236. *Id.*

237. REV. MODEL BUS. CORP. ACT § 16.01(a) (1984).

238. *See, e.g.*, ALA. CODE § 10-2B-1.40(22) (1975).

239. REV. MODEL BUS. CORP. ACT § 8.24(d).

rate decisions. Matters that must be determined by the board and cannot be entrusted to the shareholders include: convocation of a general meeting of shareholders,<sup>240</sup> approval of a director's transaction with the corporation for his own account or for the account of a third person,<sup>241</sup> and approval of financial statements and business reports.<sup>242</sup> Unless the articles of incorporation provide to the contrary, the board has the authority to appoint a representative director or directors<sup>243</sup> and issue debentures with preemptive rights.<sup>244</sup>

In addition, every director of a South Korean corporation has the individual right to attend a general meeting of the shareholders, sign and seal the minutes of the board meeting,<sup>245</sup> and convene board meetings.<sup>246</sup> Notwithstanding the fact that every director has the authority to convene a board meeting,<sup>247</sup> most boards of South Korean corporations designate a director to do so. If the designated director does not convene a meeting upon a director's request to do so without justifiable reasons, then the requesting director may do so.<sup>248</sup>

Under South Korean law, the board meeting must normally be preceded by notice to each director and statutory auditor.<sup>249</sup> Notice must be given to statutory auditors since the law permits them to attend, state their opinion, and report directors' wrong-

240. See COM. CODE art. 362 (S. Korea).

241. *Id.* at art. 398.

242. *Id.* at arts. 447, 447-2.

243. *Id.* at art. 389(1).

244. *Id.* at art. 516-2.

245. *Id.* at art. 373(2).

246. COM. CODE art. 390(1) (S. Korea).

247. *Id.*

248. South Korean Supreme Court Decisions of February 13, 1975, 74 Ma 595; and February 10, 1976, 74 Da 2255. In practice, the board gives this authority to a particular director, who is usually the president or the representative director, to call the meeting. CHUNG, *supra* note 18, at 403. The individual right of convocation may function as a means of supervising the representative director's performance.

249. COM. CODE art. 390(2) (S. Korea). Notice should be issued in an oral or written form at least a week before the date set for such a meeting. CHUNG, *supra* note 18, at 403-04. Unlike a shareholders general meeting, the period of notice for the board meeting may be shortened if provided for in the articles of incorporation. COM. CODE art. 390(2) (S. Korea). The period must be long enough for the recipient to attend the meeting, however. According to due procedure, it does not matter whether the notice issued is actually received. Notice is not required where all the directors and auditors have consented, before or with the event, to hold the meeting without notice. *Id.* at art. 390(3). When all of the directors attend the meeting without waiving notice explicitly and unanimously, the meeting and the resolutions passed are valid.

ful acts at the board meeting.<sup>250</sup> However, statutory auditors are not entitled to vote at the meeting because they are not directors.<sup>251</sup>

The South Korean Commercial Code is silent as to how to proceed with the meeting and who is to chair the board meeting.<sup>252</sup> Usually, a chairman, a president, or any other representative director of a corporation takes the role of presiding over the meeting.<sup>253</sup> The articles of incorporation or bylaws contain the procedures involved in conducting a meeting.<sup>254</sup>

In South Korea, a majority vote of those present at a meeting where at least a majority of all the directors are physically present is necessary for the board to pass a resolution.<sup>255</sup> Through provisions in the articles of incorporation, the necessary vote and quorum may be increased but cannot be decreased.<sup>256</sup> Most South Korean corporations have a provision in their articles of incorporation stating that the person who chairs the meeting has the deciding vote when the votes are equally divided.<sup>257</sup>

South Korean law contains some similar director formalities as U.S. law. In South Korea, directors vote on a per capita basis and cannot vote by proxy,<sup>258</sup> nor can they participate in a meeting through the use of letters.<sup>259</sup> Telephones or other simultaneous audiovisual electronic devices, however, can be employed for voting.<sup>260</sup> Furthermore, under South Korean law, a director who

---

250. See *id.* at art. 391-2.

251. Cf. Zenichi Shishido, *Japanese Corporate Governance: The Hidden Problems of Corporate Law and Their Solutions*, 25 DEL. J. CORP. L. 189, 200 (2000) (stating that statutory auditors do not have decision-making power).

252. CHUNG, *supra* note 18, at 403.

253. See, e.g., Articles of Incorporation of Seoul Systems Company Ltd., art. 32(1); Articles of Incorporation of Samsung Electronics Company Ltd., arts. 29, 30(1).

254. See, e.g., Articles of Incorporation of Seoul Systems Company Ltd., art. 32(1); Articles of Incorporation of Samsung Electronics Company Ltd., arts. 29, 30(1).

255. COM. CODE art. 391(1) (S. Korea).

256. CHUNG, *supra* note 18, at 404-05.

257. See, e.g., Articles of Incorporation of Seoul Systems Company Ltd., art. 36(1); Articles of Incorporation of Hyundai Motor Company, art. 29(4).

258. See South Korean Supreme Court Decision of July 13, 1982, 80 Da 2441 (holding that unlike the voting of the general meeting of shareholders, voting by proxy at the board meeting is void).

259. SONN, *supra* note 105, at 826.

260. COM. CODE art. 391(2) (S. Korea). Through the use of such technology, the formalities of board meetings can be relaxed. When telephones are used as communications equipment for board meetings, their quorum could be established if one of the absent directors could be reached by telephone. *Id.*

is personally interested in the resolution cannot exercise his vote, and his vote cannot be counted towards the quorum.<sup>261</sup> Moreover, a recital of the proceedings must be contained in the minutes, and then signed and sealed by the directors and auditors present.<sup>262</sup> Also, a director who has joined in the resolution and whose dissent does not appear in the written minutes is presumed to have assented to such resolution.<sup>263</sup>

The South Korean Commercial Code, however, does not have a provision for the validity of a defective board resolution that resulted from improper content or procedure.<sup>264</sup> Such a resolution is dealt with outside of the South Korean Commercial Code.<sup>265</sup> It is dealt with by the general principles of nullity and the provisions contained in the South Korean Civil Code.<sup>266</sup>

#### F. DELEGATION OF BOARD AUTHORITY

Because the board of directors is not expected to be familiar with all the details of the corporation, management by the board itself is impractical in the United States and South Korea.<sup>267</sup> In the United States, little or no direct involvement of the board in day-to-day management prevails in large and medium-sized publicly held corporations.<sup>268</sup> An amendment to Section 35 of the Model Business Corporation Act of 1969 was adopted in 1974 to set forth a standard of conduct for directors and to define the authority of the board of directors.<sup>269</sup> The clause of the 1969 Act stating that, "the business and affairs of a corporation shall be managed by a board of directors" was later amended to read "the business and affairs of a corporation shall be managed *under the direction* of a board of directors."<sup>270</sup> Much of the authority of the

261. COM. CODE arts. 368(4), 391(3) (S. Korea).

262. *Id.* at art. 391-3(1).

263. *Id.* at art. 399(3).

264. CHUNG, *supra* note 18, at 407-2.

265. C. LEE, *supra* note 184, at 138.

266. *Id.*

267. COMM. ON CORPORATE LAW, AMERICAN BAR ASSOC., *Corporate Director's Guidebook*, 33 BUS. LAW. 1591, 1603 (1978); K. Kim, *supra* note 19, at 142.

268. COMM. ON CORPORATE LAW, AMERICAN BAR ASSOC., *supra* note 267, at 1603.

269. *Id.* at 1606-07. The opening sentence of Section 35 of the Model Business Corporation Act of 1974 provides: "All corporate powers shall be exercised by or under authority of, and the business and affairs of a corporation shall be managed under the direction of, a board of directors except as may be otherwise provided in this Act or the articles of incorporation." MODEL BUS. CORP. ACT § 35 (1974).

270. See MODEL BUS. CORP. ACT § 35 (emphasis added). One of purposes of the amendment was to make it clear that the authority of directors in the corporations can be delegated to officers. See Elliot Goldstein, *Future Articulation on Corporation Law*,

board of U.S. corporations is statutorily allowed to be delegated to the chief executives or to the officers.<sup>271</sup>

Under the state corporate law of the United States, the board of directors has the power to designate board committees.<sup>272</sup> The board has considerable discretion in determining how a committee is formed, what function the committee performs, and how the committee operates.<sup>273</sup> Usually, the board committee is composed of two or more directors, who often perform functions that otherwise would be within the province of the authority of the entire board of directors.<sup>274</sup>

Similarly, the board of a South Korean corporation may delegate some of its authority to representative directors or other executive directors, or subcommittees of the board.<sup>275</sup> A representative director is usually selected from among the directors by the board.<sup>276</sup> It can also be written into the articles of incorporation that shareholders shall appoint a representative director.<sup>277</sup> South Korean law does not impose a statutory limit on how many representative directors the corporation may have.<sup>278</sup> Thus, a corporation may have more than one representative director.<sup>279</sup> In addition, as a way to enhance the function of the board of directors, the South Korean Commercial Code allows the board to establish internal subcommittees within it.<sup>280</sup> That is, if the articles of incorporation provide for them, the board of directors may delegate part of its power to subcommittees.<sup>281</sup>

A representative director is empowered not only to take

39 BUS. LAW. 1541, 1545 (1984). Similarly, the Delaware Corporate Code has the provision that "[t]he business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors." DEL. CODE ANN. tit. 8, § 141(a) (1974). The phrase "managed by or under the direction of," both in the Model Business Corporation Act and in the Delaware corporate statute, indicates that respective corporate boards may function in a variety of ways. *See id.* (emphasis added).

271. *See* Goldstein, *supra* note 270, at 1545.

272. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(c)(1).

273. *Corporate Director's Guidebook Third Edition*, 56 BUS. LAW. 1571, 1597 (2001).

274. *See, e.g.*, REV. MODEL BUS. CORP. ACT § 8.25; DEL. CODE ANN. tit. 8, § 141(c).

275. J. Kim, *supra* note 49, at 290.

276. CHUNG, *supra* note 18, at 410; Ehrlich & Kang, *supra* note 12, at 34.

277. COM. CODE art. 389(1) (S. Korea). In practice, representative directors, usually selected from among the directors, have considerable authority in handling the day-to-day management of a corporation. INTRODUCTION, *supra* note 76, at 847-48.

278. CHUNG, *supra* note 18, at 411.

279. *See id.* The name of the representative director must be registered. COM. CODE art. 317(2)[9] (S. Korea).

280. *See* J. Kim, *supra* note 49, at 290.

281. COM. CODE art. 393-2 (S. Korea).

charge of internal corporate business, but also to represent the corporation.<sup>282</sup> His authority to represent a corporation runs the whole gamut of all corporate business, both judicial and extra-judicial.<sup>283</sup> Limitations may be imposed on the representative director's power by the articles of incorporation, but they cannot be raised as a defense against a third party acting in good faith reliance on the representative director's representations.<sup>284</sup> Once joint representation among multiple representative directors is established, one representative director cannot act without the consent of the other.<sup>285</sup> Therefore, the requirement of joint representation has a chilling effect on a representative director's misbehavior.

Actions of a representative director are preceded by a valid board resolution.<sup>286</sup> When a board resolution is void, this creates the problem of whether a representative director's action is valid.<sup>287</sup> In seeking the answer to this problem, the protection of bona fide third parties should be taken into account.<sup>288</sup> Consensus exists among South Korean scholars that transactions that involve the public, such as sales or loans and issuance of debentures, are not dependent upon the validity of the resolution.<sup>289</sup> However, completely intra-corporate transactions, such as transfers of reserve funds to capital and the appointment of a manager, are affected by the void resolution and are thus regarded as void.<sup>290</sup> The South Korean Supreme Court supports this view and further states that a representative director's act, made upon a void board resolution, will be valid even if the corporation he serves proves that the third parties acted in bad

282. See *id.* at arts. 209(1), 389(3).

283. See *id.* at arts. 209(1), 389(3). The phrase "both judicial and extra-judicial" means to be "both in- and out-of-court."

284. *Id.* at arts. 209(2), 389(3).

285. See *id.* at art. 389(2). If a corporation requires representative directors to act jointly, this restriction must be registered. *Id.* at arts. 317(2)[10], 389(2). Even if joint representation is not registered, a transaction between a single representative director and a third party in good faith is effective against the corporation. *Id.* at art. 37(1). After the registration, a transaction is binding on the corporation when it is made between a single representative director and a person who is unaware of joint representation for any due reason. *Id.* at art. 37(2). If joint representation is required for all representative directors, notice issued by a third party to only one of the directors is binding on the corporation. *Id.* at arts. 208(2), 389(3).

286. CHUNG, *supra* note 18, at 416-17.

287. *Id.* at 417.

288. *Id.*

289. *Id.*

290. See C. LEE, *supra* note 184, at 554.



faith.<sup>291</sup>

If a representative director acts in bad faith against the corporation, the representative director is subject to removal from his position in the same way a director is. When a representative director loses his position due to removal by the shareholders, the expiration of his term of office as a director, or resignation, he can no longer serve as a representative director.<sup>292</sup> When the board terminates his office as a representative director, however, he remains a director.<sup>293</sup>

### III. GOVERNANCE ROLE OF STATUTORY AUDITORS AND THE AUDIT COMMITTEE

#### A. AN OVERVIEW

In the United States, only one jurisdiction has had an express statutory provision requiring the establishment of an audit committee.<sup>294</sup> Nevertheless, under the rules of the New York Stock Exchange, NASDAQ, and the American Stock Exchange, publicly listed corporations are required or recommended to establish an audit committee.<sup>295</sup> Under U.S. law, the primary function of the committee is to "assist the board of directors with the development and maintenance of the corporate accountability framework."<sup>296</sup>

Under the South Korean Commercial Code, however, a *chusik hoesa* is required to be audited by one or more statutory auditors.<sup>297</sup> The corporation may, in accordance with the articles

291. See South Korean Supreme Court Decision of March 24, 1998, 95 Da 6885.

292. See CHUNG, *supra* note 18, at 411.

293. *Id.*

294. See CONN. GEN. STAT. § 33-318(b)(1) (repealed 1997).

295. See Ehrlich & Kang, *supra* note 12, at 12. The New York Stock Exchange and the NASDAQ require audit committees, while the American Stock Exchange only recommends that a company have an audit committee. Scott V. Simpson, *The Emerging Role of the Special Committee-Ensuring Business Judgment Rule Protection in the Context of Management Leveraged Buyouts and Other Corporate Transactions Involving Conflicts of Interest*, 43 BUS. LAW. 665, 666 n.3 (1988) (citing New York Stock Exchange Listed Company Manual paras. 303.00, 802.00 (1987); NASDAQ National Market System Listing Agreement para. 1(c) (1987); [2] Am. Stock Ex. Guide (CCH) § 121, para. 10.021 (1985)).

296. LOUIS BRAIOTTA, JR., *THE AUDIT DIRECTOR'S GUIDE: HOW TO SERVE EFFECTIVELY ON THE CORPORATE AUDIT COMMITTEE* 24 (1981) (emphasis added). The audit committee is therefore a quasi-assistant to the board of directors.

297. COM. CODE art. 568(1) (S. Korea). In South Korea, listed corporations on the securities market and corporations with total assets of seven billion *won* or more must

of incorporation, establish an audit committee in place of statutory auditors.<sup>298</sup> Statutory auditors and audit committees under the South Korean Commercial Code are different from the audit committee under U.S. law, in that they work as adversaries to management and monitor the directors' overall performance.<sup>299</sup> They are empowered to act on a continuous basis as an independent watchdog and to act in the interests of the shareholders and creditors.<sup>300</sup>

## B. NUMBER AND QUALIFICATIONS OF STATUTORY AUDITORS AND THE AUDIT COMMITTEE

Statutory auditors are completely foreign to U.S. law. Even though the United States does not have statutory auditors per se like South Korea, there are statutes that provide for auditing of corporations to ensure the reliability of corporate financial reports.<sup>301</sup> Congress requires that certain financial reports be reviewed by outside accountants, who are deemed independent auditors.<sup>302</sup>

Furthermore, state laws and the rules of stock exchanges do

be audited by outside auditors, usually Certificated Public Accountants (CPAs) or audit corporations. See LAW CONCERNING OUTSIDE AUDIT OF A CHUSIK HOESA, No. 3297, art. 2 (amended 1981); Presidential Decree No. 10453, art. 2 (amended 1981). Compared with outside auditors, statutory auditors are also called "inside auditors" or "internal auditors." Kon Sik Kim, *Corporate Governance in Korea*, 8 J. COMP. BUS. & CAP. MKT. L. 21, 26-27 (1986) (using the term "inside auditors" instead of "statutory auditors"); see K. Kim, *supra* note 19, at 148 (using the term "internal auditors"). Outside auditors are not statutorily authorized to perform the function of monitoring directors. The functions of outside auditors are:

- (1) to audit the financial statements and submit an audit report to the corporation . . . ;
- (2) to report any improper acts committed by a director in performing his duties and any material violations of law or the articles of incorporation . . . ; and
- (3) to attend shareholder meetings upon request of the shareholders and present opinion or answer questions . . . .

K. Kim, *supra* note 19, at 152. In South Korea, CPAs are accountants who are qualified to engage in the accounting profession after passing a national examination and serving as probationary CPAs for at least two years. For the licensing and training requirements of becoming a CPA in South Korea, see Belverd E. Needles, Jr. et al., *Taxonomy of Auditing Standards*, in HANDBOOK OF INTERNATIONAL ACCOUNTING 6.14 (Frederick D.S. Choi ed., 1991).

298. COM. CODE art. 415-2(1) (S. Korea).

299. See J. Kim, *supra* note 49, at 290-92.

300. See Ehrlich & Kang, *supra* note 12, at 34.

301. Joseph I. Goldstein & Catherine Dixon, *New Teeth for the Public's Watchdog: The Expanded Role of the Independent Accountant in Detecting, Preventing, and Reporting Financial Fraud*, 44 BUS. LAW. 439, 439-40 (1989).

302. *Id.* (citing 15 U.S.C. §§ 77aa(25)-(26), 78q(e), 78l(b)(J)-(K), 78m(a)(2), 78n(a), 79e(b)(2)(H)-(I), 79j(a), 80a-8(b)(5), 80a-29(e), 80b-3(c) (1982)).

not normally require audit committees.<sup>303</sup> When an audit committee is required, there is no uniformity as to the requirements of their number and qualifications.<sup>304</sup> The sole uniform requirement or recommendation is that the audit committee remain independent of management.<sup>305</sup>

Conversely, under South Korean law, one or more statutory auditors are to be appointed at the general meeting of shareholders for a period of typically three years.<sup>306</sup> Since the term of office for statutory auditors is provided in the South Korean Commercial Code, they enjoy job security and independent authority.<sup>307</sup> They cannot concurrently be directors, managers, or employees of the corporation to be audited<sup>308</sup> or one of its subsidiaries.<sup>309</sup> This statutory provision is aimed at ensuring independence and impartiality. In order to eliminate the influence of majority shareholders, any shareholder owning more than three percent of the outstanding voting shares is not allowed to exercise his vote on his shares in excess of the three percent in the election of statutory auditors.<sup>310</sup>

Since the South Korean Commercial Code does not specify the requirements for being a statutory auditor, almost all statutory auditors of South Korean corporations are neither independent from the management nor professionally trained.<sup>311</sup> In the real world, the independence and objectivity of statutory auditors are not guaranteed in South Korea.<sup>312</sup> There is some protection, however, in that statutory auditors and audit committee members must exercise the same degree of care as directors in managing the corporation.<sup>313</sup> Since they do not participate in managing the corporation, there is no danger of a

---

303. See *supra* note 294 and accompanying text.

304. For example, the NASDAQ requires audit committees to have at least three members and be comprised solely of independent members. See *supra* note 302 and accompanying text. The Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) mandates banks and savings institutions with assets more than \$500 million to have an independent audit committee. FDICIA of 1991, Pub. L. No. 102-242, 105 Stat. 2236 (codified at 12 U.S.C. § 1831m (Supp. IV 1992)).

305. Kevin Iurato, *Warning! A Position on the Audit Committee Could Mean Greater Exposure to Liability: The Problems with Applying a Heightened Standard of Care to the Corporate Audit Committee*, 30 STETSON L. REV. 977, 981 (2001).

306. COM. CODE arts. 409(1), 410 (S. Korea).

307. J. Kim, *supra* note 49, at 291.

308. COM. CODE art. 411 (S. Korea).

309. J. Kim, *supra* note 49, at 291-92.

310. COM. CODE art. 409(2) (S. Korea).

311. Ehrlich & Kang, *supra* note 12, at 34.

312. *Id.*

313. COM. CODE arts. 382(2), 415 (S. Korea).

conflict of interest occurring between the corporation and its statutory auditors.<sup>314</sup>

If an audit committee is established to replace the functions of statutory auditors, it must consist of at least three members.<sup>315</sup> Persons who have personal or business relations with the largest shareholder of the corporation or the corporation itself, shall not exceed one-third of the total members of the committee.<sup>316</sup> Therefore, more than two-thirds of the audit committee members are outside auditors who are independent from the management and controlling shareholders.<sup>317</sup>

### C. POWERS OF STATUTORY AUDITORS AND THE AUDIT COMMITTEE

In the United States, the audit committee plays an important role in enhancing corporate accountability by “oversee[ing] and monitor[ing] the activities of the corporation’s financial reporting system and the internal and external audit processes.”<sup>318</sup> The listing standards and state and federal securities laws do not require any specific functions or structure of the audit committee, but the primary purpose of the audit committee in practice is to monitor the internal operations of the corporation.<sup>319</sup>

The audit committee, like any other committee in U.S. corporations, is composed of directors of the corporation.<sup>320</sup> Because the audit committee is composed of directors, they have complete access to information and attend director meetings.<sup>321</sup> Unlike the other members of the board of directors, though, the audit committee is usually held to a higher standard of care than their outside director counterparts; this subjects audit committee members to a greater potential for liability.<sup>322</sup>

As stated above, the “watchdog” function of the statutory

314. See Kim & Silverman, *supra* note 12, at 217.

315. COM. CODE art. 415-2(2) (S. Korea).

316. *Id.*

317. See *id.*

318. BRAIOTTA, *supra* note 296, at 24; see also Robert W. Hamilton, *Corporate Governance in America 1950-2000: Major Changes but Uncertain Benefits*, 25 J. CORP. L. 349, 361-62 (2000) (introducing various functions of the audit committee); Lewis D. Solomon, *Restructuring the Corporate Board of Directors: Fond Hope — Faint Promise?*, 76 MICH. L. REV. 581, 606-09 (1978) (viewing the audit committee as an instrument for monitoring management).

319. See Iurato, *supra* note 305, at 981, 985.

320. See Simpson, *supra* note 295, at 665-66; see also *supra* note 203 and accompanying text.

321. *Corporate Director’s Guidebook*, *supra* note 273, at 1599-1603.

322. Iurato, *supra* note 305, at 987-96.

auditors, under South Korean law, include auditing accounting matters as well as the managerial activities of directors.<sup>323</sup> Statutory auditors are presumed to have full access to corporate records and reports.<sup>324</sup> They have the right at any time to request a report from the directors regarding their operations, to investigate the affairs of the corporation, and to investigate the status of the corporation's property.<sup>325</sup> Statutory auditors perform the duty of examining all matters proposed to be resolved and documents to be presented by the directors at the annual general shareholders' meeting.<sup>326</sup> In addition, they are authorized to express their opinions at the meeting if all or part of the documents violate regulations or the articles of incorporation or are seriously unfair.<sup>327</sup> Statutory auditors are obligated to demand that a director halt his act contemplated in violation of the law or the articles of incorporation if it is likely to cause irreparable harm to the corporation.<sup>328</sup>

As a watchdog, a statutory auditor has a variety of tasks. Most importantly, statutory auditors are empowered to inspect the performance of directors.<sup>329</sup> Statutory auditors may attend meetings of the board of directors, give their opinions,<sup>330</sup> and sign and seal the minutes,<sup>331</sup> but they are not entitled to vote at the board meeting.<sup>332</sup> As mentioned previously, they have to perform their duties with the care a director would exercise.<sup>333</sup> Therefore, frequent absence from board meetings without cause may suggest a breach of the duty of care.<sup>334</sup> Interestingly, statutory auditors are authorized to represent the corporation in any action brought by the corporation against a director, and vice versa.<sup>335</sup> They also have the right to file with the court an action to revoke shareholder resolutions<sup>336</sup> and to nullify an issuance of

---

323. COM. CODE art. 412 (S. Korea).

324. *Id.*

325. *Id.*

326. *Id.* at art. 413.

327. *Id.*

328. *Id.* at art. 402.

329. COM. CODE art. 412(1) (S. Korea).

330. *Id.* at art. 391-2. For this reason, notices of board meetings are required to be given to statutory auditors. See *supra* notes 249-50 and accompanying text.

331. COM. CODE art. 391-3 (S. Korea).

332. CHUNG, *supra* note 18, at 480.

333. COM. CODE arts. 382(2), 415 (S. Korea).

334. C. LEE, *supra* note 184.

335. COM. CODE art. 394 (S. Korea).

336. *Id.* at art. 376(1).

new shares,<sup>337</sup> a merger,<sup>338</sup> an incorporation of the corporation,<sup>339</sup> and a capital reduction.<sup>340</sup>

Nonetheless, a majority of South Korean law scholars believe that statutory auditors are empowered only to ensure and confirm that all managerial activities of the directors are lawful, unless the law expressly permits statutory auditors to review the reasonableness of directorial action.<sup>341</sup> The rationale is that if the authority of statutory auditors encompasses measuring the reasonableness of every managerial activity, then conflict would ensue and lead to a denial of the legal authority of the board to oversee board members.<sup>342</sup> The South Korean courts have yet to handle a case on the authority of statutory auditors.

Failure of the auditors to perform their duties would subject them to civil liability.<sup>343</sup> Auditors are jointly and severally liable for the corporation's damages for negligence in connection with statutory audits.<sup>344</sup> They are not released from liability without the unanimous consent of all shareholders.<sup>345</sup> If statutory auditors willfully neglect any of their duties or are grossly negligent in the course of their activities, they are jointly and severally liable for any damages to third parties.<sup>346</sup>

In South Korea, the powers of the audit committee are not different from those of statutory auditors since the former can be established in place of the latter.<sup>347</sup> However, two-thirds of the audit committee members do not have any interests with the company, the management, or the controlling shareholder.<sup>348</sup> The audit committee members function more neutrally and objectively than statutory auditors.<sup>349</sup>

## CONCLUSION

The corporation is one of the most remarkable and success-

---

337. *Id.* at art. 429.

338. *Id.* at art. 529.

339. *Id.* at art. 328.

340. *Id.* at art. 445.

341. *See, e.g.,* C. LEE, *supra* note 184, at 647.

342. COM. CODE art. 393(2) (S. Korea).

343. *Id.* at art. 414.

344. *Id.* at art. 414(2).

345. *Id.* at arts. 400, 415.

346. *Id.* at art. 414(2).

347. J. Kim, *supra* note 50, at 291.

348. *Id.*

349. *Id.*

ful institutions in modern history, having a considerable effect on almost all aspects of our lives.<sup>350</sup> There have been significant improvements in communication and mutual understanding between the United States and South Korea.<sup>351</sup> South Koreans have monitored the successes and failures of the law in the United States and some rules, which proved to be viable, have won wide acceptance in South Korea.<sup>352</sup> Therefore, it is not surprising that much of South Korean corporate law is influenced by principles of U.S. corporate law and practice.<sup>353</sup>

A simple example of U.S. influence is the fact that the theoretical legal framework for the South Korean system of corporate governance is based on the traditional U.S. model of corporate democracy.<sup>354</sup> Under both U.S. corporate law and the South Korean Commercial Code, the role of the board of directors is emphasized to make corporate management more effective. The board is granted the authority to exercise corporate management functions and finally to act as the principal forum for decision-making.

Despite the similarities, however, South Korean and U.S. corporate law have distinct differences. Shareholders under South Korean law and directors under U.S. law, select statutory auditors or audit committee members who work as monitors of directors' overall performance. Additionally, the functions of statutory auditors and the audit committee under the South Korean Commercial Code are different from those of the audit committee under U.S. law. Furthermore, U.S. law provides for officers in corporate governance, which does not have a counterpart in South Korean law.

---

350. See *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 565 (1932) (Brandeis, J., dissenting) (stating that "[t]hrough size, corporations, once merely an efficient tool employed by individuals in the conduct of private business, have become an institution — which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the State"). See also Alfred F. Conard, *Business Corporations in American Society*, in COMMENTARIES ON CORPORATE STRUCTURE AND GOVERNANCE: THE ALI-ABA SYMPOSIUMS 1977-1978, 41-42 (Donald E. Schwartz ed., 1979); Wolfgang G. Friedmann, *Corporate Power, Government by Private Groups, and the Law*, 57 COLUM. L. REV. 155, 176 (1957).

351. Kwon, *supra* note 11, at 1095.

352. See Alan Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L.J. 313, 321 (1978) (arguing that transplantation of law is the most common form of legal change).

353. See generally Kang, *supra* note 114.

354. For example, the right to elect directors which is regarded as the cornerstone of corporate democracy is vested in shareholders both in U.S. and South Korean law. CHARKHAM, *supra* note 2, at 188.