

Table of Contents

| | |
|---|-------|
| Preface | xix |
| Acknowledgements | xxiii |
| INTRODUCTION | |
| The Close Corporation and The Shareholders' Agreement | 1 |
| 1 Why Study the Law(s) of Shareholders' Agreements? | 1 |
| 2 The Multiple Characteristics of the Close Corporation | 2 |
| 3 The Close Corporation and the Absence of a Ready Market for Sale | 5 |
| 4 A Practical Definition of a Close Corporation | 6 |
| 5 Summary Functions of a Shareholders' Agreement | 6 |
| 6 Importance of the Shareholders' Agreement in National and International Transactions: Shareholder Control | 7 |
| 7 The General Philosophy of Corporate Law | 8 |
| CHAPTER 1 | |
| The Multiple Varieties of Shareholder Control | 9 |
| 1.1 A Detailed List of Shareholder Control | 9 |
| 1.1.1 The Shareholders' Agreement and Shareholder Control | 11 |
| 1.1.2 Similar Expressions for "Shareholders' Agreement" | 11 |
| 1.1.3 Alternative Legal Instruments for Shareholder Control on Voting | 12 |
| 1.1.4 Pooling Agreements, Also Known as the Shareholder Voting Agreements | 12 |
| 1.1.5 The Venerable Voting Trust | 16 |
| 1.1.6 American Bar Association Definition of a Voting Trust | 17 |
| 1.1.7 Main Elements of a Voting Trust | 18 |
| 1.1.8 The Holding Company | 21 |

Table of Contents

| | | |
|---|---|----|
| 1.1.9 | Trusts | 22 |
| 1.1.10 | Subsidiaries, Affiliates, and Interlocking Directorates | 22 |
| CHAPTER 2 | | |
| Shareholder Control Realized through Articles of Incorporation or the Shareholders' Agreement | | 25 |
| 2.1 | Situs of Shareholder Control | 25 |
| 2.2 | Shareholder Pre-emptive Rights | 25 |
| 2.3 | Different Classes of Shares | 26 |
| 2.4 | Classification of Directors | 28 |
| 2.5 | Quorum Requirements | 29 |
| 2.6 | Proxy and Irrevocable Power of Attorney Coupled with Interest | 31 |
| 2.7 | Cumulative Voting | 32 |
| 2.8 | Bylaws | 33 |
| 2.9 | Plurality Voting and Majority Voting | 34 |
| 2.10 | Restrictions of Powers of Directors | 35 |
| 2.11 | Director Veto Provisions | 36 |
| 2.12 | Restrictions on Transfer of Shares | 36 |
| 2.13 | Limited Term to Corporate Existence | 38 |
| 2.14 | Miscellaneous Methods and Documentation | 38 |
| 2.15 | Conclusions on Shareholder Control and the Preferred Method | 39 |
| CHAPTER 3 | | |
| Drafting Suggestions for Shareholder Control | | 41 |
| 3.1 | Forms Shareholder Control | 41 |
| 3.2 | Pooling Agreement | 41 |
| 3.3 | Voting Trust | 44 |
| 3.4 | Further Voting Trust Agreement | 48 |
| 3.5 | Form Restriction on Transfer of Shares | 52 |
| 3.6 | Form Absolute Restriction | 56 |
| CHAPTER 4 | | |
| International Joint Ventures and Shareholder Control | | 59 |
| 4.1 | The Special Problems of International Joint Ventures and Shareholder Control | 59 |
| 4.2 | The Craft of International Joint Ventures | 62 |
| 4.3 | The Characteristics of an International Joint Venture and Shareholder Control | 63 |

Table of Contents

| | | |
|---|--|----|
| 4.4 | Diversity of Legal Methods for Creating an International Joint Venture | 63 |
| 4.5 | Diversity of Legal Forms of International Joint Ventures | 64 |
| 4.6 | Convergence of Legal Methods and Legal Forms for International Joint Ventures | 64 |
| 4.7 | International Joint Ventures Raise Specific Problems of Documentation, Including the Shareholders' Agreement | 65 |
| 4.8 | Contractual Joint Ventures or the Unincorporated Joint Venture | 65 |
| 4.9 | A Shareholders' Agreement Has No Place in the Joint Venture Known as a Consortium | 66 |
| 4.10 | Partnership: Contractual or Equity Joint Venture? | 66 |
| 4.11 | The Universal Equity Joint Venture | 67 |
| 4.12 | Equity Joint Venture Definition | 68 |
| 4.13 | Management Rights Are Property Rights Which Must Be Protected by a Shareholders' Agreement | 68 |
| 4.14 | The Form of the International Joint Venture Must Permit an Efficient Use of a Shareholders' Agreement | 69 |
| CHAPTER 5 | | |
| The Contractual Theory of the Shareholders' Agreement | | 71 |
| 5.1 | Practical Importance of a Theory of the Shareholders' Agreement | 71 |
| 5.2 | A Unified Theory for the Shareholders' Agreement | 73 |
| 5.3 | Formal Requirements | 74 |
| 5.4 | The Shareholders' Agreement Is a Contract Subordinate to the Corporate Articles of Incorporation Regulating the Rights of Shareholders | 75 |
| 5.5 | The Shareholders' Agreement Addresses the Specific Needs of the Individual Shareholder and Seeks to Protect Shareholder Rights | 75 |
| 5.6 | The Universal Formality of the Articles of Incorporation Contrasts with the Uniqueness of the Shareholders' Agreement | 77 |
| 5.7 | The Formalism of Company Law and the Flexibility of the Shareholders' Agreement | 77 |
| 5.8 | The Conflict between the Articles of Incorporation and the Shareholders' Agreement | 78 |
| 5.9 | Registration Requirements: The Shareholders' Agreement and Its Effect on Third Parties | 78 |
| 5.10 | The Contemporary Aspect of the Shareholders' Agreement | 79 |
| 5.11 | The Breach of the Shareholders' Agreement | 79 |
| 5.12 | The Creation of the Shareholders' Agreement a Tool of Lawyers | 80 |
| 5.13 | The Public Corporation, the Private Company or Closely-Held Corporation, and the Shareholders' Agreement | 81 |
| 5.14 | The History of the Shareholders' Agreement in Common Law and Civil Law Jurisdictions | 82 |

| | |
|--|-----|
| CHAPTER 6 | |
| Common Law, Statutory, and Civil Law Definitions of Shareholders' Agreement | 85 |
| 6.1 Definitions of a Shareholders' Agreement USA | 85 |
| 6.2 The Shareholders' Agreement in the UK, Canada, and Australia | 89 |
| 6.3 Civil Law Definitions | 90 |
| 6.4 Other Definitions within Civil Law Systems | 91 |
| 6.5 The Shareholders' Agreement in Germany | 92 |
| 6.6 The Shareholders' Agreement in the European Union | 94 |
| 6.7 Neither Common Law nor Civil Law Jurisdictions | 94 |
| 6.8 The Empirical Theory of the Shareholders' Agreement | 95 |
| 6.9 There Is Theory and There Is Practice and They Must Complement Each Other | 95 |
| CHAPTER 7 | |
| General Drafting Suggestions for Shareholders' Agreements | 97 |
| 7.1 Forms: Drafting Suggestions of a Shareholders' Agreement | 97 |
| CHAPTER 8 | |
| Drafting Suggestions for Transfer Restrictions in Shareholders' Agreements | 111 |
| 8.1 Forms for Transfer Restrictions | 111 |
| CHAPTER 9 | |
| How the Shareholders' Agreement Functions in International Joint Ventures | 121 |
| 9.1 The Function of a Shareholders' Agreement in International Joint Ventures | 121 |
| 9.2 Forms of a Joint Venture Which Favor the Shareholders' Agreement | 122 |
| 9.3 The Traditional Model of a Joint Venture | 122 |
| 9.4 Constellation of Contracts Is Not a Joint Venture | 122 |
| 9.5 Management Agreement Is Not a Joint Venture | 123 |
| 9.6 Building Block Format Is Not a Joint Venture | 123 |
| 9.7 Shareholders Agreement Forms Part of Numerous Documentation | 123 |
| 9.8 What Is the Function of the Shareholders' Agreement Amidst Various Documents? | 123 |
| 9.9 Standstill Restrictions in the International Joint Venture and the Shareholders' Agreement | 125 |
| 9.10 Advantages of a Shareholders' Agreement over Joint Venture Agreement | 125 |
| 9.11 The Distribution of Power between the Shareholders' Agreement and the Joint Venture Agreement | 127 |

| | |
|---|-----|
| 9.12 Using the Shareholders' Agreement for Purposes of Control in a Joint Venture | 128 |
| 9.13 Avoidance of Contradiction between Joint Venture Agreement and Shareholders' Agreement | 128 |
| 9.14 The Management Aspect of a Shareholders' Agreement in a Joint Venture | 129 |
| 9.15 Characteristics of a Joint Venture and the Use of a Shareholders' Agreement | 129 |
| 9.16 Similar Names Does Not Mean Similar Concepts | 132 |
| 9.17 In Favor of the Private Limited Liability Company | 132 |
| CHAPTER 10 | |
| The Basic Elements of the Shareholders' Agreement | 133 |
| 10.1 The Shareholders' Agreement Form in All Its Aspects | 133 |
| 10.2 The Form of the Shareholders' Agreement | 134 |
| 10.3 The Law Which Governs the Shareholders' Agreement | 134 |
| 10.4 The Classification of Shareholders' Agreements | 135 |
| 10.5 The Parties to a Shareholders' Agreement | 135 |
| 10.6 Joining the Corporation as a Party | 136 |
| 10.7 The Shareholder Who Is Also a Director or Administrator | 137 |
| 10.8 The Shareholders' Agreement and the Time of Its Execution | 137 |
| 10.9 The Shareholders' Agreement and the Classification of the Share | 137 |
| 10.10 The Shareholders' Agreement and Registration | 138 |
| 10.11 The Shareholders' Agreement and Term | 138 |
| 10.12 The Shareholders' Agreement with Excessive Term | 139 |
| 10.13 The Shareholders' Agreement and Its Objectives | 140 |
| 10.14 Amendment of the Shareholders' Agreement | 140 |
| 10.15 The Articles of Incorporation as an Abbreviated Shareholders' Agreement | 141 |
| 10.16 Should the Articles of Incorporation and the Shareholders' Agreement Contain References to One Another? | 141 |
| 10.17 The Policy Limits of the Shareholders' Agreement | 142 |
| 10.18 The Unanimous Shareholders' Agreement | 143 |
| 10.19 The Shareholders' Agreement and Minority Rights | 145 |
| 10.20 The Shareholders' Agreement as Arbiter of Diverse Corporate Powers | 146 |
| 10.21 Creating the Shareholders' Agreement with Minimum Standard Clauses | 147 |
| 10.22 Adherence Agreement | 147 |
| 10.23 Incorporation Articles Used as Abbreviated Shareholders' Agreement | 148 |

Table of Contents

| | |
|---|-----|
| CHAPTER 11 | |
| Drafting Suggestions for Basic Shareholders' Agreement | 151 |
| 11.1 Forms for Basic Shareholders' Agreement | 151 |
| 11.2 Minimum Dividend in Articles of Incorporation | 151 |
| 11.3 Venture Capital Investors | 152 |
| 11.4 Typical Shareholders' Agreement of Closely Held Corporation | 153 |
| 11.5 Insertion of Renewal Clause | 165 |
| 11.6 Simple Management Agreement of Private Limited Liability Company without Shares | 165 |
| CHAPTER 12 | |
| International Joint Ventures & Special Clauses in the Shareholders' Agreement | 169 |
| 12.1 The Shareholders' Agreement as Protection against Shareholder Aggression | 169 |
| 12.2 Topical List (39) for Shareholders' Agreement in International Joint Venture | 170 |
| 12.3 Discussion of Topical List | 171 |
| 12.4 The Deadlock Company | 182 |
| 12.5 Symptoms of Deadlock | 183 |
| 12.6 Terminations Issues | 183 |
| CHAPTER 13 | |
| Controlling the Board of Directors | 187 |
| 13.1 The Common Law and the Civil Law: Different Histories with Different Conclusions | 187 |
| 13.2 The Shareholders' Agreement and Common Law Jurisdictions | 188 |
| 13.3 The Shareholders' Agreement and Civil Law Jurisdictions | 188 |
| 13.4 The Future Legal Form for Use of the Shareholders' Agreement | 190 |
| 13.5 The Legislative Approach to Restrictions on Management | 190 |
| 13.6 The Closely Held Corporation History and the Shareholders' Agreement | 192 |
| 13.7 The Board of Directors in a Share Corporation and in a Private Limited Liability Company | 192 |
| 13.8 Controlling the Board of Directors and General Policy Considerations | 194 |
| 13.9 Designation and Election of Directors | 195 |
| 13.10 Removal of Directors | 196 |
| 13.11 Replacement of Directors | 197 |
| 13.12 Board Composition and Quorum Considerations | 197 |
| 13.13 Delegation of Powers, in Part, to a Third Party, Such as a Committee | 198 |

Table of Contents

| | |
|---|-----|
| 13.14 Limiting the Powers of the Directors: General Conclusions | 199 |
| 13.15 Limits of Restrictions: Sterilizing the Board of Directors | 203 |
| CHAPTER 14 | |
| Drafting Suggestions for Controlling the Board of Directors | 205 |
| 14.1 Foreign Investor Protection | 205 |
| 14.2 Protection as to Presence in General Assembly | 207 |
| 14.3 Veto by Non-resident Foreign Investor | 208 |
| 14.4 Restriction on Management | 212 |
| 14.5 Certificate of Incorporation, By-Laws, and Certificate Legends | 215 |
| CHAPTER 15 | |
| International Joint Ventures and Controlling the Board of Directors | 217 |
| 15.1 The Shareholders' Agreement and the Protection of Management Functions | 217 |
| 15.2 The Number of Directors and Company Articles | 218 |
| 15.3 Controlling the Board of Directors and Private Agreements | 218 |
| 15.4 Dismissal of Management | 219 |
| 15.5 Quorum Obligations as a Safeguard to Minority Interests | 220 |
| 15.6 Quorum Rights: Constituent Assembly and Valid Voting | 222 |
| 15.7 Voting Requirements and Distinction from Qualified Majority on Certain Issues | 223 |
| 15.8 Customizing the International Joint Venture through the Use of the Shareholders' Agreement | 224 |
| 15.9 Table of Items Concerning Management in Shareholders' Agreement | 224 |
| 15.10 The Shareholders' Agreement as the Arbiter of Power | 235 |
| 15.11 Rights Are Being Created; Modified; Power Distributed and Power Weakened | 236 |
| CHAPTER 16 | |
| Restrictions on the Transfer of Shares | 239 |
| 16.1 Transfer Is Not Transmission | 239 |
| 16.2 Why Transfer Restrictions? | 242 |
| 16.3 Theory of Transfer Restrictions and Consequences for the Concepts of "Transfer" and "Transmission" | 242 |
| 16.4 Parties to Share Restrictions: Shareholder, Spouse, and Company | 243 |
| 16.5 Where Should the Transfer Restrictions Appear? | 244 |
| 16.6 Pre-incorporation Agreement | 244 |
| 16.7 Articles of Incorporation | 244 |
| 16.8 ByLaws | 245 |
| 16.9 Restrictions in the Shareholders' Agreement | 246 |

| | | |
|------------|--|-----|
| 16.10 | Formal Requirements of Share Restrictions | 246 |
| 16.11 | Notice of Share Restrictions to Shareholders and Third Parties | 247 |
| 16.12 | What Are the Different Options by Which Restrictions Are Formulated? | 247 |
| 16.13 | Practical Guidelines | 247 |
| 16.14 | Problems Where the Corporation Has the Priority to Purchase Instead of Cross-Options to the Other Shareholder(s) | 249 |
| 16.15 | Right of First Refusal (ROFR)/Right of First Offer (ROFO) | 249 |
| 16.16 | Mandatory Sale Provisions | 250 |
| 16.17 | Optional Valuation Standards | 250 |
| 16.18 | Drag-Along and Tag-Along Rights | 251 |
| 16.19 | Drag-Along Issues | 251 |
| 16.20 | Testamentary Dispositions and Involuntary Transmissions Conflicting with Share Restrictions | 252 |
| 16.21 | Liens and Pledges | 253 |
| 16.22 | Divorce and Dissolution of Marriage | 254 |
| 16.23 | Enforcement | 255 |
| 16.24 | Valuation Issues | 255 |
| 16.25 | Book Value | 255 |
| 16.26 | Agreement on Purchase Price | 256 |
| 16.27 | Market or Best Offer Price | 256 |
| 16.28 | Capitalizing Earnings | 256 |
| 16.29 | Appraisal | 257 |
| 16.30 | Board of Directors, Other Shareholder(s) | 257 |
| 16.31 | Tax Rulings | 257 |
| 16.32 | The Most Practical Method | 258 |
| 16.33 | Payment Provisions | 258 |
| 16.34 | Tax Considerations | 258 |
| 16.35 | Conclusion | 260 |
| CHAPTER 17 | | |
| | Drafting Suggestions for Share Transfer Restrictions | 261 |
| CHAPTER 17 | | |
| 17.1 | Topical Items for Restrictions on Transfer Transmissions | 261 |
| 17.2 | Sample Forms Restrictions on Transfers | 263 |
| 17.3 | Tag Along and Drag Along Right | 264 |
| 17.4 | Right of First Refusal to Corporation | 267 |
| 17.5 | Estate Planning Exceptions | 268 |
| 17.6 | Variation of Exception for Estate Planning | 269 |
| CHAPTER 18 | | |
| | International Joint Ventures and Transfer Restrictions | 271 |
| CHAPTER 18 | | |
| 18.1 | The Relevant Legal Form for International Joint Ventures and Transfer Restrictions | 271 |

| | | |
|------------|---|-----|
| 18.2 | The Objectives of Restrictions and Other Clauses in a Shareholders' Agreement | 272 |
| 18.3 | The Search for a Sustainable Theory of the Joint Venture Company: The Division of Power | 273 |
| 18.4 | The Sharing of Power | 274 |
| 18.5 | Absolute Restrictions and Conditional Restrictions | 276 |
| 18.6 | Private Limited Liability Company and Restrictions | 277 |
| 18.7 | Insertion of Restrictions in Operative Documents | 277 |
| 18.8 | Circumventing the Rule against Absolute Restrictions | 278 |
| 18.9 | Essential Topics for Transfer Restrictions | 278 |
| CHAPTER 19 | | |
| | Rights of the Minority Shareholder | 285 |
| CHAPTER 19 | | |
| 19.1 | The Morass of the Minority Shareholder | 285 |
| 19.2 | Symptoms of Festering Dispute and Unraveling of Shareholder Cooperation | 286 |
| 19.3 | Typical Common Law Jurisdictions: USA, the Close Corporation, and the Private Limited Liability Company | 287 |
| 19.4 | Remedies for Shareholder Dissension: UK and the Private Limited Liability Company | 287 |
| 19.5 | Typical Civil Law Jurisdictions | 289 |
| 19.6 | Dissolution as a Remedy When There Is Shareholder Dissension: Customizing the Triggering Events | 290 |
| 19.7 | What Realistic Default Relief Do Minorities Shareholders Have at Law? | 292 |
| 19.8 | Buy-Out Provisions Are an Efficient Method to Avoid Litigation and Permit a Fair Exit Option for Shareholders | 294 |
| 19.9 | Valuation Methods | 295 |
| 19.10 | Funding | 298 |
| 19.11 | Choice of Law and Choice of Forum Clauses | 299 |
| 19.12 | Absence of Choice of Law Clause | 299 |
| CHAPTER 20 | | |
| | Drafting Suggestions: Expanding Adversary Rights for the Minority Shareholder | 301 |
| CHAPTER 20 | | |
| 20.1 | Access to Corporate Documents | 301 |
| 20.2 | Dispute Resolution | 302 |
| 20.3 | Restricting Power of Arbitrator | 304 |
| 20.4 | Material Not Subject to Arbitration | 305 |
| 20.5 | Dissolution Rights | 307 |
| 20.6 | Specific Buy Sell Clauses Following Arbitration | 308 |
| 20.7 | General Clause for Buy-Sell Agreements | 311 |
| 20.8 | Clause Providing for Shareholder to Choose Alternate Jurisdiction | 312 |

| | |
|--|-----|
| CHAPTER 21 | |
| International Joint Ventures and Shareholder Dissension | 315 |
| 21.1 Introduction to Dispute Resolution | 315 |
| 21.2 Conciliation | 317 |
| 21.3 Mediation | 319 |
| 21.4 Issues Relating to Mediation | 320 |
| 21.5 Mediation as a Condition to Further Action | 321 |
| 21.6 The Topics to Be Mediated | 321 |
| 21.7 The Selection of Mediators | 322 |
| 21.8 Exchange of Information and Confidentiality of the Mediation Process | 322 |
| 21.9 The Mediation Process | 323 |
| 21.10 Enforceability of Mediation | 324 |
| 21.11 Adjudication | 324 |
| 21.12 Arbitration | 326 |
| 21.13 Tribunal | 329 |
| CHAPTER 22 | |
| The End of the Shareholders' Agreement Breach and Remedies | 333 |
| 22.1 Conflicting Sources for the Protection of Shareholders | 333 |
| 22.2 Introducing the Constitutional Shareholders' Agreement | 334 |
| 22.3 Multiple Sources Provide Multiple Rights to the Shareholder | 334 |
| 22.4 Remedies for Breach Sought in All Documentation under Nexus of Contracts Theory | 335 |
| 22.5 Termination of the Shareholders' Agreement | 335 |
| 22.6 Distinguishing the Many Sources of the Remedies | 336 |
| 22.7 Analytical Scheme of Remedies for Aggrieved Shareholder | 337 |
| 22.8 General Litigation Remedies and Their Theories under Shareholders' Agreement | 337 |
| 22.9 Litigation Risk When Company Party to Shareholders' Agreement | 337 |
| 22.10 The Constitutional Shareholders' Agreement | 339 |
| 22.11 Available Remedies Associated to the Private Shareholders' Agreement | 340 |
| 22.12 Specific Performance | 341 |
| 22.13 Shareholder Injunctive Relief | 342 |
| 22.14 Damages and Discharge | 343 |
| 22.15 Statutory Remedies Granted to the Oppressed Shareholder Independent of the Shareholders' Agreement and the Importance of Reasonable Expectations | 343 |
| 22.16 Oppression and Related Concepts Influenced by the Concept of Reasonable Expectations of the Parties | 344 |
| 22.17 Oppressed Minority Shareholders and Remedies | 345 |
| 22.18 Avoiding the Shareholders' Agreement | 345 |

| | |
|--|-----|
| 22.19 Selecting the Appropriate Law and Forum in Search of Broad, Effective Remedies | 346 |
| 22.20 Commercial Arbitration Problems | 346 |
| 22.21 Choice of Law Provisions | 347 |
| 22.22 Internal Affairs Doctrine | 348 |
| 22.23 Forum Selection | 348 |
| CHAPTER 23 | |
| International Joint Ventures and the End of the Shareholders' Agreement | 351 |
| 23.1 Termination of the Joint Venture | 351 |
| 23.2 Reasons for Withdrawal | 352 |
| 23.3 Mechanisms of Exiting | 352 |
| 23.4 Post-termination Restraints on Commercial Conduct of Joint Venture Parties | 354 |
| 23.5 Continuation of the Joint Venture | 356 |
| 23.6 Continuation of Contractual Obligations | 357 |
| 23.7 Existing Liabilities of Withdrawing Partner | 357 |
| APPENDIX I | |
| Shareholders' Agreement Checklist | 361 |
| APPENDIX II | |
| Checklist International Joint Venture Integrated with Shareholders' Agreement | 369 |
| APPENDIX III | |
| Forms for the Practitioner | 377 |
| APPENDIX IV | |
| Shareholders' Agreements | 381 |
| Bibliography | 435 |
| Table of Cases | 443 |
| Index | 445 |