IX NATIONAL LAW SCHOOL-TRILEGAL INTERNATIONAL ARBITRATION MOOT, 2016

IN THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE ARBITRAL TRIBUNAL AT BANGALORE, REPUBLIC OF ARBERIA

IN THE MATTER CONCERNING THE CAPACITY LEASE AGREEMENT AND SHAREHOLDERS' AGREEMENT BETWEEN:

CLAIMANT: **BLUE SKY B.V.**

AND

RESPONDENT: **AIR MEDIA PVT. LTD. AND OTHERS**

MEMORIAL ON BEHALF OF THE CLAIMANT

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¶¶/¶	Paragraph
A.C.	Appeal Cases
ADR	Alternate Dispute Resolution
AIR	All India Reporter
AJIL	American Journal of International Law
AII ER	All England Reporter
Anr.	Another
ANSAT	Arberian Satellite
AOA	Articles of Association
Arb	Arbitration
ARSO	Arberian Space Organisation
Art	Article
Ch	Chapter
Ch.d	Chancery Division
Cir.	Circuit
CLA	Capacity Lease Agreement
Co.	Company
COLUM.L.REV	Columbia Law Review
DTH	Direct to Home
DoS	Department of Space
ECR	European Courts Reporter
EAA	English Arbitration Act, 1996

ECA	English Companies Act 2006
FSA	Founding Shareholder's Agreement
Govt	Government
H.L	House of Lords
Hon'ble	Honorable
ICSID	International Centre for Settlement of Investment Disputes
ILR	International Law Report
Int'l	International
J.	Journal
Kosmix	Kosmix Corporation Limited
L.R	Law Reporter
Ltd	Limited
MoU	Memorandum of Understanding
No.	Number
NYC	New York Convention
OECD	Organization for Economic Cooperation and Development
p.	Page
pp.	Pages
Pub	Publication
QB	Queen's Bench
QBD	Queen's Bench Division
R.I.A.A	Reports of International Arbitral Awards

Supp	Supplementary
SC	Space Commission
SC	Supreme Court
SCC	Supreme Court Cases
SHA	Share Holders Agreement
Trib.	Tribunal

STATEMENT OF JURISDICTION

Blue Sky b.v. (Claimant) has the honour to submit the present dispute and its memorandum before this SIAC Arbitral Tribunal at Bangalore, Arberia, under Article 6 of the Shareholders' Agreement under the SIAC Rules, seated in London and governed by principles of corporate and commercial law common to Arberia and England.

STATEMENT OF FACTS

I

ARBERIAN SATELLITE COMMUNICATIONS PROGRAM AND POLICY: In 1969, the Government of Arberia established the Arberian Space Organisation (ARSO) to carry out its national space program. It later constituted the Space Commission (SC) and established the Department of Space (DoS), after which ARSO was brought under DoS management. Kosmix was the commercial arm of DoS. Senior ARSO and DoS officials sit on Kosmix's board of directors. There is no codified law in Arberia on the grant of satellite capacity licenses or lease. In 1997, the Arberian Government approved the 'Framework for Satellite Communication Policy in Arberia' (SatCom Policy) with an aim to develop a healthy and thriving communications satellite as well as encouraging private sector investment in the space industry in Arberia, amongst other things.

II

ESTABLISHMENT OF AIR MEDIA PRIVATE LIMITED: In February 1998, Air Media was incorporated as a private company with the aim to provide multimedia data services on mobile devices in Arberia using satellite technology. Air Media's founding shareholders were 4 Arberian nationals who formerly worked at ARSO, NASA, and other space technology entities in Arberia and abroad. The four shareholders entered into a Founding Shareholders Agreement (FSA), which was not incorporated into the articles of association of Air Media. The company's articles of association were not registered under the Arberian Companies Act, 1956.

III

AIR MEDIA'S CONTRACT WITH KOSMIX FOR SATELLITE CAPACITY: In December 2000, Air Media and Kosmix entered into a Memorandum of Understanding, to explore space-based digital multimedia delivery opportunities based on new technologies that Air Media was developing by itself.

In January 2004, Air Media concluded an agreement with Kosmix (Capacity Lease Agreement or CLA) leasing out 5 transponders for the manufacture and launch by of "Aspiration-1" satellite by ARSO.

Under the CLA, Kosmix would be responsible for all necessary governmental approvals relating to orbital slot and frequency clearances, and to raise the funding for the satellite. Kosmix could terminate the CLA "for convenience" in the event "it is unable to obtain the necessary frequency and orbital slot coordination approval on or before the pre-shipment review of the particular satellite." The parties' performance of the CLA would be "suspended" in the case of "force majeure".

All disputes relating to this agreement, including its validity, were to be submitted to arbitration under the SIAC Rules, to be seated in New Delhi. Arberian law governed the contract.

IV

THE NEW INVESTMENT INTO AIR MEDIA: In September 2004, two new shareholders were brought into Air Media. The rights attaching to each class of shares were specified in a Shareholders Agreement (SHA) entered into by and between all shareholders and Air Media, which gave different voting rights to Class A (Blue Sky), Class B (Space Age) and Class C(Founder) shareholders.The SHA was not incorporated into Air Media's articles of association.

All disputes relating to the SHA, including its validity, were to be submitted to arbitration under the SIAC Rules to be seated in London and decided by three arbitrators. The SHA was to be governed by "principles of corporate and commercial law common to Arberia and England." (Article 6, SHA)

V

THE PERFORMANCE OF THE CLA: In July 2004, ARSO placed a proposal before a regular meeting of the SC seeking budgetary support for the design, manufacture and launch of a new satellite to be called Aspiration-1. The SC approved the proposal but the minutes of the SC meeting do not make any reference to the CLA.

In August 2004, at a regular Cabinet meeting, the Cabinet approved the DoS' Note and Kosmix conveyed to Air Media that it had received the necessary approval for building, launching, and leasing the capacity of a new satellite.

VI

TERMINATION OF THE CLA: In June 2009, a new chairman took over at ARSO. He ordered a committee "to review and examine the legal, commercial, procedural and technical aspects" of the CLA, which found certain procedural and technical lapses in the same. Following this, DoS sought legal advice from both the Ministry of Law and Justice and the government law officers, who opined that the agreement be terminated for 'convenience' and 'force majeure' under Article 8 and 9 of the Agreement. In light of the 2 G Spectrum scam, the Media reported a similar view on the CLA between Air media and Kosmix. The Prime Minister and Law Minister made statements that in light of the government policies with regard to allocation of spectrum having undergone a change, they would annul the agreement. Based on this communication, on 25 January 2011, Kosmix wrote to Air Media that it would annul the agreement under Article 8 and 9, and the amounts paid by Air Media to Kosmix under the CLA will be reimbursed.

VII

THE SHAREHOLDERS' DISPUTE: A meeting of Air Media's board was held on 24 December 2010, wherein Blue Sky wished to negotiate a full reimbursement of Air Media's payments to Kosmix. Space Age and the Founding Directors wished initiate legal correspondence against Kosmix. All the directors agreed that they needed to consider the matter further and possibly take legal advice. No decision was taken. The Board met again on 27 December 2010, and a vote was taken on whether legal correspondence should be initiated against Kosmix, where Blue Sky vehemently opposed the same but were outnumbered, as it was an ordinary matter discussion. As part of the second Agenda, Blue Sky Directors introduced a draft special resolution proposing the voluntary winding up of Air Media, which the Chairman did not propose as both the Founder Directors as well as the Space holder directors held could not be introduced without consultation.

On 31 December 2010, Blue Sky served a Notice of Arbitration jointly on Air Media, Space Age, and the Founders claiming breaches of the SHA and appointing one arbitrator (***SHA Notice of Arbitration***).

On 26 January 2011, Air Media issued a Notice of Arbitration to Kosmix under the CLA seeking annulment of Kosmix's purported termination of the CLA and/or damages including lost profits (***CLA Notice of Arbitration***).

On 1 February 2011, Air Media, Space Age and the Founders jointly sent a Response to the SHA Notice of Arbitration, denying Blue Sky's claims in entirety, and making counterclaims. They jointly appointed the second arbitrator. On 27 February 2011, the two arbitrators wrote to the parties that they had agreed on the presiding arbitrator and that the Tribunal was now constituted. The first hearing will take place in Bangalore, Arberia.

ISSUES RAISED

The following questions have been raised before this Hon'ble Tribunal to consider:

I. In relation to Issues (II)-(IV), what is the content of law applicable to the SHA?

II. Under the law applicable to the SHA, is it valid and enforceable?

III. Under the law applicable to the arbitration agreement, does the Arbitral Tribunal have jurisdiction to decide whether the directors acted in bad faith or violated their fiduciary duties when casting their votes on 27 December 2010?

IV. Under the law applicable to the SHA, are the decisions taken at the 27 December 2010 meeting valid?

SUMMARY OF ARGUMENTS

I. THE CONTENT OF LAW APPLICABLE TO ISSUES (2)-(4)

The principle of *jura novit curia* does not apply to common law countries following the Anglo-American system of jurisprudence. As per the SIAC Rules and English Arbitration Act, 1996, the arbitrator is to take into consideration the substance of the facts and legal arguments put forth by the parties and would apply the rules of law designated to the parties to the substance of the dispute and is discouraged from undertaking its own investigation.

A. Law Applicable to the Substance Of the Contract

The law that applies to the SHA in this present dispute is principles of corporate and commercial law common to Arberia and England, forming a common, neutral set of principles designed to ensure that no party is in a more favourable position than the other. This is the *tronc commun* doctrine, which implies that the parties have expressed their intention that their relationship be, in no way, governed by their national laws.

B. Law Applicable to the Arbitration Agreement

The law applicable to the arbitration agreement is the English law, the English Arbitration Act, 1996. In the absence of an express choice of law applicable to the arbitration agreement, the law of the seat governs the arbitration clause. This is based on the implied intent of the parties to seat the arbitration in London.

II. VALIDITY OF THE SHA UNDER THE APPLICABLE LAW

Under the applicable law, the SHA is valid as consensual agreements between shareholders that are not incorporated into the articles are enforceable insofar as they are not contrary to the articles of the company but are not enforceable as a regulation of the company and do not bind it. However, they are binding among the parties as a valid personal contract between them. As Air Media is a party to the SHA, it is bound by its terms. Thus, the Respondents are all bound by the SHA and the Claimant's affirmative vote is to necessarily be obtained in order to commence legal proceedings or arbitration**.**

a. ALL PARTS OF ARTICLE 1 ARE VALID

It is submitted that all parts of the SHA are valid under the applicable law, namely, the right of the Claimant's nominee director to veto any decision of the board relating to

commencement of legal proceedings or arbitration, the right to require that the founding shareholders vote with the Claimant on matters of winging up, preferential repayment of the Claimant in the event of winding up and the right of the Claimant to appoint up to three directors to the company's board are valid and recognised rights under the applicable law.

i. THE ARBITRAL TRIBUNAL CAN ORDER SPECIFIC PERFORMANCE OF ARTICLE 1

Under the applicable law, it is a recognised principle that arbitral tribunals can order specific performance as a remedy. Contractual relations such as voting agreements are examples of agreements which can be specifically enforced. Given the fact that monetary compensation would not benefit the Claimant as commencement of legal proceedings or arbitration would infect its other investments, it is appropriate that the Tribunal grant specific performance of the SHA.

1. THE LAW OF THE CONTRACT GOVERNS THE POWER TO ORDER SPECIFIC PERFORMANCE

Remedies can be granted only if there is a valid contract in existence. Thus, the power to grant remedies stems from the contract. Hence, law governing the substantive part of the contract must recognise providing specific performance as a remedy. Under the applicable law, it has been established that Arbitral Tribunals have the power to provide specific relief as a remedy.

III. THE TRIBUNAL HAVE JURISDICTION OVER THE INTRA-CORPORATE DISPUTE AND THE TERMINATION OF THE CLA WAS LAWFUL

The Arbitral Tribunal has the jurisdiction to arbitrate disputes of fiduciary duties and acts of bad faith of the directors. These intra-corporate disputes fall within the scope of the arbitration agreement. This is based on the broad wording of the arbitration agreement, which under English law allows arbitration of fiduciary disputes and acts of bad faith. The arbitrability of the dispute is also not contrary to public policy as provided under the English law. The tribunal has jurisdiction to decide upon the intra-corporate disputes in the present case. As the disputes are arbitrable, the scope of the tribunals review also extends to deciding the reasons given by the directors for the termination of the CLA under Arberian Law. The termination of the CLA is lawful and in accordance with the laws of Arberia. The conditions for the invocation of force majeure have been fulfilled by the Claimants, whereby Kosmix

exercised reasonable care to meet the conditions under the CLA. The termination under Aricle 9 was due to the sovereign decision of the Government of Arberia. Moreover, Air Media did not take necessary approvals for terrestrial spectrum and the policy violations in the allotment of the license would render the CLA termination lawful under Arberian Law.

IV. THE MEETING HELD ON 27 DECEMBER 2010 WAS INVALID

The meeting that took place on 27th December is invalid, as it is important that the contents of a notice and agenda are to state the business to be transacted at the meeting. The notice must also be of reasonable length of time, and a resolution is invalid where it was passed at a meeting of which too short a notice was given and which did not state the purpose of the meeting. The SHA was not complied with in terms of the voting rights, and the arbitration tribunal has the power to grant remedies such as a declaratory relief and specific performance, and can also ask the respondents to withdraw the notice of Arbitration.

ARGUMENTS ADVANCED

1. With respect to issues (2)-(4), what is the content of law applicable to the SHA?

A. LAW APPLICABLE TO SHA

The principle of *jura novit curia* embodies the court's power to base its decisions upon law not advanced by the parties during the procedure.[1] In common law jurisdictions, it is presumed that that the court does not know the law and is confined to adjudicate the case on the exclusive basis of the legal pleadings of the parties' counsel. The rule is not a part of English law[2] and is not applied to foreign laws pled in English courts[3]. Section 34(1)(2)(g) of the EAA, 1996, provides the Tribunal with the power to decide all matters including the extent of ascertaining the facts and the law. Where the seat of arbitration is in England or Wales, a tribunal is bound to apply the English approach to determining the content of foreign law.[4] Rule 17.2 of the SIAC Rules, 2010 states that the parties shall state in their submissions, a statement of facts and legal grounds supporting the claim together with the relief claimed. Rule 27.1 states that the Tribunal would apply the rules of law designated by the parties to the substance of the dispute. The Tribunal is discouraged from engaging in independent investigations[5] and is confined to adjudicate the case on the basis of the legal pleadings of the parties. The law that applies to the SHA in this present dispute is principles of corporate and commercial law common to Arberia and England,[6] forming a common, neutral set of principles designed to ensure that no party is in a more favourable position than the other. In the *Liamco* Arbitration,[7] the Arbitral Tribunal held that any part of Libyan law in conflict with the principles of international law was to be excluded.[8] This is the *tronc commun* doctrine, which implies that the parties have expressed their intention that their

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[1] Anna Mantakou, *The Misadventures of the Principle Jura Novit Curia in International Arbitration – A Practitioner's Approach*, ESSAYS IN HONOUR OF SPYRIDON VI. VRELLIS 487, 487-498 (2014).
[2] F.A. *Mann, Fusion of the Legal Professions*, 93 L. Q. Rev 367 (1977).
[3] Koji Takahashi, *Foreign Law in Japanese Courts – A Comparison with the English Approach: Idealism versus Pragmatism*, SINGAPORE JOURNAL OF LEGAL STUDIES 489, 492 (2002).
[4] Hussman (Europe) Ltd. v. Al Ameen Dev & Trade Co. [2000] EWHC 210 (Comm).
[5] Ieva Kalnina, *Iura Novit Curia: Scylla and Charybdis of International Arbitration?* 8 BALTIC Y.B. INT'L. L 89, 103 (2008).
[6] Moot Proposition, p. 6.
[7] Libyan American Oil Company v. The Libyan Arab Republic, Award, 12 April 1977 (S. Mahmassani, sole arb.), 20 I.L.M. 1 (1981).
[8] ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, 104 (Sweet & Maxwell, London, 2004).

relationship be, in no way, governed by their national laws.[9] The Arbitral Tribunals[10] and the Courts[11] have applied this doctrine.

B. LAW APPLICABLE TO THE ARBITRATION AGREEMENT

The law applicable to the arbitration agreement is the EAA, 1996. The concept that the seat governs arbitration is established in both the theory and practice.[12] In the absence of an express choice of law applicable to the arbitration agreement, the law of the seat governs the arbitration clause,[13] based on the implied intent of the parties to seat the arbitration in London.[14] The conduct of the arbitral proceedings in Bangalore does not effect the choice of law regarding the arbitral seat.[15] The foundation for application of distinct law is the doctrine of separability[16] which treats the arbitration clause as distinct.[17] The SIAC rules provide the parties the freedom to agree upon the seat.[18] An agreement as to the seat is analogous to an exclusive jurisdiction clause.[19]

C. LAW APPLICABLE TO ARBITRABILITY OF THE INTRA-CORPORATE DISPUTE

Arbitrability is a condition for validity of the arbitration agreement. The *lex arbitri* is applicable in the determination of the arbitrability[20] as it is an accepted proposition that the law applicable to the arbitrability of the dispute is the law of the seat.[21]

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[9] Mauro Rubino-Sammartano, *The Channel Tunnel and the Tronc Commun Doctrine*, 10 JOURNAL OF INTERNATIONAL ARBITRATION 59, 59 (1993).
[10] ICC Proceedings No. 2866 of 1977; ICC Proceedings No. 3327 of 1981.
[11] Channel Tunnel Group Ltd. and France Mansche S.A. v. Balfour Beatty Construction Ltd. and Ors. (1992) 2 All E.R. 609; Deutsch Schachtbau und Tiefbohrgesellschaft mbh v. The R'as al Khaimah National Oil Co. and Shell International Petroleum Co. Ltd (1987) 2 All E.R. 769.
[12] REDFERN & HUNTER, *supra* note 8 at 98
[13] *Id;* Bharat Aluminium Co. Ltd. v. Kaiser Aluminium Technical Services Inc, 2012 (9) SCC 552.
[14] SIMON GREENBERG, ET AL. INTERNATIONAL COMMERCIAL ARBITRATION: AN AREA PACIFIC PERSPECTIVE, 54 (Cambridge University Press, 4th ed. 2011); Sul America cia Nacional de Seguros SA and Anr v. Enesa Engenharia SA and Ors [2012] EWHC 42 (Comm). Arsanovia Ltd. v. Cruz City 1 Mauritius Holdings [2013] 2 All E.R. 1.
[15] Lesotho Highlands Development Authority v. Impregilo Spa, [2006] 1 A.C. 221 (House of Lords).
[16] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 411-412 (Vol. 2, Kluwer Law International, 2009); C v. D [2007] EWCA Civ 1282.
[17] Fiona Trust v. Privalov [2008] 1 LLR 254.
[18] SIAC Rules 2010, rule 18; Firstlink Investments Corporation. Ltd v. GT Payment Pte Ltd [2014] SGHCR 12; PT Garuda Indonesia v. Birgen Air [2002] 1 SLR (R) 401.
[19] Shashoua v. Sharma [2009] EWHC 997 at 23.
[20] Bernard Hanotiau, *The Law Applicable to Arbitrability*, 26 SAcLJ 874 (2014).
[21] *Id*; ICC *Case No. 6162* (1990), XVII Y.B. Comm. Arb. 158-159 (1992).

2. VALIDITY OF THE SHA UNDER THE APPLICABLE LAW

A pertinent question that arises when deciding upon the validity of the SHA is whether principles common to Arberian **[A]** and English **[B]** company law allows shareholders to enter into agreements among themselves outside the scope of the articles.

A. THE SHA IS VALID UNDER ARBERIAN COMPANY LAW

The ACA, 1956 is silent regarding whether shareholders' agreements are valid and enforceable. The Arberian Supreme Court upheld the rights of shareholders to enter into agreements among themselves which may or may not include the company as a party to such an arrangement.[22] The Bombay High Court[23] interpreted *Rangaraj*[24] to be applicable not only to restrictions on sale of shares, but also to all private agreements between shareholders. The abovementioned cases lay down the requirement of incorporation of the SHA into the articles of the company for it to be enforceable. The SHA was not incorporated into Air Media's articles of association.[25] It is submitted that the requirement of incorporation into the articles is an antiquated requirement that cannot be used to deny the enforceability of the SHA. The Privy Council[26] held that 'no law that precludes the shareholders from contracting for value that they shall each submit to any reasonable restriction which they choose to agree to.' Further, the Bombay High Court[27] held that the Supreme Court in *S.P. Jain*[28] does not in any way hold that transfer of shares agreed between shareholders *inter se* does not bind them or cannot be enforced like any other agreement. That means that it is open to the shareholders to enter into consensual agreements, which are not in conflict with the articles of association, the Act and the Rules, in relation to the shares held by them, and such agreement can be enforced like any other agreement. The Bombay High Court[29] held consensual agreements between shareholders relating to their shares can be enforced like any other agreement and there is no requirement for them to be embodied in the articles of association. The Supreme Court[30] observed that it did not subscribe to the view in *Rangaraj*[31]. Shareholders have the power to enter into any agreement in the best interests of the company, but the agreement

[22] V.B Rangaraj v. V.B Gopalakrishnan AIR 1992 SC 543
[23] IL and FS Trust Co. Ltd. v. Birla Perucchini Ltd. [2004] 121 Comp Cas 335 (Bom).
[24] *Rangaraj, supra* note 22.
[25] Moot Proposition, p. 6.
[26] Ontario Jockey Club Ltd. v. Samuel McBridge AIR 1928 Privy Council 291
[27] Messers Holdings Ltd. v. Shyam Madanmohan Ruia [2010] 159 Comp. Cas. 29 (Bom).
[28] Shanti Prasad Jain v. Kalinga Tubes Ltd. [1965] 35 Comp Cas. 351 (SC).
[29] *Messers Holdings Ltd., supra* note 27.
[30] Vodafone International Holdings BV v. Union of India (2012) 6 SCC 613.
[31] *Rangaraj, supra* note 22.

cannot be contrary to the articles.[32] The provisions of the SHA are not contrary to the articles. The SHA creates classes of rights that are exercisable by the three classes of shareholders. Thus, the rights of the equity shareholders have been validly varied to this effect. As per section 106 of the ACA, the variation of the rights attached to a class of shares has to be authorized by the articles of the company. The articles of Air Media were registered under the ACA and mirrored the provisions of Table A of the ACA.[33] Regulation 3(1) of the articles provides that the rights attached to the classes of shares may be varied with the consent of the members. The shareholders had *mutually agreed* to enter into an SHA, thus, it can be inferred that this variation took place with the consent of the members. Therefore, the variation of rights is not repugnant to section 106 either. Thus, under Arberian law, the SHA and the different classes of rights created under it are valid and enforceable.

B. THE SHA IS INVALID UNDER ENGLISH COMPANY LAW

Shareholders' agreements have been used to eradicate the tyranny of the majority or to distribute voting rights among the shareholders[34] and have the advantage of privacy because they do not have to be filed at the Companies House.[35] Shareholders' agreements have been recognized as valid.[36] Courts have held that such arrangements are not prohibited by law, by good morals or public order.[37] The only ground on which an SHA can be challenged is if it frustrates the operation of mandatory, statutory corporate powers.[38] In the present case, the SHA does not require that the company contract out of its statutory power. In the case of *Russell,*[39] the House of Lords held that the shareholders' agreement regulating voting rights of members was valid and enforceable, notwithstanding its non-incorporation into the articles. It further held that the agreement was enforceable against the parties to the agreement, and not against the company in the event that any clause contained in the

[32] *Vodafone International Holdings BV, supra* note 30.
[33] Moot Clarification, Procedural Order-1.
[34] V. Goldwasser, *Shareholders Agreements: Patent Protection for Minorities in Closely Held Corporations,* 22 A.B.L.R 265, 275 (1944); Vasudha Anil Kumar, *The Enforceability of Shareholder Agreements in India: Freedom to Contract versus the Freedom to Transfer* 24(1) I.C.C.L.R. 24, 35 (2013).
[35] PAUL L. DAVIES, GOWER AND DAVIES' PRINCIPLES OF MODERN COMPANY LAW, 676, (8th ed., Sweet and Maxwell, 2008).
[36] Greenwell v. Porter [1902] 1 Ch. 530; Greenhalgh v. Mallard [1943] 2 All E.R. 234.
[37] Ringuet v. Bergeron (1960) 24 D.L.R. (2d) 449.
[38] Giora Shapira, *Voting Agreements and Corporate Statutory Powers,* 109 L.Q.R. 215, 210-215, (1993).
[39] Russell v. Northern Bank Development Corporation Ltd. [1992] 1 W.L.R. 558.

agreement is in conflict with an existing legislation.[40] It held that as between the shareholders, the clause was a valid personal agreement[41] and that a promise by shareholders as to how they will exercise their votes is valid and can be enforced by injunction, if need be. This flows from the general proposition that the right to vote is a property right which a shareholder is free to exercise his own selfish interests, and an agreement between shareholders as to how to exercise their votes is valid and enforceable[42] as a private binding contract between the members for the time being of the company[43] so long as they do not affect third parties or the general public.[44] The jurisprudence of the company has to reflect the reality of free incorporation.[45]

The variation of class rights is valid under English law as section 630 of the ECA allows for variation if the holders of the shares consent. Under the applicable law, consensual agreements between shareholders that are not incorporated into the articles are enforceable insofar as they are not contrary to the articles of the company but are not enforceable as a regulation of the company and do not bind it. However, they are binding among the parties as a valid personal contract between them. Thus, the Respondents are bound by the SHA and the Claimant's vote is to be obtained in order to commence legal proceedings or arbitration.

a. ALL PARTS OF THE SHA ARE VALID

All parts **[A-D]** of Article 1 of the SHA are valid as per the applicable law.

A. RIGHT TO VETO DECISION OF BOARD OF THE COMPANY TO COMMENCE LEGAL PROCEEDINGS OR ARBITRATION

A board of a corporation is elected – at least in substantial part – by the firm's shareholders.[46]

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[40] Vasudha Anil Kumar, *supra* note 24.
[41] Eilis Ferran, *The Decision of the House of Lords in* Russell v. Northern Bank Development Corporation Limited, 53 CAMBRIDGE LAW JOURNAL 343, 344 (1994).
[42] Rita Cheung, *Shareholders' Agreements – Shareholders' Contractual Freedom in Company Law,* 6 J.B.L. 504, 508 (2012).
[43] DEREK FRENCH, STEPHEN W. MAYSON & CHRISTOPHER RYAN, MAYSON, FRENCH & RYAN ON COMPANY LAW, 74 (13th ed., Oxford University Press, 2014-2015).
[44] Rita Cheung, *supra* note 42 at 530.
[45] Clare M.S. McGlynn, *The Constitution of the Company: Mandatory Statutory Provisions v. Private Agreements,* 15(10) COMP. LAW. 301, 301 (1994).
[46] John Amour, Henry Hansmann & Reinier Kraakman, *What is Corporate Law?* in THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH, 14 (Oxford University Press, 2nd ed., 2009).

This helps ensure that the board remains responsive to the interests of the firm's owners.[47] Section 291 of the ACA describes the general powers of the board and does not explicitly mention that the business of the company is to be vested solely in the board. In the absence of such a provision either in the articles or in the ACA, it is implied that directors are to obey the instructions of the shareholders. The Calcutta High Court[48] referred to Halsbury's Laws of England which stipulate that in the absence of any contract to the contrary in the articles, the majority of the members of the company are entitled to decide, even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. Hence, the majority of the shareholders of a Company have the ultimate control of its affairs and are entitled to decide whether or not an action in the name of the Company shall proceed. This proposition is accepted in England, the principles of which can be extended to Arberia. The English Commercial Court[49] has held that English law and Indian law share the same principles, unless proven otherwise. Courts have permitted members of the company to decide whether legal proceedings should commence in the name of the company.[50] The right of the director appointed by the Claimant to veto any decision of the Board to commence legal proceedings or arbitration is a valid right. It is possible for members in general meeting to control the board of directors by passing an ordinary resolution, provided the resolution is not inconsistent with the Companies Act or the articles.[51] It has been argued that *Marshall*[52] was correctly decided and that shareholders are entitled to interfere in companies.[53] In the absence of any contract to the contrary, the majority of shareholders in a company have the ultimate control of its affairs and are entitled to decide whether or not an action in the name of the company may proceed.[54] Professor Gower notes that leaving the power of initiation of litigation solely with the board would be an unsound policy as it may operate against the interests of the company in some circumstances.[55] Even if the board does not wish to sue, it is open to the shareholders

[47] *Id*.
[48] Murarka Paint and Varnish Works Ltd. v. Mohanlal Murarka and Ors. AIR 1961 Cal 251
[49] Reliance Industries Ltd. v. Enron Oil and Gas India Ltd. and Another [2002] 1 Lloyd's Rep. 645.
[50] MAYSON, FRENCH AND RYAN *supra* note at 43.
[51] Marshall's Valve Gear Co. Ltd. v. Manning Wardle & Co. Ltd. [1909] 1 Ch. 267
[52] *Id.*
[53] G R Sullivan, *The Relationship between the Board of Directors and the General Meeting in Limited Companies,* (1977) 83 L.Q.R 569, 578.
[54] Pender v. Lushington 6 Ch. D. 70; Duckett v. Gover 23 Ch. D. 82; Harben v. Phillips (1883) 23 ChD 14.
[55] DAVIES, *supra* note 35 at 607.

collectively by ordinary resolution to decide to do so.[56] Nominee directors are nominated to ensure that the interests of the institution they represent are duly or effectively safeguarded.[57] Since the director appointed by the Claimant is their nominee director, it is his job to ensure that the interests of the Claimant are protected. Thus, creation of such right in the SHA is valid, as English law provides that majority shareholders can have control over the affairs of the company. In the present case, it is possible for the members to decide whether action should commence in the name of the company.

B. VOTING AGREEMENTS:

The right of the Claimant to require that Class C shareholders vote along with it any matter pertaining to the winding up of the company is a valid right stemming from valid pooling agreement, enforceable between the shareholders. Pooling agreements have been defined[58] as 'an agreement between two or more shareholders which generally provides that in exercising any voting rights, the shares held by the shareholders shall be voted as provided therein.' Pooling agreements constitute a contract and held that agreements are enforceable because the right to vote is a 'proprietary right' of the shareholder.[59] In England, it is an established principle that an agreement between two or more shareholders to coordinate their votes is lawful, as it is a contract between some or all of the members of a company by which they agree *qua* shareholders to ensure that their company will be run in a particular way.[60] The vote of a shareholder is a part of his property and may be exercised, or contracted for, as he sees fit.[61] Shareholders can acquire, by contract, the right to compel sufficient of his fellow members to exercise their votes against a resolution and thereby to ensure that resolution's defeat.[62] The validity of agreements with voting agreements with a partial restriction have been upheld.[63] So long as the voting control remains with the shareholders who were parties

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[56] *Id.*
[57] A.C. FERNANDO, CORPORATE GOVERNANCE: PRINCIPLES, POLICIES AND PRACTICE, 192 (1st ed., Prentice Hall College Div., 2009).
[58] *Rolta India Ltd., supra* note 58.
[59] *Id.*
[60] L.S Sealy, *Shareholders' Agreements: An Endorsement and a Warning from the House of Lords*, 51 CAMBRIDGE LAW JOURNAL, 437, 437 (1992).
[61] C.A. Riley, *Vetoes and Voting Agreements: Some Problems of Consent and Knowledge*, 44. N. IR. LEGAL Q. 34, 37 (1993); D.D Prentice, *Alteration of Articles of Association – Expropriation of Shares*, 112 L.Q.R. 194, 194 (1996). North-West Transportation Co. Ltd. v. Beatty (1887) 12 App. Cas. 589; Greenhalgh v. Arderne Cinemas Ltd. [1946] 1 All E.R. 512; Pender v. Lushington 6 Ch. D. 70.
[62] Riley, *id.*
[63] *Russell, supra* note 39.

to, and bound by, the original agreement, that agreement will continue to provide an effective veto, and a new member can be outvoted accordingly.[64] An agreement between shareholders as to how they would vote was a valid personal obligation and would not become the regulation of the company[65] Shareholders exercising their rights under a shareholders' agreement can use their votes as they wish.[66] The right to take a decision to wind up the company voluntarily is an important right of the shareholder[67] and there is no legal obligation on the part of the shareholder to give his or her vote merely with a view to what other persons may consider the interests of the company at large.[68] Thus, the provision is valid.

C. RIGHT TO RECEIVE PREFERENTIAL REPAYMENT IN CASE OF WINDING UP OR REPAYMENT OF CAPITAL

A shareholders' agreement may provide for a preferential payment of dividends and capital upon liquidation to the parties to the agreement[69] and is a valid contractual right. The preferential repayment to the Claimant would operate *qua* the existing shareholders, insofar as sections 529A and 530 of the ACA 175 and 176ZA of the English Insolvency Act, 1986, have been complied with first before the preferential right operates among them.

D. RIGHT TO APPOINT DIRECTORS

One of the features of the corporate form underlying corporate governance is the existence of a delegated management, which implies that shareholder influence is exercised indirectly, by electing directors.[70] Section 255(2) of the ACA states that subject to the regulations in the articles of the company, the directors of a private company which is not a subsidiary of a

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[64] Riley, *supra* note 61 at 38.
[65] Welton v. Saffery [1987] A.C. 299.
[66] LEN SEALY & SARAH WORTHINGTON, SEALY'S CASES AND MATERIALS IN COMPANY LAW, 248 (9th ed., Oxford University Press, 2010); Wilkinson v. West Coast Capital [2005] All E.R. (D) 346 (Dec.); [2005] EWHC 3009 (Ch.).
[67] DAVIES, *supra* note 35 at 376.
[68] William M.F Wong, *Can Shareholders Vote Irrationally?* 127 L.Q.R. 522, 524 (2011); Pender v. Lushington 6 Ch. D. 70; North West Transportation Co. Ltd. v. Beatty (1887) L.R. 12 App. Cas. 589 PC (Can.); Re Astec (BSR) Plc [1998] 2 B.C.L.C. 556 Ch.D.
[69] DARRELL PRESCOTT & SALLI SWARTZ, JOINT VENTURES IN THE INTERNATIONAL ARENA, 176 (2nd ed., American Bar Association, 2010).
[70] Luca Enriques, Henry Hansmann & Reinier Kraakman, *The Basic Governance Structure: The Interests of Shareholders as a Class* in THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH, 56 (2nd ed., Oxford University Press, 2009).

public company will be appointed by the company in general meeting.[71] The provisions of the articles are silent as to the appointment of directors, implying that all the directors will have to be appointed by the shareholders. There is nothing in the ACA or the articles that prevent the shareholder from exercising the rights to appoint a certain number of directors to the board of the company. Thus, the provision mandating that the Claimant can appoint three directors is valid under Arberian law. The ECA says leaves the means of appointing directors to the articles of association.[72] As the law permits that shareholders appoint directors, an agreement specifying who shall hold these offices is valid.[73] Article 1 of the SHA provides that the Claimant has the power to appoint three directors to the board by way of ordinary resolution, as stipulated in Regulation 17. There is nothing to prevent the articles from providing that a particular class of shareholders, rather than shareholders as a whole, can appoint directors.[74] Extra voting rights were given to shareholders to remove a director from office have been held to be valid.[75] Thus, extra voting rights to a class of shareholders to appoint a director would not be illegal, hence, the provision is valid.

i. THE ARBITRAL TRIBUNAL CAN ORDER SPECIFIC PERFORMANCE OF THE VALID PARTS OF ARTICLE 1

The Arbitral Tribunal has the power to grant specific performance under Arberian **[A]** and English **[B]** law. Most domestic laws empower an Arbitral Tribunal to award specific performance.[76] Even absent an express agreement conferring such powers, courts have routinely upheld grants specific performance of contractual obligations.[77] Courts have observed that the words used to confer power to resolve the dispute confer 'unlimited flexibility' in the method of its resolution.[78] Specific performance has been granted by Arbitral Tribunals in arbitrations by the ICSID.[79] Awards that required specific performance

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[71] A. RAMAIYA, GUIDE TO THE COMPANIES ACT, 3334 (17th ed., vol. 2, Lexis Nexis Butterworths Wadhwa, Nagpur).
[72] DAVIES, *supra* note 35 at 378.
[73] George D. Hornstein, *Shareholders' Agreements in the Closely Held Corporation,* 59 Yale L.J. 1040, 1043 (1949-1950).
[74] DAVIES, *supra* note 35 at 379.
[75] Bushell v. Faith [1969] 2 Ch. 438.
[76] THE FORDHAM PAPERS 2007, INTERNATIONAL ARBITRATION AND MEDIATION, 183 (Arthur Rovine ed., Martinus Nijhoff Publishers, 2007).
[77] *Id.*
[78] Compare NSW Racing v. TAB [2002] N.S.W.S.C. 742; McNeil v. Magee16 F. Cas. 326; Ethiopian Oilseeds & Pulses Exp. Corp. v. Rio del Mar Foods Inc. [1990] 1 Lloyd's Rep. 86 (Q.B).
[79] Enron v. Argentina ICSID Case No. ARB/01/3.

of a contract to deliver coal[80] and cotton[81] have been upheld, and such relief is not contrary to the *functus officio* doctrine.[82] Parties can agree that the discretion to grant specific performance can be exercised by a forum of their choice.[83]

A. ARBITRATOR'S POWER TO GRANT SPECIFIC PERFORMANCE IN ARBERIA

This power has been upheld by the Supreme Court[84] (upholding decisions of the Bombay[85], Punjab[86] and Calcutta[87] courts) as there is no prohibition in the Specific Relief Act, 1963, that the issues relating to specific performance cannot be referred to arbitration. Specific performance of a contract for transfer of shares in a private limited company has been granted by Indian courts,[88] holding that specific performance may be enforced when there is no standard for ascertaining the actual damage caused by the non-performance of the act or when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.[89] In the instant case, the decisions taken at the meeting were in violation of the Claimant's rights under Article 1 of the SHA. The Claimant was restrained from providing an affirmative vote to commence legal proceedings or arbitration, despite the right being granted to it.[90] A breach of such a nature that has the possibility of affecting all of the Claimant's investments in different companies cannot be compensated by way of monetary damages, and specific performance would be the only adequate remedy in order to ensure that the Respondents adhere to the terms of the SHA.

B. ARBITRATOR'S POWER TO GRANT SPECIFIC PERFORMANCE IN ENGLAND

In England, specific performance is available when the nature of relations makes the remedy

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[80] Island Creek Coal Sales Co. v. City of Gainesville 729 F.2d 1046, 1049 (6th Cir. 1984).
[81] Marion Manufacturing Co. v. Long 588 F.2d 538 (6th Cir. 1978).
[82] BORN, *supra* note 16 at 2483; Dreis & Krump Mfg. Co. v. Intl. Association of Machinists and Aerospace Workers, etc. 802 F.2d. 247 (7th Cir. 1986); Engis Corp v. Engis Ltd. 800 F.Supp. 627, 632 (ND. Ill. 1992).
[83] POLLOCK & MULLA, THE INDIAN CONTRACT AND SPECIFIC RELIEF ACTS, 1881 (Nilima Bhadbhade ed., vol 2, 14th ed., 2012).
[84] Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan and Ors. (1999) 5 SCC 651;
[85] Fertiliser Corporation of India v. Chemical Construction Corporation ILR 1974 Bombay 856 (D.B).
[86] Laxmi Narayan v. Raghubir Singh AIR 1956 Punjab 249.
[87] Keventer Agro Ltd. v. Seegram Comp. Ltd. (Calcutta High Court, unreported,27 January 1998).
[88] Madhusoodanan v. Kerala Kaumudi Pvt. Ltd. (2004) 9 SCC 204.
[89] *Madhusoodanan, supra* note 88; Chloro Controls (I) Pvt. Ltd. v. Severn Trent Water Purification Inc. and Ors. Civil Appeal No. 7134 of 2012.
[90] Moot Proposition, p. 17.

appropriate.[91] Voting agreements are contractual relations. English law of equity allows for the granting of negative/prohibitive injunctions binding shareholders to refrain from voting in a general meeting for particular resolutions.[92] Courts can compel shareholders to vote in a particular manner based on their contractual obligations.[93] In *Russell,*[94] the House of Lords accepted the availability of negative injunctions when a voting agreement interfered in the provisions of the statute and the articles of association. The Court in *Puddephatt*[95] ordered the defendant to vote according to the instructions of the plaintiff based on the shareholder agreement, because in the preceding general meeting the defendant had voted against the instructions of the plaintiff.[96] Section 48(5)(b) of the EAA, 1996 provides Arbitral Tribunals with the power to grant specific performance as a relief. Contracts among majority shareholders to elect certain persons as directors have been held to be valid, the relief of specific performance was granted as the enforcement of such a right 'damages nobody.'[97] The legal proceedings would only be able to commence in the name of the company if the Claimant provides its affirmative vote with regard to the same.

1. THE LAW APPLICABLE TO THE CONTRACT IDENTIFIES THE TRIBUNAL'S POWER TO ORDER SPECIFIC PERFORMANCE

The remedies powers of an international Arbitral Tribunal are defined he parties' arbitration agreement. Parties may also have the commercial intent to grant the arbitrators broad powers to fully and satisfactorily resolve their dispute in a practical manner.[98] The purpose of contractual remedies is to place a promisee in the position he would have enjoyed had his promisor performed.[99] Specific performance is the most accurate method of achieving the compensation goal of contract remedies because it gives the promisee the precise performance that he purchased.[100] Specific performance is a right that arises from the contract

[91] Susan Gomstian, *The Enforcement of Shareholder Agreements under English and Russian Law*, 7 J. Comp. L. 115, 130 (2012).
[92] *Id.*
[93] *Id.*
[94] *Russell*, *supra* note 39.
[95] Puddephat v. Leith [1916] 1 Ch. 200, 202
[96] Gomstian, *supra* note 91.
[97] Clarke v. Dodge 269 N.Y. 410.
[98] BORN, *supra* note 35 at 2479.
[99] Alan Schwartz, *The Case for Specific Performance*, Faculty Scholarship Series, Paper 1118, (1979) p. 252.
[100] *Id.*

that enforces the actual performance that the claimant is entitled to according to its terms.[101] In Arberian Supreme Court[102] held that there must be a valid contract in existence in order to claim specific performance. A plaintiff claiming specific performance has to show that a valid contract exists.[103] There must be a lawful, binding, contract on all the certain, precise terms that Court can order and supervise the exact performance of.[104] Article 10(1)(c) of the Rome Regulation, 1980 (incorporated into English law by way of Article 10(1) of the Contracts (Applicable Law) Act, 1990) provides that the law applicable to contractual obligations will govern the consequences of total or partial breach of obligations or damages. The damages from a broken contract is considered to be arising naturally from the *breach of contract*.[105] Claimants were entitled to remedies the material law allows courts to order specific performance of a contract.[106]

3. THE TRIBUNAL HAS JURISDICTION OVER THE INTRA-CORPORATE DISPUTE

The Claimant humbly contests the jurisdiction of the Tribunal regarding the intra-corporate dispute and the scope of review over the reasons of the directors for their votes. This argument is fivefold: *Firstly*, the Tribunal has competence to determine its own jurisdiction **[A]**. *Secondly*, under the law applicable to the arbitrability of the dispute, corporate disputes concerning fiduciary obligations and bad faith fall within the substantive scope of the arbitration agreement **[B]**. *Thirdly*, the intra-corporate disputes of fiduciary nature and allegations of bad faith against the directors are arbitrable under the SHA **[C]**. *Fourthly*, the arbitrability of these disputes is not contrary to public policy **[D]**. *Fifthly* the Arbitral Tribunal has the power to decide for its own purposes that the Government's termination of the Capacity Lease Agreement (*hereinafter* CLA) is lawful **[E]**. Lastly, the enforceability of the award does not affect the arbitrability of the dispute **[F]**.

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[101] Ewan McKendrick & Iain Maxwell, *Specific Performance in International Arbitration*, 1 CHINESE JOURNAL OF COMPARATIVE LAW 195, 199 (2013).
[102] Kanmana Sambamurthy v. Kalipatnapu Atchutamma AIR 2011 SC 103.
[103] POLLOCK AND MULLA, *supra* note 83 at 1885.
[104] *Id.*
[105] Hadley v. Baxendale (1843-60) All E.R. Rep. 461.
[106] ICC Final Award in Case No. 8032 of 1995; INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, YEARBOOK: COMMERCIAL ARBITRATION, 113 (Albert Jan Van Den Berg, ed., vol. XXI-1996, Wolters Kluwer (India) Pvt. Ltd, 2008).

A. THE TRIBUNAL HAS COMPETENCE TO DETERMINE ITS OWN JURISDICTION

The Tribunal is competent to determine its own jurisdiction on the basis of the doctrine of *Kompetenz-Kompetenz*,[107] which is a recognized principle under English law and the SIAC rules.[108] Moreover the validity of the arbitration agreement is not affected if the Tribunal holds the contract null and void.[109]

B. VIOLATION OF FIDUCIARY DUTIES AND ACTS OF BAD FAITH FALL WITHIN THE SCOPE OF THE ARBITRATION AGREEMENT

The use of the phrase 'all disputes relating to' in the arbitration clause of the SHA indicates the broad nature of the arbitration clause[110] and extends to claims beyond the contract.[111] Article 6 of the SHA is broad as it covers 'all disputes relating to the SHA'. If the clause is 'broadly worded, it will catch breaches of directors duties which are imposed by law and equity'.[112] When the corporation is party to the arbitration agreement, the director's duties would fall within the scope of the arbitration agreement.[113]

C. THE INTRA-CORPORATE DISPUTE IS ARBITRABLE UNDER THE LAWS OF ENGLAND

a. FIDUCIARY DUTIES AND ACTS OF BAD FAITH OF DIRECTORS IS ARBITRABLE

The Arbitral Tribunal is competent to arbitrate on the violations of fiduciary duties and acts of bad faith of the directors. Arbitrability is a broad concept with few prescriptive rules as to its scope and application.[114] There are neither 'English statutory provisions nor common law

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[107] A&B v. C&D [1982] 1 Lloyds Rep 166; C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 415 (2001); Oracle Am., Inc. v. Myriad Group A.G., 724 F.3d 1069, 1071 (9th Cir. 2013); Petrofac, Inc. v. DynMcDermott Petroleum Operations Co., 687 F.3d 671, 674 (5th Cir. 2012).

[108] Fallo v. High-Tech Inst., 559 F.3d 874, 876 (8th Cir. 2009); Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366, 1369 (Fed. Cir. 2006); Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327, 1329 (11th Cir. 2005); Getzelman v. Trustwave Holdings, Inc., No. 13-cv-02987-CMA, 2014 WL 3809736.

[109] BORN, *supra* note 35 at 411-412 (Vol. 2, Kluwer Law International, 2009); C v. D [2007] EWCA Civ 1282.

[110] REDFERN AND HUNTER, *supra* note 35 at ¶3-40; BORN, *supra* note 35 at 319-320.

[111] Julian v. Julian, No. 4137-VGP, 2009 WL 2937121 at *5 (Del. April 23, 2009); Brown v. Coleman Co., Inc., 220 F.3d 1180, 1184 (10th Cir. 2000).

[112] St. Pierre v. Chriscan Enterprises Ltd. Docket 84835 Vancouver British Columbia 2011 BCCA 97; Premium Nafta Products Limited v. Fiji Shipping Company Limited ("Fiona Trust") [2007] UKHL 40; PT Thiess Contractors Indonesia v. PT Kaltim Prima Coal [2011] EWHC 1842 (Comm) at [35]; DAVID JOSEPH QC, JURISDICTION AND ARBITRATION AGREEMENTS AND THEIR ENFORCEMENT ¶11.15-11.16 (Sweet & Maxwell, 2ndEd, 2010) ("Jurisdiction and Arbitration Agreements"); Oao Gazprom v. Ministry of Energy of the Republic of Lithuania, Arbitration No.: V (125/2011) SCC.

[113] Wendy Kennett, *Arbitration of Intra-Corporate Disputes*, INTL. J. L. & MGT. 16, 17 (2013).

[114] James Carter & Sophie Payton, *Arbitration and Company Law in England and Wales* in EUROPEAN COMPANY LAW, 141 (Wolters Kluwer, 2015).

rules',[115] which restrict the arbitration of certain intra-corporate disputes. Therefore, the 'permissive approach'[116] is used for the determination of the arbitrability of the dispute.[117] Inarbitrability under English law has been accepted to be not an 'issue which goes to the jurisdiction of the tribunal.'[118] A shareholders' agreement to arbitrate corporate and management disputes is permissible if it does not 'affect third party rights or is contrary to public policy.'[119] Here, all relevant parties are party to the arbitration (i.e., shareholders and the corporation). The arbitrability of the dispute is not contrary to the public policy of England. Both these conditions are satisfied in the present case and hence the dispute is arbitrable. The EAA does not specify which disputes are arbitrable[120] and as disputes concerning intra-corporate,[121] shareholder disputes,[122] competition law[123] are arbitrable, fiduciary duties are also arbitrable. The presumption is always in favor of arbitrability.[124]

When the relief granted does not affect third parties then 'orders for regulations of the company's affairs' is within the scope of relief that can be granted by the Arbitral Tribunal. Jurisdictional limitations were no more than 'practical consequences' of choosing arbitration, and did not affect whether the subject matter is arbitrable.[125] The ECA does not limit the scope of intra-corporate dispute arbitration and has allowed arbitration as a means for shareholders to resolve disputes with the board of directors.[126] If all the relevant parties submit to arbitration, 'insolvency or intra-companies disputes would be perfectly arbitrable.'[127] It is accepted that fiduciary duties of the directors are arbitrable.[128] The absence

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[115] *Id.*
[116] Fulham Football Club (1987) Ltd. v. Richards [2011] EWCA Civ 855.
[117] James Carter & Sophie Payton, *Arbitration and Company Law in England and Wales* in EUROPEAN COMPANY LAW, 141 (Wolters Kluwer, 2015).
[118] *Id.*
[119] *Fulham Football Club (1987) Ltd., supra* note 116.
[120] THE ENGLISH ARBITRATION AC, §. 81(1)(a),
[121] *Fulham Football Club (1987) Ltd, supra* note 116
[122] In Re Vocam Europe Ltd (1998) B.C.C 396 Ch.
[123] ET Plus SA v. Jean-Paul Welter (2005) EWHC 2115 (Comm.) Q.B.
[124] Kristen Sanocki, *Determining Arbitrability of the Dispute,* J. DISP. RESOL. 251, 252 (2013).
[125] *Fulham Football Club (1987) Ltd, supra* note 116; MICHAEL J. MUSTILL AND STEWART C. BOYD, COMMERCIAL ARBITRATION, 173 (2nd ed., Butterworths, 2001).
[126] John Armour, Bernard Black, Brian Cheffins, Richard Nolan, *Private Enforcement of corporate law: An Empirical Comparison of the US and UK* 6 J. EMPIRICAL LEGAL STUD. 687, 722 (2009).
[127] K.H. Bockstiegel, S. Kröll & P. Nacimiento, ARBITRATION IN GERMANY - THE MODEL LAW IN PRACTICE, 1030, (Wolters Kluwer 2007).
[128] Robotunits Pty Ltd v. Mennel [2015] VSC 268; Sinwa S.S. (H.K.) Co. Ltd. v. Morten Innhaug [2010] 4 SLR 1; Desputeaux v. Editions Chouette (1987) Inc. [2003] 1 SCR 178; Pilar Perales Viscasillas, *Arbitrability of (Intra-) Corporate Disputes* in ARBITRABILITY: COMPARITIVE AND INTERNATIONAL LAW PERSPECTIVES, 140, 143 (2009).

of an attempt to define arbitrability[129] is based on recognizing party autonomy and 'drastically the extent of intervention by the courts in the arbitral process'.[130] The disputes of fraud and illegality have been held to be arbitrable, with court applying a narrow approach, which would not render disputes as inarbitrable.[131] This approach can be similarly being applied in the case of arbitrability of corporate disputes in case of fraud and illegality.

b. THE ARBITRABILITY OF THE DISPUTE DOES NOT CONTRAVENE THE PUBLIC POLICY OF ENGLAND

In *Fulham*[132], it was stated that there was no public policy reason to render inarbitrable an arbitration agreement concerning disputes of the internal management of a company.[133] Courts[134] have held that arbitrators should not be excluded from the application of public policy rules.[135] The court accepted that disputes concerning 'internal management of a company' and where the company's affairs have been conducted in a manner unfairly prejudicial to the interests of its members, there are is no issue of public interest being affected.[136] This is in consonance with *Russell*[137] and *Fulham,*[138] which recognize the primacy of freedom of contract over public policy measures.[139] Arbitrators should not be 'excluded from applying national rules of public policy nature'.[140] A dispute is not rendered inarbitrable if it involves public policy issues.[141] If all relevant parties submit to arbitration, insolvency or intra-company disputes will be perfectly arbitrable.[142] An arbitrator should be

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[129] MICHAEL J. MUSTILL AND STEWART C. BOYD, COMMERCIAL ARBITRATION, 149 (2nd ed., Butterworths, 2001).
[130] Brockton Capital LLP v. Atlantic- Pacific Capital LLC, [2012] EWHC 1459 (Comm).
[131] Westacre Investments Inc. v. Jugo import-SPDR Holding Co. Ltd. [2000] QB 288; London Steamship Owners' Mutual Insurance Association Ltd v. Kingdom of Spain, The Prestige (No 2) [2013] EWHC 3188.
[132] *Fulham Football Club (1987) Ltd., supra* note 116.
[133] *Fulham Football Club (1987) Ltd., supra* note 116
[134] *Premium Nafta Products Ltd., supra* note 112.
[135] Brekoulakis S., *Arbitrability and Conflict of Jurisdictions: The (Diminishing) Relevance of Lex fori and Lex Loci Arbitri,* in 1 CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION, 129 (eds., Franco Ferrari, Stefan Kröll).
[136] *Fulham Football Club (1987) Ltd., supra* note 116.
[137] *Russell, supra* note 39.
[138] *Fulham Football Club (1987) Ltd., supra* note 116
[139] Marc Moore, *Private Ordering And Public Policy: The Paradoxical Foundations Of Corporate Contractarianism* 34 (4) OXFORD J LEGAL STUDIES 693, 728 (2014);
[140] Stavros Brekoulakis, *Arbitrability – Persisting Misconceptions and New Areas of Concern*, in ARBITRABILITY: INTERNATIONAL & COMPARATIVE PERSPECTIVES, 35 (Kluwer Law International, 2009).
[141] ET Plus SA v. Jean-Paul Welter (2005) EWHC 2115 (Comm.) Q.B; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., (1985) 473 U.S. 614, 626-27 (U.S. S.Ct)
[142] ET Plus SA v. Jean-Paul Welter (2005) EWHC 2115 (Comm.) Q.B.

entitled to apply the principles and rules of public policy and grant redress.[143] The arbitrability of the dispute cannot be denied only on the ground that the 'mandatory provisions of law or a given material public policy make the claim null and void or its execution impossible'.[144] *Beattie*[145] does not prevent the shareholders from initiating derivative action against the directors as it ruled on the ability of the directors[146] to invoke the arbitration clause. Arbitration serves the objectives of corporate governance[147] in contrast to litigation as the 'means to protect investor's interests holding directors liable in courts'.[148] Questions of breach of directors' duties and acts of bad faith are arbitrable[149] as there is no sufficient public interest.[150] This public policy concern of arbitration is absent in the present case, as the shareholders and corporation are party to the SHA.[151] The emphasis on party autonomy provides for flexibility regarding procedural rules and confidentiality over litigation.[152] The use of public policy for the determination of inarbitrability of a dispute has diminished relevance[153] and has limited application in determining the scope of arbitrability.[154] The accusation that arbitration of fiduciary duties reduces the precedential development of company law cases has been rejected and 'does not compromise the existing social value of the courts'.[155] Commentators[156] have suggested that there is a public interest in arbitrating corporate disputes to avoid the excessive costs associated with shareholder litigation. Therefore, the disputes within companies, which have no direct impact on third parties, then there can be 'no reason' that they would be inarbitrable.[157]

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[143] Ganz v. Nationale des Chemins de Fer Tunisiens (SNCFT), (1991) Rev. Arb. 478.
[144] Fincantieri-Cantieri Navali Italiiani and Oto Melara v. M and Arbitration Tribunal, (1995) XX YBCA 766.
[145] Beattie v E & F Beattie Ltd 1 Ch. 708, 719-20 (CA 1938).
[146] Goldberg, *The Controversy on the Section 20 Contract Revisited*, 48 MODERN LAW REVIEW 158 (1985).
[147] John Coffee, *No Exit? Opting Out, The Contractual Theory of the Corporation, and the Special Case of Remedies*, 53 BROOKLYN LAW REVIEW 919, 974 (1988);
[148] G Shaffer & M Pollack, *Hard Vs. Soft Law: Alternatives, Complements, And Antagonists In International Governance* 94(3) MINNESOTA LAW REVIEW 706, 799 (2010).
[149] Hal S. Scott & Leslie N. Silverman, *Stockholder adoption of mandatory individual arbitration for stockholder disputes* 36 HARVARD JOURNAL OF LAW & PUBLIC POLICY 1187,1230 (2013);
[150] Robotunits Pty Ltd v Mennel [2015] VSC 268;
[151] Brekoulakis, *supra* note 140 at 32.
[152] REDFERN & HUNTER, *supra* note 8 at 195.
[153] Antoine Kirry, *Arbitrability: Current Trends in Europe*, 12 ARB. INT. 4, 379 (1996); Brekoulakis, *supra* note 140 at 32.
[154] Brekoulakis, *id.*
[155] O'Neill v. Phillips [1999] B.C.C. 600; [1999] 1 W.L.R. 1092.
[156] Wendy Kennett, *Arbitration of Intra-Corporate Disputes*, INTL. J. L. & MGT. 16, 17 (2013).
[157] Sundaresh Menon, *Rethinking Arbitrability, Including the Arbitrability of Company Disputes*, in FLAWS AND PRESUMPTIONS: RETHINKING ARBITRATION LAW AND PRACTICE IN A NEW ARBITRAL

D. THE ARBITRAL TRIBUNAL HAS THE POWER TO REVIEW THE REASONS FOR THE DECISION TAKEN BY THE DIRECTORS OF AIR MEDIA

The courts in common law countries have held that merely because a question arises under a company law enactment, it does not render the dispute inarbitrable.[158] The reasoning that 'statutory power which the court would not have at common law apart from the statutory provision, does not mean that an arbitrator does not have the similar power.'[159] The reason that an arbitrator cannot grant all the remedies of the court, does not result in rendering the 'arbitration agreement of no effect.'[160] Specific provisions denoting the court's power to adjudicate do not exclude arbitration.[161] The Tribunal has the power to determine the reasons of the directors gave for the Governments termination of the CLA.

E. THE ENFORCEABILITY OF THE ARBITRAL AWARD DOES NOT AFFECT THE ARBITRABILITY OF THE DISPUTE

A narrow view has been adopted on non-arbitrability as a ground for non-enforcement of the arbitral award.[162] The national courts should 'subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration'.[163] The arbitral award will not be denied enforceability on the grounds of public policy, as arbitrability of fiduciary duties of the directors does not violate Arberia's public policy. Unless the remedies sought effect third parties, intra-corporate disputes are arbitrable.[164] Exclusive jurisdiction of certain of courts for certain disputes does not exclude arbitration. [165] The dispute does not become inarbitrable if it involves issues of public policy or mandatory law.[166] The application of the mandatory

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SEAT, 101 (The International Bureau of the Permanent Court of Arbitration eds., Mauritius Government Printing Department, 2010).

[158] Dean Witter Reynolds Inc v Byrd [1985] USSC 44; 470 US 213 (1985); Shearson Lehman Hutton Inc v. Wagoner 944 F 2d 114 (2nd Cir 1991);

[159] Wealands v. ICLC Contractors Ltd [1999] 2 Lloyd's Rep 739.

[160] *Fulham Football Club Ltd*. *supra* note 116.

[161] *Id.*

[162] Fouchard Goldman, International Commercial Arbitration, 996 (Kluwer Law International, 1999).

[163] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., (1985) 473 U.S. 614, 626-27 (U.S. S.Ct); BORN, *supra* note 16 at 775. Telenor Mobile Communications v. Storm L.L.C, 524 F.Supp.2d 332 (S.D.N.Y. 2007).

[164] Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 S.C.C. 532; HDFC Bank v. Satpal Singh Bakshi, (2013) 134 D.R.J. 556

[165] Pilar Viscasillas, *Arbitrability of (Intra-) Corporate Disputes* in ARBITRABILITY: COMPARITIVE AND INTERNATIONAL LAW PERSPECTIVES (eds., Mistelis/Brekoulakis, 2009).

[166] *Mitsubishi Motors Corp.*, *supra* note 163.

norms of the place of performance[167] will result in the arbitrator exceeding the jurisdiction provided under the arbitration agreement.

i. THE GOVERNMENT'S TERMINATION OF THE CLA IS LAWFUL

The termination of the CLA by the Government is lawful and in accordance with the laws of Arberia. The arguments of the Claimants in this regard are fourfold. Firstly that CLA validly terminated in accordance with Article 9 of the CLA. Secondly the termination for convenience is valid under Article 8. Thirdly the necessary approvals were not taken by Air Media in addition to material violations of the CLA. In Arguendo the policy violations in the allotment of the license would render the CLA termination lawful under Arberian law.

I. THE TERMINATION OF THE CLA UNDER ARTICLES 8 AND 9 IS LAWFUL UNDER ARBERIAN LAW.

a. THE INVOCATION OF FORCE MAJEURE IS A VALID GROUND FOR THE TERMINATION OF THE CLA

In order to satisfy the conditions of force majeure, *firstly* the impediment is beyond the control of the non-performing party[168]. *Secondly*, this could not have been foreseen at the time of entering into the contract.[169] The invocation of force majeure is to 'save the performing party from the consequences of anything over which he has no control.'[170] The contractual obligations in the present case, have become impossible to perform[171] due to the sovereign decision of the government to not allocate the spectrum. The change in government policy regarding the utlization of the S-Band renders the contractual obligations of Kosmix frustrated.[172] The responsibility of state enterprises for acts of public authority due to force majeure are based on the separation between the state enterprise and the state.[173] The acts of state in the form of administrative acts, due to the presumption that a state will not have its executive organs act to the detriment of its own state enterprise, should not be considered

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[167] WILLIAM W. PARK, ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE, 271 (Oxford University Press, 2nd ed., 2012).
[168] Industrial Finance Corporation of India Ltd. v. The Cannanore Spinning & Weaving Mills Ltd. and Ors, (2002) 5 SCC 54.
[169] *Id.*; Southern Gas Ltd. v. Visveswaraya Iron & Steel Ltd, (2003) 7 SCC 396.
[170] Dhanrajmal Gobindram v. Shamji Kalidas & Co, AIR 1961 SC 1285.
[171] Markfed Vanaspati & Allied Industries v. Union of India, AIR 2007 SCC 679; Alopi Parshad & Sons Ltd. v. Union of India, AIR (1960) SC 588.
[172] Naihati Jute Mills v. Khyaliram Jagannath, AIR 1968 SC 522.
[173] R. DOAK BISHOP, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS, AND COMMENTARY, 283 (James Crawford et al. eds.).

force majeure.[174] This presumption is not applicable if it can be *prima facie* proved that the administrative act was caused by general considerations not connected with this contract.[175] The three factors that are considered in the case of a state enterprise invoking force majeure is that firstly the state entity must possess a distinct legal identity from that of the state,[176] secondly the state entity must not act in collusion with the State to bring about the action that leads to force majeure,[177] and thirdly that the actions of the State must be 'either an act of state or a political decision of national sovereignty outside of the state's purely pecuniary interest in the commercial transaction.'[178] Kosmix exercises its own discretion regarding commercial transactions,[179] hence, as a state enterprise can rely on the force majeure clause. Where a state enterprise was subject to the authority of a Ministry and was denied licenses, the court held that the enterprise can invoke the force majeure clause.[180] Where the contract is cancelled due to a political campaign, then the state enterprise can declare *force majeure*, the 'corporate veil may not be pierced simply because the state approved the contract.'[181] Here, cancellation of the contract primarily based on the considerations of political decisions and national interest of the sovereign, which are valid cause for termination of the CLA under Article 8.[182] The governmental policies regarding allocation of satellite spectrum prevailing at the time of conclusion of the CLA in 2005 have varied, with the S-Band spectrum necessary for strategic requirements and societal services. The Supreme Court[183] has stated that 'Spectrum has been internationally accepted as a scarce natural resource which is susceptible to degradation in case of inefficient utilization'[184] based on the public trust doctrine[185]. The allocation of spectrum in violation of these principles would render the CLA unlawful.

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[174] CHRISTOPH BRUNNER, FORCE MAJEURE AND HARDSHIP UNDER GENERAL CONTRACT PRINCIPLES, 299 (Wolters Kluwer, 2008).
[175] BISHOP, *supra* note 173 at 284; *Id.* at 298.
[176] Pierre Lalive, *Arbitration with Foreign States' State-Controlled Entities: Some Practical Questions* in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION, 290 (Julian Lew eds., School of International Arbitration, 1998).
[177] Pac. Prop. (Middle East), Ltd. v. Arab Rep. of Egypt, 32 I.L.M. (1993).
[178] Lalive, *supra* note 176.
[179] Czarnikow Ltd. v. Centrala Handlu Zagranicznego, 1978 Lloyd's Rep. 305 (1978).
[180] Jordan Investments, Ltd. v. All-Union Foreign Trade Corp, 27 I.L.R. 631 (1958).
[181] *Pac. Prop.*, *supra* note 177.
[182] Lalive, *supra* note 176.
[183] Centre for Public Interest Litigation and others v. Union of India and Ors, (2009) 6 SCC 171.
[184] *Id.*
[185] Reliance Natural Resources Limited v. Reliance Industries Limited, (2010) 7 SCC 1; M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388 and has been applied in Jamshed Hormusji Wadia v. Board of Trustee, Port of Mumbai, (2002) 3 SCC 214; Intellectuals Forum, Tirupathi v. State of A.P, (2006) 3 SCC 549 and Fomento Resorts and Hotels Limited v. Minguel Martins, (2009) 3 SCC 571.

b. KOSMIX COULD NOT HAVE REASONABLY PREVENTED THE ANNULMENT OF THE CLA BY THE CCS

Kosmix was obligated under law to disclose the committee report and recommend an annulment of the CLA to the Space Commission, which is necessarily exercised in different roles Chairman of ARSO and Secretary of DoS. Kosmix did exercise all its powers in order to prevent the annulment and the decision of the Cabinet Committee on Security was independent of the acts of Kosmix. In the present case the event was not within the Kosmix's control, as several factors effected the decision arrived at by the CCS, rather than solely relying on the fact that it was reasonable for Kosmix to not have drawn the attention of the CCS to the irregularities in the CLA.

c. THE TERMINATION OF THE CLA IS VALID UNDER ARTICLE 8

Under Article 4, Kosmix was responsible for the necessary governmental approvals relating to orbital slot and frequency clearances, but the government was not obligated to provide the clearance considering the strategic requirements. Article 8 of the CLA allows for termination based on convenience, whereby Kosmix was unable to obtain the necessary frequency approval before the pre-shipment review of the satellite.

d. AIR MEDIA'S ACTS CONSTITUTED REPEATED MATERIAL VIOLATIONS OF THE CLA

The SIAC Rules 16.2[186] state that the 'Tribunal shall determine the relevance, materiality and admissibility of all evidence. Evidence need not be admissible in law.' Therefore the Committee reports of the experts[187] and as concurred in the clarification, holds that these allegations in the report do hold validity to adjudicate the dispute. The CLA recorded Air Media's representations and warranties that, Air Media had developed its own technology for S-DMB broadcasting and delivery, which was contradictory to the findings of the Committee, which constitutes a material violation of the CLA under Article 5.

II. IN ARGUENDO THE POLICY VIOLATIONS IN THE ALLOTMENT OF THE LICENSE WOULD RENDER THE CLA TERMINATION LAWFUL

[186] SIAC Rules, 2010, rule 16.2
[187] Procedural Order 1, Moot Clarification.

As the SDM-B technology is both terrestrial and satellite based, the Allocation of Business Rules[188] requires approvals from the Ministry of Telecommunications and the Ministry of Information & Broadcasting. The procedure followed for allocation was not in consonance with the DTH guidelines,[189] which require broadcasting services to not be used for telecommunication, requiring specific licenses from the competent authorities. Article 2.6.5 of the SatCom Policy was also violated as Kosmix signed the agreement to lease instead of DoS/ANSAT.[190]

ii. THE FOUNDER DIRECTORS AND SPACE AGE DIRECTORS HAVE VIOLATED THEIR FIDUCIARY DUTIES

Directors have a fiduciary obligation towards the company,[191] which requires the directors put the interests of the company first.[192] Rules preventing conflict of interest are integral to the understanding of fiduciary duties.[193] The Board meeting of the directors of Space Age clearly proves that the intent of the Space Age directors was to 'dominate Air Media and takeover its technology'[194] and to acquire the Claimant's shareholding at discount. The intent of the voting pattern of Space Age directors violated their fiduciary duties, as they did not act in the best interests of the company.[195] Air Media had approached Kosmix under the SatCom policy, but entered into a contract with Kosmix in violation of the SatCom Policy. It proceeded with Aspiration-2 when there was no Cabinet approval of the same. Despite having knowledge of the fact that the CLA termination was beyond the control of Kosmix, the founder and Space Age directors continued to pursue the enforcement of the CLA.

4. THE DECISIONS TAKEN AT THE MEETING WERE INVALID

The meeting was invalid as there was non-compliance with statutory procedure **[A]** and that the Founder and Space Age directors did not act in the best interests of the Company **[B]**.

A. NON COMPLIANCE WITH STATUTORY PROCEDURE

[188] Arberia (Allocation of Business Rules), 1961.
[189] Guidelines for Obtaining License for Providing Direct-to-Home (DTH) Broadcasting Service in India, 2001.
[190] SatCom Implementation Policy, art. 2.6.5 and 2.7.
[191] Bishop of Woodhouse v. Meredith (1820) 1 Jac & W 204.
[192] DAVIES, *supra* note 35 at 78.
[193] A. Scott, *The Fiduciary Principle,* 37 CALIFORNIA L.J. 539, 540 (1949).
[194] Moot Proposition, p. 17.
[195] SIC v. Sydney Investment House Equities Pty Ltd, (2008) NSWSC 1224.

As per laws in the England, directors are entitled to receive notice of Director's meetings. Directors are usually allowed by the articles to decide the manner in which their meetings are conducted and to permit any director to call a meeting.[196] Where the articles are silent with respect to specifics, these can be determined by the board. Resolutions are usually passed by a simple majority and directors have the right to one vote each.

i. NOTICE AND QUORUM IN A BOARD MEETING

Under the articles, any director may call a director's meeting by giving notice to all directors.[197] The quorum for a director's meeting is two unless the Directors decide otherwise.[198] The general rule is that the decision of the Directors must be taken either unanimously under art 8 or by majority at a director's meeting, thought this not preclude a meeting passing a resolution unanimously. Similarly, in India, Sec. 286 and 287 deal with notice of meeting of directors and quorum to be present in a director's meeting respectively, being two directors or one third of the total number of director's respectively. Every notice of a meeting of a company must specify the statement of meeting to be transacted at the meeting.[199] One of the important contents is to state the business to be transacted at the meeting.[200] Notice of board meeting has to be construed reasonably.[201] It must also be of reasonable length of time. A resolution was held to be invalid too short a notice was given and which did not state the purpose of the meeting. In the present case, the directors had decided to meet to decide whether continue with legal proceedings, however, the directors decided to take a vote on the same, which was not earlier communicated in the notice.[202]

ii. RESOLUTIONS AND VOTING AT BOARD MEETINGS

Decisions taken at Board meetings are by formal resolution. A decision recorded in the minutes will be a valid decision of the Board, provided that the decision is within the competence of the Board, in accordance with provisions of law and articles of the company, the directors were not disqualified or otherwise ineligible to participate in the proceedings

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[196] THE COMPANIES (TABLES A TO F) REGULATIONS, 1985, reg. 88.
[197] THE COMPANIES (MODEL ARTICLES) REGULATIONS, 2008, reg. 9(1).
[198] THE COMPANIES (MODEL ARTICLES) REGULATIONS, 2008, reg. 90(2).
[199] Companies Act, 1956, §172(1).
[200] R.K.AGARWAL, COMPANY BOARD MEETINGS, LAW AND PRACTISE, 19 (Hind Law Publishers, 3rd ed 1995).
[201] Needle Industries (India) Ltd v. Needle industries Newey (India) Holdng Ltd (1981) 51 Comp Cas 743 (SC).
[202] Moot Proposition, p. 17.

and vote.[203] If a director convenes a meeting with the object of getting the resolution passed, but deliberately omitted to include them on the agenda, it will amount to active concealment of a fact by one having knowledge or belief that the fact will amount to fraud.[204] Regulation 74(1) of the articles provides for a majority rule with regard to the decisions taken at Board Meetings, provided that the decisions are within the competence of the board, in accordance with the provisions of law and articles, a duly convened and constituted meeting, etc.[205] However, the majority rule shall not apply when the articles provide for a certain decision to be taken to be by the whole body of directors or group of directors.[206] The SHA provided for Class A shareholders to veto any decision to commence legal proceedings or arbitration, which was not allowed in the 27th December meeting, and the other directors violated the terms of SHA.

B. SPACE AGE AND FOUNDER DIRECTORS VIOLATED THEIR FIDUCIARY DUTIES

A director's fiduciary duty is 'the fundamental duty of a director to act in good faith in the best interests of his company.'[207] A Director has a duty of honesty and duty to act bona fide may be regarded as a composite obligation.[208] As the board owes a fiduciary duty to the company[209], a minority shareholder can bring a derivative action against an act of the board or an individual director.[210] The Space Age Directors had vested interests in the exit of Blue Sky Directors from Air Media.[211] Blue Sky was not allowed to exercise their veto right nor did they vote in favor of Blue Sky as per the SHA.[212]

a. REMEDIES WITHIN THE POWER OF THE ARBITRAL TRIBUNAL

The remedial powers of an international tribunal are defined by the parties' arbitration agreement.[213]. Most arbitration legislation is silent with regard to the arbitrators' remedial

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[203] DR. K.R CHANDRATRE, COMPANY MEETINGS: LAW, PRACTICE AND PROCEDURE, 422, (All India Reporter Pvt Limited, 1st ed, 2001).
[204] Dr T M Paul v. City Hospital Pvt Ltd (1999) 97 Com Cas 216.
[205] CHANDRATRE, *supra* note 204.
[206] Perrott & Perrott v. Stepehnson (1934) 4 Comp Cas 358 (Ch D).
[207] Item Software (UK) Ltd v. Fassihi (2004) EWCA Civ 1244.
[208] Townsing Henry George v. Jenton Overseas Investment Pte Ltd (2007) SGCA 13.
[209] E Lim, *Directors' Fiduciary Duties: A New Analytical Framework*, 129(2) L.Q.R 242, 263 (2013).
[210] J Lin, *Barring Recovery for Diminution in Value of Shares on the Reflective Loss Principle* 66(3) CAMBRIDGE L. J 537, 558 (2007).
[211] Moot Proposition, p. 17.
[212] Moot Proposition, p. 18.
[213] BORN, *supra* note 204 at 2478.

powers.[214] Section 48 of the EAA grants Arbitral Tribunal's the power to grant declaratory relief[215] as well as specific performance.[216] Arbitrators have broad powers to grant relief a court cannot[217] and may grant equitable relief that a Court could not.[218] This gives arbitrators broad powers to resolve disputes.[219] The arbitrator may order an accounting, appraisal or valuation, or serve as a tiebreaker in the event of a deadlock of the board.[220] Courts have upheld orders of declaratory relief[221] and injunctive relief[222]. In virtually no case, is it appropriate for the possibility of difficulties in enforcement, against a party that might refuse to comply with its obligations under the award, to justify withholding otherwise appropriate relief. [223] Therefore, the tribunal can pass a declaratory relief as well as specific performance.

a) WITHDRAWAL OF NOTICE OF ARBITRATION

i) VOTING RIGHTS OF BLUE SKY TO COMMENCE LEGAL PROCEEDING/ ARBITRATION

The Claimant's directors had the right to veto any decision of the board of the company to commence legal proceedings or arbitration,[224]. Class B shareholders had the right to which veto any decision of company to commence legal proceedings.[225] Thus, Members have a recourse where the action is brought against directors to enforce duties owed to the company.[226] The Claimant Directors were not allowed to exercise their rights, and Air Media issued a notice of Arbitration based on an invalid meeting. The meaning of litigation has to be determined as 'judicial controversy or contest in a court of law whether it is civil or criminal litigation'.[227] The Court in *Fulham*[228] states that the tribunal has the power to grant the necessary relief as in the present case, all parties are subject to the SHA. Therefore, the Tribunal has the power to withdraw the notice of arbitration.

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[214] R. MERKIN, ARBITRATION LAW, 18.55-18.71 (Informa Law, 2007).
[215] ARBITRATION ACT, 1996, §48(3).
[216] ARBITRATION ACT, 1996, §48(5)(b).
[217] Konkar Maritime Enter, SA v Campagnie Belge d' Affretement, 668 F.Supp. 267(S.D.N.Y. 1987).
[218] REDFERN & HUNTER, *supra* note 8 at ¶ 8-11.
[219] BORN, *supra* note 204 at 2478.
[220] Notes, *The Close Corporation,* 1 AAA LAWYERS' ARBITRATION LETTER, 16 (1976).
[221] Staklinski v. Pyramid Elec. Co, 160 N.E.2d 78, 79 (NY 1959).
[222] Brown v. Watson (1839) 6 Bing NC 118, Re Goddard and Mansfield (1850) 1 L M& P 25.
[223] BORN, *supra* note 204 at 2483.
[224] Moot Proposition, p. 6.
[225] Moot Proposition, p. 6.
[226] Foss v. Harbottle (1843) 2 Hare 461.
[227] P.J. Kurien v. Renjitha and Ors., (2000) CriLJ 1731 (Ker); General Officer Commanding, Rashtriya Rifles v. CBI and Anr., [2012] 6 SCC 228; Jamuna v. Badhai 1964 AIR 1541.
[228] Fulham Football Club Ltd., *supra* note 116; *Silica Investors Ltd, supra* note 150.

PRAYER

In the light of the facts stated, issues raised, authorities cited and arguments advanced the Counsel for the Claimant respectfully requests the Tribunal to adjudge and declare:

1. That the SHA, and all the parts of Article 1, are valid under the applicable law;
2. That specific performance can be granted for the valid parts of Article 1;
3. That the Government's termination of the CLA was lawful and justified;
4. That the Founder directors and the Space Age directors violated their fiduciary duties, acted in bad faith and breached the SHA;
5. That the decisions taken at the 27 December 2010 meeting were invalid;
6. That Air Media can be ordered to withdraw the notice of CLA Arbitration;

And pass such other order or orders as the Hon'ble Tribunal may deem fit in the interest of justice, equity and good conscience.

All of which is humbly prayed.

Date: Sd/-

Place: Counsels for the Respondents