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 RESPONDENT

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LIST OF ABBREVIATIONS

¶¶/¶	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

Air Media, Space Age Ltd. and the Founding Shareholders (the Respondents) have the honor of submitting their answers to the present dispute and their memorandum before this SIAC Arbitral Tribunal at Bangalore, Arberia, by invoking the arbitration clause under Article 6 of the SHA between Blue Sky b.v. and the Respondents. However, the Respondents respectfully submit that the Arbitral Tribunal does not have jurisdiction to decide the question of whether the directors acted in bad faith or violated their fiduciary duties.

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 would 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.

C. Law Applicable to Arbitrability of the Dispute

The law applicable to the arbitration agreement is the EAA, 1996. The concept that arbitration is governed by the seat is established in both the theory and practice of international arbitration. In the absence of an express choice of law applicable to the arbitration agreement, the law of the seat governs the arbitration clause, based on the implied intent of the parties to seat the arbitration in London.

II. INVALIDITY OF THE SHA UNDER THE APPLICABLE LAW

The law applicable to the SHA is principles of corporate and commercial laws common to Arberia and England. Under the applicable law, the shareholders' agreement is not enforceable and does not become a regulation of the company unless it is incorporated into the articles. Thus, the SHA will not bind the company and cannot be enforced against it. Secondly, the SHA

is invalid as it seeks to infringe upon the powers that the board is validly expected to exercise on behalf of the company. It effectively places a fetter on the statutory powers of the company and is invalid and unenforceable under the applicable law.

b. INVALIDITY OF THE ARBITRATION AGREEMENT

The arbitration clause is invalid as the agreement in itself is invalid, unenforceable and offends public policy as it seeks to place a fetter on the power of the company to initiate legal proceedings, which is a statutory right exercised by the board on behalf of the company. The arbitration clause should effectively come into existence only if the underlying contract is valid, for the question of adjudicating upon an illegal agreement does not arise under the law governing the arbitration agreement.

III. THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE INTRA-CORPORATE DISPUTE AND THE TERMINATION OF THE CLA WAS UNLAWFUL

The Arbitral Tribunal does not have jurisdiction as to whether the directors acted in bad faith or violated their fiduciary duties. This is based on the reasoning that such intra-corporate disputes are inarbitrable under English Law and violate the public policy of England. Therefore, such disputes are inarbitrable. Further, the Arbitral Tribunal's review does not extend to deciding the reasoning of the directors for the termination of the CLA under Areberian Law as it infringes on the management prerogative under company law. In arguendo, the dispute does not fall within the scope of the Arbitration Agreement and under the law applicable to the arbitrability of the dispute, the dispute is inarbitrable under Arberian Law.

The Arberian government unlawfully terminated the CLA in furtherance of their vested interests. The invocation of the convenience and force majeure clauses provided for in articles 8 and 9 of the CLA are invalid as the pre requisite conditions for invoking those clauses have not arisen. Instead the clauses were invoked by means of malice and misrepresentation by the various government instrumentalities that were involved in the deal between Kosmix and Air Media.

IV. THE MEETING HELD ON 27 DECEMBER 2010 WAS VALID

The meeting that took place on 27th December was valid, as all the statutory requirements were complied with, such as the notice duly being given and the necessary quorum being present.

Moreover, for any resolution to be passed at a board meeting, a simple majority of votes is necessary, which was complied with. The decision is within the competence of the Board, in accordance with and not in contravention of, and in provisions of law and articles of the company, the directors were not disqualified or otherwise ineligible to participate in the proceedings and vote, and hence the meeting is valid.

ARGUMENTS ADVANCED

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

A. LAW APPLICABLE TO THE SHA

The principle of *jura novit curia* embodies the power of the court to base its decisions upon rules, provisions, case law and general principles of the applicable 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 most spectacular feature of English procedure is that the rule never has been and 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 that the tribunal has the power to decide all matters including the extent of initiative in ascertaining the facts and the law. Where the seat of arbitration is in England or Wales, an arbitral tribunal is bound to apply the England and Wales 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 supporting the claim, the legal ground or arguments supporting the claim together with the relief claimed for the amount of all quantifiable claims. Rule 27.1 states that the tribunal would apply the rules of law designated by the parties to the substance of the dispute. Thus, the Arbitral Tribunal is discouraged from engaging in independent investigations[5] 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

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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).

excluded.[8] 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.[9] This doctrine has been applied by the Arbitral Tribunals[10] and the courts.[11] The *tronc commun* doctrine essentially protect against the risk of unfair conduct by a state party 'comparable to stabilization clauses'.[12] If the state amends its laws in its own favor then amendment will not have effect, if it is not consistent with the concurrent laws.[13]

B. LAW APPLICABLE TO THE ARBITRATION AGREEMENT

The law applicable to the arbitration agreement is the EAA, 1996. The concept that arbitration is governed by the seat is established in both the theory and practice of international arbitration.[14] In the absence of an express choice of law applicable to the arbitration agreement, the law of the seat governs the arbitration clause[15], based on the implied intent of the parties to seat the arbitration in London.[16] The conduct of the arbitral proceedings in Bangalore also does not affect the choice of law regarding the arbitral seat.[17] The foundation for application of distinct law for the arbitration agreement is the doctrine of separability[18] which treats the arbitration clause as distinct from the substantive agreement.[19] Further, the SIAC Rules of 2010

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[8] ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, 104 (Sweet & Maxwell, London, 2004).
[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] GABRIELLE KAUFMANN-KOHLER & ANTONIO RIGOZZI, INTERNATIONAL ARBITRATION: LAW AND PRACTICE IN SWITZERLAND, 356 (Oxford University Press, 1st ed., 2015).
[13] *Id*.
[14] REDFERN & HUNTER, *supra* note 8 at 93.
[15] *Id* at 98. Bharat Aluminium Co. Ltd. v. Kaiser Aluminium Technical Services Inc, 2012 (9) SCC 552.; J*udgment of 26 May 1994*, XXIII Y.B. Comm. Arb. 754, 757 (Bezirksgericht Affoltern am Albis 1994 (1998); Minoutsi Shipping Corp v. Trans Continental Shipping Services (Pte) Ltd, [1971] SGHC 3; R. v. International Trustee for the Protection of Bondholders, [1937] A.C. 500, 529.
[16] SIMON GREENBERG, ET AL. INTERNATIONAL COMMERCIAL ARBITRATION: AN AREA PACIFIC PERSPECTIVE, 54 (Cambridge University Press, 4th ed. 2011.; Hamlyn & Co. v. Talisker Distillery, [1894] A.C. 202, 208 (House of Lords); Sul America cia Nacional de Seguros SA and Anr vs. Enesa Engenharia SA and Ors [2012] EWHC 42(Comm); Arsanovia Ltd. v. Cruz City 1 Mauritius Holdings [2013] 2 All E.R. 1.
[17] Lesotho Highlands Development Authority v. Impregilo Spa, [2006] 1 A.C. 221 (House of Lords).
[18] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 411-412 (Vol. 2, Kluwer Law International, 2009); C v. D [2007] EWCA Civ 1282.
[19] Fiona Trust v. Privalov [2008] 1 LLR 254.

provide the parties the freedom to agree upon the seat.[20] Generally an agreement as to the seat of an arbitration brings in the law of that country as the curial law and is analogous to an exclusive jurisdiction clause.[21]

C. OBJECTIVE ARBITRABILITY OF THE DISPUTE IS GOVERNED BY ARBERIAN LAW

In arguendo, the law applicable to the arbitrability of the dispute may differ from the law governing the arbitration agreement and the law of the seat of arbitration.[22] The SIAC Rules do not provide for determination of the law applicable to the arbitrability of a dispute. The law applicable to the arbitrability cannot be the substantive law as 'arbitrability is an issue of jurisdiction rather than substance.'[23] It also cannot be the law applicable to the arbitration agreement, as 'arbitrability is not a matter related to the validity of an arbitration agreement.'[24] The law applicable to the arbitrability needs to be determined in accordance with the laws of that state 'whose public policy is affected by the arbitral tribunal, based on the close connection to that dispute.'[25] Moreover the determination of arbitrability based on the seat of arbitration is 'inappropriate as the choice of seat is premised on its neutrality'.[26] Therefore, Stavros Brekoulakis suggests that the tribunal should examine whether the law of the place of enforcement.[27] The primary consideration of the tribunal in deciding arbitrability should be whether the 'decision of the tribunal would be able to successfully resolve the dispute'.[28]

6. INVALIDITY 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, and whether this would operate as a fetter on the statutory powers of the company **[C]**.

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[20] 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.
[21] Shashoua v. Sharma [2009] EWHC 997 at 23.
[22] REDFERN & HUNTER, *supra* note 8 at ¶2-14, 3-13.
[23] S. Brekoulakis *Arbitrability And Conflict Of Jurisdictions: The (Diminishing) Relevance Of Lex Fori And Lex Loci Arbitri* in CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION, 129 (Franco Ferrari, Stefan Kröll eds., European Law Publishers, 2011).
[24] *Id* at 35.
[25] REDFERN & HUNTER, supra note 8 at ¶2-05.
[26] *Id* at ¶2-14, 3-13; ICC Case No. 4132 of 1983.
[27] Brekoulakis, *supra* note 23 at 35.
[28] *Id* at 129.

A. THE SHA IS INVALID UNDER ARBERIAN COMPANY LAW

The ACA is silent regarding whether such agreements are valid and enforceable. The 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.[29] The Bombay High Court[30] interpreted *Rangaraj*[31] to be applicable not only to restrictions on sale of shares, but to all private agreements between shareholders.

The SHA was not incorporated into Air Media's articles of association.[32] In *Rangaraj,*[33] the Supreme Court held that any additional restriction on any rights of a member not contained in the articles but in a private arrangement between shareholders is not binding either on the company or on the shareholders. The interpretation was soon rejected in the case of public companies[34], however, the position still holds good in case of private companies. It is also pertinent to note that *Rangaraj*[35] has not been overruled, and has been followed since.[36] The Delhi High Court[37] held that it would not be possible to hold that a clause in the agreement would be binding without incorporation into the articles. Clauses which are not repugnant to the Companies Act but which have not been incorporated into the articles would be unenforceable. The Gujarat High Court[38] held an agreement providing the right of pre-emption to be unenforceable, as it had not been not incorporated into the articles. The Supreme Court[39] also held that an agreement between two shareholders cannot bind the company unless the same was incorporated into the articles. The only exception created by the court[40] wherein private agreements did not have to be incorporated in the articles of the company if the agreement was within "particular" shareholders and if the company was not a party to the agreement. Here, the SHA includes the shareholders and the company, hence, the requirement of incorporation into the articles would still have to be followed to bind the company as a

[29] V.B Rangaraj v. V.B Gopalakrishnan AIR 1992 SC 543
[30] IL and FS Trust Co. Ltd. v. Birla Perucchini Ltd. [2004] 121 Comp Cas 335 (Bom).
[31] *Rangaraj*, *supra* note 29.
[32] Moot Proposition, p. 6.
[33] *Rangaraj*, *supra* note 29.
[34] Western Maharashtra Development Corporation v. Bajaj Auto Ltd. (2010) 154 Comp. Cas. 593 (Bom).
[35] *Rangaraj*, *supra* note 29.
[36] Mafatlal Industries Ltd. v. Gujarat Gas Co. Ltd. [1999] 97 Comp. Cas. 301 (Gujarat High Court).
[37] World Phone India Pvt. Ltd. v. WPI Group Inc., USA. [2013] 178 Comp Cas 173 (Del).
[38] Mafatlal, *supra* note 36.
[39] Shanti Prasad Jain v. Kalinga Tubes Ltd. [1965] 35 Comp Cas. 351 (SC).
[40] Madhusoodanan v. Kerala Kaumudi Pvt. Ltd. (2004) 9 SCC 204.

regulation. While the Bombay High Court[41] held that pooling agreements between shareholders to coordinate their votes is legal, it also held that a pooling agreement cannot be used to supersede the statutory rights given to the board to manage the company, the underlying reason being that shareholders cannot achieve by a pooling agreement that which is prohibited to them when they are voting individually.

B. THE SHA IS INVALID UNDER ENGLISH COMPANY LAW

In England, the position of law on this point has been elucidated in *Russell*[42], where the shareholders' agreement, which included the company as a party, contained a clause that stated that in the event of a conflict between the agreement and the articles, the parties would cooperate to amend the articles to take into account the provisions of the agreement. In *Welton v. Saffery,*[43] Lord Davey remarked that while individual shareholders may deal with their own interests in a contract as they may think fit, those contracts would create personal obligations among themselves only, and would not become a regulation of the company, or be binding on the transferees of the parties to it or upon new or non-assenting shareholders. This differs from the articles of the company, which operate as a company regulation and are the principal element of its constitution.[44] In *Russell,*[45] the Court held that the shareholders' agreement was enforceable against the parties to the agreement as a valid personal agreement between them, and not against the company in the event that any clause contained in the agreement is in conflict with an existing legislation.[46] If the shareholders' agreement contains a clause that operates as a fetter on statutory power of the company, the clause would be invalid.[47] Clauses that provide fetters to exercise a power imposed by the statutory framework of the company are obnoxious.[48] Thus, the SHA would be enforceable only *qua* the shareholders, and cannot be enforced against the company or other shareholders as a regulation of the company, the way the articles would operate. The SHA cannot operate as a fetter upon the statutory power of the

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[41] Rolta India Ltd. v. Venire Industries Ltd. [2000] 100 Comp. Cas. 19 (Bom.)
[42] Russell v. Northern Bank Development Corporation Limited [1992] 1 WLR 588.
[43] Welton v. Saffery [1897] A.C. 299, 331.
[44] DEREK FRENCH, STEPHEN W. MAYSON & CHRISTOPHER RYAN, MAYSON, FRENCH & RYAN ON COMPANY LAW, 72 (13th ed., Oxford University Press, 2014-2015).
[45] *Russell, supra* note 42.
[46] Eilis Ferran, *The Decision of the House of Lords in* Russell v. Northern Bank Development Corporation Limited, 53 CAMBRIDGE LAW JOURNAL, 343, 344 (1994). 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).
[47] *Russell, supra* note 42.
[48] B.J. Davenport, *What did* Russell v. Northern Bank Development Corporation Ltd. *Decide?* 109 L.Q.R. 553, 556 (1993); Bushell v. Faith [1969] 2 Ch. 438.

company or cannot be used to supersede the powers of the management of the company. Article 1 of the SHA contains a clause that mandates that the directors appointed by the Claimant have the power to veto, at the board level, any resolution to commence legal proceedings or arbitration. Courts have opposed attempts by non-director shareholders in close corporations to circumvent this statutory policy by an arrangement that infringes upon the powers of the board of directors.[49]

C. THE SHA OPERATES AS A FETTER ON THE STATUTORY POWERS OF THE COMPANY

The provision in the SHA takes away the powers of the director under the applicable law. The articles of Air Media were registered under the ACA and mirrored the provisions of Table A, Schedule I of the ACA.[50] The provisions of the articles are silent as to the exclusive powers of the board. Section 291 states that the board of directors of the company would be entitled to exercise. The powers under this section are interpreted to include the powers of the director to manage the company's business, for which they may exercise all powers of the company. It can be inferred that the directors have a statutory power to commence legal proceedings or arbitration in the interest of the company. The company would be the only party entitled to sue for redressal of any wrong done to it.[51] Since a company is an artificial person, it must act through its directors.[52] In Arberia, the Court[53] held that the board is not bound to do an act if it feels that it would not be in the interest of the company to do such an act, notwithstanding that the company in general meeting has resolved that it should be done. It has been held[54] that so long as particular powers are vested in board of directors, they are entitled to exercise those powers without interference by the shareholders and it is irrelevant whether the shareholders approve of what the Directors have done or not. The spheres of the directors and the General Body of the shareholders are quite separate and distinct.[55] In exercising their powers, the directors do not act as agents for the majority or even all of the members and so the members cannot supersede the Directors' powers and overrule the decision of the directors.[56] Directors

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[49] Notes, *Arbitration as a Means of Settling Disputes within Close Corporations*, 63 COLUMBIA L.R. 267, 275 (1963).
[50] Procedural Order-1, Moot Clarification.
[51] A. RAMAIYA, GUIDE TO THE COMPANIES ACT, 1429 (17th ed., vol. 1, Lexis Nexis Butterworths Wadhwa, Nagpur).
[52] *Id*.
[53] A.P Pothen v. Hindustan Trading Corporation (1967) 37 Comp. Cas 266 (Ker).
[54] Jagdish Prasad v. Paras Ram AIR 1941 All 360.
[55] Mehta Singh & Co. (Agencies) and Other v. Globe Motors Ltd. [1983] 54 Comp. Cas. 883 (Del).
[56] *Id*.

are given the powers to manage the affairs of the company and are perfectly competent to take decisions relating to the actual management of the company in the allotted field of the directors.[57]

In England, even though stockholders may validly agree to elect themselves directors and to appoint specified persons as officers, they still may not completely by-pass the board of directors by written agreement which pre-empts virtually all directoral powers.[58] The power to initiate litigation in the name of the company cannot be exercised by the members[59] as it is one of the general powers of the management and cannot be exercised by the members.[60] The rule in *Foss v. Harbottle*[61] states that the proper plaintiff in a suit for the enforcement of a corporate right is the company itself. Management powers vest exclusively in the board of directors and the members in general meeting cannot override board decisions or direct the board to act in a certain way.[62] The directors, being the custodians of the seal of the company, were the persons who should normally sue in the name of the company.[63] A numerical majority could not impose its will upon the directors.[64] Directors of a company do not act as agents of the members of the company.[65] Though largely or entirely chosen by the firm's shareholders, the board is formally distinct from them.[66] This separation economises on the costs of decision making by avoiding the need to inform the firm's ultimate owners and obtain their consent for all but the most fundamental decisions regarding the firm.[67] The directors are fiduciaries of the company, not of the members and the interests of the members do not always coincide with the interests of the company[68]. One of fiduciary duty is the duty of loyalty, which imposes upon

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[57] *Id*; Murarka Paint and Varnish Works Ltd. v. Mohanlal Murarka and Ors. AIR 1961 Cal 251.
[58] George D. Hornstein, *Shareholders' Agreements in the Closely Held Corporation,* 59 Yale L.J. 1040, 1044 (1949-1950).
[59] Alexander Ward and Co. Ltd. v. Samyang Navigation Co. Ltd. [1975] 1 WLR 673; Mitchell and Hobbs (UK) Ltd. v. Mill [1996] 2 BCLC 102.
[60] FRENCH, MAYSON & RYAN *supra* note 44.
[61] Foss v. Harbottle (1843) 2 Hare 461.
[62] Automatic Self-Cleansing Filter Syndicate Co. Ltd. v. Cunninghame [1906] 2 Ch. 34; Quin & Axtens Ltd. v. Salmon [1909] AC 442.
[63] MacDougall v. Gardiner (1875) 1 Ch. D 13; Pender v. Lushington (1877) 6 Ch. D. 70.
[64] The Gramophone and Typewriter Ltd. v. Stanley [1908] 2 K.B. 89.
[65] FRENCH, MAYSON & RYAN *supra* note 44 at 465.
[66] John Amour, Henry Hansmann & Reinier Kraakman, *What is Corporate Law?* in THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH, 14 (2nd ed., Oxford University Press, 2009).
[67] *Id*.
[68] Ronald Choo Han Woon, *Division of Powers Between the General Meeting and Board of Directors in a Company,* 5 S.Ac.L.J 360, 364 (1993); Walter R. Hinnant, *Fiduciary Duties of Directors: How Far Do They Go?* 23 Wake Forest L. Rev. 163, 163 (1988).

the board an obligation to act in the best interests of the corporation and its shareholders.[69] This has crystallised into a statutory duty under the ECA[70] which states that the director must act in a way to 'promote the success of the company as a whole and all its members.'

Section 173 of the ECA mandates that a director has the statutory duty to exercise independent judgment. Such duty cannot be infringed upon by his acting in accordance with any agreement entered into by the company that restricts the future exercise of discretion by the directors.[71] These rights have been violated by the directors. While exercising the right under Article 1, the directors have violated their fiduciary duties of independent judgment and duty of loyalty. Providing this right leads to undesirable outcomes which would be injurious to the company and its members. This would imply that even if commencing legal proceedings or arbitration would be in the best interest of the company, the directors appointed by the Claimant would still be constrained to veto such proceedings at the whim of the Claimant. An agreement between shareholders was held illegal on the ground that individual directors cannot surrender their right and obligation to exercise their best judgment and discretion.[72] The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering the articles or by refusing to re-elect the directors of whose action they disapprove.[73] They cannot usurp the powers which by articles are vested in the directors, nor can the directors usurp the powers vested by the articles in the general body of the shareholders.[74] Justice Jenkins K.C.[75] remarked that in such situations when directors' interests conflict with their duties, and it is impossible for them, however honest, to be unbiased and independent in the exercise of their discretion. Harman J.[76] held that that the members could not initiate litigation because only the board had that power. Shareholder control could involve poor strategies that are harmful to corporations.[77] A director who is nominated by a shareholder does not owe a duty to that shareholder under company law.[78] The members cannot exercise directors' powers even if the they cannot be traced.[79] Allowing the shareholders to

[69] Item Software (UK) Ltd. v. Fassihi (2004) EWCA Civ. 1244.
[70] English Companies Act, 2006, § 172(1).
[71] English Companies Act, 2006, § 173(2)(a).
[72] Manson v. Curtis 223 N.Y. 313; Edmund T. Delaney, *The Corporate Director: Can His Hands be Tied in Advance?* 50 Colum. L. Rev. 52, 55 (1950).
[73] John Shaw & Sons (Salford) Ltd. v. Shaw (1935) 2 K.B. 113.
[74] *Id.*
[75] Marshall's Valve Gear Co. Ltd. v. Manning Wardle & Co. Ltd. [1909] 1 Ch. 267.
[76] Breckland Group Holdings Ltd. v. London and Suffolk Properties Ltd. [1989] BCLC 100.
[77] Ataollah Rahmani, *Shareholder Control and its Nemesis,* 23(1) I.C.C.L.R. 12, 13 (2012).
[78] Kuwait Asia Bank E.C v. National Mutual Life Nominees Ltd. [1991] 1 AC 187.
[79] Re Frountsouth (Withham) Ltd. [2011] EWCH 1668 (Ch), [2011] BCC 635.

have control over a management decision which is also the exclusive power to be exercised by the directors on behalf of the company would be illegal and unenforceable. A company could give an undertaking not to exercise a corporate statutory power, but such an undertaking cannot be specifically enforced by courts as the company cannot place a fetter on its statutory power.[80] The New York Court of Appeals[81] held a stockholders' agreement giving stockholders broad powers of management of the company invalid, as an infringement on the board of directors' powers.Under the applicable law, the SHA would be unenforceable and invalid as against the company unless it is incorporated into the articles. The right conferred by Article 1 operates as a fetter on the corporate statutory power that is exercisable by the board on behalf of the company. It is for this reason that it is pleaded that the SHA is invalid and unenforceable.

b. THE ARBITRATION AGREEMENT IS INVALID

The Respondents assert that the arbitration agreement contained in the SHA is invalid.

Arbitration agreements are separable from the underlying contracts with which they are associated.[82] The proposition rests on the assumption that the exchange of promises to resolve disputes by international arbitration is different from other exchanges of commercial promises in the parties' underlying contract[83] and is considered 'ancillary'[84] as contrasted to the parties' underlying 'substantive' or 'main' contract.[85] An illegal agreement is ordinarily not enforceable.[86] In the case of a contract which is illegal *ab initio*, the common law principle was that the arbitration clause, though autonomous in principle, cannot exist[87] and this principle has been enumerated in multiple English cases[88]. Eve J.[89] held that the arbitration agreement was a valid part of the rules, and that there was only one contract, which was tainted in its entirety. The invalidity, illegality or termination of the parties' underlying contract affects the validity

[80] Clare M.S. McGlynn, *The Constitution of the Company: Mandatory Statutory Provisions v. Private Agreements*, 15(10) COMP. LAW. 301, 305 (1994); Cumbrian Newspapers Group Ltd. v. Cumberland & Westmorland Herald Newspaper & Printing Ltd. [1986] B.C.L.C. 286.
[81] Long Park Inc. v. Trenton-New Brunswick Theaters Co. 297 N.Y. 174
[82] BORN, *supra* note 18 at 348.
[83] *Id* at 350.
[84] Westacre Inv. Inc. v. Jugoimport-SPDR Holding Co. Ltd. [1998] 4 All E.R. 570, 580; OK Petroleum AB v. Vitol Energy SA [1995] C.L.C. 850, 957 (Q.B.).
[85] BORN, *supra* note 18 at 350.
[86] *Id* at 755.
[87] ROBERT MERKIN, ARBITRATION LAW, 48 (Informa Law, 2004).
[88] Zinc Corporation Ltd. v. Hirsch [1916] 1 K.B. 451; Ertell Beiber & Co. v. Rio Tinto Co. [1918] A.C. 260.
[89] Joe Lee Ltd. v. Lord Dalmeny [1927] 1 Ch. 300; O'Callaghan v. Coral Racing Ltd [1998], unreported.

or effectiveness of the arbitration clause.[90] While recognizing the general applicability of the separability presumption, a number of authorities have also held that the illegality of the underlying contract can also vitiate an arbitration clause contained within that contract.[91] An agreement between 'highwaymen' (to split criminal proceeds or to execute a crime) was illegal and unenforceable, therefore an agreement to arbitrate disputes arising out of such a contract was unenforceable as well.[92] Agreements to arbitrate certain types of disputes, involving claims of illegality directed at the underlying contract are invalid and cannot be enforced.[93] Loan agreements containing arbitration clauses which are illegal under usury laws have been held to implicate the arbitration agreement.[94]

It has been argued that the separability doctrine should be repealed because no dispute should be sent to arbitration unless the parties have formed an *enforceable* contract requiring arbitration of that dispute.[95] The right to litigate would be alienable through an enforceable contract, but not a contract that is unenforceable due to illegality or any other contract law defence.[96] The separability doctrine holds that a party alienates its right to litigate when that party forms a contract containing an arbitration clause even if that contract is unenforceable.[97] Other critics have observed that if an agreement contains an obligation to arbitrate disputes arising under it, but the agreement is invalid or no longer in force, the obligation to arbitrate disappears with the agreement of which it is a part.[98] Hence, it would be unconscionable to hold the Respondents to the arbitration agreement when the contract itself was illegal.

Based on the dicta in *Russell*[99] and *Rolta India*,[100] the SHA is illegal and unenforceable. Contracts which deprive directors of a company of their powers and functions contrary the Act are void and arbitration clauses therein are unenforceable.[101] Even such issues were made

[90] BORN, *supra* note 18 at 358.
[91] *Id* at 758.
[92] Soleimany v. Soleimany [1999] Q.B. 785, 797 (English Court of Appeal).
[93] BORN, *supra* note 18 at 759.
[94] Party Yards Inc. v. Templeton 751 So.2d 121 (Fla. App. 2000).
[95] Stephen J. Ware, *Arbitration Law's Separability Doctrine After* Buckeye Check Cashing Inc. v. Cardegna, 8 Nev. L.J. 107, 119 (2008-2009).
[96] *Id* at 121.
[97] *Id.*
[98] BORN, *supra* note 18 at 397.
[99] *Russell*, *supra* note 42.
[100] *Rolta India Ltd. supra* note 41.
[101] Max Schoengold, *Arbitration: Its Snares and Delusions*, 19 BROOK L. REV 199, 210 (1952-1953).

arbitrable under the agreement, they would be unenforceable as against public policy.[102] In *Abbey v. Meyerson*,[103] the incorporators' agreement, which contained an arbitration provision, vested the management power in the holders of one class of voting stock.[104] The Court declared that the agreement deprived the board of directors of their authorities and responsibilities in violation of the New York General Corporation Law and the public policy of New York.[105] An order directing arbitration was reversed, because the illegality of the principal contract voided the arbitration clause.[106] On the basis of the abovementioned principles, it is clear that the doctrine of separability would not operate in cases where the underlying contract is itself affected by illegality. Thus, the arbitration agreement, which is intrinsically connected to the invalid and unenforceable underlying contract, cannot be held to be valid and cannot be invoked.

3 THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE INTRA-CORPORATE DISPUTE

The Respondents humbly contend that Tribunal does not have jurisdiction to decide whether the directors acted in bad faith or violated their fiduciary duties. This argument is fourfold: *Firstly*, the corporate disputes of fiduciary nature and acts of bad faith are not arbitrable under English Law **[A]**. *Secondly*, the enforcement of the award is contrary to public policy **[B]**. *Thirdly*, the arbitration agreement under the SHA is invalid and unenforceable **[C]**. *Fourthly*, the arbitrators do not have power to review the reasons of the directors for the termination of the CLA **[D]**.

A. THE FIDUCIARY DUTIES AND ACTS OF BAD FAITH OF THE DIRECTORS ARE INARBITRABLE UNDER ENGLISH LAW

The Respondents humbly contend that the corporate disputes of fiduciary nature and allegations of bad faith are not arbitrable under English Law. This argument is threefold. *Firstly*, that the decision in the *Fulham case* does not render fiduciary duties and acts of bad

[102] *Id*; Application of Diamond 80 N.Y.S 2d 465; Lumsden et. al. v. Lumsden Bros & Taylor, Inc. 242 App.Div 852, 275 N.Y.S. 221, Matter of Scuderi, 265 App. Div. 1054, 39 N.Y.S.2d 422; Matter of Allied Fruit & Extract Co. Inc. 243 App. Div. 52, 276 N.Y.S. 153.
[103] Abbey v. Meyerson 274 App. Div. 389, 83 N.Y.S. 2d 503 (1st Dept. 1948).
[104] Notes, *supra* note 49 at 275.
[105] *Id*.
[106] *Id.*

faith of the directors as arbitrable **[a].** *Secondly*, public policy mandates that fiduciary duties of directors are inarbitrable **[b]**. *Thirdly*, the management prerogative is inarbitrable **[c]**.

a. THE DECISION IN FULHAM DOES NOT RENDER FIDUCIARY DUTIES AND ACTS OF BAD FAITH OF THE DIRECTORS AS ARBITRABLE

In the *Fulham* case, the question of whether unfair prejudice claims in relation to 'regular commercial companies might be invalid in particular cases'[107] remains unanswered. Further the 'attempt to delegate to the arbitrators what is a matter of public interest which cannot be determined in the limitations of private contractual interest'.[108] Hence, the question of arbitrability of fiduciary duties of directors in commercial companies is not determined in the *Fulham case*.[109] The courts in England[110] have clearly held that courts do not 'abdicate their role in protecting the managerial prerogative and the majority rule simply because the complaint takes the form of a unfair prejudice claim.'[111] If the decision making of the directors were called into question through arbitration, it would prevent the court from 'filtering applications which would amount to an abuse of process because they seek to bypass the restrictions of derivative actions.'[112] The *Fulham case* does apply to all unfair prejudice claims and this can be based on different limitations pointed by Patten LJ in his judgment.[113] These include the 'limited scope of the relief sought and the differential nature of the premier league in contrast to a private trading company.'[114] Even when the courts points to supplementing the tribunal's powers, the court clearly stated the limited scope of disputes concerning the management of the company.[115] Further 'managerial prerogative was highly attenuated in context of this case with the league's administration determined in accordance with formal rules, actionable by injunction'. [116] Therefore in a commercial company where there a 'few explicit contractual restrictions … but rather more implicit equitable considerations that constrain that discretion',[117] then the *Fulham case* can be distinguished in regard to fiduciary

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[107] ANDREW JOHNSTON, ARBITRABILITY OF COMPANY LAW DISPUTES, CHINA AND INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION IN CHINA AND INTERNATIONAL COMMERCIAL DISPUTE, 223 (Qiao Lio, eds, BRILL, 2015).
[108] Fulham Football Club Ltd v. Richards [2011] EWCA Civ 855, ¶40.
[109] ANDREW JOHNSTON, supra note 107 at 223.
[110] In Re Charnley- Davies Ltd (No.2) 1990 BCLC 760.
[111] *Id;* ANDREW JOHNSTON, supra note 107 at 224.
[112] ANDREW JOHNSTON, supra note 107.
[113] *Fulham, supra* note 108 at ¶47.
[114] ANDREW JOHNSTON p.223
[115] Fulham, *supra* note 108.
[116] ANDREW JOHNSTON, *supra* n. at 223.
[117] ANDREW JOHNSTON, *supra* n. at 225.

duties. Patten LJ in support of this view clearly states that the dispute in question is 'essentially a contractual dispute…without effect on third parties.'[118] Moreover, the claim of breach of fiduciary duties was based on the FAPL rules in the *Fulham case*.[119]

The issues which require orders *in rem* in are less suitable for arbitration as in the case of 'winding up actions, declaration of validity of corporate acts and granting of relief from officers' liabilities for breaches of duties.'[120] The arbitration clause in the *Fulham case* included the arbitration of the duties of directors and in the case of intra- corporate dispute arbitration. Thus it can be reasonably concluded that disputes that 'go beyond matters of contract and intrude on the managerial prerogative have to be treated differently'.[121] Hence, the *Fulham case* does not apply to disputes concerning fiduciary duties[122] and thus the discretion of the board cannot be subject to arbitration.

b. PUBLIC POLICY MANDATES THAT FIDUCIARY DUTIES OF DIRECTORS ARE INARBITRABLE

In the *Fulham case*[123], Patten LJ made it clear that merely because a dispute affected only the parties to the dispute does not make it arbitrable. The court noted that one has to take into consideration whether the dispute in question '*represent an attempt to delegate to the arbitrators what is a matter of public interest which cannot be determined within the limitations of a private contractual process'.*[124] *It has been accepted by commentators*[125] *that attempts by shareholders arbitrate fiduciary duties of the directors would* 'imperil the overarching company law principle of managerial prerogative under majority rule.'[126] Three reasons have advanced to this effect, which relate to firstly that the arbitration of company rights adversely affects the division of powers within the company and impacts the 'discretion over the management of the business'.[127] Secondly shareholders actions, which threaten the majority

[118] Fulham, *supra* note 108.
[119] Fulham, *supra* note 108 at ¶77; ANDREW JOHNSTON, *supra* note 107 at 225.
[120] HUANG ZHANG, DIRECTORS' LIABILITY FROM THE PERSPECTIVE OF PRIVATE INTERNATIONAL LAW, 175 (University of Barcelona, 2014).
[121] ANDREW JOHNSTON, *supra* note 107 at 223. Sundaresh Menon, *Rethinking Arbitrability, Including the Arbitrability of Company Disputes*, in FLAWS AND PRESUMPTIONS: RETHINKING ARBITRATION LAW AND PRACTICE IN A NEW ARBITRAL SEAT, 101 (The International Bureau of the Permanent Court of Arbitration eds., Mauritius Government Printing Department, 2010).
[122] ZHANG, *supra* note 120.
[123] Fulham, *supra* note 108.
[124] Fulham *supra* note 108 at ¶40.
[125] ANDREW JOHNSTON *supra* note 107.
[126] *Id* at 196.
[127] *Id* at 197.

rules, require intervention of the court[128] and thirdly the arbitration of fiduciary duties threatens to 'make inroads into the business judgment rule.'[129]

The arbitrability of director's fiduciary duties results in the courts being unable to contribute to the development of the law.[130] As Shell notes the arbitration of the duties of the management would 'substantially weaken state regulation of large business enterprises.'[131] The arbitration of unfair prejudice claims results in the loss of precedent and 'complex legal issues that affect frequently the very structure, management and composition of a company', which are required to be settled by courts. [132] Further unfair prejudice claims, which seek arbitration of fiduciary duties of the directors and acts of bad faith, cannot be arbitrated because of the 'potential to bypass the public policy rules …restricting the availability of derivative actions.'[133] When the fiduciary standards are enforced by 'private ad hoc dispensation of equity which might be devoid of precedential consistency.'[134] This would result in there being 'no legal norms to govern and deter management misconduct in close corporations.'[135] The 'directors duties cases have public good qualities' which makes it undesirable that the output should be privatized.

c. THE MANAGERIAL PREROGATIVE IS INARBITRABLE

In the *Beattie case*[136] which concerned a claim regarding the violation of fiduciary duties, the court clearly stated that there would be 'very great difficulty in enforcing an arbitration clause by a shareholder regarding the internal management of the company.' Therefore, if the minority shareholders can initiate arbitration against the directors for the violation of their duties without the courts intervention which is meant to exercise its 'gatekeeping function created in relation to challenges to the majority rule, then it would make significant inroads into the managerial prerogative.'[137] It has been accepted that this forms the basis of company law in contrast to

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[128] ANDREW JOHNSTON, *supra* note 107 at 197.
[129] Companies Act, 2006 §172; Revlon Inc v. MacAndrews & Forbes Holdings Inc 506 A 2d 173 (del 1986).
[130] Wendy Kennett, *Arbitration of Intra-corporate disputes*, 55 (5) INT'L J. OF L. AND MANAGEMENT, 333 (2013).
[131] G Shell, *Arbitration and corporate governance*, 520, 517 67 NORTH CAROLINA LAW REVIEW 520 517- 575 (1989).
[132] Professor Stephen Griffin, *Case Comment: The Primacy Afforded to an Arbitration Agreement in the Context of a Petition Against Unfairly Prejudicial Conduct*, 305 (Sweet & Maxwell's Co. L. Newsltr. 1–4, 2011).
[133] ANDREW JOHNSTON, *supra* note 107 at 227.
[134] M S. S. J., Jr. , *Mandatory Arbitration as a Remedy for Intra-Close Corporate Disputes* 56 VIRGINIA LAW REVIEW 271, 294 (1970).
[135] *Id.*
[136] Beattie v. E & F Beattie Ltd (1938) Ch.708, C.A.
[137] Hickman v. Kent Romney Marsh Sheep Breader' Association (1915) 1 Ch. 881

contract law, which 'allows the separation of ownership and control with the shareholders who do not take part in the management making decisions by majority.' [138] Further the considerations of public policy mandate that director's duties should not be by arbitration as judicial decisions 'provide guidance to directors, function as precedent and aid in the development of law'.[139] It has been accepted by academic scholars that arbitrators cannot decide on the questions of managerial prerogative.[140] As Andrew Johnston states that 'when the courts should not interfere in the internal affairs of the company and equally neither should arbitrators.'[141] The shareholders cannot interfere where the directors have instituted proceedings in the company's name.[142] In cases where the shareholders disputes relates to the prohibitory aspects of company law such as fiduciary duties, then such disputes need to be resolved by the courts.[143] The directors duties are of public interest as 'regulation of directors' duties may prevent corporate abuse and market externality that may result from corporate failure…. which may not be provided if left to private bargain.'[144] Therefore, the arbitration of such disputes can result in 'substitute his solution for the judgment of the majority shareholders or directors.'[145] Though the directors can contractually commit to acts in accordance with the shareholders agreement, these obligations are 'not only contractual… but have implications towards third parties, such as the entity's employees, its creditors or the other shareholders.' [146]

14. THE ARBITRAL TRIBUNAL DOES NOT HAVE THE POWER TO REVIEW THE DECISIONS OF THE DIRECTORS

The board of directors are required to exercise their 'best judgment and independent discretion' as conferred by statute. The shareholders cannot circumvent the 'statutory policy by an arrangement that infringes the powers of the board of directors.'[147] The argument that the corporation is a party to the SHA does not render the fiduciary duties and issue of bad faith as

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[138] ANDREW JOHNSTON, *supra* note 107 at 201.
[139] *Id* at 209.
[140] Notes, *supra* note 49 at 63.
[141] Beattie, *supra* note 136.
[142] SEALY AND WORTHINGTON, CASES AND MATERIALS ON COMPANY LAW 189 (9th ed. Oxford 2010).
[143] Iesini v. Westrip Holdings Ltd (2010) All ER (D) 10,73.
[144] *Id.*
[145] Hodge O'Neal, *Resolving Disputes in Closely Held Corporations-Intra-Institutional Arbitration* HARVARD LAW REVIEW 786 (1954).
[146] *Id.*
[147] O'Neal, *supra* note 145. McQuade v. Stoneham, 263 N.Y. 323, 189 N.E. 234 (1934) Manson v. Curtis, 223 N.Y. 313, 119 N.E. 559 (1918) Compare Clark v. Dodge, 269 N.Y. 410, 199 N.E. 641 (1936); *A* Notes, *supra* note 49 at 267-289; Matter of Burkin (Katz), 1 App. Div. 2d 655, 147 N.Y.S.2d 1.

arbitrable. It is a 'conceptual argument to base denial of arbitration upon a finding that the corporation is not a party to an arbitration agreement.'[148]

a. THE DIRECTORS CANNOT DIVEST THE FIDUCIARY DUTIES TO BINDING ARBITRATION

The arbitration of fiduciary duties is restricted on the basis that it undermines the freedom of the directors in the determination of the best interests of the company.[149] This reasoning is based on preserving the management prerogative whereby 'courts courts will not give legal sanction to agreements which have the effect of removing from directors in a very substantial way their duty to use their own best judgment on management matters.'[150] Therefore the courts do not grant legal sanction to agreements which effectuate the concept of directors subjecting their fiduciary duties to arbitration,[151] then the arbitration is impermissible as it does not fall within the scope of the arbitration agreement and that if the tribunal accedes to such a demand of determining the management issue, it would render the award unenforceable.

b. THE TRIBUNAL CANNOT GO BEHIND THE REASONS OF THE DECISIONS TAKEN BY THE DIRECTORS

The arbitration of the directors duties 'impinges on the statutory norm vesting corporate management and control in the board of directors.'[152] The primary reasons to further this are based on the fact that such dispute resolution is 'inconsistent with the general scheme and structure of corporate management' [153] and deprives the directors of the right to exercise judgment'.[154]

15. **THE ARBITRAL TRIBUNAL HAS TO CONSIDER THE ARBITRABILITY OF THE ISSUE IN THE ENFORCING STATE TO DECIDE UPON THE INTRA-CORPORATE ISSUE**

The Respondents contend that the arbitral award would not be recognized or enforceable in Arberia. Article V(2) of the Convention states two grounds for the non-recognition of arbitral awards, firstly when dispute is not capable of settlement by arbitration of the enforcement

[148] Ehrlich v. Drake Constr. Corp 92 N.Y.S.2d 711 (1949).
[149] Kennerson v. Burbank Amusement Co., 120 Cal. App. 2d 157, 173 (Cal. Dist. App. Ct. 1953).
[150] Abercrombie v. Davies, 123 A.2d 893, 899 (Del. Ch. 1956) (Seitz, J.), rev'd on other grounds, 130 A.2d 338 (Del. 1957); See Chapin v. Benwood Found., Inc., 402 A.2d 1205, 1210 (Del. Ch. 1979); Chapin v. Benwood Found., Inc., 402 A.2d 1205, 1210 (Del. Ch. 1979).
[151] Jewel Cos. v. Pay Less Drug Stores Northwest, Inc., 741 F.2d 1555, 1563 (9th Cir. 1984).
[152] O'Neal, *supra* note 145 at 823.
[153]Matter of Scuderi, 265 App. Div. IO54, 39 N.Y.S.2d 422 (2d Dep't 1943).
[154] O'Neal, *supra* note 145 at 823; Application of Diamond, 8o N.Y.S.2d 465 (Sup. Ct.), 274 App. Div. 762, 79 N.Y.S.2d 924 (ist Dep't 1948); Motherwell v. Schoof [I949] 4 D.L.R. 818.

forum[155] and secondly when the enforcement of the award would be contrary to the public policy of the enforcement forum.[156] On the basis of comity of nations and the public policy of England, disputes, which are inarbitrable in the enforcement, state and concluded in violation of the law of Arberia are therefore against the public policy of England.[157]In Arberia, where the matter pertains to oppression and mismanagement,[158] violation of Statute or AoA,[159] then the parties are refused arbitration [160] disputes arising out of violation of statutory rights and duties are not arbitrable disputes. The limits to arbitrability that apply to corporations are the public policy and the exclusive jurisdiction of the national courts.[161] In the *Rakesh Malhotra*,[162] the High Court dealing with the arbitrability of the dispute, held that under Indian law the remedial measures under Indian Companies Act are exercised by the Company Law Board are not even the courts, thereby excluding the measures available to arbitral tribunals. The court stated that oppression and mismanagement petitions are non-arbitrable. There is a duty on the arbitral tribunal to render an enforceable award and the tribunal should decline jurisdiction when it cannot ensure enforceability of the award.[163] Thus even if the dispute is arbitrable the tribunal should decline jurisdiction over the fiduciary disputes and acts of bad faith of the directors to ensure enforceability.

a. IN ARGUENDO THE DISPUTE IS INARBITRABLE IN ARBERIA

The grant of an award without consideration of the arbitrability rules of Arberia would affect the enforceability of the award as the courts would refuse enforcement of an award under Article V(2)(b) of the NYC, if the enforcement would be contrary to public policy of Arberia. Public policy is constituted by a provision, which protects 'community interests …or juridical interests which are from an ethical point of view, more important than contractual freedom.'[164] The arbitration of fiduciary duties and acts of bad faith of directors is contrary to the statutory

[155] NEW YORK CONVENTION, art. II(1) and V(2)(a).
[156] NEW YORK CONVENTION, art. V(2)(b).
[157] AJT v. AJU [2010] 4 SLR 649;
[158] Sudershan Chopra v. CLB, (2004) 64 CLA 214 (P&H).
[159] Griesheim GmbH v. Goyal MG Gases Pvt Ltd, (2004) 62 CLA (CLB-Del).
[160] Gautam Kapur v. Limrose Engineering Order of CLB in C.P.No.18 of 2002; Lammertz Industriadel GmbH v. Altek Lammertz Needles Ltd Order of CLB-Chennai in C.A. No.21 of 2004 in C.P.No.3 of 2004.
[161] Pilar Perales Viscasillas, *Arbitrability of (Intra) Corporate Disputes* in Arbitrability: Comparitive and International Law Perspectives (eds., Mistelis/Brekoulakis, 2009).
[162] Rakesh Malhotra v. Rajinder Kumar Malhotra & Ors. [2015] 192 CompCas 516 (Bom); Natraj Studios Pvt. Ltd. v. Navrang Studios, A.I.R. 1981 S.C. 537.
[163] ALAN REDFERN & MARTIN HUNTER, *supra* note 8 at ¶25-46;
[164] ICC Award No. 5622 of 1988.

mandate of the courts in India.[165] The courts in Arberia have also refused arbitration of intra-corporate disputes, which lie specifically under the domain of the Company Law Tribunal.[166] As the assets of Air Media are located in Arberia, the tribunal should consider the enforceability of the award in determining the jurisdiction over the intra-corporate dispute.

i. UNLAWFUL TERMINATION OF THE CLA BY THE ARBERIAN GOVERNMENT

The Arberian government unlawfully terminated the CLA in furtherance of their vested interests. The invocation of the convenience and force majeure clauses provided for in articles 8 and 9 of the CLA are invalid as the pre requisite conditions for invoking those clauses have not arisen. The clauses were invoked by means of malice and misrepresentation by the various government instrumentalities that were involved in the deal between Kosmix and Air Media. The termination also proves that the Blue Sky directors violated their fiduciary duties and acted in bad faith.

A. BREACH OF CONTRACTUAL PROVISIONS BY STATE INSTRUMENTALITIES

a. VIOLATION OF ARTICLES 4 AND 8 OF THE CLA

It is one of the fundamental principles of contract law that the parties to a contract must perform their respective promises unless such performance is dispensed or excused by law as per section 37 of the Indian Contract Act.[167] A party cannot be absolved of their liability under a contract merely because the performance of the same became onerous.[168] The express terms of a contract cannot be ignored only grounds of uncontemplated turn of events post the contract formation.[169] Here, Kosmix was responsible for obtaining the requisite orbital slot and frequency clearances from the appropriate authorities. Kosmix not only failed to obtain such approvals but also ignored their responsibility article 4 of the CLA, in contravention of their responsibilities under the contract. The invocation of article 8 of the CLA is invalid as such termination for convenience is usually permitted only if a party to the contract is unable to

[165] Rakesh Malhotra v. Rajinder Kumar Malhotra & Ors. [2015] 192 CompCas 516 (Bom); Kingfisher Airlines Limited v. Prithvi Malhotra Instructor 2013(7) Bom C.R. 738; Natraj Studios Pvt. Ltd. v. Navrang Studios, A.I.R. 1981 S.C. 537.
[166] *Rakesh*, *supra* note 165.
[167] MULLA, THE INDIAN CONTRACT ACT 93, (Anirudh Wadhwa et al. eds., Lexis Nexis Butterworths, Wadhwa, 15th ed., 2016).
[168] Alopi Parshad and Sons Ltd v. Union of India AIR 1960 SC 588.
[169] *Id.*

procure something that is necessary for performance of his promise under the contract[170]. The duty of good faith, fair dealing and reasonable efforts are implied in every contract.[171] Kosmix had not taken the initiative to obtain such approvals and had communicated to Air Media in August 2004 that they had received the necessary approval for building, launching and leasing the capacity of Aspiration-1 and that they were in a position to go ahead with the building and launch of Aspiration-1 spacecraft and lease the technology to Air Media. The actions of the chairman of Kosmix set off a chain of events which triggered the whole mischief as he sought advice from Ministry of Law and Justice to annul the agreement and permitted his department to inform SC to annul the CLA. There is a glaring conflict of interest as this director was the chair of the SC when it resolved to instruct Kosmix to annul the CLA and sought advice and approval from the ASG and CCS in furtherance of the same.

b. VIOLATION OF ARTICLE 9 OF THE CLA

Force majeure is defined as an occurrence beyond the control of the party affected, provided that such party could not reasonably have foreseen such occurrence at the time of entering into the contract or could not reasonably have avoided or overcome its consequences.[172] A force majeure clause is a contractual provision that allocates the risk if performance becomes impossible as a result of an event or effect that the parties could not have reasonably anticipated or controlled.[173] The *sine qua non* of valid invocation of a such clause is that the act must be outside the control of the party who seeks to invoke the clause.[174] The performance of a contract does not become impossible due to force majeure or by reason of any change in government policy which could not be foreseen by the parties.[175] A person cannot claim the benefit of a force majeure event after having triggered it in the first place.[176] In terms of international law, this might lead to situation where a state owned company is automatically discharged from all its obligations under a contract with a private entity because an action of the controlling state

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[170] K.H. Bockstiegel, *Arbitration and State enterprises: Survey on the National and International State of Law and Practice*, 23(1) JOURNAL OF THE LONDON COURT OF INTERNATIONAL ARBITRATION, 93, 96 (2007).
[171] US Airways Group, Inc. v. British Airways PLC, 989 F. Supp. 482 (S.D.N.Y. 1997).
[172] WILLIAM F. FOX, INTERNATIONAL COMMERCIAL AGREEMENTS: A PRIMER ON DRAFTING, NEGOTIATING, AND RESOLVING DISPUTES, 143 (Kluwer Law International, 4th ed., 2009); Czarnikow Ltd. v. Centrala Handlu Zagranicznego, 1978 Lloyd's Rep. 305 (1978).
[173] *Id.*
[174] 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).
[175] Satyabrata Ghose v. Mugneeram Bangur and Co, 1954 SCR 310.
[176] D Sampath Kumar, *When Arbitration Turns Unfair*, THE HINDU, October 8, 2015.

has brought about the event. The general understanding is that a state enterprise should be treated in the same manner as a private enterprise being neither at a privilege nor disadvantage due to its relation to the state.[177] This leads to an inequitable result when applied to a scenario where a state enterprise induces the state into actions that make performance impossible.[178] As a result, arbitral tribunals will scrutinize the actions of the state closely in order to see if they were taken to benefit the state enterprise. The state cannot purposely introduce legislations and regulations that would allow a state enterprise to be released from an unfavourable contract without any consequences. In deciding whether a state enterprise can invoke the force majeure clause in a contract based upon actions of the state, the arbitral tribunal may weigh three factors: (1) the state enterprise must possess a legal identity distinct from that of the state in commercial transactions[179] (2) the state enterprise must not be colluding with the host state to bring about the action that brought about the existence of a force majeure event[180] and (3) the action of the host states should either be an act of state or a political decision of its national sovereignty independent of the state's purely pecuniary interest in the commercial transaction.[181] In the present case, invocation of the force majeure clause is not valid as the abovementioned factors have not been satisfied.

c. VIOLATIONS BY ARSO AND DOS

At the meeting of the SC commission ARSO had placed a proposal seeking budgetary support of USD 110 million for the design, manufacture and launch of a new satellite to be called Aspiration-1.[182] However, despite being constructively aware of the deal between Kosmix and Air Media, ARSO purposefully declined to make any mention of it before the SC. It can be inferred inferable that ARSO was aware of the CLA. Moreover Air Media did not violate the CLA, based on the representations in the contract and the MoU, as they intended to use both proprietary as well as other relevant technology under license.[183] A party who misrepresents during the course of the contracts commits a breach of duty.[184] The DoS Note misrepresented to the Cabinet that there were several expressions of interest from service providers for using the capacity on Aspiration- 1. This reveals that DoS had the *mala fide* intention of the DoS to

[177] *Id.*
[178] Pac. Prop. (Middle East), Ltd. v. Arab Rep. of Egypt, 32 I.L.M. (1993).
[179] Bocksteigel, *supra* note 170 at 357.
[180] *Id.*
[181] Bockstiegel, *supra* note 170 at 357.
[182] Moot Proposition, p. 7.
[183] *Id* at 4.
[184] MULLA, *supra* note 167 at 87.

pin the blame on Air Media and terminate the CLA.

d. THE PRINCIPLE OF PROMISSORY ESTOPPEL AND COMPLIANCE WITH THE ROVISIONS OF THE SATCOM POLICY

The principle of estoppel is a rule of evidence and an equitable doctrine which holds that if a party changes its position or otherwise acts in reasonable reliance on the promise of another, the promisor is 'estopped' from reneging on that promise.[185] Air Media was in perfect compliance of their obligations under the SatCom Policy which is the basis of the deal itself. Under Article 2.5.6, Air Media had the responsibility of obtaining the requisite government approvals and were expected to deliver their services to the rural areas of Arberia. Both the responsibilities had been complied with. In contrast, Kosmix's actions were in tune with the SatCom Policy requirements. Kosmix sought Cabinet approval for the CLA which was not a requirement under the SatCom and operates as cogent evidence of Kosmix's and the DoS's wilful ignorance.

B. THE BLUE SKY DIRECTORS ACTED IN VIOLATION OF THE FIDUCIARY DUTIES

One of the most fundamental duties of a director is the fiduciary obligation towards the company[186] which requires the directors put the interests of the company ahead of their personal interests.[187] Rules preventing conflict of interest on the part of directors are integral to the understanding of fiduciary duties.[188] It is submitted that the directors of Blue Sky were in complete dereliction of the fiduciary duties that they owed to Air Media. The only agenda that the directors of Blue Sky had was to ensure minimal losses to them irrespective of what the consequences of such demands would be on Air Media. In Australasian Annuities Pty Ltd[189] the court held that directors owe their duties to the company, and those duties cannot be superseded by the commercial interests of the broader corporate group. In the present case the directors acted in accordance with the their shareholders interest of Blue Sky rather than the Air Media, amounting to a breach of their fiduciary duties.[190]

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[185] RICHARD STONE, THE MODERN LAW OF CONTRACT, 105 (Cavendish Publishing, 6th ed., 2005).
[186] Bishop of Woodhouse v. Meredith (1820) 1 Jac & W 204.
[187] PAUL L. DAVIES, GOWER AND DAVIES' PRINCIPLES OF MODERN COMPANY LAW, 78, (8th ed., Sweet and Maxwell, 2008).
[188] A. Scott, *The Fiduciary Principle,* 37 CALIFORNIA L.J. 539, 540 (1949).
[189] Australasian Annuities Pty Ltd. v. Rowley Super Fund Pty Ltd [2013] VSC 543.
[190] Gwembe Valley Development Co Ltd v. Koshy (2003) EWCA Cic.1048

4. THE MEETING HELD ON 27 DECEMBER 2010 WAS VALID

Respondent contends that the meeting that was held on 27th December was valid and in accordance of law, as all the statutory procedures were complied with **[A]**.

As per laws in the United Kingdom, Directors are entitled to receive notice of Director's meetings. It is usual for the Articles to allow the directors to decide the manner in which their meetings are conducted and to permit any director to call a meeting.[191] Where the articles provide this general authority but are silent in respect of specifics such as the frequency of meetings, quorum requirement, period of notice, etc., these can be determined by the board. Resolutions are usually passed by a simple majority and, unless restricted by the Articles or a shareholders' agreement, directors have the right to one vote each.

a. NOTICE AND QUORUM IN A BOARD MEETING

Under the articles, any director may call a director's meeting by giving notice to all directors.[192] The quorum for a director's meeting is two unless the Directors decide otherwise, and the directors cannot make the quorum less than two.[193] The draft model articles for a private company in the UK says that 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. The draft model articles for a company provide that a unanimous decision is taken when all the directors indicate to each other, by any means, that they share a common view on the matter.[194] Similarly, in India, sections 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.[195] It is not necessary to give a detailed agenda of the meeting, or exact text of resolutions proposed to be moved, although that is the standard practice, which is good secretarial practice. However, a meeting of which an agenda is not given is not held to be an irregular meeting.[196] A lacunae in the proceedings, for example, a failure to forward the agenda

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[191] THE COMPANIES (TABLES A TO F) REGULATIONS, 1985, reg. 88.
[192] THE COMPANIES (MODEL ARTICLES) REGULATIONS, 2008, reg. 9(1).
[193] THE COMPANIES (MODEL ARTICLES) REGULATIONS, 2008, reg. 90(2).
[194] THE COMPANIES (MODEL ARTICLES) REGULATIONS, 2008, reg. 8(1).
[195] Companies Act, 1956, §172(1).
[196] Abinash Kaur v. Lord Krishna Sugar Mills Ltd (1974) 22 Comp Cas 390 (Delhi); Ferruccio Sias v. Jai Manga Ram Mukhi (1993) 12 CLA 212 (1994) 1 Comp LJ 345.

to directors, is not fatal to the proceedings of the meeting.[197] The board of directors can conduct a business even if it is not included in the agenda for the meeting.[198] This can be done if majority of the directors agree to the same.[199]The meeting was held on 24th and due to disagreements, it was decided that the matter needed further considerations and the Board decided to reconvene on 27th December 2010, following which further steps were taken in pursuance of the notice and the previous meeting.[200] All the members of the board were also present and therefore it can be easily inferred that the notice for the meeting and its agenda were clearly conveyed to all the directors.

b. 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 and binding decision of the Board, provided that the decision is within the competence of the Board, in accordance with and not in contravention of, and in provisions of law and articles of the company, the directors were not disqualified or otherwise ineligible to participate in the proceedings and vote.[201] The intention to propose a resolution should be set out in the notice convening the meeting, and the exact wording of the resolution must be given.[202] Where the notice of meeting at which a special resolution for appointment of a director was to be proposed did not specify the resolution, it was held that the resolution would be invalid.[203] In the meeting that was held on 27th December, the Blue Sky directors introduced a special resolution for voluntary winding up of the Company, which was not mentioned in the notice for meeting, and therefor not known by any other directors. Therefore, the Chairman did not table the draft for special resolution. This act of the Chairman was valid as 'any other business' is to be carried out with the permission of the Chairman, in case of urgent issues, and the Chairman should be vigilant to ensure that those whose main interest lies in the passing of resolutions do not use 'other business' to bounce a resolution through a meeting.[204] There is no specific method of voting for board Meetings, however, Regulation 74(1) of Table A provides for a majority rule with regard to the decisions taken at Board Meetings. It further provides that

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[197] P S Offshore Inter land Services Pvt Ltd v. Bombay Offshore Suppliers and Services Ltd (1991) 5 CLA 376.
[198] Kashinath Tapuruah v. Incab Industries Ltd (1995) 6 SCL 201.
[199] Homer District Consolidated Goldmines (1888) 89 Ch D.549.
[200] Moot Proposition p. 16.
[201] DR. K.R CHANDRATRE, COMPANY MEETINGS: LAW, PRACTICE AND PROCEDURE, 422, (All India Reporter Pvt Limited, 1st ed, 2001).
[202] SHACKLETON, THE LAW AND PRACTICE OF MEETINGS, 157, (Sweet and Maxwell, 8th ed, 2007).
[203] V.G.Balasundaram v. New Theatres Carnatic Talkies Pvt Ltd, (1993) 77 CompCas 324 (Mad).
[204] SHACKLETON, *supra* note 200.

in case of an equality of votes, the Chairman of the Board, if any shall have a second or casting vote. In the present case, the issue of initiating legal proceedings against Kosmix was clearly stated in the Agenda of the meeting, and as it was a draft ordinary resolution, a simple majority of votes on the issue will suffice, and therefore the votes taken in furtherance of the resolution are valid.

A. REMEDIES OF ARBITRATION TRIBUNAL AND WITHDRAWAL OF NOTICE OF ARBITRATION:

a. THE MEETING AND RESOLUTION PASSED THEREIN IS VALID

The Respondents submit that the meeting held on 27th December were validly held. Moreover, the tribunal cannot go behind the reasons of the decisions taken by the directors, as such dispute resolution is 'inconsistent with the general scheme and structure of corporate management' and deprives the directors of 'the right to exercise judgment'.[205] The courts in common law countries have held that a dispute relating to the arbitration of fiduciary duties of directors of the corporation would be against public policy and hence unenforceable.[206]

b. IN ARGUENDO, ARBITRATION PROCEEDINGS HAVE NOT COMMENCED

In *General Officer v. CBI*[207] the court analyzed the expression 'institution of a case' to determine what constitutes litigation, and thus observed, 'The expression may mean filing/presentation or received or entertained by the Court.' Similarly, in case of arbitration proceedings, a notice of arbitration must be filed with the registrar.[208] Only after this is done are the arbitration proceedings initiated.

[205] O'Neal, *supra* note 145 at 799.
[206] Application of Diamond, 8o N.Y.S.2d 465 (Sup. Ct.), aff'd mem., 274 App. Div. 762, 79 N.Y.S.2d 924 (ist Dep't 1948); Motherwell v. Schoof [I949] 4 D.L.R. at 818.
[207] General Officer Commanding, Rashtriya Rifles v. CBI and Anr., [2012] 6 SCC 228; P.J. Kurien v. Renjitha and Ors., (2000) CriLJ 1731 (Ker).
[208] SIAC Rules, 2010, rule 2.

PRAYER

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

1. That the SHA and the arbitration clause contained within it are invalid and illegal;
2. That the Arbitral Tribunal has jurisdiction to decide whether the directors acted in bad faith or violated their fiduciary duties;
3. That the Government's termination of the CLA was unlawful and unjustified;
4. That the Blue Sky directors violated their fiduciary duties, acted in bad faith and breached the SHA;
5. That the decisions taken at the meeting on 27 December 2010 were valid;

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