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Foreword

Hon'ble Justice B.R. Gavai

Short Articles

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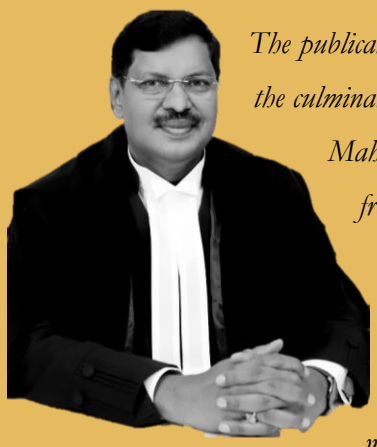
FOREWORD



The publication of the second volume of "The Arbitration and Corporate Law Review" is the culmination of the hard work done by the industrious undergraduate law students of the Maharashtra National Law University, Mumbai. The second volume follows on from the success of the first volume, which included scholarly pieces on diverse topics within the wider commercial legal sphere such as competition law and insolvency as well as on arbitration law.

To my mind, the modern lawyer must keep abreast of the latest developments within this sphere, for commercial laws and other ancillary regulations change course swiftly, so much so that what is settled law in one year may fall into desuetude the very next. Litigation in the commercial field, be it in a court of law or a tribunal established under law or before an arbitration tribunal established through the consent of the contracting parties or otherwise, requires the modem lawyer to grasp wide-ranging concepts quickly and to employ these concepts in a coherent fashion in order to present her case ably before the aforementioned forums. Therefore, it becomes important to engage with critical and up-to-date literature on commercial legal issues to understand the complexity as well to gauge the nuances that underpin these laws.

I have no doubt that the second volume of the journal will be a useful aid to lawyers, academicians and all interested individuals. That there is a second volume is testament to the commitment of the student body and, more specifically, the Editorial Board, towards the furtherance of scholarship in the commercial legal sphere. I congratulate them for this stellar achievement and I commend them for their spirited efforts towards the continuance of the journal. I extend my best wishes for the future of the journal and hope that, in time, it takes its place amongst the pantheon of law journals of global renown.

Hon'ble Mr. Justice B.R. Gavai
(Judge, Supreme Court of India)
04-07-2022

I.

SHIPPING AND INTERNATIONAL TRADE IN AN AGE OF DISRUPTION

Philip Teoh[1]

ABSTRACT: International trade and shipping is currently undergoing a seismic shift, in regard to its relationship with the current age of disruption caused due to various challenges, including, Covid-19 pandemic, Ukraine war, trade wars, Ever Given and the Suez Canal issue, and alike. As such, this article offers a normative analysis of these key challenges from the perspective of their disruption for the shipping and international trade. While the harder issue is how fast, and how disruptive these changes offer in relation to law, it is important to look into the legal effects it will posit. This article, in sum, analyses these imbalances caused towards the shipping and international trade area, in an attempt to understand the future.

CITATION: P. TEOH, "*Shipping and International Trade in an Age of Disruption*", (Vol 2, 2022), pp. 1.

[1] Philip Teoh is a lawyer and International Arbitrator with 32 years of experience. His LinkedIn Profile can be found at: https://www.linkedin.com/in/philipteoh/.

When 2020 began, the key challenge which was faced by the shipping industry was the implementation of the Fuel Standards of IMO 2020 mandating lower Sulphur Fuel Content. Looming ahead was the massive global tragedy which was the Covid-19 Pandemic, which spared no nation, no industry. The Pandemic ravaged lives, decimated businesses and forced a rethink of how much we can prepare. Shipping was badly affected in many ways.

We are certainly in the middle of a perfect storm – we were just getting out of the Pandemic. China is still closing ports, grappling with increase in Oil prices, drastic rise in shipping costs and adapting to the effects of the Trade Wars, and now the war in Ukraine.

A. COVID

At the height of the Pandemic in 2020, the plight of the passengers and crew on board Cruise ships and the cruise industry came into stark focus. Cruise ships - with large numbers of passengers and crew and an emphasis on communal dining and group activities - became incubators of the Covid-19 virus. The crews on board merchant vessels could not sign off as ports did not allow it. The closure of businesses and ports also created disruption to supply chains.

Where ports close because of the pandemic or where the crew of the vessels is infected, this affects the contract of carriage. The effect depends on the terms of the Charter - specifically whether the particular disrupting event is covered. A vessel with infected crew will mean that the vessel will not be granted free pratique or clean bill of health by the port authorities and this may prevent the readiness of the vessel, owners time for loading or discharge, and the consequent effects of running of laytime and demurrage.

This disruption caused multi-fold increase in freight costs, shortage of containers, and congestion in ports. In turn, this resulted in shortages of key components in the supply chain halting or delaying production of automobiles, smartphones. Even the ubiquitous McDonald's was not spared, with shortages of fries. The multi-fold rise of freight costs had caused considerable price increases in all manner of consumables.

Now the Pandemic in the form of the Omicron variant is once again resurgent and has caused a massive and comprehensive lockdown in Shanghai, more extensive than other ones in China. Shanghai is a key Trade and Manufacturing base for global supply chains. These effects of this lockdown reverberate as globalization has made key supply chains inter-connected and what happens in key locations affects the whole chain.

B. Ever Given and the Suez Canal

The Mega Containership Ever Given ran aground while transiting the Suez Canal on March 23, 2021, lodging herself against both banks of the waterway. The blockage caused vessels to back up in the Mediterranean to the north and the Red Sea to the south. It is estimated that the costs to global trade were about $400 million per hour. The fragility of trade routes was exposed when the incident caused knock-on effects on the movement of cargoes globally, as 12 percent of global trade is carried on board ships using the canal.

For six days, the world watched as a multi-national team of salvors, tug operators and the Suez Canal Authority (SCA) coordinated a race against time to free the ship and unclog the canal.

A year later, the sister ship of Ever Given, Ever Forward is in April 2022 now stuck in Chesapeake Bay near the port of Baltimore, USA. This incident exposes the navigation risks faced by large merchant vessels.

C. Trade Wars

President Donald Trump launched a Trade War with China resulting in tit for tat imposition of tariffs on each other's country's exports. This caused traders to devise ways to overcome them by disguising the origins of the cargo. China and Australia also cooled their trade relations, after Australia pushed for an international probe into the origin of the coronavirus without diplomatic consultations beforehand. China has targeted Australian barley, beef, wine, lobsters and coal over the past year after Canberra called for an inquiry into the origins of the coronavirus pandemic. The acts included China calling Chinese parties not to import the products from Australia and imposing high duties.

D. Ukraine

Putin's invasion of Ukraine in March 2022 is bringing the World to the brink. The world was not prepared for this conflict. Countries reacted by imposing trade sanctions, cutting off Russia from international financial system and trade globally. Russian vessels, and sanctions implemented by major trading nations, led to the disruption of Agriculture products. Ukraine is a key producer of wheat, barley, sunflower, corn, soybeans, production of which has been disrupted by the war. The sanctions against Russian oil and energy have escalated the upwards rise in the price of Oil. All these contribute to further and continued disruption to Shipping and International Trade.

A force majeure clause typically excuses parties from the performance of the contract following the occurrence of certain events. A company affected by the Russian sanctions must determine whether its contracts include force majeure provisions and whether the Russian sanctions are an event that excuses full or delayed performance under the contract.

If sanctions are not explicitly mentioned as a force majeure event, a broad definition of war, hostilities, conflict or act of government could cover the consequences of sanctions.

From record low prices of Crude Oil, the Ukraine War has made oil prices climb to record levels.

E. LEGAL EFFECTS

Parties to shipping and related contracts, e.g. Charterparties, FOB, CIF Contracts, bills of ladings and contracts of affreightment, fix their agreed price, provide for price adjustment clauses, force majeure and defences in the event of specified events arising. The allocation of risks is essentially a contractual one.

If the purchase or transaction has become more difficult or more costly to perform, then one party will have to bear the increased costs of the transaction. Force Majeure Clauses or the common law principle of frustration will apply only if the transaction becomes impossible to perform, not more difficult or costly.

If parties rely on standard contracts, it is highly likely these contracts do not adequately provide for the shocks that had hit shipping post-2020. To enter into the contracts without adequately considering the contract terms in the light of known and potential risks would be indeed foolhardy.

Likewise, Insurance can protect to a certain extent. Parties should also seek advice from their broker or insurance intermediary as to whether the existing coverage adequately covers their transactional risks in the light of the current situation. For instance, most forms of marine cargo insurance do not cover delay or the insolvency of the carrier. The insurance cover is for transit risks and not transactional default or failure.

II.

SHAREHOLDER ACTIVISM: AN ESG TOOL OR A FOUNDER'S CURSE?

Ritika Bansal, Mohammad Kamran & Sahil Kanuga[2]

ABSTRACT: The need for appropriate shareholder activism has often been critically viewed as a proactive step towards managing the adverse functioning of a company to ensure corrective measures. The current study aimed at highlighting the good, the bad and the ugly of shareholder activism and its impact on companies from an environmental, social and governance perspective. However, before engaging in a comprehensive analysis of shareholder activism, it may be useful to explore what actually shareholder activism is, where is it coming from, and where it is going. The term is self-descriptive but only to a limited extent. In this study the authors have highlighted despite it having the potential to be misused, it remains desirable when it pushed the management of a company into achieving its ESG obligations.

CITATION: R. BANSAL, M. KAMRAN & S. KARUGA, "*Shareholder Activism: An ESG tool or a Founder's curse?*", (Vol 2, 2022), pp. 1.

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A. INTRODUCTION

An activist shareholder is one who uses its rights as a shareholder of a company to bring about changes within or for the company. In recent years, there has been a rise in the number of institutional investors and the influence exerted by them on companies as activist shareholders.[3] Institutional investors, especially larger public hedge funds, have increasingly used their rights as shareholders of a company to effect changes within the company.[4]

Unlike investors of yesteryears, today's investors are not looking to exit companies at the first sign of distress. Today's investors are eager to play a more proactive role and do not shy away from calling out the blunders of the management.[5] If required, they are also willing to ensure that corrective measures are taken in a timely manner to steer the company from any adverse consequences. However, while shareholder activism is often an effective means of disciplining the management, it has the capability to be misused and can become a nuisance to founders and the management. It may also act as a weapon in the hands of a motivated investor trying to protect short-term interests.[6]

In this article, we discuss the good, the bad and the ugly of shareholder activism and its impact on companies from an environmental, social and governance ("**ESG**") perspective. In Part II, we discuss the background and rise of shareholder activism as well as the objectives it seeks to achieve. In Part III, we examine the types of demands that activist investors raise and the tools available to them under Indian law to bring about changes within companies. In Part IV, we discuss the importance of communication between shareholders and companies to ensure that objectives of shareholder activism are realized without such activism becoming a nuisance to founders and the management. Lastly, we conclude by finding that shareholder activism remains desirable, despite its potential to be misused, when it pushes the management of a company into achieving their ESG obligations.

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[3] Assaf Hamdani and Sharon Hannes, *The Future of Shareholder Activism*, BOSTON UNIVERSITY LAW REVIEW, 99(3), 971, 971 (2019).

[4] *Id.*

[5] Iman Anabtawi and Lynn Stout, *Fiduciary Duties of Activist Shareholders*, STANFORD LAW REVIEW, 60(5), 1255, 1258 (2008).

[6] Virginia Harper Ho, *"Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide*, JOURNAL OF CORPORATION LAW, 36(1), 59, 61 (2010).

B. THE RISE AND OBJECTIVES OF SHAREHOLDER ACTIVISM

Shareholder activism has grown multifold in the last few years due to multiple factors such as the increase of institutional investors, increase of informed investors, tightening of the corporate governance regime and better access to information.[7] In fact, investors' growing preoccupation with ESG standards across the world is also giving rise to significant shareholder activism.[8] A recent and prominent example of this includes the activism demonstrated by Engine No. 1, a small hedge-fund investor of Exxon, which was successful in mobilizing the support of other institutional investors and installing three directors on the board of Exxon, with the aim of pushing Exxon into reducing its carbon footprint.[9]

Shareholders are increasingly engaging with the company management to influence their behaviour, push for policy changes and influence overall conduct. There have, typically, been two streams of shareholder activism. [10] First, financial activism which focuses on maximizing the shareholder value and governance issues. Second, social activism which focuses on the influence of the company on larger outcomes, such as company's overall environmental impact, social standing etc. Many a times, the activist investors raise both financial as well as social issues.[11] The type of investor often determines the nature of the issues that the investor is likely to raise.[12] For instance, venture capital funds, private equity funds and mutual funds may be more interested in making changes from a financial and governance standpoint. On the other hand, investors who are environmentally or socially more conscious may be more interested in bringing changes from a social standpoint. Having said that, when an issue is raised, each investor will attempt to mobilize support from others in aid of their view.

C. ACTIVIST DEMANDS AND TOOLS UNDER INDIAN LAW

[7] Assaf Hamdani and Sharon Hannes, *supra* note 2 at 971.

[8] Anna Christie, *The Agency Costs of Sustainable Capitalism*, UC DAVIS LAW REVIEW, 55(2), 875-954 (2021).

[9] *Id*; Anna Christie, *Battle for the Board: Climate Rebellion at Exxon Marks a New Era of Shareholder Activism*, OXFORD BUS. L. BLOG (Jul. 12, 2021) https://law.ox.ac.uk/business-law-blog/blog/2021/07/battleboard-climate-rebellion-exxon-marks-new-era-shareholder.

[10] Virginia Harper Ho, *supra* note 5, at 67.

[11] *Id*. at 67.

[12] *Id*. at 60.

To achieve these goals, an activist investor may raise multiple and a varied set of demands from a company. For example, in public companies that are valued at less than the sum of their parts (i.e., the amount they could generate if they were liquidated), the investors can push the management to break up and sell off parts of the business,[13] issue generous dividend,[14] divest and simplify the corporate structure and conduct asset sales, with the proceeds intended for share repurchases and the repayment of debt.[15]

In other cases, the activists typically make demands such as requiring the management to voluntarily disclose climate change risks,[16] sell prior acquisitions and split operations (e.g., design and manufacturing), revamp human resource policies and be more disciplined with capital allocation. From a governance standpoint, the activist investors may require the company to increase or decrease the number of directors, add more independent directors, overhaul management compensation, rationalize CXO pay, put in place better internal control mechanisms, and change the management.

Indian law provides several tools for shareholder activists to hold a company accountable. In particular, the shareholders can exercise the following rights under law to influence the behaviour of the company:

a. **Right to receive information**: The Indian Companies Act, 2013 ("**Companies Act**") entitles the shareholders to receive information / document such as annual return

[13] Walter Frick, *The Case for Activist Investors*, HARVARD BUSINESS LAW REVIEW (March 2016), https://hbr.org/2016/03/the-case-for-activist-investors.

[14] *Id.*

[15] In fact, a recent study by Reuters suggests that nearly half of all activist investor campaigns in 2019 in the United States involved a demand for asset spin-off and sales. Svea Herbst-Bayliss, *Activist hedge funds stepped up calls for asset sales and spin-offs in 2019: Data*, REUTERS (Jan. 15, 2020) https://reuters.com/article/us-hedgefunds-activism-idUSKBN1ZE1TT.

[16] Caroline Flammer, Michael W. Toffel, and Kala Viswanathan, *Shareholders Are Pressing for Climate Risk Disclosures. That's Good for Everyone*, HARVARD BUSINESS REVIEW (Apr. 22, 2021) https://hbr.org/2021/04/shareholders-are-pressing-for-climate-risk-disclosures-thats-good-for-everyone?utm_medium=email&utm_source=newsletter_daily&utm_campaign=dailyalert_actsubs&utm_content=signinnudge&deliveryName=DM129167.

extracts,[17] audited financial statements along with auditor's report,[18] and statutory registers (such as register of members, debenture-holders etc.[19])

b. **Right to vote on critical matters**: Under the Companies Act, certain critical matters require consent of the shareholders and cannot be carried out by the board. While some matters can be passed by a simple majority, certain matters require approval by special majority. Matters such as removal of directors,[20] remuneration of directors,[21] acceptance of deposits from the public,[22] etc. can be passed with simple majority. Whereas matters such as alteration of memorandum of association,[23] alteration of articles of association,[24] change in the registered office of the company,[25] issue of sweat equity shares,[26] reduction of share capital,[27] etc. require special majority approval.

c. **Right to appoint auditor:** Shareholders have the right to appoint the auditors of the company in an annual general meeting.[28]

d. **Right to requisition shareholders meeting:** Shareholders holding 10% of the shares with voting rights can require the board of directors to call for an extraordinary general meeting.[29] In the event the board of directors fails to requisition the meeting, the requisitionist shareholder can call the meeting on its own.

[17] Companies Act, No. 18 of 2013, § 94 (Ind.).

[18] Companies Act, No. 18 of 2013, § 136 (Ind.).

[19] Companies Act, No. 18 of 2013, § 94 (Ind.).

[20] Companies Act, No. 18 of 2013, §169 (Ind.).

[21] Companies Act, No. 18 of 2013, § 197 (Ind.).

[22] Companies Act, No. 18 of 2013, § 73 (Ind.).

[23] Companies Act, No. 18 of 2013, § 13 (Ind.).

[24] Companies Act, No. 18 of 2013, § 14 (Ind.).

[25] Companies Act, No. 18 of 2013, § 12(5) (Ind.).

[26] Companies Act, No. 18 of 2013, § 54 (Ind.).

[27] Companies Act, No. 18 of 2013, § 66 (Ind.).

[28] Companies Act, No. 18 of 2013, § 139 (Ind.).

[29] Companies Act, No. 18 of 2013, § 100 (Ind.).

e. **Grievance redressal mechanism:** A listed company or a company with more than 1000 shareholders, debenture-holders, deposit holders or any other security holders, must have a stakeholder relationship committee to resolve grievances.[30] In this regard, a web-based grievance redressal mechanism called the SEBI Complaints Redress System (SCORES) has been set up by SEBI, which enables investors to lodge and track their complaints through the platform.

f. **Related Party Transactions:** Shareholders can withhold their consent for any related party transaction being undertaken by a company.[31]

g. **Protection of interest of the minority shareholders:** The Companies Act also accounts for the interests of minority shareholders by providing that at least one director of a company should be appointed by small shareholders.[32]

h. **Class Action Suits:** Certain category of shareholders can bring a class action suit against the company, its directors and third-party advisers if the rights of any of the members are infringed or the conduct of the management is prejudicial to the interest of the company or its shareholders.[33]

i. **Derivative Action:** A single shareholder, irrespective of his/her shareholding in the company, can also bring a derivative suit on behalf of the company challenging a board resolution if it was detrimental to the interest of the company. The derivative action procedure is set out in the Code of Civil Procedure 1908.[34]

j. **Serious Fraud Investigations Office (SFIO):** Shareholders by passing a special resolution can intimate the Central Government that the affairs of the company are required to be investigated. The Central Government, on receiving such a request, can order the SFIO to investigate the affairs of the company.[35]

[30] SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, Gazette of India, pt. III sec. 4, Reg 4(2)(a)(vii) read with Reg 13 and Reg 20(4) (Sept. 2, 2015).

[31] Companies Act, No. 18 of 2013, § 188 (Ind.).

[32] Companies Act, No. 18 of 2013, § 151 (Ind.).

[33] Companies Act, No. 18 of 2013, § 254 (Ind.).

[34] Code of Civil Procedure, No. 5 of 1908, Order I Rule 8 (Ind.).

[35] Companies Act, No. 18 of 2013, § 212 (Ind.).

Further, Section 241 of the Companies Act allows shareholders to file an application in the National Company Law Tribunal against the company if it believes that the company is operating in a manner which is against the public interest or is oppressive and prejudicial to the shareholders. Shareholders also have the right to remove directors by passing an ordinary resolution under Section 169 of the Companies Act.

It is important that activists understand and exercise their rights in accordance with law.

The demands by investors can and usually do end up becoming contentious. To that end, the manner in which such issues are raised and the manner in which solutions are discussed require that constant communication through dialogue remain constant. Should dialogue not take place, the matter will probably end up before the courts, which will prejudice all stakeholders.

D. IMPACT OF ACTIVISM ON THE COMPANY

Most cases of activism are a well-intentioned attempt at addressing any issues that may be found in the company. Shareholders' role as "watchdog" therefore, can provide effective oversight of the management and board. It also ensures effective acknowledgement and implementation of improved ESG standards in the company, with more transparency and accountability.

However, shareholder activism has also gained disrepute as it can sometimes cause more interference than necessary in the management of the companies.[36] Many a times, increased involvement of shareholders, howsoever well-intentioned, has resulted in greater disputes between the management of the companies with the activist shareholders. One need not look further than the *BharatPe*[37] controversy or the more recent *Trell*[38] and *Zillingo*[39] controversies, to understand these clashes between founders and investors. These controversies are unsurprising in start-ups wherein investors, taking on immense risks at the early stages of a

[36] Virginia Harper Ho, *supra* note 5, at 61.

[37] *BharatPe redefined India's payment ecosystem. The unicorn now wants to challenge India's banks*, THE FORBES (Sept. 9, 2021) https://forbesindia.com/article/take-one-big-story-of-the-day/bharatpe-redefined-indias-payment-ecosystem-the-unicorn-now-wants-to-challenge-indias-banks/70299/1.

[38] *Trell is the new BharatPe; Boat Plans Acquisition Spree*, ECONOMIC TIMES (Mar. 17, 2022) https://economictimes.indiatimes.com/tech/newsletters/morning-dispatch/trell-is-the-new-bharatpe-boat-plans-acquisition-spree/articleshow/90277139.cms?from=mdr.

[39] Salman SH, *Zilingo CEO Ankiti Bose exploring buyback option ahead of board meeting*, FINANCIAL EXPRESS (Apr. 26, 2022) https://financialexpress.com/industry/sme/cafe-sme/zilingo-ceo-ankiti-bose-exploring-buyback-option-ahead-of-board-meeting/2503439/.

company, consider themselves justified in taking a more active role in the management of such companies, especially as the companies grow exponentially. We see this happening not only in Indian companies such as *Flipkart*[40] and *Housing.com*[41], but also globally through the examples of *Apple*, *WeWork*, *Uber* and *Twitter* amongst others.[42]

E. IMPORTANCE OF EFFECTIVE COMMUNICATION

While investor activism is a double-edged sword, it becomes important to understand whether the sword is being used as a weapon of attack, or defense. To that end, understanding the motive and the proposed solution is key.

In the case of Maruti, India's largest carmaker and subsidiary of the Japanese Suzuki corporation, a situation unfolded where the parent, Suzuki Motor Corporation acting through a separate subsidiary, proposed leasing a plot of land from its own subsidiary, Maruti, and setting up a plant which would manufacture Maruti cars and engine components and sell them to Maruti. It did not take long for activist investors to question the decision to house the manufacturing in a separate subsidiary and on land which was already owned by Maruti.[43] It was argued by IIAS that Suzuki Motor Corporation was parking a profitable business in a 100% subsidiary.[44] Extremely vocal shareholder activism led to this proposal being scrapped and Maruti setting up the Gujarat plant directly thus ensuring that the benefit was passed on to all its stakeholders. In its true sense, the company was able to derive full value from its own business and future growth.

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[40] Saritha Rai and Matthew Boyle, *Revealed: How Walmart Decided to Oust Flipkart Co-founder Binny Bansal*, BUSINESS STANDARD (Nov. 15, 2018) https://business-standard.com/article/companies/revealed-how-walmart-decided-to-oust-flipkart-co-founder-binny-bansal-118111500702_1.html.

[41] Deepti Chaudhary, *Housing.com shows the door to Rahul Yadav*, THE FORBES (Jul. 1, 2015) https://forbesindia.com/article/special/housing.com-shows-the-door-to-rahul-yadav/40597/1.

[42] Tom CW Lin, *The Corporate Governance of Iconic Executives*, NOTRE DAME LAW REVIEW, 87(1), 351, 359 (2011). *Also see* David Gelles, Michael J. de la Merced, Peter Eavis and Andrew Ross Sorkin, *WeWork C.E.O. Adam Neumann Steps Down Under Pressure*, THE NEW YORK TIMES (Sept. 24, 2019) https://nytimes.com/2019/09/24/business/dealbook/wework-ceo-adam-neumann.html; Seth Fiegerman, *Uber's first investors open up about their wild ride*, CNN BUSINESS (May 10, 2019), https://edition.cnn.com/2019/05/08/tech/uber-first-investors/index.html; Greg Roumeliotis and Sheila Dang, *Twitter CEO Jack Dorsey Hands Reins to Technology Chief Agrawal*, REUTERS (Nov. 30, 2021) https://reuters.com/business/media-telecom/twitter-ceo-jack-dorsey-expected-step-down-cnbc-2021-11-29/.

[43] Himank Sharma and Aradhana Aravindan, *Big Funds Challenge Maruti over Gujarat Suzuki plant*, REUTERS (Feb. 24, 2014) https://reuters.com/article/india-maruti-investors-gujarat-plant-idINDEEA1N0FU20140224.

[44] *Maruti Investors See Red over Suzuki Plan to set up Gujarat Plant*, THE FINANCIAL EXPRESS (Jan. 30, 2014) https://financialexpress.com/archive/maruti-investors-see-red-over-suzuki-plan-to-set-up-gujarat-plant/1221432/.

Accordingly, it is important to maintain clear channels of communication between the investors and the company. This would not only ensure that the motives of activist investors are clearly understood by companies, but it would also ensure that shareholders are better aware of a company's decisions. The reasons for a proposed decision form the bedrock on which investor opinion is based. We live in a world of extreme transparency where each aspect of a decision can and usually is dissected by each and every stakeholder. The opaqueness with which entities operated previously is a thing of the past. To that end, a company's decision-making process, if well communicated and articulated, will reduce the chances of activism in its ranks. Where the moral compass is unquestionable and the communication is well-thought-out and reasonable, it will usually ensure that the stakeholders of a company will have faith in the proposals that come before them.

F. CONCLUSION

With the increase of institutional investment in Indian companies, more and more incidents of activism are being seen whereby activists are attempting to control or influence the day-to-day activities of the company. This is only going to increase. Shareholders are slowly but surely taking on an active role to the extent that they begin to make their voice heard within the decision-making within a company. While overreach by shareholders may arguably have an adverse effect, it does not mean that the management of a company should be free to run the company without any monitoring.

As the Companies Act also requires, directors of a company should act in the best interests of the company, shareholders and the community.[45] Shareholder activism, when it rightfully seeks to push the management of the company into achieving such obligations, continues to remain desirable and will be required in the larger scheme of implementing and monitoring ESG goals.

[45] Companies Act, No. 18 of 2013, § 166 (Ind.).

III.

DOCTRINE OF ARBITRAL IMMUNITY: IS IT CARTE BLANCHE?

Sameer Jain & Vivek Joshi[1]

Abstract: The authors of this article describe the importance of the independence and impartiality clause in the context of arbitration and how it came to be significant in the Indian context. They also clarified the rationale behind adopting the language on arbitrator immunity, which gives arbitrators protection from legal action. The law does not give prima facie support for the doctrine of arbitral immunity, but the exceptions provided are more focused on the arbitrator's actions or omissions that have the potential to be detrimental to the arbitral process, despite the fact that the elements of good faith remain a grey area and nothing is absolute. Therefore, arbitrators need not use caution when making rulings, but there must be an element of caution that comes along with the same.

Citation: S. Jain & V. Joshi, "*Doctrine of Arbitral Immunity: Is It Carte Blanche*?", (Vol 2, 2022), pp. 14.

[1] Sameer Jain is the Founder & Managing Partner at PSL Advocates & Solicitors and Vivek Joshi is an Associate at PSL Advocates & Solicitors.

A. INTRODUCTION

Independence and impartiality are perhaps considered to be the heart and soul of the arbitration proceedings that depicts the hallmarks of a good arbitrator and essence of a seamless proceeding. Instances where serious allegations are casted on the independence of the arbitrator, the same have the effect to derail the entire arbitration itself. In similar vein, there must not be instances wherein the arbitrator is put under the fear of being held liable for damages or any legal actions against him as a consequence of the decisions that he makes in good faith and as being duty bound to adjudicate the disputes before him.

Some interesting observations in this regard were made by Lord Denning in his opinion in *Sirros v. Moore*[2] wherein he observed:

> *Just like judges, '[an arbitrator] should be able to work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: 'If I do this, shall I be liable in damages?'…He is not to be plagued with allegations of malice or ill-will or bias or anything of the kind.'*

Essentially, arbitrators like judges, should be able to work without fear. To prevent trembling fingers of an arbitrator, the doctrine of arbitral immunity has now become the preferred 'way-out' or the 'safest defence' whereby arbitrators can claim safeguards from a legal action against them. Significantly, whilst the constituents of good faith remain a grey area, it may be safely construed to encompass all acts/decisions taken by the arbitrator in furtherance of his/her mandate and during the course of the arbitral proceedings, while following the substantive procedure of law and exercising his discretion judiciously.

The Indian law has only recently adopted the doctrine of arbitral immunity inasmuch as the concept stands codified under Section 42B of the Arbitration and Conciliation Act, 1996 (**"the Act"**).[3] Section 42B of the Act which was inserted vide the Arbitration and Conciliation (Amendment) Act, 2019[4] (**"2019 Amendment Act"**), and it provides that the arbitrator will not be liable for any decisions taken by him during the course of the arbitral proceedings and ones that are taken in good faith. From the first blush, it appears that the draftsmen intended to provide a blanket ban on the parties from pursuing any legal recourse directly or in-directly against the arbitrator. However, a deeper analysis would reveal that the Act itself provides for certain exceptions that can be read along with the doctrine of arbitral immunity. The following sections of this article will steer across the various provisions and their respective stipulations that can be read as exceptions to the doctrine of arbitral immunity.

B. CONCEPT OF ARBITRAL IMMUNITY

[2] [1975] 1 QB 118.

[3] The Arbitration and Conciliation Act, 1996, § 42B, No. 26, Acts of Parliament, 1996 (India).

[4] The Arbitration and Conciliation (Amendment) Act, 2019, § 9, No. 33, Acts of Parliament, 2019 (India).

The first instance of judicial immunity developed in common law jurisdictions dates back to the year 1607 when Lord Coke had opined that King's Bench were immune from being sued in courts for the acts performed in their judicial capacity.[5] In this light, the foundations of judicial immunity have been extended to arbitral immunity given the statutory appointment and judicial functions performed by arbitrators in discharge of their duties.

Any aggrieved party is at liberty to take appropriate recourse in law and agitate all grievances therein. In this regard, there exist ample legislative avenues to do so. However, bringing an arbitrator before a court of law for any decision that was taken in good faith by them would tantamount to exceeding the scope of judicial discipline itself. Thus, there lies no reason or scope for arbitrators to defend suits brought against them by disgruntled parties. To safeguard the arbitrators from such frivolous and vile attempts of the parties, the doctrine of arbitral immunity holds immense relevance in today's day and age. Time and again the courts in India have deprecated the practice of making the arbitrator a party to the challenge proceedings. In *Kothari Industrial Corporation Ltd. v. M/s. Southern Petrochemicals Industries Corporation Limited & Anr.*[6], the Hon'ble Madras High Court had observed as follows:

> *"It is a pernicious practice in this court to implead arbitrators or arbitral tribunals when there is no need to do so. Often, arbitrators are embarrassed upon receipt of notice. It is only in a rare case when a personal allegation is made against an arbitrator may such arbitrator be impleaded. Just as in case of a revision or an appeal the lower forum or the Judge manning the lower forum is not impleaded as a party, in proceedings under Section 34 of the Arbitration and Conciliation Act, 1996, the arbitrator or the members of the arbitral tribunal are utterly unnecessary parties unless specific personal allegations are levelled against them that would require such persons to answer the allegations."*

Apart from safeguarding the arbitrators from any legal actions taken against them by the parties, it must be seen from the perspective and touchstone of sanctity of decisions passed by them as well. To this extent, arbitral immunity may also be regarded as stronger than the judicial immunity. This is solely premised on the fact that decision passed by an arbitrator in the form of an arbitral award is subjected to judicial review on extremely narrow and limited grounds. Given the pro-enforcement stance being adopted by a plethora of jurisdictions, there is an inherent trend that courts lean in favour of enforcement of arbitral awards rather than setting aside the same. On the other hand, judicial decisions passed by courts are routinely appealed before higher courts as a matter of right or by craving leave by depicting requisite grounds. Thus, arbitral immunity is only strengthened by this very fact that the sanctity of decisions are preserved, directly enforced and less susceptible to being set aside. At the same time, this creates an obligation of independence and impartiality much stronger on the arbitrator.

[5] Prathima R. Appaji, *Arbitral Immunity: Justification and Scope in Arbitration Institutions*, 1 IJAL 63 (2012).

[6] MANU/TN/7023/2021.

There lies much more to the concept of arbitral immunity but has been generally overlooked. In cases where the arbitrator has been appointed by mutual consent of the disputing parties, there lies no room for either party to question the arbitrator about any decision that has been taken in good faith and bring a legal action against him for the same. If the concept of party autonomy is desired to be knit in the very fabric of arbitration, it also remains paramount that the arbitrator is given the freedom to make any decision regarding the dispute and within the terms of reference without hesitating or about the ramifications of the decision. This freedom of decision making must not be taken away from the arbitrator at all, until and unless the arbitrator himself decides that he does not have jurisdiction to rule in a specific dispute[7] or is rendered *de jure* or *de facto* unable to perform his functions, as provided under the Act.[8]

Notably, arbitral immunity now stands codified under the Act by virtue of Section 42B that safeguards the arbitrator from any action that was done in good faith. This was recently brought in the arbitration sphere in India vide the 2019 Amendment Act.[9] Pertinently, protection of the arbitrators was already encapsulated under various rules of the arbitral institutions[10], however the same now stands codified by virtue of the 2019 Amendment Act and in the law of the land, which would apply to every Indian seated arbitration.

However, the Indian law provides far more than what meets the eye. It is perhaps a misconception that the arbitrator possesses blanket immunity from all actions done in good faith.

C. EXCEPTIONS

The underlying objective of exploring the possible exceptions is aimed at bringing forward certain cases wherein the arbitrators could be held liable for certain acts and may also attract consequences. However, it is apposite to note that there exist no direct exceptions to the doctrine of arbitral immunity but these exceptions are more towards actions/omissions of the arbitrator that have the degree of being detrimental to the arbitral process.

1. De jure or de facto inability of the Arbitrator

[7] The Arbitration and Conciliation Act, 1996, § 16, No. 26, Acts of Parliament, 1996 (India).

[8] The Arbitration and Conciliation Act, 1996, § 14(1)(a), No. 26, Acts of Parliament, 1996 (India).

[9] *Supra* note 3.

[10] Mumbai Centre for International Arbitration, Rule 34, MCIA Rules, 2016 (June 18, 2022, 1:00 PM), https://mcia.org.in/mcia-rules/english-pdf/; Nani Palkhivala Arbitration Centre, Rule 54, Rules to Regulate Arbitration (June 18, 2022, 1:05 PM) http://www.nparbitration.com/Documents/pdf/NPAC-Rules-Book.pdf; Delhi International Arbitration Centre, Rule 35 DIAC Rules, 2018 (June 18, 2022, 1:10 PM) http://dhcdiac.nic.in/wp-content/uploads/2020/01/DIAC-Arbitration-Proceedings-Rules-2018.pdf.

Section 14 of the Act prescribes the conditions wherein the mandate of the arbitrator is liable to terminated and the erstwhile arbitrator would be substituted. One of the foremost pre-conditions is the *de jure* (in accordance with law) or *de facto* (by the very fact) inability of the arbitrator to perform his statutory functions.[11] The *de jure* or *de facto* inability of the arbitrator to discharge his functions also points to usurping the arbitral immunity since the objective of Section 14 of the Act is aimed at removal of the existing arbitrator and effectuate a substitution of the arbitrator.

Interestingly, Section 14 of the Act does not operate *in silo* from other provisions of the Act. Section 14 is closely and intricately linked with Section 12(5) of the Act that provides for the inability of the arbitrator in case he falls under any of the categories specified under the seventh schedule of the Act that would render him ineligible.[12] Therefore, lack of proper disclosure from the arbitrator's end could attract the consequences under Section 12(5) of the Act, save and except in cases where the parties consciously waive the applicability by an express agreement in writing as prescribed under the *proviso* to Section 12(5) of the Act.

Thus, any overt act which might be constituted as bias, would be a basis for arbitrator's removal that is squarely addressed under Section 12(5) of the Act. Pertinently, once the consequences of Section 12(5) are attracted, Section 14(1)(a) becomes the applicable provision that renders the arbitrator *de jure* unable to perform his functions.

2. Failure to pass the award within the timelines stipulated in the Act

The second exception includes the imposition of monetary penalty on the arbitrator. In accordance with the proviso to Section 29A(4), if the court finds that the proceedings have been delayed for reasons attributable to the arbitral tribunal, then a reduction of the fee may be ordered that does not exceed 5% for each month of the delay.[13]

The proviso is perhaps one of the most stringent penalties that the arbitrator could be penalized with under the Act, considering the fact that arbitral immunity will not be applicable in such cases. Even though a reasonable opportunity is contemplated by the Act, the imposition of monetary deductions is noteworthy from the perspective of usurping the arbitral immunity.

The failure of an arbitrator in not passing the award within a reasonable timeline has been considered to be a serious fallacy in the arbitration regime in India. In-fact, the Hon'ble Delhi High Court in *Director General,*

[11] *Supra* note 6.

[12] The Arbitration and Conciliation Act, 1996, § 12(5), No. 26, Acts of Parliament, 1996 (India).

[13] The Arbitration and Conciliation Act, 1996, § 29A(4), No. 26, Acts of Parliament, 1996 (India).

Central Reserve Police Force v. Fibroplast Marine Pvt. Ltd.[14] has recognized the inordinate and unexplained delay in passing of the award to be against the Public Policy of India and susceptible to set-aside the award. This reflects the pro-arbitration stance in India and also treating the failure of the arbitrator to comply with the timelines as a serious issue.

3. Failure to act in accordance with the mandate and causing inordinate delay

Another notable provision attracting the usurping of the arbitral immunity is codified under Section 14 of the Act wherein the mandate of the arbitrator can be terminated if he fails to act without undue delay.[15] Pertinently, termination of the mandate of the arbitrator is akin to stripping him with all authority, immediately thereafter the protection under Section 42B of the Act is no more available. If the competent court determines that the arbitrator caused inordinate delay, the mandate will be terminated as postulated under Section 14 of the Act.

Recently, in *Swadesh Kumar Agarwal v. Dinesh Kumar Agarwal*[16], it was asserted that the Ld. Sole Arbitrator had caused undue delay in conducting the arbitral proceedings that prompted one of the parties to allege termination of his mandate. Whilst the Hon'ble Supreme Court refrained from returning any findings on the merits of the allegations, the same was remitted back to the concerned court to be determined in accordance with the law. This is another instance which shows that the courts in India are not prone to brushing aside such allegations without any consideration.

4. Fraud and Corruption

The captioned grounds have, perhaps, been one of the most debatable grounds under the Act for resisting an award by the award-debtor either under Section 34 or even under Section 36 of the Act, after the Arbitration and Conciliation (Amendment) Act, 2021 (**"2021 Amendment Act"**). Interestingly, proving fraud at the stage of Section 34 of the Act is challenging for the award-debtor given the fact that courts would look to preserve the sanctity of the arbitral award and only permit very narrow grounds for making an interference. *Albeit*, this position has now been substantially altered due to the insertion of new provisions that provide an unconditional stay on the award where the award-debtor is *prima facie* able to depict fraud or corruption.[17] Therefore, the 2021 Amendment Act has certainly given rise to certain concerning aspects.

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[14] Central Reserve Police Force v. Fibroplast Marine (P) Ltd., 2022 SCC OnLine Del 1335.

[15] *Supra* note 5.

[16] Swadesh Kumar Agarwal v. Dinesh Kumar Agarwal, 2022 SCC OnLine SC 556.

[17] The Arbitration and Conciliation Act, 1996, § 36(3), No. 26, Acts of Parliament, 1996 (India).

Coming to the concerning part, the same arises in a twofold manner i.e., (i) an unconditional stay on the award that runs contrary to the well settled position of law and (ii) questioning the arbitrator's decision on serious grounds that could have manifold ramifications.

Whilst addressing the former, the judgment in *Hindustan Construction Company v. Union of India*[18] holds relevance since it disregarded the practice of automatic stay on arbitral awards. Moreover, the threshold for deciding the constituents of *prima facie* case would again be subjected to judicial scrutiny in the near future.

The latter would involve raising serious questions on the integrity and independent decision making of the arbitrator since the courts under Section 34 would have to dig deeper into discerning the element of fraud or corruption through reviewing the merits (that is strictly prohibited). Therefore, a roving inquiry by the courts under Section 34 to determine the element of fraud would usurp the arbitral immunity and, in many ways, eventually reopen the entire docket of the case. Further, to take recourse of this provision, it is imperative for the party alleging fraud and corruption, to demonstrate it with the help of cogent and/or direct or circumstantial evidence. Thus, grounds such as fraud and corruption carry a heavy baggage that has the ability to take away the layer of immunity conferred on the arbitrator, thus seriously looked down upon.

5. Protection from only acts/omissions done in discharge of duties

Significantly, even from a bare perusal of Section 42B of the Act, it can be inferred that only actions/omissions done in discharge of the duties are exempted from any consequences. Thus, any personal act that may have civil/penal consequences are not exempted. Therefore, the concept of arbitral immunity to be understood as blanket immunity is perhaps incorrect and comes with its own caveats as addressed hereinabove.

D. CONCLUSION

Granting blanket immunity to the arbitrator(s) is certainly not the right approach given the influential factors that come along with it. However, in many ways, the doctrine of arbitral immunity remains more inclined towards the perceptions rather than technicalities. In other words, it is only a school of thought that arbitral immunity is *carte blanche*. There are several factors that could usurp the same. Therefore, it is not that arbitrators must beware whilst making decisions but there must be an element of caution that comes along with the same. Moreover, it must be appreciated that parties do not benefit from extending immunity to arbitrators. If a court forms an opinion to terminate the mandate of the arbitrator due to failure or non-performance, the fault lies at the end of the arbitrator and parties are made to litigate before several judicial forums creating a 'no-win' situation.

[18] Hindustan Construction Co. Ltd. v. Union of India, (2020) 17 SCC 324.