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LEGAL ASPECTS OF ONLINE ARBITRATION IN INDIA: FACT OR FALLACY

Dr. Tanmay Roy & Ankit Kumar[1]

Abstract

Technology is becoming more prevalent as a tool in the resolution of legal disputes. A large number of online dispute resolution (ODR) platforms and arbitral institutions have emerged globally to expedite the settlement of a wide range of legal disputes. Traditional legal dispute resolution processes have also been put to the test as a result of the COVID-19 epidemic. International legal systems and private dispute settlement institutions have set standards for the use of remote participation in court proceedings, including videoconferencing. The majority of international arbitration bodies have adopted online arbitration practices and created guidelines for carrying out arbitration procedures online. It is in this context, the article will address online arbitration and its international legal framework. However, the main crux of the article is to analyze the Indian legal framework for online arbitration. While analyzing this, the article will reasonably attempt to emphasize on several judicial pronouncements governing this issue. Further, the article will assess the barriers towards the realization of online arbitration and come up with concluding observations in a definite form and lay down certain viable recommendations in order to facilitate online arbitration in India.

Keywords: Arbitration, Award, Convention, Enforcement, Mediation.

I. INTRODUCTION

The concept of 'Online Arbitration' is not new and the field of ODR has grown exponentially during the last two decades. Technology is increasingly being used as a tool in the settlement of legal disputes. Several online dispute resolution (ODR) platforms and organisations have sprung up throughout the world to facilitate speedy resolution of a wide range of legal conflicts. Not only have these ODR Platforms been useful in settling disputes related to digital exchanges, but they have also been widely used. Traditional methods of resolving legal disputes have also been tested as a result of the COVID-19 outbreak. This new era of technology was spearheaded by online dispute resolution (ODR). As a consequence of the epidemic, there was a need for innovative and adaptable approaches everywhere, including the court system. Worldwide, legal systems and private dispute resolution centres have established guidelines for the use of videoconferencing and other kinds of remote participation in judicial processes. Online arbitration practises have been adopted by arbitral bodies like the International Chamber of Commerce (ICC), the Indian Council of Arbitration (ICA), the Singapore International Arbitration Centre (SIAC), the World Intellectual Property Organization (WIPO), and the London Court of International Arbitration (LCIA). Most international arbitration organisations have developed rules for conducting arbitration

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processes online. It is in this context; this article will begin by describing online arbitration and providing some historical context on its use in various parts of the globe. In its second part, the authors have addressed the international legal framework governing online arbitration. The primary focus of this article is to examine the legal framework for online arbitration in India. The authors have appropriately endeavoured to highlight a number of legal decisions pertaining to this issue while assessing it. Furthermore, the paper will analyze the obstacles in the implementation of online arbitration in India. After an assessment of all these significant aspects and allied issues, the authors have come up with concluding observations in a definite form and have further attempted to lay down certain viable recommendations in order to facilitate online arbitration in our county in its true and proper perspective.

II. ONLINE ARBITRATION: MEANING AND SCOPE

Online arbitration is a subfield of dispute resolution that makes use of digital tools to help parties reach a settlement. Using alternative dispute resolution (ADR) mechanisms available online offers the best chance of success in this regard. ODR offers many of the same benefits as ADR but with the added benefit of being more accessible. ICT and internet access have challenged the concept that conflict resolution need physical meeting. The settlement of legal conflicts via online forums is the future of ADR. Businesses that use ODR may increase productivity, savings, employee satisfaction, risk mitigation, and customer loyalty. Businesses that ignore it will be pulled into expensive and fruitless legal proceedings that create ill will and reduce competitive strength.[2] The ODR Standards suggested by the International Council for Online Dispute Resolution[3] stipulate that ODR platforms and procedures must be accessible, accessible, accountable, competent, confidential, equal, fair, impartial, legal, secure, and transparent.[4] The term "online arbitration" does not have a single, all-encompassing definition; nevertheless, its meaning may be comparable to that of "online dispute resolution." The American Bar Association's Task Force on E-Commerce and Alternative Dispute Resolution provides a comprehensive explanation of online dispute resolution (ODR).[5] *"ODR is a broad term that encompasses many forms of ADR and court proceedings that incorporate*

[2]Colin Rule, *Online Dispute Resolution for Business: B2B, e-commerce, consumer, employment, insurance, and other commercial conflicts* 7 (John Wiley & Sons, San Francisco, 2003).
[3]ICODR, a non-profit organisation established in the US, develops, converges, and adopts open standards for the worldwide endeavour to settle disputes and conflicts utilising information and communications technology.
[4]Leah Wing, "Mapping the Parameters of Online Dispute Resolution" 9 *Journal of Online Dispute Resolution* (2022); see also Colin Rule, "Online dispute resolution and the future of justice" 16 *Annual Review of Law and Social Science* 289 (2020).
[5]Faye Fangfei Wang, *Online arbitration* 6 (Informa Law from Routledge, 2017).

the use of the internet, websites, e- mail communications, streaming media and other information technology as part of the dispute resolution process. Parties may never meet face to face when participating in ODR. Rather, they might communicate solely online."[6]

UNCITRAL has provided a definition for the ODR as: *"a mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology"*.[7] The NITI Aayog Report[8] also defines ODR as "e-ADR" or ADR that is facilitated by technology or it is just the use of technology to settle conflicts outside of the public court system.

Employing the internet, websites, communication though email, videoconferencing, and other information technologies to resolve disputes is a common practice known as ODR, which involves a wide range of ADR methods and legal proceedings. In ODR, parties may never meet face-to-face, communicating solely online instead. Thus, it is a method for settling legal disputes that makes use of the internet and other forms of electronic communication. A common oversimplification of the meaning of "Online Arbitration" (OA) is that it refers to "e-Arbitration," which stands for arbitration facilitated by technology.

OA is just a term that encompasses different forms of ODR. The term Online Arbitration (OA) refers to a variety of e-ADR/ODR methods as well as private proceedings that make use of the information technology as part of the process of resolving legal disagreements. When engaging in OA, the parties may not ever meet one another in person. Instead, it's possible that they only talk over the internet. It is a process for settling disagreements that makes use of many forms of information and communication technology, most notably the internet and other forms of digital communication.

III. HISTORY &BACKGROUND OF ONLINE ARBITRATION

ODR has changed over time. It began with the invention of the World Wide Web in 1989. In 1999, eBay started online mediation on their platform. During the internet bubble of 1999–2000, a number of ODR start-ups, including Cybersettle, Smartsettle and Squaretrade were created. As of July 2004, at least 115 ODR services had been set up around the world. In 2007, the Government of the Netherlands set up Rechwijzer to provide ODR services for family

[6]American Bar Association, "Addressing Disputes in Electronic Commerce: Final Recommendations and Report" 58 *The Business Lawyer* 415-477 (2002).

[7]Online dispute resolution for cross-border electronic commerce transactions, United Nations Commission on International Trade Law Working Group III (Online Dispute Resolution) Thirty-second session Vienna, 30 November 2015, A/CN.9/WG.III/XXXII/CRP.3.

[8]The NITI Aayog Expert Committee on ODR, *Designing the Future of Dispute Resolution: The ODR Policy Plan for India* (NITI Aayog, 2021).

disputes. In 2009, the European Committee for Standardisation released a report on the standardisation of ODR. In 2010, UNCITRAL set up a Working Group to create standards for ODR. In 2012, Canadian district of British Columbia passed a law to set up the Civil Resolution Tribunal to provide ODR services for small claim disputes. In 2013, the European Union passed a law to set up an ODR platform at the Union level to offer single point dispute resolution services. In 2015, the Committee on Human Rights and Legal Affairs of the Council of Europe published a report on the adoption of ODR. In 2016, UNCITRAL finalised and adopted the Technical Note for ODR which are descriptive and non-binding.[9] The National Centre for Technology and Dispute Settlement (NCTDR) was established in 1998, and ever since its inception, it has worked to advance both the theory and practise of online dispute resolution all over the globe. Following the 2017 ODR Forum conference in Paris, France, the Administration and Fellows of the NCTDR established the International Council for Online Dispute Resolution (ICODR) to function as a supplement institution to NCTDR.[10] A variety of arbitration centres have included digital services in their sets of rules to better assist their customers, and these centres have also opened the door to online arbitration. In 2014, the LCIA established Arbitration Rules, particularly Article 19(2), which allows virtual hearings *via* video or telephone conference or in person. In 2016, the Indian Council of Arbitration (ICA) established Arbitration Rules where 17(4) authorize tribunal to conduct procedure by video conferencing in order to carry out online arbitration. In 2017, the Vietnam International Arbitration Centre (VIAC) establishes Rules of Arbitration where Article 25 allows tribunals to hold hearings by teleconference, videoconference, or other acceptable methods provided the parties agree. In 2018, the Asia Pacific Economic Cooperation (APEC) adopted an ODR framework to deal with business disputes. The World Intellectual Property Organization (WIPO) has also created a web-based platform to manage arbitrations and mediations. WIPO e-ADR facilities have been available since 2005, and around 30% of WIPO Arbitration and Expedited Arbitration cases include the use of these services. In WIPO disputes, parties, mediators, and arbitrators may consent to online sessions or hearings.[11]

In the year 2020, when the world was hit by the COVID-19 pandemic, various arbitration tribunals initiated the ODR system to deal with dispute settlement and they also put out

[9]Constantina Sampani, "Online dispute resolution in e-commerce: is consensus in regulation UNCITRAL's utopian idea or a realistic ambition?" 30 *Information & Communications Technology Law* 236 (2021).
[10]Leah Wing, "Mapping the Parameters of Online Dispute Resolution" 9 *Journal of Online Dispute Resolution* (2022).
[11]WIPO Online Case Administration Tools, *available at:* https://www.wipo.int/amc/en/eadr/ (last visited on January 09, 2023).

guidelines for how to handle disputes. For example, in April 2020, the International Chamber of Commerce released "ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic". The Singapore International Arbitration Centre also put out guidelines for online arbitration. The London Court of International Arbitration [12] and Indian Council of Arbitration provided facility of online case filing on their websites and using video conferencing facilities in order to carry out online arbitration. Online dispute resolution communication has increased because to the worldwide COVID-19 scenario, even though arbitral institutions have traditionally provided for virtual interactions. After the COVID outbreak, online arbitration emerged as the most popular method for the settlement of disputes, and almost all arbitration institutions now have added an online facility to their websites in order to cope with the demand.

IV. ONLINE ARBITRATION & INTERNATIONAL LEGAL FRAMEWORK

In this context, the international convention that comes to fore is "Electronic Communication Convention." It is to be noted here that the "UN Convention on the Use of Electronic Communications in International Contracts" was adopted by the General Assembly on November 23, 2005. The purpose of the United Nations Convention is to facilitate cross-border trade by doing away with any doubts or obstacles posed by various legal systems regarding the formation or execution of contracts among parties located in different countries through the use of electronic communications. It makes transnational electronic contracts more clear and predictable from a legal and economic perspective. It addresses issues like the validity of electronic contracts, the parties' physical locations, the time and place of sending and receiving messages, the reliability of automated messaging systems, the accessibility of terms of agreements, and the consequences of technical failures in electronic communications. Its goal is to harmonise national regulations so that international business dealings are less fraught with legal uncertainty.[13]

Without electronic signature, online transactions could not be considered legally binding. Common in online trade is the use of digital signatures, which prevent unauthorised parties from sending out statements in electronic form. Article 7(1) of the Model Law on E-Commerce establishes the e-signature as a valid signature of a person. And hence most contracts made in

[12]LCIA, "COVID-19 Update: Recalibrating and Resilience – LCIA continues to deliver the highest quality services for users", *available at:*https://www.lcia.org/News/covid-19-update-recalibrating-and-resilience-lcia-continues-to.aspx. (last visited on January 09, 2023).
[13]Faye Fangfei Wang, *Online Dispute Resolution* 8-9 (Chandos Publishing, England, 2009).

cyberspace are enforceable under law. Another potential interpretation of an arbitration agreement is that it is formed by electronic transmission, but that the arbitration proceeding itself will be handled in accordance with the UNCITRAL Model Law on E-Commerce.[14] The UNCITRAL Model Law on E-Commerce updates the traditional ideas of writing and signatures to accommodate the digital age. Electronic data exchange (EDI), email, telegraph, telex, and telecopy are all examples of "data messages" used in this context. The condition that a communication "in writing" is met by any of these methods as long as the information sent can be easily retrieved and used in the future (Article 6). Unless the parties agree contrary, data messages may be used to make offer and accept contracts (Article 11).[15] When conducting an online arbitration, the parties often have the option of deciding on the location of the arbitration hearing. If the parties can't agree on an arbitrator, the arbitrators will. In the absence of an agreement between the parties as to the location of the arbitration, the Model Law on Arbitration, Article 20(1), provides that the arbitral tribunal shall have the authority to decide where the proceedings will take place.[16]

UNCITRAL adopted a proposal to update the Model Law on International Commercial Arbitration and was amended on July 7, 2006, which also included a revised Article 7. The amendment mandates that agreements to arbitrate made online must be treated as legitimate. According to Article 7(3) provides that any kind of written or oral communication whose content has been recorded is considered an agreement. Further, Article 7(4) provides for formation of an arbitration agreement through use of electronic communication. It defines “electronic communication” means “any communication that the parties make by means of data messages”. Data message means “information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy”. The amendment guarantees the legitimacy of electronic agreement that is made at par with the written agreement. The idea of a "written" arbitration agreement is effectively modernized by this provision, which updates it to take into account data transmissions and electronic communications. This gives clarity and flexibility while preserving the integrity and accessibility of arbitration agreements, ensuring their validity and enforceability in a digital age. This approach corresponds with international trends towards the digital transformation of legal and commercial procedures. According to

[14]Jana Herboczková, “Certain Aspects of Online Arbitration” 1 *Journal of American Arbitration* 1-12 (2001).
[15]*Ibid.*
[16]*Ibid.*

UNCITRAL, this change was made to bring the legislation up to date with the realities of modern business and technology trends.[17] Article II (2) of the New York Convention provides that an arbitration clause, agreement, exchange of letters or telegrams with one another qualifies as "agreement in writing" but the Convention does not mention electronic communication as a way of concluding an arbitration agreement. However, in the recent decade, legislation on both the international and national levels has begun to accommodate the growth of e-commerce and electronic contracts.

V. ONLINE ARBITRATION VIS-À-VIS ITS APPLICATION IN INDIA

There is a well-established mechanism in India to deal with disputes that are resolved via online arbitration. Several statutes including the Code of Civil Procedure of 1908 and the Arbitration and Conciliation Act[18] of 1996, in addition to technology laws like the Information and Technology Act of 2000 and, the Indian Evidence Act of 1872 give sufficient weightage to both ADR and to technical challenges that usually arise in online arbitration. Additionally, India is a party to the New York Convention on the Recognition and Enforcement of Foreign Awards. India also ratified the 2018 UN Convention on International Settlement Agreements Resulting from Mediation. In India, arbitration is governed by the Arbitration and Conciliation Act of 1996. The 2015 amendments to the Arbitration and Conciliation Act made substantial changes, including the inclusion of electronic methods. Legal acceptance of electronic signatures and their authentications was added to the IT Act in 2008. Alternative dispute settlement is encouraged under Section 89 of the Code of Civil Procedure of 1908. Order X Rule 1A also allows the court to order the parties to a suit to use any ADR procedure. This may also include the use of ODR. The judiciary's support for OA inside the legal system has also been explicit, with judges expressly recognizing the possibility of ODR within judicial decisions for the acceptance of digital arbitration agreements, electronic records as evidence or virtual proceedings.

It is necessary to keep in consideration the digital agreement, electronic signatures, electronic records, evidences, and data while carrying out online arbitration. The Enforcement of Arbitration Agreements through electronic communication in India is recognized by Section 7(4) of the Arbitration and Conciliation Act of 1996 and Section 10A of IT Act[19] of 2000. The

[17]Atish Chakraborty, "Online Arbitration Model: A Need of the Hour" *available at*: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3536252 (last visited on January 24, 2023).
[18]The Arbitration and Conciliation Act, 1996 (Act 26 of 1996).
[19]The Information Technology Act, 2000 (Act 21 of 2000), s.10A. This section which deals which "Validity of contracts formed through electronic means" emphasizes and supports this.

Section 7(4) of Indian Arbitration Act recognises the enforceability of online arbitration agreements in situations when communication was conducted by electronic means, which provides a record of the agreement. Section 10A of IT Act gives legal recognition to electronic contracts and it states that electronic proposals, acceptance, and revocation are not grounds for invalidating a contract. On the other hand, the Indian Supreme Court has ruled that the electronic agreement does not violate any laws, thus it is perfectly lawful. The Supreme Court of India upheld the validity of arbitration agreements reached between parties through electronic mail rather than a formally executed written agreement in the *Shakti Bhog Foods Ltd.* v. *Kola Shipping Ltd*.[20] Also, in *Trimex International FZE Ltd*.v. *Vedanta Aluminum Ltd.*[21], the Apex court ruled that the absence of a formal contract between the parties after an oral agreement has been reached does not invalidate the validity of the agreement or its performance.

The place of arbitration is the location where the arbitration takes place. According to Section 20 of the Indian Arbitration Act, if the parties haven't specified a place for the arbitration in their agreement, the tribunal will. Therefore, the location of the online arbitration institution might be considered the place of arbitration for determining the applicable law, nationality of the award and the jurisdiction of local courts in the event of an award being challenged.

When initiating arbitration, a party must file a Statement of Claim in accordance with section 23, and both hearing and written procedures must adhere to section 24 of the Indian Arbitration Act. Physical submission of these papers is mandatory; however, the Information Technology Act[22] does permit electronic submission. Electronic transmission of Statements of Claim and Defence is permissible under sections 4 and 5 of the IT Act read with section 65B of the Evidence Act[23]. Section 65B of the Evidence Act provides for the admissibility of electronic records and Sections 4 and 5 of the IT Act emphasize legal recognition of electronic documents and signatures.[24] In the case of *State of Maharashtra* v. *Dr. Praful B. Desai*[25], the Supreme Court authorised the recording of witness testimony by video conferencing. This means that both the submissions and the proceedings may be conducted virtually.

[20]AIR 2009 SC 12.
[21](2010) 3 SCC 1.
[22]The Information Technology Act, 2000 (Act 21 of 2000).
[23]The Indian Evidence Act, 1872 (Act 1 of 1872).
[24]Pradip Kumar Das and Ankit Kumar, "Impact of Online Arbitration Upon Society: A Discourse from Legal Prespective" 29(113) *Purvadeva* 134 (2023).
[25](2003) 4 SCC 601.

A significant part of an online arbitration is the "Online Arbitral Award" and the order to implement it. Section 31 specifies the form and substance of the arbitral award, including that it must be in writing and signed by all members of the arbitration panel. In addition, Section 31(5) requires that a signed copy of the award be sent to all parties once it has been made. Arbitrators may once again utilise digital signatures and electronic documents for the same purpose. Section 36 of the Indian Arbitration Act provides that an award shall be enforceable under the CPC, 1908 as if it were a decree of a court.

The provisions of the Arbitration Council of India were introduced to the Indian Arbitration Act in 2019.[26] Section 43K of the Act provides for the depository of awards and requires the Council to maintain an electronic depository of arbitral awards and other related documents. Therefore, it offers a digital record of the physical award, and as a result, it may also be employed for the arbitration awards that are issued online.

There are a number of problems with Online Arbitration, but all these depend on the parties involved and the nature of the dispute present therein. Time may be an important issue if the dispute involves between commercial entities, but technical issues and digital illiteracy should not be a concern in its long term. It is undoubtedly, there could be a problem if the claim is about those parties who don't know much about technology. Due to a lack of awareness, parties in litigation and businesses have low confidence in ODR processes. Online arbitration challenges include online fraud, loss of secrecy through the circulation of files and data submitted during OA processes, manipulation of digital evidence, or online arbitration awards. Lack of Digital lockers that store online document can also be perceived as a real contemporary problem in online arbitration, as there is a need to secure and save online documents in a digital locker. Further, the legitimacy of an arbitral award made using an online platform is also seems to be doubtful. It is easy for domestic cases, but in the case of a cross-border dispute, foreign arbitral awards might be hard to enforce due to the complicated system involved in award enforcement. Online arbitration award enforcement laws vary from country to country and award execution *via* the courts is also a time-consuming and complicated process. However, the legal and administrative challenges brought on by OA may be overcome in India because of the country's extensive body of statutes and court decisions. The Indian government is not only advocating for online arbitration, but is also actively progressing towards implementation of online dispute resolution (ODR) in a variety of departments.

[26]The Arbitration and Conciliation Act, 1996 (Act 26 of 1996), ss. 43A-43M.

VI. CONCLUSION AND SUGGESTIONS

Since ODR has gradually started its journey in India, it's crucial that the regulatory environment fosters innovation both in the public and private sectors. There are several laws and judicial rulings in India that provide legal and judicial legitimacy to online arbitration, thereby creating a favourable environment for trusting ODR services. Private companies are also flourishing in the ODR industry. But not only private organisations have been pioneering; government entities have also done so. The Reserve Bank of India (RBI) has recently introduced an online dispute resolution procedure for digital payments.

Arbitral institutions have always allowed for virtual interactions, but the COVID-19 epidemic has paved the way for a broader use of online services in dispute resolution. The utilisation of virtual arbitration comes with a few limitations; however, these drawbacks may be fixed. There is a need to promote ODR, and the government should set up a database of OA service providers to make sure that they are authentic and accountable. In OA, both the parties and the arbitrators should be trained in a uniform way by the OA service provider. The OA platforms should provide different services at par with the WIPO Center's online tools. It would sound reasonable if the service providers could limit the number of persons on both sides that may join, limit access to passwords and communications, protect data, and penalise privacy violators. Electronic signatures may be used in OA as they are vital for ensuring the identity, authenticity, and non-repudiation or validity of data transmission. The physical copies of the Statement of Claim and defence, etc. that must be delivered may be sent electronically. Arbitration awards should be sent by email with attached PDF files to the relevant parties, with the signed hard copies following by courier. After considering all of the relevant elements, it becomes clear that an international organisation must be set up to formulate a uniform OA code in consultation with its member states and the United Nations' general assembly. Almost all the arbitral tribunals have provided an online facility mechanism, so there is a need for uniform rules so it will be acceptable. In India it is necessary to establish OA systems and encourage private players of OA in order to settle international disputes of both low and high value, and this will be done via the promotion of online arbitration.

Domestic Judicial System and Rule Of Law: Does It Impact The Flows Of Foreign Investment In India?

Dr Avinash Kumar[27]

Abstract

This article aims to analyze how effective national judicial system, together with the country's commitment to uphold the rule of law, influence the decisions of foreign investors to invest in a host country and provides an in-depth review of the interactions between national courts and international mechanisms for the settlement of investment disputes. Author critically analyses the Indian National Judicial system and further highlights the instances where excessive interreference in economic policies by the Indian judiciary caused investor concerns. The author after analyzing legal infrastructure, regulatory transparency and investor confidence in investing in India provides an insight about attractiveness of India as an investment destination.

INTRODUCTION

The global landscape of foreign investment has undergone significant transformations, with emerging economies like India increasingly becoming focal points for international capital flows. Amidst this trend, the role of an effective judicial system and the adherence to the rule of law have emerged as crucial determinants of a country's attractiveness to foreign investors. In the case of India, where economic reforms have aimed to liberalize and facilitate foreign investment, it is crucial to understand how the national judicial system and the rule of law influence foreign investment flows.

Foreign investment[28] has long been regarded as essential in advancing a country's economic status. It is proved to be resilient during financial crises.[29]In developing or under-developed countries, the past few decades have seen a resurgence of dependence on foreign investment. It is apt that a fair judicial process and rule of law reduce investment risk. It provides a positive signal for foreign investors. Strengthening the legal system enhances democratic values and accountability, which are crucial for fostering a stable political and legal framework. Therefore, developing countries should embrace legal reforms for both political and economic reasons.

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[28] In this article, Foreign Investment means Foreign Direct Investment (FDI). It does not include portfolio equity and debt flows.

[29] Prakash Loungani and Assaf Razin, How Beneficial Is Foreign Direct Investment for Developing Countries? Finance & Development (Journal published by International Monetary Fund) (June 2001, Vol 38. 2), available at: https://www.imf.org/external/pubs/ft/fandd/2001/06/loungani.htm (visited on 10 April 2024) citing East Asian countries global financial crises of 1997-98, Mexican crisis of 1994-95 and the Latin American debt crisis of the 1980s, the author argues that FDI was remarkably stable.

Before examining legal stability, judicial fairness, and instances where excessive judicial interference in economic policies has raised investor concerns, it is essential to understand the risk involved in investing outside the home country.

RISK TO FOREIGN INVESTORS

Foreign investment involves a transfer of tangible and intangible assets from one state to another to produce wealth under the total or partial control of the owner.[30] This puts investors at risk. The risk to investors is much more when the investment is in states referred to as volatile states such as Egypt, Libya and Syria. In the context of foreign investment, India is not thought to have an adverse environment.

Investors need to worry about arbitrary governmental decisions and policy changes that adversely affect business profitability and otherwise diminish the value of the foreign investment. There is no denying that foreign investments are subject to the law and administrative control of the host state, but it must not jeopardise the guarantees afforded to foreign investors. Vattel recognized the state's right to control the entry of foreigners. But once the state allows the investment to enter into its territory, it is under obligation to protect the investment as per its domestic legal system.[31]

When a foreign investor who is not a citizen of the host state and who has not taken part in the election of the government, invests his money in the State other than his home state, the fear of the fact that the host State may, directly or indirectly, expropriate his investment continues to haunt him. Therefore, a stable political and legal system, independent judiciary, and fair adjudication process become a *sine qua non* for attracting foreign investors. Moreover, rule of law purports that enactments and adjudication must adopt the fundamentals of legality.

A. Risk reduced through BITs/ IIAs

The risk of investment is taken by the foreign investor because it relates to conflictive equilibrium and hide & seek between foreign investors and host governments. Mostly, the foreign investor is at the receiving end and mercy of both the home and host governments. Now, foreign investment mostly comes under sovereign guarantees through the Bilateral

[30] A. K. Koul, *Guide to the WTO and GATT-Economics, Law and Politics* 15 (Satyam Law International, 3rd edn. 2012).

[31] Avinash Kumar, Analysis of Present Problems in India's International Investment Agreements and its Right to Regulate Foreign Investments (2021) (Unpublished PhD thesis, Central University of South Bihar) pp.3-4 citing M. de Vattel (Ed.), The Law of Nations; or, Principles of the Law of Nature: Applied to the Conduct and Affairs of Nations and Sovereigns (Gale Ecco, 2010).

Investment Treaty (hereinafter BIT) and/or International Investment Agreement (hereinafter IIA). India also had to sign the BITs/IIAs.[32]

BIT/ IIA provides for Investor-State Dispute Settlement (mechanism ISDS), and to some extent, this system of adjudication has provided relief to the foreign investors against the risk created by the host State. But the host States have criticised the ISDS mechanism. They have asserted that the ISDS mechanism is hurting the public policy objectives and operating as an unnecessary constraint on the regulatory freedom of the State, and imposing unnecessary restrictions on sovereignty. There is a growing trend amongst developing countries to withdraw from BITs or ISDS systems.[33] Nicaragua has passed legislation to avoid investment arbitration; Bolivia withdraws from International Centre for Settlement of Investment Disputes (hereinafter ICSID);[34] Venezuela in 2012 denounced the ICSID Convention 1966;[35] Ecuador has also withdrawn from ICSID (2009). The Australian government is the first developed country to withdraw from the system of investor-state arbitration in response to the *Philip Morris* dispute in 2011.[36] Many others are excluding ISDS, e.g., the Philippines have avoided ISDS while signing Free trade Agreement (hereinafter FTA) with Japan,[37] and India has signed BIT with Brazil which contains no ISDS.[38]

Role of DOMESTIC Judiciary body In International Investment dispute settlement

Countries, having had negative experiences with BITs, IIAs, or the ISDS mechanism, are now seeking to avoid ISDS mechanism. India in particular has not removed and/or denounced the ISDS mechanism. But it terminated 67 plus BITs in between 2017-19. Indian Model BIT of 2015 (hereinafter "Model BIT 2015") has continued with the ISDS mechanism, but with

[32] India with other developing countries were naïve and singed without understanding the implications.

[33] UNCTAD, *Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims*, IIA Issue note, Issue 2 (2010), available at https://unctad.org/en/Docs/webdiaeia20106_en.pdf (visited on 21 March 2020).

[34] Scott Appleton, "Latin American Arbitration the Story behind the Headlines" *International Bar Association* (2010), available at: http://www.ibanet.org/Article/Detail.aspx?ArticleUid=78296258-3B37-4608-A5EE-3C92D5D0B979 (visited on 21 January 2018).

[35] Being second only to Argentina in this respect, the country currently has 20 cases pending against it.

[36] Luke Nottage, "Throwing the Baby out with the Bathwater: Australia's New Policy on Treaty Based Investor State Arbitration and its impact on Asia" 37 *Asian Studies Review* 253-72 (2013), Jürgen Kurtz, "Australia's Rejection of Investor–State Arbitration: Causation, Omission and Implication" 27 *ICSID Review - Foreign Investment Law Journal* 65 (2012).

37 Available at: https://www.mofa.go.jp/policy/economy/fta/philippines.html (visited on 29 December 2023).

38Prabhash Ranjan, "India-Brazil Bilateral Investment Treaty – A New Template for India?" Available at: India-Brazil Bilateral Investment Treaty – A New Template for India? (SouthAsian University)/March 19, 2020 arbitrationblog.kluwerarbitration.com/2020/03/19/india-brazil-bilateral-investment-treaty-a-new-template-for-india/ (visited on 29 January 2023).

certain exceptions. The role of national judicial body become essential because of below-mentioned four reasons:

First, before initiating the international arbitration, the investor has to submit its claim before the domestic judicial or administrative bodies of the host State. It is noteworthy that the ISDS clause under Model BIT 2015 is stringent in comparison to other State's investment treaty practices. Under Model BIT 2015, a total of 5 years and 9 months is a must if every step is diligently taken as per the provision. However, the hard-stop date is six years from the date when the investor acquired knowledge of the measure and knowledge of the loss. Post expiry of this period, the investor cannot submit an arbitration claim. On bare perusal, the investor has been granted a mere margin of three months to successfully submit its claim to arbitration.

Second, A level playing field for the foreign investors, comparable to that of domestic investors can only be ensured with a fair and independent domestic court. According to the 2015 Model BIT, foreign investors must exhaust local remedies and endure lengthy processes, potentially over five years, before resorting to international arbitration. As a result, for smaller disputes such as breach of contract, foreign investors may find it impractical to wait or adhere to the procedures outlined in the New Model BIT of 2015.

Third, Foreign investors commonly insist on arbitration clauses (i.e., ISDS mechanism) to avoid less reliable court systems available in the host State, but arbitration is not without cost and adds expenses. In a country like India, the exhaustion of local remedies takes so much time. It is quite evident from *the White Industries dispute* and in *Vodafone International Holdings BV* v. *Government of India* [I][39] and *Vodafone Group Plc. and Vodafone Consolidated Holdings Limited* v. *Government of India* [II].[40]It is common ground that judicial delay in India needs to be addressed.

Fourth, the assurance that a host country to uphold property titles and enforce contracts largely depends on the competence of its courts. Effective national judicial bodies offer a reliable and cost-effective means of ensuring that property titles are recognized and contracts are enforced.[41] Olson opined that *"there is typically no reliable contract enforcement unless there*

[39] Vodafone International Holdings BV v. Government of India [I], PCA Case No. 2016-35 (Dutch BIT Claim) (hereafter *Vodafone* v. *India [I]*).

[40] Vodafone Group Plc. and Vodafone Consolidated Holdings Limited v. Government of India [II], UNCITRAL (UK BIT Claim) (hereinafter *Vodafone* v. *India [II]*).

[41] Douglass C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, New York, 1990) pp.34, 58; Mancur Olson, "Dictatorship, Democracy, and Development" 87(3) *American Political Science Review*, pp.567–76 (1993).

is an impartial court system that can call upon the coercive power of the state to require individuals to honour contracts they have made."[42]Hence, day to day contractual disputes or employment or a general commercial dispute can only be resolved by the efficient national courts. If the national judicial bodies are failing to provide a speedy and effective remedy, the foreign investor may be in a forced situation to approach the international arbitral tribunals. In the *White Industries Australia Ltd.* v. *Republic of India*[43]dispute, the foreign investor approached international commercial tribunal just because Indian courts failed to provide a speedy remedy.

Fifth, even if foreign investor succeeds to get the remedy at international arbitration, it is not self-enforcing. An aggrieved party has to return to the domestic court to enforce and collect on an arbitration award.[44] The annulment or enforcement of the international arbitration award can only be done through national courts but the involvement of national courts increased due to diverse provisions (exhaustion of local remedies, and domestic litigation requirements etc.) contained in newly signed BITs/IIAs.[45]

Sixth, host governments can look for other ways to expropriate foreign investment that in long term negatively affect the value of the investment. The effective judiciary is entrusted with powers to enforce the rule of law and to provide investors with avenues of recourse.[46]

Hence, the ISDS mechanism which is considered transparent and independent from the host State, foreign investors are susceptible to approach the national judicial bodies. There is an inherent link between the adjudicatory process provided under BITs/IIAs and national judicial bodies.

It is essential that courts not only ensure fairness but also possess the necessary competence to adjudicate cases impartially, prioritizing justice over favoring the host government. Courts can

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[42]Mancur Olson, "Dictatorship, Democracy, and Development" 87(3) *American Political Science Review* ,p.572 (1993).

[43] *White Industries Australia Limited* v. *The Republic of India*, (UNCITRAL Final award, 30 November 2011), available at: http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf (visited on 11 November 2016).

[44] Joseph L. Staats, Duluth Glen Biglaiser, "The Effects of Judicial Strength and Rule of Law on Portfolio Investment in the Developing World" 92.3 *Social Science Quarterly* (2011) p.2-6.

[45] Gabrielle Kaufmann-Kohler Michele Potestà, *European Yearbook of International Economic Law*, Special Issue: Investor-State Dispute Settlement and National Courts, Current Framework and Reform Options, 2020, pp.4-5.

[46] William M. Landes and A. Posner Richard "The Independent Judiciary in an Interest-Group Perspective" 18(3) *Journal of Law and Economics*, p.882 (1975); Douglass C. North and R. Weingast Barry "Constitutions and Commitment: The Evolution of Institutional Governing Public Choice in Seventeenth-Century England" 49(4) *Journal of Economic History*, p.819 (1989); Aymo Brunetti and Weder Beatrice, "Investment and Institutional Uncertainty: A Comparative Study of Different Uncertainty Measures" Washington, DC: World Bank, p.2 (1999).

require governments to follow established legal procedures. The government might have to give notice of proposed changes, pass legislation, or even, in some cases, amend the constitution. court-enforced regulatory changes enhance protection against the indirect expropriation of foreign investments, raising the bar for such actions. Legal reforms in a democratic country, must encompass political and regulatory stability, a fair judicial process, and a strong adherence to the rule of law in dealing with foreign investors.

The fundamental requirement for a fair judiciary is a democratic system and rule of law. While the rule of law can reflect into effectiveness of a fair judicial system. A judiciary must also be independent and competent to ensure fairness in dealings with both citizens and non-citizens. In practice, governments often prioritize the interests of their voters, and foreign investors are typically protected primarily when their interests align with national economic growth. The competent and independent courts would not allow the executive to act against rule of law. Consequently, it is essential to grasp the full meaning of the rule of law and fair judicial process, as well as the expectations of foreign investors regarding these principles.

RULE OF LAW AND FAIR JUDICIAL PROCESS DEFINED

The basis of democracy is the rule of law and there isa need of an independent judiciary, which can take decisions independent of the policy framed by the executive. Judges must be able to decide a dispute according to law, uninfluenced by any other undue factor. Judicial independence refers to judges' ability to make judgements free of political constraints and influences. Judges should not be pressurized by political parties, private interest, or popular opinion when they are called upon to determine what the law requires. Keeping the judiciary independent of these influences ensures that everyone has a fair chance to make their case in court, and that judges will be impartial in making their decisions. Judges must give a reasoned decision, and it must be appealable to a higher court for review. These elements of judicial decision making ensure that judges remain accountable to the rule of law.[47]

Rule of law is crucial to the right to a fair adjudication. It comprises formal principles such as stability and productivity of the norms that govern a society, as well as deals with procedural aspects such as courts and an independent judiciary that is required to maintain the rule of law. It also comprises certain substantive ideals like a presumption of liberty and respect for private property rights.

[47] American Bar Association, "What is the rule of law?" available at: https://www.americanbar.org/advocacy/rule_of_law/what-is-the-rule-of-law/ (visited on 12 April 2022).

Rule of Law in narrow sense is the adherence to the enacted laws and is generally understood in that sense. But, a broader meaning of the rule of law, essential for investment treaty arbitration and international investment agreements, is related to political and legal stability. The enacted laws may be changed by the government to expropriate foreign investors' property. Legislature can sometimes undermine the rule of law by purporting, for example, to remove legal accountability from a range of official actions or to preclude the possibility of judicial review of executive action.[48] Similarly, legislation can be brought in to harass the foreign investor or cause their private property rights to be confiscated or aggrieved.

It has been recognized that a person's fate should not be in the hands of a single individual. It demands that a judgment against a person be made in accordance with the law. Rule of law in the work of Aristotle, Lord Coke, Dicey, and Hayek purports that 'no one should have any penalty, stigma or serious loss imposed upon them except as the upshot of procedures that involve a hearing by an impartial and independent tribunal that is required to administer existing legal norms based on the formal presentation of evidence and argument'.[49]A system of governance is not counted unless it exhibits the characteristics and processes that is associated with legality.[50]

Rule of law in broader sense, is intended to promote stability. Any action required for legal or political stability falls within the purview of rule of law. For example, if the action was taken to address a situation of conflict or political unrest and the above action resulted in damage to the investment, which should be remedied as an action taken for the rule of law. Any breach of rule of law, which threatens political and legal stability must be taken as against rule of law. Hence, any such efforts threatening the independence of the judiciary, or a frequent change in law and legal system, without exhibiting the characteristics and processes that is associated with legality, may be taken against rule of law.[51]

Judge Diane Wood highlight the need for an open and transparent system of making laws, and laws that are applied predictably and uniformly. Openness and transparency are essential. If people are unable to know and understand what the law is, they cannot be expected to follow

[48] Jeremy Waldron, "The Rule of Law", The Stanford Encyclopedia of Philosophy (Summer 2020 Edn.), Edward N. Zalta (ed.), available at: https://plato.stanford.edu/entries/rule-of-law/ (visited on 26 April 2022); See Waldron, J., *The Dignity of Legislation*, Cambridge University Press, 1999, 142–43 and 147–48.

[49] W. Tashima, 2008, "The War on Terror and the Rule of Law", Asian American Law Journal, 15th edn. 264.

[50] Jeremy Waldron, "The Rule of Law", The Stanford Encyclopedia of Philosophy (Summer 2020 Edn.), Edward N. Zalta (ed.), available at: https://plato.stanford.edu/entries/rule-of-law/ (visited on 26 April 2023).

[51] American Bar Association, "What is the rule of law?" available at: https://www.americanbar.org/advocacy/rule_of_law/what-is-the-rule-of-law/ (visited on 12 April 2023).

it. At the same time, people deserve to know why a particular law has been passed and why they are being asked to obey it. The rule of law also requires that people can expect predictable results from the legal system; this is what Judge Wood implies when she says that 'the laws must not be arbitrary'. Predictable results mean that people who act in the same way can expect the law to treat them in the same way. If similar actions do not produce similar legal outcomes, people cannot use the law to guide their actions, and a 'rule of law' does not exist.[52]

FAILURE OF INDIAN DOMESTIC JUDICIAL BODY TO DISPLAY STATESMANSHIP AND SUPPRESS DISSATISFACTION AMONG FOREIGN INVESTORS

Protection of foreign investment and the judiciary is indeed a complex and ironic relationship. While the judiciary protects the right of foreign investors by controlling the actions of the government, the very actions of the Indian Judiciary may constitute a basis for investors' claims.[53]Even if the domestic courts decide the investment disputes between the host government and foreign investors as per the law, a foreign investor may allege biasness in favour of the host State. This perhaps may not be the reality in every case. But this tense and conflicting relationship has caused further crises in the investment regime. The investors may claim that the action of the judiciary was the action of the state, and hence, the losses suffered due to judicial action may be compensated.

India has adopted the principle of separation of power and in a stable democracy like India, the judiciary is considered an independent body. This makes it clear that the framers of the Constitution envisaged a non-ambitious judiciary for which only the guiding values were the provisions of the Constitution. But many have argued that *"while the judiciary in India is independent, a disturbing trend discernible is that when confronted by a powerful executive displaying autocratic tendencies, the judiciary tends not to assert.*"[54]

In some of the Supreme Court decisions, the Court intervened in the economic policy and decided a case involving foreign investors. Notably, the Supreme Court has occasionally corrected executive actions. For instance, in 2011, the Apex Court canceled the 2G license on

[52] U.S. Court of Appeals Judge Diane Wood "The Rule of Law in Times of Stress" (2003).

[53] Article 4 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001 counts the action of the host government and the decisions of the domestic courts on equal footing.

[54] Prabhash Ranjan, "A Domestic Law may not Protect Foreign Investments in India" *Hindustan Times*, 04 February 2020. The same stand was taken by Prabhash Ranjan while answering a question in the webinar whether ISDS system is still required when India is having an independent judiciary. Webinar on 19 May 2020 on "International Investment, BITs, and the COVID Challenge" Campus Law Centre, University of Delhi.

grounds of corruption, which adversely affected foreign investors and led to challenges from them. While the Supreme Court addressed the issue of corruption, it did not adequately consider the financial losses incurred by foreign investors who had genuinely invested their capital in the country.Moreover, in the *Vodafone* case of 2012, the Supreme Court ruled in favour of the foreign investor.[55]

However, when the judiciary in other jurisdictions keeps finding ways to support the home government or domestic interests, India followed the respectable patterns internationally. The Indian judiciary has shown maturity and does not command a bad image in international literature. In the cases where the foreign investors were indulged, the Supreme Court has shown a quite independent stand. Yet, the Indian judiciary has failed to show statesmanship and may not be considered as an effective judicial body because of the following reasons:

i. The Apex Court's role in the *White Industries* dispute may be criticised not because the court was not independent. The role of the Court may be criticised because of the most important feature of the Indian judicial system i.e., the delayed and lax approach to justice. Hence, denying prompt and adequate justice. There are instances where the action of the Indian judiciary has failed to protect foreign investors and given rise to claims under BITs which is unprecedented.[56] Hon'ble former CJI Bobde on 2 March 2020 also remarked that *"the judiciary needs to reduce delays in dealing with cases involving foreign investors or arbitration awards to minimize the risk of claims against the country."*[57]

ii. A few experts blame the Supreme Court for some of the problems ailing the economy. For example, in 2012, the Supreme Court quashed the licences in question which decided the fate of several telecom companies – led to 5 plus BIT arbitrations against India. The Supreme Court, without considering the economic effect of this order, delivered the judgement. The Supreme Court has failed to consider the point that foreign investors may approach the ISDS. It is submitted that if the Apex Court revoked the 2G licences based on alleged irregularities, it should have provided compensation to foreign investors, if no case of corrupt practices was established by the foreign

[55] *Supra note* 4at pp.159-164.

[56] *Ibid.*

[57] CJI Bobde in an event on 2 March 2020, available at: https://www.news18.com/amp/news/india/judiciary-needs-to-reduce-delays-in-cases-involving-foreign-investors-arbitration-awards-cji-sa-bobde-2522853.html (visited on 20 May 2020).

investors. It is not on record whether this information was shared by any party to the proceedings. Should these judgements be treated*per incuriam.*[58]

iii. It cannot be said that problems lie with the judiciary only. Sometimes, it is the executive who proved the judiciary a failure. For instance, in the *Vodafone case*, the Supreme Court in 2012 ruled in favour of the foreign investor. If the executive is adamant about the retrospective tax effect and changes the law, the Supreme Court instead of interpreting the law, cannot reformulate the same.[59]

iv. *TheBoard of Trustees of the Port of Kolkata* v. *LDA,*[60]*Union of India* v. *Vodafone Group Plc. and Ors.*[61]and recently decided *Union of India* v. *Khaitan Holdings (Mauritius) Ltd. and Ors.*[62]arising in the context of anti-arbitration injunctions in BIT arbitration. The decisions have clarified that BIT arbitration is distinct from commercial arbitration and has its basis in public international law. Moreover, it was held that the Arbitration and Conciliation Act 1996 does not apply to BIT arbitration. National courts need to exercise self-restraint and not interfere in ongoing BIT arbitration, except if there are compelling circumstances and the court has been approached in good faith and no other efficacious remedy is available.[63] Three judgements (*Board of Trustees of the Port of Kolkata* v. *LDA, Union of India* v. *Vodafone Group Plc. and Ors. and Union of India* v. *Khaitan Holdings (Mauritius) Ltd. and Ors.*) have been pronounced by the Indian apex court, where the apex court has shown a lenient approach.[64]In all three decisions, the Supreme Court dismissed the government's plea for an anti-arbitration injunction and ruled in favour of the foreign investor. It can be said that the Supreme Court has always shown its non-biased approach in deciding the case of a citizen and a non-citizen.

v. For the *White Industries* award, the judiciary was answerable for the judicial delays that took place in deciding the dispute regarding the payment. The next case, i.e., *Vodafone*

[58]*Supra note* 4at pp.159-164.

[59]*Ibid.*

[60] *The Board of Trustees of the Port of Kolkata* v. *Louis Dreyfus Armatures*, G.A. 1997 of 2014 & C.S. No 220 of 2014 (Calcutta High Court, 29 September 2014).

[61] *Union of India* v. *Vodafone Group Plc. United Kingdom & Anr.*, CS (OS) 383/2017 & I.A.No.9460/2017 (Delhi High Court, 07 May 2018).

[62] *Union of India* v. *Khaitan Holdings (Mauritius) Limited & Ors*, CS (OS) 46/2019, I.As. No.1235/2019 & 1238/2019 (Delhi High Court, 29 January 2019).

[63] Prabhash Ranjan & Pushkar Anand, "Indian Courts and Bilateral Investment Treaty Arbitration" 4 *Indian Law Review* 24-25 (2020).

[64]*Supra note* 4at pp.159-164.

Tax dispute for which, the judiciary must not be held responsible. After the Supreme Court decided the case, the executive changed the law and imposed the retrospective tax on the *Vodafone-Hutch deal.* In September 2020, India had lost against Vodafone Plc. after an international arbitration court ruled the Indian government, seeking ₹22,100 crores in taxes from Vodafone using retrospective legislation, was in "breach of the guarantee of fair and equitable treatment" under the BIT between India and the Netherlands. On 22 December 2020, India lost another arbitration case related to a tax dispute with Cairn Energy Plc. The international arbitration tribunal has asked India to pay ₹8,000 crores as damages to Cairn Energy Plc.[65]In both the Vodafone tax dispute and the Cairn Energy tax dispute, the executive demonstrated a stronger determination to secure the revenue. It is not the judiciary that should be held accountable in this context.

Critics opine that the Indian judiciary has to share the responsibility for not rising to the occasion and safeguarding the failure of other organs in relation to BIT arbitration awards against India.[66] The executive with the controlled legislature in practice in the parliamentary system has the primary responsibility. Judiciary is responsible to correct the executive and legislature. But we have to keep in mind that the judiciary has its limitations.

It is pertinent to mentioned herein that India has adopted separation of power mainly, not strictly. Policy choices are with the executive and the judiciary may interfere only if the policy has arbitrarily been decided. The judiciary should restrain from interfering in the formulation of economic policy. When making a decision on a case, the judiciary should consider economic factors. In other words, the judiciary must evaluate how the outcome of the case would impact the economy.

The Supreme Court should remember that, under international law, the judiciary's actions are considered to reflect those of the state as a whole.[67] Therefore, when the judiciary attempts to rectify or counteract the actions of the executive by interfering excessively in the economic policy, it can sometimes exacerbate the situation for the government. Cancellations of coal licences and cancellation of 2G spectrum licences jeopardized large scale investments and the

[65]*Business Today*, 23 December 2020, available at https://www.businesstoday.in/current/corporate/breaking-india-loses-tax-arbitration-case-against-cairn-told-to-pay-rs-8000-cr/story/425747.html (visited on 13 January 2023).

[66]*Supra note* 4at pp.159-164.

[67]*Supra note* 26.

investment climate. The cancellation of 88 iron ore mining leases in Goa on the ground of severe environmental damage by the apex court in 2018 created a disavowable environment for the foreign investor. Sale of alcohol within a distance of 500 metres on national and state highways across the country which was banned by the Supreme Court to curb accidents due to drunken driving seems excessive judicial activism.[68]

The court's foray into policy-making is responsible for some of the problems ailing the economy. Prof. Bharadwaj relates the cancellation of coal blocks with the current economic slowdown.[69]The Supreme Court has been inconsistent in dealing with commercial cases, causing grave concern in the minds of investors.[70]

Needless to mention, following the above incidences, the Supreme Court took note of the problems of the ailing economy and discussed the economic policy implications at length in a recent judgement *Shivashakti Sugars case* and held that *"it becomes the duty of the judicial wing to do the economic analysis or economic impact assessment. Courts should restrain themselves to the extent of whether the government is empowered to do that and within the law but the courts are not qualified to make economic policy decisions.*[71]The apex court chose to allow a sugar factory set up in violation of statutory norms to continue operations, after hailing the 'economic analysis of law' approach as the best route for the judiciary to conclude.[72] If the judiciary decides a case without assessing the economic impact of the decision, that can be taken as judicial transgression in economic policy. It may not be taken as judicial strengthening.

CONCLUDING REMARKS

The host government may carry believability to its responsibilities by designating to courts, the power to compel current and future governments to behave as per the law. This will add reliability to the domestic legal system, and unwavering quality to the domestic legal system

[68] Anhad Miglani, With Highway Liquor Ban, Supreme Court Has Over-Reached Itself, The Wire, 11 April 2017, available at: https://thewire.in/government/liquor-ban-supreme-court-highway (visited on 23 January 2023).

[69] Apoorva Misra argued that the judgment did not penalise the government. Instead, it ended up penalising the companies, industries and other inter-linked sectors. The impact on the coal industry became visible with the Economic Survey 2016-17 highlighting that NPAs in the power sector had grown significantly. The Print, Supreme Court squarely to blame for economic slowdown, says senior advocate Harish Salve, 16 September 2019, available at: https://theprint.in/judiciary/supreme-court-squarely-to-blame-for-economic-slowdown-says-senior-advocate-harish-salve/292115/ (visited on 03 August 2023).

[70] The Print, Supreme Court squarely to blame for economic slowdown, says senior advocate Harish Salve, 16 September 2019, available at: https://theprint.in/judiciary/supreme-court-squarely-to-blame-for-economic-slowdown-says-senior-advocate-harish-salve/292115/ (visited on 03 August 2023).

[71]*Shivashakti Sugars Limited*v. *Shree Renuka Sugar Limited & Ors.*(*2017*) 7 SCC 729 70.

[72] Darren Teoh, "Economic Analysis of Law with Indian Characteristics: *Shiva Shakti Sugars Ltd.* v. *Shree Renuka Sugar Ltd.* [2017]" 9 *Singapore Law Review, Juris Illuminae* (2017/18) citing Lee Kuan Yew's speech delivered at the University of Singapore Law Society's annual dinner in 1962.

that will increase foreign investment inflows.[73] An effective national judicial body is an absolute requirement for the resolution of international investment disputes, besides the host state and the home state being signatory of the IIAs/ BITs ISDS mechanism.

While the Indian judiciary has largely maintained impartiality, its effectiveness has occasionally been questioned due to delays in justice delivery and its involvement in economic policy decisions. These factors have sometimes undermined investor confidence, highlighting the need for judicial reforms to bolster the rule of law and create a more stable legal environment for foreign investment. The judiciary has, on several occasions, acted against arbitrary actions by the executive and supported foreign investors, demonstrating its commitment to impartiality.

Judicial delays and frequent changes in laws and policies—whether driven by the executive or through judicial intervention—reflect instability rather than a well-functioning legal and political system. For the judiciary to effectively contribute to a stable investment climate, it should prioritize stabilizing laws and policies over initiating changes. The cancellation of coal licenses and numerous iron ore mining leases has illustrated the strained relationship between the judiciary and the executive, emphasizing the need for a more harmonious approach to legal and economic matters.

[73] Aymo Brunetti, Gregory Kisunko and Beatrice Weder "Credibility of Rules and Economic Growth: Evidence from a Worldwide Survey of the Private Sector" *Background Report carried out for World Development Report* (Washington, DC: World Bank, 1997); Aymo Brunetti and Beatrice Weder "Investment and Institutional Uncertainty: A Comparative Study of Different Uncertainty Measures" *Background Report carried out for World Development Report* (Washington, DC: World Bank, 1999); Ross Levine, ''The Legal Environment, Banks, and Long-Run Economic Growth.'' 30(3) *Journal of Money, Credit, and Banking*, (1998) pp.596–613; Douglass C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, New York, 1990); Robert M. Sherwood, Geoffrey Shepherd and Celso Marcos De Souza "Judicial Systems and Economic Performance" 34(1) *Quarterly Review of Economics and Finance*, pp.101–16 (1994).

SUSTAINABILITY OF TEA COMPANIES IN ASSAM IN THE EMERGING DYNAMICS OF CORPORATE LAW

Poonam Pandiya & Debajit Kr. Sarmah[74]

Abstract

Tea, often known as the elixir of life, has been enjoyed throughout the world for centuries and holds a special place in the hearts of people in Assam. The 172-year-old tea industry in Assam is the highest tea-producing State in India and contributes significantly to the national economy. The tea industries, which were once under the domination of the British, have now changed hands and are run by skilled Indian entrepreneurs, giving rise to a more rational industry. The industry, which is also run by big corporate houses now, has enabled opportunities, especially for young entrepreneurs, to take up tea cultivation as a business venture. Also, hundreds of small farmers have started cultivating this crop. Nevertheless, running the tea industry is a highly difficult and risky business considering several factors, such as the management of the company, the high cost of production, increased labor costs, procuring and managing huge hectares of land, complying with the intricacies of the regulatory framework, giving prominence to labor rights, a decrease in tea auction prices, etc. These factors have a significant influence on running the tea business. Moreover, the statutory authorities require strict compliance with the laws pertaining to environmental, social, and governance standards in the business sector. Such compliance with the statutory authorities not only ensures transparency with its shareholders while doing business but also helps investors analyze if a company is worth investing in. This article aims to highlight the legal challenges and opportunities taken by tea companies in Assam in establishing sustainable business ventures within the regulatory framework.

Keywords: **Assam, Tea Companies, Entrepreneurship, Sustainable, Law.**

I. Introduction

Camellia sinensis, the botanical name of tea, is a crop cultivated across the North East, particularly in Arunachal Pradesh, Sikkim, Manipur, Tripura, Nagaland, and widely in Assam. Amongst the other states of India are Darjeeling in the Himalayan range, the Wayanand-Nilgiris range of Kerala, Tamil Nadu, Karnataka, and some parts of Himachal Pradesh and Uttar Pradesh. Tea cultivation in Assam plays an important role in the Indian economy as well as in the economy of Assam. Because of its distinct flavour, Assam tea is the most sought-after tea. This contributes significantly to revenue and employment generation. The small tea cultivators are widely growing in the State making it a whopping 1,22,415 small tea growers in the State.[75] Apart from this there are big tea gardens and Bought Leaf Factories where tea leaves are processed. The small-scale producers of tea sell their leaves to the nearby big plantations and Bought Leaf Factories where the tea leaves are processed.

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[75]Government of India, *Small Tea Growers in North East Region* (Ministry of Commerce and Industry, March 31, 2022) *available at:* https://www.teaboard.gov.in/pdf/Small_Tea_Growers_in_North_East_Region.pdf (last visited on March 3, 2024).

While tea industries and tea farming occupy a section of the garden area, a sizable percentage of the land must be left being unsuitable for tea cultivation. Recall that these tea plantations hold the ground on which industries are set up including essential welfare and supporting services like residential colony for employees, staff entrepreneurs, staff of such industrial units, estates, industrial parks, school buildings, shops of small vendors etc. Compliance with strict statutory regulations, classification land under local land laws, encroachment issues of land, land acquisition, possible exploitation of the small growers by buyers of green tea leaves, dilemma in the management of the tea companies, fluctuating prices, are some of the challenges before this least talked about sector of business in the corporate world- the tea industry. Difficulties with investments and debt payments will persist until these conditions are satisfied.

II. Background of the Assam Tea Industry:

The tea crop is said to be first grown in China. The tea cultivation was organized, and China ruled the tea market around the world, exporting in large quantities to European countries. The Chinese created a monopoly in the tea trade, driving up prices and becoming a status symbol for the rich Englishmen. Soon, drinking tea made its way into the mainstream society of Britain, and there was a great demand for the beverage. The British realized the demand for opium in China and took control of the trade of opium. The Britishers encouraged Indian farmers and started cultivating opium in Bengal. These were then exported to China in exchange for Chinese tea. Soon, they started smuggling opium when the Chinese Emperor banned the drug, considering its addiction among its citizens. In order to break the Chinese monopoly in the tea trade, the British Empire decided to cultivate tea. Around the 18th century, the British East Company decided to cultivate tea in India, considering the ideal climatic conditions. Robert Fortune is credited with the success of the tea industry in India. It is said that he stole some of the tea plants from China and planted them in the settled gardens of Darjeeling with the assistance of a few laborers.[76] The plants flourished in the rich soil of India and adapted to the climatic conditions, giving tea a rich flavor and new tones. The British quickly embraced this superior and affordable alternative to Chinese tea.[77]This marked the beginning of the commercialization of the tea industry, and accordingly, tea was cultivated in

[76]Tea Emissary, "How was tea discovered in Assam" *Tea Orb*, (August 21, 2022) *available at:* https://teaorb.com/en-us/blog/how-was-tea-discovered-in-assam (last visited on March 03, 2024).
[77]*Ibid.*

an organized manner. The three main types of tea are grown in Niligirs, Assam, and Darjeeling, wherein Assam Orthodox Tea has a registered Geographical Indication (GI) tag.[78]

Although the cultivation of tea and introducing it to the international market were British endeavors for commercial motives but in fact, *Camellia sinensis* (the botanical name of tea leaves) was familiar to the Indians and was always used for its healing properties.[79] The *Bruce* brothers were highly credited with the discovery of tea and starting tea cultivation in Assam. But little did the world know about the Singhpo tribe of Assam, who utilized tea as an herbal drink long before the British came to India. The first reference to the indigenous Assam tea plant was made by Samuel Baidon in his 1877 book "*Tea"* in Assam.[80] As history goes, in 1823, Robert Bruce, during his expeditions to India, met the Singhpo tribe in Assam, who offered him a herbal drink to treat him. In his quest to discover the herb, Robert met the Singhpo Chief and discovered that the drink was made of tea leaves. The tribe not only taught the Englishman about different kinds of tea leaves but also taught him the indigenous methods to cultivate these tea leaves. After the death of Robert Bruce, his younger brother, Charles Alexander Bruce, used his brother's journal, which mentioned this unique herb, and wanted to pursue his brother's discovery. He sought the help of Maniram Dewan whose mention was made in his brother's book, and met the Singhpo Chief, Besa Gam. He managed to secure the tea plants and took them to Upper Assam where he planted these trees outside his quarters using techniques learned from the Singhpo tribe.[81]Unlike the tea bushes we see today, the Singhpo tribe harvested tall tea trees, which seemed as if these trees rested on the backs of elephants in the wild. Initially, the samples of these harvested tea leaves, which were sent by Bruce to the Botanists of the British Empire, were rejected, claiming "not true tea" but after 7 long years, the Botanists of the British Empire certified the tea leaves of Assam as "Assam *tea was as real as the tea of China"*.[82]

Maniram Dutta Baruah popularly known as Maniram Dewan explained the potential of tea cultivation in Assam to the Britishmen. He was a Dewan (chief administrative and financial officer) of the newly formed Assam Tea Company by the British East India Company. He soon resigned in 1841 and became the first Indian to start his own tea plantation. TheChinnamara,

[78] Government of India, *Assam Tea* (Tea Board India, Ministry of Commerce and Industry, 2024) *available at:* Assam (teaboard.gov.in) (last visited on March 3, 2024).
[79]*Ibid.*
[80]*Supra* note 4.
[81] Government of India, *The Tea History Timeline* (Tea Board India, Ministry of Commerce and Industry, 2024) *available at:* https://www.teaboard.gov.in/pdf/Circular_reg_FAO_BATIC_2024_pdf569.pdf (last visited on March 03, 2024).
[82]*Supra* note 4.

Senglung and Toklai Tea Gardens were owned by Maniram Dewan.[83] Dewan realized the pitiable conditions of laborers working in the tea gardens owned by British companies where they were treated like slaves. He protested against the rule of British Raj and encouraged people of Assam to start their own tea plantations. The Britishers soon started discriminating the local tea planters and arrested Dewan and charged him for protesting the British Government. His tea estates were sold to officers of British Crown at cheap prices. In 1858, Maniram Dewan was hanged by British for protesting against the British Crown. The execution of their beloved Dewan ignited a revolt amongst the people of Assam against the British Rule. Soon, the labourers left the estates and inspired by their Chief's sacrifice started their own tea cultivation. The Britishers unable to run the tea garden due to lack of labourers sold off the tea gardens.[84] Presently, the largest tea research center in the world is currently located in Tocklai, Jorhat which looks after the research and development of tea industry in India.[85] There are currently around 800 well organized tea plantations in Assam. Additionally, there are more than 1,00,000 individual and cooperative small-scale tea farms.[86] Hence; Assam tea has a special place in the tea business because of its distinguished flavor.

III. Significance of Establishing Sustainable Tea Companies in the State

Agriculture contributes prominently in the economy of Assam. Tea is one such beverage which is consumed by humans next to water. The tea leaves are widely known for its medicinal properties. Considering the benefits and popularity of this beverage the cultivation, manufacturing and sale of this crop significantly contributes in the economy of the entire nation. The significance of establishing sustainable tea companies are as follows:

1. Contribution in the economy of the nation: Assam tea finds its place in the world market due to the distinguished flavor and overtones it carries with it. About half of India's total tea output is said to come from Assam, which produces an average of 630 to 700 million kg of tea

[83] Halmari Tea, "History of tea in Assam" Halmari, (January 24, 2024) *available at:* https://www.halmaritea.com/blog/history-of-tea-in-assam/ (last visited March 03, 2024).
[84] Gadapani Sarma, "A Historical Background of Tea in Assam", Vol. 1 Issue IV *Pratidhwani- the Echo-An Online Journal of Humanities & Social Science* 127 (2013) *available at:*https://www.thecho.in/files/a-historical-background-of-tea-in-assam.pdf (last visited on March 03, 2024).
[85]TRA Tocklai, "Overview" *TRA Sustainabilitea Brochure*, *available at:*https://www.tocklai.org/ (last visited on March 03, 2024).
[86]Government of Assam, *About Tea Industries* (Department of Industries and Commerce, 2024) *available at:* https://industries.assam.gov.in/portlet-innerpage/about-teaindustries#:~:text=The%20tea%20industry%20in%20Assam,1833%20in%20erstwhile%20Lakhimpur%20district. (last visited on March 03, 2024).

yearly.[87] Hence; establishing sustainable business ventures in the tea industry occupies an important place and plays a very useful part in the national economy. It generates employment amongst the common man especially the youth who have taken tea cultivation as a business venture and promotes entrepreneurship in India.

2. Creating the culture of Entrepreneurship amongst the people of Assam: After the British regime the Government exclusively took the commercial production of tea. The Assam Tea Company erstwhile owned by the East India Company enjoyed a monopoly in the business. Later, capitalists from Calcutta and even London started investing in the business. They later approached the Government to sell them the tea garden. The Government finally allowed private enterprises to set up their venture and kept a few of the gardens for its experimental usage.[88] This gave entry to major companies of India to enter into the tea sector of this State and owned several tea estates, set up factories etc. However, with the passage of time the small-scale tea growers of Assam set up tea gardens and have now become the major contributors of Bought Tea Leaves. The Tea Board of India defines a small tea grower as "a person or a group having plantation area up to 10.12 Hectares or 25 Acres of land i.e. 75 Bighas"[89] The small scale tea growers started outsourcing their tea leaves which were produced in their gardens to big tea companies. These tea companies, in order to save their labour cost purchased tea leaves from the small tea gardens instead of in-house production. This strategy gave paved the way of into the tea industry. The confidence of these small-scale tea producers was boosted with the support of Tea Board of India. The Tea Board of Indi is an organization under the Central Government constituted under Section 4 of the Tea Act, 1953 and is governed by the Ministry of Commerce. Tea is one of such industries which comes under the control of the Union of India.[90]The support from such organizations gave rise to production in the industry and served as a means of existence for the small farmers who are depended on the soil for their livelihood.

[87] *Id.* at 11.
[88] Karabi Das, "Technical Efficiency in Small Tea Gardens of Assam" 25 *Review of Development and Change* 115 (2020) *available at:* https://journals.sagepub.com/doi/full/10.1177/0972266120916318 (last visited March 03, 2024).
[89] *Ibid.*
[90] Tea Board India, "About Tea" *available at:* https://www.teaboard.gov.in/TEABOARDCSM/NA (last visited March 03, 2024).

3. Employment Generation in the state of Assam: Tea leaves are perishable, which means they need to be processed in factories on the same day, or else the leaves lose moisture and weight and dry easily. The factories that process tea leaves are huge factories known as Bought Leaf Factories which are set up over huge areas of land and are equipped with superior, technically advanced equipment and machinery to dry, crush, and process tea leaves. Similarly, in large tea estates, the leaves are grown in the garden and then taken to the factory for processing, which is situated within the estate. The entire process requires a lot of workers, starting from farmers cultivating tea leaves in the garden, laborers plucking tea leaves and working in factories, and various staff, managerial authorities, etc. to run and manage the garden.

4. Sustainable Business Goals adopted by the tea companies: The tea companies in India are also realizing the importance of environmental, social, and corporate governance responsibilities while running their business establishments. The requirements to comply with the rules framed by various regulatory bodies not only enhance the social responsibilities and transparency of the companies but also enhance investor confidence in investing in this sector of business. Moreover, measures such as organic farming, preserving ecosystems, fair trade practices, building schools and hospitals, providing housing accommodation to its employees, educating the farmers on modern agricultural practices, educating the farmers and laborers on climate change, taking measures to save energy, utilizing solar energy to meet energy requirements, promoting cultural heritage, and encouraging tourism in the tea gardens are some of the practices that the tea companies in Assam are adopting to create sustainable business ventures in this sector.

IV. Opportunities provided for upliftment of small tea growers in Assam

The Government of India and the Government of Assam are taking up initiatives for the growth of the small tea growers in Assam. Various benefits like crop insurance schemes, accident insurance schemes, financial aid, subsidies, development and promotion schemes for setting up factories, plantations, machineries, and assistance in technical assistance for cultivation, using machines and equipment, tea trading through e-auction facilities, etc. One such scheme is the Tea Development and Promotion Scheme, which was implemented by the Central government for the period 2021–2026 with a budget of Rs 968 crore. This scheme especially covers small tea growers and provides training in cultivation using modern

techniques, accounting and bookkeeping, management of tea gardens, etc. Also, various banking institutions provide financial aid to the tea industry based on schemes from the Central and State Government and the repayment of loans at minimum interest rates.

Various schemes are also set up for the laborers working in the tea garden for their welfare, such as the provident fund scheme, pension, gratuity benefits, wage schemes for pregnant women in the tea gardens of Assam, free medical benefits, housing accommodation, etc.

V. Regulatory Framework governing Tea Companies in Assam

The companies in India have to operate under strict regulatory compliance. The tea companies in Assam have to work under a constant surveillance where the land under the tea garden are governed by the local land laws of Assam as such settlement operation under the land laws, acquisition of land by government, Industrial and Labour Laws which regulates the welfare of tea garden labourers, the Companies Act for the proper management of the tea companies, Food Standards and Safety Act to overlook the quality of tea leaves, and Rules framed by the Tea Board of India from time to time to regulates the market auction prices. Apart from this the Procedural Laws of the country also govern the tea industry in Assam.

The different legislations that govern the tea industry in Assam are briefly discussed below:

1. The Tea Act, 1955[91] : The Tea Board of India established under the Tea Act, 1953 to control the activities of the tea industry. The stakeholders of the tea industry are farmers, manufacturers, tea auctioneers, brokers, buyers, sellers etc. All these participants are required to register themselves with the Tea Board of India and provide requisite information at regular intervals as required under the statute such as quantity of tea leaves produced, amount of leaves sold at auction, market, factory etc. and details about in house management such as cost of production, human resource management, taxes paid, warehouse details etc.

Recently, the Centre proposed to repeal the Tea Act, 1955 a legislation enacted during the Colonial regime, and delete the provisions which are old and outdated for the recent changes that the tea industry is going through. The Tea (Promotion and Development) Bill, 2022 consists of provisions which would give new objectives, functions and powers to the Tea Board and facilitate export, development, fix fair prices for the tea market, promote sale and

[91] The Tea Act, 1955 (Act No. 29 of 1953).

consumption tea through online platforms and lower the burden of obtaining complex processes of license from the Board. [92]

The Tea Board of India receives grants in aid from the Government of India. It looks after the overall development of the tea industry in India. In addition, to the inspection of the tea gardens and factories, it also looks after the minimum norms that the tea producers should maintain in accordance with the Food Safety and Standards Act before selling the tea in the market.

2. The Plantations Labour Act, 1951[93]:This legislation is enacted to protect the welfare of plantation labourers and regulating their working conditions. The provisions of the Act among others include Health and Welfare of workers, Hours of Work, Rest Intervals etc., Employment of children / adolescents and Annual leave with wages.

3. The Assam Tea Plantations Employees Welfare Fund, 1960[94]: The Act provides for a scheme for the constitution of funds named the Assam Tea Plantations Welfare Fund. This is regulated by a Board named the Assam Employees Welfare Board and consists of funds realized by employees in the course of management, claimed or forfeited amounts, grants from the Central Government, the Tea Board, donations, etc. The officers exercise constant vigilance on plantations, including tea factories, to ensure strict compliance with social security programs.[95]

4. The Assam Tea Plantations Provident Fund and Pension Fund Scheme: The Act provides for the establishment of provident fund where the employer contributes his own share of contribution alongwith deduction of 12% of the employee's wages to deposit into the fund. After the cessation of employment i.e. due to retirement or dismissal or death etc the employee

[92] Sambit Saha, "Centre to repeal Tea Act of 1953 and Coffee Act of 1942", *The Telegraph*, November 1, 2022 *available at:* https://www.telegraphindia.com/business/centre-to-repeal-tea-act-of-1953-and-coffee-act-of-1942/cid /1847062 (last visited on March 03, 2024).

[93] The Plantations Labour Act, 1951 (Act No. 69 of 1951).

[94]The Assam Tea Plantations Employees Welfare Fund, 1960 (Act No. 16 of 1960).

[95] Government of Assam, Labour Welfare Department, *From 1955 - A Tough Journey Ahead* (Assam Tea Employees Provident Fund Organization) *available at:* Welcome To Assam Tea Employees Provident Fund Organization (atppf.nic.in) (last visited on March 3, 2024).

is entitled to receive the amount standing at credit to the member's account. Similarly, the pension scheme, deposit linked insurance benefit scheme, loan and advances benefit scheme are the benefits that the legislation aims to provide to the labourers.[96]

5. Labor Laws: Labor laws like the Employees' Compensation Act, 1923[97] which provides for payment of compensation to the employees and their dependents in case of injury arising from an accident in an industry, including occupational diseases arising out of and in the course of employment resulting in death or disablement.[98] Similarly, the Factories Act, 1948[99], the Minimum Wages Act, 1948[100] and The Child and Adolescent Labour (Prohibition and Regulation) Act, 1986[101] are the protective labour legislations that ensure the social security, welfare, and financial security of the labourers working in the tea industry.

6. Local Land Laws governing tea lands: The Assam Land and Revenue Regulation, 1886[102] and Rules framed thereunder, The Assam Assessment Of Revenue Free Waste Land Grants Act,1948, The Assam Fixation of Ceiling on Land Holdings Act,1956[103],The Assam Agricultural Land (Regulation of Reclassification and Transfer for Non-Agricultural Purpose) Act, 2015, Land Policy, 2019, and rules, regulations and notification by the State Government from time to time. These local land laws provide for the lease of land subjected to the right of renewal, agricultural income tax, an increase in land revenue from time to time, and the and the settlement of tea land.

As per the regulations of tea land prevailing in the State no tea land may be transferred by way of gift, sale etc. without obtaining government's prior approval. Even if the tea land has been alienated without such approval, mutation in the record of rights is not allowed until prior approval for mutation of such transferred tea land is obtained. If any such tea land is found to have been diverted or used for purposes other than cultivation of tea is subjected to acquisition under the terms of the Assam Fixation of Ceiling on Land Holdings Act.

The State Government has provided specific benefits to small tea growers in Assam. The small tea growers who are registered with the Tea Board of India or the Directorate of Tea,

[96] ***Ibid.***
[97] The Employees' Compensation Act, 1923 (Act 8 of 1923).
[98] ***Ibid.***
[99] The Factories Act, 1948 (Act No. 63 of 1948).
[100] The Minimum Wages Act, 1948 (Act No. 11 of 1948).
[101] The Child Labour (Prohibition and Regulation) Act, 1986 (Act No. 61 of 1986).
[102] Assam Land and Revenue Regulation, 1886 (Regulation 1 of 1886).
[103] The Assam Fixation of Ceiling on Land Holdings Act, 1956 (Assam Act No. 1 of 1957).

Assam, on payment of a premium of Rs. 1000.00 per Bigha of land, up to a maximum of 30 Bighas may get the land settled in their favor for special cultivation of tea. Thus, for the next ten years from the date of the settlement order or the date of taking possession, whichever comes first, the land settled cannot be transferred by sale, mortgage, lease, gift, or any other means. Moreover, the tea land specially meant for the production of tea may not be used for purposes other than tea growing. It is pertinent to mention here that any transfer of tea land by way of sale, donation, or other means requires the prior approval of the State Government.[104]

7. Legislations that also govern the tea businesses in India: Tea Waste (Control) Order, 1959[105], Tea Warehouses (Licensing) Order, 1959[106], The Tea (Marketing) Control Order, 2003[107], The Tea (Distribution and Export) Control Order, 2005[108], The Food Safety and Standards Act, 2006[109]. The Tea companies shall be governed by this Act to manage its business affairs.

The tea companies, desirous to expand their business globally are required to cope up with the emerging dynamics of corporate law. One of such dimensions in the corporate law is Section 135 of the Companies Act, 2013- Corporate Social Responsibility.[110] Companies such as Goodricke Group Limited, Kanco Tea and Industries Limited, Mc Leod Russel India Limited, Parry Agro Industries Limited, Halmari Tea Estate are some of the Companies engaged in CSR activities in the State. Also, the concept of Environment Social Governance considerations in business is significant. The SEBI has mandated filing a Business Responsibility and Sustainability Report (BRSR) for the top 1,000 listed companies in India for the FY 2023–2024 based on market capitalization.[111] These disclosures include environment, social security and governance measures so as to cope up with the climate change, wages paid to the workers and contributions towards creating sustainable business ventures and strengthening the economy of the nation.[112] However, sustainability and concern for environment is not a mandatory to be followed by large business giants. The customers,

[104]Government of Assam, *Tea Land Administration In Assam*, (Revenue and Disaster Management) *available at:* https://landrevenue.assam.gov.in/information-services/tea-land-administration-in-assam (last visited on March 08, 2024).
[105] Government of India, Ministry of Commerce and Industry (Department of Commerce) *available at:* https://www.teaboard.gov.in/TEABOARDPAGE/NzU= (last visited March 08, 2024).
[106]Tea Warehouses (Licensing) Order, 1959.
[107]The Tea (Marketing) Control Order, 2003.
[108]Tea (Distribution & Export) Control Order, 2005
[109] The Food Safety and Standards Act, 2006 (Act No. 34 of 2006).
[110] The Companies Act, 2013 (Act No. 13 of 2013), s.135.
[111]Securities and Exchange Board of India, (Circular No. SEBI/HO/CFD/CFD-SEC-2/P/CIR/2023/122 July 12, 2023) *available at*: https://www.sebi.gov.in/legal/circulars/jul-2023/brsr-core-framework-for-assurance-and-esg-disclosures-for-value-chain_73854.html (last visited on March 08, 2024).
[112]*Ibid.*

these days are demanding products which are made responsibly without harming the environment. It is becoming more and more crucial to embrace sustainability in light of this requirement. Considering the same and in order to sustain the growing consumer demand of Indian tea the Tea Board India have come up with the Plant Protection Formulations (PPFs). This includes Good Agricultural Practices, alternative methods of pest management and reducing the use of pesticides in tea gardens so as to protect wildlife and environment, safe storage of tea leaves, proper disposal of tea waste.[113] The tea industries whether big or small registered with Tea Board India or the Directorate of Tea, Assam has to adhere to the PPF norms.

V. Challenges before the Tea Industry in Assam:

The tea industry in Assam has witnessed several transformations since independence. There has been a constant rise in the consumption of tea in the market, and about 75 percent of the consumers in rural India are purchasing packet tea instead of loose tea.[114] Yet, the commercial plantation of tea has witnessed a decline, and these disclosures include environment, social security, and governance measures so as to cope with climate change, wages paid to the workers, and contributions towards creating sustainable business ventures and strengthening the economy of the nation. Both small and large tea producers are struggling to sustain themselves in the market due to the fall in tea prices. The situation made the Indian Tea Association seek help from the Central Government to revive the tea industry. Here are a few challenges that pose threat to the tea industry in Assam:

1. Decline in tea auction prices: The biggest challenge the tea industry faces is the constant fall in the tea auction prices. For instance, in the week ending 29.06.2024 the weekly average price of CTC leaf in Kolkata was Rs 294.57 whereas in Guwahati per kilogram of CTC leaf was sold

[113] Tea Board, *Plant Protection Code* (Ministry of Commerce and Industry, May, 2023) India, *available at*: https://www.teaboard.gov.in/pdf/Plant_Protection_Code_Version_15_pdf5959.pdf (teaboard.gov.in) (last visited on March 08, 2024)

[114] Dr. Shatadru Chattopadhayay, "Time For A New Approach For Sustainability Of The Indian Tea Industry" *available at*: https://industry.siliconindia.com/viewpoint/cxoinsights/time-for-a-new-approach-for-sustainability-of-the-indian-tea-industry-nwid-22693.html (last visited on March 08, 2024)

at Rs 261.66.[115] Similarly, on 22.06.2024, 15.06.2024, 08.06.2024 prices of CTC leaf per kilogram in Kolkata was Rs 300.58, 287.89 and Rs 256.88 whereas Assam saw Rs 254.10, Rs 261.46 and Rs 244.72 on these respective dates.[116] On comparison with its neighboring States, the average price of CTC in Assam for the financial year 2022-2023 was Rs 203.94 while Arunachal Pradesh saw Rs 214.56, Nagaland Rs 233.78.[117] On a yearly comparison of tea auction prices in Guwahati Auction Centre, Assam, in the financial year April, 2022 - March, 2023 the price of tea per kg was Rs 191.28[118]; the financial year April, 2021 - March, 2022 per kg tea was sold at Rs 182.52[119]; the financial year 2020-2021 price of per kg tea was 217.91[120] and the financial year 2019-2020 the price of per kg tea was Rs 139.81.[121]

Due to the downfall in the auction price it is difficult to meet the costs of inputs, wages, fuel, and interest rates which are increasing faster than price increase in tea. Moreover, the land tax, agricultural taxes, minimum requirements to maintain provident fund, gratuity, pension benefits, providing welfare facilities, ration, firewood, free medical treatment, salary to employees, packaging, warehouse tax etc. are the special requirements that the tea industry has to comply with. Even the small tea growers are not exempted from this pressure of running the business. The small tea growers cultivate tea leaves and sell them to the Bought Leaf Factory. However, there are enormous financial risks even faced by them. The small tea growers usually own small plots of land and their production is less. As a result, the realization price of bought tea leaves is not enough to meet the cost of production and they hardly yield any profits.

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[115] Tea Board India, "Annual Tea Price" *available at*: Weekly Prices | The Official Website of Tea Board India (last visited on July 12, 2024).

[116]Tea Board India, "Annual Tea Price" *available at*: Weekly Prices | The Official Website of Tea Board India (last visited on July 12, 2024).

[117] Tea Board India "Auction Data 2022-2023", *available at*: Annual_Price_2022_2022_23_pdf2822.pdf (teaboard.gov.in)(last visited on July 12, 2024).

[118] Tea Board India, "Auction Data 2022-2023" *available at*: Annual Price 2022 2022 23 pdf2822.pdf (teaboard.gov.in) (last visited July, 12, 2024).

[119] Tea Board India, "Auction Data 2021-2022" *available at*: https://www.teaboard.gov.in/pdf/Annual_Price_Website_pdf5627.pdf (teaboard.gov.in)(last visited July, 12, 2024).

[120] Tea Board India, "Auction Data 2020-2021" *available at*: https://www.teaboard.gov.in/pdf/Annual_Price_Website_pdf5627.pdf (teaboard.gov.in)(last visited July, 12, 2024).

[121] Tea Board India, "Auction Data 2019-2020" Tea Board India Auction Data *available at*: https://www.teaboard.gov.in/pdf/Annual_Price_Website_pdf6423.pdf (teaboard.gov.in)(last visited July, 12, 2024).

2. Change in the climate conditions: Climate change is also one of the reasons for the downfall in the price of tea leaves. The excessive rainfall leading to soil erosion, use of pesticides to maintain soil fertility are not only affecting production but also lowering the quality of tea leaves. The production of tea leaves is not sufficient to meet the expectations of the growers.

3. Change in consumer preferences: Consumer behavior is another aspect that affects the sale of tea. Increased interest in tea brands such as herbal tea, flavored tea, a shift towards cocoa, coffee, packed iced tea, etc. has reduced the sale of organic tea leaves. Moreover, the big brands that invest a huge amount of money in branding, packaging, and relating their name to several social activities make consumers wonder if the brand they are choosing supports social security and ensures environmental sustainability. This has affected the small companies that genuinely cater to the needs of the laborers and comply with the regulatory framework but cannot afford huge advertisement and branding costs.

4. Labour unrest: Tensions between management and the workforce, frequent court litigation, and the and the menace of political parties in the name of well-wishers of the workforce have increased in the past and have affected the production in the tea garden.

5. Difficulty in land management: A primary problem faced by the small tea growers is shortage of land and difficulty in mutation of land in their named in the record of rights. In Assam, most of the tea estates suffer this problem as to the non-availability of proper land documents. Due to this reason many small tea growers cannot avail the benefits provide by the Tea Board India. Thus, there is a need to update the regulations on part of the government or else the small tea growers would be denied the benefits and face difficulties in pursuing business. Again, land grabbing is yet another issue where tea lands are forcefully occupied and encroached by people residing in the tea garden and they start constructing their houses in the lands owned by tea companies.

6. Forcefully withholding the company's property by employees: The tea lands are mutated in the name of the owner tea company, and apart from tea cultivation and the setting up of factories, various staff quarters are constructed as welfare measures for the staff. It is often noticed that the staff, after retirement or death, do not vacate the allotted housing accommodation, which is the company’s property. Such wrongful withholding of property of the company is a criminal offense punishable under Section 452 of the Companies Act, 2013.

The staff or employees of the tea garden are usually migrant workers who have been working in the tea gardens for a long time and find it difficult to leave the quarters of the company. On the other hand, tea garden management cannot at the same time afford retired employees and their families due to the limited holding of land in their favor and infrastructure. This leads to unnecessary court litigation, labor unrest, strikes, etc. in the employer-employee relations of the tea companies.

VII. Conclusion and Suggestions

The entrepreneurs in Assam are striving hard to survive in the competitive tea industry and adhere to the statutory rules and regulations. They are consistently putting efforts into recognizing the needs of the tea sector and addressing them. It is hoped that the Government would pay necessary attention towards tea sector in Assam that caters to about 70 percent of the tea requirements of the country and also of the international market. This would help in reviving the drowsy tea industry and significantly contribute value added tea in the market.

Mentioned below are some suggestions for the tea companies to maintain their viability in the long run:

1. Various land policies and local laws of Assam should be uniformly codified into one so that the tea companies can have better understanding of laws and find it easier to comply with. Further, settlement procedures should be simplified for small tea growers to get greater accessibility to land as tea production requires large numbers of hectares of land.

2. If the minimum support price (MSP) of green tea leaves is fixed, the small tea growers would get fair remuneration of the plucked green tea leaves. The MSP should be fixed keeping in mind the production cost of the tea growers and the price which is set for other States in the tea market to maintain price parity of green tea leaves in the country.

3. The government should also provide financial aid and arrange loans from financial institutions at lower lending rates so as to help the small tea producers buy machinery at a discounted rate and to inform them of the benefits that are available.

4. The introduction of the latest technology, robotics, smart farming techniques, etc. in agricultural practices and training the farmers with the latest agricultural practices will minimize the cost of production and reduce waste.

5. The export policies should be liberalized, and proper teachings from recognized trainers should be provided so that the tea companies do not fall prey to agents who might exploit them.

6. Appointing watchdogs to see that the different government schemes that provide subsidies and financial aid should be properly implemented so that repaying the debts does not become a burden for young entrepreneurs and farmers engaged in the tea industry.

7. Tea cultivation is seasonal, and it is required that the leaves plucked during the harvesting season be stored properly in cold storage units. Thus, the government should support the tea growers in maintaining their infrastructure facilities and electricity requirements.

8. Cultivation of palm trees alongside tea cultivation would not only generate extra income, as palm oil is largely meant for human consumption and is also used for several skin care products. It also controls pest problems and significantly solves the problem of soil erosion.

Emerging Dynamics of Corporate & Commercial Laws in the Context of Amazon.com v. Future Retail Limited[122].

Adv. Sunil Mittal and Gurkirandeep Kaur[123]

Abstract

This case commentary explores the intricate legal terrain shaped by Amazon.com NV Investment Holdings LLC v. Future Retail Limited and Ors[124]. It highlights the evolving significance of honoring contractual obligations and respecting arbitration decisions within the framework of the Arbitration and Conciliation Act (1996) and the Arbitration Rules of the Singapore International Arbitration Centre (2016). The focal point of this analysis revolves around enforcing an Emergency Arbitrator's order, which is crucial for exploring its impact on international arbitration practices. This case establishes a pivotal precedent, emphasizing the foundational principles of contract law and the critical role of emergency arbitrators in preserving the integrity of arbitration proceedings.

Introduction:

Arbitration serves as a vital mechanism for resolving international commercial disputes, providing parties with a neutral and efficient alternative to traditional court systems. This method not only ensures confidentiality and expertise in complex commercial matters but also promotes predictability in dispute resolution outcomes. The Amazon.com v. Future Retail[125] case stands as a landmark in global arbitration jurisprudence, shaping how emergency arbitration mechanisms are employed to address urgent disputes in the commercial sphere.

In this case commentary, we delve into the intricacies of this significant case, analyzing its implications under both Indian law and international arbitration standards. We explore key themes such as the enforceability of emergency arbitral awards, the role of institutional rules like those of the Singapore International Arbitration Centre (SIAC)[126] , and the broader impact on future arbitration practices worldwide. By emphasizing the role of arbitration, we illuminate how it shapes the legal landscape and fosters a conducive business environment.

Background and Timeline:

The dispute between Amazon and Future Retail originated from Amazon's acquisition of a stake in Future Coupons, which granted it certain rights over Future Retail. In August 2019, Amazon.com NV Investment Holdings LLC acquired a 49% stake in Future Coupons Private Limited (FCPL), thereby gaining significant control over Future Retail Limited (FRL) due to the shareholder agreements in place. This strategic acquisition included provisions granting

[122]Amazon.com NV Investment Holdings LLC v. Future Retail Limited and Ors., AIR 2021 SC 443 (R.F. Nariman, J. and B.R. Gavai, J., Supreme Court).
[123] Advocate & Final Year Undergraduate Student, Panjab University Regional Center Ludhiana.
[124]Ibid. (referring to the same case)
[125]Ibid. (referring to the same case)
[126]Singapore International Arbitration Centre Arbitration Rules (2016).

Amazon a right of first refusal over any transfer of FRL's assets, aiming to safeguard Amazon's interests in the Indian retail market.

These rights were crucial in maintaining control over Future Retail's strategic decisions, particularly in the context of its potential merger with Reliance Retail Ventures. As financial pressures mounted on Future Retail, exacerbated by the COVID-19 pandemic, eventually it sought to alleviate its distress by agreeing to sell assets to Reliance Retail Ventures.

Central to the dispute were the specific provisions within the shareholder agreements between Amazon and Future Coupons, which Amazon invoked to challenge Future Retail's proposed sale to Reliance. These provisions aimed to safeguard Amazon's investments and contractual rights, ensuring any strategic shifts by Future Retail were aligned with Amazon's interests.

The timeline of events leading to arbitration proceedings underscores the urgency and complexity of the case. Beginning with Amazon's invocation of arbitration under the SIAC Rules, the proceedings saw rapid developments in both arbitration and judicial forums. These included emergency arbitration initiated at SIAC to secure interim relief, followed by judicial responses in India that shaped the enforcement and validity of emergency arbitral awards under Indian law.

The Case: Proceedings Analysis

A dispute arose between Amazon.com NV Investment Holdings LLC and Future Retail Limited[127], resulting in arbitration. The crux of the matter involves interpreting the provisions of the Arbitration and Conciliation Act (26 of 1996) and the Singapore International Arbitration Centre Arbitration Rules (2016), specifically regarding the enforcement of an Emergency Arbitrator's order. The dispute arose from a complex web of agreements between the parties. Amazon had invested in Future Coupons Ltd., a promoter group company of Future Retail Ltd., through its investment arm. Amazon was awarded specific protective rights as part of the arrangement. Amazon objected and started arbitration proceedings when Future Retail Ltd. sought to transfer its retail businesses to Reliance Retail. It said that the proposed transaction violated its contractual rights.

[127] Amazon.com NV Investment Holdings LLC v. Future Retail Limited and Ors., AIR 2021 SC 443 (R.F. Nariman, J. and B.R. Gavai, J., Supreme Court).

Legal Analysis and Implications:

Role of Emergency Arbitrator:

The Amazon.com v. Future Retail[128] case underscores the pivotal role of emergency arbitrators under institutional arbitration rules. SIAC's decision to grant an emergency award in favor of Amazon highlights the effectiveness of emergency arbitration in providing immediate relief pending formal arbitration proceedings. The legal framework under the Arbitration and Conciliation Act (1996), particularly Sections 2(1)(a)[129], 2(6)[130], and 2(8)[131], supports the enforceability of interim measures issued by emergency arbitrators, ensuring swift resolution of disputes while upholding party autonomy and the integrity of arbitration as a dispute resolution mechanism.

Significance of Emergency Arbitrators' Role

The critical role of an Emergency Arbitrator within institutional frameworks is highlighted in the case Amazon.com NV Investment Holdings LLC v. Future Retail Limited and Ors. The court's interpretation emphasizes the harmonious coexistence of the Arbitration Act and Emergency Arbitrator's orders when supported by institutional regulations. This signifies that parties' adherence to the SIAC Rules and the Emergency Arbitrator's award is viewed as compliance with the Arbitration Act, rather than a breach of its mandatory provisions. The judgment in Amazon.com NV Investment Holdings LLC v. Future Retail Limited and Ors., paragraphs 17, 18, and 19,[132] underscores that there are no restrictions in the Arbitration Act preventing contracting parties from including a provision for an award by an Emergency Arbitrator. In fact, the Act's sections advocating party autonomy regarding institutional rules reinforce that these regulations govern the parties' rights, which is not contradictory but rather endorsed by the Arbitration Act. Additionally, the judgment addresses the argument concerning the exhaustive definition of an "arbitral tribunal" as specified in Section 2(1)(d)[133] of the Act, encompassing either a sole arbitrator or a panel of arbitrators. This tribunal has the authority to issue interim orders and is established by the parties to render interim and/or final awards. However, the judgment clarifies that the definition of "arbitral tribunal" is subject to interpretation "unless the context otherwise necessitates it." When coupling the definition of

[128] Ibid.
[129] Arbitration and Conciliation Act, s. 2(1)(a) (26 of 1996) defines "arbitration agreement."
[130] Arbitration and Conciliation Act, s. 2(6) (26 of 1996) defines "foreign award."
[131] Arbitration and Conciliation Act, s. 2(8) (26 of 1996) defines "international commercial arbitration."
[132] Amazon.com NV Investment Holdings LLC v. Future Retail Limited and Ors., AIR 2021 SC 443, para 17,18,19 (R.F. Nariman, J. and B.R. Gavai, J., Supreme Court)
[133] Arbitration and Conciliation Act, s. 2(1)(d) (26 of 1996) defines "court."

"arbitration" in Section 2(1)(a) with Sections 2(6) and 2(8), it is evident that even interim orders issued by Emergency Arbitrators under permanent arbitral institution rules fall within its scope. These interpretations offer vital insights into the Emergency Arbitrator's role and jurisdiction, the application of institutional rules, and the extent of party autonomy within arbitration proceedings. They contribute significantly to the ongoing evolution of corporate and commercial laws, particularly within international business contracts and dispute resolution mechanisms. This comprehension is indispensable for legal practitioners, businesses, and policymakers in designing robust and streamlined arbitration frameworks.

Enforcement of Arbitral Orders: Crossing Jurisdictional Boundaries

The case between Amazon.com NV Investment Holdings LLC and Future Retail Limited provides crucial insights into the enforcement of arbitral orders. The court states that the power to enforce lies with the Court, not the arbitral tribunal. This aligns with the enforcement of a court order under Section 9(1)[134]. The enforcement mechanism under Section 17(2)[135] aligns with the procedural framework of the Code of Civil Procedure (CPC), offering clear guidance on jurisdictional boundaries. Referring to the case judgment of Amazon.com NV Investment Holdings LLC v. Future Retail Limited and Ors., paragraph 21 and 22, the court refers to the case of Firm Ashok Traders v. Gurumukh Das Saluja[136], quoting a passage from the judgment discussing the powers of the Arbitral Tribunal and the court under Sections 17 and 9 of the Act, respectively. However, this judgment doesn't advance the Respondents' case as the question at hand is whether the Emergency Arbitrator's award can be considered as made by an "arbitral tribunal" as defined, and it doesn't reference when a party may approach a court under Section 9. This sheds light on the enforcement of arbitral orders, the roles of the court and the arbitral tribunal, and the interpretation of key sections of the Arbitration Act. Mr. Salve then argues that the arbitration agreement between the parties, as outlined in section 25.2 of the FCPL Shareholders' Agreement (similar to section 15.2 of the FRL Shareholders' Agreement), stipulates that the SIAC Rules would be subject to the Indian Arbitration Act. As a result, the provisions governing an award made by an Emergency Arbitrator under the SIAC Rules would not be applicable between the parties. However, the court refutes this argument, stating that it is incorrect to say that Section 17(1) of the Act would exclude an Emergency Arbitrator's orders. Even if section 25.2 of the FCPL Shareholders' Agreement makes the

[134] Arbitration and Conciliation Act, s. 9(1) (26 of 1996) deals with interim measures by courts.
[135] Arbitration and Conciliation Act, s. 17(2) (26 of 1996) addresses the form of an arbitral award.
[136] Firm Ashok Traders v. Gurumukh Das Saluja, (2004) 3 SCC 155 : (AIR 2004 SC 1433)

SIAC Rules subject to the Arbitration Act, the said Act, when properly construed, would include an Emergency Arbitrator's awards. There is nothing inconsistent in the SIAC Rules when read with the Act.

Appealability and Finality:

The case clarifies the appealability of emergency arbitrator's orders under Section 37[137] of the Arbitration Act, emphasizing the finality of emergency awards once rendered. The Supreme Court's stance on limiting appeals against interim measures reinforces the efficiency of emergency arbitration as a means of securing urgent relief without prolonged judicial intervention. This interpretation strengthens the enforceability of emergency awards and enhances investor confidence in arbitration as a preferred method for resolving cross-border commercial disputes.

SIAC Rules' Significance:

The procedural framework of SIAC emergency arbitration provides clear benefits compared to traditional court processes in addressing urgent disputes. Unlike courts, which may be constrained by procedural formalities and backlog, SIAC provides a streamlined process for obtaining interim relief through emergency arbitration. This mechanism allows parties to swiftly address critical issues without the delays often associated with judicial proceedings.

SIAC's institutional framework plays a pivotal role in promoting efficiency and fairness in arbitration. The SIAC Rules are carefully crafted to facilitate prompt arbitration proceedings, upholding procedural integrity and ensuring due process. By opting for SIAC arbitration, parties benefit from a well-established institutional framework that is recognized globally for its impartiality and expertise in handling complex commercial disputes.

The unique aspects of SIAC Rules, particularly those pertaining to emergency relief, were instrumental in the resolution of high-profile cases like Amazon.com v. Future Retail Limited. The ability to obtain emergency relief promptly under SIAC Rules underscores their effectiveness in addressing time-sensitive commercial disputes. This aspect not only enhances the enforceability of arbitral awards but also reinforces the trust placed by multinational corporations in SIAC as a preferred forum for dispute resolution.

A comparative analysis with international arbitration standards further underscores SIAC's alignment with best practices in arbitration. The clarity and efficiency of SIAC Rules in administering emergency arbitration contribute to multinational corporations' strategic choices

[137] Arbitration and Conciliation Act, s. 37 (26 of 1996)

regarding jurisdictional preferences. By opting for SIAC arbitration, parties demonstrate confidence in a robust dispute resolution mechanism that offers enforceable outcomes and procedural fairness.

Conclusion:

In conclusion, the analysis conducted in this commentary underscores the pivotal role of arbitration, particularly under the SIAC framework, in modern commercial dispute resolution. The comprehensive legal framework provided by the Arbitration and Conciliation Act (26 of 1996), coupled with the specific provisions of SIAC Rules, ensures that emergency arbitrator awards are enforceable under Indian law. This reinforces the importance of party autonomy in choosing arbitration as a means of resolving disputes efficiently and effectively.

The broader implications extend beyond individual disputes to encompass stakeholders such as businesses, legal practitioners, and policymakers. The Amazon.com v. Future Retail case demonstrates the efficacy of arbitration, particularly under institutional frameworks such as SIAC's, in accelerating the resolution of intricate international disputes. Stakeholders benefit from predictable outcomes and reduced procedural complexities, enhancing commercial certainty and fostering economic growth.

Looking ahead, the commentary suggests potential reforms to further enhance arbitration laws, based on insights gained from cases like Amazon.com v. Future Retail. These reforms aim to optimize arbitration's role in responding to evolving global business needs while ensuring fairness and enforceability of arbitral awards. By embracing proactive reforms, policymakers can reinforce India's position as a preferred destination for international arbitration, supporting economic development and investor confidence.

SEBI'S PERSPECTIVE ON FINFLUENCERS- WAY AHEAD IN THE REALM OF FINANCIAL ADVISES

Anushka Ajmera & Simran Rauf[138]

Abstract

In the world of social media, Influencers have emerged as key players in today's digital landscape, wielding considerable power to shape opinions, trends, and consumer behavior. Amidst the rise of social media platforms, new class of influencers who impart financial advice have emerged which are commonly known as Finfluencers. As financial education remains a pressing need for many individuals worldwide, finfluencers have filled a crucial gap by providing accessible and engaging content on investment and financial planning. The art of demystifying complex financial concepts and make them understandable to a layman made them what they are today. Incongruously these Unsolicited advices, lack of qualification in the field of finance, no license of practice and illegal profit making added to the plight of new investors. They have not only misled the investors but also manipulated the stock markets while escaping the eye of SEBI due to lack of regulations. Alarmed by market capture of unregistered financial advisors, ASCI in collaboration with SEBI issued guidelines against unregistered fins, which led fins renting out registered advisors' number from 'Investment Advisors' to dodge SEBI. To address this situation, SEBI released a detailed consultation paper on August 25th, 2023, it encased non allowance of registered advisors to deal with fins, jotted down prerequisite for unregistered financial advisors and is endeavoring to ensure reliable, authentic financial advices to all investors.

INTRODUCTION

Finfluencers ('Fins') are principally individual financial influencers on various social media platforms with certain financial knowledge and who might be specialized, but not necessarily registered as professional financial advisers, in offering financial advices regarding investment, budgeting and personal finance management through creating and sharing content online on various social media platforms such as Twitter, Instagram, Youtube, Facebook etc., on their public channels. They share their own personal experiences, their witted intelligence, recommendations, tips and insights involving how to smartly and efficiently build wealth and achieve various financial goals by initiating discussion on various investment topics such as stock market, mutual funds, cryptocurrency, financial trend tracking, property etc.

In the same fashion as influencers, these fins have large reach through various social media platform. People who are seeking financial advice from these fins are generally retail investors with disposable income who are interested in seeking quick money without spending hours on market research. Given that these finfluencers offer unsolicited stock advice on various social media platforms and illegally profit from it without being registered investment advisers, finfluencing has provoked and drawn attention from the investor community. This is because

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social media has made it easier for all types of users to access financial services by streamlining information into a simple and easily understandable format.

JURISDICTION OF SEBI

One of the most important questions with respect to the legitimacy of such individuals is whether SEBI has jurisdiction to deal issues regarding unsolicited advice given by fins. The SEBI Act of the year 1992, mainly regulate number of activities related to the capital market in India. These entities include financial advisers as well, those who disseminates financial advice.

Though there are no specific provisions to regulate fins, but broadly, they can come under Section 12-A of the SEBI Act, 1992,

which requires that no person shall directly or indirectly manipulate, deceive, mislead any person with respect to transactions relating to stock market,[139]and

Regulation 4 of SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003, it includes –

Trading in securities can involve any or all of the following and will be considered fraudulent or unfair trading practices if it involves fraud: (a) engaging in a conduct that gives the impression that something is real or deceptive,[140]

dealing in the securities market, (k) an advertisement that could sway investors' decisions by providing false or inaccurate information.[141]

For giving legitimate advices, these fins as per Regulation 7 of the ***SEBI Research Analysts Regulations 2014,*** must be registered as research analysts, or those engaged in preparing reports and publishing their analysis must meet certain criteria i.e. qualification and certification issued by National Institute of Securities Markets. Therefore, even though these finfluencers possessing certain knowledge about capital market and security exchange, without holding any authentic certification under the SEBI Research Analysts Regulation, they are prohibited and are not authorized to disseminate any kind of financial advice or tips as they are not classified as research analysts.[142]

[139]The Securities and Exchange Board of India Act, 1992 (Act of ACT NO. 15 OF 1992), s. 12-A.
[140]SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 (last amended on October 19th 2020), s.4(a).
[141]SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 (last amended on October 19th 2020), s.4(k).
[142]SEBI (Research Analysts) Regulations 2014, s.7.

It is pertinent to mention that financial advisors who provide information to general public regarding stock market must be registered as 'Investment Advisors' under SEBI (Investment Advisors) Regulations, 2013,[143] or as 'Research Analyst' under SEBI (Research Analysts) Regulations, 2014 ("RA Regulations").[144] They must possess particular qualification to be able to do so. Unregistered fins are excluded from these regulations given by SEBI.

NEED FOR REGULATION

1. **Uncontrolled Guidance**: Reason behind SEBI issuing all these guidelines and regulations is to control unsolicited stock tips as there is drastic increase in number of unregistered investment advisers who are dramatically removing the difference between listed companies and non-listed companies when it comes to fraud. The lack of qualification can lead to substantial loss to gullible investors.
2. **Market Manipulations**: Various financial influencers promote certain assets without sufficient disclosure, probably harming investors. These practices are somehow giving rise to various technological risks such as digital data theft, diversion of funds, system breach, cyberattacks and various others risks. And these risks are eventually leading to erosion of wealth for shareholders and creating various ethical and financial crises.
3. **Decline of Market Integrity**: As a well-regulated market is important for its stability and long-term growth. But because of increasing trend of finfluencing certain listed companies have also started using social media platforms to boost their share prices with the help of these finfluencers because of their global reach.
4. **Vulnerability of Retail Investors:** New investors in market are always prone to making decisions on the basis of advises given by the finfluencers. Mainly the emergence of these finfluencers has been propelled by the significant growth of cryptocurrency market and subsequent effect of covid. As the financial literacy rate in India is still below 27 percent,[145] which implies that most of the investors lacks genuine knowledge and are blindly believing on these finfluencers and which is main concern that has been raised and need to be taken care by the SEBI.

[143]SEBI (Investment Advisors) Regulations, 2013, s. 2(m).
[144]SEBI (Research Analysts) Regulations, 2014, s. 2(u).
[145]Shyam Gandhi, "SEBI's Stance on Financial Influencers: A Case of Executive Overreach or A Strategic Move?" *available at* https://cbcl.nliu.ac.in/capital-markets-and-securities-law/sebis-stance-on-financial-influencers-a-case-of-executive-overreach-or-a-strategic-move/ (last visited March 15th, 2024).

5. **To Ensure Stringent Regulatory Regime:** The reason behind issuing of guidelines by the SEBI is to bring the finfluencers within the ambit of SEBI so to protect the interest of the credible investors. And to monitor these finfluencers in order to make a better regulatory environment for the protection of the investors.

Thus, SEBI can strengthen the quality of financial advices provided to the public on social media and safeguard interest of the investors by promulgating comprehensive set of guidelines.

CASE STUDIES – HOW FINFLUENCERS ADDED TO THE DEEDS OF NEW INVESTORS

VAULD CASE

Vauld is a Singapore based crypto trading platform operating in India. Recently Darshan Bhatija the CEO of this crypto company has announced that due to some major financial challenges, the crypto exchange is withdrawing and suspending all its finances, deposits and trading. These respective crypto exchanges were backed by some major ticket names like PayPal, Peter Thiel and Coinbase. From the beginning the company promised high returns on people's crypto investment, but later on the company went bankrupt, resulting substantial loss to those who invested. In this case several famous personalities such as Ankur Warikoo, Akshat Srivastava and were also involved who promoted this particular company also went downhill, as they were not particularly registered and qualified to be a professional financial adviser.[146]

PR SUNDAR CASE

Purisai Rajamani Sundar, a finfluencer, renowned and well-known personnel in the field of security exchange, consultant and share trading. He is known to be acclaimed market analyst, providing valuable financial guidance to his number of followers on social media. Recently, allegations were made that he selectively shared information of successful transactions, while covering those trades which are not successful enough. Eventually he was banned by the SEBI, as he was offering financial advises without having any legal registration under SEBI. This is one of the most complex problems when it comes to finfluencers as people tend to persuade from their advises, which is sometime incorrect and lacks authenticity and from this only these finfluencers gains illegal financial benefits.[147]

[146]Mehab Qureshi, "Only Invested After Watching Videos on YouTube': Indian Investors of Vauld Blame Influencers", Indian Express, July 11, 2022, *available at*: Only invested after watching videos on YouTube': Indian investors of Vauld blame influencers (last visited on Mar. 15, 2024).

[147]Fp Trending, "PR Sundar: Who is the Controversial Options Trader Penalised by SEBI Recently?", First Post, June 09, 2023, available at: PR Sundar: Who is the controversial options trader penalised by SEBI recently? (last visited on Mar. 15, 2024).

After this alarming situation, the Advertising Standards Council of India (ASCI) issued guidelines for those influencers giving financial advice and influencing the financial decision of people and are receiving certain financial gains or compensation out of it, then these finfluencers are mandatorily required to give a disclaimer on their content regarding both pros and cons of that particular security.[148]

IN RE STOCK RECOMMENDATION USING SOCIAL MEDIA CHANNELS SUCH AS TELEGRAM, X OR REDDIT

It has been identified that the people responsible for managing the telegram channel were ascertained to be lacking any kind of qualification and required license to practice as a registered financial adviser or research analyst. Additionally, it also came to light that those individuals managing the whole channel were also imposing certain fees on innocent investors for their personal monetary gains which was considered to be very unethical and inequitable.[149]

Retail investors have been able to rally around these companies thanks to social media platforms like Reddit and X, which can often result in sharp price movements and increased volatility. This coordinated strategy could lead to "short squeezes," which would force short sellers to buy more shares to cover their positions and drive-up stock prices even higher.

Nonetheless, there are vulnerabilities associated with social media's impact on market dynamics. Because these platforms have the potential to cause market distortions due to disinformation and herd mentality, regulatory organizations are actively monitoring them. Social media's power to mobilize consumers and transform the conventional investing surroundings is proven by its impact on the markets.

Thus, from the above cases it can be ruled out that how finfluencers are posing potential danger to the capital market as mass of people, who possess limited financial literacy ends up trusting these unlicensed individuals by adhering to their unsolicited financial advices and consequently suffer greater hardships. Thus, it has become the need of the hour for the SEBI to issue guidelines to regulate these financial influencers and hold them liable for any misleading information and advice.

[148]Guidelines for influencer advertising in social media, *available at,* https://asci.social/assets/files/ASCI%20Guidelines%20-%20Influencer%20Advertising%20In%20Digital%20Media.pdf (last visited March 15, 2024).

[149]Stock Recommendations using Social Media Channel (Telegram), WTM/SKM/54/201-22.

ASCI GUIDELINES ON FINANCIALINFLUENCERS

ASCI has revised its influencer advertising guidelines to increase accountability, particularly for financial influencers known as "finfluencers".

- Influencers in the banking, financial services, and insurance (BFSI) space are only permitted to provide advice on investments once they have registered with SEBI, India's Securities and Exchange Board. Their qualifications and name must be conspicuously posted next to their SEBI registration number.[150]
- For other financial aids, a finfluencer must register its qualification credentials with respective regularizing agencies to ensure authencity of the solicited advices. Additionally, they are supposed to follow any disclosure requirements that are periodically set forth by financial sector regulators.
- Finfluencers must display their registration no. or certification no. clearly in the opening remark of the video, in case of blogs it should be marked where consumers can easily read and in podcasts it should be called out at the beginning.[151]
- Notably, the Department of Consumer Affairs expanded its influencer standards on August 11, 2023, requiring extra disclosures from anyone who advertise health and wellness goods and services. Influencers who are discovered to have violated the rules can be punished with sanctions under the Act.

CONSULTATION PAPER ON ASSOCIATION OF SEBI REGISTERED INTERMEDIARIES/REGULATED ENTITIES WITH UNREGISTERED ENTITIES (INCLUDING FINFLUENCERS)

After ASCI Guidelines, fins to be registered with SEBI for using social media as a platform to disseminate information to the investors. This added to the plight of the fins. To their escape, they started to rent registration numbers from the Research analysts so that they are outside the eye of SEBI.[152]

To address this situation, SEBI released a detailed consultation paper on 25th August 2023. It contained within –

[150]Press Release, ASCI places additional responsibility on health and financial influencers, extends influencer Guidelines *available at*:https://www.ascionline.in/wp-content/uploads/2023/08/Health-and-Finance-Guidelines-Update-Press-Release.pdf (Last visited on July 9, 2024).

[151]*Id.*

[152]Shivani Bazaz, Financial influencers are 'renting' licenses to escape SEBI watch, *available at*https://www.cnbctv18.com/personal-finance/financial-influencers-are-renting-licenses-to-escape-sebi-watch-16861601.html (last visited March 15th, 2024).

Unregistered Financial influencers shall not deal with registered intermediaries or promote their services.

Intermediaries registered with SEBI or stock exchanges or Association of Mutual Fund of India (AMFI) shall not -:

- Share any confidential information regarding their clients to the finfluencers.[153]
- Directly or indirectly form association monetary or non-monetary for the promotion of services of the fins.[154]

Financial influencers registered with SEBI, Stock exchanges or AMFI in all capacity-

- Mention proper registration number, contact details, investor grievance cell, make proper disclosures and disclaimers regarding post.[155]
- They won't pay a referral fee or trailing commission based on the quantity of referrals.[156]
- Limited retail customer referrals, and stockbrokers may be permitted to charge fees for such limited referrals.[157]
- Fins shall comply with all the guidelines regarding advertisement as issued by SEBI or any supervisory bodies time to time.[158]
- Intermediaries registered with SEBI are required to take proactive steps to distance themselves from any unregistered firm that uses their name, goods, or services. They will take the necessary steps to notify the relevant enforcement agency so they may take the proper action, which may include bringing a case for fraud and impersonation under section 420 of the Indian Penal Code, 1860, among other things.[159]

WAY FORWARD

SEBI has rightly recognized the need of regulation regarding financial influencers. Malpractices of fins have created havoc for the new investors in the stock market, regularization is of utmost importance. The accountability of the finfluencers is what SEBI is mainly focusing on. Amendment is required to ensure these fins comes under the ambit of the regulators. ASCI is a not a government regulated body, its only a regulatory body which

[153]Consultation paper on Association of SEBI Registered Intermediaries/Regulated Entities with Unregistered Entities (including Finfluencers), s. 4.3.
[154]*Id* at 4.2.
[155]*Id* at 4.4.
[156]*Id* at4.6.
[157]*Id* at 4.7.
[158]*Id* at 4.3.
[159]*Id* at 4.8.

provides guidelines owing to which its not binding on the fins. But court in India has time and again upheld the guidelines of the ASCI and its on SEBI to back the rules by mandating necessary disclosures from the finfluencers.

SEBI is deriving jurisdiction on the fins through SEBI (Investment Advisors) Regulations, 2013 and Research analysts. However, they don't include services of Finfluencers in it. To incorporate them, SEBI needs to amend the definition of *Investment Advisors* that include both registered analysts and unregistered finfluencers so that services of the fins can be held accountable as and when required. Unregistered advisors must be given minimum services and other higher requirements can be complied by Registered advisors. SEBI is empowered to make distinct category for the finfluencers under Section 11 of the Act was created to safeguard the interests of securities investors, encourage the creation of securities, and regulate securities.[160]

SEBI should issue guidelines regarding minimum qualifications required to become finfluencers. This can ensure reliable services to the new investors and reduce the chance of loss. Qualifications such as MBA, diploma in stock market etc.

Furthermore, in the world of social media and influencers, it is impossible for SEBI to trace down the activities of fins. SEBI must release guidelines financial posts and videos. Also, it is important to differentiate educational posts from financial advice posts so that all material doesn't come under the red area of the guidelines.

SEBI has definitely put their right foot forward to overcome the current situation of finfluencers.

[160]The Securities and Exchange Board of India Act, 1992 (Act of ACT NO. 15 OF 1992), s. 11.

CONCLUSION

After a considerable amount of time, SEBI has been selectively planning to guide investors and brokers to reduce use and access to financial influencers or manipulators so to tame these so called "finfluencers" and to stop the increasing danger posed by the financial advice provided through ponzi apps, social media advertising and marketing propaganda. It's an undeniable fact that these finfluencers lack the qualification and requisite license to practice as a professional adviser. Issuing guidelines to address this cause and to protect the credible investors is a strategic move by SEBI to build a meticulous framework to monitor and regulate finfluencers. ASCI has issued guidelines on disclosures on the financial advices provided by fins through social media. Consultation paper released by SEBI deals with basic requirements as a registered advisor and unregistered finfluencers. The primary object is to develop a financial eco-system that encourages autonomy for financial influencers together with upholding their responsibility to face repercussion of people's financial decision being impacted from financial advises given by these influencers. It is important to acknowledge the substantial influence that financial advisors have on promoting financial literacy. Prioritizing openness and upholding moral principles, however, is equally crucial. SEBI needs to create distinct category for finfluencers along with minimum qualifications. This legislative move of SEBI plays an important role in today's scenario; however, it is also an undeniable fact that fins are guiding new investors in decision making and understanding market trends. It's on SEBI to bridge the malpractices with correct practices to create healthy investment market for investors.

Corporate Governance and Shareholder Activism in India: Assessing Regulatory Gaps and Probable Corporate Response Mechanisms

Shruti Mishra[161]

Abstract

The emerging tide of shareholder activism in corporate governance is surely drowning the malpractices, arbitrariness, and bias involved in the decision-making process of corporations. A complex entity like a company inculcates diverse individuals with varying interests and this complex structure makes it vulnerable to conflicts and malpractices. While the benefit of the company is of paramount interest, it cannot supersede the rights present with the shareholders, which derive their existence from their investments in the company. This is where the current trend of shareholder activism comes into play the active participation of shareholders in the corporate governance of a company is important to keep the working of management aligned with the interests of shareholders. However, the lack of statutory regulations and legislative control over these activities poses a threat to not only the corporate structure but also the public at large. This paper deals with this rising trend of shareholder activism in the Indian context by delving into the technicalities of shareholder activism. It addresses questions like why there is a need for a mechanism like shareholder activism and how shareholder activism affects a corporation and its functioning. Highlighting the significance of shareholder activism as a mechanism to ensure accountability and transparency, the paper identifies key regulatory gaps hindering its efficacy. The paper not only aims to analyze the mechanism of shareholder activism but also to put forward suggestions for corporate response mechanisms to balance the interests of the company with those of the shareholders. The key message of this paper lies in advocating for regulatory enhancements and corporate best practices to bridge the gaps in shareholder activism, thereby fostering a more robust and accountable corporate governance framework in India.

Introduction

From the incorporation of any company to its winding up, the one thing that prevails consistently is the administration of that corporation. This direction and control of a business corporation is called corporate governance. However, understanding the term corporate governance is not a piece of cake, as it has many aspects that change the nature of its definitions. From an economic perspective, the aim of corporate governance is solely to benefit the shareholders of a company and to increase the profit made by the corporation. Whereas if we opt to analyze the term corporate governance within the ambit of ethical and moral grounds, it can be defined as the ethical conduct of the administration of a company that aligns with the prevalent social norms. The legal aspect of corporate governance focuses on the adherence to legal requirements and regulations provided by the state.

A complex entity like a company inculcates diverse individuals with varying interests and this complex structure makes it vulnerable to conflicts and malpractices. Hence having good control over corporate governance is very important in the modern paradigm where the

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economies and international position of countries are dependent on these corporations. While the benefit of the company is of paramount interest, it cannot supersede the rights present with the shareholders, which derives its existence from their investments in the company. This is when the current trend of shareholder activism comes into play, the active participation of shareholders in the corporate governance of a company is important to keep the working of management aligned with the interests of shareholders. It not only creates a system of checks and balances but also forces the company to adhere to the principles of corporate social responsibility.

Navigating Shareholder Activism

Amidst the Covid-19 pandemic, the year 2021 observed a hike of 10% to the remuneration of the managing director of **Eicher Motor Ltd.** This move was highly criticized by the shareholders with a majority of votes against it. Similarly, shareholders of **Hero MotoCorp** were seen to negate the proposal for raised remuneration to the chairman and chief executive. This rising tide of denial of proposals and participation of shareholders in deliberately shifting the corporate governance and management of a company is called shareholder activism. Shareholder activism entails utilizing voting rights among different classes of shareholder to advocate for governance issues within companies.

With corporations exerting significant influence over economic and political systems, there's a growing necessity for an effective means to monitor corporate conduct. One external approach to exert pressure on corporations involves leveraging shareholder rights acquired through investments in targeted companies. This interaction with corporations regarding environmental, social, and corporate governance matters is termed shareholder activism. Often triggered by a corporation's failure to meet investment expectations or its proposed actions negatively impacting investor returns, activism increasingly serves as a mechanism to influence corporate social governance and environmental practices, irrespective of direct investor concerns about returns. Notably, improved social governance and environmental policies typically yield positive returns, enabling economic leverage to drive social advancements.

The benefit of the company is of pivotal importance in a corporate setting, still, if we talk about the grassroots level, it is the interest of shareholders that is being fulfilled ultimately by the management and Governance of a company. Every step taken in the management of a company affects the rights of the shareholders. The goal of any shareholder is to gin profits and hence, the process of shareholder activism is aimed at fulfillment of the personal interests of

shareholders, to either bar a transaction or to initiate one. As seen in the **Sun Pharma** case in 2015, where the company had to withdraw from the decision of the Board to invest US$ 225 Million in the United States, as the shareholders interrupted and declined the proposal on the premise of lack of financial resources as well as the minimal profit collected by the company.[162]

If we look into the case of **Siemens India,** in August 2014, the shareholders rejected the planned sale of its metal technologies division to "Siemens AG". Following this, Siemens India revised the terms of the deal, resulting in a higher sale price. Eventually, in December 2014, the shareholders approved the transaction after these adjustments were made. The case of Siemens India provides another side of the spectrum that directs us towards the drawbacks of shareholder activism. The sole aim of shareholders to increase the profits of the company can sometimes lead to mismanagement and malpractices in corporate governance, and hence the system of shareholder activism can also turn out to be a bane rather than a boon.

The need for shareholder activism

Shareholder activism is a crucial mechanism to create accountability and transparency in a company, where there are stakes of multiple members involved. In the present globalized and interconnected world, companies use huge financial assets, affecting different individuals, including investors, and workers. Nonetheless, this impact frequently accompanies fraud, including likely irreconcilable circumstances, unethical behavior, and disregard for societal and environmental consequences.

In a 2021 case involving **Zee Entertainment Enterprises Private Limited (Zee)**, a public trading company, and Invesco Developing Markets Fund (referred to as "Invesco"), an institutional shareholder of Zee, the Bombay High Court decided a dispute over a shareholders' meeting. Zee had declined to convene the meeting following Invesco's requisition notice, which aimed to address the appointment of independent directors at Zee. The court referenced the Supreme Court's ruling in **Life Insurance Corporation of India (LIC) v. Escorts Ltd**.[163]The Board's actions which restricted the exercise of shareholders' right to requisition meetings, are illegal and undermine the democratic structure of a company. This ruling emphasized that the democratic functioning of companies is essential and that any actions that

[162]Lexology, *available* at: https://www.lexology.com/library/detail.aspx?g=f961174a-768b-4ecc-81dc-e1756b2312cd. (last visited on March 4, 2024).

[163] Life Insurance Corporation of India v. Escorts Ltd, 1986 AIR 1370

impede this could lead to significant consequences for corporate governance in India. Consequently, Zee was instructed to convene the meeting.[164]

The requirement of shareholder activism emerges from multiple key factors. Primarily, it forces strict adherence to the principal-agent relationship that is essential to the corporate structure. This Principal-Agent relationship in Corporate Governance in a company involves managers acting as agents on behalf of shareholders who are principals, to maximize the company's value. Managers are entrusted with decision-making power to run daily operations, but their interests may diverge from shareholders'. This creates a potential conflict wherein the management could give precedence to immediate profits above enduring sustainability or the interests of stakeholders. Shareholders rely on mechanisms like compensation structures, oversight, and performance incentives to align managerial actions with shareholder interests, ensuring efficient operation and value creation. Shareholders Activism gives them the ability to hold management responsible and align business plans with the interests of shareholders and society.

Shareholder activism enhances the corporate social responsibility program of a company. One notable case is that of **Apple Inc**. In recent years, shareholders have pushed Apple to adopt more environmentally sustainable practices. In 2018, a group of shareholders successfully persuaded Apple to commit to using 100% renewable energy to power all its facilities worldwide. This initiative not only reduced Apple's carbon footprint but also set a precedent for other tech companies to prioritize environmental sustainability. The company has also made notable advancements in utilizing recycled materials. In addition to cutting plastic packaging usage by approximately 48% and increasing the incorporation of recycled plastic, it now integrates recycled tin, aluminum, and cobalt into Apple products and components.

In 2018, Apple became a primary supporter of the Malala Fund, greatly amplifying the fund's initiatives to promote girls' education and equal opportunity, led by Malala Yousafzai.[165] Furthermore, Apple is directing investments towards impoverished and marginalized communities, fostering empowerment initiatives aimed at addressing poverty and social

[164] Invesco Developing Markets Fund vZee Entertainment Enterprises Limited and Another, (2022) SCC OnLine Bom 630.

[165]The Hindu business line *available* at: https://www.thehindubusinessline.com/news/world/apple-joins-malala-fund-for-girls-education-in-india-world/article10046131.ece (last visited on March 4, 2024).

inequities. Shareholder activism played a crucial role in holding Apple accountable and promoting environmentally responsible business practices.

Shareholder activism in corporate governance leads to environmental sustainability as seen in the case of **Apple** and **Patagonia**, an outdoor clothing and gear company. Shareholders, led by founder Yvon Chouinard, have actively advocated for environmental sustainability. Patagonia has implemented various initiatives to minimize its environmental footprint, such as developing an environmental internship program where the employees can take two months off and work for any environmental group of their choice. Since 1993, the company has also been involved in removing obsolete and damaging dams and supporting environmental activism.[166] Shareholders have supported these efforts, pushing for transparency and accountability in environmental practices. This proactive stance has earned Patagonia a reputation as a leader in corporate environmental responsibility, demonstrating how shareholder activism can positively promote environmental protection and sustainability.

Additionally, Shareholder activism plays a big role in enhancing corporate governance policies. Through collaboration on matters such as board composition, compensation, and risk management, shareholders strengthen oversight frameworks and advance the development of dynamic cycles within businesses. Generally speaking, Shareholder activism is a vital tool for improving corporate social responsibility, modernizing management practices, and developing sustainable strategic plans that benefit partners, investors, and society at large.

The impact of Shareholder activism

In India, a significant number of corporations are closely held family enterprises, where a single individual and their family control the majority stake. This substantial ownership allows them to directly manage the company, often holding executive positions on the board and wielding significant decision-making power, which may sometimes be used to exploit minority shareholders.[167]This dynamic creates an agency issue, as the interests of the controlling shareholders may diverge from those of other shareholders, leading to a conflict of interest.

The Companies Act of 2013 has strengthened shareholders' rights and provided them with more avenues to influence management and act against any misconduct. These avenues include class action, requisitioning general meetings, seeking compensation in cases of oppression and

[166]Washington Post, *available* at: https://www.washingtonpost.com/climate-solutions/2022/09/15/patagonia-chouinard-environmental-activism-climate/ (last visited on March 12, 2024).

[167] Goshen Z, Hamdani A. "Corporate Control and the Regulation of Controlling Shareholders" Cambridge University Press; 23-52 (2019).

mismanagement, and applying to the National Company Law Tribunal for investigations into company affairs. Shareholders have the option to voice their concerns through voting power, remain passive, or exit the company.[168] However, such actions can impact the company's market share price. In a company, institutional investors, with their significant stakes and expertise, often have more influence than retail investors. They may have their representatives on the board and utilize proxy firms to maximize their voting power.

Shareholder activism leads to a plethora of improvements in a company. Primarily, a company's governance is carried out more efficiently by advocating for independent board members, transparent financial reporting, and stronger accountability mechanisms. Thus, shareholder activism fosters good corporate governance These changes help ensure that the company's management operates in the best interest of all stakeholders without preference to the majority, foster trust and confidence among investors, and enhance the company's reputation in the market for responsible management. Activist shareholders can exercise significant influence on a company's strategic decisions by advocating for changes in business operations, acquisitions, divestments, and capital allocation. For example, they may push for divestment from underperforming businesses or promote such acquisitions that align with the company's long-term growth objectives. By steering the company toward more profitable ventures or away from risky ones, activists contribute to enhancing the company's competitive position and its long-term sustainability.

Shareholder activism aims to provide additional control and benefit for shareholders by challenging management decisions that may hinder efficiency, deter growth, or misappropriate assets of the company. Through their engagement, activists encourage companies to prioritize measures that enhance operational efficiency, reduce costs, and optimize capital allocation, ultimately leading to improved financial performance and higher stock prices, thereby benefiting all investors. When shareholders demand better practices in areas such as environmental sustainability, diversity, or ethical conduct, other companies within the industry may take notice and adopt them to avoid reputational consequences or to meet investor expectations. As a result, shareholder activism can contribute to raising the overall standards of corporate governance and social responsibility across entire industries, benefiting stakeholders beyond individual companies. Activists engage with various stakeholders,

[168]Ambareen Beebeejaun, Pramod Kumar Bissessur, "The adoption of shareholder activism by minority investors in Mauritius and a comparative analysis with the UK laws"65 No. 6, International Journal of Law and Management, 683 (2023)

including employees, customers, and communities, to advocate for responsible practices that go beyond financial gains. By championing issues such as fair labor practices, environmental sustainability and community engagement, activists promote positive social and environmental impacts, that resonate beyond the bottom line of companies as mere profit-making entities. Fostering trust and collaboration with stakeholders can help companies build stronger relationships and enhance their long-term reputation and sustainability. Nonetheless, shareholder activism can hold companies accountable and improve corporate governance practices, discouraging promoters from prioritizing their interests over those of the company and minority shareholders. Despite these efforts, concentrated shareholding by promoters and promoter groups can still hinder the effectiveness of shareholder activism.

Regulations Establishing Shareholder Activism in India

The "Securities and Exchange Board of India (SEBI)" recommendations and the Companies Act of 2013 are the main sources of rules for shareholder activism in India. The purpose of these rules is to enable shareholders to hold firms responsible and actively engage in corporate governance.

A. Regulations under the Companies Act

i. Extraordinary general meeting (EGM)-The right to call extraordinary general meetings lies with members under Section 100In order to examine certain issues, such as resolutions pertaining to corporate governance, shareholders may call extraordinary general meetings.

ii. Class action suits: Shareholders can under Section 245file class action suits against companies for oppression and mismanagement, seeking remedies for any prejudicial actions taken by the company. The Companies Act of 2013 has seen the utilization of class action suits in prominent cases, illustrating its efficacy in addressing corporate misconduct. In the "*Securities and Exchange Board of India vs. Sahara India Real Estate Corporation Ltd.*[169]" case, the Supreme Court upheld a class action filed with SEBI against Sahara India for regulatory non-compliance, resulting in a fine. Similarly, in *Jignesh Shah vs. Union of India*[170], investors filed a class action alleging market manipulation by the National Stock Exchange. The National Company Law Tribunal ruled in favor of the investors, compelling the exchange to

[169]Securities and Exchange Board of India vs. Sahara India Real Estate Corporation Ltd (2017) SCC OnLine SC 1069.

[170]Jignesh Shah vs. Union of India (2019) 10 SCC 750.

compensate for damages. These cases underscore the significant role of class action suits in holding companies and institutions accountable for wrongdoing, thereby safeguarding investor interests and promoting corporate governance.

iii. Protection of minority shareholders and protection of public interest-Minority shareholders possess various rights, including the right to voice their opinions at Annual General Meetings and other company gatherings. They also hold a legal entitlement to initiate class-action lawsuits against the company under Section 245[171]of the Companies Act. Additionally, minority shareholders can participate in the appointment of directors through proportional representation principles[172] outlined in Section 163. "Delhi Gymkhana, a club registered under Section 8 of the Companies Act," with the primary objective of promoting sports and pastimes, faced penal action initiated by the Ministry of Corporate Affairs following a government complaint. The complaint alleged mismanagement and conduct prejudicial to public interest within the club. In response to the government's complaint, the "Ministry of Corporate Affairs approached the National Company Law Tribunal (NCLT) under Section 241(2)[173]for issues of oppression and mismanagement The National Company Law Appellate Tribunal (NCLAT) examined the scope of Section 241(2)" and made the following observations: "When the Central Government files a complaint under this section, it must document its view that the club's affairs are being conducted in a manner detrimental to the public interest This documentation is a prerequisite for invoking Section 241(2) The Tribunal does not have the authority to evaluate the sufficiency of the evidence upon which the government based its opinion, especially when there is no allegation of malice against the Central Government."[174]

B. Regulations under SEBI Regulations: SEBI has released principles aimed at advancing responsibility, equity and openness in corporate governance.

i. Disclosure requirements: SEBI mandates companies to disclose information related to corporate governance practices, including details of board meetings, related party transactions, and shareholder resolutions. Rule4(2)(a) of the "SEBI (Listing

[171] The Company Act, 2013. (Act 18 of 2013), s. 245.
[172] LiveLaw, *available* at:https://www.livelaw.in/columns/protection-of-minority-shareholders-and-related-party-transactions-221704. (last visited on March 15, 2024)
[173] The Company Act, 2013. (Act 18 of 2013), s. 241
[174] Delhi Gymkhana v Union of India (2021) SCC OnLine 76

Obligations and Disclosure Requirements) Regulations 2015" provides for the right of shareholders in a company to increase the interaction of members and to implement their opinions and interests in the governance of a company.

ii. Procedures regarding 'proxy adviser'**:** 'Proxy advisory firms' plays an imperative role by offering indispensable services that aid shareholders in navigating complex corporate matters beyond their immediate grasp. They enable investors to make well-informed decisions on a multitude of agenda items that they might not have the capacity to thoroughly research independently. Without these firms, shareholders would struggle to stay abreast of critical issues and may find it challenging to make informed choices regarding corporate governance matters. To regulate these advisory bodies SEBI Passed Procedural Guidelines for Proxy Advisors**.**[175]

Regulatory gaps in matters of shareholder activism

Whereas shareholder activism can be seen as the silver lining to correct corporate mechanisms and establish good governance, this mechanism is not devoid of complexities. This part of the article deals with technicalities that bar the free and active interception by shareholders. Primarily, in the cases of extraordinary general meetings**,** a minimum share capital of 10% is required to be held by the person calling for a meeting, in cases of a company with share capital, and in companies that do not have a share capital, the requisite to call a meeting is having 10% of the total voting rights regarding the subject matter of the resolution that is intended to be proposed.[176]

This requirement leads to shareholders facing challenges in exercising their rights effectively, risking arbitrary decision-making by company management or majority shareholders. While Shareholder activism serves as a vital mechanism for holding management accountable and promoting good corporate governance practices, the 10% threshold creates barriers that obstruct minority shareholders from challenging management decisions or proposing reforms aimed at enhancing transparency, accountability, and shareholder value. Addressing this gap by introducing specific provisions would help mitigate the risk of abuse and promote greater shareholder activism and engagement in corporate decision-making processes.

[175] SEBI, *available at:* https://www.sebi.gov.in/legal/circulars/aug-2020/procedural-guidelines-for-proxy-advisors_47250.html. (last visited on March 15, 2024)
[176]The Company Act, 2013. (Act 18 of 2013), s. 100

Similarly, under Section 163of the Companies Act proportional representation of minority shareholders on the board is allowed, however, its practical implementation remains ambiguous. The language of the section implies the provision of proportional representation is discretionary. The Articles of a company may provide for such representation. This discretion undermines the statutory availability of adequate representation to the minority shareholder. In practice when a company conducts its appointment of directors and the provisions of the Act state the requirement of proportional representation is not mandatory, this will create a backlash for the representation of minority leading to possible situations of oppression and mismanagement. This ambiguity can lead to challenges in ensuring fair representation, potentially impacting the diversity and independence of the board. As a result, minority shareholders may feel excluded and have no remedy to actively take and influence the management of a company, leading to reduced confidence in the company's governance structure.

Class action lawsuits may be filed against corporations for discriminatory or oppressive practices under Section 245. However, the stringent standards and complex legal processes involved in bringing such lawsuits can pose significant barriers, particularly for minority shareholders. Due to the complex nature of class action lawsuits, individual stockholders may not have the necessary financial resources or essential legal knowledge. Furthermore, the lengthy and uncertain legal proceedings can deter shareholders from pursuing their rights effectively. Delayed litigation can create financial burdens on both the shareholders and the targeted corporation, leading to prolonged uncertainty for the shareholder and the potential to damage the company's reputation in the market. This has a deterring effect on shareholder activism.

Further, as stated previously, companies are required by SEBI to provide information about their corporate governance policies as disclosure requirements.[177]On the other hand, precise criteria about the extent and breadth necessary for disclosure are lacking. This lack of regulated reporting practices makes it challenging for shareholders to effectively engage in activism and make informed decisions. Without clear guidelines on the specific information that companies should disclose, shareholders may struggle to assess corporate governance practices consistently across different companies and industries.

[177]SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, s. 2 (e)

On the other hand, the new trend of Proxy advising firms plays a crucial role in influencing shareholder activism and governance choices by providing recommendations on voting decisions for meetings. However, without robust regulatory oversight and defined norms, there is a risk of disproportionate influence and potential conflicts of interest. The legitimacy of shareholder votes and governance choices may be compromised if proxy advice firms operate without clear guidelines regarding their conduct and operations. The absence of defined norms can lead to questions about the objectivity and independence of their recommendations, as well as the adequacy of their disclosure practices.

SEBI requirements for proxy advising firms are not very broad, which raises questions regarding the businesses' responsibility, independence, and transparency. For example, the definition of Proxy Adviser in itself is extensive. According to SEBI, a proxy advisor is defined as any entity providing advice to institutional investors regarding the exercise of their rights, including voting recommendations.[178] This gives scope for indefinite interpretations leading to demeaning the institution's foundation.

On the other hand, the more recent circular on Procedural Guidelines for Proxy Advisors[179] inculcates in itself a detailed methodological division of procedures to be followed by these advisors such as communication of detailed procedures incorporated while analyzing a company, disclosure of rationale behind the recommendations, and information to clients within 24 hours of reception of any new material information. However, despite these guidelines, it fails to address the issue of conflict of interest. It lacks comprehensive measures to ensure the independence of these firms and does not mandate stringent oversight mechanisms to address potential conflicts of interest.

The SEBI circular dated August 4, 2020, titled grievance resolution between listed entities and proxy Advisers, acknowledges the inherent power held by this institution in influencing the shareholders and creating conflicts with the listed entities. It is no news that the legitimacy of shareholder votes and governance choices may be impacted by proxy advice firms' disproportionate influence over shareholder activism resulting in the absence of defined norms. Hence there is a need for robust mechanism to address these regulatory gaps.

[178]SEBI (Research Analysts) Regulations, 2014, s. 2 (p)
[179]*Supra* 14.

Effect of regulatory gaps on a company

Regulatory gaps can give rise to many governance issues, including insufficient accountability measures, lack of transparency and inadequate diversity on board. This might damage shareholder and investor confidence which would affect a company's long-term sustainability. A company's reputation can also be hampered by inconsistent disclosure methods or perceived governance shortcomings which can result in criticism from stakeholders. This may have an effect on investor sentiment and consumer loyalty which may eventually affect financial performance. Companies may also be subject to fines, penalties, or litigation expenses if they neglect to resolve shareholder concerns or adhere to regulatory obligations. This can undermine overall competitiveness and development prospects by depleting resources and taking management's attention away from essential company activities.

On the other hand, giving absolute freedom to the shareholders in the management can also lead to adverse conditions as seen in the Emission case involving **Volkswagen**. In the year 2015, it was noted that the cars manufactured by Volkswagen emitted 40 times more Nitrogen dioxide than the permitted limit. [180]This is where it was seen that excessive shareholder activism in a company can lead to negligence and failure to comply with corporate social responsibility. Despite claiming a commitment to sustainability and better environmental conditions, they violated emission regulations to boost their market position with the provision of better and enhanced cars. Volkswagen has promised to take significant measures to stop similar incidents in the future and win back the public's trust since the anomalies in the emissions test go against the company's core principles.

A deeper analysis of this scandal and Volkswagen's response thereof indicates that the public's scrutiny following the scandal is the main factor driving Volkswagen's corporate social responsibility program. The crisis was partly caused by shareholders and investors who, in their pursuit of profit, seemed to have neglected their obligations under corporate social responsibility(CSR). This suggests that CSR is not being cared for by the shareholders, as the program was only improved in reaction to public criticism. Furthermore, launching a CSR initiative after the controversy was an act only for the interests of shareholders, as shown by the notable drop in stock price that occurred after the scandal was made public. This case

[180]Forbes, *available* at: https://www.forbes.com/sites/georgkell/2022/12/05/from-emissions-cheater-to-climate-leader-vws-journey-from-dieselgate-to-embracing-e-mobility/?sh=7328e76568a5(last visited on March 15, 2024)

clearly shows the detrimental effect that unregulated shareholder activism can have on corporate governance.

One notable instance in India is the case involving Infosys Limited, one of India's leading multinational corporations in the IT sector. In 2017, Infosys faced significant shareholder activism when co-founder and former chairman, N.R. Narayana Murthy, raised concerns regarding corporate governance issues within the company. Murthy questioned the hefty severance payouts to former executives, including the then-CEO, and criticized the board for alleged lapses in governance and transparency.[181]The controversy led to a public feud between Murthy and the company's board, with Murthy demanding changes in the board's composition and governance practices. Shareholders, including institutional investors, voiced their concerns over the lack of clarity and transparency in decision-making processes, particularly regarding executive compensation and board appointments.

Despite Infosys' efforts to resolve shareholder concerns and reassure investors of its commitment to good governance, the prolonged dispute lead to a decline in investor confidence and adversely affected the company's stock price. The Infosys case highlights the challenges faced by shareholders in effectively influencing corporate decision-making processes and holding management accountable. The absence of clear regulatory provisions and guidelines for shareholder activism exacerbates these challenges, leading to prolonged disputes and uncertainties that can adversely affect company performance and stakeholder trust.

Suggestions regarding corporate response mechanism to balance shareholder activism

Corporations can implement the following best practices to develop effective response mechanisms for balancing shareholder activism and corporate stability. To resolve problems and get feedback, the Company should first create open communication channels with its shareholders. The lack of such mechanisms can lead to scandals as seen in the Satyam scandal. The company's management failed to maintain open lines of communication with shareholders, leading to a significant loss of trust and ultimately resulting in legal actions. This case underscores the critical need for companies to establish effective communication channels to address concerns and provide timely information.

[181]Corporate Governance Case Studies *available* at: https://www.cpaaustralia.com.au/-/media/project/cpa/corporate/documents/tools-and-resources/ethics/cg-vol-7.pdf?rev=e67cf73e5157444b95a0696049f2b3a0. (last visited on March 15, 2003).

By establishing regular communication with investors through conferences, meetings, and open reporting, companies can foster confidence and show acknowledgment of the rights and interests of shareholders. Hindustan Unilever Limited (HUL**)** regularly holds investor meetings and interactive sessions to discuss business performance and strategic initiatives. The company publishes detailed annual reports that include insights from these interactions, allowing shareholders to understand management's perspective and the company's direction. This proactive communication approach helps in addressing shareholder concerns and demonstrates the company's commitment to their interests.

The company must give utmost importance to improving corporate governance by diversifying the composition of the board, unbiased selection of independent directors, and putting in place effective supervision procedures to mitigate governance-related risk. They should also implement transparent decision-making procedures and ensure regulatory compliance. They must try to integrate social, corporate governance, and environmental factors into strategies and operations. This will create good corporate mechanisms and a shareholder-friendly environment. This will lead to a decrease in the need for shareholder activism. Further, they must develop social responsibility programs, ethical standards, and sustainable business practices to meet shareholder demands and advance long-term value development.

Identifying and resolving shareholder complaints proactively will benefit the corporation significantly. Whether there are complaints related to executive compensation, board accountability, or strategic direction, every shareholder complaint must be regarded as important and be solved with utmost virtuousness, irrespective of the voting right or the percentage of share capital owned by that shareholder. Companies should strive to give priority to transparency, promptness, and responsiveness while handling complaints. This will promote productive communication and avoid escalation of disputes. The provision of thorough information and instruction on business guidelines, performance standards and long-term goals to shareholders is another requisite. By increasing transparency and encouraging financial literacy through investor education initiatives and communication channels, companies can enable investors to make well-informed decisions.

The companies should, in collaboration with stakeholders and organizations, develop industry-wide standards, guidelines, and best practices to address systemic challenges, encourage group action on common goals, and engage in positive discourse and collaboration efforts. This will create a statutory system of checks and balances to mitigate the need for shareholder activism by providing a system devoid of oppression and mismanagement, with clear statutory

guidelines on the administration of a company, and penalties thereof in cases of negligence. Hence, along with corporate best practices, regulatory enhancements have the potential to balance shareholder activism in India.

The lack of extensive regulation regarding the disclosure requirements creates apprehension in the minds of shareholders; hence, to tackle this, the listed companies should provide all the details involved in the management of a company. These would include in-depth reporting on remuneration practices, outcomes of initiatives taken by the shareholders, and the adopted policies of environmental and social governance, to improve transparency and accountability of the Board towards shareholders.

The inadequacies in the aspect of the proxy voting can be corrected by reducing complexities and expediting the proxy voting procedure. This would enable the shareholders to partake in the decisions taken by the company that not only affect the irrights but are also concerned with the corporation and society. Furthermore, to improve the democratic structure of a company there must be unambiguous rules relating to proxy voting, the establishment of electronic voting platforms to provide access to all the shareholders, and a transparent vote tabulation process that increases confidence among the shareholders preventing any apparent oppression or in consequence shareholder activism.

The corporation must guarantee accessibility, effectiveness, and equity in resolving complaints from shareholders. Regulatory supervision and enforcement procedures should be strengthened to avoid instances of oppression and mismanagement, which would lead to maximum involvement of the shareholders in the company. This further leads to the involvement of third parties like the Court and tribunals in the internal administration of the company which hinders its reputation and market stability. The companies should handle cases of market abuse or unfair activities with utmost diligence and monitor compliance with corporate governance norms as any negligence can lead to harmful consequences and even a decline in the market value as seen in the emissions scandal of Volkswagen.

Companies can successfully strike a balance between shareholder activism and company stability, promote trust and transparency, and boost sustainable value creation for all stakeholders in the corporate ecosystem by implementing these best practices and regulatory enhancements.

Conclusion

Corporate governance and shareholder activism play pivotal roles in shaping the trajectory of companies, ensuring accountability, transparency, and alignment with stakeholder interests.

While corporate governance encompasses economic, ethical, and legal dimensions, shareholder activism acts as a crucial mechanism for investors to influence governance practices and hold management accountable. This proactive engagement by shareholders is particularly essential in diverse economies like India, where closely held family enterprises dominate the corporate landscape, presenting challenges in minority shareholder protection and governance oversight. While shareholder activism serves as a vital mechanism for promoting corporate accountability and driving positive change, regulatory gaps in India present challenges that hinder its effectiveness. These gaps, particularly in the Companies Act and SEBI guidelines, create barriers to effective shareholder engagement and limit the ability of minority shareholders to exercise their rights.

Effective shareholder activism may be hampered by complexity in class action suits, uncertainty in proportionate representation, and limitations for calling extraordinary general meetings. Furthermore, these difficulties are made worse by the lack of laws relating to disclosure requirements and regulatory supervision for proxy advisory firms, which may reduce the effectiveness of shareholder activism.

To address these shortcomings, companies must prioritize open communication, transparent decision-making and regulatory compliance. Enhancing board diversity, implementing social responsibility programs, and fostering collaboration with stakeholders can bolster governance practices and mitigate the need for shareholder activism. Moreover, regulatory enhancements, such as clearer disclosure requirements and streamlined proxy voting procedures, are essential to promote transparency and accountability.

Conclusively, striking a balance between shareholder activism and corporate stability requires concerted efforts from both companies and regulators. By implementing best practices and regulatory reforms, companies can cultivate trust, transparency, and sustainable value creation for all stakeholders. Further, through collaborative efforts and adherence to governance norms, companies can navigate shareholder activism effectively, fostering a corporate environment that prioritizes accountability, transparency, and long-term sustainability, all of which are the premise and founding pillars of good corporate governance.