Shareholders agreement

Shareholders’ Agreement is an agreement amongst the shareholders of a company. When a company is created, its founding shareholders determine how a company will be owned and managed. The Shareholders’ Agreement establishes rules to govern the relationship between two or more owners of a company.

Without a shareholders’ agreement in place, the rules that apply are in the applicable corporate statute. The shareholders’ agreement creates an overlay that addresses issues created or left unanswered by the corporate statute; they work together to create the rules that govern the relationship between the shareholders.

In many cases, the structure protects the basic economic interests of the shareholders more effectively than the corporate statute does on its own. A Shareholders’ Agreement provides details of the rights and duties of the stakeholders and the shareholders. It should be reviewed and revised periodically to ensure that it is in line with the current business environment, but it should not be revised to often so as to cause instability.

A company which is wholly owned by one person need not have such an agreement. However, as soon as there is more than one owner, such an agreement is essential.

Shareholders’ Agreement is sometimes referred to in the U. S. as Stockholders’ Agreement.

SCOPE OF THE SHAREHOLDERS’ AGREEMENT The Shareholders’ Agreement attempts to define the following, * Share Distribution: It will include the rights related to the issuance, sale, or subsequent distribution of shares. It will also have the pre-emptive rights and first refusal rights of the directors and management. * Structure of the Company: This will inform shareholders of the persons who are running the organization and managing their money. Distinction in the Ownership of the Shares: This section helps distinguish between the different classes of shareholders. * Rights and Duties of the Shareholders: It informs the shareholders of how much they can or cannot participate in the running of the company or how much they can control the management of the money they have invested.

* Rights and Duties of the Management and the Employees: This is the legal foundation of the personnel aspect of the business and will ensure that the business is not run in an autocratic manner. Voting Rights: This section will outline the voting rights of the shareholders on management decisions, thereby indicating what control the shareholders will have over the management of the money they have invested. * Vesting Rights: Conditions under which a shareholder can sell his shares and lockdown periods. * Transfer of Shares: With the passage of time, directors and management may want to divest their shares. The shareholders' agreement should contain guidelines and options for the selling and buying of shares, so that the overall share distribution ratio is not disturbed.

Guidelines for Exigencies: This will include contingencies for the retirement or the death of a stakeholder or Director. These guidelines will ensure that there is minimum confusion as and when an emergency should occur. It will ensure business continuity and safeguard the interest of the shareholders. *

Quorum: Lays down the number of shareholders that needs to be present to hold a shareholders’ meeting and to pass a resolution.

* Composition of the Board of Directors: This is a legal requirement that clearly identifies members of the Board of Directors and their terms of employment or continuity.

It will also describe the duties of the board. * Compensation: Members of the Board of Directors are normally not employees of the company. Therefore, they need to be compensated for their effort in formulating policies and overseeing the management of the company.

* Conditions for Change in Composition: This section will lay down the conditions under which the Board of Directors may bring in a new stakeholder, or existing stakeholders may transfer or sell their shares so as to reconstitute the Board of Directors. * Ownership in Case of Buyouts: Lays down the rules governing how to handle ownership buyouts. Dispute Settlement Machinery: This section will spell out the methods of arbitration that would be used to settle a shareholders dispute. * Exit Clauses: A shareholder or stakeholder may choose at any time or for any reason to divest his share or stake. The shareholders agreement should lay down the conditions he needs to fulfil at this time. This will help to ensure that the directors and management continue to maintain control of the company and it will also ensure that the overall shareholding pattern of the company does not change without the express agreement of the directors.

TERMINATION OF SHAREHOLDERS’ AGREEMENT The Shareholders’ Agreement can end when all shareholders agree to end it, or on a specific date. The option to end it upon the agreement of all shareholders should only be used where there are a relatively small number of shareholders, the Corporation is not thinking of taking on new shareholders, and the shareholders have a good working relationship. Even one disgruntled shareholder could cause significant problems for the Corporation by refusing to terminate the agreement, even where it would in the best interests of the Corporation to do so.

If there are a relatively large number of shareholders, or where the Corporation is trying to increase the number of shareholders, or if the potential exists for conflict among the shareholders, then the Shareholders' Agreement should probably be ended on a specific date. APPLICABLE LAWS Companies must comply with the law.

Companies are incorporated in a particular jurisdiction. This legislation lays out the ground rules for corporate governance. When a company is formed, it files a Memorandum and Articles of Incorporation (depending on jurisdiction) which are public documents filed with the Registrar of Companies.

A shareholders agreement is confidential and its contents need not be filed or made public.

1) Canada Business Corporations Act (CBCA) [Canada] Unanimous Shareholders' Agreement (USA) provision was first included in the CBCA in 1975, because it overrode the common law rule that shareholders, even when acting unanimously, could not fetter the discretion of directors. The USA provision is found in section 146 of the CBCA. It provides for the

following matters, Creation and General Description (sections 146(1) and (2)) A USA could potentially wholly restrict the management powers of the directors.

Even in such a situation, the CBCA does not permit the Board of Directors to be eliminated. Being “ unanimous,” a USA must be among all the shareholders of the corporation.

One or more persons who are not shareholders may also be parties to a USA. If the corporation has only one shareholder, that person may create a USA alone through a written declaration. Since the use of a USA could lead to the “ override” of some corporate law requirements, some jurisdictions have limited the use of USAs to corporations that have no more than a specified number of shareholders.

The possibility of so limiting the CBCA provision was raised prior to the introduction of a significant set of amendments made to the CBCA in 2001; however, no restriction was made. The continuing approach of simply requiring a USA to be unanimous is largely self-limiting because, once a corporation exceeds a certain number of shareholders, achieving unanimous agreement may be difficult.

While a USA is a contractual agreement among shareholders, it may also be considered a contenting document (like the by-laws or articles) that deals with the internal governance of the corporation.

It has been described as a “ corporate law hybrid, part contractual and part constitutional in nature. ” Various CBCA provisions that govern fundamental aspects of internal affairs of the corporation are explicitly made subject to the terms of any USA that is in place. For example, section 102, which require the directors to manage, or supervise the management of, the business and affairs of a corporation, is subject to any USA. Similarly, the directors' powers to make, amend or repeal by-laws of the corporation (section 103), and to appoint officers and specify their duties (section 121) are also subject to any USA

Purchasers or Transferees (Sections 146(3) and (4)) If shares that are subject to a USA are sold or transferred, the new shareholder is deemed to be a party to the USA.

However, it is advisable to give notice of the USA to the new shareholder before that person acquires the shares. Notice may be given by including the USA with the security certificate or making conspicuous reference to it on the certificate (section 49(8)), or notice may be given in any manner that provides actual knowledge of the USA.

If notice of the USA is not given to the new shareholder, then within 30 days of becoming aware of the existence of the USA, the shareholder may rescind the transaction by which the shares were acquired Rights, Powers, Duties and Liabilities (Section 146(5)) When a USA is in place, certain rights, powers and duties that the directors would otherwise have are transferred to the shareholders, to the extent set out in the USA.

Prior to the amendments made to the CBCA in 2001, it was not clear whether shareholders who took on the directors' powers under a USA were also subject to the related liabilities, or whether the directors continued to be so subject.

This was clarified by the 2001 amendments, which added wording to section 146(5) explicitly stating that when shareholders relieve directors of their powers, they also relieve them of the associated liabilities, whether they arise under the CBCA or otherwise. Defences related to these liabilities are also transferred to the shareholders.

The CBCA explicitly states an example of a director liability that may be transferred to the shareholders. Under section 119, directors may be liable to employees of the corporation for up to six months' wages owed to employees. A USA may result in this significant liability shifting to the shareholders.

It is not clear upon what constitutional basis a CBCA provision may relieve directors of liabilities imposed on them by validly enacted provincial legislation Fettering Discretion of Shareholders (section 146(6))

Before the USA provision was included in the CBCA, the common law did not allow shareholders to fetter the discretion of directors. It was believed that directors needed freedom to fulfil their duties to the company. The USA provision changed that rule, specifically allowing the shareholders to enter an agreement to acquire directors' rights, powers and duties. However, this change made it possible to argue that the new USA provision did not supplant the old common law rule, but rather only displaced it to apply in respect of shareholders' discretion rather than directors' discretion.

It became arguable that, when a USA was in place, shareholders were not allowed to fetter the discretion they had acquired from the directors for themselves. The 2001 amendments corrected this potential problem.

Section 146(6) of the CBCA now states that “ nothing in this section prevents shareholders from fettering their discretion when exercising the powers of directors under a unanimous shareholder agreement. ” In other words, shareholders may agree on how they will exercise the powers they have taken from directors under a USA. Compliance with a USA

A USA is both a legal contract and a constituting document. Accordingly, it is legally enforceable. Section 122(2) states that directors and officers must comply with the terms of a USA. There are at least four different legal means of enforcing a USA, – A complainant may seek to enforce a USA in court under contract law.

Generally only parties to a contract may sue to enforce the contract. However, exceptions are made in certain circumstances – Under section 247 of the CBCA, a complainant may apply to a court for an order directing compliance with, or restraining a person from acting in breach of, a USA.

The complainant under section 247 may be almost anyone, in the court’s discretion. The defendant(s) may be “ the corporation or any director, officer, employee, agent, auditor, trustee, receiver, receiver-manager or liquidator of a corporation.

” If an application under section 247 is successful, the court may make any further order it thinks fit – Under section 241 (the oppression remedy), a complainant may apply to a court for an order on the basis that a breach of the USA is “ oppressive or unfairly prejudicial to or … unfairly disregards the interests of any security holder, creditor, director or officer. The court may make any interim or final order it thinks fit in connection with an oppression case, including an order restraining the conduct complained of, setting aside a transaction, compensating an aggrieved person, or even liquidating or dissolving the corporation – Under section 214, a shareholder may apply for an order liquidating or dissolving a corporation, or any of its affiliated corporations, on the basis that a USA entitles the complaining shareholder to this remedy after the occurrence of a specified event, which has occurred – A special rule applies in the case of the corporation itself, or a guarantor of an obligation of the corporation, seeking to assert non-compliance with a USA against a third party dealing with the corporation. Under section 18, the corporation or its guarantor may only do this if the third party knew about the USA, or ought to have known of the USA by virtue of the party’s relationship to the corporation 2) Stock Companies and Securities Market Laws [RUSSIA] New Article 321 of the Stock Companies Law defines a “ shareholders agreement” as an agreement relating to the exercise of rights arising from the ownership of shares, including limitations on the exercise of such rights.

Such agreement may establish binding obligations of parties to vote in a certain manner at a general shareholders meeting; to acquire or dispose of shares at a predetermined price (thus facilitating “ buy-sell” provisions); to restrict transfers of shares, in certain circumstances; and to cooperate in certain other matters connected with corporate governance, reorganization and/or liquidation of a stock company The amended Stock Companies Law places certain limitations on shareholders agreements. For example, shareholders agreements must be in writing and signed as a single document, and must relate to all of the shares owned by each of the parties.

– Article 68 of the Stock Companies Law governs decisions of the board of directors.

Prior to the amendments, it was possible for the charter or internal regulations of a stock company to provide for the adoption of board decisions by less than a simple majority of all directors present at a meeting – Article 69 of the Stock Companies Law now states that if the board is deadlocked with respect to the appointment or termination of senior management (i. e. , the general director), then, in addition to other remedies available under a shareholders agreement (if any), the matter may be referred for resolution to the shareholders, unless the charter provides otherwise – Changes to Article 30 of the Securities Market Law have established new public disclosure requirements for stock companies with a registered prospectus, which include notification of deadlocks with regard to appointment and termination of the senior management and acquisition by a shareholder (alone or with its affiliates), either directly or indirectly as the result of entering into a shareholders agreement.

The disclosures must be made by notice to the proper authority – generally, the FFMS – within five days. LEGAL PROBLEMS AND JUDICIAL DECISIONS Shareholders agreement has a wide range of applications in the modern context.

When a company is created, its founding shareholders determine how a company will be owned and managed. This takes the form of a " shareholders agreement". Not having such an agreement can lead to serious problems and disputes and can result in corporate failure. This agreement aids in holding up the rights of the existing shareholders.

The significance of this agreement can be depicted through the cases given below: I. FOSS v. HARBOTTLE (UK, 1843) Context and Plea

Richard Foss and Edward Starkie Turton were two minority shareholders in the " Victoria Park Company". The company had been set up in September 1835 to buy 180 acres of land near Manchester and, according to the report, " enclosing and planting the same in an ornamental and park-like manner, and erecting houses thereon with attached gardens and pleasure-grounds, and selling, letting or otherwise disposing thereof". This became Victoria Park, Manchester. Subsequently, an Act of Parliament incorporated the company.

The claimants alleged that property of the company had been misapplied and wasted and various mortgages were given improperly over the company's property.

They asked that the guilty parties be held accountable to the company and that a receiver be appointed. The defendants were the five directors (Thomas Harbottle, Joseph Adshead, Henry Byrom, John Westhead, Richard Bealey) and the solicitors and architect (Joseph Denison, Thomas Bunting and Richard Lane) and also H. Rotton, E.

Lloyd, T. Peet, J. Biggs and S. Brooks, the several assignees of Byrom, Adshead and Westhead, who had become bankrupts. Judgment The court dismissed the claim and held that when a company is wronged by its directors it is only the company that has standing to sue. In effect the court established two rules.

1) The " proper plaintiff rule" is that a wrong done to the company may be vindicated by the company alone.) The " majority rule principle" states that if the alleged wrong can be confirmed or ratified by a simple majority of members in a general meeting, then the court will not interfere, cadit quaestio. " The Victoria Park Company is an incorporated body, and the conduct with which the Defendants are charged in this suit is an injury not to the Plaintiffs exclusively; it is an injury to the whole corporation by individuals whom the corporation entrusted with powers to be exercised only for the good of the corporation. " " It was not, nor could it successfully be, argued that it was a matter of course for any individual members of a corporation thus to assume to themselves the right of suing in the name of the corporation.

In law the corporation and the aggregate members of the corporation are not the same thing for purposes like this; and the only question can be whether the facts alleged in this case justify a departure from the rule which, prima facie, would require that the corporation should sue in its own name and in its corporate character, or in the name of someone whom the law has appointed to be its representative. " Developments The reasons for the application of the rule in Foss v Harbottle were, firstly that the court should not become involved in matters involving disputes over company business policy, that disputes between members should have been resolved between themselves at a general meeting, and thirdly, that otherwise there would have been the danger of multiplicity of claims. The rule was later extended to cover cases where what is complained of is some internal irregularity in the operation of the company.

However, the internal irregularity must be capable of being confirmed /sanctioned by the majority.

The rule in Foss v Harbottle has another important implication. A shareholder cannot generally bring a claim to recover any reflective loss – a diminution in the value of his or her shares in circumstances where the diminution arises because the company has suffered an actionable loss. The proper course is for the company to bring the action and recoup the loss with the consequence that the value of the shares will be restored. Exceptions to the Rule As Foss v Harbottle leaves the minority in an unprotected position, exceptions have arisen and statutory provisions have come into being which provide some protection for the minority.

The following exceptions protect basic minority rights, which are necessary to protect regardless of the majority’s vote.

* Ultra vires and Illegality The directors of a company or a shareholding majority may not use their control of the company to paper over actions which would be ultra vires the company, or illegal. * Actions requiring a Special Majority If some special voting procedure would be necessary under the company’s constitution or under the Companies Act, it would defeat both if that could be sidestepped by ordinary resolutions of a simple majority, and

no redress for aggrieved minorities to be allowed. II. COOK V DEEKS [Canada, 1916] Context and Plea

The Toronto Construction Co had four directors, Mr GM Deeks, Mr GS Deeks, Mr Hinds and Mr Cook. It helped in construction of railways in Canada.

The first three directors wanted to exclude Mr Cook from the business. Each held a quarter of the company’s shares. Deeks, Deeks and Hinds took a contract with the Canadian Pacific Railway Company in their own names. They then passed a shareholder resolution declaring that the company had no interest in the contract.

Mr Cook claimed that the contract did belong to the Toronto Construction Co. and the shareholder resolution ratifying their actions should not be valid because the three directors used their votes to carry it. Judgment

The Privy Council advised that the three directors had breached their duty of loyalty to the company, that the shareholder ratification was a fraud on Mr Cook as a minority shareholder and invalid. The result was that the profits made on the contractual opportunity were to be held on trust for the Toronto Construction Co.

The jury held that the three had, deliberately designed to exclude and used their influence and position to exclude, the company whose interest it was their first duty to protect. The benefit of such contract must be regarded as held on behalf of the company. [It was] quite certain that directors holding a majority of votes would not be able to make a present to themselves. This would be to allow a majority to oppress the minority. Such use of voting power has never been sanctioned by the court.

It was found that the benefit of the contract belonged, in equity to the company, and the directors could not validly use their voting power to vest it in themselves.

III. DODGE V. FORD MOTOR COMPANY (Michigan, 1919) Context and Plea: Dodge v. Ford Motor Company, was a famous case in which the Michigan Supreme Court held that Henry Ford owed a duty to the shareholders of the Ford Motor Company to operate his business for profitable purposes as opposed to charitable purposes.

By 1916, the Ford Motor Company had accumulated a capital surplus of $60 million. The price of the Model T, Ford's mainstay product, had been successively cut over the years while the cost of the workers had dramatically, and quite publicly, increased.

The company's president and majority stockholder, Henry Ford, sought to end special dividends for shareholders in favor of massive investments in new plants that would enable Ford to dramatically grow the output of production, and number of people employed at his plants, while continuing to cut the costs and prices of his cars. In public defense of this strategy, Ford declared: " My ambition is to employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes.

To do this we are putting the greatest share of our profits back in the business. ” While Ford may have believed that such a strategy might be in the long-term benefit of the company, he told his fellow shareholders that the value of this strategy to them was not a primary consideration in his plans. The minority shareholders objected to his strategy, demanding that Ford stop reducing his prices when they could barely fill orders for cars and continue to pay out special dividends from the capital surplus in lieu of his proposed plant investments. Two brothers, John Francis Dodge and Horace Elgin Dodge, owned 10% of the company, among the largest shareholders next to Ford. The Court was called upon to decide whether the minority shareholders could prevent Ford from operating the company for the charitable ends that he had declared. Judgment The Court held that a business corporation is organized primarily for the profit of the stockholders, as opposed to the community or its employees.

The discretion of the directors is to be exercised in the choice of means to attain that end, and does not extend to the reduction of profits or the non distribution of profits among stockholders in order to benefit the public, making the profits of the stockholders incidental thereto. ‘ It is a well-recognized principle of law that the directors of a corporation, and they alone, have the power to declare a dividend of the earnings of the corporation, and to determine its amount. ” IV. EBRAHIMI V. WESTBOURNE GALLERIES LTD (UK, 1973) Context and Plea: Mr.

Ebrahimi and Mr Nazar were partners. They decided to incorporate as the business was highly successful, buying and selling expensive rugs. Mr.

Ebrahimi and Mr Nazar were the sole shareholders in the company and took a Directors’ salary rather than dividends for tax reasons.

A few years later, when Mr Nazar’s son came of age, he was appointed to the board of directors and Mr. Ebrahimi and Mr Nazar both transferred shares to him. Mr Nazar and son then called a company meeting, at which they passed an ordinary resolution to have Mr. Ebrahimi removed as a Director.

Mr. Ebrahimi, clearly unhappy at this, applied to the court for a remedy to have the company wound up. In the case of a small company the rights and obligations went beyond that of bare company law requirements. The applicant had been excluded from being involved in the management of the company against his reasonable expectations and this equated to him being effectively unable to dispose of his interest.

Judgment

The House of Lords stated that as a company is a separate legal person, the court would not normally entertain such an application. However, they believed that as the company was as similar in its operation as it was when it was a partnership, they created what is now known as a Quasi-Partnership. Lord Wilberforce: “ A limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound.

In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small.

The ‘ just and equitable’ provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way. ” In any event, just and equitable predates the first codification of Company Law and is entrenched in common law.

Treating the company as a quasi-partnership allowed the rules of partnership to be used and thus the winding up of the company to be possible. The company was wound up. V.

BAKER v. ARKANSAS BLUE CROSS AND BLUE SHIELD (California, 2010) Context and Plea Med-Vantage, Inc. (“ Med-Vantage”) is a software company founded by plaintiff Baker in 2001. On August 22, 2007, Plaintiffs and others entered into a Stockholder Agreement, pursuant to which B. P. Informatics LLC (BPI) acquired a 52 percent interest in Med-Vantage, leaving Baker with a 31 percent equity interest.

Thereafter, BPI and various related entities assumed control of the Med-Vantage board and allegedly began operating the company for their benefit, to the detriment of minority shareholders, including Plaintiffs.

On August 20, 2008, Plaintiffs filed suit against various defendants, including BPI, for breach of fiduciary duty, minority shareholder oppression, violation of California's Unfair Competition Law and breach of contract. Plaintiffs filed a First Amended Complaint on March 17, 2009, alleging the same causes of action. In their breach of contract claim, Plaintiffs averred that BPI breached the Stockholder Agreement by failing to vote their shares at the December 8, 2008, stockholder's meeting in favour of the two nominees that Baker had proposed for the board.

In response to the amended complaint, defendants filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).

On July 31, 2009, the Court granted Defendants' motion in part and dismissed all claims except Plaintiffs' fourth cause of action for breach of contract. On August 14, 2009, BPI filed an answer to the amended complaint, along with a counterclaim for breach of contract. The counterclaim, which is the flipside of Plaintiffs' contract claim, alleges that " at the Med-Vantage Meeting held on December 8, 2008, Baker and Mullen did not vote for any of the directors that BPI had nominated, ostensibly in violation of Section 2. 2 of the Stockholder's Agreement.

On June 1, 2010, the Court granted Plaintiffs' motion to voluntarily dismiss their breach of contract claim.

Plaintiffs now move for summary judgment on BPI's counterclaim on the ground that it cannot show that it suffered any damages from the alleged breach of the Stockholder's Agreement. Plaintiffs contend that because BPI held the majority of shares, its nominees were elected to the board, notwithstanding the fact that Plaintiffs voted for Baker’s nominees. Nonetheless, BPI alleges that it has been injured “ in that it has been forced to defend a meritless suit, which is barred by own conduct, including without limitation that Baker and Mullen come to this action with unclean hands. ” Legal Standard Rule 56(c) of the Federal Rules of Civil Procedure authorizes summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

The moving party bears the initial burden of demonstrating the basis for the motion and identifying the portions of the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file that establish the absence of a triable issue of material fact. If the moving party meets this initial burden, the burden then shifts to the non-moving party to present specific facts showing that there is a genuine issue for trial. An issue of fact is “ material” if, under the substantive law of the case, resolution of the factual dispute might affect the outcome of the claim. Factual disputes are genuine if they “ properly can be resolved in favour of either party”.

Accordingly, a genuine issue for trial exists if the non-movant presents evidence from which a reasonable jury, viewing the evidence in the light most favourable to that party, could resolve the material issue in his or her favour.

A. BREACH OF CONTRACT Delaware law governs the Stockholder Agreement. Under Delaware law, the elements of a breach of contract under Delaware law are: (1) a contractual obligation; (2) a breach of that obligation by the defendant; and (3) resulting damage to the plaintiff. To be recoverable, the damages sought in a breach of contract claim must be the natural and probable consequence of the conduct constituting the breach.

In other words, the claimed damages must be proximately caused by breaching party's alleged actions. The failure to establish damages resulting from an alleged breach is fatal to claim for breach of contract. Plaintiffs contend that BPI cannot show that it suffered any damages resulting from their failure to vote their shares for BPI's nominees. Specifically, Plaintiffs point out that their votes were superfluous because BPI's nominees were elected to the Med-Vantage board, notwithstanding Plaintiffs' decision to vote for Baker's nominees. As noted, BPI does not dispute this, but instead, argues that it has been injured by having incurred legal fees defending against Plaintiffs' lawsuit.

However, BPI's legal fees resulted from Plaintiffs' decision to file this lawsuit, and not because of the Plaintiffs' decision to vote for Baker's nominees. Tellingly, BPI offers no evidence or cogent explanation as to how Plaintiffs' voting decision caused BPI to defend this case and concordantly incur legal fees. Thus, the Court concludes that BPI's legal fees do not constitute damages caused by Plaintiffs' alleged breach of the Stockholder Agreement. B.

DECLARATORY RELIEF Alternatively, BPI argues that no showing of damages is required for declaratory relief. Those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the

Constitution by alleging an actual case or controversy As set forth above, there is no evidence BPI has suffered any harm resulting from Plaintiffs' decision not to vote for BPI's board nominees at the stockholder meeting. Nor is there any evidence to show that there is any possibility of future injury. To the contrary, BPI's counterclaim is based on a past event; namely, Plaintiffs' refusal to vote for BPI's board nominees at the December 8, 2008 stockholder meeting.

As such, BPI's injury, if any, occurred in the past, and there was no showing of any possible future harm. Given these circumstances, BPI has no standing to seek declaratory relief (" a plaintiff who has standing to seek damages for a past injury, or injunctive relief for an ongoing injury, does not necessarily have standing to seek prospective relief such as a declaratory judgment Judgment

For the reasons stated above, Plaintiffs' Motion for Summary Judgment was granted. Judgment on BPI's counterclaim entered in favour of Plaintiff. APPLICABILITY OF SHAREHOLDERS' AGREEMENT IN INDIA While shareholders' agreements are enforceable in England regardless of whether they have been incorporated in the articles of association of the company, in India they are not enforceable unless incorporated in the articles.

The Supreme Court of India has held that a restriction which is not specified in the articles of association is not binding either on the company or on the shareholders. [Dr Chandchud of the Bombay High Court in IL & FS Trust Co Ltd v Birla Perucchini Ltd [2004] 121 Comp Cas 335 (Bom). The following case portrays whether the shareholders can among themselves enter into an agreement which is contrary to or inconsistent with the articles of association of the company. Context: Defendant Company – Private Company with 50 shares in total.

It is owned by 2 brothers-Baluswamy Naidu and Guruviah Naidu who are cousins with each having 25 shares in the company. Baluswamy died on February 5th, 1963 and Guruviah died on Jan 10th, 1970. Both had 3 sons each whom we will address as Def1, Def2, Def3, Def4, Def5 and Def6. Def1 to Def3 are sons of Baluswamy whereas Def4 to Def6 are sons of Guruviah Naidu. Now Def2 sold his shares to one of the sons of Guruviah Naidu.

However, the sons of Baluswamy allege that there was an oral agreement between Baluswamy Naidu and Guruviah Naidu in 1951 and he contents are as given below. The Shareholders’ agreement: Each of the branches if the family would always continue to hold equal number of shares viz 25and that if any member in either of the branches wished to sell his share/shares, he would give the first option of purchase to the members of that branch and only if the offer so made was not accepted, the shares would be sold to others. The Plea: Baluswamy’s sons filed an application that there should be an injunction to the sale of the shares and that the shares should be directly transferred to one of Baluswamy’s sons as specified in the shareholders’ agreement. What do the Articles of Association say?

According to AOA, there should be no restriction as to sale of shares unless it goes beyond the specified number which is 50 for a private company and unless AOA itself is amended to effect otherwise. Argument put forward by defendants 4-6: Shri Parasaran appearing for defendants 4 to 6 in C. A.

No. 1946 of 1980 contended that the agreement in effect imposed an additional restriction on the right to transfer the shares. The restriction was not envisaged by any of the articles of association. Hence, it was not binding on any shareholder or a vendee of the shares from the shareholders. It was also unenforceable at law and, therefore, not binding on the company.

Hence, the sale of the shares by the first defendant to defendants 4 to 6 was not invalid and the High Court was wrong in directing the transfer of shares in favour of the plaintiffs.

Argument put forward by defendants 1-3: Shri Krishnamurthy contended that (i) the shareholders were bound by the agreement of 1951; (ii) the agreement was entered into to maintain the ownership of the company in the family and to ensure that the two branches of the family had an equal share in the management and profits and losses of the company;(iii) there was nothing in the articles of association which prohibited such agreement; and (iv) the two branches of the family being parties to the agreement, it was enforceable against them, and the courts have done nothing more than to enforce the agreement. Judgment:

Section 3(iii) of the Companies Act (hereinafter referred to as ‘ the Act’) defines a private company to mean a company which by its articles, restricts the right to transfer its shares, if any, and limits the number of its shares to 50 (excepting employees and former employees who were and are members of the company) and prohibits any prohibits any invitation to the public to subscribe for any shares in, or debentures of, the company. Section 26 of the Act provides that in the case of a private company limited by shares, such as the defendant 3 company, there shall be registered with the memorandum, Articles of association signed by the subscribers of the memorandum prescribing regulations for the company. Section 28 provides that the articles of association of a company limited by shares may adopt all or any of the regulations contained in Table A in Schedule I to the Act. Section 31 provides for alteration of the articles by a special resolution of the company.

Section 36 states that when the Memorandum and Articles of Association are registered, they bind the company and the members thereof.

Section 39 provides for supply of the copies of memorandum and Articles of Association to a member. Section 40 makes it mandatory to incorporate any changes in the Articles of Association in every copy of the Articles of Association. Section 82 defines the nature of shares and states that the shares or other interests of any member in a company shall be movable property transferable in the manner provided by the articles of association of the company. These provisions of the Act make it clear that the articles of association re the regulations of the company binding on the company and on its shareholders and that the shares are movable property and their transfer is regulated by the Articles of Association of the company. Thus even though there was a shareholders agreement in place, the judgment was in the favour of the other party as only the articles of association are held sacrosanct in India.

Advantages of having an enforceable shareholders’ agreement 1) Can attract foreign companies With the increasing involvement of overseas companies in joint ventures in India, there is a need for the shareholders agreement since this gives a sense of security to the foreign companies and they might not scare away from entering the Indian Markets.) Can make the directors totally accountable