Rights of Minority Shareholders

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1. Current scenario at your jurisdiction:

1.1. How and to what extent are *minority shareholders* protected in publicly and privately held corporations in your country, either as to legal or firm level protection?

Traditionally, companies in India have been predominantly family-owned enterprises with limited separation between ownership and professional management. The majority shareholder would typically control the management and affairs of the company ignoring the interests of minority shareholders and at times, overlooking the interests of the company also. Corporations would invariably adopt 'majority' rule due to their majority voting powers despite statutory provisions for protecting minority shareholders. With the liberalisation of the Indian economy in 1991 and significant increase in foreign and institutional investment into India, India became a preferred choice for foreign companies to set up their subsidiaries or explore tie-ups with Indian companies through joint ventures. The slow evolution of first time entrepreneurs riding the knowledge economy wave further caught the attention of private/institutional investors who infuse funds in consideration of a minority stake in the company with water-tight contracts.

The legal framework for protection of minority shareholders in publicly and privately held companies in India is set out under the Indian Companies Act and other related legislations regulating the corporate sector in India. The new Companies Act, 2013 ("Act") which came into force on April 1, 2014 provides the statutory framework to protect the interests of minority shareholders of both public and privately held companies in India. While the Act has replaced the old Companies Act, 1956 ("Old Law"), it is pertinent to note that some provisions of the Old Law, relating to oppression and mismanagement and winding up of companies, are still in force. Specific provisions introducing class action suits and freeze actions under the Act are yet to be notified as well. Hence, this has led to a unique situation in India where the Act is applicable for all corporate matters except specific items which are still regulated by the Old Law.

2 / 17

Besides the Act and Old Law, public listed companies are also subject to comply with various securities laws and the Listing Agreement with the stock exchanges, as regulated by the Indian securities market regulator, Securities and Exchange Board of India ("SEBI").

While the term 'minority shareholder' is not defined in the Act, typically a minority shareholder has been identified as a shareholder with a non-controlling interest in the company. Some key statutory provisions protecting minority shareholders' interests introduced under the Act are set out below.

Related Party Transactions ("RPTs"): RPTs have invariably been a tug of war between the regulators and the corporate sector what with majority shareholders perceived to be misusing their controlling stake at the expense of unrelated/minority shareholders for personal gains. In keeping with greater corporate governance standards and to counter the abuse of RPTs by corporates, provisions regulating RPTs have been set out in the Act ushering in transparency and a host of compliance requirements. Besides identifying related parties and transaction thresholds, the Act outlines the process for dealing with all RPTs entered into by a company with appropriate approvals and disclosures. Prior approval of the unrelated members of the board is mandatory for RPTs which are not in the ordinary course of business or not at arm's length basis. Further, prior approval of the uninterested shareholders is also mandatory for RPTs for transactions above the specific materiality thresholds prescribed in the Act. The transaction thresholds vary based on the nature of transaction contemplated by a company and are broadly based on a fixed percentage of the turnover or net worth of the company or the amount proposed in respect of the particular transaction. By way of an example, shareholders approval would be required for specified transactions that are a) not in the ordinary course of business, or b) not at arm's length basis, or c) if it is related to the sale/purchase of supply of materials exceeding 10% (ten per cent) of the turnover or $ 16 million[1] (whichever is lower). If a majority of the uninterested shareholders do not approve such a transaction in a general meeting, the company would not be able to proceed with the transaction.

[1] Approximate conversion from Indian Rupee to US Dollar at current exchange rates

3 / 17

Listed companies: The capital markets regulator, SEBI has been proactive in amending the provisions of the Listing Agreement to be entered into by companies with the stock exchanges ("Listing Agreement") to align it with the provisions of the Act. As per clause 49 of the Listing Agreement, companies have to formulate a policy for dealing with all RPTs. These provisions go a long way in ensuring greater participation of minority shareholders in routine and non-routine matters of a company.

Electronic Voting ("e-voting"): The Act has introduced e-voting for all listed and unlisted companies having 1000 or more shareholders. E-voting empowers shareholders to voice their assent or dissent by casting their votes in shareholders' meetings electronically, without arduous treks to far-flung locations where the shareholders' meetings may be held, or through unreliable postal ballots.

Small Shareholders' Director: Listed companies, suo moto or upon request by small shareholders, have to appoint at least 1 (one) director elected by small shareholders, i.e. any shareholder holding shares of value not exceeding $ 315[2].

Oppression and Mismanagement: Provisions relating to oppression of minority shareholders and mismanagement of the affairs of a company are governed by the Old Law. While the words "oppression" and "mismanagement" have not been defined per se, oppression arises when the affairs of the company are being conducted in a manner prejudicial to public interest, or in a manner oppressive to any shareholder/s. Mismanagement arises when the affairs of the company are being conducted in a manner prejudicial to public interest or to the interests of the company. Material change in the management or control of the company thereby leading to the conduct of affairs in a manner prejudicial to public interest or interest of the company would also be construed as mismanagement.

As per the Old Law, minority shareholders, being a minimum of 100 (one hundred) members or holding 10 % (ten per cent) of the share capital (whichever is less), have the right to seek

[2] Approximate conversion from Indian Rupee to US Dollar at current exchange rates

4 / 17

appropriate relief from the Company Law Board ("CLB"), a quasi-judicial body set up under the Old Law, in case of oppression and/or mismanagement. Further, the Central Government enjoys the discretionary power to allow any number of shareholders to apply for adequate relief, if in its opinion circumstances exist which makes it just and equitable to do so.

Contractual rights: With investment options like private equity, venture capital and joint ventures gaining popularity, the minority shareholders, especially investors, negotiate for various contractual rights, in addition to their statutory rights, to better protect their interests in their investee/joint venture companies. Such contracts typically flesh out shareholder protection rights in detail, which are negotiated and mutually agreed between various stakeholders, for the protection of the minority investor or joint venture partner. Typically, veto rights relating to the key aspects of the company such as changing the business of the company, changing the rights or privileges of a class of shareholders, mergers and acquisitions, sale of substantial assets, voluntary liquidation, etc. are granted to the investors to protect their investment in the company.

1.2. Do they have in essence real choices, or are the ones that are in the hands of the dominant group, either managers or major shareholders, or are they restricted to those that do not challenge the majority power, representing the status quo?

Traditionally, the shareholding structure in a lot of companies in India has been led by a dominant shareholder or a group per se. From a practical perspective, promoters typically exercise significant influence on matters involving companies' resources with a sense of entitlement, often disregarding the concerns of the minority shareholders. However, the existing statutory framework does provide teeth to protect the rights of the minority shareholders.

Redressal mechanisms provided under the Old Law play an important part in enforcing rights of minority shareholders when they have been trampled over by the majority shareholder. Indian courts generally do not interfere in the internal management of the affairs of a company unless significant circumstances of oppression and mismanagement exist.

5 / 17

The Act has provided the much needed impetus to the rights of minority shareholders and shareholder activism, hitherto non-existent in India, is gradually making its presence felt. With the Act prescribing stringent disclosure norms and enhanced accountability standards for companies besides investor protection measures, there is a statutory framework in place to protect any abuse of powers by the dominant group and encourage meaningful participation of minority shareholders in the affairs of a company. It is in essence a real choice to be exercised by the minority shareholder in a judicious manner, not merely to obstruct the majority agenda. However, given the considerable time and cost involved, judicial redressal is pursued as a last option by minority shareholders.

1.3. Has the law and precedents of your country evolved in ways that increase *minority shareholders* ability to defend against expropriation by those in control (misuse of assets, reallocation of profits, transfer pricing, etc.) ?

Taking a leaf from the lessons learnt from the Satyam scam which rocked corporate India in 2008-09, the Act has introduced a slew of measures to enhance corporate governance standards in India and protection of minority shareholders. One of the important measures is with regard to RPTs as already mentioned above, which has led to various instances whereby minority shareholders have been successfully involved in the decision making process. Other measures include regulating the affairs of the board with numerous disclosure requirements, codifying the duties of directors and appointment of independent directors prescribed classes of public companies.

Provisions relating to class action suits and freezing of assets of a company on inquiry and investigation have been introduced under the Act for the first time in India. While these provisions have not been notified till date, it is expected to take minority shareholder activism to a greater level in India as and when these provisions come into effect. As on date, minority shareholders continue to seek relief for oppression and mismanagement under the Old Law till the provisions under the Act are notified.

6 / 17

The role of SEBI vis-à-vis listed companies has been significant as it has been relatively successful in taking action against companies involved in expropriation of shareholder wealth. The market regulator has recently introduced amendments to the Listing Agreement to align corporate governance norms with the Act and in sync with existing global practices. Some of these norms include provisions for a whistle-blower mechanism, the prohibition of stock options for independent directors, performance evaluation measures of independent directors and the board.

As already stated above, Indian courts or the Central Government do not interfere in the internal matters of a company unless compelling reasons persist. While invariably upholding the commercial interests of companies, the courts have taken care to ensure the majority is also not subject to obstructionist tendencies by minority shareholders on routine matters in a company. The test of minority expropriation is stringent as the burden of proof that there exist significant circumstances of oppression and/or mismanagement lies on the minority shareholder alleging the same.

A brief look at the case laws on this topic reveals the balanced approach adopted by the courts in ensuring minority interests are not clamped down by the majority dealing in an unjust manner. While upholding that oppression may take many forms where there is an element of lack of probity and unfair dealing, courts have ruled in various cases that isolated acts, future apprehensions, commercial miscalculations, continuous losses suffered, failure to declare dividend or deadlock in management per se cannot be regarded as oppression of any shareholder. Bonafide decisions consistent with the company's charter documents do not constitute oppression or mismanagement. Courts have also come down hard on motivated petitions and abuse of the process especially where the allegations remained unsubstantiated. Courts have consistently provided appropriate reliefs depending on the facts and circumstances of the case and the conduct of the petitioner. These reliefs include, inter-alia, purchase of shares of members of a company by other members, termination/setting aside or modification of

7 / 17

agreements relating to managerial personnel, setting aside of transactions relating to transfer of goods, mode of valuation of shares and winding up of the company.

While a lot more needs to be done, the legislative and judicial framework has considerably evolved to recognize the vulnerability of minority shareholders and provide redressal measures to ensure protection of their rights.

1.4. Is the legal dimension the prevalent one in the Corporate Governance (CG) atmosphere, or is the firm level CG the common manner to protect minorities?

There has been a gradual evolution in the importance of corporate governance along with the opening up of the Indian economy. While some aspects of corporate governance were enshrined in the Old Law, the Act significantly emphasises on corporate governance on par with global best practises.

Further, the capital markets regulator, SEBI, has also incorporated various corporate governance requirements in Clause 49 of the listing agreement executed by companies with stock exchanges. Companies which are not complying with the provisions of Clause 49 could be de-listed in addition to coughing up financial penalties. In its present form, Clause 49 deals with a range of issues such as composition of board, independent directors and their responsibilities, remuneration of non-executive directors, code of conduct for the board and senior management, role of the audit committee of the board of directors, disclosure requirements relating to related parties, accounting treatment, report on corporate governance and compliance reporting.

1.5. What is the role of ownership concentration in the protection of the minority?

As already mentioned above, traditionally the shareholding structure prevalent in Indian companies is concentrated ownership in the hands of a dominant shareholder or group per se. Typically, in public sector undertakings, government is the dominant shareholder, in

8 / 17

multinational companies, the parent company is the dominant shareholder and companies in the private sector are predominantly family/ promoter-owned. In addition to direct stake, the ownership concentration by promoters in companies is further augmented by adopting different structures like pyramiding, cross-holding and tunneling by exercising control over entities indirectly through intermediaries. Structuring of companies in such a manner is common and promoters are undoubtedly the largest stakeholders, allowing them, significant control over the board of directors.

With institutional investors making a foray into investments in Indian companies, it has become a standard practice for water-tight contracts to be negotiated and drawn up between various stakeholders (majority shareholder being the promoter and the minority investor). Such contracts typically provide preference to the minority investor over other shareholders with a clutch of contractual rights like use of investment proceeds, veto rights and exit options being granted to the minority investor for his/her protection.

1.6. Is benchmarking used as a mechanism for minorities to select the country or firm better suited to risk profile and protection from rights deprival?

Yes, benchmarking is used as a mechanism by multinational companies and institutional investors to consider various aspects for the ease of doing business in a country. Aspects like prevailing legal and regulatory framework for setting up and doing business, protection of investor rights, legal enforceability of contracts, clarity on tax impact, due process and rule of law are considered and debated to mitigate risk to the greatest extent possible.

1.7. Is the formation of group dynamics among dispersed shareholders working in your country?

The formation of group dynamics among shareholders is still at a nascent stage in India. The professional advisory firms operating in this space cater primarily to institutional investors. Over the last couple of years, a handful of proxy advisory firms have advised institutional investors on

9 / 17

routine and non-routine matters like mergers & acquisitions or corporate restructuring, appointment of independent directors and auditors. Broadly speaking, where there has been a governance concern, the recommendations of the advisory firms have been against the management proposals. For example, these firms have recommended against appointment of independent directors or auditors who have served the companies for a long period of time. The dominant shareholders of companies can thus no longer ignore the influence of minority shareholders.

The emergence of advisory firms and discussions of their recommendations in the public domain is a boost to increasing shareholder activism in the country. At the same time, a cautious approach has to be adopted to ensure issues like conflict of interest (potential or actual) are not driving the agenda. Also, a tendency to adopt a one–size–fits–all approach by advisory firms without delving into circumstances or nuances of a business decision specific to a company may need to be considered.

1.8. What is the role of market liquidity in the *minority shareholders* exit option?

Market liquidity plays a significant role in a minority shareholder's exit from a company. Securities of public listed companies are freely traded on the stock exchange, which provides a relatively easy exit to such shareholders subject to regulatory compliances. However, exit from a public unlisted company and private company is difficult in the absence of a formal channel for buying or selling such securities.

Typically, contractual exit options such as trade sale, secondary sale are provided to minority investors to ensure protection and realisation of their investments and providing a 'bail-out' option if things take a downward turn. With a spurt in entrepreneurship in India, market liquidity for private players in the ecosystem appears to be on an upswing. This can be seen from the steady growth of mergers and acquisitions, takeovers and secondary sale of shareholding of minority investors especially in high-growth ventures.

10 / 17

1.9. Have legal reforms in your country given tools to majority to use compliance as an instrument to somehow "legalize" minority expropriation?

Legal reforms in India have recognized the need to safeguard and empower the interests of minority shareholders. This is best seen from the gamut of provisions in the Act regulating transactions between related parties, disclosure requirements, corporate governance and stringent penalties set out for non-compliance. The Act also adopts a holistic approach to ensure greater transparency in corporate decision making and encouraging co-operation between companies and its stakeholders in creating wealth, jobs, and the sustainability of enterprises.

It is, thus, increasingly becoming difficult for the majority to use compliance as an instrument to "legalise" minority expropriation.

2. Looking forward at your jurisdiction:

2.1. What is the way to avoid *minority shareholders* from suffering mayor shocks, -if applicable in your country- due to restrictive visions as to minority rights, without falling into abuses of minority rights? Is it possible to harmonize both?

The legal and regulatory framework in corporate India presently provides a fairly robust mechanism to ensure protection of minority shareholding interests. The Act provides a framework by building in appropriate checks and balances to balance the needs of the majority and minority shareholder and the interests of a company at large.

As already mentioned above, courts refrain from interfering in the internal affairs of a company unless compelling reasons prevail as provided under the Act. While the statute confers wide discretionary powers to courts, courts have been very cautious in exercise of such powers. Courts have considered the substance of the matter maintaining a fine balance between the need to protect the minority from being trampled upon by the majority to maintaining the democratic

11 / 17

rights of the majority shareholder to manage the affairs of a company in accordance with its charter documents. Courts have also been wary of the remedies set out by law being misused by either the minority or majority shareholder to serve one party's ends.

In essence, the present Indian statutory framework tries to maintain a fine balance to avoid minority shareholders suffering shocks by ensuring the law harmonises both the rights of minority shareholders and its resultant abuse by appropriate checks and balances.

2.2. Is ***minority shareholders*** activism taking place in your country, and to what extent?

Minority shareholders activism has slowly gained momentum in India as minority shareholders are now turning increasingly assertive to influence corporate decision making. Over the last few years, there have been quite a few attempts by minority shareholders to change decisions of managements especially when their interests have been compromised. Of late, minority shareholders have become more active in taking on promoters and managements of various large companies.

As already mentioned above, with the Act coming into effect from April 2014, interests of minority shareholders have now been provided statutory recognition with extensive procedures in place for related party transactions, appointment of small shareholders' directors and the role of independent directors. There have been news reports of at least five instances in the year 2014 alone, where minority shareholders have defeated resolutions proposed by their companies with regard to related party transactions, board appointments, compensation of managerial personnel, delisting proposals and royalty payments to parent companies. In a first for minority shareholders' activism in India, the shareholders of Tata Motors Limited successfully stalled the routine compensation proposals of top executives in the company in July 2014 due to inadequate profits of the company. A similar result greeted United Spirits in late 2014 when its shareholders did not approve its proposal to enter into related party transactions with its promoter group and related entities.

12 / 17

Shareholders increasingly want to be kept in the loop for most matters with detailed explanatory statements and disclosures. This trend of minority shareholders becoming more vigilant and conscious of their rights and interests is only bound to increase and mature over the next few years.

2.3. What is the trend in your country for the protection of *minority shareholders*?

As already mentioned above, the Act has empowered minority shareholders significantly. Some of the notable provisions under the Act empowering and protecting the interests of minority shareholders are as follows:

a. Any RPT that is not in the ordinary course of business and not on an arm's length basis, requires the approval of the majority of minority shareholders.

b. Appointment of independent directors who play a major role in protecting minority shareholders and upholding the principles of corporate governance. The presence of independent director/s on the board of a company ensures transparency and objectivity in the processes, harmonising the interests of the company and its minority shareholders.

c. The Act has also introduced the concept of class action by shareholders on behalf of the company for the wrong done to the company. Hence, minority shareholders can move the forum against the company or its officials for any wrongful act affecting their interests or the interests of the company if the affairs of the company are being conducted in a manner prejudicial to their interests or of the company.

d. In addition, wider powers have been given to the minority shareholders in respect of mergers, acquisition and amalgamation processes undertaken by any company. The transferee company has to give notice to dissenting shareholders stating that it desires to acquire their shares in case the scheme of merger/ amalgamation is approved by the majority shareholders. The notice further includes that such dissenting shareholder(s)

13 / 17

may determine the price of the shares by a registered valuer. Thus this process ensures that the dissenting shareholders who form the minority shareholders are paid a fair price for their shares.

e. The Act also provides for the purchase of shares of minority shareholders by the acquirer of the company. The minority shareholders shall be paid for their equity shares at a value determined by a registered valuer once the acquirer becomes the registered holder of 90% (ninety per cent) or more of issued equity share capital of the company. The minority shareholders also have the option to make an offer to the majority shareholders to buy their shares.

f. In addition to the Act, SEBI has also provided for corporate governance norms to be followed by all listed companies to protect the interests of the minority shareholders under Clause 49 of the listing agreement. It has amended Clause 49 with effect from October 2014 and the new Clause 49 provides an express and greater recognition of the role and protection of minority shareholders and their participation in the process of corporate democracy.

Thus, the trend is clearly towards upholding the rights of the minority shareholder.

2.4. What is the impact of the Sarbanes-Oxley Act (SOX) in your country, as a canon to regulate domestic capital markets and CG?

The objective of the Sarbanes-Oxley Act, 2002 ("**SOX**") inter alia was to improve the quality and transparency in financial reporting, independent audit and accounting services for the listed companies and increased corporate responsibility. The requirements set out by SOX have beein in place to a large extent under Indian company law.

The Act deals with accounts and audit of companies in a comprehensive manner. Besides providing the formats of the financial statements, the Act also prescribes qualifications in the

14 / 17

audit report, responsibilities of the auditors, director's responsibilities for preparation and presentation of accounting standards. The Act also extensively deals with corporate governance aspects relating to the responsibilities of the directors and auditors to avoid conflict of interest in the discharge of their duties and responsibilities. While strongly advocating the basic tenets of corporate democracy in its framework, the Act adequately deals with independence of auditors and provides penal measures in case of delinquency.

The Indian capital markets regulator, SEBI plays a pro-active role in regulating and developing the Indian securities market and improving its safety and efficiency. SEBI has adopted a consistent approach to ensure transparency in financial reporting and meaningful corporate responsibility. The corporate governance reforms included as part of Clause 49 of the Listing Agreement with the stock exchanges and applicable to all listed companies in India, consist of some of the best practices in leading equity markets around the world. The main items covered under Clause 49 are: (i) ensuring independence of the Board and disclosure of their compensation (ii) ensuring correctness, sufficiency, and credibility of disclosures (iii) requirement of financial literacy among members of the audit committee and expertise in accounting/ financial management among them (iv) whistle-blower policy (v) requirement of a formal risk management policy (vi) certification of financial and cash flow statements by the CEO/CFO to the Board; and (vii) quarterly reporting to the stock exchanges on compliance with the requirements of every provision of Clause 49.

2.5. Do you think it advisable to rescue the concept of "Popular Capitalism", as defined in the fifties by the great jurist Joaquin Garrigues, in view of the present circumstances regarding status of minorities?

The present legal framework in India provides for adequate safeguards to protect the interests of minority shareholders and corporate governance standards. Increasingly companies are also open to adopting a "compassionate capitalist" approach. Accordingly, considering the present statutory framework in India, the need to rescue the concept of "popular capitalism" may not be relevant.

15 / 17

2.6. What should be the role of minorities as to the flaws of executive pay packages that reflect structural problems in underlying governance agreements, as pointed out by Lucian Bebchuk, Harvard Law Professor?

Minority shareholders have a critical role in ensuring executive pay packages are attractive to retain competent executives, who can enhance the value of their shareholding in the company. While there are elaborate disclosure requirements in Indian company law regarding senior executives' compensation, minority shareholders, along with other shareholders can engage with the board in a meaningful manner to put in a framework to set out clear guidelines (objective and selective criteria) for determination of pay and performance. Minority shareholders should drive their boards to implement processes which make the determination and payment of incentives to executives as transparent as possible. Further, minority shareholders should demand to ensure a monetary value is placed on all forms of compensation doled out to executives and bring in a rationalised pay structure to reward performance which generates and enhances shareholder value.

Board accountability would significantly improve if minority shareholders play a vigilant role in questioning the majority shareholder as well as the board on its acts and policies. Of course, this also means the minority shareholder has to maintain objectivity and ensure not to be swayed by short term considerations or fall prey to vested interests.

3. Precedent cases at your jurisdiction:

3.1. Please report some recent judicial cases regarding *minority shareholders* issues.

- *Cholamandalam Investment & Finance Co. Ltd. vs. Amaravathi Sri Venkatesa Paper Mills Ltd.*[3]*:* It was held that by the CLB Chennai that the mere fact of a particular investment not bringing profit to the Company is not by itself an act of oppression or mismanagement. Shareholders

[3] [2004] 119 Comp Cases 803 (CLB), MANU/CL/0098/2002

16 / 17

must trust the wisdom of the directors of the company, and as long as there is no violation of accounting standards and statutory provisions, courts shall not interfere with the management of the company only on the basis of commercial misjudgments.

- *Kohli vs. Ltd.*[4]*:* While entertaining a petition of oppression due to a rights issue diluting the shareholding of a minority shareholder, it was held that the fiduciary nature of the power conferred on the board requires it to consider all matters fairly, in the interest of all classes of shareholders. Any failure to give proper consideration to the issue price of the shares in light of true and practical circumstances facing the company would amount to a breach of the fiduciary duty cast upon the directors.

- *Rakesh Malhotra vs. Rajinder Kumar Malhotra*[5] *:* The Bombay High Court held that the maintainability of oppression and mismanagement petitions are not affected by the existence of an arbitration clause in the agreements with shareholders, as such allegations fall outside the purview of an arbitration agreement. The same stance was relied upon by the Delhi High Court in *Vikram Bakshi vs. MC Donald's India Pvt. Ltd.*[6]

- *In Re: Cadbury India Limited*[7]*:* This case brought to light certain interesting aspects of the role of minority shareholders in India. Cadbury India Ltd. was forced to issue a fresh valuation of its stock, at a 50% increase in the initial offer price it had made a few years earlier to buy back its shares from minority shareholders, due to objections raised by them. Nevertheless, the court also reprimanded the minority and declined to entertain their requests for conducting repeated valuations so as to obtain an even higher share price, thereby upholding the overall commercial interests of the company whilst providing minority shareholders with adequate consideration for their forced exit from the company.

[4] *(2010) 1 BCLC 367 (Ch)*
[5] MANU/MH/1309/2014
[6] MANU/DE/3483/2014
[7] [2015] 125 CLA 77 (Bom)

17 / 17