About this edition
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NUJS-HSF National Corporate Law Moot Court Competition: The Collected Problems
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A decade on
Dr. P. Ishwara Bhat

This year marks the 10th edition of the NUJS-HSF National Corporate Law Moot Court Competition. Over the last decade the competition has gained a reputation as the foremost corporate law moot in the country. It has provided a much needed platform to young law students enabling them to engage and contribute to the ever expanding field of corporate law.

Every year, the moot challenges the participants with complex propositions of contemporary importance, set by leading names in the world of corporate law. Through the years, we have seen students perform remarkably, coming up with ingenious arguments and showing an indomitable spirit to learn about the nuances of this niche area of law.

This has become possible because of the partnership between NUJS and HSF which has opened an entire world of possibilities. Herbert Smith Freehills, being one of the leading law firms in the world, has brought a unique understanding of corporate law to the students through this moot.

As the head of the Institution, it has been a pleasure to see the students take upon them to organize this moot and I am thankful to the people at Herbert Smith Freehills, who despite having their schedules packed have never shied away from giving it their best. I convey my best wishes to the participants, organisers and the team at Herbert Smith Freehills for building and contributing to the legacy of this moot court competition over the years.

I hope the reader enjoys the book as much as we've enjoyed being a part of what lies in it.
The importance of moot courts
Dr. Mahendra Pal Singh

Moot court activities were almost non-existent in India’s law schools until 1970s. However, since 1980s, they have become one of the most sought after activities in almost every law school, entry to which is made through a rigorous selection process.

The selected teams of different law schools compete first amongst themselves and then at the inter-university level for national and international moot courts. Successful teams, besides taking pride in their achievement, also bring good name to their law schools. Moot courts also play an important role in the overall rating of the law schools nationally and internationally. Therefore, besides encouraging their students to participate, prepare and perform well in the moot courts, the law schools also provide them with all possible incentives of financial assistance, support of expert trainers and whatever else is required or is desirable so that the teams can deliver their best performance.

Besides earning a good name for the teams and their law schools, moot courts train students for facing real life legal issues which they are expected to handle in their legal practice. They educate them in all that is required to prepare a case in court including the kind of research and its sources, the method and style of presentation, the technique of convincing the court in favour of one’s claim and against the claim of the opposite party. The educative role of the moot courts is best served by the kinds of problems that are set for them. In this context, Herbert Smith Freehills (HSF) has performed this role remarkably well for the law schools in India.

HSF entered into an MoU with the West Bengal National University of Juridical Sciences, Kolkata a decade ago when I happened to be the University’s Vice-Chancellor. The kind of problems which have been set for the moots are ideal examples of the issues that do and may arise in real life cases in the courts. The teams which participate in these moots and reach the final stage get equipped to face any case that may arise in any court or tribunal during their litigation career and in which they may appear as advocate or are required to give an opinion.

I highly appreciate HSF’s initiative of publishing these problems as a book for the education and training of future moot court teams as well as for the problem setters. I am sure the initiative taken by Chris Parsons and Nicholas Peacock for HSF will be highly appreciated and well received by all law schools in India and abroad. I also avail this opportunity to thank Chris for personally giving lectures to moot court aspirants and others and also for bringing eminent legal scholars and practitioners from the United Kingdom for the same purpose to NUJS every year. The book is a representation of that tradition which I am sure will be well received by all those who organise and participate in moot courts.
Here I propose to touch upon three aspects relevant to the NUJS HSF Moot and this volume, viz. (i) the state of play in corporate law in India, (ii) mooting as an integral part of legal education and, in particular, the structuring and designing of moot court problems, and (iii) the impact that the NUJS HSF Moot has had in the last decade.

**Corporate law in India: Recent trends**

The NUJS HSF Moot was launched at an opportune moment in India’s growth trajectory. By the end of the first decade of this century, not only had foreign investment into India grown to a robust level, but Indian businesses too had matured considerably. Joint ventures, private equity investments, venture capital investments, mergers and acquisitions and capital market transactions became the order of the day, thereby demonstrating a demand for sophisticated legal support. Lawyers and law firms servicing the cross-border transactional market in India grew into prominence.

The regulatory set-up was not far behind. The last decade witnessed path-breaking reforms in corporate and securities laws. The enactment of the Companies Act, 2013 represents a watershed event in India’s corporate law, not to mention a plethora of reforms introduced by the Securities and Exchange Board of India (SEBI) in the securities markets, particularly in areas such as takeover regulation and insider trading. More recent reforms involving insolvency and bankruptcy law have captured the attention of the corporate sector, especially banks and financial institutions.

Not only have these developments attracted the attention of practitioners, policymakers and commentators within India, but they also gained international prominence due to the nature of cross-border activity involving Indian companies. It is not at all surprising that a moot court competition in the area of corporate law would bear utmost salience.

**Mooting: Structure and design of the problem**

Moot court competitions form an important co-curricular activity in the lives of law students. Apart from equipping students with the skills required to prepare and argue a case before a court or tribunal, it also introduces them to various areas of law and legal issues that are contemporary in nature. By enabling teamwork, it also makes the entire process an enjoyable experience. Moot courts have gradually acquired a great deal of specialisation, as evidenced by the NUJS HSF Moot that focuses on corporate law.
Over the last several years, I was fortunate to develop a close connection with the NUJS HSF Moot, as I have been called upon to draft six out of its 10 moot court problems, all based on corporate and commercial law relating to India that carry an international flavour. Each time, I have approached the task with some trepidation, as it is usually daunting to draft moot court problems that come closest to real-life situations and at the same time are challenging, well-balanced and capable of extracting the talents of creativity and innovative thinking in young legal minds. But, the process of identifying the relevant legal issues, building suitable facts around them, and constructing controversies that enable a worthy legal battle has been a substantially rewarding experience. The task has been aided substantially by the several episodes, including corporate battles, that India has witnessed over the years, which makes the issues participants face in the competition closer to real-life scenarios.

I have also had the opportunity to obtain a ring-side view of the NUJS HSF Moot as a judge. It is always heartening to note that although the issues that students lock horns over in the NUJS HSF Moot are quite similar to that faced by practicing lawyers, the participants are able to handle most of the issues with deft and sophistication that lawyers at the highest levels command. The legal competence of the participants, their extent of preparedness, the level of thought and consideration placed on complex legal issues and the poise with which they deliver their arguments always amaze me. Of course, as judges it is our job to catch the participants off-guard and even startle them, but many are able to cleverly extricate themselves from sticky situations through quick thinking. In that sense, mooting is an excellent tool used in legal education to prepare budding lawyers to face the real world, in this case in corporate law and corporate litigation.

Impact of the competition

There is no doubt that the NUJS HSF Moot has attracted top-class mooting talent around the country and helped hone it even further. Several participants in the NUJS HSF Moot have mentioned to me about how the process of preparing for the rounds and participating in them (regardless of the result) has been an enriching and rewarding one in several ways. Incidentally, one of them recently emailed me to say that the learnings from one of the mooting experiences in the NUJS HSF Moot helped him secure a dream job! These are only some instances of how widely and personally the NUJS HSF Moot has touched on individual careers and dreams, and on legal education in India more generally.
That the NUJS HSF Moot has witnessed tremendous success for the last 10 years can be attributed to the hard work and perseverance of a number of individuals and institutions. Herbert Smith Freehills has contributed substantial resources in many ways, including through the role played by Mr. Chris Parsons and Mr. Nicholas Peacock, who have spent inordinate amounts of their busy time in ensuring a smooth conduct of the competition and also as judges. The administration of the National University of Juridical Sciences, Kolkata, has played a key role as host institution, under the leadership initially of Professor M.P. Singh and thereafter Professor Ishwara Bhat, not to speak of the close involvement of the faculty members and students of the moot court society. The judges for the competition have spanned across a spectrum containing judges of the Calcutta High Court, corporate transactional practitioners, litigators, in-house lawyers, academics (including faculty members from Oxford), whose involvement and incisive questioning have substantially enhanced the quality of the competition. Finally, and perhaps most significantly, generations of participants over the last decade have contributed to the competition through their intelligence, hard work, grit and determination. It is no small wonder that the NUJS HSF Moot has acquired cult status on the Indian mooring scene.

Concluding thoughts

Finally, I would like to congratulate the organizers of the NUJS HSF Moot for embarking on the preparation and publication of this volume. This effort would make the moot court problems available more widely to the legal academic community in India. Students may find the legal issues posed by these problems of relevance. Others who wish to steer clear of dense legal issues and rather pursue some general reading may find some of the fact situations emanating from these problems of interest as they narrate the manner in which businesses are formed and managed in India, and seek to capture the circumstances that give rise to souring relationships that result in legal disputes.

I hope you enjoy reading this volume!
A decade of persuasive advocacy

K. S. Suresh

Winners of prestigious moot court competitions, such as the NUJS-HSF National Corporate Law Moot Court Competition (NUJS HSF Moot) are deservingly the recipients of much admiration. I have had the pleasure and privilege of being one of the judges for this distinguished moot court competition from its very inception.

While the glory associated with a moot court win often incentivises students of law to participate in such competitions, the rewards associated with mooting far exceed the accolades received for a win. Moot court competitions provide students of law with opportunities to nurture and hone their skills of advocacy in simulated court room situations. Preparing for the moot is in itself a daunting task and requires intense and extensive research, analytical prowess, precise writing, and most importantly, the ability to work as a team within stringent timelines.

The NUJS HSF Moot has traditionally focussed on contemporary issues in corporate law. Over the years, participants have received an invaluable opportunity to study and analyse problems they are likely to face in their future careers. Participants have argued for and against enforceability of call options, derivative contracts, arbitration clauses and foreign decrees. Others had to deal with oppression and mismanagement, schemes of arrangement and winding up of joint ventures. Fundamental principles of contract law such as privity of contract, misrepresentation and breach have found as much prominence in these moot court problems as have nuanced issues under the Takeover Code.

I have seen the NUJS HSF Moot grow slowly and steadily, both in its outreach and organisational efficiency. The quality of participation has always been stellar and I have often been pleasantly surprised by the innovative arguments made by young law students, some of whom may not yet have been exposed to corporate law subjects in their formal academic training.

As the moot court competition completes a decade, it is time to applaud not just the participants who have displayed exemplary advocacy skills over the years but also the organisers and authors of the finely drafted moot problems. This collection of all the moot problems is a thoughtful idea. Each moot problem has been carefully crafted, touching upon multiple issues under a gamut of corporate, foreign exchange and securities laws. The challenge in drafting a moot problem lies in maintaining a balance so that both sides have sufficient room to argue their case. I congratulate each author, NUJS and HSF for surpassing this challenge and presenting problems that pose relevant and complex corporate law issues, teasing the minds of young participants and not-so-young judges like myself.

I am certain that this collection will be of interest to law students and practitioners alike. To me, it is a fine reminder of a decade of persuasive advocacy.
Celebrating a landmark

Timothy Endicott

I am delighted to congratulate NUJS and Herbert Smith Freehills on a landmark: 10 years of the NUJS-HSF National Corporate Law Moot Court Competition (NUJS HSF Moot).

I had the privilege of serving as a judge in the 2011 round. I encouraged colleagues from Oxford to do likewise, and I am proud to say that Professors Paul Davies, Christopher Hare, Kristin van Zwieten and Matthew Dyson have also joined the distinguished bench of practitioners, academics, and judges. I am very pleased that we have been involved. From our point of view in a University on a small island in northwest Europe, this is a great learning opportunity.

First of all, the moot is an eye-opener in respect of the high quality of the mooting. That quality reflects the individual abilities of many very bright students. But no one is bright enough to compete in the NUJS HSF Moot without hard work, and the high quality also reflects the impressive commitment and preparation that are put into mooting in Indian law schools. It is clear to me that for many outstanding law students in India, mooting has been an absolutely central element in their formation as lawyers, and not merely an add-on to their studies.

Secondly, the NUJS HSF Moot is a window into Indian corporate law. To serve as a judge in the competition is to discover a huge wealth of experience and innovative thinking not only in the structuring and finance and operation of businesses, but also in legislation, in the development of the common law, in the various fields of regulation of corporate activity, and in techniques of dispute resolution and design of judicial remedies.

I salute the excellent lawyers who drafted the moot problems collected in this volume. Those problems serve as vignettes of the immense resourcefulness of corporate actors in pursuing projects that are sometimes brilliant and sometimes tragically or even comically disastrous. For the future, the Indian legal system will need all the resourcefulness of its lawyers and judges, to administer justice and to develop good policy in Indian corporate law. And I am sure that the NUJS HSF Moot will contribute to that future, through the training of outstanding lawyers.
As I do each year at NUJS, I want to make special mention of Mithun Thanks, an alumni of NUJS, who was the first lateral hire we made for Herbert Smith Freehills in London from India. Mithun came to me one day and noting my interest in doing more with the law schools in India suggested we should try and partner with his law school, NUJS, and create a leading moot court competition which every law student in India would aspire to be part of. Mithun, being a persuasive man, convinced me easily so he stands today as the father of this competition with a little help from NUJS and Herbert Smith Freehills. Mithun’s vision, to create an aspirational competition of the highest order, has, I hope, been largely met. We remain very proud of our long association with NUJS through two Vice Chancellors, Professor Singh and Professor Bhat, and hope that the competition will go on to celebrate many more milestones in future.

Wow! 10 years have passed since we first started this competition in partnership with NUJS. This book not only celebrates the strong relationship between NUJS and Herbert Smith Freehills but also the wonderful moot problems that have tantalised and tormented generations of law students plus the hard work of the moot court committees and of the lawyers at Herbert Smith Freehills who have helped keep this project on track. It is also a testament to the outstanding judges who have appeared over the years. We hope you enjoy this reminder of ten years of wonderful legal argument.

A vision come to pass
Chris Parsons
Some thoughts from the bench
Nicholas Peacock

It is a pleasant duty and a privilege to be involved with the NUJS-HSF National Corporate Law Moot Competition (NUJS HSF Moot), in particular to sit as a judge and face the advocates in action.

For the past few years, as part of the opening ceremony, I have endeavoured to offer a few of my own thoughts and tips on effective advocacy to the students. These lessons are derived from my own practice of some 20 years acting sometimes as an advocate before judges of the English court, and more often as counsel in international arbitration proceedings. They also reflect my reactions when sitting as arbitrator on tribunals in Europe and Asia.

There are undoubtedly many ways to conduct effective advocacy. Each advocate must find their own voice, and a style that works for their audience and for themselves. The effective advocate will also be able to adapt their style where the particular tribunal, or the case they must argue, require it. Nonetheless, in commercial cases at least, a number of lessons are perhaps universal enough to act as helpful guidance for all aspiring advocates, and to bear periodic (even annual) repetition.

Tip 1: Use the facts
A good advocate makes full use of the facts at their disposal. Facts win cases, rarely the law in abstract. As will quickly become apparent to a reader of the moot problems in this volume, the author of any sophisticated moot problem will invariably offer a wealth of ‘good facts’ and ‘bad facts’ for the advocates and their teams to analysis, synthesise, and deploy.

Of course, there is always the law to apply to these facts, but in a well-balanced moot problem (as so often in close-fought commercial disputes) the law is not clear-cut, or it offers a degree of discretion for the decision-maker to favour one side or the other. Which side truly deserves such preference, which is to say – ‘where does justice lie’ – is the question that all judges and arbitrators ask themselves and which all advocates must above all else endeavour to address.

Use the law and your analysis to offer the decision-maker a route to give the judgment you seek. But in explaining how your client wins, never fail also to explain why they should win.

Tip 2: Find a simple story
The superlative factual and legal conundrums presented to competitors in the NUJS HSF Moot over the last 10 years are deliberately dense, multi-layered, and multi-faceted. They require successful teams first to spot the issues, then to decide which are important (and which are critical), before they can then start to analyse how to construct winning arguments, and – lastly – how to condense their oral submissions into the brief time they have to address the judges.
The greatest challenge for advocates at the conclusion of this process is to arrive at both answers to the complexity before them, but also a clear and compelling message to offer to the judges before whom they have such a short window of persuasion.

Effective advocacy requires a theme, or a ‘case theory’. A sentence or two at the outset to orientate the judges to where the subsequent minutes of advocacy are leading. An answer to the question “What is your case?” which comes at the start, rather than at the end, of the submissions.

The best themes, or case theories, also act as a ‘hook’ for the longer submissions. Like a memorable melody in a piece of classical music whose repetition and echoes infuse the whole piece. Is your client’s case, for all its complexity, ultimately about a promise that was not kept? Or is it a case of property that has been wrongly obtained? Or is it about a harm caused which needs to be acknowledged and compensated? Whatever the simple story is, say that – and then say the rest.

**Tip 3: Take the judges with you**

The best moot court advocacy is not about reading a polished speech, or getting through your time without questions. Indeed, an advocate who is not interrupted should be concerned that the judges are either not understanding, or not truly engaging with, the arguments being made. Either possibility precludes the judges from adopting the advocate’s arguments in formulating their decision.

There are two solutions to avoiding this unwelcome outcome. First, go as slowly as you can. This may seem almost impossible with so much to cover in so little time, but any advocate must acknowledge that 100 words that are heard and understood will serve them better than 300 words that are merely passing noise. If the substance of what you are saying is important (and, if not, why say it), then... slow down ... and ensure ... that you are heard.

The second solution is to watch your judges and try, so far as they will allow you, to take them with you through the stages of your arguments. Make eye contact when you can, recognising that much time will be spent by both judges and advocates in looking at the relevant documents. Nevertheless, watch your judges even if they are not watching you. Few judges aspire to an absolute ‘poker face’ since it is often far more useful for an advocate to see when you are still thinking about a point or are struggling to understand their argument. Don’t move on to your next point if the judge is still thinking about, or wants more help with, your last point.
Tip 4: Acknowledge difficulties

Never forget that the advocate is asking the judge to adopt and present the arguments that are being made as their judgment, on a contentious topic and in the face of competing arguments. All good judges (as will be found in the NUJS HSF Moot) aspire to be both fair and right in their judgments. In the commercial world they may also find their judgments and awards subject to publication, scrutiny, review, and even appeal.

A judge in such circumstances needs to work cogently and methodically through the facts and the law in dispute, and to pick their way through any difficulties or ambiguities they face in arriving at their final decision. A good advocate needs to help the judge to deal precisely with these difficulties and ambiguities. A judge is never assisted by an advocate who pretends that the very difficulties the judge will need to grapple with do not exist, and that ambiguities can simply be elided. While such a tactic may get an advocate quickly through their submissions, they will not help the tribunal to get the advocate’s client to the outcome they seek.

A good advocate must therefore be as cogent and methodical as the judgment they seek in working through contentious topics, and in acknowledging and addressing competing arguments. They will also not forget to use the facts at their disposal to underscore why the route through these obstacles that they wish the judges to take is not only permissible at law, but is required by justice.

Advocacy is a skill that can always be improved. There is much scope to learn from one’s colleagues, opponents, judges, and from one’s own experiences. This is what keeps the challenge fresh and the role enjoyable. Win or lose, give of your best and try to enjoy!
The Problems
(2008 - 2018)
2008 - Problem One
Authors - Rohit Das and Pingal Khan

The Herbert Smith LLP Mooting Competition

Friday 5 - Sunday 7
December 2008
NUJS - Herbert Smith
National Corporate Law
Moot Court Competition

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Overview
Winning team
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Roshan Santhalia, Chand Chopra

Runners up team
Government Law College,
Mumbai
Neety Thakker, Prateek Bagaria,
Manendra Singh

Best speaker
Parnika Chaturvedi
National Law University, Jodhpur

Best memorandum
National Law University, Jodhpur
Parnika Chaturvedi,
Aayushi Sharma, Greethika Francis
Zodkajhatka Soware Limited & Heman Brothers Opportunity Limited (Appellants) v. Bank of Maal & Gol Maal & Gambat Meetha & Chhoton Pare & The Union of India (Respondents)\(^1,2\)

1. Zodkajhatka Softare Limited (the Company) is a public limited company incorporated under the provisions of the Companies Act, 1956 in the year 2000 and having its registered office within the original jurisdiction of the High Court of Calcutta at Kolkata. The Company was started by six young enterprising software professionals, who had just graduated from IIT, each of whom invested Rs. 1,00,000/- each by each subscribing to 10,000/- equity shares of Rs. 10/- each in the Company backed by a private investor, Mr. Gambat Meetha who invested Rs. 4,00,000/- and subscribed 40,000 equity shares of Rs. 10/- each, i.e., 40% of the paid up share capital in the Company. Mr. Gambat Meetha was also appointed as a director on the Board of Directors of the Company. The Company grew from strength to strength and in 2003 went for an IPO. The shares of the Company got listed in the BSE and NSE. As a result of the IPO, Mr. Gambat Meetha’s stake fell to 14% of the paid up share capital of the Company. From 2001 to 2005, the Company had a steady growth in net-worth from Rs. 10,00,000/- as on April 1, 2000 to Rs. 23,00,00,000/- as on March 31, 2006. A majority of its income came from software development and software consultancy services for U.S. clients who paid in U.S. Dollars.

2. However, during the year 2006-2007 the profitability of the Company went down substantially because of the falling dollar to rupee exchange rate. In April 2007, Mr. Gambat Meetha decided to sell his 14% stake in the Company. At that time, the shares of the Company were trading at Rs. 295/- per equity share of the Company. He got into serious negotiations with Heman Brothers Opportunity Limited (the Investor), a private equity fund established in Trinidad and Tobago, where the Government of Trinidad & Tobago had a majority stake, and offered to sell his 40,000 equity shares in the Company for a total consideration of Rs. 1,40,00,000/-, i.e., at a price of Rs. 350/- per equity share. After extensive legal and financial due diligence and negotiations, the Investors, while impressed with the growth rate during 2000-2006, were apprehensive of the Company’s over-dependence on the Dollar value and therefore apprehensive of their future profitability, as the Investor’s financial analysts predicted a possible trend of falling dollar values as against the Rupees in the next two financial years. Mr. Gambat Meetha assured that the Company was entering into appropriate foreign currency forward contracts to hedge against the foreign currency risk. He stated that the Board of Directors of the Company had estimated even higher revenues this year to the tune of US$1,75,00,000/- from their software contracts with U.S. clients. After further negotiations, it was decided and agreed to by both the parties that rather than entering into an immediate purchase of
Mr. Gambat Meetha’s stake in the Company, the Investor would enter into a call option for purchasing Mr. Meetha’s shares after one year in order to evaluate whether the claims of Mr. Meetha as to the revenue are justified and the foreign currency risk hedging strategy was effective.

3. An agreement was accordingly drafted and settled between the parties. The Call Option Agreement dated April 12, 2007 (the Call Option Agreement) was executed by the Investor and Mr. Meetha on the aforesaid date in London. The Call Option Agreement provided that the Investor shall pay Rs. 14,00,000/- (the Option Price), upfront immediately on execution of the Call Option Agreement to Mr. Meetha. In consideration of the Option Price, the Investor shall be entitled to call upon and purchase the 40,000 shares of Mr. Meetha for a total consideration of Rs. 1,26,000/-, i.e., for a strike price of Rs. 315/- per equity share of Rs. 10/- each, at any time within a period of one year from the date of the Call Option Agreement, i.e., by April 11, 2008 (the Option Exercise Date). The Call Option Agreement further provided that it was governed by English law and any dispute under the Call Option Agreement was subject to the exclusive jurisdiction of the Courts in London. The Call Option Agreement also contained several provisions as to material adverse effect. The clauses are reproduced below:
Clause 2 – Definitions and Interpretation

In this Call Option Agreement, unless the context otherwise requires or unless otherwise defined or provided for herein, the capitalised terms used in this Agreement shall have the following meaning:

... (g) “Material Adverse Effect” means any adverse change including but not limited to any change, event or effect that is materially adverse to the business, assets (including intangible assets), prospects, financial condition or results or operations of the Company, including without limitation, any change, event or effect that is materially adverse to the foreign currency risk hedging strategy proposed to be adopted by the Company.

Clause 5 – Information Rights of the Investor

During the period from and including the date of this Agreement and ending on and including the Option Exercise Date, Mr. Meetha undertakes to:

... (f) forthwith intimate the Investor immediately on the occurrence of a Material Adverse Effect

(g) forthwith intimate the Investor immediately receiving any information that an event has occurred or circumstances exist that is likely to result in a Material Adverse Effect.

Clause 6 – Termination on Occurrence of Material Adverse Effect

In the event that, during the period from and including the date of this Agreement and ending on and including the Option Exercise Date a Material Adverse Effect occurs or an event occurs or circumstances exist that is likely to result in a Material Adverse Effect, this Call Option Agreement shall forthwith terminate and Mr. Meetha shall have an obligation to immediately refund the Option Price.”
4. The Company approached several banks to enter into appropriate foreign currency hedging arrangements. Even though several banks offered much better terms to the Company, Mr. Meetha convinced the Board of Directors of the Company to enter into a foreign exchange swap with the Bank of Maal & Gol Maal (MGM Bank). Mr. Chhoton Pare, the Chairman of the Board of Directors of the Bank of Maal and Gol Maal was the brother-in-law of Mr. Meetha. On April 25, 2007, the Company swapped INR 70,00,00,000/- for US$1,75,00,000/- at the then US-INR conversion rate of US$1 = INR 40. In terms of the Forex Swap Agreement dated April 25, 2007 (the Forex Swap Agreement), after settlement of coupon payments based on respective floating interest rates, the currencies were to be re-swapped at the same rate of conversion after one year, i.e. on April 24, 2008. Mr. Meetha convinced the Board of Directors of the Company, that based on the opinion of several financial experts and economists, he was sure that the value of the Dollar would plunge within the next year and the Company would make a huge profit out of the Forex Swap transaction. Mr. Pare on the other hand convinced the Board of Directors of MGM Bank that contrary to the predictions of financial experts, he was certain that the value of the Dollar would increase significantly in the coming year and therefore MGM Bank would make a huge profit out of the Forex Swap transaction and other similar transactions. MGM Bank adopted this policy and bet significantly on the Dollar value increasing in all its forex swaps and derivatives transactions with other parties.

5. By March 31, 2008, the Company had earned revenues of USD 1,80,000/-. However, the Dollar value had taken a plunge dropping to a conversion rate of US$1 = INR 12 and was showing signs of falling further. However, owing to the imminent re-swap under the Forex Swap Agreement, the management of the Company were confident of earning revenues in excess of Rs. 70,00,00,000/- this year. The market reacted to the increased revenues and the share price surged up to Rs. 400/- per equity share of the Company.

6. With such a huge plunge in the Dollar value and the re-swaps and settlement dates of the forex derivatives transactions in the last financial year approaching fast, the MGM Bank faced prospects of huge losses and a possible bankruptcy. A confidential meeting of the Board of Directors of the MGM Bank was called on April 9, 2008. In the meeting, Mr. Pare observed that due to the sharp decline in the Dollar value, MGM Bank would suffer huge losses if it honored the forex swaps and derivatives transactions entered into by MGM Bank. He further stated that he had obtained legal opinion that such swaps and derivatives were speculative and wagering contracts under Section 30 of the Indian Contract Act, 1872 and therefore, unenforceable. He requested the Board of Directors to resolve that the Bank would declare that all its forex swaps and derivatives
transactions were void and unenforceable. The Board of Directors considered the proposal and unanimously resolved to adopt it. It was decided that the resolution would be kept absolutely confidential and the declaration that MGM Bank considered all the derivatives and forex swaps void would be released on the date of re-swap under the Forex Swap Agreement with the Company, which was chronologically the first settlement date for transactions of a similar nature entered into by MGM Bank in the last financial year.

7. On April 10, 2008 Mr. Meetha and Mr. Pare met at a party thrown by a common relative. During the course of the party, Mr. Pare was seen calling Mr. Meetha aside and thereafter the two were seen to be having private discussions secluded from the rest of the party members for most of the remaining time till the party ended.

8. On April 11, 2008, the Investor, satisfied that the revenue forecasts for the Company had been met and that the Company’s revenue was protected from the sharply declining Dollar value by the Forex Swap Agreement, exercised its call option under the Call Option Agreement by delivering a notice to Mr. Meetha. By this time, the shares of the Company were trading in the stock exchanges at Rs. 410/- a share. The trade was executed on April 12, 2008 and Mr. Meetha sold his 40,000 shares in the Company for a total consideration of Rs. 1,26,000/-, i.e., for a strike price of Rs. 315/- per equity share of Rs. 10/- each. On the same day, Mr. Meetha as trustee of the Meetha Pare Trust (the Trust), a registered family trust, sold the 4% stake in the Company acquired by the Trust at the time of the Company’s IPO in the stock exchange at the prevailing price of Rs. 410/- per equity share.

9. The Investor’s officers were happy with the deal as the exercise of the call option has resulted in a significant paper profit, but decided to hold on to the stake in the Company as the Company’s share price and financial prospects were clearly showing an upward trend.

10. On April 24, 2008, the Company approached MGM Bank for the re-swap under the Forex Swap Agreement. MGM Bank refused to transact the re-swap and declared that the Forex Swap Agreement was void and unenforceable. MGM Bank stated that it would be happy to convert the Company’s Dollar revenue into Indian Rupees at the prevailing conversion rate US$1 = INR 10. Immediately, the prospect of revenues in excess of Rs. 70,00,00,000/- became dim as the Dollar revenue of US$1,80,00,000/- was worth only Rs. 18,00,00,000/- at the prevailing conversion rate. At this level, not only was there a huge loss for the Company, but also a prospect of bankruptcy as the current liabilities of the Company exceeded the current assets of the Company.
11. The market immediately reacted to the news and the share price fell to Rs. 270/- per equity share. A number of other Banks had bet heavily on the Dollar value increasing and on their petition, the Reserve Bank of India issued a circular on April 28, 2008 declaring that such speculative instruments are invalid and void ab initio. A copy of the circular is enclosed herewith as Annexure I. After the circular, the market reacted further and the share price of the Company fell further to Rs. 140/- per equity share as on April 30, 2008. To prevent any further losses, the Investor sold the entire 14% stake it had in the Company in the stock exchange at the prevailing price of Rs. 140/- per equity share thus booking a huge loss on the transaction.

12. One of the employees of the Investor, Mr. Anthony Gonzales, was present at the party on April 10, 2008 and had observed Mr. Meetha and Mr. Pare having private discussions for a long time. He reported the same to the superiors and agreed to testify to the same in any legal proceeding. On further investigation by the Investor, it was also discovered that Mr. Pare was a major beneficiary of the Trust of which Mr. Meetha was trustee and which had off-loaded its 4% stake in the Company on April 12, 2008.

13. On May 10, 2008, the Company filed a suit in the Calcutta High Court against MGM Bank for specific enforcement of the Forex Swap Agreement. It filed a separate suit against Mr. Meetha claiming that Mr. Meetha had violated his fiduciary responsibilities as a Director in his conduct in the Forex Swap transaction. In this suit, Mr. Pare was also joined as a Defendant. On the same day, the Company filed a writ petition against the Union of India challenging the validity of the circular issued by the Reserve Bank of India. On May 12, 2008, the Investor filed a suit against MGM Bank, Mr. Meetha and Mr. Pare claiming compensation for the loss it had suffered by purchasing the 14% stake of Mr. Meetha. It also joined in the writ petition filed by the Company against the Union of India as petitioner claiming that the circular was an indirect expropriation under customary international law and violated Article 300A of the Constitution of India. Since, the issues in the various proceedings referred to above were similar, the Calcutta High Court clubbed them together and posted them for final hearing.³

Footnotes

1. The problem has been drafted by Mr. Rohit Das, Managing Partner and Mr. Pingal Khan, Partner of Rohit Das & Associates for and on behalf of the West Bengal National University of Juridical Sciences, Kolkata. © The West Bengal National University of Juridical Sciences, 2008. Moral rights to the document belong to Mr. Rohit Das and Mr. Pingal Khan.

2. The facts, incidents, entities and persons are fictitious and any resemblance to any incident, person or entity existing or in the past, is purely coincidental. The Reserve Bank of India circular referred to in the problem and annexed herewith is also fictitious and has been fabricated for the purposes of this Moot Court Competition. However, the same shall be considered a circular having the same legal validity as any other circular issued by the Reserve Bank of India under the Reserve Bank of India Act, 1934. All laws in force and applicable in India on the relevant dates shall also be applicable to the problem.

3. For the purposes of these proceedings it shall be presumed that the evidence stage including discovery of documents, examination and cross-examination is over and the facts as outlined in this problem have been established in the Calcutta High Court. Accordingly, it shall also be presumed that Mr. Anthony Gonzales has testified as to the incidents mentioned in paragraph 7 of this problem. Even though the evidence stage shall be presumed to be over, participants are allowed to raise any preliminary objections on a point of law including maintainability of the proceedings, lack of jurisdiction, etc.
ANNEXURE I

Ref.No.MPD.BC.187/07.01.279/1999-2008

April 28, 2008
Baisakh 07, 1930(S)

To,

All Scheduled Commercial Banks/
Primary Dealers/
All India Financial Institutions

Dear Sirs,

Regulation on Forward Rate Agreements/Interest Rate Swaps

In exercise of its powers under Section 45V of the Reserve Bank of India Act, 1934 and in the context of the severe economic hardship and damage that is being faced by financial institutions due to speculative transactions keeping in view the complaints by several banks in this regard, and being satisfied that it is necessary in the public interest to do so, the Reserve Bank of India has decided, in principle, to create a safer environment that would facilitate trade of interest rate swaps as also to enable banks, primary dealers and all-India financial institutions to hedge interest rate risks by prohibiting purely speculative swaps and other purely speculative derivative instruments.

1. Accordingly, it has been decided that purely speculative derivatives traded by scheduled commercial banks (excluding Regional Rural Banks), primary dealers and all-India financial institutions as a product for their own balance sheet management and for market making purposes shall be impermissible and shall be void. Transactions in such speculative swaps and derivatives, shall be deemed always to have been void, as if the provisions of this clause (1) were in force at all material times.

2. Participants who intend to undertake FRAs/IRS are, however, advised that before undertaking market making activity, they should ensure that appropriate infrastructure and risk management systems are put in place. Further, participants should also set up sound internal control system whereby a clear functional separation of trading, settlement, monitoring and control and accounting activities is provided.

3. Guidelines on FRAs/IRS formulated in consultation with market participants will remain the same as before with the exception of this change.

4. Kindly acknowledge receipt.

Yours faithfully,

(K. Kanagasabapathy)
Chief General Manager
2010 - Problem Two
Author - Pingal Khan

Overview
Winning team
National Academy of Legal Studies and Research, Hyderabad
Jagdish Menezes, Tarun Gopalakrishnan and Nehaa Chaudhari

Runners up team
National Law University, Jodhpur
Lagna Panda, Divya Srikanth and Tarumoy Chaudhari

Best speaker
Nikhil Chawla
Indian Law Society’s Law College, Pune

Best memorandum
National Academy of Legal Studies and Research, Hyderabad
Jagdish Menezes, Tarun Gopalakrishnan and Nehaa Chaudhari
Committee of Dinergy Creditors & Others (Appellants) v. Dinergy Sughoskar Power Pvt. Ltd., Bretley Bank & Others (Respondents)

Introduction

1. Dinergy Power and Infrastructure Inc. (Dinergy), is a company listed on the New York and Luxembourg Stock Exchanges, and is a power and infrastructure company with its own financing arm. Dinergy is incorporated in the state of Delaware, United States of America (US).

2. Dinergy has 235 subsidiaries across the globe with footprints in every habited continent, the most important of them are:
   i. Dinergy Chemicals (Nigeria),
   ii. Dinergy Power and Infrastructure (Canada) and
   iii. Dinergy Services (Cayman Islands).

3. In May 2006 Dinergy entered into a project specific joint venture in India with Sughoskar Holdings Limited (Sughoskar). Accordingly, they set up a company in India called Dinergy Sughoskar Power Pvt. Limited (the JV Company). The JV Company is registered with the Registrar of Companies at Kolkata.

4. From the very outset the JV Company was marred by turf fights between the two partners in spite of the apparent advantages of having Sughoskar as the joint venture partner. The board of the JV Company is dominated by nominee directors of Dinergy. In fact, Dinergy along with its wholly owned subsidiaries listed above, owns about 88% of the JV Company’s equity.

5. In January 2007 the JV Company won a bid to develop a hydel power project in Chandigram (the Project), in West Bengal. This bid was won largely by the efforts of Sughoskar which has had good political ties with the ruling party in West Bengal. The Project is supposed to generate 3,00,000 MW of power a year, from the year 2014 and hit its peak capacity by the year 2020 solving eastern India’s terrible power crises.

6. This Project has been the claim to fame of the incumbent government of the state of West Bengal and it has time and again hailed the Project as the symbol of development in the state.
Leveraging of the JV Company

7. The paid up equity share capital of the JV Company is Rs. 200 Crores of which Dinergy and its wholly owned subsidiaries (listed above) have contributed 88% while Sughoskar has contributed 12%.

8. In addition, the JV Company already has had an investment of Rs. 9,800 Crores in debt financing.

9. Dinergy had invested Rs. 4,500 Crores as unsecured shareholder loans under the extant Reserve Bank of India Guidelines on External Commercial Borrowings. While arranging for this loan Dinergy had caused the JV Company to stand as its guarantor to certain foreign banks that provided the funds to Dinergy.

10. The remaining Rs. 5,300 Crores had been lent as a secured loan with first pari passu charge on the assets of the JV Company by a consortium of Indian banks. The prime lender and lead arranger for this loan was Bretley Bank, one of India’s fast emerging private banks with a very aggressive business and investment strategy. The agreement under which this loan was made clearly stated that any change in control of the JV Company would require the prior consent of Bretley Bank and other members of the Syndicate (defined below). Apart from Bretley Bank, the other lenders in the consortium are Sukoi Bank, National Kharchapani Bank and Bank of Chandigram (the Syndicate).

Investigations into Dinergy

11. In Delaware, US in June 2008, Dinergy defaulted in the payment of its insurance premium of US$300 Million for its workers. The Employees’ Union, known as Union of Power Workers of Dinergy (UPWD) (which has been historically a great launch pad for local politicians) with active lobbying convinced the local government in the state of Delaware to start an investigation into the financial affairs of Dinergy.


13. The Delaware Government Report revealed clear proof of a lot of unaccounted payouts in the Indian JV Company which could constitute potential fraud. Dinergy explained these to the authorities as facilitation payments. This was immediately considered a violation of US laws and was also referred to the Indian authorities for greater investigations into the matter of facilitation.
14. As a result in **October 2008** the Central Bureau of Investigation (CBI) in India started investigations on the directors of the JV Company who were alleged to have made these payouts. On around **5 August 2009** the CBI completed its investigation and it was found that a large proportion of the debt finance had been spent by the JV Company in unaccounted payouts.

15. The investigations also revealed that a former minister in the previous government of the state of West Bengal along with several bureaucrats had received large payouts from the JV Company and allegations were flying thick and fast that the approval of the bid for the Project and the necessary approvals had been fixed. Moreover, these payouts appeared to be equivalent of the money that was found unaccounted for by the investigations in Delaware.

16. Amidst the confusion of these investigations, work on the Chandigram Project came to a standstill with severe losses. 2,000 out of the 9,000 workers were laid off and Sughoskar was rumoured to be looking for an exit.

17. The possibility of a breakdown in the state’s power related infrastructure and the already heated up atmosphere regarding job loss and private enterprises, meant that the government of West Bengal was under immense pressure to resolve the situation and keep the Project running. On **30 August 2009** the Minister of Power in the State Government addressed the media and stated the following:

   “We are aware of the brewing crisis in the Chandigram project. We will like to state that the Government remains fully committed to development of the State of West Bengal and protection of it people’s interests. The Government believes that since the Chandigram Project is crucial to the future of development in the state and therefore as a stakeholder in this matter we shall take every step possible to resolve the problems.”
Financial Difficulties of Dinergy

18. In the US, the SEC’s investigation report (the SEC Report) which was published on 4 December 2008 came to the same conclusions as the Delaware Government Report. It also found that Dinergy with all its other group entities had a glut of common directors and that all of its independent directors were also industrialists in whose companies, Robin Schmidt, Chairman of Dinergy was actively involved.

19. As a result of these revelations, Moody’s downgraded Dinergy’s credit rating to CCC and it became impossible for Dinergy to raise capital in the debt market to fight through this situation.

20. On 22 December 2008 Dinergy decided to file for bankruptcy in Delaware. Robin Schmidt and the other members of the Schmidt family (who together own a majority 20% stake in Dinergy and had controlled it for generations) resigned on 24 December 2008 from the boards of several entities of the group including the parent company, Dinergy.

21. Several creditors of Dinergy made their claims before the Court at Delaware regarding priority of their claims and pleaded for an order of consolidation of assets across the 235 subsidiaries of Dinergy. The Court ensured that every subsidiary of Dinergy, including the JV Company was represented and was a party to this matter. From its own examination of the matters at hand and on the basis of the Delaware Government Report and SEC Report (of which it took suo motu cognizance) the Court concluded that there was great scope of possible corporate fraud. As a result it applied the principles of asset consolidation and corporate disregard doctrines and ordered pay-outs for the secured creditors from the consolidated assets of the subsidiaries of Dinergy. This order (Foreign Decree) was dated 18 September 2009 and included the assets of the JV Company. The Court set up a committee of major secured creditors of the Dinergy and named it Committee of Dinergy Creditors (CoC) and gave them the responsibility and powers to execute this order in every jurisdiction across the globe. This change happened only on 1 October 2009.

Action by Indian Banks

22. In the meantime, on 23 August 2009 Bretley Bank notified the JV Company about its two successive defaults on repayment. The management’s apathy towards addressing the issue meant that the Syndicate was apprehensive of a credit risk disaster on the Project.

23. Then on 27 August 2009 Bretley Bank and the Syndicate gave a further notice to the JV Company stating clearly that it was clearly unable to meet its immediate liabilities and amidst such a situation there’s a grave possibility of winding up of the JV Company.
24. Under intervention from powerful members of the ruling party, the management and the creditors agreed to meet on 2 September 2009, to work out an arrangement under Section 391 of the Companies Act, 1956 (the Indian Scheme).

25. On 22 September 2009 the Indian Scheme was agreed between the parties and it was decided that the Indian creditors (Bretley Bank and the Syndicate) would have higher pari passu charge than the foreign lenders. Even the Dinergy representatives voted in favour of this scheme. On 29 September 2009 the Indian Scheme was duly submitted before the CLB for approval after all required compliances.

Proceedings in Kolkata

26. After the Foreign Decree on consolidation and liquidation of the assets of the Dinergy’s subsidiaries across international jurisdictions was passed, Dinergy and its subsidiaries were taken over by the CoC for better and faster liquidation. Dinergy’s representative directors changed and the CoC appointed its own directors on 5 October 2009 on the board of the JV Company. This was ostensibly done to facilitate execution of the Foreign Decree and to block any attempt at restructuring the JV Company. On 14 October 2009 the creditors from the US approached the Civil Court in Kolkata for enforcement of the Foreign Decree dated 18 September 2009. This was immediately opposed by the Syndicate as they wanted the Indian Scheme, which was subjudice, to be given primacy in the interest of the public. The Syndicate also urged that it had priority over the assets of the JV Company. The State of West Bengal intervened in the matter and pleaded that this matter was of grave public importance and should be seen in light of the public interest and the Indian Scheme that had already been worked out and submitted before the CLB should be implemented. The Board of the JV which was now controlled by the CoC stated that the Indian Scheme was not acceptable and had been passed after the Foreign Decree had been passed and before it had taken control of the JV Company.

27. The Civil Court decided to stay the enforcement, till the CLB decision. The foreign creditors led by CoC appealed to the High Court at Calcutta in Kolkata. The Court granted the request of the Government and the Syndicate and decided to transfer the matter of the restructuring scheme from the CLB and hear the two matters together as they were so intricately significant to the outcome of either.
2011 - Problem Three
Author - Umakanth Varottil

Overview
Winning team
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Srishti Maheshwari, Aayush Srivastava, Nooren Sarna
Best speaker
Anish Agarwal
National Law University, Jodhpur
Best memorandum
Dr. Ram Manohar Lohiya
National Law University, Lucknow
Vinayak Mathur, Manini Bharati, Yashi Kumar
Jay Jadeja Motoparts (India) Limited (Appellants) v. Truckz Valves GmbH (Respondents)

1. Jay Jadeja is an automotive engineer with 30 years' experience in the field. After having worked with several leading companies around the world, he decided to return to India during mid-2004 to give vent to his entrepreneurial aspirations. Essentially an environmentally conscious individual, Jay was keen to introduce a new (and greener) technology for the manufacture of automobile exhaust systems. Certain socially oriented automobile companies in India immediately caught on to Jay's idea and agreed in-principle to deploy Jay's exhaust systems in vehicles manufactured by them, subject to finalisation of the detailed terms and conditions including price.

2. Jay then had to build a corporate framework within which he could nurture his business idea. Due to the long years Jay spent abroad, he was not confident about foraying into the Indian market on his own. He decided to partner with an Indian business group that could contribute the local expertise and marketing network (especially for the aftermarket). Jay's search for such a partner led him to Motoparts (India) Limited. Motoparts is a company predominantly owned by Mr. Kapra, with the remaining shareholding spread across 50 other members of Mr. Kapra's extended family. Motoparts has long been in the business of sourcing and supplying automotive spare parts and servicing automobiles at its various outlets in 15 cities across India.

3. After several rounds of discussions between Jay and Mr. Kapra, they came to an agreement regarding the broad terms of their partnership. It was decided that the business of manufacturing the exhaust systems would be housed in a new company Exhaust Systems (India) Private Limited (with the corporate brand \textit{ExSys}), which was incorporated on November 7, 2004 with its registered office in Chennai's Sriperumbudur industrial area, where the company's plant was also to be located. The company was incorporated with a paid-up share capital of Rs. 10 crores with Jay and Mr. Kapra holding 50% shares each, and with Jay and Mr. Kapra also being the first directors of the company. Subsequently, after Mr. Kapra discussed the exhaust system proposal with his family members, they all expressed great interest in participating in the new business, and hence it was decided that Mr. Kapra would transfer all of the shares held by him in ExSys to Motoparts. Jay provided his concurrence, and the transfer of shares was given effect to on December 7, 2004, such that Jay and Motoparts became equal shareholders in ExSys. On the same day, the board of ExSys appointed Jay as its managing director.
4. Now that the corporate structure was in place, Jay began expending his resources to get the business off the ground. Upon finalising the business plan, he found that he needed an additional financing of Rs. 5 crores to tide him through the requirements of initial capital outlay such as leasing the land, building the factory and purchasing equipment. Neither Jay nor Motoparts possessed liquid funds to invest for the purpose. They were not keen to approach a private equity fund, venture capital firm or other financial investor for fear that such investor was likely to seek extensive rights on matters pertaining to the company and its business, which would stifle the ability of existing shareholders to manage the company in an optimal fashion. After a few days of brainstorming, Jay and Mr. Kapra were able to arrive at a consensus regarding only one avenue, and that was to borrow the additional funds from Truckz Valves GmbH, a previous employer of Jay with whom he continued to enjoy excellent relations. Truckz considered this a passive financial investment and was not interested in exercising any control over ExSys or its management.
5. The initial euphoria was short-lived as Truckz’s Indian lawyers advised their client against lending to an Indian company due to the extensive restrictions imposed by Indian law on borrowings by Indian companies from overseas lenders. Instead, the lawyers suggested that a more optimal structure would be for Truckz to invest in unsecured compulsorily convertible debentures, which they assured was a straightforward method of financing ExSys’ business. Jay was uncomfortable borrowing on the basis of any instrument that would provide the holder thereof a right to obtain equity shares in ExSys, but he was left with very little choice as the company desperately needed the financing. In order to protect his interest in ExSys and that of Motoparts, he devised (with the able assistance of his lawyers) the following clauses in the Subscription Agreement to be entered into between Truckz and ExSys, which were acceptable to Truckz (hence finding their way into the final document):

i. On the fifth anniversary of this Agreement, each unsecured compulsorily convertible debenture (Debenture) shall automatically, and without further act or deed, be converted into one equity share of the Company.

ii. The Debentures shall not be sold, mortgaged, secured, charged or in any way disposed by the holder thereof without the prior written approval of all the shareholders of the Company.

iii. The shareholders of the Company shall have the option, exercisable by providing a written notice of at least 30 days, to purchase the Debentures from the holder/s thereof in the same proportion as such shareholders hold shares in the Company. Upon expiry of the notice period specified in the preceding sentence, the holder/s of the Debentures shall be obligated to transfer the Debentures to the shareholders at a price that represents the aggregate of (i) the amount invested in the Debentures, and (ii) a return of 10% of the amount invested in the Debentures.

iv. The provisions of clauses (ii) and (iii) shall apply mutatis mutandis to the equity shares arising out of conversion of the Debentures.

Jay insisted on these protective measures to ensure that control over the company remained with himself and Motoparts, and that the proposed financing did not in any way result in a dilution of the existing shareholding interests.

6. The negotiations surrounding the subscription agreement were concluded on January 10, 2005, and the parties were preparing to sign the agreement late that evening. However, at the eleventh hour, Mr. Kapra’s nonagenarian mother, who returned from her periodic consultation with the astrologer, insisted that signing ceremony be postponed to January 14, 2005, which was an auspicious day. The parties verbally agreed that no text of the subscription agreement would be altered and that Truckz committed to a postponement of the formal signing merely out of respect for Kapra family’s beliefs.
7. On the rescheduled date of January 14, 2005, the subscription agreement was formally signed. On the same day, the articles of association of ExSys was amended to include the following clauses:

   aa. The Company and the shareholders shall give full effect to any arrangements by which the Company has obtained (or may in the future obtain) funds for its business, either by way of issue of shares, stock, bonds, warrants or any other instruments, whether or not convertible into equity shares of the Company. Nothing contained in these Articles shall be deemed to constrain the Company from performing its obligations under those arrangements.

   ba. The board of directors of the Company shall consist of 3 directors. Motoparts Limited shall be entitled to nominate 2 directors, and Jay shall be entitled to nominate 1 director. The parties shall take all necessary steps, including by exercising their voting rights, to ensure that the composition of the board shall be in compliance with the provisions of this clause (ba).

Article (aa) above was introduced after the existing article (a), which read as follows:

   a The Board may, at any time in its absolute and uncontrolled discretion, decline to register any proposed transfer of shares in the Company.

Article (ba) was introduced at the insistence of Mr. Kapra, who was uncomfortable with the complexity of the arrangements entered into with Truckz. Mr. Kapra wanted to ensure that he had sufficient representation on the board to protect his family’s interests if the deal with Truckz were to go awry.

8. Upon signing the subscription agreement, ExSys issued 50 lakh convertible debentures to Truckz at a price of Rs. 10 per debenture. The proceeds for the issue were utilised effectively by ExSys, which was able to launch its new exhaust system branded “Greensys” by December 2005. The company broke even by mid-2007 and was generating splendid profits thereafter. It even commenced a separate division for designing and producing exhaust systems for Formula 1 cars. Under the stewardship of Mr. Mike Formstone, a race car designer, who was poached by Jay from a leading car manufacturer, the Formula 1 division (which was christened Rockforce) turned out to a main cash cow for ExSys.

9. However, by late 2008, the financial crisis had engulfed the globe and the automotive sector too was badly affected. Truckz sank deep into the red. It began liquidating its assets so as to pay off its creditors. In the same vein, it wished to sell its convertible debentures held in ExSys. While it would have been most logical to attempt a sale of the debentures to ExSys’ existing shareholders, time was of the essence, and Truckz could not afford to initiate long-winded discussions with Jay and Mr. Kapra. Even if negotiations were to succeed, Truckz feared that dealing with a complex regulatory maze to effect the sale would result in loss of precious time.
10. Truckz's misery was tempered by a windfall that emanated from unexpected quarters. Lori Wagons Limited, a UK based automobile company offered to pay Truckz 150% of the latter’s initial investment in order to purchase the convertible debentures held in ExSys. Unexpected this was because Truckz and Lori Wagons were caught in protracted litigation spanning 3 countries and several years, that had soured the relationship between the two companies. Moreover, the cause for such litigation could be pinpointed as none other than Jay Jadeja. Lori Wagons was Jay's employer for 10 years before he decided to terminate that employment and join Truckz. Since the two companies were intense competitors in the marketplace, Lori Wagons feared that Jay was likely to use his experience gained with it, and possibly also proprietary information gained from it, to its detriment in the course of his employment with Truckz. Soon after Jay's departure from Lori Wagons, a few of its customers transitioned to Truckz, and it was a matter of great speculation that Jay was the cause of that. The parties were therefore embroiled in years of litigation over these matters in the UK as well as Germany.

11. On October 16, 2008, Truckz declared itself to be a trustee of the convertible debentures held in ExSys for the benefit of Lori Wagons. In consideration for such declaration of trust, Lori Wagons paid Truckz 150% of its initial investment in ExSys. The parties decided on such an arrangement as opposed to a direct sale because they did not desire to invite the attention of ExSys (and particularly Jay) to the arrangement. They were almost certain that if a direct transfer of convertible debentures was attempted, the shareholders would not consent to the transfer of the convertible debentures under clause (ii) of the Subscription Agreement. The declaration of trust was made by Truckz in writing, with such document expressly governed by the laws of India. This arrangement continued for several months, and interest payments received by Truckz from ExSys were paid over to Lori Wagons under the trust arrangement.
12. In the meanwhile, certain developments occurred within ExSys. Differences of opinion loomed regarding the manner in which the Rockforce business should be managed. While Mike Formstone was in favour of rapid expansion of the business by higher leveraging, Jay wished to adopt a more cautious approach. After months of prolonged discussions, no breakthrough was in sight, and Mike therefore approached Jay with a proposal whereby Mike would carry out a management buyout of the Rockforce business. Although Jay was initially reluctant, he agreed to the proposal because, that way, he could at least get rid of a business he was not too keen on operating. An added advantage was that he did not have to deal with Formstone, who he found to be an abrasive character. After discussions, it was decided that the Rockforce business would be hived off (by way of a slump sale) for nominal consideration into a newly incorporated wholly-owned subsidiary of ExSys called Rockforce Systems Limited (Rockforce Systems). The plan was that all the shares of Rockforce Systems would then be transferred to Formstone Investment Co. Pvt. Ltd. (Formstone Investment), a personal investment company of Mike Formstone established in India for the sole purpose of implementing the management buyout of Rockforce Systems. The parties agreed upon a price of Rs. 25 crores for transfer of the shares.

13. The parties entered into the relevant legal agreements on February 9, 2009 to give effect to the management buyout of the Rockforce Systems business. The transactions were completed within a period of 10 days thereafter. During the completion ceremony, when Jay enquired with Mike as to how he managed to arrange funds to complete the acquisition, he was flabbergasted with the response he received. Mike stated that he had signed up for part funding from certain international banks and the remaining from Truckz. Jay was unable to fathom how Truckz could fund this acquisition since it was committed to ExSys. Jay decided to dig deeper, and found that Truckz had provided financing to Formstone Investment to the extent of Rs. 10 crores in the form of subscription to compulsorily convertible debentures of that company. Truckz’s fortunes had quickly reversed and it was again flush with funds that enabled it to invest. On this occasion, Truckz had taken an additional step to protect its interests. In order to secure the periodic returns (in the form of interest) on the convertible debentures in Formstone Investment, it obtained a pledge of the shares held by Formstone Investment in Rockforce Systems. Truckz was also keen on obtaining a guarantee from Rockforce Systems that would ensure fulfilment of the payment obligations under the debentures issued by Formstone Investment to Truckz. Such a guarantee by Rockforce Systems was not possible as it was bound by a negative covenant provided to other lenders of that company. Hence, it was decided that Rockforce Systems would provide a comfort letter to Truckz stating that “it shall make reasonable endeavours to ensure that sufficient funds are placed with Formstone Investment so as to enable it to comply with payments obligations under the secured compulsorily convertible debentures issued to Truckz”.

14. Jay also probed matters further at Truckz’s end. He was distraught that Truckz had betrayed him by investing indirectly in the Rockforce Systems business. An investment in ExSys as well as Rockforce Systems was sure to create a conflict of interest. Although it was a tough nut to crack, Truckz relented and then disclosed how it had got rid of its investment in ExSys to Lori Wagons through the trust arrangement, and therefore it did not foresee any conflict of interest.

15. All of this was too much for Jay to handle. He sensed that Lori Wagons had paid a high premium for the convertible debentures in ExSys just so that they could cause trouble in the company, hold Jay’s back against the wall and squeeze some payments out of him in the pending litigation with Lori Wagons. He also discovered that Truckz had struck a bargain in the trust arrangement that it would be exonerated from any liability to Lori Wagons, which would focus its actions entirely upon Jay. He then consulted his lawyers to determine the course of action.

16. Based on legal advice, the first step Jay initiated was to send on March 15, 2009 a joint notice (along with Motoparts) to Truckz requiring it to sell the convertible debentures in ExSys to its shareholders in accordance with clause (iii) of the subscription agreement. Truckz replied within a week rejecting the request and stating that they were merely a bare trustee of the convertible debentures, and they no longer held any other interest so as to be able to sell the debentures to shareholders of ExSys. Truckz also stated in its reply that in any event it was not obligated to sell the convertible debentures to ExSys’ shareholders as such a commitment was “not worth the piece of paper on which it was written”.

17. Left with no other option, Jay and Motoparts initiated legal action against Truckz in the High Court of Judicature at Madras in order to obtain suitable remedies in respect of the convertible debentures held by Truckz in ExSys. In addition, they sought to invalidate Truckz’s financing of Formstone Investment that enabled the latter to acquire shares in Rockforce Systems, on the ground that the same violated various Indian laws and regulations. Truckz did not dispute the jurisdiction of the Indian courts, but strongly resisted the merits of the plaintiffs’ case on all counts.

18. The High Court at Madras rejected the claims of Jay and Motoparts at the original level as well as appellate level. As they preferred a further appeal, the Supreme Court of India has decided to hear the matter, and has granted leave for the purpose. The parties have provided an undertaking to the court that the debentures in ExSys will not be converted into equity shares, pending resolution of the dispute by the Hon’ble Court, and that they would thereafter be converted subject to the outcome of the Court’s decision.
2012 - Problem Four
Author - Promod Nair

Overview
Winning team
Government Law College, Mumbai
Riva Shah, Raunak Shah, Niharika Chaturvedi

Runners up team
National Law Institute University, Bhopal
Anuja Pethia, Raghav Seth, Devnagna Neelam

Best speaker
Ms. Riva Shah
(Government Law College, Mumbai)

Best memorandum
Government Law College, Mumbai
Riva Shah, Raunak Shah, Niharika Chaturvedi
State Bank of Tamil Nadu v. Max Engineering Limited

IN THE HIGH COURT OF JUDICATURE AT MADRAS

APPELLATE JURISDICTION

1. In early 2000, the city of Chennai in India suffered from an acute water shortage. The monsoons in the previous year had failed and water levels in the city were at an all-time low. The Chennai Municipal Corporation introduced a scheme of water rationing and limited the supply of water to two hours per week. This caused a public outcry and Chennai had to purchase supplies of water in large ships from neighbouring States at a substantial cost to the public exchequer to ensure a regular supply of water to the city’s population.

2. Recognising it was essential that a lasting solution to Chennai’s chronic water deficit problem be found and in order to exploit its extensive access to sea water, the government of Tamil Nadu invited proposals from private sector investors to develop water desalination plants on the outskirts of the city.

3. Desalt Corporation (Malaysia) Berhad (Desalt), a Malaysia-incorporated company and a leading supplier of desalination technology worldwide, was keen to make a foray into the India market. It engaged in preliminary discussions with the government of Tamil Nadu and was advised to make its investment in partnership with a local Indian company. After screening a number of potential partners, Desalt finally decided to enter into a joint venture with Max Engineering Limited (Max).

4. Desalt and Max entered into a Promoters/Shareholders Agreement (the Promoters’ Agreement) on 28 December 2002. The basis of the Promoters’ Agreement was that the parties wished to form a private limited company incorporated in India with the main object of obtaining a concession to build, establish and then operate a water desalination plant in Chennai. In terms of clause 5 of the Agreement, Max’s role was to:

   “immediately upon incorporation of the company do and take all such steps to assist and liaise with and provide all local knowhow and information so as to enable the company to obtain all such approvals, permits, grants, licences from the relevant government agencies and other regulatory bodies as may be necessary to enable the company to build, construct and operate the said desalination plant.”
5. Under clause 7 of the Promoters' Agreement, it was agreed that Desalt would have:

"the sole and absolute right to establish, manage and operate the company for the duration of the project envisaged under this Agreement and to such extent the parties hereto agree to exercise their voting rights and do all such acts and deeds and things as may be necessary to procure that the company forthwith enters into a management agreement with Desalt to such effect. Without prejudice to the generality of the above provision, the parties hereto shall procure that the said management agreement shall also give the rights in particular to Desalt:

(a) To establish, manage and operate the company as a going concern;..."

6. Clause 10 of the Promoters' Agreement provided that all disputes "arising out of or in relation to this Agreement shall be resolved by arbitration in London under the Rules of the London International Arbitration Centre".

7. On 15 January 2003, Desalt and Max formed a company known as Chennai Desalt Private Limited (CDPL) in which Desalt held 75% of the shares and Max held the remaining 25%. The parties agreed that the constitution of the Board of Directors would reflect the shareholding pattern and accordingly Desalt was entitled to appoint 3 Directors and Max one Director. Under the Articles of CDPL, the quorum for each meeting of the Board of Directors of the company was four with at least one member from Max required to be present.

8. On 15 February 2003, the Tamil Nadu Water Authority (TNWA) and CDPL entered into a Concession Agreement under which CDPL was given the right to build, own and operate for a period of 20 years a water desalination plant in Chennai. Under the terms of the concession agreement CDPL agreed to sell desalinated water to TNWA in return for (i) a fixed monthly capacity charge, and (ii) a variable charge based on the actual volume of water desalinated and supplied each month.
9. Clause 20 of the Concession Agreement expressly permitted CDPL to assign its rights and obligations “as required for financing and refinancing purposes”. TNWA was entitled to terminate the Concession Agreement in the event of a “Concessionaire Default” which was defined to include a situation where a winding up petition was filed against CDPL and was not dismissed within a period of 90 days following the presentation of such a petition. Clause 24 of the Concession Agreement provided that “all disputes arising out of or in relation to the contract shall be finally resolved by arbitration in New Delhi under the LCIA India Arbitration Rules”.

10. CDPL obtained funds for establishing the project by raising US$30 million in equity contributed entirely by Desalt and US$70 million in debt financing from the State Bank of Tamil Nadu (SBTN) under a Loan Facility Agreement. The initial round of financing was secured by: (i) a Charge of Shares created by Desalt and Max in favour of SBTN, and (ii) the mortgage of the land on which the water desalination plant was established together with the plant itself. Under the Charge of Shares, SBTN was entitled to appoint a Receiver over Desalt and Max’s shares upon the occurrence of a breach of the Loan Facility Agreement and exercise all rights of a shareholder in respect of such shares.

11. In 2008, Desalt obtained further funding of US$25 million from SBTN for CDPL’s working capital requirements. In this regard CDPL (acting through Desalt) entered into a Security Deed dated 1 June 2008 pursuant to which CDPL assigned to SBTN “all its right, title and interest in and to the Assigned Contracts, including all moneys which may be or become payable to the borrower”. One of the Assigned Contracts was the Concession Agreement.

12. A copy of the Security Deed was sent to TNWA by CDPL. None of the charges or securities created under the first and second rounds of financing was registered. The second round of financing was also not approved or ratified by the Board of Directors of CDPL.

13. The desalination plant commenced commercial operations from 1 June 2005. However, since January 2006, certain disputes arose between Desalt and Max in relation to the functioning of their joint venture. Max repeatedly complained that dividends were not declared or paid since the inception of the joint venture and also suspected that Desalt had engaged in diversion of CDPL’s assets. It was unhappy that it had been sidelined in the management of CDPL’s affairs and major decisions impacting the business of CDPL were taken by Desalt alone.
14. On 25 March 2008, CDPL was served with a winding-up petition filed by Max in the High Court of Judicature at Madras in which it submitted that due to the alleged acts of oppression and mismanagement and a complete deadlock in the affairs of CDPL it was "just and equitable" that the company be wound up. It also requested various forms of interim relief including that the court appoint a Provisional Liquidator over CDPL to collect all payments due to CDPL.

15. CDPL filed an application to dismiss Max's claim on the grounds of the arbitration clause in the Promoters' Agreement. Desalt simultaneously commenced arbitration proceedings against Max before the London Court of International Arbitration in London. Max informed the arbitral tribunal that it would not participate in the arbitration since the Indian courts were already seised of the shareholders' dispute. In January 2009, the arbitral tribunal made a partial award in which it ordered Max to discontinue the winding up action.

16. In May 2008, citing the dispute between CDPL's shareholders, TNWA stopped paying tariffs under the Concession Agreement. In June 2008, CDPL suspended operations at the desalination plant and since then has also been in default in respect of its debt servicing obligations to SBTN.

17. In August 2008, SBTN appointed a Receiver over the shares of Desalt and Max. In exercise of its rights over Max's shares in CDPL, the Receiver filed an application before the High Court seeking permission to withdraw the winding up petition. It contended (i) SBTN had notified Desalt and Max of its decision to exercise its rights under the Charge of Shares, (ii) Desalt and Max were therefore no longer entitled to exercise their rights as shareholders in CDPL, and (iii) instead, such rights could only be enforced by the Receiver acting under instructions from STBN. In exercise of Max's rights, the Receiver therefore sought to withdraw the winding up petition.

18. On 15 January 2011, SBTN (claiming to be an assignee of CDPL's rights under the Concession Agreement) commenced arbitration proceedings against TNWA for the tariffs that remained unpaid under the Concession Agreement.
19. On 1 June 2011, the High Court of Judicature at Madras admitted the winding up petition and appointed a Provisional Liquidator to manage the affairs of CDPL. It dismissed CDPL’s application seeking reference of the dispute to arbitration on the ground that the arbitration clause was not enforceable and could not in any event deprive the High Court of its jurisdiction under the Companies Act 1956. It also rejected the application of STBN’s Receiver on the ground that the rights conferred under the Charge of Shares were not enforceable. Finally, it restrained SBTN from proceeding with the arbitration commenced by it against TNWA on the ground of lack of standing and ruled that it fell within the domain of the Provisional Liquidator to take appropriate action to recover any amounts owed to CDPL.

20. On 15 June 2011, SBTN filed an appeal before the Division Bench of the High Court of Judicature at Madras challenging the 1 June 2011 decision. Max has filed its objections to the Memorandum of Appeal in which it supported the 1 June 2011 decision in its entirety. The matter is now set down for a final hearing before the Division Bench on 11 February 2012.
2013 - Problem Five
Author - Umakanth Varottil

Overview
Winning team
Campus Law Centre, Delhi
Prithvi Rohan Kapur, Payal Chandra, Bharath Gangadharan

Runners up team
National Law University, Jodhpur
Priyadarshini Rao, Arundhati Venkataraman, Teja Bhagwati

Best speaker
Priyadarshini Rao
National Law University, Jodhpur

Best memorandum
National Law School of India University, Bangalore
Sarthak Gupta, Varnika Chawla, Aditya Singh Chawla
APPELLATE JURISDICTION

Securities and Exchange Board of India (Appellant) v. LinkPark Investment Partners LLC (Respondent) & Securities and Exchange Board of India (Appellant) v Freddie Balsara, Mike Bennington, (Respondent) Purple Floydeon Investments Private Limited

1. Novio Software Systems Limited is a niche technology company based in Mumbai, India (where its registered office is situated) that focuses on developing gaming software that can be accessed on computers and handheld devices. Its success in developing the Laughing Cows game has catapulted it into the major league of global gaming players. The game involves players skillfully aiming and maneuvering objects across a scientifically determined trajectory to strike bovine creatures, which perform a Rangram-style waltz before disintegrating. The game’s popularity can be measured by the fact that millions of children and adults alike around the world instantly developed an addiction to it. Needless to add, Novio’s financial success can be measured by the millions of dollars that it began to rake in within a short span of time. Buoyed by its accomplishments, in 2010 Novio listed its shares on the Stock Exchange, Mumbai (BSE) and the National Stock Exchange of India Limited (NSE). Despite adverse market conditions, its initial public offering was oversubscribed at a substantial premium.

2. Novio’s founder and chief executive officer is Freddie Balsara, an engineer and a gaming addict, who had a successful stint with a gaming company in Finland before his return to India. Freddie and his family, being the promoters of Novio, hold 37% shares in the company, with the remaining shares held by diverse shareholders. The board of Novio consists of Freddie, his wife Hannah and 4 other directors. Freddie is the only director who acts in an executive capacity.

3. Since its listing, Novio has been developing a suite of gaming offerings, most of which have been successful, with some failures too. Unknown to the market, Novio had been developing the next generation blockbuster offering codenamed “The Messenger”. During early 2012, the company found itself in need of further funding to complete the development and testing of The Messenger. Since the market conditions were not appropriate for another public offering, and since Freddie did not wish to leverage the assets of the company through borrowings, a private offering of shares was zeroed in as the most viable option. After discussions with various potential investors, Freddie and his team selected LinkPark Investment Partners LLC, a New York-based private equity fund as the investor for the next round of funding in Novio. Apart from raising capital, LinkPark was an attractive option as the firm had extensive experience in investing in gaming companies around the world, and also provided
strategic inputs and handholding to its portfolio companies. Novio also
considered itself lucky that LinkPark was willing to invest, because it was
extremely picky about its investments (and would turn down more
opportunities than it accepted) and had an immaculate track record in
investing in gaming companies that were hugely successful.

4. After the broad terms of the valuation and other details were struck
between the parties, the lawyers were left with the task of finalizing the
structural details. It was decided that LinkPark would invest in 10% shares
of Novio (post-issue) at a price of Rs. 1,500 per share, which was at a 5%
premium over the then prevailing market price. In addition to this, it was an
essential term of LinkPark’s investment that it also obtains a call option on
an additional 16% shares in Novio. With these mandates, the lawyers on
both sides drafted and negotiated the transaction documents.

5. On March 15, 2012, LinkPark and Novio entered into a Share
Subscription-cum-Shareholders Agreement in order to enshrine the terms and
conditions on which Novio will issue, and LinkPark will invest in, 10% shares of
Novio. Two of the key clauses in the Agreement are extracted in the Annex.
These clauses were also incorporated into the articles of association of Novio.

6. Separately, on the same day, Freddie executed a side-letter in favour of
LinkPark, which stated that in case there is a dilution in LinkPark’s
shareholding within 3 months from the date of completion of the investment,
whether on account of issue of shares upon exercise of employee stock
options or the conversion of pre-existing convertible instruments, then
Freddie will sell, or procure the sale from other shareholders of, further shares
such that LinkPark’s shareholding will be maintained at 10% during the
3-month period following completion of the initial investment.

7. On the same day, i.e. March 15, 2012, LinkPark entered into a Call Option
Agreement with Freddie and Hannah in relation to their shareholding in
Led Skinnard Investment Limited, an Indian company with its registered
office in Mumbai. Freddie and Hannah (along with some nominees) hold
100% shares of Led Skinnard. The Call Option Agreement provides that
within a period of 18 months from the date of the Agreement, LinkPark has
the option, exercisable by giving 30 days’ written notice, to acquire all of
the shares of Led Skinnard held by Freddie, Hannah and their nominees.
Led Skinnard’s only asset is a holding of 16% shares in Novio. It has no
other assets or businesses. Therefore, the strike price of the call option
was fixed such that the value of Led Skinnard’s shares represented its 16%
shares in Novio at the value of Rs. 1,500 per share, which is the same price
at which Novio would issue shares to LinkPark. In consideration for the
grant of the option, LinkPark agreed to pay Freddie and Hannah an
aggregate option fee of Rs. 1 lac, which was subsequently in fact paid.
8. The LinkPark investment was first discussed formally by the board of directors of Novio during its meeting on March 15, 2012. The notice convening that meeting was sent to the stock exchanges by Novio on March 13, 2012, in which it was simply stated that "the Company will consider and, if found satisfactory, approve an issue of shares to an investor". Following the board meeting, the formal transaction documents were executed on March 15, 2012, and Novio immediately sent out another notice to the stock exchange on the same day disclosing LinkPark’s proposed 10% investment and the price at which it was to be made. However, no disclosures were made regarding Freddie’s side letter or the Call Option Agreement. Subsequently, Novio held its shareholders’ meeting on April 14, 2012 and obtained a special resolution approving the issue of 10% shares to LinkPark. The very next day, the shares were duly issued and allotted to LinkPark, which then became a shareholder of the company. On that day, LinkPark also separately notified the stock exchanges of its investment in Novio.

9. The transaction was well received by the stock markets. Upon announcement, Novio’s stock rallied upwards due to bullishness expressed by the markets. The share price has since remained stable and has not dropped below the transaction price of Rs. 1,500 per share. The proceeds of the issue of shares to Novio were immediately deployed into the development of The Messenger game, which was unveiled to the world in October 2012 at a mega launch during the Annovar Tech Fair in Germany, turned out to be a great success.
10. During early May 2012, a key employee of the company converted a large number of employee stock options into shares of Novio that resulted in a dilution of LinkPark’s shareholding to 9.83%. As Freddie had undertaken to top up any shortfall, he contacted several of his family member and friends and convinced them to sell some of their shares to LinkPark. By way of negotiated transactions effected on May 15, 2012, LinkPark acquired a further 0.17% shares from family members and friends of Freddie so as to regain its originally contemplated shareholding of 10%. The transactions were effected at prices ranging from Rs. 1525 to Rs. 1575 per share.

11. Sometime during June 2012, Novio and Freddie received a notice from the Securities and Exchange Board of India (SEBI) seeking further details of the issuance of shares to LinkPark. Specifically, SEBI requested for copies of all transactions documents, including agreements and letters entered into between the parties, which Novio and Freddie duly provided within 3 days. Subsequently, on July 10, 2012, LinkPark received a show cause notice from SEBI seeking its response as to why it should not be required to make a mandatory open offer to the shareholders of Novio (other than the promoters) to purchase their shares at a minimum price as prescribed in applicable regulations issued by SEBI pursuant to the SEBI Act, 1992. Furthermore, the show cause notice also required LinkPark to demonstrate as to why it should not be subject to penalties for failing to make the
mandatory open offer and also for other technical violations of applicable regulations issued under the SEBI Act. In its notice, SEBI also directed LinkPark to annul the call option in respect of the shares in Led Skinnard, being void and unenforceable as it violated various corporate and securities laws applicable in India.

12. LinkPark, with the assistance of its lawyers, prepared a reply to SEBI’s show cause notice. It was also given the opportunity to make submissions in person before SEBI. Thereafter, on August 13, 2012, SEBI’s wholetime director issued an order mandating LinkPark to make an open offer to the other shareholders of Novio to acquire their shares at a price no less than Rs. 1575 per share, and imposing a penalty of Rs. 1 crore for failure to comply with provisions of regulations issued by SEBI. The order also required LinkPark to treat the call option over the Led Skinnard shares as void, and restrained it from exercising the option.

13. LinkPark preferred an appeal to the Securities Appellate Tribunal (SAT). After hearing the parties, on October 16, 2012 SAT ruled in favour of LinkPark, holding that SEBI had erred in requiring LinkPark to make a mandatory open offer, in holding it in breach of the regulations issued by SEBI and in treating the call options as void. SAT reversed SEBI’s order on all counts.

14. During the time that Novio and LinkPark were dealing with the notices received by SEBI above, Freddie was delivered another knockout blow. Towards the end of July 2012, Freddie received a notice from SEBI seeking information regarding his possible contravention of several regulations issued by SEBI. The notice stated that during a random surveillance conducted by the NSE on Novio’s scrip, certain unusual transactions were detected during early March 2012. These were reported to SEBI. Upon probing further, SEBI found that, among other transactions, a total of 50,000 shares of Novio (representing approximately 0.2% of its share capital) were purchased on March 7, 2012 by Purple Floydeon Investments Private Limited, India’s largest hedge fund. These shares were purchased both on and off the market at an average price of Rs. 1,400 per share. Purple Floydeon was managed by Mr. Mike Bennington, who was a smart technopreneur as well as a financial whizz. His success emanated from his clever (but aggressive) strategy of investing in tech stocks.
15. During its investigations, SEBI found a link between Freddie and Mike. It transpired that the two were college buddies who continued to stay in close touch. They were both graduates of the prestigious HarvMit institution from where they obtained their engineering degrees. Coincidentally, the spouses of both Freddie and Mike were from the same batch of HarvMit. Although born and bred in California, Mike and his family relocated to Bangalore and made India’s Silicon Valley their home. Not only did Freddie and Mike speak to each other (either in person or over the telephone) at least once a week, but the close ties between the families also meant they went together on at least two vacations a year. During their vacations, meetings or conversations, it was common for them to discuss matters relating to the tech and gaming industries as each felt they could gain much from obtaining the perspectives of the other. In May 2012, when Freddie was required in accordance with the side letter to make good the shortfall in LinkPark’s shareholding, he had approached Mike to request him to sell some of Novio’s shares held by Purple Floydeo, but that ultimately became unnecessary because Freddie’s relatives and other friends offered a substantial number of shares that was sufficient to make good the shortfall.

16. At a more formal level, Mike also provided business and financial consultancy services to Novio under a consulting agreement entered into between the two parties. Under this agreement, Mike is required to provide strategic advisory services to Novio on a quarterly basis (or more often, if required) on various matters pertaining to the business and financial aspects of the company. In return for these services, Novio is required to pay an annual consulting fee of Rs. 10 lacs to Mike. Although Freddie has been keen for Mike to join the board of directors of Novio, he has been hesitant to give effect to this desire because he feared the cooptation of a friend onto the board may not be perceived well by the stock markets generally, or even by LinkPark more specifically.

17. Amongst other information received by SEBI in response to the notice to Freddie was his itemized mobile telephone bill for the calendar month of March 2012. SEBI found that between March 1, 2012 and March 7, 2012, there were 125 short text messages sent from Freddie to Mike, during which period he received 89 short text messages from Mike. For the remainder of March 2012, there were only an aggregate of 41 messages flowing back and forth between Freddie and Mike. During this period, there were no telephone calls made from the mobile phones of Freddie and Mike to each other. Considering the oddity in the communication pattern, SEBI sought to obtain further information from Freddie by requiring him to provide the contents of his text messages, which he vehemently denied access to. SEBI also sought to obtain the records of the text messages from his mobile telephone operator, Creedtel, which equally strongly rejected
the request, SEBI then initiated proceedings before the Bombay High Court, seeking an order against Creedtel that would compel it to provide the contents of text messages, which proceedings are still pending. No order has yet been passed by the Bombay High Court.

18. In any event, based on the available information, SEBI issued a show cause notice to Freddie, Mike and Purple Floydeon in connection with a possible violation of the SEBI Act and regulations issued thereunder. The noticees made their submissions to SEBI and were also granted a hearing. On facts, it is not disputed that Novio’s quest for a large investment in the company was well known even in February 2012, and therefore matters were indeed in public domain, although the identity of the investor or the precise terms of the investment were known only on March 15, 2012 when the announcement was made by the company. Moreover, it is also not disputed that Purple Floydeon is a short-term trader and is accustomed to trading constantly in securities of various companies. However, for the year 2012, the trades in question represented Purple Floydeon’s first investment transaction in Novio, although during the period its investments and divestments occurred frequently in other companies.
19. After reviewing the submissions and providing a hearing to the parties, on August 20, 2012 the SEBI wholetime member found that by trading in the Novio scrip Purple Floydeon was guilty of violating regulations issued by SEBI, and that so were Freddie and Mike. It debarred all three from accessing the capital markets, imposed a penalty of Rs. 50 lacs on Purple Floydeon and Rs. 10 lacs each on the two individuals, and also ordered Purple Floydeon to compensate all investors who sold their shares to Purple Floydeon on March 7, 2012, with the loss per share being the amount representing the difference between Rs. 1575 and the sale price at which the investor sold the shares to Purple Floydeon.

20. Freddie, Mike and Purple Floydeon preferred appeals before the SAT. The SAT reversed the order of SEBI, and held that there was insufficient evidence to return a finding of violation of regulations issued by SEBI. SAT also found that SEBI does not have the power to seek transcripts of telephone calls and short text messages either from the noticees or the mobile telephone companies.

21. Aggrieved by the orders of the SAT as set out in paragraphs 13 and 20 above, SEBI has preferred appeals to the Supreme Court of India. Since the two orders arise out of the same set of transactions, the Supreme Court has decided to club the appeals and hear all the issues together in a consolidated manner.
Annex

Extracts from the Share Subscription-cum-Shareholders Agreement

3.1 Board Composition

The Board shall comprise 6 (six) directors. Of these, 2 (two) directors shall be nominated by LinkPark.

7.1 Affirmative Rights

Subject to the terms of this Agreement, no action shall be taken by the Company or the board or committee thereof or at any general meeting or at any meeting of the board or committee thereof or by resolution by circulation with respect to any of the following matters without the prior written consent of LinkPark or the affirmative vote of LinkPark’s nominee directors, as the case may be:

i. alteration of the provisions of the articles of association of the Company;

ii. commencement of a new line of business;

iii. issuance of further shares or securities to any person (including shareholders);

iv. reduction of share capital or any buy back of securities;

v. approval of variation of rights of shares;

vi. any change in the constitution of the board or in the number of directors other than as expressly provided in this Agreement;

vii. declaration of dividend;

viii. adoption of audited annual accounts;

ix. application to a court to wind up the Company;

x. any merger, de-merger or other corporate restructuring by way of a scheme of amalgamation, arrangement or compromise to be undertaken by the Company;

xi. remuneration of the managing director and other senior personnel;

xii. approval of annual business plan and annual budget;

xiii. transactions with any shareholder or any affiliate of the shareholders of an amount exceeding Rs. 2.5 crores cumulatively per financial year;

xiv. creation of any security or encumbrance on the assets of the Company, or of any indebtedness, or the granting of any guarantee in excess of Rs. 25 crores outside the ordinary course of business in any given financial year or such other limit prescribed by the board from time to time;

xv. capital expenditures or disposals (including business or asset acquisitions or disposals) for the use of the Company in excess of Rs. 5 crores in any given financial year or such other limit prescribed by the board from time to time outside the ordinary course of business;

xvi. appointment or replacement of the auditor; and

xvii. delegation of any of the above matters to a committee or an individual.
2014 - Problem Six
Author - Umakanth Varottil

Overview
Winning team
National Law School of India University, Bangalore
Ashwij Ramaiah,
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MiniBankAG (Appellant) v. Acero Steels Limited (Respondent)

1. Acero Steels Limited is a leading manufacturer and exporter of iron ore pellets. 90% of its inventory is exported, primarily to the United States (US) and to countries in continental Europe, with a small percentage of its sales flowing eastward to China and a few ASEAN nations. Acero has been in this business for over 20 years, and has enjoyed tremendous success. The business was built from scratch by Mr. Yatin Asher, who was then a metals trader. His son, Mr. Manoj Asher, is now running the business as the managing director of the company. While the registered office and corporate office of Acero are in Prabhadevi, Mumbai, its main plant is located in Panvel, on the outskirts of Mumbai.

2. In 2006, Acero drew up plans to undertake a significant expansion of its production capabilities and sought to establish a new plant at Ranjangaon, near Pune, with a manufacturing capacity of five million tonnes per year. After prolonged deliberations, the board of Acero approved the expansion plan, which became inevitable given that Acero had to previously turn down many lucrative supply contracts on account of its inability to fulfill them due to the lack of manufacturing capacity.

3. In order to finance its expansion plans, Acero approached a number of banks and financial institutions for financial support. In doing so, it enlisted the services of Brady Advisors Limited, a boutique advisory firm that specialises in debt financing. Brady and its financially talented managing advisor, Mr. Kunal Prakash, were well known for driving a hard bargain on behalf of companies that intend to borrow monies from various lenders. Their expertise also extended to formulating and implementing plans for restructuring of debts in case any of their clients faced financial difficulties.

4. As part of the plans for financing the proposed Ranjangaon plant, Acero and Brady approached MiniBank AG, a Swiss bank. Although MiniBank had a branch office in Mumbai from where it carried out its lending operations, the key financing decisions were taken from its regional office in Singapore. Mr. Pascal Berger, the Asia Operations Director of MiniBank visited Mumbai to meet with Acero and Brady, and after some discussions it was agreed that MiniBank would lend US$50 million to Acero.

5. The transaction was structured as a medium term-loan facility. While the loan was to be disbursed in two tranches of US$25 million each, the repayment by Acero was to be made upon the expiry of four years from the date of each disbursement. Interest was payable on a quarterly basis in arrears commencing the date of disbursement. On December 22, 2006, Acero and MiniBank entered into a Facility Agreement setting out the detailed terms and conditions of the loan and the security package.
Simultaneously, Coronation Bank, an Indian banking company, was appointed as facility agent and security trustee under the loan. The principal terms and conditions of the Facility Agreement are extracted in Appendix A. Upon the advice of MiniBank’s Indian solicitors, M/s. Lex Legalistics & Partners, the Facility Agreement and the charge created thereunder were not registered with the Registrar of Companies (RoC) under the Companies Act, 1956. Simultaneously with the execution of the Facility Agreement, the disbursement of the first tranche of US$25 million was completed.

6. Acero had also obtained term loans and working capital facilities from other lenders at the same time, and began the process of acquisition of land for the Ranjangaon plant. By December 2007, the land was acquired and the construction of the plant had commenced. In the meanwhile, the order book of Acero was building up steadily due to heavy demand from around the world for its iron ore pellets. During quarterly meetings with lenders, Mr. Manoj Asher displayed tremendous optimism regarding the future financial prospects for the company.

7. However, by mid-2008, the tide had turned the other way. The world was beginning to get engulfed in the global financial crisis, triggered by the downfall of the subprime lending market in the US. Slowly but surely, the impact was becoming visible on Acero’s business. Some of its large orders from the US markets began getting cancelled. Although Mr. Manoj Asher was beginning to worry, he very ably disguised his emotions and put up a brave face at the lenders’ meeting held for the 2nd quarter of 2008-2009. Matters were, however, drastically precipitated in September 2008 with the collapse of Lehman Brothers whereby the already distressed global financial markets began experiencing volatility and turbulence.

8. In its meeting in October 2008, the board of directors of Acero took the position that this was only a minor blip in the global financial markets and that this is unlikely to substantially affect commodities prices, which would hold up. Hence, it decided to press on with its long-term plans. Consistent with this outlook, on October 17, 2008 Acero issued a notice to MiniBank under the Facility Agreement for drawdown of the second tranche of the loan of US$25 million. Within two days of receipt of the notice from Acero, MiniBank responded in writing to state that it was under no obligation to disburse the second tranche under the terms and conditions of the Facility Agreement. Although Acero initiated discussions with MiniBank to persuade them of the need for the second tranche, their pleas fell on deaf ears as MiniBank’s management had by then taken a strategic view of imposing a lending freeze as a result of the market downturn due to which they would not make any further disbursements of loans.
9. Due to a deadlock in the discussions between Acero and MiniBank regarding the drawdown of the second tranche under the Facility Agreement, Acero initiated legal proceedings before the Bombay High Court seeking specific performance of MiniBank’s legal obligations under the Facility Agreement. A single judge of the Bombay High Court granted Acero’s pleas, against which MiniBank preferred an appeal before the division bench of the High Court (Appeal No. 1).

10. By the end of 2009, it became evident to Acero’s board that the global financial crisis was much more serious and impactful than it had initially thought. By then, the business of the company was adversely affected, and it did not have sufficient cash flow to service its debts, primarily due to default in payments by its customers. Acero was unable to meet its interest payment obligations from the 3rd quarter of 2009-2010, and it also defaulted on repayment obligations (of principal amounts) under two facility agreements with different lenders that became due during that period. Upon the first default by Acero of the interest payments under the Facility Agreement with MiniBank, MiniBank informed Acero in writing of the occurrence of an Event of Default under the Facility Agreement. Approximately 10 weeks after the occurrence of the Event of Default, MiniBank registered its charge pursuant to the Facility Agreement with the RoC under the Companies Act. This it did so upon receiving further advice from Lex Legalistics & Partners.

11. After declaring an Event of Default under the Facility Agreement, MiniBank instructed Acero to deposit all amounts received from its customers under the Nominated Account maintained with it in accordance with the terms and conditions of the Facility Agreement. Although Acero immediately began making payments into the Nominated Account, MiniBank issued standing instructions permitting Acero to withdraw monies from the Nominated Account without any restrictions. These standing instructions were revoked only about six months after the date of the occurrence of the Event of Default, following which Acero was unable to withdraw amounts from the Nominated Account.

12. Acero had no choice but to go back to the drawing board with the assistance of its advisor, Brady. In early 2010, it was decided that the only way Acero can survive this onslaught was by initiating a corporate debt restructuring. On February 9, 2010, Acero convened a meeting of its creditors where it proposed a debt restructuring package. It proposed that all unsecured creditors would receive 70 cents on the dollar in full repayment of the amounts due to them. In other words, the unsecured creditors will be required to take a 30% “hair cut” on their amounts. In the meeting, almost all of the unsecured creditors indicated their preference for this proposal since they were better off receiving partial repayment upfront rather than to remain with the uncertainty that they may not be able
to recover their amounts in a timely manner, if at all. As far as secured creditors are concerned, the proposal was that they would be eligible to receive the full amounts owed to them, but only in 2017, regardless of their contractual dates of repayment. In other words, the secured creditors will be required to grant a moratorium on principal repayments until then. Interest will accrue until then, although they will now become payable annually regardless of the contractual periodicity of interest payments.

13. Acero’s debt restructuring plan was taken up in accordance with the Corporate Debt Restructuring (CDR) mechanism prescribed by the Reserve Bank of India (RBI). However, since some of the lenders (including MiniBank) were not within the CDR mechanism prescribed by the RBI, it was decided to implement the restructuring through a scheme of arrangement under the Companies Act, 1956. Acero drafted and proposed a scheme, and approached the Bombay High Court to convene meetings of the different classes of creditors. It proposed meetings of four classes of creditors, each of which had to approve the scheme in accordance with the Companies Act. The classes are as follows:

(a) Secured creditors with fixed charge;
(b) Secured creditors with floating charge;
(c) Unsecured creditors; and
(d) Preferential creditors.

14. The class meetings were convened under the auspices of the Bombay High Court on June 23, 2010. The scheme received overwhelming approval of each class of creditors as required under the Companies Act. Returning to MiniBank, it was against the debt restructuring proposal from the outset. Despite its strong objections voiced at the initial lenders’ meeting, Acero decided to ignore them and to proceed with the scheme. MiniBank was placed under the category of unsecured creditors. This class comprised of the largest number of creditors and those holding the largest amounts of credit in value. Hence, MiniBank’s objections were overshadowed by the brute majority possessed by the other unsecured creditors. It is also the case that MiniBank would not have been successful in preventing the scheme from proceeding had it been classified as a secured creditor with floating charge, as it would have been the lone dissenting voice in that category. The class of secured creditors with fixed charge had only one creditor with a small outstanding, and hence the only possibility of a successful dissent from MiniBank was if it was classified as a secured creditor with fixed charge.
15. As a next step, Acero filed a petition before the Bombay High Court for sanction of the scheme of arrangement for debt restructuring of the company as it had received the requisite majority of the different classes of creditors. MiniBank, in the meanwhile prepared and filed strong objections to the petition insisting that the class meetings were wrongly convened and held, and that the requisite majorities were incorrectly obtained. Accordingly, its case was that the scheme must not be sanctioned or permitted to be implemented. Although MiniBank could have initiated winding up proceedings against Acero, it resisted itself from doing so upon advice from M/s. Lex Legalistics & Partners. As such, there are no winding up proceedings pending against Acero. Also, Acero does not qualify as a “sick industrial company”.

16. While Acero’s petition for the sanction of the scheme of arrangement and MiniBank’s objections were being heard by a single judge of the Bombay High Court, Mr. Pascal Berger was shell-shocked as he received some further facts and information in August 2010 regarding the restructuring proposal from another foreign bank that was also a lender to Acero. That bank had initially objected to Acero’s scheme, but subsequently caved in to support it as it realised it was better off going with the majority and recovering some amount of its loan rather than holding out and remaining exposed. Mr. Berger was informed that about two months prior to Acero’s default on interest payments on various loans (including from MiniBank), Acero had struck a deal with Coronation Bank, its largest lender in value, to make a prepayment of about 25% of the debts due to it. Acero duly made that repayment to Coronation Bank. Mr. Berger was of the view that by structuring the transaction to occur prior to the default and the debt restructuring process, Coronation Bank was effectively obtaining a benefit that was unavailable to the other creditors upon whom the restructuring scheme was simply being thrust. Moreover, it also came to light that at the time of such prepayment, Acero also granted a floating charge in respect of part of the borrowings from Coronation Bank (representing Rs. 20 crores) that was hitherto unsecured. To the extent of that amount, Coronation Bank’s status was converted from that of an unsecured creditor to that of a secured creditor with floating charge. At the same time, it was also the case that the alteration of the status of Coronation Bank to the extent of Rs. 20 crores outstanding was unlikely to alter the majorities in respect of each of the classes that had approved the scheme of arrangement.
17. After these facts came to light, MiniBank amended its objections to the scheme of arrangement before the Bombay High Court by adding an additional ground on which it sought the court to reject the scheme as these arguably important pieces of information were not disclosed to the creditors or the court by Acero while proposing the scheme of arrangement. After prolonged hearings on the various objections placed by MiniBank, the single judge of the Bombay High Court sanctioned the scheme of arrangement in November 2011. Aggrieved by this decision, MiniBank has preferred an appeal before the division bench of the Bombay High Court (Appeal No. 2).

18. Having felt it was a victim of a conspiracy, MiniBank decided it was necessary for it to take a bold and aggressive stance against Acero. It replaced its solicitors with M/s. Amittessay & Co. On October 25, 2010, it initiated criminal proceedings before the Sessions Court in Mumbai against Acero, its board, some of its officers as well as Coronation Bank and some of its officers, for fraud and criminal breach of trust on account of Acero having made preferential payments to Coronation Bank and created security in its favour, both in a manner that caused significant detriment to the interests of the other creditors.

19. Upon receipt of a copy of the complaint filed by MiniBank, Acero filed a petition before the Bombay High Court under section 482 of the Criminal Procedure Code, 1973 seeking to quash the criminal proceedings filed against it. Among other grounds raised by it, Acero stated that neither Mr. Manoj Asher nor its board were aware of the arrangement between Acero and Coronation Bank for the prepayment of part of the loan and for creation of security. The entire transaction was given effect to on behalf of Acero by the Finance Manager of Acero, Mr. Shiv Sheth. Although Mr. Sheth was not on the board of Acero and was reporting directly to the chief financial officer Mr. Pramath Shah (who was a director of Acero), Mr. Sheth was authorised to undertake all interaction on behalf of Acero with its lenders. Mr. Sheth was also responsible for spearheading the corporate debt restructuring on behalf of Acero. After hearing the parties, in November 2011, a single judge of the Bombay High Court exercised his jurisdiction under section 482 to quash the criminal proceedings against Acero. Aggrieved by this decision, MiniBank has preferred an appeal before a division bench of the Bombay High Court (Appeal No. 3). This appeal concerns Acero only, and separate appeals were filed on behalf of its board, officers, Coronation Bank and its officers, which are the subject matter of separate proceedings.
20. It has been decided to club the three appeals preferred by MiniBank against Acero, and to hear them in a composite fashion. The hearing of the appeals was being considerably delayed. In the meanwhile, MiniBank received an attractive proposal from Vulture Distressed Assets Fund LP (Vulture Fund), a debt fund specialising in distressed debts, whereby Vulture Fund was willing to purchase 50% of the outstandings from Acero to MiniBank at a discounted rate of 20%. Hence, for half of the outstandings, MiniBank would be able to obtain 80% of the debt value from Vulture Fund as opposed to 70% from Acero under the debt-restructuring scheme (even if continued to be treated an unsecured creditor). The amount representing 50% of the outstandings from Acero were assigned by MiniBank in favour of Vulture Fund pursuant to an Agreement for Assignment by Way of Securitisation entered into between MiniBank and Vulture Fund. Under this Agreement, while the part of the debt (representing 50%) under the Facility Agreement was assigned to Vulture Fund, MiniBank was appointed as a collection agent of Vulture Fund by which it would continue to collect the dues from Acero, and carry out such actions as may be necessary, to give full effect to the Agreement for Assignment by Way of Securitisation with Vulture Fund.
Appendix A

Principal Terms and Conditions of the Facility Agreement dated December 22, 2006 Entered Into Between Acero and MiniBank

2. Definitions

“Material Adverse Change” means any material adverse change in the business, results of operations, assets, liabilities, or financial condition of Acero, as determined from the perspective of a reasonable person in MiniBank’s position.

3. Facility; Disbursements

The facility of US$50 million (the Facility) shall be disbursed by MiniBank to Acero in two tranches. The first tranche of US$25 million shall be disbursed on the date of this Agreement. Within a period of two years from the date of this Facility Agreement, Acero shall be entitled to draw down the second tranche of US$25 million by providing at least 30 days’ written notice to MiniBank. Within the period stipulated in the notice, MiniBank shall disburse the second tranche amount to Acero, so long as there has not occurred a Material Adverse Change or any event or circumstance that would reasonably be expected to result in a Material Adverse Change.

15. Security

(a) In consideration of MiniBank granting the Facility to Acero, Acero as beneficial owner hereby agrees that upon the occurrence of any of the Events of Default, all outstandings under the Facility shall become due and payable immediately and MiniBank shall be entitled to a charge over all the debts due to Acero from its customers. Acero hereby unconditionally and irrevocably agrees that such charge shall be deemed to be granted to MiniBank immediately upon the occurrence of the Event of Default, without the need for any further consent, agreement, conduct or act on the part of either party.

(b) For the purposes of Clause 15(a) above, the following events shall constitute “Events of Default”:

(i) failure of Acero to pay on the due date any amount payable to MiniBank pursuant to this Facility Agreement;

(ii) failure of Acero to comply with any material provision of this Agreement that does not relate to any payment obligation;

(iii) where any representation or statement made or deemed to be made by Acero in this Facility Agreement or any other document delivered by or on behalf of Acero under or in connection with this Facility Agreement is or proves to have been incorrect or misleading in any material respect when made or deemed to be made; and

(iv) where any legal action or proceeding has been initiated in relation to the appointment of a liquidator, receiver, administrator, or any other similar officer in respect of Acero or any of its assets.
(c) Upon the occurrence of an Event of Default, Acero shall pay any amount received from its customers into a nominated and blocked bank account (the **Nominated Account**) of Acero maintained with MiniBank. Unless otherwise indicated by MiniBank in writing, Acero shall not utilise the funds deposited into the Nominated Account except for paying the sums owed by Acero to MiniBank under this Agreement. Upon full satisfaction of all the Outstandings, Acero shall be free to utilise the funds available in the Nominated Account without the prior consent of MiniBank.

16. Covenant

So long as any part of the Facility or any other amount under this Facility Agreement remains outstanding, Acero shall not, except with the prior written consent of MiniBank, create or permit to be created any mortgage, charge, pledge, lien, or other encumbrance on any of its property to secure any indebtedness.

20. Ranking of Obligations

All the obligations and liabilities of Acero hereunder rank, and will rank, either pari passu in right of payment with or senior to all other unsubordinated indebtedness of Acero.

23. Assignment of Rights

Acero expressly recognises and accepts that MiniBank shall be absolutely entitled to, and has full power and authority to sell, assign or otherwise transfer in such manner and on such terms as MiniBank may decide (including if deemed appropriate by MiniBank reserving a right to MiniBank to retain its power to proceed against Acero on behalf of the purchaser, assignee or transferee) any or all outstandings and dues of Acero, to any third party of MiniBank’s choice. Acero shall not assign this Facility Agreement or any of the rights, duties or obligations of Acero hereunder, except with prior written consent of MiniBank.

25. Governing Law

This Facility Agreement and any dispute or claim arising out of or in connection with it or its subject matter, existence, negotiation, validity, termination or enforceability (including non-contractual disputes or claims) shall be governed by, and construed in accordance with, the laws of India.

26. Dispute Resolution

The parties submit all their disputes arising out of or in connection with this Facility Agreement to the exclusive jurisdiction of the appropriate courts in Mumbai, India.
2015 - Problem Seven
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Celltone plc (Appellant) v. IndMobile Telecoms Limited, 5G Star Networks (Respondents) Limited, Band Bank & M/s. Darsh Legal Associates

1. IndMobile Telecoms Limited is a successful telecom equipment company in India. It manufactures and sells mobile network equipment to various telecom services companies. It has also been a member of the Nifty 50 for the last two years. The company has been piloted by the energetic Mr. Sardar, who is its chairman and managing director. Mr. Sardar and his family are the promoters of IndMobile as they hold a total of 35% shares in the company.

2. Although flush with success, IndMobile set its sight on loftier ambitions. It wishes to become a player in the telecom services industry rather than to be a mere supplier. Hence, when the Government of India announced the grant of licences for the 5G mobile networks to be established in the metro cities in India, it decided to bid for those licences. For this purpose IndMobile Telecoms Limited set up a wholly owned subsidiary 5G Star Networks Limited in Kolkata, in which the telecom services business will be housed.

3. In 2013, the Government of India conducted separate bidding processes for each metro area, with the condition that no single entity or group can submit bids for more than three metros. 5G Star duly submitted the bid documents to the Government of India for the Kolkata, Chennai and Hyderabad areas. The bidding process was highly competitive given the lucrative nature of the market. The Government first shortlisted bidders on the basis of technical criteria. The shortlisted bidders were in turn evaluated on the basis of financial and other criteria, after which the bids were announced. Due to the phenomenal nature of the bids placed by 5G Star, it was successful in bagging the licences for Kolkata and Hyderabad. It was trounced in Chennai by an existing influential telecom service provider. Following the award of the licences, the actual licence agreements were executed between the Government and 5G Star for the Kolkata and Hyderabad metro areas on November 1, 2013.

4. During the bidding process, IndMobile began in parallel to scout for potential partners to be brought into its 5G business. Mr. Sardar was well aware of IndMobile’s limitations. Having been a telecom equipment player, he knew that establishing and managing a telecom services company was a different cup of tea altogether for which he did not possess expertise within the company. That expertise necessarily had to be sourced from elsewhere. For this purpose, he approached Vegus Investment Advisors, a boutique M&A investment banking firm. Vegus in turn prepared an information memorandum, which it used to ascertain interest from various telecom players in 5G Star. After discussions with several potential players, IndMobile (based on Vegus’ advice) decided to invite Celltone plc, a
leading telecom services company in the UK. The partnership was finalised at a dinner meeting one wintry night in London between Mr. Sardar and Mr. Barrett, the CEO of Celltone. The parties shook hands on a deal in which Celltone would acquire 49% shares of 5G Star at a total value of US$ 490 million. This was of course subject to the conduct of satisfactory due diligence by Celltone and the drafting, negotiation and execution of definitive deal documentation between the parties.

5. In order to help accomplish the deal in India (particularly as to its legalities), Celltone appointed M/s. Lexman Associates, a leading Indian law firm. It also appointed DBAD Partners, a leading accounting firm, to advice on accounting and taxation aspects. Given that it was Celltone’s first foray into the Indian market, it adopted a rather cautious approach, and decided to conduct a full-blown due diligence. It began with a two-day kick-off meeting in Kolkata where Celltone and its advisors attended a series of presentations by 5G Star, IndMobile and their representatives on various matters pertaining to the business of the companies. Celltone was rather interested in understanding the licensing process for the 5G networks and the robustness of the same. During the presentation by 5G Star representatives on licensing, Mr. Gangston, the Celltone project manager leading the deal quizzed intensively on the process and as to what measures were adopted to ensure that the award of licence was foolproof. Specifically, he voiced Celltone’s zero-tolerance policy towards corruption. The 5G Star representatives responded to Mr. Gangston’s concerns and assured him that the process was transparent and entirely above board. Following the presentations, Celltone and their lawyers and accountants were given full access to all the relevant books and records of 5G Star and (to the extent necessary) those of IndMobile. The lawyers and accountants subsequently prepared detailed due diligence reports and submitted the same to Celltone.
6. Given that Celltone was entering a new market and due to the sensitivities involved in the licensing process, Mr. Gangston decided to conduct a further background check on his own on various matters. Through Vegus, he was able to obtain access to some customers of IndMobile as well as some former and current employees of that company. During one such meeting, a former employee of IndMobile revealed the rather flexible approach of the company towards its dealings with the government. She mentioned that in the past the company had entertained government officials in expensive restaurants and showered them with gifts. She was however unable to tell the value of these gifts and whether they were significant in nature. These revelations were of great concern to Mr. Gangston. However, he was pacified by Mr. Dhanlal, the managing partner of Vegus, who mentioned that this was not uncommon in the developing world, where it is otherwise impossible to do business. Mr. Gangston was somewhat conflicted. On the one hand, there was a lurking fear in his mind given Celltone’s strict policies. But, on the other hand, the 5G Star deal was too important to be scuttled. He therefore decided not to escalate this issue to the senior management and board of Celltone.

7. Along with the due diligence, the parties also negotiated and agreed upon the terms of the legal documentation. On October 3, 2013, a Share Acquisition Agreement (SAA) was executed between Celltone, IndMobile and 5G Star. Under the terms of the SAA, Celltone was to subscribe to 40% shares of 5G Star, for which the company would undertake a new issue of shares. This would be for a consideration of US$400 million that Celltone would pay 5G Star. Celltone would acquire the remaining 9% (representing 125,998 shares) from IndMobile for a consideration of US$ 90 million that it would pay IndMobile. Upon completion of the transaction, Celltone would hold 49% of 5G Star on a fully diluted basis. The relevant terms and conditions of the SAA are contained in Appendix A.

8. On November 25, 2013, upon satisfaction of all the conditions precedent, Celltone completed the acquisition under the SAA and became the owner of 49% shares in 5G Star, with the remaining 51% shares being held by IndMobile. Upon closing, the necessary formalities involving the filings with the Reserve Bank of India, the Registrar of Companies, and the like were duly completed. One of the conditions precedent in the SAA related to the issue of a closing legal opinion by the legal counsel representing IndMobile and 5G Star, which was M/s. Darsh Legal Associates. Accordingly, on November 25, 2013, Darsh Legal issued a legal opinion, the relevant paragraphs of which are contained in Appendix B. At the time of issuing the opinion, Darsh Legal also obtained the requisite confirmations from IndMobile and 5G Star. It was a condition of the issue of the legal opinion that Darsh had to obtain professional liability insurance worth at least US$100 million, which it in fact obtained from ProInsure.
9. Celltone, IndMobile and 5G Star also entered into an Escrow Agreement dated November 25, 2013 with Band Bank. Under this arrangement, Band Bank as the escrow agent is to hold 10% of the consideration payable by Celltone to IndMobile and 5G Star respectively (i.e. the escrow amount). The escrow amount is to be held for a period of three years from the Closing Date to be applied towards satisfaction of any indemnification obligations of IndMobile and 5G Star that may arise under the SAA. In the absence of such claim, the escrow agent is to pay over the respective shares of the escrow amount to IndMobile and 5G Star at the end of the said three-year period.

10. After the acquisition of the 49% stake by Celltone in 5G Star, the parties got down to business to exploit the licence for the Kolkata and Hyderabad metro areas. Orders were placed for millions of dollars' worth of equipment, and loans were arranged from banks and financial institutions. Although the business aspects were proceedings smoothly, the parties experienced a temporary hiccup in December 2013 when Navro Telecom Limited, one of the losing bidders for a licence in the Kolkata metro area filed a writ petition before the Calcutta High Court challenging the award of the licence for the Kolkata metro area to 5G Star. Matters became somewhat compounded by the sensational nature of the allegations made by Navro Telecom. Navro stated in its writ petition that Mr. Bantha Ranga, a project manager in IndMobile (who was subsequently transferred to 5G Star) is alleged to have promised significant favours as well as cash and other gifts to Mr. Debaraya, one of the members of the Government committee that was deciding upon the bids for the Kolkata metro area. It is alleged that Mr. Ranga paid a sum of Rs. 2,50,000 by way of consulting fees to a company fully owned by Mr. Debaraya and his wife on the pretext of obtaining strategic advisory services from that company. This sum was paid from 5G Star and shown towards payment of consulting fees in its books. No details were available regarding the precise nature of the services provided by Mr. Debaraya’s consulting company to 5G Star, if at all.
11. Mr. Sardar was livid with these revelations in the writ petition. He did not in his wildest imagination expect his employees to act in such a manner. Of course, he had some inkling about the wayward habits of Mr. Ranga, including making all kinds of promises to government officials, but he never imagined that Mr. Ranga would actually execute those promises and make payment of such significant sums of money from the company's account. 5G Star decided to put up a strong defence against the challenge to its licence for the Kolkata metro area. However, that was not good enough. The Calcutta High Court decided that the allegations made against the bidding process for the Kolkata metro area were rather serious and given the law laid down by the Supreme Court of India in this field, it ordered a cancellation of the licence awarded to 5G Star for the Kolkata metro area. This came as a significant shock to 5G Star and its two principal shareholders. Although the Hyderabad licence was unaffected, this development effectively meant that about half the business of 5G Star was in disarray. 5G Star decided to put up a strong fight and preferred a special leave petition to the Supreme Court, which was dismissed at the admission stage itself.

12. The information regarding the shaky nature of the licence granted to 5G Star came as a shock to Celltone, being a significant shareholder in 5G Star having put in enormous amounts of money into the company. While it was still assessing its situation, Celltone's miseries intensified with a series of further bad news that poured in. During a discussion between Mr. Gangston and the operational personnel of 5G Star, a serious discrepancy was found in the financial projections pertaining to the Hyderabad metro area. Celltone operated on the assumption that the projected monthly average revenue per unit (ARPU) for the Hyderabad metro area was Rs. 250. During due diligence, DBAD Partners had advised Celltone that the components that went into the calculation of ARPU may not be uniform across countries or even among different telecom operators. Hence, it would be best to clarify this with 5G Star. Mr. Beanman, the Vice-President (Finance) of Celltone, who was leading the accounting due diligence effort, raised this issue during a telephone conference call with the finance personnel of 5G Star. During the conference call, the 5G Star personnel explained that the projected monthly ARPU of Rs. 250 was without regard to discounts and rebates that may be offered to customers. During this discussion, however, the connectivity was poor and the conference call kept getting dropped with the participants having to rejoin a number of times. While 5G Star was under the impression that they had disclosed this information to Celltone, the fact remains that during the frustrating moments of the conference call marred by continuous disruptions, that information was not properly received and assimilated at the Celltone end. In fact Mr. Beanman remarked to his colleagues sitting along with him that if this was the quality of the telecom network in Kolkata and Hyderabad, then 5G Star had a promising outlook with its superior
quality services. As they were subsequently caught up with other sticky negotiation points, neither Mr. Beanman nor his colleagues had the opportunity clarify as to what components went into the computation of the projected monthly ARPU for the Hyderabad metro area. It was only after the closing of Celltone's investment in 5G Star that it was discovered the projected monthly ARPU figure of Rs. 250 provided by 5G Star was without regard to discounts and rebates. The net figure taking these aspects into account would be only Rs. 175, which would significantly alter the valuation of the shares of 5G Star. In other words, Celltone was left with the stark reality that it had considerably overpaid for its stake in 5G Star.

13. When Celltone was still licking its wounds, it was delivered another blow. It received a legal notice from the lawyers of Grovera Inc., a telecom consultancy company based in Greenwich, Connecticut. The legal notice claimed that IndMobile had agreed with Grovera to sell the 125,998 shares in 5G Star that it ultimately sold to Celltone. The notice included a document titled "Letter of Intent", which is set forth in Appendix C. The notice claimed that the sale of the 125,998 shares in 5G Star to Celltone was illegal and that Celltone must immediately transfer those shares to Grovera at a price of US$40 million. No other document was signed between IndMobile and Grovera.

14. Following this series of unsavoury events, Celltone through its legal advisors Lexman Associates decided to undertake remedial actions. It issued instructions to Band Bank to release the escrow amount and pay it to Celltone's designated bank account in the UK on account of the breach of the terms and conditions of the SAA by IndMobile and 5G Star. Band Bank immediately consulted its own lawyers and replied that it has been advised not to so release the escrow amount to Celltone.

15. Celltone filed three civil suits before the Calcutta High Court as follows.

(i) Its first suit was against IndMobile and 5G Star pursuant to the SAA. It sought a refund of the purchase consideration of US$490 million that it had paid for the acquisition of shares in 5G Star, or alternatively damages for an equivalent amount.

(ii) It filed a suit against Band Bank seeking release of the escrow amount in favour of Celltone pursuant to the terms of the Escrow Agreement.

(iii) It filed a suit against Darsh Legal Associates seeking damages to the tune of US$490 million against it for rendering an incorrect legal opinion for which it is to be held liable.
16. In parallel, Celltone also initiated an arbitration claim against the Government of India under the Agreement Between the Government of the Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments, on the ground that the action of cancellation of the licence for the Kolkata metro area amounted to an expropriation of its investment in 5G Star. The arbitrators are yet to be appointed.

17. In the meanwhile a single judge of the Calcutta High Court heard Celltone’s civil suits and dismissed all of them on their merits. Celltone has preferred an appeal against all the orders to a division bench of the Calcutta High Court, which has decided to club all the appeals and hear them together. None of the parties has raised any issue regarding the jurisdiction of the court, which they all accept.
Appendix A

Extracts from the Share Acquisition Agreement dated October 3, 2013

2. Definitions

"Company" means 5G Star Networks Limited;
"Purchaser" means Celltone plc;
"Sale Shares" means 125,998 shares representing 9% of the share capital of the Company to be sold and transferred by the Vendor to the Purchaser pursuant to this Agreement;
"Vendor" means IndMobile Telecoms Limited.

6. Representations and Warranties of the Vendor and the Company

The Vendor and the Company hereby represent and warrant to the Purchaser as follows:

6.1 The Vendor is the sole legal and beneficial owner of the Sale Shares, free and clear of all liens and the Vendor is absolutely entitled to sell and transfer the Sale Shares in accordance with the terms and conditions of this Agreement.

6.2 The Company and the Vendor are limited liability companies duly incorporated and organised and validly existing under the laws of India having the full corporate power and authority to enter into this Agreement and to perform their respective obligations under this Agreement.

6.3 This Agreement and the execution, delivery and performance constitutes a legal, valid, and binding obligation on the Vendor and the Company, and is enforceable against them in accordance with its terms.

6.4 There are no rights of first refusal, non-disposal undertakings or other restrictions whatsoever on transfer in respect of the Sale Shares and the Sale Shares are freely marketable by the Vendor, and would create a valid title of the Purchaser to the Sale Shares.

6.5 The Company at all relevant times has the corporate power and all licenses, authorisations, consents and approvals required under applicable law to own its assets and to carry on business as conducted now or from time to time and is duly qualified to do business in each jurisdiction where the nature of the assets owned or leased by it or the activities conducted by it and as proposed to be conducted make such qualification necessary.

6.6 The latest audited balance sheet and profit and loss account of the Company and the latest unaudited balance sheet provide a true and fair view of the financial condition of the Company and there have been no subsequent events, which, to the best knowledge of the Vendor and the Company, and after due enquiry, would materially alter the financial condition of the Company.
6.7 To the best knowledge and bonafide belief of the Company and the Vendor, the Company is neither in, nor has at any time been in, violation of any applicable law or regulation which is likely to result in any material liability or criminal or administrative sanction of a material nature to the Company or otherwise have a material adverse effect on the ability of the Company to conduct its business as currently conducted or as contemplated to be conducted.

6.8 All books and records relating to operating income and expenses of the Company furnished or made available to the Purchaser were those maintained by Company in the normal course of business and are true and correct and accurately reflect the matters contained therein.

10. **Indemnification**

10.1 In the event of any breach by the Vendor or the Company of any representation, warranty, covenant or agreement made or given by the Vendor or the Company in this Agreement, the Vendor and the Company undertake to indemnify and hold harmless the Purchaser to the extent of any and all damages (including without limitation all losses, costs, damages, fines, fees, penalties, out-of-pocket expenses under the applicable law, fees and expenses of attorneys, accountants and other expenses) suffered or incurred by the Purchaser, resulting from or consequent upon or relating to such breach of representation or warranty, covenants or agreement by the Vendor or the Company.

10.2 Notwithstanding clause 10.1 above, the maximum liability of the Vendor and the Company for purposes of indemnification under this clause 10.2 shall be the fifty percent (50%) of the total consideration paid by the Purchaser to the Vendor and the Company respectively under this Agreement, provided that this clause 10.2 shall not apply in case of fraud or deliberate omission by the Vendor or the Company, as the case may be.

10.3 All representations and warranties of the Parties contained in this Agreement shall survive for a period of three (3) years from the closing date (the **Indemnification Period**) and upon the expiration of the Indemnification Period, all representations and warranties to which such Indemnification Period relates to shall automatically expire without any action from the Parties hereto.
Appendix B

Legal Opinion dated November 25, 2013 issued by M/s. Darsh Legal Associates

To: Celltone plc

Sub: Acquisition of Shares in 5G Star Networks Limited

1. We have acted as legal advisors to 5G Star Networks Limited (the Company) and to IndMobile Telecoms Limited (the Vendor) in relation to the acquisition by Celltone plc (the Purchaser) of 49% shares in the Company by way of a Share Acquisition Agreement dated October 3, 2013 (SAA).

2. For the purposes of this opinion, we have assumed that:
   (a) All statements as to matters of fact (other than matters on which we are expressing an opinion herein) contained in the SAA are true, accurate and complete.
   (b) There are no facts or circumstances in existence and no events have occurred, which render the SAA void or voidable, or repudiated or frustrated, or capable of rescission for any reason, and in particular but without limitation by reason of the lack of consideration, default, fraud or misrepresentation. The SAA and other documents perused by us do not indicate any such facts, circumstances or events.

3. Based on and subject to the aforesaid assumptions, we are of the following opinion:
   (a) The Company and the Vendor have been duly incorporated and have all the requisite corporate power and authority to enter into the Transaction Documents and to perform their respective obligations thereunder.
   (b) The execution, delivery and performance of the SAA do not, and will not result in a breach of, violate, or otherwise conflict with or contravene any of the terms and provisions of any law, contracts or any of the constitutional documents of the Company and the Vendor, as applicable.
   (c) Based on confirmation from the Company, it is qualified to carry on its business in all jurisdictions where it carries on such business, except where failure to do so would not have a material adverse effect on the financial condition of the Company.
Appendix C

August 16, 2013

From: IndMobile Telecoms Limited  
23 Chowringhee  
Kolkata  
India

To: Grovera Inc.  
34 Office Tower Park  
Greenwich, CT USA

Sub: Letter of Intent

This represents our agreement and understanding regarding the purchase by Grovera Inc. from IndMobile Telecoms Limited of 125,998 shares in 5G Star Networks Limited. Grovera shall purchase the said shares from IndMobile for a total consideration of US$40 million. Prior to the sale of the shares to Grovera pursuant to this arrangement, IndMobile shall be restricted from selling, transferring or creating security over these shares in favour of any other person. The parties shall negotiate in good faith the detailed definitive documentation to give legal effect to the understanding set forth in this letter of intent. The articles of association of 5G Star shall also be amended to reflect the specific terms of the definitive documents. The parties shall work in good faith towards completing and executing the definitive documentation within a period of three months from the date of this letter of intent.

Yours faithfully

Sd/-

(IndMobile Telecoms Limited)

Received and confirmed.

Sd/-

(Grovera Inc.)
2016 - Problem Eight
Author - Murali Neelakantan

Overview
Winning team
National Law School of India University, Bangalore
Megha Mehta, Sharwari Kothawade, Ayushi Agarwal

Runners up team
National Law University, Odisha
Priyanka Murali, Anant Gupta, Prateek Suri

Best speaker
Ishan Khanna
Hidayatullah National Law University, Raipur

Best memorandum
Nirma University
Saakshi Sharma, Alaukik Shrivastava, Sarthak Sonwalkar
Abhijit and Piyush (Appellants) v. Flume Capital, Nurture Capital, Arcot, (Respondent) Smith & Brown Limited & Flyabhi.com Pvt Ltd

1. Abhijit, a final year student at a leading engineering school and Piyush, his roommate who comes from a wealthy family in Lucknow got talking about how Uber and Ola had become successful in India. Inspired by Netjets they came up with the idea of making air travel more efficient in India by maximising the use of private aircraft owned by air charter companies and private aircraft owned by the rich and famous to make private air travel more easily accessible to the rich. Piyush’s family contributed a dozen aircraft that it owned (valued at about Rs. 40 Crores) and Abhijit assigned all the current and future copyright in the software, all rights to the idea, the business plan and processes and all other IPR (as commonly understood around the world), whether registerable in India or not, to the company. Flyabhi.com Pvt Ltd was established in Lucknow with Abhijit and Piyush each owning 50% of the Rs 2,000,000 invested as initial share capital.

2. A recent change in government civil aviation policy to encourage the use of old airports, including those in the heart of the city like the ones in Bangalore and Hyderabad greatly helped their business prospects. Other airstrips like the one in Simla were also opened up for charter and private flights and ground facilities there improved with private investment. Corporate houses which owned private aircraft and a few air charter companies expressed interest in the idea. Abhijit and Piyush researched the business of many companies in India, China and the United States before developing their own business plan which they believe addressed an unmet need in the Indian market.

3. With some financial help from Piyush’s family and Abhijit’s programming skills they were able to create a prototype and design for their online service which they presented to a group of potential investors at an event organised by a local angel network in Bangalore in August 2010. While there was interest from several investors in their idea, Flume Capital (Flume) and Nurture Capital (Nurture), both angel investors incorporated in Singapore convinced the founders that they were best placed to partner with them. Flume and Nurture convinced the founders that they were long term investors who fully supported the founders’ vision and would be able to provide not just cash but also expertise to rapidly grow the young company. After months of negotiations, on December 31, 2010 Flume and Nurture beat Snowflake Capital to invest in optionally convertible debt of flyabhi.com for a cash consideration of Rs. 100 Crores. The debt was convertible into Class B equity shares, at the investors’ option over a three year period based on the EBITDA of the company and subject to the company meeting business targets and milestones. Piyush was keen to invest additional equity and convertible debt in the company but Abhijit and the investors dissuaded him from doing so.
4. When the founders were presented the complex convertible debt financing structure with a myriad of government approvals, rather than plain equity investment which they had been expecting, they were apprehensive about their interests being protected. However, they were assured by the investors as well as BESTCO, a leading Indian law firm, that this was commonplace in the VC community and BESTCO was acting as "transaction counsel" to protect the interests of all stakeholders and ensure efficient closing of the deal. The founders were also informed that BESTCO’s fees were to be paid by flyabhi.com. BESTCO was a well-recognised name, consistently ranked among the top 4 law firms (together with SAMSHOR, CAMDO & JSK) for venture capital and start up work, primarily representing investors in Indian start ups.

5. While the process of drafting the investment agreement and seeking various government approvals was under way, Ms. K.S. Kumar, an employee of Flume, and Ms. Sush Iyer, a partner at BESTCO were inducted on to the board of directors of the company so that the founders could benefit from the immense experience of experts while fine-tuning the business plan for the company and preparing the company for the investment by the two angel investors.
6. The founders, Abhijit and Piyush, and the investors, Flume and Nurture, and the company represented by Ms. Iyer signed the investment agreement in the offices of BESTCO. The key terms of the investment agreement included:

6.1.1 Key business milestones and financial targets for each fiscal quarter.

6.1.2 Abhijit was designated as the CTO and Piyush as the Chief Marketing Officer.

6.1.3 Consequences of company failing to achieve the key business targets were: (i) adjustment in the conversion price of the debt to equity to the investors and (ii) preferential right, by themselves or their affiliates, to provide all further equity and debt to the company (iii) at the option of the investors, either put or call all the securities owned by the founders and their assignees.

6.1.4 Founders and investors' directors had to approve the appointment of all key management personnel.

6.1.5 Tabula Rasa, a well known global consulting firm and an affiliate of Flume, would provide advisory services at the cost of Rs. 25 lakhs per month (net of taxes and disbursements) to help the founders develop and execute the business plan.

6.1.6 Founders' and investor directors' consent was required for key decisions involving the company.

6.1.7 The two founders, two nominees of the investors and an experienced independent person who would be chairman of the company would form the first board of directors. Each party had the right to nominate a director so long as it held at least 10% shareholding in the company.

6.1.8 All rights granted by the investment agreement to a party would terminate if that party (together with affiliates and permitted assignees) held less than 10% shareholding in the company on a fully diluted basis assuming conversion of investor debt based on the EBITDA of the preceding fiscal quarter. However, each of the parties was bound to offer company's securities to the others before selling it to any person who was not a shareholder in the company.

6.1.9 All disputes would be subject to SIAC arbitration in Singapore.

7. The company's articles of association were amended by BESTCO to incorporate all these terms and were effective on January 01, 2011. In addition to Abhijit and Piyush, the board of directors included Ms. K.S. Kumar, Ms. Sush Iyer, a partner at BESTCO nominated by Nurture, and Ms. Scarlet Lester, a well known tech entrepreneur who was on the board of many companies in which Flume and Nurture had invested.
8. Abhijit, with his geeky charm was able to attract some of the best software talent to work with him. Flyabhi.com was the place for software coders, graphic designers and artists to hang out. The office was set up in an old, disused warehouse in the industrial part of old Bombay that was owned by a friend of Piyush’s family. The atmosphere was relaxed and informal with almost no rules and looked very much like the hostel of the engineering college that several of those who worked there were attending.

9. While the app for the service was being developed, Tabula Rasa began a national publicity campaign to socialise flyabhi.com’s business plan amongst prospective users and aircraft owners. Flyabhi.com was the title sponsor of fashion shows in the key Indian cities. It sponsored music festivals and artists’ shows and even a spectacular Valentines Day fireworks display throughout the country.

10. Despite all of this marketing and publicity, business was slow and the investors, based on the data and analysis provided by Tabula Rasa, felt that there was significant scepticism about the business model, the young inexperienced management team and whether the company could deliver on this promises. While it was still early days for the business, the company was not even close to reaching the business and financial targets set out in the investment agreement and the articles of association.

11. The board had been meeting every month to discuss the state of the business. By a majority vote, on July 21, 2011, it was decided that the company needed an experienced CEO for the business to be credible. After a global search process conducted by a leading search firm, Arjun Iyer was shortlisted to be the CEO. Arjun had studied at the American School of Bombay and then went to the US where he had undergraduate degrees in computer science and finance with a post graduate degree in management from Wharton. He was a brilliant student and was hired by McKinsey & Co to work with fast growing tech startups. During his five years at McKinsey & Co, he completed assignments in the US, China and Europe. Both clients and colleagues considered him a superstar.

12. The two founders did not see any value in such an expensive hire and voted in the board meeting on September 22, 2011 against the appointment of Arjun Iyer. Abhijit stated in the board meeting that he had conceived of the idea of the company, handpicked all the developers and Piyush, with his family connections was capable of developing the business across the country. However, the majority of the directors on the board of the company disagreed with them and Arjun Iyer was appointed as the CEO with immediate effect. He was given 5% Class A equity stake (same class as the founders) in the company, $1 million per annum of stock options which would vest at a nominal price of Rs. 100 over a period of 3 years and an annual salary of Rs. 1 Crore. He was free to sell the shares to the investor, founders or the company at the fair market value immediately upon exercise of the stock options.
13. Arjun hit the ground running; immediately contacting the leading owners of private aircraft and signing up a few of them to participate in the service by agreeing to sell a fixed number of flying hours each month. A few industrialists, sports stars and Bollywood celebrities also subscribed to the service by “purchasing” a fixed number of flying hours each year. By December 2011, the service was ready for launch and flyabhi.com made news all over the country. Sports stars, industrialists, fellow entrepreneurs, Bollywood celebrities and socialites were full of praise on social media. Arjun Iyer was featured on technology, lifestyle and business TV shows and magazines for the “unique business” that he was creating. The media was quick to report the names and publish pictures of the impressive list of Indian and international clients using the flyabhi.com service.

14. In an unexpected turn of events, flyabhi.com had stiff competition from Airavata, a joint venture between Netwings, the leading global fractional share ownership company and Suyodh, a leading Indian business house. Suyodh was one of India’s leading conglomerates and was trusted as a brand for its customer service. It was beginning to enter the luxury goods segment with joint ventures with global brands for the Indian market.

15. Airavata was able to raise over Rs. 500 Crores in initial equity and also obtain additional finance from Indian and international finance companies. With these financial resources, it was able to buy, or in some cases, get long term leases from global small and medium size business jet manufacturers. Airavata was also able to use the many aircraft and helicopters owned by Suyodh and also register several foreign aircraft in India to start a service on January 01, 2012 with more aircraft than flyabhi.com. This was quite a surprise for the founders and investors of flyabhi.com since Suyodh had, several times in the past two decades, tried, extremely unsuccessfully, to enter the aviation sector and its entry was a complete shock to everyone following the aviation industry in India.

16. In the board meeting on February 07, 2012 it was obvious to all the directors that the company needed more money very quickly to take on the unexpected competition. The management team led by Arjun Iyer was ready with a financing plan and immediately set about on an elaborate international road show to raise Rs. 500 Crores, which, in addition to paying for the expenses of the company would be used to (i) buy up “inventory” of flying hours from air charter companies and owners of private aircraft and (ii) purchase or lease business jets.
17. Piyush, supported by his family, was willing to provide equity, convertible debt or even bridge finance on preferential terms but he was told, once again, by the investors and their nominee directors that it would be better for the company’s image as a young professional tech start up if the cash was injected by investors and not his family. The board of directors also obtained a legal opinion from BESTCO, as the company’s counsel, that the investors had the right under the investment agreement and the articles to make further investment in equity and debt.

18. Instead, the board approved, by a majority vote (the founders dissenting), a financing arrangement with Arcot, Smith & Brown Limited, a 100 year old listed Indian NBFC and affiliate of the two angel investors to provide a bridge loan of Rs. 20 Crores to enable the company to pay its routine expenses until next round of equity was successfully raised. Key terms of the bridge finance were:

18.1.1 The maximum tenure of the loan was 1 year.
18.1.2 The interest was 18% per annum.
18.1.3 The security for the loan was the hypothecation of the aircraft owned by the company.
18.1.4 Right to veto key decisions affecting the finances of the company.

19. Drawdown of the bridge loan occurred on February 14, 2012 and most of the cash was used to finance the dry lease of aircraft from Brazil, Argentina and other South American countries. At the board meeting held on April 10, 2012, the investors’ nominee directors expressed concern that the road shows had not yielded any positive result and the company was in financial difficulty again despite the bridge finance.

20. On July 21, 2012, Flume and Nurture novated the investment agreement to over 20 of their affiliates since they had reached the end of the investment term and were required, under the terms of their constitution, to liquidate and distribute all their assets to their investors. The founders were extremely concerned that the relationship with the angel investors was now virtually over and they now had to deal with over 20 investors who didn’t know them, their business and their journey at all. BESTCO provided an opinion to the company that the novation was valid under the articles of association and the transfer of shares by Flume and Nurture should be registered. Flume and Nurture assured the founders that the change in shareholding was merely a legal requirement and as the composition of the board of directors remained unchanged, for all practical purposes, nothing had changed at an operational level for the founders.
21. On August 07, 2012, all the affiliates of Flume and Nurture notified the company that they wished to convert 50% their debt into equity with immediate effect based on the EBITDA as set out in the unaudited accounts dated June 30, 2012. On the same day, their nominee directors gave notice of a board meeting to be held at 0900 hrs on August 14, 2012 in the offices of BESTCO to allot and issue Class B equity shares to the investors, calling an EGM on the same day and venue at 1600 hrs to amend to the articles of association and reconstitute the board of directors. Despite the founders’ protest, all three resolutions were approved by a majority of the board of directors. The company issued shares in demat form to the investors immediately after the board meeting and as a result the shareholding of each of Piyush and Abhijit was reduced to 6% of the equity share capital. In the EGM held that same afternoon, new articles of association were adopted by the company and Piyush and Abhijit were removed from the board. The articles of association allowed all decisions to be taken by a majority vote of shareholders. Abhijit and Piyush did not attend the EGM, in protest against the recent actions of the other shareholders.

22. On August 16, 2012, JSK Law, instructed by Piyush and Abhijit wrote to BESTCO that the termination of the investment agreement, the amendments to the articles of association and the removal of the founders from the board of directors was illegal. The letter also contained an offer by the founders to purchase all the securities of the company owned by the investors at a fair market value. Legal proceedings were threatened if these actions were not immediately reversed.
23. On August 24, 2012, the founders filed an application before the Company Law Board (CLB) complaining of continuing acts of oppression and mismanagement by the majority shareholder. Rather than responding to these allegations, on September 26, 2012 each of the investors filed identical applications under s.45 of the Arbitration and Conciliation Act, 1996 seeking the referral of this dispute to arbitration. The CLB heard all the parties on October 04, 2012 and in a long and detailed decision delivered on November 05, 2012 referred the dispute to arbitration.

24. As news of the disputes between the founders and investors made front page news, there were reports of the company’s financial position worsening, employees leaving the company, customers getting more and more concerned and creditors and service partners getting nervous. By December 2012, it was clear to Arjun Iyer that there was no future for him in the company. He left flyabhi.com on December 06, 2012 to join Airavat, now a successful listed company, as its Chief Commercial & Operating Officer. He sold all the Class A equity shares that he received from the periodic exercise of his stock options to the investors. The investors now held a little over 50% of the Class A equity shares of the company. Ms Kumar and Ms Lester also resigned from the board of directors and Mr. Rane, the company’s mild mannered chartered accountant was appointed as a director of the company.

25. In February 2013, the founders appealed this decision of the CLB to the High Court. During his submissions, counsel for the appellant, sensing that the appeal may be dismissed, asked the court to consider this matter as a writ petition. In the interest of justice and to expedite the disposal of the matter, the court agreed to consider this as a writ petition. In a judgment delivered on April 11, 2014 the High Court dismissed the appeal and the writ. The founders immediately appealed this decision to the division bench of the High Court which, after hearing all parties, dismissed the writ appeal on July 04, 2014. As the decision was read out in court, counsel for the founders sought leave to appeal to the Supreme Court since there was a conflicting decision of another high court coincidentally involving Nurture, Flume and a start-up based in Bangalore and an appeal from the decision of the High Court was pending in the Supreme Court. The court allowed this oral application. On July 05, 2014, the 3 directors of flyabhi.com met in the offices of BESTCO at 0900 hrs and resolved that the business of flyabhi.com needed to be restructured. They recommended to the shareholders that the business of aircraft operation and all business connected therewith be separated from the warehouse and other land assets that the company owned. It was proposed that the aircraft business be demerged from flyabhi.com and merged into Arcot, Smith & Brown Limited, a listed NBFC with its registered office in Calcutta. The auditors of the company had suggested a share exchange ratio that was also confirmed by the auditors of Arcot, Smith & Brown and an independent merchant bank. The directors
THE COLLECTED PROBLEMS

HERBERT SMITH FREEHILLS

of flyabhi.com met again at 1400 hrs to record receipt of the letters of consent for the scheme of arrangement of (i) all the Class B equity shareholders, (ii) more than 50% of Class A shareholders and (iii) all secured and unsecured creditors. The board immediately instructed BESTCO to file the scheme of arrangement before the Allahabad High Court, Lucknow Bench.

26. On July 14, 2014, Arcot, Smith & Brown Limited began the process of seeking approval for the scheme of arrangement. On December 06, 2014, the Calcutta High Court approved the scheme. The founders challenged the scheme of arrangement before the Allahabad High Court, Lucknow Bench. On July 15, 2014, Arcot, Smith & Brown sent a notice to the founders exercising their right under s. 245 of the Companies Act. The founders immediately applied to the Allahabad High Court, Lucknow Bench to hear them before allowing the notice to take effect. Pending the disposal of the scheme of arrangement, the court allowed the founders’ application and injunctioned Arcot, Smith & Brown from taking any action pursuant to the notice or the scheme. Arcot, Smith & Brown approached the Supreme Court under Article 136 of the constitution of India against this order and although leave to appeal was granted, the injunction remained. After hearing all the parties, the Allahabad High Court approved the scheme of arrangement on April 11, 2015 but stayed the implementation of the scheme for a period of 90 days to enable the founders to appeal the decision to the Supreme Court. The appeal by the founders to the Supreme Court was heard and the injunction granted by the High Court continued until further orders.

27. The Supreme Court has now listed all matters connected with flyabhi for final hearing on all procedural and substantive issues.
2017 - Problem Nine
Author - Umakanth Varottil

Overview
Winning team
National Law Institute University, Bhopal
Vaishali Vidnod, Meher Tandon, Sakshi Rai

Runners up team
Gujarat National Law University, Gandhinagar
Ifrah Shaikh, Dhruv Malhotra, Aarathi M Krishna

Best speaker
Dhruv Malhotra
Gujarat National Law University, Gandhinagar

Best memorandum
National Law University, Delhi
Neeraj Nainani, Namita Varghese, Sanjana Ravjiani
Appeal No. 1

Stunt Organization, Inc. (Appellant) v. Stunt IndiaReal Properties Limited, (Respondents) IndiaReal Investments Limited, Roxy Investment Private Limited, Tulip Holdings Limited & The Reserve Bank of India

Appeal No. 2


1. At the turn of the century, the real estate market in India witnessed exponential growth. It has been reported that property prices in premium locations went up by 6 to 10 times between 2002 and 2013. This boom also created immense wealth for several real estate barons in India. One such is Mr. Arun Kelkar, a home-grown Mumbai business tycoon with a keen eye and successful hand in the real estate business. His projects under the banner “IndiaReal” are a top-draw among the well-heeled from Bollywood to Dalal Street. Some of his marquee multi-storeyed projects, which are by “invitation only”, were lapped up in a matter of days despite the steep (and arguably unrealistic) frenzy-driven pricing. As one can clearly imagine, Mr. Kelkar was a man of no small ambition, and sought to scale greater heights. He set his mind on building India’s tallest and finest multi-storeyed housing complex with state-of-the-art facilities that were unparalleled in the country, replete with maximum automation and reliant substantially on the “Internet of things”. For this purpose, Mr. Kelkar entered into negotiations with Mr. Farzan Ahmed, the owner of a fairly large piece of land on Carter Road, Mumbai, for an outright purchase with a view to constructing his dream project.

2. Despite his lofty aspirations, Mr. Kelkar was blessed with a virtue: he was firmly grounded to reality. He realized that in order to pull off his dream project, he needs to approach potential partners, given that a project of this nature was never attempted before in India. His thoughts went back to 2010 when he visited New York with a delegation of the Indian Chamber of Commerce. During this visit, he had a rather curious meeting with one of the most flamboyant real estate tycoons in the United States (US), Mr. Ronnie Stunt. Although Mr. Kelkar was seated next to Mr. Stunt during dinner, he was unsuccessful in having a meaningful business discussion, as Mr. Stunt dominated the conversation largely with tales about how he was most astute businessman in the world. Even when Mr. Kelkar managed to get a word in, it was about how his wife Ms. Laila Kelkar was an ardent fan of the clothing line managed by Mr. Stunt’s daughter, Urska. More than being embarrassed...
about this, Mr. Kelkar berated himself about the lost opportunity of having initiated possible business collaborations with Mr. Stunt’s organization, which clearly carried huge brand value not just in the US, but also around the world. Mr. Kelkar was determined to rectify the situation now.

3. In early 2012, Mr. Kelkar contacted Mr. Ronnie Stunt enquiring whether his Stunt Organization, Inc. would be interested in collaborating with him for a potential real estate development project in India. During a telephonic conversation, Mr. Stunt seemed rather distracted and mumbled something about his “presidential ambitions” and that, much as he admired India and its people, he did not have the time for Mr. Kelkar. Fortunately for Mr. Kelkar though, Mr. Stunt referred him to Ms. Joanne Kellaway, the international business development manager for the Stunt Organization. Unlike Mr. Stunt, who seemed to lack patience, Ms. Kellaway immediately delved into the nitty gritty of the proposed Carter Road project and demonstrated keen interest in Stunt Organization’s participation in the project. In a few days, she flew down to India with a team of managers and also external lawyers and accountants to conduct due diligence and to explore possible ways to structure a collaboration.
4. After several days of negotiations, a deal was struck between Stunt Organization, Inc. (SOI) and IndiaReal Investments Limited (IIL), Mr. Kelkar’s investment holding company (which he held jointly with his wife, Laila, with seven other family members holding a negligible stake). Pursuant to discussions, Mr. Kelkar incorporated a company in Mumbai by the name of Stunt IndiaReal Properties Limited (SIPL). The main object of SIPL was to “develop residential and commercial real estate and construction projects in the Greater Mumbai Metropolitan Region”. SIPL was capitalized such that the SOI held 49% shares, while IIL held 51% shares. Of the 51% shares held by IIL, five shares were held by certain Kelkar family members as nominees for IIL. In order to obtain the 49% shares, SOI invested Rs. 490 crores with an issue price of Rs. 1,000 per share. IIL’s shares in SIPL were issued at a much lower price of Rs. 100 per share in recognition of the local expertise that Mr. Kelkar would bring into the project. SOI’s investment into SIPL was made in compliance with policies relating to foreign direct investment (FDI) in India, and the Carter Road project met with all the conditions required for FDI, about which there is no doubt.

5. Prior to so capitalizing SIPL, a joint venture agreement (JVA) was entered into on 18 August 2012 between SOI, IIL and SIPL in order to formalize the arrangements between the parties. Note, however, that due to some discrepancies that were subsequently discovered in the signature of Mr. Kelkar (signing on behalf of IIL) on certain pages of the JVA, the entire JVA was re-executed on 4 October 2013, merely by way of abundant caution. On 25 August 2012, SOI and IIL made their respective investments such that SIPL was fully capitalized. Under the JVA, the board of directors of SIPL was to consist of three nominees of IIL and two nominees of SOI. IIL nominated Mr. Arun Kelkar, Ms. Laila Kelkar and their personal tax advisor Mr. Shekhar Gandhi. SOI nominated Ms. Kellaway and its Asia business head, Mr. Stan Cannon. Some of the key terms and conditions of the JVA are contained in Annex A. The specific terms and conditions of the JVA were not incorporated into the articles of association of SIPL, which adopted Table A of the Companies Act, 1956, and thereafter Table F of the Companies Act, 2013. On 18 August 2012, along with the execution of the JVA, SOI also entered into a royalty agreement with SIPL by which SIPL was granted a non-exclusive licence to use the word “Stunt” in connection with the Carter Road property. In consideration for such a licence, SIPL was to pay a royalty of 5% of its net profits (after tax) to SOI once the property was fully developed. This was particularly important for SIPL since the Carter Road project was proposed to be marketed as “Stunt Kala”.
6. On 31 August 2012, SIPL entered into an Agreement for Sale with Farzan Ahmad for purchase of the Carter Road property upon which “Stunt Kala” was to be built. Under the terms of the Agreement for Sale, Farzan Ahmad agreed to transfer the Carter Road property to SIPL at a price of Rs. 400 crores. The execution of the sale deed and registration of the sale was subject to the satisfaction of certain conditions precedent, including obtaining the permission of the Brihanmumbai Municipal Corporation (BMC) for use of the land for construction of a housing complex. Under the terms of the Agreement for Sale, Farzan Ahmad carried the primary responsibility for obtaining the permission of the BMC. Accordingly, he made an application to BMC in the requisite format and provided all the necessary information.

7. In the meanwhile, planning was underway between SOI and Mr. Kelkar for development of the Carter Road property. They engaged ERP Consultants, a reputed architectural firm based in Singapore, for drawing up a plan for the building. Similarly, other consultants too were engaged for this purpose. SOI, as a significant investor in SIPL and a substantial contributor to the project, sent in a team of surveyors and engineers to study the property and the building plans. On 4 December 2012, SIPL entered into a services contract with Cya Consulting Services Limited, a leading information technology (IT) company promoted by the well-known Cya Group. Under this contract, Cya was to provide a suite of IT services, both hardware and software, to bring alive the automation aspects of the “Stunt Kala” project that distinguishes it from other projects around the country. Under this contract, SIPL paid Cya an advance of Rs. 25 crores.

8. Despite all these preparations and the excitement surrounding the Carter Road project, some amount of frustration began creeping in at a pretty early stage. For months together, Mr. Ahmed undertook constant efforts to obtain the requisite permission of the BMC to proceed with the project and the sale of the Carter Road property to SIPL. However, no progress was forthcoming. The officials of BMC appeared to be in no mood to grant their permission to the project. Mr. Kelkar too accompanied Mr. Ahmed for several meetings with BMC officials, but to no avail. At the same time, the officials of SOI at its Manhattan headquarters began to get hot under the collar. They were running out of patience. Much to their dismay, the project got considerably delayed. Mr. Kelkar too began seeing his dreams go up in smoke. Added to this was the considerable negative press the project began receiving, which had a major impact in terms of a downturn in the enquiries from prospective customers.

9. In order to keep SOI at bay, at least temporarily, Mr. Kelkar decided that it might be better for SIPL to waive the condition precedent (of obtaining BMC permission) under the agreement for sale with Mr. Farzan Ahmed. At least if SIPL has ownership of the property, it could have some value, and could take over pursuit of the BMC permission process directly instead of
approaching it through Mr. Farzan. After consultation with SOI officials, the board of SIPL decided unanimously to waive the condition under the agreement of sale. On 10 July 2014, a sale deed was executed and the property was acquired by SIPL from Mr. Farzan Ahmed, and it was registered in the name of SIPL. In turn, SIPL made payment of 90% of the consideration, with the balance being held back in escrow until BMC permission was obtained. However, this transaction only brought some temporary optical reprieve. BMC remained unmoved, and hence project implementation could not be commenced.

10. At this stage, Mr. Kelkar decided that he needed to take immediate steps to salvage the situation. Any further delays could only erode his investment in SIPL. Moreover, it would also cause further damage to his already straining relationship with SOI. He decided that it might be preferable for IIL and SOI to liquidate their investments in the Carter Road property. Unbeknown to SOI, Mr. Kelkar began scouting for potential buyers of the Carter Road property. After making enquiries among his social circles in Mumbai, he was able to spark some interest in Mr. Ralph Mendonza, a hotelier from Goa with a bank of hotel properties in leading tourist hotspots in the tiny state. Mr. Mendonza had earlier eyed the Carter Road property, but was unable to snatch it before Mr. Kelkar, who demonstrated an early mover advantage. Mr. Mendonza, with his persuasive abilities and proximity to the corridors of power, was confident of swinging the BMC permission in his favour, and was therefore keen to take over the property. Despite an increase in property prices in the Carter Road area over the previous 2 to 3 years, Mr. Mendonza made his final offer at Rs. 400 crores due to the difficulties with obtaining BMC permission. Moreover, Mr. Mendonza imposed only one significant condition in that, rather than acquire the Carter Road property from SIPL, he would like to acquire the entire share capital of SIPL from its current shareholders. These shares, he proposed, would be acquired by Roxy Investment Private Limited (Roxy), his personal investment holding company.

11. On 26 August 2015, IIL issued a “Sale Notice” to SOI under section 8.5(b) of the JVA indicating its intention to sell its entire 51% shares in SIPL to Roxy at a price of Rs. 400 per share. The Sale Notice also contained the requisite particulars required by the said provision of the JVA. SOI was not at all surprised to receive the Sale Notice. In fact, SOI were themselves considering ways of exiting from the SIPL investment, and the Sale Notice came as a welcome measure. On 4 September 2015, SOI responded to the Sale Notice by indicating to IIL of its intention to exercise the Tag Along Rights under the JVA. Of course, SOI would be taking a straight 60% loss on its investment, but that was preferable to holding on to an investment that was rapidly deteriorating in value. Early action was better than no action. In any event, notwithstanding Mr. Stunt’s boastful talk about his business acumen, SOI is not a stranger to failed business ventures and bankruptcies.
12. While things appeared to be moving along smoothly towards a sale of shares of SPIL held by IIL and SOI to Roxy, it was Mr. Mendonza’s trusted accountant who put a spoke in the wheel. He advised Mr. Mendonza to conduct a valuation of SPIL before proceeding with the acquisition, for which purpose KC Jargon, a leading global investment bank, with a specialization in real estate business, was appointed. KC Jargon’s valuation, based on a combination of discounted cash flow, book value and other commonly recognized methods, ascribed a value of no more than Rs. 200 per share of SPIL. Based on the advice received from his accountant, Mr. Mendonza was willing to buy shares held by IIL at Rs. 400 per share and those held by SOI at Rs. 200 per share. This was completely unacceptable to SOI as it was inconsistent with the terms of the JVA. However, Mr. Mendonza explained that his hands were tied and that he was unable to pay SOI more than Rs. 200 per share without obtaining the prior approval of the Reserve Bank of India (RBI). He insisted that SOI obtain RBI approval for the sale at Rs. 400 per share. On 8 October 2015, SOI made an application to the RBI seeking permission for a sale of its shares at Rs. 400 per share. On 15 November 2015, SOI received a letter from the RBI rejecting its application, and refusing to accord its approval for the sale of the shares at any price beyond that arrived at by an appropriate chartered accountant or investment banker.

13. In the meanwhile, the shrewd businessman that he is, Mr. Mendonza decided to go ahead and acquire IIL’s shares first, so as to obtain control of the company. On 30 November 2015, IIL transferred its shares in SIPL to Roxy at a price of Rs. 400 per share. At a full board meeting held the same day, the shares were duly registered in the name of Roxy despite the vociferous protestations of SOI’s nominee directors who were present at the meeting. At the same meeting, three nominees of Mr. Mendonza were appointed to the board of SIPL, immediately after which the IIL nominees resigned. Mr. Kelkar himself felt victimized because while he was willing to fulfill his contractual obligations under the JVA, his hands were tied due to regulatory issues as opposed to his own failures. Mr. Mendonza continued to extend an olive branch to SOI by still offering to buy their shares at Rs. 200 per share, and warning them that they are unlikely to get a better deal due to regulatory problems, if not for anything else. But, SOI was incensed by this turn of events, and decided to consult their lawyers to prevent further damage.

14. It was indeed well-known that Mr. Mendonza had a strong presence in Macau as he owned the Tulip Casino through his company Tulip Holdings Limited (THL) incorporated there. SOI’s lawyers advised that the transaction may be structured offshore such that SOI’s 49% shares in SIPL be purchased by THL at the equivalent of Rs. 400 per share. However, Mr. Mendonza flatly refused to discuss this proposal any further, as it had
adverse tax and regulatory implications to him, although he refused to elaborate on those implications despite repeated quizzing by SOI’s lawyers. SOI’s lawyers suspect, although they do not have sufficient proof, that THL may be a front for laundering the money belonging to certain crime syndicates operating from Goa, and hence Mr. Mendonza’s hesitation to involve THL in the purchase of SIPL shares. Out of the goodness of his heart, Mr. Kelkar too tried to intervene to persuade Mr. Mendonza to acquire the shares through THL, but was unsuccessful. Mr. Mendonza insisted that he would only buy the shares through Roxy, or not at all. After all, he could afford to dictate terms as he had SOI wrapped around his little finger by enjoying majority control over SIPL.

15. In January 2016, SOI initiated a civil suit in the original side of the Bombay High Court against IIL and Roxy. SOI sought for a direction from the Court against Roxy, or alternatively THL, compelling it to purchase SOI’s shares in SIPL at a price of Rs. 400 per share. In the alternative, it sought damages to the tune of Rs. 196 crores against IIL for breaching the JVA. These claims were vehemently denied by IIL and Roxy. While the case was being heard, the RBI impleaded itself as a party and argued against grant of relief to SOI as it would be contrary to the laws of India. A single judge of the Bombay High court denied relief to SOI. On appeal, a division bench of the same court affirmed the decision of the single judge. Against this, SOI preferred an appeal to the Supreme Court, which has been admitted as Appeal No. 1.
16. While the aforesaid litigation was underway, on the advice of their lawyers and with their assistance, SOI began investigating deeper into the affairs of SIPL. To their sheer surprise, they were also approached by Mr. Shekhar Gandhi who could not bear to witness SOI's dismal state of affairs with their SIPL investment. Considering himself to be a whistle-blower and in order to keep his own conscience intact, although at the risk of being labelled a turncoat and a traitor by Mr. Kelkar, he spilled the beans to SOI and their lawyers regarding certain previous occurrences in SIPL. He drew the attention of Ms. Joanne Kellaway and Mr. Stan Cannon to a board meeting way back on 16 August 2014 wherein Mr. Kelkar laid before the board a possible acquisition by SIPL of a piece of property adjacent to the Carter Road property that could potentially constitute an annex to the main property and could house a bunch of small villas. Mr. Kelkar also mentioned that unlike the main property, the annex for the villa project had all the necessary approvals from BMC, and hence the construction could be commenced almost immediately upon acquisition. Joanne and Stan vividly remember the discussion at the board meeting where they questioned the need for SIPL to invest in the annex when the main project itself was in peril, with uncertainty as to its future as well as timing. Hence, the board had unanimously decided not to take up the villa project. However, what was unknown to SOI and its nominee directors was that the land for the proposed annex was immediately thereafter acquired by Kelkar Developments Private Limited (KDPL), a company established and co-owned entirely by Mr. Arun Kelkar and Ms. Laila Kelkar. KDPL was able to obtain a significant loan from a bank for acquiring the land for the proposed villa project. It began construction of the villa project in early 2015, which was an instant success, with all the villas being bought at a huge premium by elite customers. The villas were also able to command a significant premium due to its proximity to the potential, but promising, new development in the form of “Stunt Kala”. At present, KDPL is said to have earned profits of about Rs. 75 crores. Even though the Kelkars were not bound by any non-compete clause in the JVA, SOI felt cheated by this new relegation.

17. Mr. Gandhi came up with another stunning expose: it was that Ms. Laila Kelkar held 10% shares in Cya, which was providing IT services to SIPL for the Stunt Kala project. The Kelkars had not mentioned a word about this to SOI or to its nominee directors on SIPL. At the same time, it is true that the contract between SIPL and Cya, under which Cya was also paid a hefty advance, was placed before and approved by the board of SIPL, but not before stoking some level of controversy. Joanne and Stan were rather sceptical about Cya’s abilities to undertake and successfully complete a sophisticated IT contract of the nature required for the “Stunt Kala” project, and they had sought more information and assurances about Cya, which were not forthcoming. Hence, while the contract with Cya was approved by SIPL's board, it was not a unanimous decision, with Joanne and Stan deciding to abstain from voting rather than to put their seal of approval to a
proposal that was accompanied with half-baked information. Similarly, when the proposal to enter into a contract with Cya was placed before the shareholders’ meeting of SIPL, SOI abstained from voting. Nevertheless, the contract with Cya was approved by the requisite majority of the board and shareholders of SIPL in spite of SOI’s and their nominees’ abstention.

18. SOI’s lawyers were also able to ascertain from Mr. Gandhi that IIL was starved of funds back in 2012 and was barely able to purchase its shares in SIPL pursuant to the terms of the JVA. It was Mr. Gandhi who arranged for a bridge funding of Rs. 30 crores from a non-banking finance company (NBFC) owned by Mr. Harshadbhai Patel, a Dalal Street operator. The funding was provided by the NBFC to IIL on 20 August 2012. Soon after IIL made the investment in SIPL, it began defaulting on the rather hefty interest it owed to Mr. Patel’s NBFC. This was turning out to be somewhat of an embarrassment to Mr. Kelkar, who was keen to maintain a stellar reputation in the financial markets which provided most of the clientele for his projects. Hence, with the assistance of his wife, who held a significant shareholding in Cya, he persuaded Cya to pay the Rs. 25 crores it received as an advance from SIPL, as a loan to IIL ( repayable over a three-year period). The loan was disbursed by Cya to IIL on 14 January 2013, which was in turn used to pay back an equivalent amount of the amount borrowed from Mr. Patel’s NBFC. Since then, IIL has honoured all its commitments relating to payments due to Mr. Patel’s NBFC as well as to Cya. Finally, once IIL liquidated its holdings in favour of Roxy in November 2015, it repaid all its financial obligations owed to Mr. Patel’s NBFC as well as to Cya, none of which now remains outstanding.

19. When Mr. Ronnie Stunt was briefed on the goings on with relation to SIPL and the “Stunt Kala” project, he was apoplectic with rage. He is known not to be taken for granted in his business dealings. Deprived of sleep upon hearing the bad news from India, he unleashed a tweet-storm in the wee hours of the next morning from his Manhattan penthouse brooding to his 15 million followers on Twitter. The Kelkars and Mr. Mendonza were at the receiving end, earning monikers such as “Krooked Kelkar”, “Lyin’ Laila”, “nasty woman” and “bad hombre Mendonza”. Known for being trigger-happy when it comes to litigation, he immediately instructed his managers to “sue the hell out of” the fraudsters in India.
20. Accordingly, in January 2016, SOI filed a civil suit in the original side of the Bombay High Court against various parties and for various causes as follows:

a. SOI alleged that Mr. Arun Kelkar and Ms. Laila Kelkar had breached their duties as directors of SIPL by establishing KDPL and earning profits therein, and sought that all profits received by KDPL be paid over to SIPL, or alternatively be held in trust for SIPL;

b. SOI sought to treat the contract entered into between SIPL and Cya as void, and for Cya to hand over all monies received under the contract back to SIPL; and

c. SOI sought to invalidate the issue of shares by SIPL to IIL on 25 August 2012, as being in violation of applicable laws. This SOI did so as a measure of last resort in order to ensure that, if successful on this count, it will be able to wrest full control over SIPL from Mendonza.

21. The defendants in the above suit vehemently resisted SOI’s claims, including on the ground that SOI was not acting in the interests of SIPL, but rather in their own interests. Moreover, Mr. Stunt’s conduct of publicizing the events had the effect of defaming the Kelkars and Mr. Mendonza, and tarnishing their reputation, due to which their business activities have been adversely affected. Although a single judge of the Bombay High Court granted leave to SOI to bring the suit, she heard it on merits and denied relief to SOI. On appeal, a division bench of the same court affirmed the decision of the single judge. Against this, SOI preferred an appeal to the Supreme Court, which has been admitted as Appeal No. 2.

22. Appeal Nos. 1 and 2 are being heard together by the Supreme Court.
Annex A
Extracts from the Joint Venture Agreement
dated 18 August 2012

8.5 SOI Tag-Along Rights

(a) In the event that IIL proposes to transfer the shares held by it or a part thereof (the IIL Sale Shares) to a third party in one or more transactions, SOI shall have pro-rata tag-along rights, exercisable at its sole discretion, to participate in such Transfer, in the manner specified in Section 8.5(b) below (Tag Along Rights).

(b) Upon identifying a third party to acquire Shares held by them or any part thereof (the Purchaser), IIL shall communicate the same to SOI setting out the following details in relation to the third party’s offer (the Sale Notice):
   (i) price per Share;
   (ii) number of Shares proposed to be Transferred (the Offered Shares);
   (iii) identity and material particulars regarding the Purchaser; and
   (iv) material terms and conditions for the proposed Transfer.

SOI shall, within a period of 30 (thirty) days from the date of receipt of the Sale Notice, be entitled to exercise its Tag Along Rights and offer Shares held by it (the Tag Along Shares) pro rata to the Shares proposed to be Transferred by IIL to the Purchaser. The Transfer of the IIL Sale Shares to the Purchaser shall be conditional upon such Purchaser acquiring the Shares offered by SOI in exercise of its Tag Along Rights on terms no less favourable than those offered by such third party to IIL. SOI shall be paid the same price per Tag Along Share and the sale shall be effected on terms no less favourable as are received by IIL.

(c) IIL shall not complete the sale of any of its Shares unless the Purchaser has purchased the Tag Along Shares (pursuant to sub-section (b) above) in accordance with the provisions of this Section 8.2. In the event that the sale of the Tag Along Shares in accordance with the provisions of this Section 8.2 is not permissible for regulatory reasons, IIL shall work with SOI in good faith to arrive at an appropriate solution such that the provisions of this Section 8.2 shall be given full effect.

(d) The provisions of this Section 8.5 shall apply so long as SOI owns at least 25% of the Share Capital of the Company.
2018 - Problem Ten

Author - Umakanth Varottil

Overview
At the time of publication, the Tenth NUJS-HSF National Corporate Law Moot Court Competition has yet to take place.
1. Mr. Ramanna Gowda’s family has been a doyen of the silk industry in South India for decades. Hailing from Ramanagara, a town outside Bangalore and famous for its sericulture, the Gowda family have established themselves as the leading private player in the design, manufacturing and marketing of the Mysore silk apparel. In 1990, Ramanna took charge of the business upon the death of his father. He then decided to institutionalize the business, which was more or less run loosely until then. He was ably assisted by his two children, Mr. Sagar Gowda and Ms. Vinodini Gowda. Being the older between the two, Sagar completed a degree in textile design from the University of Minnesota. At the time, Vinodini was pursuing her MBA from the University of Melbourne, from which she later graduated.

2. Soon after the death of his father, Ramanna established a partnership firm M/s. New Town Silks in which each of he and his children were equal partners. Relying upon Ramanna’s vast understanding of the business and industry and the qualifications and international experience of his children, the business began flourishing. The designs developed by New Town Silks and the products it manufactured witnessed significant demand domestically and from overseas. The silk apparel designed and manufactured by New Town Silks was sold in nearly 15 countries with the annual revenue in the 1990s averaging Rs. 25 crores.

3. Around 1998, the Gowda family decided on a massive expansion plan given the growth in the business of the firm and the rising popularity of Mysore silks around the world. They intended to establish a state-of-the-art design studio in Bangalore to design silk apparel, and also a hi-tech manufacturing facility in Channapatna, a town located in the silk belt outside of Bangalore. It was clear that, despite their success, the family needed outside funding support to embark on their ambitious plans. They contacted Mr. Basavaraju, a senior director with the National Bank of Mysore (NBM), who was also a close friend and confidante of the Gowda family. Being well-versed in financial matters relating to manufacturing enterprises, Mr. Basavaraju offered to arrange for bank loans through
NBM. But, he also strongly advised the family to approach a well-known equity investor (such a private equity fund), which will not only make an equity investment in the company, but would also support the venture and its business through its expertise and business contacts at the international level. This sparked considerable interest in the younger Gowdas who were keen to involve an international investor. Consequently, Mr. Basavaraju introduced the Gowda family to Mr. Krishnan Iyer, a veteran in the private equity industry in Singapore, who was the managing director of Twenty Point Partners Private Limited, a leading Asia-focused private equity firm with specialization in the textile industry.

4. After several rounds of discussions, Krishnan demonstrated a keen interest in the business of New Town Silks and was keen to take the funding proposal forward. Twenty Point’s analysts conducted a business due diligence, which valued New Town Silks’ business at about Rs. 100 crores. However, Twenty Point’s lawyers advised that the organizational structure of New Town, a partnership firm, was inappropriate for a private equity investment. Twenty Point and its lawyers drew up a reorganization plan which involved the migration of the existing business of New Town into a two-tier corporate structure. Accordingly, the Gowda family established two companies, namely New Town Designs Limited and Mysore Jasmine Silk Manufacturing Limited. Being the parent company, New Town was owned initially by Ramanna (80%), Sagar (10%) and Vinodini (10%) either by themselves or their respective nominees. Mysore Jasmine was established as a wholly owned subsidiary of New Town, with six shares held by six nominees each. This structure was necessitated on account of Twenty Point’s proposal. Twenty Point was keen to ensure that the design studio and the manufacturing facility were kept as separate businesses housed in different entities. This would provide greater flexibility not only in attracting further investments in each business separately, if required, but also for easy exits for the investors.

5. After some negotiations between the parties, the Gowda family, Twenty Point, New Town and Mysore Jasmine entered into an Investment Agreement on May 9, 2000, by which Twenty Point agreed to take up a 5% stake in New Town for an aggregate sum of Rs. 5 crores. The key terms of the Investment Agreement are set out in Annex A. All the terms set out in Annex A were also appropriately incorporated into the articles of association of New Town and Mysore Jasmine respectively, except that the section pertaining to "Dispute Resolution" was incorporated in the articles of association of New Town but not Mysore Jasmine. Other than these provisions, the articles of the company followed Table A of Schedule I of the Companies Act, 1956. After the necessary regulatory approvals were obtained, Twenty Point made its investment in New Town on July 15, 2000 and it became a 5% shareholder of the company. Due to some minor rearrangement of shareholdings in the Gowda family that was undertaken prior to Twenty Point’s investment, the resultant shareholding was held by
Ramanna (75%), Sagar (10%), Vinodini (10%) and Twenty Point (5%). The company had only one class of shares, namely equity shares. While Ramanna was appointed the executive chairman of both companies, Sagar and Vinodini were both appointed executive directors. Sagar oversaw the operations while Vinodini managed finance and marketing.

6. The idea behind bringing Twenty Point into the Gowda ventures was not merely financial. As is evident, the amount infused by Twenty Point was not immensely significant. On the other hand, it is their expertise and network within the textile industry and, more specifically, silk business that was the main attraction for the Gowdas to bring them in. Soon, with the help of Twenty Point, the Gowdas managed to obtain connections and make inroads into the fashion industry in Paris, Milan, London and New York and acquire direct access to haute couture houses in those fashion capitals. Through this expansion, New Town and Mysore Jasmine began attracting significant business. As for further financial inputs, Mysore Jasmine obtained a loan of Rs. 25 crores for setting up the manufacturing facility in Channapatna. The loan was secured by a fixed charge over the land and other property situated on the facility, and also by a floating charge on the raw materials, inventory and book debts.

7. Over the next five years, the two companies witnessed a steady growth trajectory and they became major players in the fashion industry in the world, both for design and manufacturing of silk fabrics. Accompanying this astronomical growth was the need for further capital for expansion. The Gowdas began contemplating various options for raising capital. They obtained the advice of PeerCap Advisors Limited, an Indian leading investment bank. PeerCap recommended that Mysore Jasmine embark upon an initial public offering (IPO), especially given that most of the capital needs were for that company. Accordingly, Mysore Jasmine appointed various advisors who began conducting due diligence and drafting the red herring prospectus. After obtaining the necessary clearance from the Securities and Exchange Board of India (SEBI), Mysore Jasmine successfully concluded its IPO in December 2005 raising Rs. 300 crores for the issue of 25% shares to the public on a post-diluted basis. As part of the governance overhaul for the IPO, Mysore Jasmine appointed on its board four more directors who were independent of management and the promoters of the company. It was decided that Ramanna will continue as the chairman of Mysore Jasmine.
8. During the years in the lead up to the IPO and thereafter, Ramanna and Krishnan began developing a close professional bond. Ramanna sought Krishnan's counsel on all important matters relating to the business of both New Town and Mysore Jasmine. After all, it was the resources that Krishnan put behind Twenty Point's investment that led to the opening of various doors for Gowda's businesses that then thrived. In fact, Krishnan too had strongly recommended that Mysore Jasmine be taken public. He did so even at the cost of Twenty Point not being able to exit in the IPO, given that Twenty Point's investment was in the parent company, i.e., New Town. Krishnan believed in the overall growth prospects of both companies that would lead to higher returns in the future. He reposed immense faith and trust in the abilities of the Gowdas to use their lead in the design, manufacture and export of Mysore silks to be able to gain greater glory. The Gowdas in turn reciprocated through their hard work and dedication, and steered the company towards greater success in the following years. Mysore Jasmine also became a stock market darling, and its stock price skyrocketed over a period of time. Additional facilities were established in Kanchipuram in Tamil Nadu and in Varanasi in Uttar Pradesh to manufacture and export the local specialty silk apparels from those regions, thereby expanding the company's business beyond Mysore silks. These expansion efforts were just about enough to meet the growing demand, especially from the Indian diasporic communities around the world. Ramanna was a satisfied man, and was especially proud of what his children had helped him attain. He even wrote a will bequeathing all his property equally between Sagar and Vinodini.

9. As the business of the two companies grew, Sagar and Vinodini shot into prominence more widely in the Indian industrial scene. Sagar became the chairman of the Textile Manufacturers' Association of India and Vinodini the chairman of the Federation of Industrial Commerce. They were also quite popular in the speaking circuit and were involved in a great deal of philanthropic and charitable efforts. Sagar got married to Ms. Sowjanya, who is the daughter of a longstanding politician and Member of Parliament from Mandya, Mr. Siddappa.

10. While the children were on the ascendancy, the father's interests in business affairs started waning. By 2010, he contemplated plans for semi-retirement, principally because he reposed complete faith and confidence in the abilities of Sagar and Vinodini to not only maintain the business, but also take it to a new level altogether. He expressed his intention to scale down his involvement, and wanted to alter his formal position in Mysore Jasmine to that of a non-executive chairman. During the annual general meeting of that company in 2010, a resolution was passed by the shareholders of the company to modify Ramanna's position from that of executive chairman to non-executive chairman. From that year, Ramanna began to fulfill his dream of travelling with his wife to various exotic destinations around the world. He would spend considerable
amounts of time away from the affairs of the company, but he always arranged his itinerary such that he was present for the periodic board and shareholders’ meetings of both New Town as well as Mysore Jasmine.

11. Even during his stay in Bangalore, he spent fixed hours on company matters, and vowed never to work after office hours. He was available in the company offices from 11am to 6pm, and was known to spend his evenings at the President’s Club. Arising from his trip to Scotland, he had taken a liking to single malt whiskey. Fueling this habit further was Krishnan’s initiation of Ramanna to additional and more prominent varieties of the beverage from Japan and Taiwan. One cannot deny that Ramanna’s newly acquired habit had some tangential impact on his professional attitude. For example, he refused to attend important customer meetings on a couple of occasions when they could be scheduled only in the evenings. One time, Sagar had no option but to arrange for a meeting between Ramanna and a customer from Milan at the President’s Club during the evening hours over some single malt, wherein Ramanna’s inebriated demeanour can only be said to have been somewhat beneath acceptable levels of decorum. Although none of these had any adverse impact on the business transactions or even prospects of the companies, these incidents considerably embarrassed Sagar and Vinodini.

12. These were the first signs of some rumblings within the family. Although Sagar and Vinodini hitherto constantly obtained Ramanna’s blessings on all key decisions involving both the companies, they now began to embark upon various efforts on their own. At most, they reported these decisions to Ramanna, either at board meetings or privately. Oddly enough, Ramanna did not initially react to this change of attitude given his own decreasing interest in the affairs of the companies. While there was some friction between the father and the children at a professional level, it had not penetrated to the personal domain as they continued to enjoy the normal filial bonding. They lived together, as they always did, as a joint family in their common villa in an exclusive enclave in Bangalore that they purchased about a decade ago.

13. It was in early 2012 that Ramanna contemplated further distancing himself from the affairs of New Town and Mysore Jasmine. This was driven partially by his realization that he was turning out to be hindrance to the business and his children’s fortunes than adding much value. He decided to gift his shares in New Town to his children in equal proportion, and to step down from any formal position in the companies. It was during a round of drinks at the President’s Club with Krishnan that his plans received some refinements. Krishnan strongly counseled Ramanna against exiting fully from the company. On October 29, 2012, Ramanna gifted 72% shares in New Town to Sagar and Vinodini, with each of them obtaining
36%. The transfer of these shares was duly registered in the books of New Town on the same day. Relying upon Krishnan’s counsel, Ramanna decided to continue with his position as a director and chairman (albeit now in a non-executive capacity) on New Town, largely so that he could continue to oversee major decision-making at the parent company level, although he was not to be involved in the day-to-day affairs of the company.

14. However, Ramanna decided to relinquish his directorship in Mysore Jasmine. Accordingly, Sagar was appointed as the chairman of Mysore Jasmine. Largely owing to sentimental reasons, Ramanna was conferred the title of Mentor-in-Chief in Mysore Jasmine, and was also given access to an office in the company premises. Ramanna continued to occasionally visit various facilities of Mysore Jasmine and meet the employees, with whom he was extremely popular as he was considered a father figure. He is also known to have helped several employees out of his personal funds to meet dire financial needs such as emergency medical treatment for family members. He also arranged to distribute (again from his personal funds) a box of sweets and a new pair of silk clothing to each employee for Ugadi, the local new year festival. Ramanna, however, decided to maintain his position as a non-executive chairman of New Town so that he could continue to oversee major decision-making at the parent company level, although he was not to be involved in the day-to-day affairs of the company.

15. Trouble began brewing in May 2014 when Sagar and Vinodini placed a proposal before the board of Mysore Jasmine to commence the business of a silk exchange. Being in the nature of a commodities exchange, the business would involve allowing traders to deal in silk fabric and silk products on the exchange. The plan was to permit all types of futures, options and derivatives in silk to the extent permitted by the law. An added attraction of the exchange was that payments could be accepted by way of cryptocurrencies such as bitcoins, to the extent that they were not illegal. This business of “Silxchange” was the brainwave of Vinodini, who roped in her classmate from Melbourne, Mr. Raj Mathur, to spearhead the effort. As soon as a board meeting was convened for May 22, 2014 with the Silxchange item on the agenda, Krishnan telephoned Vinodini and expressed his displeasure regarding this development. He was of the strong opinion that this business was rather risky, and that he would not vote in favour of this proposal at the board meeting given his fiduciary commitments as a director of Mysore Jasmine. He also immediately contacted Ramanna to vent his feelings, only to realize Ramanna’s shock as he had not been privy at all to any of the discussions regarding the proposal. It appears that Sagar and Vinodini deliberately decided to keep Ramanna out of the picture.

16. Nevertheless, the proposal was put before the board of Mysore Jasmine, and was passed by the affirmative vote of all the directors, except Krishnan, whose fervent dissent was recorded in the minutes of the meeting. The discussion on the Silxchange proposal lasted exactly
20 minutes, which included a presentation by Raj. No members of the board except for Krishnan asked any questions or raised objections. Later in the year, Silxchange Limited was established as a wholly owned subsidiary of Mysore Jasmine, and Raj was appointed as its CEO, and Sagar and Vinodini as its other directors. Mysore Jasmine invested Rs. 50 crores in the share capital of Silxchange Limited.

17. True to Krishnan’s apprehensions, Silxchange had a rocky start. It encountered several regulatory and operational issues in its first year of operation, including a technical glitch that halted trading for four days, an inordinately long period of time in the business. This severely damaged the reputation of Silxchange. Moreover, in December 2015, one of the traders of futures in silk defaulted to the tune of Rs. 75 crores, which triggered panic and consternation among all the traders on Silxchange. Upon further scrutiny, it was found that several members had falsified their books of account and inventories, thereby leading to fraudulent trading on Silxchange. All of these led to investigation by SEBI which, on February 18, 2016, ordered a stop on trading on Silxchange. SEBI also passed an order against all directors of Silxchange from participating in the commodities markets or the securities markets.

18. During SEBI’s investigation, it was also found that Vinodini had, while discussing the proposal to set up Silxchange, received an anonymous letter purportedly from a member of his finance team that Raj had previously been the CEO of a derivatives company in Australia, and that proceedings (including criminal actions) were pending against him in that country for having defrauded certain derivatives traders on transactions undertaken by the derivatives company. Vinodini confronted Raj with this information, but Raj brushed it aside as being utterly false and maintaining that this may have been instigated by someone who wants to keep Raj out of Silxchange. Taking Raj’s word for it, Vinodini did not pursue the matter any further and did not consider it significant enough (especially as it was uncorroborated) to bring it to the attention of the board of Mysore Jasmine. It turns out subsequently that Raj had some regulatory actions pending against him, although they did not involve criminal proceedings.

19. With this, the Gowdas suffered a deadly blow as their reputation took an instant beating. Some of the traders who were affected on Silxchange were also customers of New Town and Mysore Jasmine, and they refused to conduct any further business with these companies. All of these had a material impact on the topline of the two companies. Moreover, Mysore Jasmine had to infuse an additional amount of Rs. 25 crores into Silxchange Limited to meet some immediate financial obligations. However, this was still insufficient to address all the financial issues that now confronted Silxchange.
20. Sometime during May 2016, Mysore Jasmine’s problems were compounded. It received legal notice from a consumer association in the United States (US). It was found that the silk fabric in a particular batch of textiles that was exported by Mysore Jasmine to the US contained a chemical that caused severe rashes on wearers of such apparel. Some of them required emergency treatment and hospitalization that required them to expend considerable sums of money. In addition, they suffered severe physical and mental trauma, for which they demanded to be appropriately compensated. Eventually, a couple of months later, several of the victims appointed legal counsel in India and filed civil suits against Mysore Jasmine in courts of appropriate jurisdiction for claims totaling Rs. 500 crores. These developments affected the company’s prospects in a significant manner. There was a considerable fall in the business and orders placed for the silk fabrics manufactured by Mysore Jasmine. Individual customers, retail chains and fashion houses grew wary of the company’s products and wanted to steer clear of any potential liabilities out of selling the silk fabrics. By way of a domino reaction, the stock price of the company catapulted to about 30% of its price from a year ago, as investors began fleeing the counter. The telephones of Sagar and Vinodini did not stop ringing as they were pestered for comments and reassurances from customers, investors and the pesky business media. Moreover, the relevant regulatory authorities commenced investigation and inspection of various manufacturing facilities belonging to Mysore Jasmine.

21. Soon after the chemical contamination scandal broke out, Mr. Shailesh Bhat, the chairman of the audit committee, ordered an internal investigation into the matter. It transpired that the silk fabrics in question were in fact manufactured by Ranganatha Silks Limited, a company that was owned by Siddappa and his family. Around May 2013, Mysore Jasmine entered into a contract manufacturing arrangement with Ranganatha Silks. This was because Mysore Jasmine was unable to meet the prevailing export demands, and needed additional manufacturing capacity. The investigation uncovered the root cause of the defects. Ranganatha Silks utilized sub-standard chemicals in the silk dyeing process. The chemical component (locally sourced) was available at a quarter of the cost of the chemical (imported from Japan) that was typically utilized at the manufacturing facilities owned by Mysore Jasmine. The internal auditors also reviewed the pricing mechanism and other contractual terms and conditions in the arrangement between Mysore Jasmine and Ranganatha Silks and found nothing out of the ordinary.

22. In the meanwhile, Ramanna found all of these a bit too much to handle. As a stickler for propriety and quality, he would never have allowed either the Silxchange venture or the contract manufacturing arrangement with Ranganatha Silks. Over dinner one evening in June 2016, he confronted Sagar and Vinodini and decided to express his free and frank opinion. He poured scorn on both of them for their irresponsible behaviour in managing the
affairs of New Town and Jasmine Silks, for belying the considerable faith that investors, creditors, customers and employees had reposed on them, and also for ruining the family reputation that had been built up through decades of hard work. Unable to withstand the tirades of a man who was clearly past his prime and out of touch with reality, Sagar refused to be harangued by his father’s interference in the business. During the heated discussion that evening, Sagar uttered some words that he would later repent: “Old man, you have lost your sanity”. Utterly humiliated, Ramanna not only rushed out from the dinner that evening, but he also decided the next morning to move out of the family home with his wife and into a farmhouse he owned outside Bangalore. He also relinquished the title of Mentor-in-Chief that he held in Mysore Jasmine, by tendering his resignation from that position. He was also deeply hurt by Vinodini’s conduct in playing a mute spectator during the sequence of events and thereafter. It almost appeared as if she was unwilling to break ranks with her brother on matters relating to the business.

23. Although at a personal level he was forced to endure disgrace at the hands of his own children, Ramanna was determined to act with composure on the professional side. He was keen to ensure that the company and its stakeholders do not suffer at the hands of his “inept” progeny. In order to determine the future course of action, he decided to embark on a trip with his wife to Singapore in early July 2016, primarily to meet with Krishnan and discuss matters with him, but also to spend a few days at a yoga retreat in Bali so that he could recharge himself emotionally. During their meeting in Singapore, Krishnan advised Ramanna to remain steadfast in his convictions, and to even try to wrest control of the companies from his children. More so, Krishnan communicated his full-fledged support of Ramanna in whatever steps he wished to undertake. He was also able to make similar commitments on behalf of Twenty Point as an institution. After all, Twenty Point was an investor operating with a lengthy horizon in mind, and was determined to ensure the long-term success of the company, which in turn would generate the returns the firm was looking for.

24. In the meanwhile, a Machiavellian plot was being hatched in Bangalore. Sagar and Vinodini convened a meeting of the board of directors of New Town by giving two days’ written notice to be held on July 12, 2016. The purpose of the meeting (which was set forth in the agenda papers) was to (i) remove Ramanna as the chairman of New Town, (ii) to appoint Siddappa and Raj as directors of New Town, and (iii) to convene a shareholders’ meeting of the company to remove Ramanna and Krishnan as directors of the company and to amend the articles of association of the company so as to delete the articles under the head “Board Composition” that were incorporated from the Investment Agreement, as extracted under Annex A.
25. Sagar and Vinodini operated with great astuteness in convening the meeting. They had become aware through the farmhouse staff that Ramanna and his wife were to be at the yoga retreat in Bali from July 10, 2016 to July 13, 2016. This was a fortuitous window of opportunity because participants at the Bali retreat were to be strictly “unplugged” from the rest of the world for the duration of the programme. No email or cellphones were allowed, and the retreat staff monitored all telephone calls made to the venue, and only medical emergencies or deaths were treated as exceptions. As was the usual practice, the notice for the board meeting of New Town was sent to the directors by email. Krishnan was devastated to receive the notice, and frantically tried to contact Ramanna, but to no avail. Krishnan determined that it would be prudent for him to immediately board a flight to Bangalore and make it to the meeting without further ado. As notified, the board meeting of New Town was held in Bangalore on July 12, 2016. The meeting began by noting the absence of Ramanna. Sagar assumed chairmanship of the meeting, and commenced proceedings. Despite strong protestations from Krishnan, all the resolutions proposed as aforesaid were passed with the requisite majority. An extraordinary general meeting (EGM) of the shareholders of New Town was convened for August 16, 2016.

26. In a parallel set of events, Sagar convened a board meeting of Mysore Jasmine to be held on July 15, 2016. The purpose of the board meeting was to convene an EGM to remove Krishnan as a director of the company and to amend the articles of association of the company so as to delete the articles under the head “Board Composition” that were incorporated from the Investment Agreement, as extracted under Annex A. Again, despite the objections of Krishnan, the resolution was passed as it received the affirmative nod of all the other directors of Mysore Jasmine. The EGM of Mysore Jasmine was to be convened on August 16, 2016. The draft notice placed before the board meeting contained serious allegations against Krishnan. In justifying his removal, the board of Mysore Jasmine noted that Krishnan had failed to uphold his fiduciary responsibilities as a director. In taking sides in a family battle, he had fettered his discretion by taking into account factors that were hostile to the business interests of the company. He was also accused of passing on information about matters discussed at the board meetings of Mysore Jasmine (including copies of agenda papers) to Ramanna and also to his employer Twenty Point. In fact, the board of directors have reason to believe (albeit not conclusively) that some of the sensitive information (such as pricing and customer information) that Krishnan shared with Twenty Point may have been used by the private equity firm to build up industry knowledge that they then used in their investments in other textile firms in India. The draft notice also informed shareholders that the management of Mysore Jasmine had filed a complaint with SEBI regarding the Krishnan’s questionable conduct, and that the board was confident that SEBI would redress any grievance. Astounded by these allegations, which he found to be false and baseless,
Krishnan immediately approached his lawyers, who issued a defamation notice against Mysore Jasmine and all its directors (except for Krishnan himself). The notice sought that Mysore Jasmine withdraw the allegations made in the EGM notice. Unperturbed by the legal threat, the Company Secretary of Mysore Jasmine sent out the notice of the EGM to the stock exchanges and also individually to the shareholders. Neither has SEBI concluded on its investigation, nor has Krishnan taken any further steps to pursue his defamation claim.

27. Upon release from his sanctuary of solitude in Bali and learning of the events that had transpired in his absence, Ramanna jetted rapidly back to Bangalore. Along with Krishnan, he quickly consulted a team of lawyers to decide on a legal strategy. He perceived two goals in the strategy: first, to save the companies from their despair and, second, to save himself from being ousted from New Town. Krishnan too shared these perceptions, which effectively conflated the goals of Ramanna, Krishnan and Twenty Point, who would all act in tandem. Based on the advice of the lawyers, Ramanna wrote on July 20, 2016 to the boards of New Town and Mysore Jasmine requesting them to reverse any decisions taken at their board meetings in the preceding week, and also asking them not to proceed with the EGMs of both companies scheduled for August 16, 2016. Krishnan and Twenty Point too wrote similar letters to the companies.

28. Ramanna’s letter, however, had an additional request. He asked that, in the interests of transparency and corporate governance, the contract between Mysore Jasmine and Ranganatha Silks be disclosed to the public, including so that shareholders and other stakeholders are aware of the roles, responsibilities and liabilities of both those companies in light of the damages claims by several US customers. Pat came the reply from New Town and Mysore Jasmine on July 22, 2016 denying the various requests. As for the disclosure of the contract between Mysore Jasmine and Ranganatha Silks, the Company Secretary of Mysore Jasmine reiterated that the internal audit had confirmed that the contract was entered into on the basis of normal commercial terms, and that there was nothing extraordinary in it. Moreover, Mysore Jasmine had appointed a leading US law firm to conduct a legal audit of the contract and its terms, and the law firm had given the company a clean chit. The Company Secretary’s reply stated that Mysore Jasmine had no obligation under law to disclose either the contract, any details pertaining to it or reports of the internal audit or the US law firm. He argued that disclosure would be counterproductive and inimical to the interests of the company.
29. A day before the letters went out to New Town and Mysore Jasmine, the trio of Ramanna, Krishnan and Twenty Point had acquired an aggregate of 1% shares in Mysore Jasmine from the stock market. Of this, Ramanna acquired nearly all of the shares, except 100 shares each that were acquired by Krishnan and Twenty Point. Incidentally, Ramanna’s 70th birthday would fall on August 16, 2016, the same day that the EGMs of both the companies were scheduled. Ramanna was keen to reward some of the employees of the companies who were loyal to the Gowda family for more than 25 years; and there were 100 such employees. This, he wished to do so on his birthday as part of the celebrations and as a mark of recognition to their loyalty and hard work over the years. However, given the unseemly turn of events, he decided to reward the employees immediately and, on July 25, 2016, he transferred 100 shares of Mysore Jasmine each to the 100 identified employees. Those employees were thrilled to receive this recognition. Although for some of the employees the monetary benefit from the shares seemed meaningless given the languishing nature of the stock, it was the sentiment that appealed to them more. Whatever the reaction may have been, the shares were credited into all of their demat accounts by July 30, 2016.

30. Surely enough, Sagar and Vinodini were quickly updated on this development, and they smelt a rat. They responded to what they believed was a gimmick by Ramanna to elicit employee support in a brewing family corporate battle. They in turn identified 30 young and upcoming star employees within the firm, and decided to offer 100 shares each in New Town to those employees. Between them, Sagar and Vinodini equally transferred shares such that 100 shares each of New Town were placed in the hands of those 30 employees. No offer was made to the other shareholders of New Town when these transfers were effected. Given that the shares of New Town were held in certificate form, the shares were transferred by physically delivering the share certificates and transfer forms to those employees. The transfers were approved at a quickly convened board meeting of New Town (that Ramanna and Krishnan refused to attend as they believed the transfers were illegal), and the names of the 30 employees were entered in the register of members of New Town on August 1, 2016.

31. All this while, efforts were being undertaken on the periphery to resolve the issues surrounding the key shareholders of New Town and Mysore Jasmine in an amicable manner. Krishnan spearheaded the efforts, and he sought to rope in Basavaraju and even the family’s spiritual master, but to no avail. The principal goal was to seek more time through a postponement of the two EGMs scheduled to be held on August 16, 2016, which would leave more time for an amicable solution. However, Sagar and Vinodini were unwilling to budge, and they were steadfast in their resolve to proceed with the meeting. Ultimately, by early August, it was clear that no resolution was in sight.
32. On August 7, 2016, Ramanna, Krishnan and Twenty Point initiated proceedings before the National Company Law Tribunal, Bangalore Bench (NCLT) against New Town, Sagar, Vinodini, Siddappa and Raj. In parallel, Ramanna, Krishnan, Twenty Point and the 100 employees who recently became shareholders of Mysore Jasmine initiated proceedings before the NCLT against Mysore Jasmine, New Town, Sagar and Vinodini. In both the actions, it was alleged that the respondents’ conduct was oppressive to the petitioners. In the case of New Town, the petitioners sought that all actions taken at the board meeting dated July 12, 2016 and any actions that may be taken at the EGM scheduled for August 16, 2016 (as specified in the notice for the meeting) must be declared null and void. In the interim, the petitioners sought an injunction from the NCLT to prevent the EGM from being held on that date. As far as Mysore Jasmine is concerned, the petitioners sought that all actions taken at the board meeting dated July 15, 2016 and any actions that may be taken at the EGM scheduled for August 16, 2016 (as specified in the notice for the meeting) must be declared null and void. In the interim, the petitioners sought an injunction from the NCLT to prevent the EGM from being held on that date. The petitioners also sought for a direction from the NCLT asking Mysore Jasmine to publicly disclose the detailed terms of the contract between it and Ranganatha Silks. They also sought a relief that the articles of association of New Town and Mysore Jasmine ought not to be amended without the prior approval of the NCLT.

33. The interim application to consider whether the EGMs should proceed came up for hearing on August 10, 2016. The NCLT refused to intervene or to pass any interim order. Accordingly, the EGMs of New Town and Mysore Jasmine were held on August 16, 2016 and the resolutions proposed therein were passed by a substantial majority. All the petitioners in the petitions above dissented, but their voting power was evidently insufficient to veto any decision taken at the meetings.
34. While the petitions were pending before the NCLT, the board of New Town convened a shareholders’ meeting to be held on October 31, 2016 to consider a proposal for reduction of capital of the company. Under the plan, New Town would reduce its capital by repurchasing the shares held by Ramanna and Twenty Point, thereby effectively evicting them from the company. At the shareholders’ meeting, all the shareholders of New Town were present, with all of them voting in favour of the capital reduction, except for Ramanna and Twenty Point, who dissented. After the passage of the resolution, New Town filed a petition before the NCLT seeking its sanction to the scheme of reduction of capital. At a hearing of the scheme of capital reduction, Ramanna and Twenty Point vehemently objected to the scheme. They argued that the company had not followed the proper procedure for seeking the approval of the shareholders for the said reduction. Moreover, the valuation report obtained by the company that showed a share value of Rs. 25 per share of New Town significantly undervalued the company. The price was based on the valuation conducted by the statutory auditor of New Town. In the meanwhile, Ramanna and Twenty Point were able to obtain another chartered accountant’s report that indicated that the value of each New Town share was Rs. 30. The NCLT has yet to hold a final hearing on the company petition pertaining to the capital reduction of New Town, which remains pending.

35. The earlier petition pertaining to New Town (filed on August 7, 2016) was amended to reflect the intervening development concerning the reduction of capital, arguing that the actions were demonstrative of the reprehensible conduct of the company and its majority shareholders. The hearings on the petitions took place in March and April 2017. The respondents in both the company petitions challenged the maintainability of the petitions, and questioned the locus standi of the petitioners. However, by agreement of the parties, the NCLT decided to hear the maintainability issues and the merits together. After hearing all the parties at length on the question of maintainability, the NCLT held that both petitions were maintainable. In the case of New Town the NCLT granted a waiver and in the case of Mysore Jasmine it held that the petitioners were competent to bring the action. But, on the merits of the case, the NCLT found no reason to intervene, and hence dismissed both the petitions.

36. Against the order of the NCLT, the petitioners in the two petitions have preferred appeals before the National Company Law Appellate Tribunal (NCLAT). Due to the significant overlap, the NCLAT has decided to hear both the petitions together.
Annex A
Extracts from Investment Agreement dated May 9, 2000

1. Definitions and Interpretation

1.1 Definitions

In this Agreement (including in the recitals hereof and Schedules hereto), the following words and expressions shall have, where the context so permits, the following meanings ascribed to them:

“Company” means New Town Designs Limited;

“Investor” means Twenty Point Partners;

“Subsidiary” means Mysore Jasmine Silk Manufacturing Limited;

3. Governance

3.1 Board Composition

(i) The board of the Company and the Subsidiary shall each comprise 4 (four) directors. Of these, one (1) director shall be nominated by the Investor. The remaining three directors shall be Mr. Ramanna Gowda, Mr. Sagar Gowda and Ms. Vinodini Gowda, unless otherwise agreed among the three of them.

(ii) Mr. Ramanna Gowda shall be the chairman of the Company and the Subsidiary for life, provided that this right shall cease to apply either the Company or the Subsidiary, as the case may be, if it is listed on a stock exchange.

(iii) In the event that either the Company or the Subsidiary were to be listed on a recognized stock exchange, then the company so listed may be entitled to appoint additional directors as required to comply with corporate governance requirements imposed by law and the listing regulations. However, notwithstanding the listing of either the Company or the Subsidiary, right of the persons specified in Section 3.1(i) to continue as directors shall remain unabated.

5. Transfer of Shares

5.1 Restriction on Transfer of Shares

No shareholder of the Company or the Subsidiary shall transfer any shares held by it to a third party without complying with the provisions of this Section 5. Any attempt to do so shall be void ab initio.
5.3 **Right of First Refusal**

In the event that any of the shareholders (the **Selling Party**) desires to sell, pledge, encumber or otherwise deal with the shares it holds in the Company or the Subsidiary, as the case may be, it shall first make an offer to the other shareholders of the Company (the **Receiving Parties**) at a proposed price (the **Offered Price**) and give the Receiving Parties a period of 28 days to determine whether they wish to purchase those shares or not. In the event the Receiving Parties decide to purchase the shares, then the Selling Party shall sell the shares to the Receiving Parties (in proportion to the shares held by them in the Company or the Subsidiary, as the case may be, at the relevant time) at the Offered Price. If the Receiving Parties decline the offer or do not respond within the period of 28 days, then the Selling Party shall be free to sell the shares to any other person at the Offered Price.

5.7 **Listing**

Nothing contained in this Section shall apply to either the Company or the Subsidiary, as the case may be, once its shares are listed on a recognized stock exchange.

12. **Dispute Resolution**

12.3 **Arbitration**

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre (SIAC) in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (SIAC Rules) for the time being in force, which rules are deemed to be incorporated by reference in this clause.

The seat of the arbitration shall be Singapore.

The Tribunal shall consist of a sole arbitrator to be appointed by the Shareholders and the Company.