

SYMBIOSIS NATIONAL MOOT COURT COMPETITION, 2014

(19th -21st September, 2014)

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1. Fliyem Offacliffe Private Ltd. is an airline operating low-cost and luxury domestic flights in India; it has its corporate office in Mumbai, Maharashtra and registered office in Wankaner, Gujarat. Operating since 1999, their fleet, branded as *Air There Everywhere* had the dubious distinction of being the least preferred airlines four years in a row, between 2000 and 2004. As speculations rose about the company being run solely to show losses, in 2002, the company made as their CEO Mr. Goodweather Ray. He began implementing a series of quality management changes, resulting in the business breaking even for the first time in April, 2005, and posting a modest profit by October, 2006. Within two years, the company went public in an IPO that was heralded as "the biggest thing to happen in Dalal Street since the BSE was inaugurated." The shares were listed on BSE as well as NSE, and the majority of the shares were purchased by Wino Hautu Cheet Ltd., a company that was set up by Mr. Ray with four other persons with the primary purpose of functioning as a holding company after Fliyem Offacliffe Private Ltd's IPO.
2. By 2011, under Mr. Ray's leadership Wino Hautu Cheet Ltd. had become a major conglomerate in India, having businesses in Media & Entertainment, Retail, Sports, Real Estate and Hospitality, amongst others, and a market capitalisation of close to USD 29.38bn. Mr. Ray was regarded as a business genius in the market, although there have been some allegations of fraud and money laundering against him and the company. In July, 2012, Wino Hautu Cheet Ltd. had come under the scanner of the SEBI, for investor fraud, amongst other things. SEBI found that Mr. Ray and the other directors of the conglomerate have been unable to provide actual particulars of a majority of the investors.
3. Mr. Ray, speaking in an open interview on one of the media television channels owned by the conglomerate, stated that the majority of the monies came from sellers of mangoes. He stated, "These mango people, who had small amounts of usually between Rs. 100 and Rs. 2,000, had no other place to invest. They have trusted the Wino Hautu Cheet family with their earnings and it is shocking that SEBI would not believe our words on this and expects us to actually give their addresses so they will verify. These mango people do not want their money back, they want returns; the family gives them this. SEBI has not hurt only the family, but the families of all these mango people." Ignoring the rhetoric, SEBI directed that the monies, about INR

23,000 crore be paid back to these people through bank transfers or cheques. An unsuccessful challenge in the SAT followed and the Supreme Court was approached for the same. The Supreme Court, in December, 2012 directed that the monies be repaid through the SEBI, since the company claims it is unable to pay the monies directly to the mango people.

4. In the month of February, 2013, Wino Hautu Cheet Ltd. announced that it will be exiting the Airline business and the same will be transferred to Taka Flyingleap Ltd., another airline operating in India, but also having international flights. Flyingleap Ltd., which began as an air taxi service in 1995, grew extensively after its merger with Taka Ltd., and the resulting Taka Flyingleap and was regarded as the biggest airlines in India from 2000 to 2010, until it was overtaken by Being Blue Ltd.
5. Taka Flyingleap Ltd. and Wino Hautu Cheet Ltd., after intense negotiations, agreed on the latter's airlines business being transferred entirely to the former, by way of a Share Purchase Agreement, since 94% of the shares were held by Wino Hautu Cheet Ltd., Mr. Ray, and five other persons / entities. The consideration was agreed at USD 500mn. The Agreement was executed in June, 2013 and the effective date was specified as the 1st day of October, 2013. The relevant extracts are produced in the appendix, but the Agreement provided *inter alia* that the parties shall refer disputes to arbitration in the London Court of International Arbitration, that the agreement will be governed by the laws of England. It provided that Wino Hautu Cheet Ltd. will indemnify Taka Flyingleap Ltd. in respect any expenses or losses in excess of Rs. 50 crore incurred, attributable to a period prior to 2009. It also provided for a list of conditions precedent, which were to be fulfilled with prior to the effective date, failing which the Agreement was to come to an end automatically.
6. By July, 2013, since no concrete proposal was forthcoming from the company or the directors, the Supreme Court directed the arrest and imprisonment of Mr. Ray and the other directors for wilful contempt of the order of the Court. One director, Ms. Vikhtima Choveenism was directed not to be arrested because she was a lady. Mr. Ray applied for being released on bail from the Court, under assurance that he will enter into multiple deals through the company and ensure that an appropriate proposal is provided to the Supreme Court. His application was allowed by the Supreme Court subject to his furnishing bail of Rs. 4,871 crore in cash and Rs. 5,112 crore by way of a bank guarantee. Unable to furnish the bail, Mr. Ray remained in custody.

- 7.** In August, 2013, owing to certain differences of opinion as to the valuation that was submitted by Wino Hautu Cheet Ltd., Taka Flyingleap Ltd. felt that it was not presented the true picture as to the value of the shares. It threatened to exit the deal and cancel the same. However, pursuant to further negotiations with senior executives *sans* Mr. Ray, the deal was retained, subject to certain changes. On 7th September, 2014, by way of a *Revised Share Purchase Agreement*, the earlier Agreement was superseded. The revised terms modified the consideration to USD 300mn from the earlier amount, and changed the effective date to 1st day of April, 2014. However, the Revised Agreement specified that all other terms from the earlier, superseded Share Purchase Agreement shall be incorporated by reference, and be deemed to be a part of the Revised Agreement as if set out therein *in extenso*.
- 8.** On 10th October, 2014, a notice was served upon Taka Flyingleap Ltd. by the Income Tax Department. The notice stated that Fliyem Offacliffe has filed inaccurate returns for the assessment years 2002-'03 and 2003-'04. The Department contended that the airline had more than sufficient income for the said years, contrary to the returns, which claimed zero taxable income owing to losses incurred. An amount of Rs. 124.43 crore was demanded towards payment of tax liability of the said two assessment years. Taka Flyingleap Ltd. immediately challenged the demand notice before the appropriate authority. It also sent a letter to Wino Hautu Cheet Ltd. informing them of the same and calling upon them to furnish an amount of Rs. 124.43 crore on the basis of the terms of indemnity. The letter stated that Taka Flyingleap Ltd. has been advised that it ought to settle the dispute with the tax authorities rather than attempting to continue with the dispute.
- 9.** Responding to the letter through their solicitors M/s. Dewey Cheatem & Howe, Wino Hautu Cheet Ltd. refused any liability to make the payment, contending that no loss has been incurred by Taka Flyingleap Ltd. It stated that inasmuch as the indemnity is only against losses, until Taka Flyingleap Ltd actually pays the tax demand, no loss is incurred and the indemnity cannot be invoked. In response, Taka Flyingleap Ltd. replied through their solicitors, M/s. Haion Lineed Munny, informing that as one of the conditions precedent was compliance with the indemnity clause, the failure to comply with the same results in the agreement coming to an end.
- 10.** Aggrieved, Wino Hautu Cheet Ltd. initiated arbitration against Taka Flyingleap Ltd., claiming an award of specific performance in respect of the Revised Share Purchase Agreement. Taka Flyingleap Ltd. participated in the proceedings, which were

conducted in London, England, and opposed the claim. It demurred that as the claimant failed to pay the amount of Rs. 124.43 as demanded, the same amount to non-compliance with the indemnity clause. It contended, on this basis, that the condition precedent has not been fulfilled and hence the contract came to an end. It, however, admitted that all the other conditions precedent were indeed fulfilled.

- 11.**Wino Hautu Cheet Ltd. admitted that the clause of indemnity was a condition precedent. It contended that it had, however, not failed to comply with the clause. Arguing that no person can earn more under an indemnity than what loss they have incurred, it contended that if respondent were to make the payment of the tax demand, only then would the liability to pay under the indemnity clause arise. It contended that if the respondent were to be paid the entire amount of tax demand, and it were to later settle the dispute for a lesser amount, it would amount to doing violence to the concept of an indemnity.
- 12.**The award of the arbitral tribunal began by noting that both parties agreed that though the agreement specified that it will be governed by the laws of England, the same ought to be read as "laws of England, to the extent it is not contrary to the laws of India". The award accepted the contentions of Wino Hautu Cheet Ltd. and held that *given the words used in the indemnity clause, which is similar to a pay to be paid clause, a liability cannot arise to indemnify until the respondent makes payment of the tax demand.* Consequently, it held all the conditions precedent were fulfilled and since Taka Flyingleap Ltd. has demurred on the claim solely on the issue of indemnities, an award of specific performance has to follow.
- 13.**Aggrieved by this award, Taka Flyingleap Ltd. filed a petition under section 34 of the Arbitration & Conciliation Act, 1996, before the District Court, Wankaner, challenging the award. Taka Flyingleap Ltd. contended that indemnities, by their nature, are for the protection of the indemnified and ought to be construed in their favour. It contended that as soon as a liability is incurred, the duty to indemnify arises. Opposing the same, Wino Hautu Cheet Ltd. raised a preliminary objection that the petition will not be maintainable in India. It relied on the dictum of the Supreme Court in (2012) 9 SCC 649 and contended that Indian Courts will not have jurisdiction where the seat of arbitration is outside India. It also reiterated its submissions before the arbitral tribunal on the issue of the indemnity.
- 14.**Holding itself to be bound by the law laid down by the Supreme Court, the District Court at Wankaner rejected the petition. After an unsuccessful appeal under section

37 of the Act, Taka Flyingleap Ltd. filed a petition seeking special leave to appeal in the Supreme Court. It contended that the earlier judgement ought to be read in consonance with section 28 of the Indian Contract Act, 1872. The petition was allowed and an appeal, being Civil Appeal No. 96812 of 2014 was registered. The Supreme Court has now listed the appeal for final hearing on all the issues. Parties are expected to file their submissions on the issues and contend on the same.

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RELEVANT CLAUSES OF THE AGREEMENT

1.18 Law

This Agreement shall be governed by and construed in accordance with the laws of England.

7.23 Indemnity

Wino Hautu Cheet Ltd. Promises to indemnify and hold indemnified Taka Flyingleap Ltd. Against all losses and / or expenses in excess of Rs. 50,00,00,000/- (Rupees fifty crore only), provided such loss and / or expense would be attributable to a period prior to 1st April, 2009.

37.1 Dispute Resolution

Any dispute as to anything in respect of the Agreement shall be referred to arbitration. The seat the arbitration shall be in London, England. The arbitral proceedings shall be conducted at London, England. The arbitral proceedings shall be governed by the rules of the London Court of International Arbitration.
