

MOOT PROPOSITION

FOR

III SURANA & SURANA AND UPES SCHOOL OF LAW NATIONAL INSOLVENCY LAW MOOT COURT COMPETITION, 2020-21

1. Vodatel is a Private limited company registered under the Companies Act, 1956 having its registered office at New Delhi, India (“the Company). As per the Memorandum of Association, the company is in the business of providing telecom services which includes but is not limited to mobile network, broadband and spectrum license. In 2010, owing to the resurgence of the Indian economy after the 2008 economic crisis, the company decided to venture into the business of real estate along with its telecom business and accordingly amended its Memorandum of Association.
2. The Government of India notified the National Telecom Policy in the year 1994 and spectrum licenses were issued to the various companies including Vodatel. The fees of the spectrum license were adjudged as per the National Telecom Policy, 1999.
3. Initially, the company was not making profits and this was apparent through the balance sheet that was showing losses for a continuous period of seven (7) years from 2002 to 2009. In an attempt to save the company. Some structural changes were made and Mr. Merwin Singhania, a Wharton MBA graduate and his wife Ms. Rachel Singhania were appointed as the directors of the company. Due to the hard work of Mr. Merwin and his wife, Ms Rachel, the company recorded a profit of INR 20 Crores in the year 2010 which reached INR 700 crores in the year 2015. Along with the progress of the company, Mr. Singhania also found success and accumulated personal property worth INR 100 Crores and his annual remuneration from Vodatel stands at INR 20 Crores.
4. In 2014, Vodatel launched a high-class housing project in Sector 88A, Gurgaon. The Project named as “Posh Residency” offered high end 4 BHK flats and pent-house along with luxurious amenities such as Club House, Swimming Pool, Gym and Spa among others. Posh Residency elicited a huge response from allottees and Vodatel raised an

amount of INR 1000 Crores by entering into two hundred (200) Flat Buyer Agreements with individual allottees.

5. In order to expand its business and also to infuse money in its real estate arm, the company took a loan of INR 10,000 Crores from a consortium of Five (5) banks with the State Bank of India as the lead member. A loan agreement was executed between the company and the Consortium members on 12.12.2012 and was also secured by the personal guarantee of Mr. Merwin Singhania.
6. The Company entered into a lease agreement dated 20.12.2014 for area admeasuring 50 Acres for a period of 99 years with Gurgaon Development Authority (“GDA”). The Total consideration of the lease was INR 380 Crore which substantially amounts to the fair value of the total leased land. Any maintenance and ancillary will be borne out by the Company. One of the clauses of the lease agreement allowed for renewal of the Agreement upon expiry of the lease term, subject to the consent of the parties. It was stipulated in the lease agreement that INR 80 Crores is to be paid at the time of entering into the agreement and the remaining amount is to be paid in 12 equal half-yearly installments. The Company paid the requisite amount of INR 80 Crores as per the agreement.
7. In 2016, the Indian telecom sector witnessed a huge disruption by the entry of a new telecom company. The new entrant in the market made a huge investment and lowered their retail rates largely as compared to those offered by existing companies including Vodatel. As a result of the same, Vodatel saw a huge decline in its market share which reduced to a mere 5% in the year 2018, a radical dip from 45% in the year 2015. Consequently, in order to remain afloat, Vodatel reduced its human Resource reduced to mere 500 employees and company had to close all its existing offices in various cities except the registered office at New Delhi and corporate officer at Gurgaon due to unpaid lease rentals.
8. As a consequence of the disruption caused by the new entrant, Vodatel was unable to meet its various obligations. In order to meet its loan obligation, Vodatel made a representation to the Department of Telecommunications (“DoT”) to grant permission for trading of its license. However, the DoT refused the same. DoT further stated that the huge arrears of the spectrum license of Vodatel which stand at INR 15,000 Crores, as was decreed by the

Hon'ble Supreme Court of India, in the case of *Union of India versus Association of Unified Telecom Service Providers of India*, C.A. No. 6328-6399 of 2015, are required to be paid as a pre-condition in order to allow the trading of the Spectrum License.

9. Unable to proceed with trading of its spectrum license and failure to raise new capital, Vodatel defaulted on its loan obligation in March, 2019. On 06.04.2019, the State Bank of India filed an Insolvency Petition before the Hon'ble National Company Law Tribunal, Principal Bench, New Delhi under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("the Code"). The petition was admitted by the Hon'ble NCLT, New Delhi vide its order dated 03.06.2019 and Mr. Joel Cardoza was appointed as the Interim Resolution Professional. As prescribed under Section 14 of the Code, a moratorium was also imposed. Mr. Cardozo was further appointed as Resolution Professional in the first meeting of Committee of Creditors ("CoC") held on 03.07.2019.
10. The CoC comprises of eighteen (18) Financial Creditors. This was further confirmed by the Hon'ble NCLT, New Delhi vide its order dated 10.07.2019. The total claims received by the Resolution Professional were to the tune of INR 33,000 Crores. (Claims of INR 27,000 Crores were that of the Telecom Department including INR 15000 Crores of AGR dues as Operational Debt & Claims of INR 6,000 Crore against the Real Estate Company). DoT communicated its protest to Resolution Professional on classifying AGR Dues as Operational Debt and requested the Resolution Professional to keep the same in abeyance until the adjudication by the Adjudicating Authority.
11. The Resolution Professional released the Expression of Interest on 30.08.2019, pursuant to which, two companies namely Skyrockets Pvt. Ltd. ("Skyrockets") & Indian Telecom Pvt. Ltd. ("Indian Telecom") expressed their interest to submit a Resolution Plan for Vodatel. Thereafter, the Resolution Professional released the Request for Resolution Plan ("RFRP") dated 30.09.2019 which included Spectrum as an asset of Vodatel. As per the RFRP, the last date to submit the resolution plan was 30.10.2019. Both the companies submitted their resolution plan with the Resolution Professional.
12. The Resolution Plan submitted by the Skyrockets provides for an upfront payment of INR 15,000 Crores and further proposes the liquidation of the Real Estate Business of Vodatel. This plan also provides for a payment of INR 100 Crores towards the AGR dues of

Vodatel. On the other hand, Resolution plan submitted by Indian Telecom stipulates a payment of INR 20,000 Crores which is inclusive of a sum of INR 10,000 Crores towards the AGR Dues of Vodatel.

- 13.** Committee of Creditors considered both the resolution plans and asked for modified resolution plans by both the Resolution Applicants. Skyrockets submitted the modified resolution plan with an increase in the total upfront payment of INR 18,000 Crores and other terms and conditions of the plan remained same. Indian Telecom was not able to submit the modified resolution plan due to certain unforeseen circumstances. Indian Telecom asked for extension of time to submit the Resolution Plan from the Resolution Professional but the request was denied. Thereafter, the Committee of Creditors approved the Resolution Plan of Skyrockets with 68% vote in its meeting dated 04.04.2020. Thereafter, the Resolution Professional filed an application dated 10.04.2020 under Section 31 of the Code for the approval of the Resolution Plan submitted by Skyrockets.
- 14.** Indian Telecom filed an intervention application no. 111/2020 under Section 60(5) of the Code challenging the decision of resolution professional denying extension of time to submit a modified resolution plan. It further contended that its plan is superior than that of Skyrockets and therefore the CoC must be directed to simultaneously vote on both the Resolution Plans. Further, it also challenged the plan of Skyrockets stating that the resolution plan cannot provide for liquidation of any part of the Corporate Debtor's business.
- 15.** GDA also filed an Intervention Application no. 111/2020 under Section 60(5) of the Code challenging the decision of the Resolution Professional which stated that the claim of INR 300 Crores submitted by GDA cannot be treated either as a Financial Claim or Operational Claim and GDA will be considered as "other creditors". GDA contended that the lease is a financial lease/Capital Lease and accordingly, GDA should be considered as a Financial Creditor.
- 16.** Department of Telecom filed an Intervention Application no. 113/2020 under Section 60(5) of the Code challenging the RFRP document and contended that the Spectrum cannot be treated as the assets of Vodatel and cannot be a part of the CIRP. Arguendo, it also

contended that AGR dues should be considered in parity with financial claims of Vodatel as the same is quintessential for the resolution of Vodatel.

- 17.** NCLT, Principal Bench, New Delhi heard all these applications together and vide its order dated 25.04.2020 held that;
 - a) Lease dated 20.12.2014 is operational in nature and GDA is not a Financial Creditor.*
 - b) As per the settled law, CoC cannot be directed to consider the plan of unsuccessful resolution applicant on the pretext of superiority and commercial wisdom is non-justiciable*
 - c) Spectrum will be a part of the CIRP and AGR dues are at best operational dues under the Code; and*
 - d) Approved the Resolution Plan of Skyrockets and Resolution Plan can also provide for liquidation.*
- 18.** Three separate appeals under Section 61 of the Code were filed before the National Company Law Appellate Tribunal (NCLAT) impugning the order dated 25.04.2020. NCLAT vide its order dated 30.06.2020 dismissed the appeals and held that there is no ground to interfere with the impugned order.
- 19.** During the CIRP of Vodatel, the CoC entered into negotiations with Mr. Merwin Singhania for repayment of Vodatel's debt as per the Contract of Guarantee dated 12.12.2012. Mr. Singhania issued three postdated cheques of INR 50 Crores to the Committee of Creditors. COC presented all three cheques to the Bank on 30.03.2020; however the cheques bounced due to insufficient funds.
- 20.** As a result of the same, State Bank of India initiated Personal Insolvency against Mr. Merwin Singhania under Section 95 of the Code. The date of default was mentioned as 30.03.2020. Mr. Singhania opposed the insolvency petition stating that the benefit of newly inserted Section 10A must also be extended to personal guarantors. He also challenged the vires of Section 95 and the related notified rules.
- 21.** The Hon'ble NCLT vide order dated 31.07.2020 negated the contention concerning Section 10A stating that there is no statutory bar to initiate insolvency against the Personal

Guarantors of Corporate Debtor and also the settled principle of contract of guarantee weighs against the Personal Guarantor. It further held that since there is no pending challenge to Section 95 of the Code and no general stay is granted by any court, the Petition is open to admission and initiated the Insolvency Proceedings against Mr. Singhania. This decision was also upheld by the NCLAT.

- 22.** Thereafter, three appeals under Section 62 of the Code were preferred before the Hon'ble Supreme Court of India. Mr. Singhania also filed an appeal along with a writ petition before the Hon'ble Supreme Court challenging the vires of Section 10A on its applicability to Personal Guarantors and provisions related to Personal Insolvency under the Code and related regulations.
- 23.** Hon'ble Supreme Court of India decided to hear all the appeals and also the writ petition filed by Mr. Singhania altogether and matter is listed for final hearing before a Three Judge Bench of the Hon'ble Supreme Court of India.