

## 7<sup>th</sup> Arun Jaitley International Insolvency and Bankruptcy Moot Competition

*CENTRE FOR TRANSNATIONAL COMMERCIAL LAW*

*IN ASSOCIATION WITH*

*INSOLVENCY AND BANKRUPTCY BOARD OF INDIA*

*INSOLVENCY LAW ACADEMY*

*AND*

*INSOL INDIA*

**27-29<sup>TH</sup> SEPTEMBER 2024**

**NATIONAL LAW UNIVERSITY DELHI**

### **MOOT PROPOSITION**

1. Wheel Rush Group Auto Limited is a public limited company (**Wheel Rush**) incorporated on 17<sup>th</sup> March 1995, under the provisions of the Companies Act 1956 (**Act 1956**), and is registered with the Registrar of Companies, Delhi. Wheel Rush has manufacturing plants in various states of India. Wheel Rush is one of the largest manufacturers of Auto Mobile spare parts. It supplies spare parts units to the major players in the automobile sector in India as well as overseas through its subsidiaries having direct as well as indirect shareholdings in these subsidiaries.
2. Wheel Rush under its direct and indirect holding is also operating multiple operational units across the globe including Japan, Thailand, Spain, United Kingdom and Germany amongst others. One of the major subsidiary companies namely MNPLC (**MNP**) is a public limited company, incorporated under the British Companies Act 1985 in the United Kingdom on 9<sup>th</sup> December 2000 and got listed on the London stock exchange on

8<sup>th</sup> January 2001.

3. MNP is engaged in the business of manufacturing gearboxes. As per the business arrangement dated 7<sup>th</sup> March 2005 (**Business Arrangement**), it was agreed between the Wheel Rush and MNP that MNP would cater to the clients of Wheel Rush in UK and Europe. As per the covenants of the agreement, MNP would ship the final products i.e. gearboxes directly to the end customers of Wheel Rush. Once the payments are received by MNP from the customers, it would deduct its referral commission of 10% from the sale proceeds and transfer the balance amount to Wheel Rush.
4. Wheel Rush's business was going as usual until the financial year (FY) 2019-20, when due to slow down in the automobile market in India as well as overseas and also the advent of COVID, it started facing trouble in serving the debt due to various financial institution, which became unsustainable as the international operations started stagnating and at the same time the domestic operations suffered from the major slowdown in the industry.
5. The onset of Covid-19 Pandemic in January 2020 caused a major economic crisis resulting in a massive decrease in demand and production related issues. This led to a massive loss of business for Wheel Rush. The financials of the company (Wheel Rush) also got affected as on many instances MNP made payments to M/s. Imiq Technologies Ltd, one of its service providers directly from the total amount received from the customers of Wheel Rush and breaching the terms of business arrangement as MNP did not transfer the amount from 2019 to Wheel Rush after deducting its commission. Thereby starting a spiral of distress. Wheel Rush's sales had been declining from FY 2020 due to many macroeconomic factors. Wheel Rush regardless of losses had access to a large amount of debt finance due to its market share and position.
6. The Annual General Meeting (**AGM**) of Wheel Rush in terms of Companies Act 2013 (**Act 2013**), was held on 17<sup>th</sup> December 2020, wherein it was observed that the cash flows

had fallen at an alarming rate. During the AGM, two of the independent directors also flagged the issue of passing some accommodation entries in the books by one of the members of the promoter family and demanded for a forensic audit. Accordingly, a resolution was passed to appoint the forensic auditors for alleged misconduct and financial irregularities. It was also agreed that the efforts would be made to create more business opportunities and at the same time negotiation would happen with the bankers to have some flexible terms and conditions for serving the loan.

7. On 3<sup>rd</sup> February 2021, a notice was issued to the directors of the company with a specific agenda to discuss the report as submitted by the forensic auditors. An Extra Ordinary General Meeting (EGM) was held on 12<sup>th</sup> March 2021, to discuss the findings of the report of the external auditors. The external auditor's report red-flagged certain payments to the tune of INR 20 Crores (Rupees Twenty Crore Only) that were initiated by the promoters of Wheel Rush to a certain pertinent supplier of raw materials, who had refused to supply further materials until their dues had been cleared - Carbon Black Pvt. Ltd. – towards settlement of debts in preference over other sundry creditors and lenders, it was also mentioned by the auditors that certain accommodation entries were passed in the books showing bogus transactions between Wheel Rush and one of the subsidiary based out of Kolkata which is a shell company without any substance.
8. In the EGM held on 12<sup>th</sup> March 2021, the report of the forensic auditors was placed for discussion and suitable action. Apart from the report, the financial position of the company was also discussed. As per the details, it transpired that there are two major creditors of Wheel Rush namely, M/s. ZET Financial Pvt. Ltd and XYZ Bank of India which had provided working capital loan for the expansion of business of Wheel Rush in FY 2018-2020. It was discussed that the company was finding it difficult to serve the debt of the aforementioned two banks & the bankers have already issued notices for timely payment of the loan amount.

9. As per the minutes of the meeting, the amount of loan due to both M/s. ZET Financial Pvt. Ltd and the XYZ Bank of India was to the tune of INR 150 crore (Indian Rupees One Hundred Fifty Crores Only) i.e., INR. 75 crore each (Indian Rupee Seventy Five Crore Only) Accordingly, a resolution was passed by the Board that the officials of the banks should be approached for a formal negotiation to avoid the further default by Wheel Rush and to avoid probable initiation of the corporate insolvency resolution process (CIRP) against it The Board of Wheel Rush met with the officials of M/s. ZET Financial Pvt. Ltd and drew up a one-time settlement agreement on 22<sup>nd</sup> April 2021.
10. At the same time, due to the adverse economic conditions and post Brexit, the UK subsidiary MNP ran into financial troubles. The loan agreement for £1,50,000 (One hundred and Fifty Thousand Pounds) was executed between MNP and ART Bank based out of London on 1<sup>st</sup> May 2008, wherein Wheel Rush was one of the guarantors for MNP being parent company, vide corporate guarantee agreement dated 1<sup>st</sup> May 2008. MNP pledged and granted to the ART Bank, a first priority floating charge on all of its right, title and interest (**Floating Charge**), in all its present and future tangible and intangible assets and rights of any kind, whether contingent or absolute.

The collateral consists of Pledger's rights, titles and interests in and to all assets of the Pledger. The relevant clauses of the Guarantee Agreement, reads as under:

*"This Guarantee shall be enforceable against the Guarantor notwithstanding that any security, or securities comprised in any instrument(s) executed or to be executed by the Borrower in favour of the Lenders shall, at the time when the proceedings are taken against the Guarantor on this Guarantee, be outstanding or unrealized or lost.*

*Right of Set-off. Upon the occurrence and during the continuance of any Event of Default, each Guarantor hereby irrevocably authorizes the Lender at any time and from time to time without notice to the Guarantors, any such notice being expressly waived by each Guarantor, to set-off and appropriate and apply any and all deposits (general or special, time or demand, provisional*

*or final), in any currency, and any other credits, indebtedness or claims, in any currency, in each case whether direct or indirect, absolute or contingent, matured or unmatured, at any time held or owing by the Lender to or for the credit or the account of the Guarantors, or any part thereof in such amounts as the Lender may elect, against and on account of the obligations and liabilities of the Guarantors to the Lender hereunder and claims of every nature and description of the Lender against any Guarantor, in any currency, whether arising hereunder, under the Credit Agreement, any Note, any Loan Documents or otherwise, as the Lender may elect, whether or not the Lender has made any demand for payment and although such obligations, liabilities and claims may be contingent or unmatured. The Lender shall notify the Guarantors promptly of any such set-off and the application made by the Lender, provided that the failure to give such notice shall not affect the validity of such set-off and application. The rights of the Lender under this Section are in addition to other rights and remedies (including, without limitation, other rights of set-off) which the Lender may have.*

*Not Affected by Bankruptcy. Notwithstanding any modification, discharge or extension of the Obligations or any amendment, modification, stay or cure of the Lender's rights which may occur in any bankruptcy or reorganization case or proceeding against either Borrower, whether permanent or temporary, and whether or not assented to by the Lender, each of the Guarantors hereby agrees that the Guarantors shall be obligated hereunder to pay and perform the Obligations and discharge their other obligations in accordance with the terms of the Obligations and the terms of this Guarantee. Each Guarantor understands and acknowledges that, by virtue of this Guarantee, it has specifically assumed any and all risks of a bankruptcy or reorganization case or proceeding with respect to either Borrower."*

11. MNP shifted its registered office from London to Italy on 10<sup>th</sup> January 2021. The management of MNP as per its financial conditions predicted that there would be an action by the ART Bank due to default in payment of loan.

12. Upon a petition for compulsory winding up by His Majesty's Revenue and Customs

- (HMRC) winding up proceedings were initiated by the London High Court under the Insolvency Act 1986, against MNP in the UK on April 15, 2021, as it defaulted on defraying payment against a tax demand to the tune of £20,000 (Twenty Thousand Pounds) and appointed Mr. Zen as the Liquidator.
13. Whereas MNP contested the proceedings on the basis that the UK Court does not have any jurisdiction since the registered office, was no longer in UK and accordingly center of main interest (COMI), lies in Italy alone, the UK Court admitted the proceedings on the basis that the business interest, the perception of creditors & the financial interest resided in the UK. The proceedings are subject matter of further challenge by MNP before the UK Court of Appeal.
14. One of the sundry creditor M/s. AZD Private Limited of Wheel Rush had file a winding up petition before Hon'ble High Court of Delhi under Section 272 of the Companies Act 2013. The notice was issued, and the Provisional Liquidator was appointed vide Order dated 15<sup>th</sup> November 2015.
15. In the meantime, XYZ Bank of India resorted to filing an application against Wheel Rush (**Corporate Debtor**) under Section 7 of the Insolvency & Bankruptcy Code 2016 (**I&B Code**) before the adjudicating authority (**adjudicating authority/NCLT**) for initiating Corporate Insolvency Resolution Process (**CIRP**) on 1<sup>st</sup> June 2021. The adjudicating authority allowed the application and appointed Mr. Ravish Kumar as the interim resolution professional (**IRP**) by an Order dated 14<sup>th</sup> June 2021. Subsequently, Mr. Ravish Kumar was also appointed as the Resolution Professional of the Corporate Debtor.
16. An appeal against the order of the NCLT was filed by one of the Directors Mr. A. K Shingal before the appellate authority (**NCLAT**) which had stayed the proceedings vide an order dated 25<sup>th</sup> June 2021. However, the order of adjudicating authority was upheld by the NCLAT, and the appeal was dismissed with costs imposed on the

appellant vide order dated 22<sup>nd</sup> August 2021. Costs were imposed on the account of NCLAT's observations that the appellants had made material misrepresentations within the appeal.

17. The RP being in control of the management of Wheel Rush, sent email dated 9<sup>th</sup> September 2022, to Pen Bank Ltd (**Pen Bank**) and Hamdi Bank where the current account of the Corporate Debtor is maintained for registering change in the signatory of all the accounts maintained by it and to operate the bank accounts in accordance with the instructions contained therein. He also requested the Pen Bank to transfer all the funds from the bank account of the corporate debtor lying with it by making a daily sweep of the funds to the operative account with Hamdi Bank by leaving an amount of ₹40,000/- (Indian Rupee Forty Thousand Only) in the account maintained with the Pen bank. It was further directed not to allow presentation of any cheque (s) without instruction/direction of the RP. The RP sent another letter to Pen Bank on 18<sup>th</sup> September 2022 with referring to the previous letter with same instructions as no action was taken by Pen Bank.
18. The Pen Bank., being one of the financial creditors of Wheel Rush, constituted almost 6% of the total value of the financial debt, along with others which were also part of the committee of creditors. The Pen Bank for the first time informed the RP on 20<sup>th</sup> September 2022 that the amount available in the current account of the corporate debtor is not an asset of the corporate debtor inasmuch as the dues of the corporate debtor in the books of respondent bank exceeds the amount available in the current account and therefore, proceeded to exercise its the rights of set off and appropriated the amount available in the current account of Wheel Rush towards the dues payable to the bank.
19. The resolution professional (RP) [erstwhile IRP confirmed as RP by the committee of creditors and vide order dated 15<sup>th</sup> September 2022, passed by the adjudicating authority.] filed an application before the adjudicating authority against the action of

the Pen bank in setting off the dues from the operational collections as it violated the moratorium issued by the Adjudicating Authority. The RP discovered that the suspended directors (**Suspended KMP**) of Wheel Rush had issued cheques dated 11<sup>th</sup> July 2021 in favour of M/s. FMG Private Limited in consideration for acquisition of development rights over a leased property allotted under the private purpose acquisition in Noida against an account held by the corporate debtor with the Pen bank for an amount of INR 3,000,000 (Rupees Three Crore Only) on behalf of Wheel Rush during the enforcement of moratorium and during the pendency of CIRP, without the prior approval of the CoC and RP. The RP has also discovered that Noida authority has cancelled the allotment to FMG Private Limited due to non-payment of premium. The cheques were encashed by M/s. FMG Private Limited on 15<sup>th</sup> July 2021.

20. It also came to light that Wheel Rush had routed approximately INR 27.07 crores (Indian Rupees Twenty seven crores seven lakhs only) through its current bank account in Hamdi Bank to MNP, after which the account became non-performing asset (NPA) from 29<sup>th</sup> May 2020.
21. It also came to the knowledge of RP that out of the suspended KMP, Mr. Verma, the Managing Director of Wheel Rush, had issued two cheques dated 6<sup>th</sup> January 2019 and 14<sup>th</sup> February 2019, amounting to INR. 2,89,00,000 (Rupees Two crores eighty-nine lakhs) (INR 1,44,50,000 each) (Rupees One crore forty four lakhs and fifty thousand only) to one of its related parties of Wheel Rush two years before the implementation of moratorium and before initiation of CIRP. The RP also filed application of fraudulent transaction against the erstwhile promoters on the basis of the earlier forensic auditor's report as well as against the suspended KMP's.
22. Meanwhile, Mr. Zen, the Liquidator as appointed by the UK Court discovered that MNP had made a number of gifts to Wheel Rush, the total value of the gifts is in the region of £15,000 and has since received a judgement for avoidance of the said transfers – as



undervalued – from the London High Court under section 238 of the English Insolvency Act 1986.

23. Mr. Zen has since filed an application before the NCLT Delhi for recognition as the Liquidator appointed in the Liquidation proceedings of MNP, and also for recognition of the aforesaid insolvency related judgement, as a debt in the pending insolvency resolution proceedings against Wheel Rush. The request was opposed by the creditors of Wheel Rush, and the request has been turned down by the NCLT, in view of the challenge in UK before the appellate court on the issue of COMI, and also on the basis that the liquidation proceedings have been brought by HMRC, and the ultimate beneficiary of any payments being made in respect of the judgement debt would be HMRC – given that there is a policy against recognition and enforcement of judgements relating to foreign tax debts in India. An appeal has been preferred by Mr. Zen before the NCLAT.
24. Post initiation of insolvency proceedings in India, the RP received two resolution plans, one submitted by M/s. RSP Investors Pvt. Ltd and the other by M/s. Run Castex Pvt Ltd. Subsequently after the meeting of the committee of creditors (CoC), M/s. Run Castex Pvt. Ltd was declared as the successful resolution applicant (**SRA**) in the 16<sup>th</sup> CoC meeting held on 6<sup>th</sup> November 2022 and The SRA was instructed to submit a revised resolution plan on or before 30 days of the said CoC meeting. The revised resolution plan was approved by the CoC with 78.05% voting share on 7<sup>th</sup> December 2022.
25. The application for approval of the resolution plan was filed by the RP before the adjudicating authority on 11<sup>th</sup> December 2022, which was approved by the NCLT on 25<sup>th</sup> January 2023.
26. Subsequently, the RP on behalf of the implementing committee filed an application before the adjudicating authority against M/s. Run Castex Pvt. Ltd, for not implementing the resolution plan, as per the agreed terms as the SRA failed to pay the

upfront amount which was 10% of the Resolution Plan within the stipulated time of 30 days; the SRA had also started placing advance orders with dealers requesting advance amounts against these orders. The SRA filed an Interim Application seeking an extension of the timelines for the Implementation of the Resolution Plan citing delays caused due to internal money appropriation amongst the Financial Creditors.

27. The RP took necessary steps to ensure that the Corporate Debtor remained as a going concern during the pendency of the application for implementation of the resolution plan. The adjudicating authority by a divided order dated 8<sup>th</sup> March 2023, did not accede to the request made by the RP and dismissed the application. The RP filed an appeal against the order of the adjudicating authority.

### ISSUES

*Issue 1:* Whether the NCLT has the jurisdiction to initiate CIRP proceedings given that a winding up petition is pending before Hon'ble High Court who is already in session?

*Issue 2:* Whether the NCLT erred in refusing Mr. Zen's request for recognition?

*Issue 3:* Whether the cheques issued by the Director to M/s. FMG Private Limited in tantamount to breach of moratorium?

*Issue 4:* Whether the RP of Wheel Rush can approach the UK Court for the purpose of recognition of Indian insolvency proceedings and to participate in the liquidation proceeding of MNP for violation of the terms of Business Arrangement and the credit of the amount which is otherwise due to Wheel Rush?

*Issue 5:* Whether the application by RP against the SRA for non-implementation of the Resolution Plan should be admitted by the Adjudicating Authority?

## NOTES

1. The teams are requested to prepare a memorandum of arguments on behalf of:
  - a. Applicant/RP before the adjudicating authority as per the issues.
  - b. Respondents/SRA before adjudicating authority as per the issues.
2. Part Z (Cross-Border Insolvency along with the Rules and Regulations) of the IBC has been notified since 2021.
3. Arguments on the issues are to be taken up in the Memorandum of Pleadings.
4. For oral rounds, issues are likely to be identified separately (but not vastly different from those in the memorandum).
5. Some further information may be provided prior to a suitable stage of oral rounds that could be utilized for arguments.
6. The Counsels for the parties are free to cite precedents from foreign jurisdictions to support their cases.
7. In addition to the issues mentioned herein above, the counsels are free to frame sub-issues and make other arguments including on the grounds of jurisdiction and maintainability that they deem fit.