INTERNATIONAL INSOLVENCY & BANKRUPTCY MOOT COURT COMPETITION

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MOOT PROPOSITION

Fortuna Industries Limited (**FIL**) is a company incorporated under the Companies Act 1956 and holds diverse business interests spanning across oil and gas, telecom, and retail, amongst others. FIL was founded in the year 1981 by Mr Atul Dev with trading business in textiles and diversified its interests starting from trading in coal to a large refinery complex in the State of Tamil Nadu in the 1990s, to establishing a telecom network and a retail chain in the 2000s. Mr Atul Dev's son Mr. Deepak Dev played an instrumental role in the growth of FIL post 1990s. Post 2004, when Mr Atul Dev passed away, Mr Deepak Dev found tremendous support and assistance in his son and daughter, Mr Rishabh Dev and Ms Ridhima Dev. Mr Deepak Dev was able to establish and run FIL's businesses with a formidable reputation and soon found a place in the list of the top conglomerates in the country. FIL is primarily held by Mr Deepak Dev and his family through a complex holding structure involving trusts and partnership firms. Amongst other shareholders in FIL, Atul Dev Trust (a discretionary trust) holds approx. 55% shares in FIL. Ms Ayesha Hassan, a senior and professional wealth manager, who is considered close to the Promoter Family of FIL, is the trustee of Atul Dev Trust. The beneficiaries of Atul Dev Trust are a limited liability partnership firm, Quest Holdings LLP (incorporated in terms of the Limited Liability Partnership Act 2008), and a charity, namely Fortuna Foundation, which is a professional managed NGO.

Quest Holdings LLP has three partners, viz. Mr Deepak Dev, Mr Rishabh Dev, and Ms Ridhima Dev with their respective partnership share being 51%, 24.5%, and 24.5%. Mr Deepak Dev also serves as the designated partner of Quest Holding LLP.

The oil and gas refinery of FIL is the largest private refinery in the country due to which it could leverage and finance its businesses in telecom and retail. FIL has one wholly-owned subsidiary company in India, Fortuna Tele Services Limited (**FTSL**), which is into the telecom business. While the oil and gas business is entirely held in FIL, FTSL was founded in the year 2008 when it successfully bid for 2G spectrum, however, with the cancellation of the then conducted auction by the Supreme Court of India, its plans for a foray into telecom sector came to a halt. However, with the advent of 4G in India, FTSL fermented this opportunity and successfully established a large 4G network across the country and with its strategy to provide telecom services virtually as freebies for the initial years of its expansion in the years 2014 to 2016, it was able to fetch a large user base becoming the second largest telecom company in India in terms of its user base by the year 2018. These expansion plans by FTSL required large financing, which was possible because of the support of FIL. FTSL raised approximately INR 32,000 crore from a consortium of 11 lenders in the form of term loans to finance its project activities in setting up the 4G network and launching its telecom business. Considering FTSL only had limited assets in terms of the right to use the spectrum licensed by the Government of India, FIL had to provide a major part of the security as well as corporate guarantees to the lenders. In line with the practice in project financing, the lenders also insisted on personal security from the Promoter Family of Fortuna Group and accordingly, Mr Deepak Dev signed a letter stating the following in favour of the lenders of FTSL:

"*This letter is provided for the comfort of the Lenders, and Mr Deepak Dev hereby guarantees that FTSL would be able to meet its repayment obligations at all times.*"

Apart from the thriving telecom business of the Fortuna group, it had also forayed into the European market especially focusing on retail and fashion. A company named Fortuna Global Enterprises PLC (**FGE**) was incorporated in the United Kingdom in the year 2011, of which Quest Holdings LLP was the 99.99% shareholder. The entire retail and fashion business of the Fortuna group in Europe was housed in FGE. The expansion strategy of FGE in Europe involved the acquisition of various local brands by raising acquisition financing in Europe, and with the formidable reputation of Fortuna Group, FGE was able to expand exponentially between 2011 and 2019. In the process of expansion, FGE raised financing to the tune of $ 1.2 billion from various banks in Europe led by HSBC. One of the securities for the said financing raised by FGE was the pledge over the entire partnership interest of Mr Deepak Dev held in Quest Holdings LLP *vide* Pledge Agreement dated 11.07.2016.

One of the key strengths of the Fortuna group was the ability of the Promoter family to control the entire operations of the group from their corporate offices headquartered in New Delhi, where a core group of Senior Managers would assist the family in overseeing and controlling the entire operations of the group. This core group led by the Promoter family would, in turn, assist the Board of Directors and senior management of its group companies in setting targets and goals and providing assistance in implementing short term as well as long terms plans to achieve their respective targets and goals. In terms of the family arrangement, while all members of the family are members of the Board of FIL, Mr Rishabh Dev and Ms Ridhima Dev are also directors in FTSL and FGE, respectively, apart from other directors in each of the companies.

Up till the year 2018, the business at Fortuna group was going as usual with a favourable outlook from all credit ratings as regards the prospects of various businesses of the group. However, the group faced various externalities in view of which the entire ecosystem of their businesses came under question.

The growth of electric vehicles in all segments from two-wheelers to four-wheelers to trucking automobiles was already underway internationally and in India also, however, a considerable breakthrough by a local Indian company in the year 2018 led to a massive decrease in the cost of production of electric vehicles coupled with increased efficiency of such vehicles whereby with a single charge of 60 mins a car can be driven for 500 kms at speed comparable to fuel-run vehicles. With this breakthrough, various investors in the automobile sector grabbed the opportunity and started the production of electric vehicles on a large scale. The Government of India also pushed the production of electric vehicles and setting up the support infrastructure for safe and hassle-free use of electric vehicles in India, in an effort to also solve the pollution problem in major cities of India.

These changes unfolding at a revolutionary speed resulted in a massive decrease in the demand for oil and gas by the start of the year 2020. The fall in demand was such that the same could be fulfilled by the government-owned refineries alone and considering the monopoly of the government-owned companies in retailing oil and gas through their stations, the government started to decrease its purchase orders from private refineries in the country, which led to a massive loss of business for FIL starting a distress spiral as regards its oil and gas business.

This apart, the aggressive expansion strategy of FGE in the European market was also not bearing the expected fruits due to two reasons. FGE was finding it hard to grab a respectable market share with its brands as the entry of new brands in the European market led to a very diverse and divided market, which was not beneficial to FGE. More importantly, FGE was reliant on Chinese manufacturing companies in fulfilling its orders, and since the year 2016, China was following its expansionist policies to score better geopolitical hold in South East Asia. These expansionist attempts of China did not find favour with any of the global powers, and as a measure of retaliation, the European Union and the United States of America banned imports from China *sine die* at the start of the year 2019. These sanctions finally triggered the start of distress at FGE in the early part of the year 2019.

The telecom sector in India is doing good, and with the large market share of FTSL, it stands in a comfortable place to sustain and prosper its hold in the Indian telecom sector. However, with the advent of 5G technologies, other competitors of FTSL have already unfolded their plans to implement and introduce 5G services to Indian consumers with sizeable capital investment. FTSL had also formally announced that it is working on introducing 5G technology to its consumers but had not indicated any definitive timelines for the same, since it had to assess its financials and the group's financials to check if FTSL would be able to fund massive capital investments required for implementing 5G network throughout the country.

FIL had provided financial assistance to FGE and FTSL in the year 2018 by way of inter-corporate deposits towards which as on 31 March 2020, INR 350 crores and INR 150 crores remained outstanding and payable by FGE and FTSL to FIL, respectively.

Mr Deepak Dev is a very social person and has good relationships with the who's who of India Inc. One of Mr Deepak Dev's good acquaintances is Mr Deboshish Sahasa, who is a promoter-founder of Sahasa Group that has diverse interests in a range of businesses, including power producing business in North-East India where Sahasa Power Limited (**SPL**) has a large power plant. For its refinery operations in Tamil Nadu, FIL buys power supply from various power producing companies. In the year 2018, FIL entered into a Power Purchase Agreement dated 20.09.2018 (**PPA**) with SPL whereby SPL will make available the specified units of electricity through the national power transmission grid for the use of FIL's refinery in Tamil Nadu in return of which FTSL shall be liable to pay a fixed charge of INR 200 crores per year. FIL had not paid the charges under the PPA for two years under the agreement.

On 01.04.2020, an Assignment cum Settlement Agreement was entered into among FIL as assignor, SPL as assignee, and FGE and FTSL as the confirming parties, whereunder FIL assigned its receivables from FGE and FTSL up to an amount of INR 400 crores (out of the aggregate receivables of INR 500 crores) in favour of SPL in return of which SPL shall satisfy the payables by FIL to SPL towards the charges under the PPA for two (2) years and FGE and FTSL confirmed to pay their respective payables to SPL instead of FIL. On the same day, FGE and FTSL transferred INR 280 crores and INR 120 crores to SPL, respectively.

Given the onset of distress in FIL and FGE since 2019, they started to default on their repayment obligations to their respective lenders from June 2019. FIL's loan accounts being in India became overdue for more than 90 days by 30.09.2019, after which the lenders of FIL classified its loan accounts as Non-Performing Assets (NPA) as per the extant RBI guidelines. Given the large size of the loan book of FIL standing at INR 43,034 crores as on 30.09.2019 owed to a consortium of 12 lenders in India, the lenders constituted a Joint Lenders Forum and initiated discussions for the restructuring of the loans of FIL.

Similarly, post the defaults in repayment by FGE to its European lenders, the restructuring efforts were initiated by its lenders in talks with the Board and Senior Management of FGE headquartered in Leeds. However, the restructuring efforts with the management of FGE in Leeds did not bear any fruits, and the lenders of FGE decided to initiate insolvency proceedings against FGE in terms of the applicable law of UK and an Insolvency Administrator, Mr James McNulty was appointed by an English Court *vide* an order dated 15.05.2020 to spearhead the restructuring efforts of FGE. Lenders of FGE led by HSBC also sought to initiate the insolvency resolution process against Mr Deepak Dev in terms of the provisions of the Insolvency and Bankruptcy Code 2016 (**IBC**) on the strength of the following Covenant to Pay in the Pledge Agreement dated 11.07.2016, which reads as under:

> "11. *Until the discharge of all Obligations in full, the Pledgor (Mr Deepak Dev) shall be liable to pay to the Lenders on demand all present and future monies, debts, and liabilities due, owing and incurred by FGE to the Lenders in any manner whatsoever.*
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> *"**Obligations**" means all indebtedness and other liabilities and obligations of FGE to the Lenders of every kind, nature and description, present or future, direct or indirect, secured or*

unsecured, joint or several, absolute or contingent, matured or not, in any currency, due or to become due, now existing or hereafter arising, regardless of how they arise or by what agreement or instrument or whether evidenced by any agreement or instrument and whether as principal or surety."

Before sending the statutory demand notice and filing of the petition to initiate insolvency resolution process before the NCLT, Principal Bench against Mr Deepak Dev, HSBC on behalf of the consortium of European lenders had served upon Mr Deepak Dev a notice calling upon him to repay the entire loan of FGE failing which the lenders would undertake necessary actions available to them under contract and / or applicable law. The petition to initiate the insolvency resolution process against Mr Deepak Dev was numbered as CP(IB)/PB/95/21/2020.

In the meanwhile, the restructuring efforts of lenders of FIL also failed, and the lead lender of FIL, State Bank of India (SBI) filed a petition under Section 7 of the **IBC** before the NCLT, Principal Bench, for initiating corporate insolvency resolution process (**CIRP**) against FIL, which was numbered as CP(IB)/PB/7/253/2020. The NCLT, Principal Bench *vide* its admission order dated 30.06.2020, initiated CIRP against FIL and appointed Mr Ravi Shankar as the Interim Resolution Professional of FIL, who was subsequently confirmed as the Resolution Professional in the first meeting of the Committee of Creditors of FIL held on 30.07.2020.

Post the commencement of CIRP of FIL, FTSL also started facing distress leading to irregular payments to its lenders and continued defaults. The Committee of Creditors of FIL resolved to direct Mr Ravi Shankar, the Resolution Professional of FIL to take the lead in the functioning and operations of FTSL, being the wholly-owned subsidiary of FIL. The Resolution Professional took charge of the affairs of FTSL as well, and after running the affairs of FTSL for around three months starting from 30.07.2020, he informed the Committee of Creditors of FIL that the defaults in FTSL are due to various externalities and the future projections of FTSL are also better only if it invests in 5G technology for which FTSL does not have sufficient leverage to raise financing for the new capital investments. Accordingly, Mr Ravi Shankar recommended to the Committee of Creditors of FIL that FTSL shall file a petition under Section 10 of the IBC for initiating CIRP against itself and subsequently, the CIRPs of FIL, FTSL, and FGE can be conducted as a group for efficient resolution, value maximisation and ensuring benefit of all stakeholders.

The Committee of Creditors of FIL affirmed the recommendation of Mr Ravi Shankar and consequently, Mr Ravi Shankar, on behalf of FIL as the 99.99% shareholder of FTSL, wrote to the Board of Directors of FTSL *vide* his letter dated 04.11.2020 to call upon the Board of Directors to file Section 10 petition for commencement of CIRP of FTSL. The Board of Directors of FTSL replied *vide* their letter dated 06.11.2020 which was signed by Mr Rishabh Dev on behalf of the Board of FTSL stating that the Board has deliberated on the recommendation of Mr Ravi Shankar and is of the considered opinion that commencement of CIRP by FTSL would not be a prudent commercial decision for the benefit of the stakeholders of FTSL. Mr Ravi Shankar placed the said reply before the Committee of Creditors of FIL, following which the Committee of Creditors in its meeting dated 10.11.2020 resolved to authorise Mr Ravi Shankar to file a Section 10 petition on behalf of FTSL in a shareholder's derivative capacity and to also pray for necessary reliefs from the Hon'ble NCLT, Principal Bench to consolidate the insolvency proceedings of FIL, FTSL and FGE in the interest of all stakeholders and better resolution. Accordingly, Mr Ravi Shankar acting in the derivative capacity on behalf of FIL as the 99.99% shareholder of FTSL filed a petition under Section 10 to initiate CIRP of FTSL, which was numbered as CP(IB)/PB/10/93/2020. Mr Ravi Shankar filed a separate interlocutory application for consolidation of the insolvency proceedings of FIL, FTSL, and FGE, in which application Mr Ravi Shankar also impleaded Mr James McNulty as the Administrator of FGE (who was appointed in terms of the English law). This consolidation application was numbered as IA 1063/2020 in CP(IB)/PB/7/253/2020 and CP(IB)/PB/10/93/2020.

Mr Ravi Shankar, having concluded the forensic audit of FIL, has also filed an application under Sections 43 and 66 of the IBC for annulment of the Assignment cum Settlement Agreement dated 01.04.2020 and for necessary orders to recover INR 280 crores and INR 120 crores from FGE and FTSL, respectively. This application was numbered as IA 1064/2020 in CP(IB)/PB/7/253/2020, and apart from other parties, the Administrator of FGE, Mr James McNulty, was also impleaded.

Upon receipt of the aforesaid applications where he has been impleaded, Mr James McNulty, through his advocates, filed replies-cum-preliminary objections to the aforesaid applications and (a) contested the alleged preferential and fraudulent transaction and (b) opposed the section 10 petition to initiate CIRP against FTSL and consequently opposed the consolidation of the insolvency proceedings of FIL, FTSL, and FGE. SPL is also contesting the allegations of preferential and fraudulent transactions.

Likewise, Mr Deepak Dev, by filing reply-cum-preliminary objections, contested the petition filed by HSBC for initiation of insolvency resolution process against him both on the grounds of lack of jurisdiction of the Hon'ble NCLT, Principal Bench to entertain such a petition and also on merits. Surprisingly, the Board of Directors of FTSL did not contest the company petition filed by Mr Ravi Shankar in a shareholder's derivative capacity for the commencement of CIRP of FTSL.

The Hon'ble NCLT Principal Bench *vide* its order dated 25.10.2020 has listed all the aforesaid applications and petitions for arguments and consideration on 11.12.2020 and has also directed that it shall first hear the Counsels for Mr Ravi Shankar and Mr Deepak Dev, followed by the Counsels for Mr James McNulty, SPL and HSBC.

Notes:

1. The teams are requested to prepare a consolidated memo of arguments on behalf of Mr Ravi Shankar and Mr Deepak Dev on one side and similarly one memo of arguments on behalf of Mr James McNulty, SPL, and HSBC on the other side.
2. Teams shall assume that Part III of the IBC has been notified in entirety with effect from 01.02.2020 and that the petition by HSBC has been filed under Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtor) Rules, 2019 after complying with the requirements under Rule 7(1) of the said Rules.