



COMPETITION PROBLEM

1. Swedish Motorisk Vagn Group (“SMV”) is a Swedish conglomerate dealing in manufacture of automobiles and it is recognised as a leader in the luxury car segment world over. SMV Group is registered as a company under the laws of Sweden. SMV India is a wholly owned subsidiary of the SMV Group handling the interests of the conglomerate in the Indian sub-continent. SMV India was primarily in the business of importing manufacturing parts for automobiles and had not launched its vehicles in India yet.
2. Ess Kay Industries, a company incorporated under the Companies Act, 1956 has its business operations in New Delhi, India. In the year 2015, Ess Kay and SMV entered into an agreement (dated 15.06.2015) wherein Ess Kay was to be the exclusive agent for supplies of SMV to the consumers in India. Ess Kay Industries also dealt in the sale and purchase of automobiles having an exclusive agency for MM cars. The key terms of the agreement between Ess Kay and SMV are as follows:

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Agreement

SMV India, a division of Swedish Motoren Group Sales India Private Limited, a company incorporated under the Companies Act, 1956 having its registered office at 3 North Avenue, Platinum Towers, Bandra Kurla Complex, Bandra East, Mumbai, 400051, India through its authorized signatories, hereinafter referred to as the “*Supplier*”, which expression shall, unless repugnant to the context hereto mean and include its, successors and permitted assigns; and

Ess Kay Industries Limited, a company incorporated under the Companies Act, 1956; having its registered office at N-26, Connaught Circle, Connaught Place, New Delhi, India, through its Directors, hereinafter referred to as “*Dealer*”, which expression shall unless repugnant to the context hereto mean and include its successors and permitted assigns.

(The Supplier and the Dealer are hereinafter referred to as “*party*” individually, and “*Parties*” collectively.)

PREAMBLE

Whereby the Parties agree to the basic terms and conditions for marketing, sales and services of the Audi products traded by Supplier in the Republic of India as follows:

1. Swedish Motoren Group Companies (hereinafter referred as “*Manufacturer*”) manufacturing high-quality products in accordance with the needs and wishes of a wide range of customers intend to sell and service these products world-wide, together with an effective sales organization, with the aim of attaining a high degree of customer satisfaction.
2. In order to achieve this aim, co-operation in a spirit of partnership is called for among the members of the Sales Organization.
3. Under this Agreement, with respect to the SMV products, the Parties acknowledge that, in carrying out the continuous transactions between the parties, the

prosperity of both Parties and the needs of society are ensured by each Party's exercising or performing of the rights, obligations and responsibilities hereunder in good faith.

4. Contractual Products as used in this Agreement shall mean all tangible and intangible products and services of the SMV brand as listed in the Agreement.

5. The Dealer shall fund his operations with the liquidity commensurate with his business requirements as set forth, maintain its business entity for as long as this Agreement remains in force, and ensure that a balanced financial structure is maintained at all times. Dealer shall provide Supplier all actual information about Dealer's financial status as and when maintained by Supplier. Dealer shall infuse fresh funds to facilitate expansion of operations and setting up of new facilities as agreed between the Supplier and Dealer or procurement of equipment's needed for smooth running of the business.

II. Supplier's Obligations and Legal Status

Article 15 – Specifications and Supply of the Contractual Products

(1) In order to accomplish the purpose of this Agreement, the Supplier shall endeavor to supply the Contractual Products in an appropriate and smooth manner.

(2) The Supplier determines the conditions, appearance, and the like of the Contractual Products.

(3) The Supplier shall notify the Dealer in writing of the specifications of the Contractual Products. The same shall supply to any modification made of such specification.

(4) The Supplier shall be entitled to change the Contractual Products with a written prior notice within a reasonable period if the Supplier considers such change necessary due to the change in the market, Supplier's policy or otherwise.

III. Warranties and Representations

Article 18 – Warranty and Goodwill expenses

The Supplier shall reimburse to the Dealer certain expenses incurred in relation to warranty. The settlement of such payments shall be made pursuant to the Supplier's Guidelines as formulated and amended from time to time. Any ex gratia payment shall be as per the discretion of the Supplier, and the settlement of such ex gratia payment will be made pursuant to the relevant Supplier's Guidelines for the same.

IV. Term and Termination of the Agreement

Article 20 – Term of the Agreement

(1) This Agreement shall become effective from June 15, 2015.

(2) This Agreement shall remain in effect for three (3) full years from the effective date. The Agreement may be renewed by both parties for a further period on the same or on such other terms and conditions as may be mutually agreed by both the parties in writing.

Article 21 – Ordinary Termination

This Agreement may be terminated with three (3) months' notice by either Party through a written notice to the other Party without assigning any reasons.

Article 22 – Termination by Mutual Consent

This Agreement may be terminated at any time by mutual consent between the Supplier and the Dealer, notwithstanding Article 20 or 21.

Article 32 – Liability

(1) Each Party to this Agreement shall bear the respective commercial risk arising from the Agreement and the execution thereof. The Supplier, in particular, shall accept no responsibility for expenses incurred by the Dealer in the execution of this Agreement or for understandings entered into by the Dealer hereunder.

(2) With regards to any and all complaints, disputes, lawsuits or demands raised by the customers resulting from the general maintenance, repair, works required under the warranty, alteration, recall campaign and the like which have been conducted by the Dealer, the Dealer shall, at his own expense and responsibility, settle and/ or resolve such complaints, disputes, lawsuits or demands raised by a customer against the Dealer in relation to the quality of the Dealer's work, delay in delivery or any other reason attributable to the Dealer, and the Supplier shall not assume any responsibility therein.

V. Dispute Resolution

Article 37 – Jurisdiction

This Agreement shall be construed as having been executed in the NCT of New Delhi and it is agreed that the rights and liabilities of the Parties hereto their heirs, executors, administrators, successors and assigners in case a dispute arises shall be subject to exclusive jurisdiction of the Courts of New Delhi.

Article 38 – Arbitration

(1) This Agreement shall be construed as having been executed in the NCT of Delhi and it is agreed that the rights and liabilities of the Parties hereto in case a dispute arises shall be subject to exclusive jurisdiction of the Courts of New Delhi. It is further agreed that in any event, service of any process shall be affected against the Supplier, only if made at the registered office of the Supplier at Mumbai.

(2) All and any disputes and claims arising out of or relating in any manner to this Agreement or the breach, termination, non-performance, interpretation or validity thereof, shall first be discussed in good faith by officers duly nominated for this purpose by each party, with a view to resolving the same. The Parties consent to a single, consolidated arbitration for all disputes that may at the time exist.

(3) All and any dispute and claims as aforesaid, which cannot be fully and satisfactorily resolved or settled by the parties as aforesaid, shall at the request of either party, be submitted to and be settled by arbitration of the sole arbitrator and if

there is no concurrent on the appointment of the sole Arbitrator then it must be resolved by appointing 3 (three) arbitrators in accordance with the Arbitration and Conciliation Act, 1996 or any other statute as may be in force for the time being.

(4) The arbitration proceedings shall take place in New Delhi, India and the language of the arbitration proceeding, the award, and all documents filed or submitted in connection therewith shall be in the English language. A written transcript of the proceedings shall be made and furnished to the parties.

(5) The arbitration award shall be reasoned, final and binding on all the Parties thereto. ”

3. Mahajan Motors Ltd. (MM) is a company registered under the Companies Act, 1956 that has recently enjoyed immense success with its model called MM Rodeo. Confident with its success in the market, MM was looking to enter the luxury market. SMV on the other hand was looking to expand its operations in South Asia and was in the process of eyeing out potential collaborators to enter the Indian luxury car market segment.
4. MM Finance Pvt. Ltd. is a 100% wholly owned subsidiary of MM. It is the financial wing of MM and provides captive finance facilities to its dealers. All exclusive dealers for MM, including Ess Kay, were required to finance their cars through MM Finance. The agreement between MM Finance and Ess Kay for the financing of its cars was carried the following terms:-

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FINANCE CONTRACT

PREAMBLE

MM FINANCE PRIVATE LIMITED, a company incorporated under the provision of the Companies Act, 1956 and duly registered with the Reserve of Bank of India as a non-banking financial company, and having its registered office at 5, East Avenue, Level 3, Maxity Marks, Bandra Kurla Complex, Bandra (East), Mumbai – 400051 hereinafter referred to as the “Lender” (which expression shall, unless it be repugnant

to the subject or context thereof, be deemed to mean and include its successors and assigns) of the ONE PART.

AND

The Borrower/s as more particularly described in serial number 3 of the Schedule 1 hereto who is hereinafter referred to as the “Borrower/s” of the OTHER PART.

Schedule 1

iii) Ess Kay Industries Limited, a company incorporated under the Companies Act, 1956; having its registered office at N-26, Connaught Circle, Connaught PLACE, New Delhi, India, through its Directors, hereinafter referred to as “Lender”, which expression shall unless repugnant to the context hereto mean and include its successors and permitted assigns.

A. The Borrower/s is an Authorised dealer of the Manufacturer (as defined hereunder), in respect of the type and brand of vehicles more particularly described in serial number [4] of Schedule 1 hereto (the “Cars”).

B. In the course of its business, the borrower/s purchases, from time to time, various Cars from the Manufacturer against invoices raised by the Manufacturer on the Borrower/s which Cars are then sold onwards by the Borrower/s to its various customers.

C. The Borrower/s on certain occasions may have purchased Cars by availing of borrowings from other lenders (“Existing Landers”) which borrowings are secured by hypothecation of the Cars financed and on certain other occasions may have purchased Cars on credit from the Manufacturer.

D. The Borrower’s has approached the Lender and has requested the Lender to grant financial facility to the Borrower/s, which the Borrower/s may utilize for one or more of the purposes specified below:

(i) to enable the Borrower/s to make payments to the Manufacturer for the Cars purchased by the Borrower/s from the Manufacturer from time to time (“Purpose A”),

(ii) to discharge the amounts due to Existing Lenders of the Manufacturer in respect of Cars purchased by the Borrower/s or as contemplated in Recital C above (“Purpose B”),

(iii) for the general corporate purpose of the Borrower/s (“Purpose C”),

E. The Lender has, at such request of the Borrower/s, agreed to the Borrower/s a facility (which facility shall be utilized for the above-mentioned purposes only) up to the Facility Limit on the terms and conditions hereinafter appearing (the “*Facility*”).

F. In addition to providing the Facility to Borrower/s, the Lender shall during the Facilitation period act as a Mediator/ Facilitator between the Manufacturer and the Borrower/s and accept sales proceeds of the Cars, for and on behalf of the Manufacturer, from the Borrower/s (except retail loan adjustment) which have been purchased from the Manufacturer on the assurance of Lender.

DEFINITIONS

“Applicable Law” includes all applicable Indian statutes, enactments and acts whether of the state legislature or the parliament, and laws, ordinances, rules, by-laws, regulations, notifications, guidelines, policies, directions, directives and order of any Government Authority, statutory authority, tribunal board, court or a recognized stock exchange, as may be applicable.

“Available Facility Limit” at any given point of time means the amount by which the Facility Limit exceeds the aggregate amount due by the Borrower/s in respect of Loans outstanding at that point of time.

“Borrower/s” refers jointly and severally to the applicants/ borrower’s and co-applicants/ co-borrower/s (if any) who has/ have been sanctioned/ granted the facility by Lender based on the Application form submitted by such applicants and co-

applicants to Lender for availing of the facility and includes, depending on the nature of the borrower/s (a) its successors and permitted assignees if the borrower/s is a company within the meaning of the Companies Act, 1956 or a society registered under the applicable laws relating to societies, (b) any or each of the partners and their survivors(s) or the partners(s) from time to time and their respective heirs, legal representations, executors, administrators and permitted assignees, if the borrower/s is partnership firm within the meaning of the Indian Partnership Act, 1932, (c) his/ her heirs, legal representatives, executors, administrators and permitted assignees, if the borrower/s is an individual and/ or carrying on business as a sold proprietary concern, (d) the karta and any of each of the adult members of the HUF and their survivors(s) and his/ her their respective heirs, legal representatives, executors, administrators and permitted assignees, if the borrower/s is joint Hindu Undivided Family and (e) the trustee(s) for the time being thereof and the successors and permitted assignees of the trust/ trustees, if the borrower/s is a trust.

“Borrower/s Obligations” means all obligations at any time due, owing or incurred by the Borrower/s to the Lender in respect of the Facility and the Loans advanced thereunder and shall include the obligation to make payment of the amounts due on each of the Relevant Payment Dates and includes interest, Default Interest and all fees, costs, charges and expenses and other monies payable by the borrower/s in respect of the Facility.

“Customers” mean the customers of the Borrower/s who purchase the Financed Cars from the Borrower/s.

“Financed Car” means each Car which is hypothecated by the Borrower/s in favour of the Lender as and by way of security for payment and discharge of the Borrower/s Obligations.

“Manufacturer” means a company incorporated under the Companies Act, 1956 and engaged in the business of manufacturing and/ or trading of automobile, spare parts and its accessories etc. more specifically mentioned in serial number [4] of Schedule 1 hereto.

3. TERMS OF CONTRACT

3.1. Grant of the Facility

3.1.1 In the premises aforesaid and subject to the other terms and conditions herein contained herein, the lender, in principle, agrees to grant to the Borrower/s the Facility and the Borrower/s agrees to avail of the Facility from the Lender upto the Facility Limit. The Borrower/s hereby acknowledges and confirms that Lender may at its sole and entire discretion and without any prior intimation enhance or reduce the Facility Limit and the same shall be binding on the Borrower/s on mere notification/ intimation of the same by the Lender to the Borrower/s. On any such revision being made and communicated by the Lender to the Borrower/s Schedule I hereto shall deem to stand modified accordingly.

3.1.2 The Facility is in the nature of a revolving facility subject to the Facility Limit.

3.1.3 The Borrower/s hereby agrees that the Lender shall not be required to make or continue to provide Loans under the Facility otherwise that at the Lender's sole discretion and that the Lender shall be entitled to cease to make Loans under the Facility without any prior notice to the Borrower/s.

3.1.4 The Facility shall be drawn upon/ used by the Borrower/s only for Approved Purposes and for no other purposes whatsoever.

3.1.5 The disbursal of the Facility by the Lender to the Borrower/s shall be subject to the fulfillment of the conditions precedent set forth in Schedule III hereto ("Conditions Precedent"), which conditions shall be fulfilled by the Borrower/s prior to the making of any Disbursement request under Clause 4 below.

4. DISBURSEMENT

4.1 Upon receipt of a Disbursement Request as aforesaid the Lender may in its sole discretion permit the Borrower/s to utilize the Facility pursuant to the terms and conditions of this Agreement. The Borrower/s hereby agrees, acknowledges and confirms that notwithstanding anything to the contrary contained in this Agreement

or in any other document, writing or other arrangement entered into between the Parties in relation to the Facility, the Lender shall not be bound to make disbursement on every Disbursement Request made by the Manufacturer or Borrower/s (as the case may be) and the Lender shall consider the same on a case to case basis prior to making any disbursement under the Facility. The Borrower/s hereby agrees and acknowledges that the Lender shall have the right to refuse disbursement without assigning any reason whatsoever for the same. The Borrower/s further agrees, acknowledges and confirms that the decision of the Lender shall be final and binding on the Borrower/s.

4.2 The Borrower/s hereby agrees, acknowledges and confirms that disbursement under the Facility shall be made by the Lender by making payments directly to the Manufacturer, the Existing Lenders or the Borrower/s (as the case may be) in such form as the Lender may deem fit, including through issue of banker's cheques, pay orders, demand drafts, Electronic Fund Transfer or any other mode.

4.3 The Borrower/s shall keep the Financial Cars in its inventory and the Borrower/s possession of the Financed Cars shall be for the sole purpose of storing and exhibiting the same for sale in the ordinary course of the Borrower/s business for the purposes of this Clause, the expression "sale in the ordinary course of the Borrower/s's business" shall mean only a bona fide retail sale to a Customer at not less than the Manufacturer's indicated list price plus taxes, registration charges and insurance charges.

5. EVENTS OF DEFAULT

5.1 Any of the following shall constitute an Event of Default under this Agreement.

(a) Failure to make payment to the Lender of the Borrower/s Obligations or any part thereof payable under these presents on the Relevant Payment dates.

(b) The Borrower/s using the Facility or any part thereof for any purposes other than for which the Facility has been sanctioned.

(c) If any representation or statements made or particulars furnished by the Borrower/s are found to be incorrect or the Borrower/s commits or threatens to commit any breach or default in performance of observance of the terms, covenants and conditions of this Agreement and or the Security Documents.

(d) If the agreement entered into by the Manufacturer and the Borrower/s terminated and/ or the Borrower/s ceases to be an authorized dealer of the Manufacturer.

5.2 The Lender shall be entitled to terminate this Agreement at any time by providing [15] Business' Days' notice to the Borrower/s.

5.3 The Lender shall terminate this Agreement with immediate effect by giving written notice to the Borrower/s if the Borrower/s commits breach of any provisions of this Agreement or if it is found that the Borrower/s has made any false/ misleading misrepresentation to Lender.

5.4 The Borrower/s shall be entitled to terminate the Agreement on discharging the Borrower/s Obligations, in full, by providing [15] Business Days' notice to the Lender subject to payment of the Borrower/s Termination Charges (if applicable) Any termination sought to be affected by the Borrower/s without making payment of the Borrower/s Obligations and the borrower/s Termination Charges (if applicable) shall be null and void.

5.5 Termination shall not affect any rights or obligations which have accrued or arisen prior to the termination and shall not affect the applicability of the provisions of this Agreement to transactions which have been taken place prior to the termination.

6 DISPUTE RESOLUTION

6.1 In the event of any dispute or differences arising directly or indirectly out of this Agreement or otherwise, the Parties undertake to use all reasonable endeavours to resolve such disputes amicably. If disputes and differences cannot be settled amicably then all disputes and differences arising between the Parties hereto in connection with this Agreement or the interpretation hereof or anything done or

omitted to be done pursuant hereto or the performance or non-performance of this Agreement shall be referred to the arbitration of a single arbitrator to be appointed by the Lender and the arbitrator's award shall be final and binding on both the Parties hereto. In the event of death, refusal, neglect, inability or incapability of a person so appointed to act as an arbitrator, the Lender may appoint a new arbitrator. The arbitration shall be held in New Delhi, India and the expenses of the arbitration shall be borne in such manner as the arbitrator may determine. The arbitration shall be conducted in accordance with the Arbitration & Conciliation Act, 1996 or such other law relating to arbitration as may be in force in India at the relevant time. The language of arbitration shall be English.

7 GOVERNING LAW AND JURISDICTION

7.1 Without prejudice to Clause [26] above, each Party submits to the executive jurisdiction of the courts at New Delhi, India. ”

5. In the year 2017, a major scandal erupted against MM Cars and it was found that MM Rodeo had cheat devices fitted to lower the emission norms on testing. The emission however was 20 times more than the permissible norms. Petitions were filed before the Environment Tribunal and after taking cognisance, the Tribunal not only imposed a huge penalty on MM Motors but also banned all diesel vehicles that were atleast 5 years old from plying in New Delhi. The sales of Rodeo that had earlier been successful as an economical SUV, plummeted leading to huge losses for MM. Ess Kay on the other hand was burdened with financial debt as it had failed to repay its loans to its creditors, the biggest being MM Finance. In fact, recovery of debts from agents was seen to be the only source for MM to gain liquidity. Sensing trouble, Ess Kay invoked clause 5.4 of its agreement and terminated the agreement with MM Finance on 25.5.2017.
6. MM Finance on the other hand, approached the National Company Law Tribunal, New Delhi under the Insolvency and Bankruptcy Code, 2016 seeking the recovery of its loans. Ess Kay invoked the dispute resolution clause and sent a notice dated 12.7.2017 invoking arbitration. Ess Kay claimed that the Rodeo was being sold as a clean energy economical SUV but there were reports stating that the Rodeo had cheat devices in it that lowered the emissions upon testing. In

fact, MM had not only cheated its customers but also the agencies like Ess Kay. Ess Kay alleged fraud on part of MM. The petition in the NCLT, Delhi is pending and has not been admitted.

7. SMV India saw the right opportunity to enter the Indian car market with its hybrid vehicles and a take over of MM was proposed. The National Company Law Tribunal vide order dated 15.10.2017 allowed the merger and SMV India took over MM. By virtue of the merger, all assets and liabilities of MM stood assigned to SMV India.
8. SMV India took over the claim against MM. In an astute move, Ess Kay who was following the news, in the NCLT sought mediation and entered into a compromise with SMV India. The terms of the compromise are as follows:

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COMPROMISE AGREEMENT

- 1) Hereinafter, unless the context is otherwise, SMV India shall be referred to as the “First Party” and Ess Kay Motors shall be referred to as the “Second Party”.
- 2) That in order to settle their disputes, the Parties have entered into the present compromise on 21.1.2018 wherein the Second Party shall compensate the First Party in two installments to the extent of Rs. 30,00,00,000.
- 3) The first instalment shall be payable by the Second Party to the First Party by 21.3.2018 and the second instalment shall be made payable by the Second Party to the First Party by 21.6.2018.
- 4) The Parties shall not malign the image and reputation of each other’s brands and shall not cause any damage to the individual brand value of their products.
- 5) Any disputes or differences arising out of the present agreement shall be referred to a sole arbitrator and shall be governed by the Arbitration and Conciliation Act, 1996 (as amended) at New Delhi, India. ”

9. SMV India refused to enter into a dealership agreement with Ess Kay which led to Ess Kay Motors defaulting in their second instalment which led to SMV India invoking the present arbitration. SMV India did not want to give up its earlier claim as well. SMV India. SMV filed its statement of claims highlighting the following points:

- a) Ess Kay Motors defaulted in paying its second instalment to the tune of Rs. 15,00,00,000 as per the compromise agreement dated 21.1.2018 and therefore the Arbitrator may be pleased to allow its claim for Rs. 15,00,00,000 with interest.
- b) As the rights and liabilities of Mahajan Motors and MM Finance rest with SMV India, SMV India is entitled to the loan amount due to Ess Kay Motors by MM Finance as the compromise was arrived at with malafide intention only to get out of the insolvency proceedings. The Arbitrator may thereofer be pleased to allow a claim for Rs. 100,00,00,000 in favour of the Claimant with interest.
- c) Award interest pendent lite and litigation expenses.

10. In response, Ess Kay filed its Statement of Defence making the following points:

- a) SMV India did not adhere to clause (4) of the Compromise Agreement as it refused to enter into a fresh dealership agreement with Ess Kay Motors thereby hindering the brand value created by Ess Kay. This is true especially in light of the recent circumstances. This has lowered the market value of the company and other brands do not want to be associated by Ess Kay Motors, therefore it is not liable to pay the second installment.
- b) SMV India is barred from invoking claims relating to MM Finance as it was not a party to that agreement. Alternatively, since the arbitration has been invoked on the basis of the compromise agreement, the SMV India cannot travel beyond the terms of the substantive agreement.
- c) A compromise arrived at during mediation proceedings cannot be made a subject matter of arbitration.

11. The arbitration commenced on 26.9.2018 with weekly hearings. The arguments culminated on 26.5.2019. The award is to be pronounced.

This competition problem is drafted by Mr. Abhilaksh Grover, Advocate, Punjab & Haryana High Court, Chandigarh.