

MOOT PROPOSITION¹

1. Gamezone Bureau Pvt. Ltd (“Gamezone”) is a global sports analytics company, incorporated in Hind, which provides in depth analysis and game data of Tennis and Badminton. Gamezone possesses state of art technology that provides advanced analytics platform and processes multitudinous metrics that facilitates players and coaches to analyse any players’ strengths and weaknesses in order to have a competitive advantage. The players’ matches and training sessions are tracked through videos, audio commentaries or wearable tech, and the company’s products and services are offered to customers through the company’s online platform in accordance with the package as subscribed by a customer after making the necessary payments. Gamezone already has a prominent presence in the field of Tennis having roped in many top-level players in the sport. However, it is still in the early stages of tapping the Badminton market.
2. Darren Kiong is the World No.1 professional Badminton player. He belongs to a country called Malai. He is a two-time Olympic gold medalist and a four-time world champion, and is the only Malai player to receive gold in the Olympics singles event. Darren Kiong is considered a national hero and has been named by Forbes as the most marketable athlete in the field of Badminton for four consecutive years from 2011 to 2015. He is also the most followed Badminton player on social media with over 18 million followers on his Twitter page and over 21 million followers on his Facebook page.
3. To launch its business in the field of Badminton, Gamezone decided to seek endorsement by Darren Kiong. Accordingly, on 5-1-2016, Gamezone wrote a letter of proposal to Darren Kiong, inviting him for a discussion and to observe a free trial run of their product during his visit to Hind, in mid-January, for the World Badminton Federation (“WBF”) Hind Super series event. Darren Kiong, having heard of

¹The Moot Proposition was drafted by Mr.Inbavijayan, FCI Arb, Managing Partner, KoVe Global and B.Deepak Narayanan, MCI Arb, LLM (QMU London), Partner, BDN Chambers. The participants shall refrain from contacting the drafters.

Gamezone and their enormous success in the sport of Tennis agreed to meet them and scheduled a meeting on 16-1-2016.

4. Gamezone met with Darren Kiong and his manager, Wong Lee, in the capital city of Hind on 16-1-2016, where a demo of their full product site “GameDNA” was showcased using the video of one of Darren’s recent matches. Darren Kiong was extremely impressed with the detailed and accurate data that the product provided. He immediately showed interest in endorsing Gamezone and discussed in detail the compensation payable and other commercials. Gamezone and Darren reached a consensus regarding the deal and Darren requested Gamezone to send a draft of the Endorsement Agreement to his lawyer Mr. Christopher Matthew.
5. Gamezone’s in-house legal team prepared the draft of the Endorsement Agreement and sent it to Darren and his lawyer through an email dated 30-1-2016. After several rounds of negotiations, both parties reached an agreement over the commercials of the Endorsement Agreement. However, on 11-2-2016, Darren’s lawyer Mr. Christopher Matthew sent an email to Gamezone stating that the only disagreement which impeded the finalization of the agreement remained in the ‘*Dispute Resolution clause*’, which stated that “*Any dispute that arises out of this Agreement shall be resolved in the Courts at Delhi*”. Instead Mr. Matthew proposed a change for dispute resolution through arbitration under the rules of Kuala Lumpur Regional Centre for Arbitration (“KLRCA”) with seat in Malai.
6. Gamezone, in a haste to finalise the deal, responded to Mr. Mathew’s proposal by an email dated 20-2-2016 stating that while their company has a strict non-arbitration policy, in order to meet a middle ground, they were agreeable to an arbitration under the KLRCA Rules with the seat of arbitration in Hind. Accordingly, the Endorsement Agreement was finalized and signed in counterparts by both parties on 25-2-2016 (excerpts of Endorsement Agreement are available in Addendum – I).
7. Subsequently on 2-3-2016, Darren created an online account on GameDNA in order to use its services. In doing so, he had routinely agreed to the Terms and Conditions of GameDNA (“T&C”) provided by way of a ‘Click-wrap contract’ (excerpts of T&C

are available in Addendum – II). T&C in consonance with the Gamezone’s non-arbitration policy, contained a provision for resolution of disputes through the Courts at Delhi.

8. The next six months saw a series of endorsement campaigns conducted by Gamezone in association with Darren Kiong. Owing to Darren’s huge fan following and the enormous amount of goodwill that he possessed, subscriptions for GameDNA saw a steady increase and many top ranked Badminton players subscribed for the product.
9. Meanwhile, Darren Kiong shockingly exited in the first round of Rio Olympics in 2016, thus putting an end to his dream of being the only player to secure three Olympic gold medals at the singles event. Even though there were speculations in media about his retirement, Darren dismissed all rumours.
10. On 31-3-2017, Gamezone reported an astounding 250% increase in subscription of their product GameDNA. Soon their product was used by Badminton players across the world irrespective of their level of play.
11. Darren Kiong suffered further losses in 2017 when he failed to secure a single title for the first time in 8 years. He was replaced by young and dynamic Hindian Badminton player, Chaitanya Sen, as the new World No.1. Further, Forbes named Chaitanya as the most marketable Badminton player for that year and sponsors and endorsement deals flooded in. Badminton in Hind was already gaining huge popularity due to recent successes of Badminton players in successive Olympics. Gamezone in order to extend its presence in Hind immediately attempted to sign an endorsement deal with Chaitanya. However, the negotiations were unsuccessful as Gamezone’s advertisement budget was already overstretched due to the lucrative deal guaranteed to Darren Kiong.
12. On 27-1-2018, media reported that WBF Anti-Doping Agency issued Darren Kiong a show cause notice for possible use of a banned substance, Probenecid, a doping masking agent, obtained from Darren’s urine sample during a random dope test at the 2018 Hindian Badminton Open. The WBF Anti-Doping Agency called for Darren’s attendance for a preliminary enquiry on 20-3-2018 at the WBF headquarters. Media

further reported that Darren Kiong was placed under provisional suspension from participating in further tournaments.

13. The next month saw a media outcry where several newspapers and television media reported that many of Darren Kiong's sponsors and endorsees threatened to terminate their contracts with him. Donex, a leading apparel and sports equipment brand did not renew its contract with Darren after its expiry in 2018. Also, many of his fans through social media raised suspicions over his prior achievements.
14. To everyone's surprise, on 20-3-2018 media reported that Darren Kiong was cleared of all charges as the Anti-Doping Panel agreed with Darren's 'kiss defence'. According to Darren Kiong, his wife's sinus medication comprised of probenecid and the effect of the drugs must have entered his body when he kissed his wife just prior to the doping test. The panel observed that even though Darren Kiong cannot prove with certainty that the drug was transferred through his wife, such a circumstance as claimed by Darren was certainly possible and hence cleared Darren of all charges with a stern warning. However, media frenzy surrounding the issue did not die and a poll conducted by a leading sports channel in Malai showed that around 50% of the Badminton fans who participated in the poll believed that the Anti-doping agency cleared Darren Kiong due to his iconic status.
15. Gamezone sent an email on 28-3-2018 to Darren Kiong, stating that they were extremely disappointed with the recent doping scandal surrounding Darren Kiong and hence they were invoking the Morals Clause to terminate their Endorsement Agreement with him and that it would take effect immediately. Darren Kiong replied through email dated 30-3-2018 that there was no necessity to terminate the Agreement as he was cleared of all charges and therefore, invoking the Morals Clause was highly arbitrary. In any event while Gamezone has paid a sum of R.50 crores to Darren Kiong, he is still entitled to receive the remaining payment of Rs.40 crores as guaranteed under the Endorsement Agreement since Gamezone's popularity is attributed highly to Darren's endorsement. Gamezone replied through an email dated 8-4-2018 that violation of the Morals Clause expressly granted Gamezone the right to

forfeit all future payments payable to Darren Kiong and Gamezone further reserved its right to claim damages from Darren Kiong as they were still ascertaining the losses (if any) caused to their Company due to the debacle surrounding Darren Kiong.

16. Darren Kiong submitted a request to initiate arbitration against Gamezone along with a Statement of Claim to the Director of the Asian International Arbitration Centre (“AIAC”) (formerly KLRCA) on 20-4-2018 and appointed Mr.Derek Wong, a Law Professor from King’s University, Malai as an Arbitrator. The Statement of Claim primarily alleged that:

- i. Gamezone has misused the ‘*Morals Clause*’ and has breached the Endorsement Agreement by unwarrantedly terminating the same. The real reason for its termination is due to recent losses suffered by Darren Kiong in the WBF circuit. Accordingly, it was prayed in the Statement of Claim that Gamezone be directed to perform its obligations under the Endorsement Agreement by holding that:
 - a. Gamezone is liable to pay a sum of Rs.40 crores as guaranteed under Clause 3 of the Endorsement Agreement.
 - b. Gamezone is liable to provide free subscription and services of GameDNA for the remaining period of the Endorsement Agreement as agreed in Clause 3 of the Agreement.
- ii. In the alternative, the Endorsement Agreement should be rescinded and Gamezone be held liable to pay liquidated damages of Rs.20 crores for breach of the Endorsement Agreement arising out of misuse of ‘*Morals Clause*’.
- iii. Gamezone shall further be liable to pay the costs of arbitration, expenses for legal representation and any other payments that the Tribunal may so order.

17. On 20-5-2018, Gamezone submitted its Statement of Defence and appointed Mr.Shivram Rai, Partner of leading Hindian Law firm, LPN Legal LLP as an Arbitrator. The Statement of Defence primarily stipulated that:

- i. Gamezone had rightfully invoked the ‘*Morals Clause*’ since the doping scandal surrounding Darren Kiong has tarnished and damaged the image of Gamezone.

- ii. Gamezone is not liable to pay a sum of Rs.40 crores since it had the right to forfeit any future payments payable to Darren Kiong if there is breach of the 'Morals Clause'.
 - iii. Gamezone is not liable to provide free subscription and services of GameDNA for the remaining period of the Endorsement Agreement.
 - iv. Gamezone has not breached the Endorsement Agreement and is not liable to pay any liquidated damages.
 - iv. Darren Kiong is liable to return all the payments received from Gamezone under the Endorsement Agreement amounting to Rs.50 crores.
 - v. Darren Kiong shall be liable to pay the costs of arbitration, expenses for legal representation and any other payments that the Tribunal may order.
18. The two arbitrators appointed Mr. Tien Chen, the President of International Arbitration Institution, Singapore, as the presiding arbitrator on 30-5-2018. All three arbitrators were cleared of any potential conflict of interest.
19. Subsequently on 10-6-2018, Gamezone emailed Darren Kiong stating that a recent interview given by Aaron Shem, a young Malai Badminton player has evidenced that Darren Kiong is in express breach of the confidentiality provision of T&C of GameDNA. According to Gamezone, Aaron Shem (who is not a subscriber of GameDNA) in his interview after winning a WBF event, has revealed (i) the existence of this arbitration between Gamezone and Darren Kiong and also that (ii) Darren Kiong has shared various data of other Badminton players obtained from use of GameDNA to Aaron Shem without authorization from Gamezone (Aaron Shem's interview excerpt available in Addendum III). Accordingly, Gamezone demanded a payment of Rs.1,00,00,000/- from Darren Kiong as damages pursuant to Clause 6.3 of the T&C, failing which Gamezone would initiate legal action pursuant to Clause 12 of the T&C.
20. Darren Kiong replied by email on 15-6-2018 stating that he has not committed any breach of the confidentiality clause since he has not shared any specific data files obtained through GameDNA, to Aaron Shen. Darren Kiong further stated that he was

already World No.1 before subscribing to GameDNA and he cannot be prevented from sharing his wealth of experience, gained over many years, to help the younger players. Gamezone is merely forum shopping by opting to initiate a claim in the Courts of Hind and that any dispute regarding confidentiality alleged by Gamezone ought to be agitated before the already constituted Arbitral Tribunal since it forms part of Endorsement Agreement and AIAC Rules.

21. On the same day, Darren Kiong also filed an Interim application against Gamezone before the Arbitral Tribunal praying for an anti-suit injunction, restraining Gamezone from initiating any proceedings before a judicial authority against Darren Kiong.
22. Gamezone, with the leave of the Arbitral Tribunal, filed a Reply on 30-6-2018 against the interim application stating that the present Arbitral Tribunal does not have the power to grant an anti-suit injunction since it restricts the inherent right of a person to approach the Court. It further stated that the interim application is liable to be dismissed since Darren Kiong has breached confidentiality provisions under T&C and not the Endorsement Agreement and accordingly Gamezone has the right to the approach the judicial Courts at Delhi.
23. A conference call was held between the party representatives and arbitrators on 30-6-2018. The oral hearing is scheduled to be held on 28-10-2018 at New Delhi. The Tribunal issued a Procedural Order as follows:

PROCEDURAL ORDER

- i. The parties have chosen not to let in oral evidence.
- ii. The matter has been posted for arguments of both parties on 28-10-2018 and the Tribunal shall hear the interim application along with the issues raised in the Statement of Claim and Statement of Defence on the same day.
- iii. The Arbitral Tribunal shall hear the following issues of 28-10-2018:

I. Interim Relief:

- a) Does the present Arbitral Tribunal have the power to grant an anti-suit injunction and will the same violate the inherent right of a person to approach Courts?
- b) Does the alleged breach of confidentiality fall within the purview of Endorsement Agreement or T&C? Accordingly, should the Tribunal grant an anti-suit injunction?

II. Main Relief:

- a) Has Darren Kiong committed a breach of the 'Morals Clause' of the Endorsement Agreement and accordingly was Gamezone entitled to terminate the Agreement?
 - b) Is Gamezone liable to specifically perform its obligation to Darren Kiong under the Endorsement Agreement by paying Rs.40 crores as the balance consideration and further provide free subscription and services of GameDNA?
 - c) Is Darren Kiong entitled to an alternate relief of rescission and liquidated damages amounting to Rs.20 crores from Gamezone?
 - d) Is Darren Kiong liable to return all the payments received from Gamezone under the Endorsement Agreement amounting to Rs.50 crores?
- iv. Laws of Hind are pari materia to the laws of India.
 - v. Laws of Malai are pari materia to the laws of Malaysia.

Addendum - I
Endorsement Agreement (excerpts) 25-2-2016

WHEREAS,

- A. Gamezone is in the business of providing Sports Analytics and Statistics in various sports and Darren Kiong (hereinafter referred to as the “Endorser”) is a professional Badminton player from Malai.
- B. Gamezone had approached the Endorser to endorse the brand name of Gamezone in the sport of Badminton in order to build its marketability and commercial value across the World.
- C. Endorser has agreed to endorse Gamezone and both the parties have agreed to abide by the following terms stipulated below:

1. Term:

- i. The term of the Agreement shall commence on the date hereof and continue for until the earlier of three years or termination thereof.
- ii. The Agreement upon its expiry may be extended for a further period of One year upon mutual agreement of parties and unless otherwise agree upon by the parties, the terms and conditions stipulated herein shall also govern the subsequent agreement.

2. Services of Endorser:

During the Term of the Agreement Gamezone shall have the right to use the name, image, likeness, characterization, visual and audio representation of the Endorser in connection with Gamezone’s business purpose for its various promotion campaigns across the world. Gamezone shall use the Endorser’s services for:

- i. Social & Digital Media Ads.
- ii. Images of Endorser on Gamezone’s website and other promotion events.
- iii. Utilising on-field presence of the Endorser.
- iv. Providing permanent space in all T-shirts worn by Endorser for the use of Gamezone’s logo and the same shall be worn in all recognized tournaments of WBF that the Endorser participates.

- v. Video campaigns.
- vi. Social media campaigns at Gamezone's social channels, including but not limited to Twitter, Facebook, Instagram, YouTube etc.
- vii. Professional network campaigns.
- viii. Brand Promotion Campaigns.

The Endorser shall be available for 12 (Twelve) days per calendar year during the Term period for providing Services mentioned herein including but not limited to TVC, Audio Visual and Brand Promotion Campaigns. All of the above services shall be performed by the Endorser on a schedule that is mutually agreed between Gamezone and Endorser and at time and places reasonably convenient to Endorser's calendar.

3. Consideration:

In pursuance of the Services rendered and obligations fulfilled by the Endorser as stipulated above, the Endorser shall receive

- i. As consideration, a guaranteed sum of Rs.90 crores as described in the Schedule hereunder:

<u>Date</u>	<u>Amount</u>
25-2-2016	Rs.5 crores
On or before 31-12-2016	Rs.15 crores
On or before 31-1-2017	Rs.15 crores
On or before 31-12-2017	Rs.15 crores
On or before 31-1-2018	Rs.20 crores
On or before 31-12-2018	Rs.20 crores
Total	Rs.90 crores

- ii. Free subscription of all the services provided under GameDNA for the Term Period of the Agreement.

6. Morals Clause:

The Endorser shall conduct himself with due regard to the public conventions and morals. The Endorser shall not, either while rendering such Services to Gamezone or in his private life, commit an offense involving moral turpitude under relevant state, national or other laws. The Endorser shall not be convicted or commit any act or thing that will tend to degrade him in society or bring him into public hatred, public disrepute, contempt, scorn, or ridicule, or that will tend to shock, insult or offend the community or public morals or decency, failing which Gamezone may, at its sole discretion, terminate this Agreement or take any appropriate action including but not limited to forfeiture of any future payments liable to the Endorser or a claim of pro-rated or full refund of payments already made to Endorser as reasonably justified under relevant circumstances.

8. Confidentiality

Except as required under the prevailing laws, each party agrees: (i) that it will not disclose to any third party or use any Confidential Information, as defined herein, disclosed to it by the other party except as expressly permitted in the Agreement; and (ii) that it will take all reasonable measures to maintain the confidentiality of all Confidential Information of the other party in its possession or control, which will in no event be less than the measures it uses to maintain the confidentiality of its own information of similar importance. For the purpose of this Agreement, Confidential Information shall mean all information, materials and data, in any form, format or medium, disclosed, or revealed by either party in any way relating to the other party's business including but not limited to its finances, customers, operations, products, data, services, plans, pricing, customers, investors, business strategies or any other similar information. Confidential Information may be contained in oral or written material, verbal or electronic communications.

14. Breach & Termination:

If either party at any time during the Term of the Agreement: (i) fails to provide consideration specified under the Agreement; and/or (ii) fails to observe or perform any of

the covenants, agreement or obligations under the Agreement, the non-defaulting party may give a written notice to the defaulting party to terminate this Agreement.

16. Limitation of Liability

Neither party shall be liable to the other for any special, consequential, incidental, punitive, or indirect damages arising from or relating to any breach of this Agreement, regardless of any notice of the possibility of such damages. The aggregate liability of the either party, its directors, officers, employees, agents, sub-contractors in respect of any claims, losses, costs or damages arising out of or related to this Agreement shall in any event be restricted to Rs.20,00,00,000/- (Rupees Twenty crores) unless otherwise provided under this Agreement.

20. Governing law and Dispute Resolution

- i. This Agreement shall be governed by the laws of Hind.
- ii. All disputes, controversies, or claims arising out of or in relation to the Agreement, including the question of its validity, existence, termination or interpretation thereof, shall be resolved by Arbitration under the rules of Kuala Lumpur Regional Centre for Arbitration. The number of Arbitrators shall be three, where each party shall appoint one arbitrator and the two arbitrators shall appoint the presiding arbitrator. The Place of Arbitration shall be at GD Goenka School of Law, Hind. The language of arbitration shall be English.

Addendum – II

Terms and Conditions of GameDNA (excerpts)

1. **INTERPRETATION** In this document the following words shall have the following meanings:
 - 1.1 "Customer" means any person who purchases Services from the Service Provider;
 - 1.2 "Service Provider" means Gamezone Bureau Pvt. Ltd.
 - 1.3 "Terms and Conditions" means the terms and conditions for Services set out in this document and any special terms and conditions agreed in writing by the Service Provider.

2. **GENERAL**
 - 2.1 The Service Provider is in the business of providing Sports Analytics and Statistics in the sport of Badminton through products and services offered to the Customers in accordance with the product/package as subscribed by the Customer after making the necessary payments to the Service Provider
 - 2.2 These Terms and Conditions shall apply to all contracts for the supply of Services by the Service Provider to the Customer and shall prevail over any other documentation or communication from the Customer.
 - 2.3 Any amendments/changes/variations to these Terms and Conditions shall be invalid unless agreed otherwise in writing by the Service Provider.

6. **LIMITATION OF LIABILITY**
 - 6.1 The Service Provider shall not be liable for any direct loss or damage suffered by the Customer howsoever caused, as a result of any negligence, breach of contract or otherwise in excess of the price paid for the Services.
 - 6.2 The Service Provider shall not be liable under any circumstances to the Customer or any third party for any indirect or consequential losses or loss of profit or other economic loss suffered by the Customer howsoever caused, as a result of any negligence, breach of contract, misrepresentation or otherwise.
 - 6.3 The Service Provider shall be entitled to initiate civil, criminal action and (or) damages not exceeding Rs.1 crore against Customer for breach of this Terms and Conditions including but not limited to misappropriation, IPR infringement and confidentiality provisions.

8. **CONFIDENTIALITY:** Confidential Information for the purpose of this Terms and Conditions shall include but not be limited to all specifications, drawings, sketches, models, samples, reports, plans, forecasts, current or historic data, computer programs or documentation and all other technical, financial or business data in verbal, written, graphic, electronic, photographic, recorded, prototype, or sample form, as disclosed by the Service Provider to the Customer. The Customer agrees: (i) that he/she will not disclose to any third party or

use any Confidential Information, as defined herein, disclosed to it by the other party except as expressly permitted in the Terms and Conditions; and (ii) that he/she will take all reasonable measures to maintain the confidentiality of all Confidential Information of the Service Provider in its possession or control, which will in no event be less than the measures it uses to maintain the confidentiality of its own information of similar importance. The Service Provider shall utilise the confidential information provided by the Customer, for Advertisement, Media, fulfilling obligations and other allied purposes.

10. GOVERNING LAW:

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

12. DISPUTE RESOLUTION:

All disputes, controversies, or claims arising out of or in relation to the Agreement, including the question of its validity, existence, termination or interpretation thereof, shall be resolved in the Courts at Delhi, Hind.

Addendum – III

Interview of Aaron Shem at Malai Daily – Excerpt

