



National Moot Court Competition MOOT PROPOSITION¹

1. Malta is a significant destination for tourist all over the world. It is a vast country which possesses a rich and varied heritage with diversity in its religions, culture and social outlook. As a result aviation has emerged as an important industry because of its linkage to the tourism sector.
2. The aviation industry in Malta got a big leap when in the wake of liberalization; it has been opened to private sector. A number of private players have entered into the aviation industry. The Malta government in its liberalization programme regularized operation by private airlines, thus acknowledging the Civil Aviation Industry's importance in the promotion of tourism and as a result gain in foreign exchange earnings.
3. The private airline industry in Malta is healthy and now some of the private airlines have started flying on international routes too. The future outlook for the industry augurs well. All this is now changing, with successive governments at the federal, and state level realizing the catalytic effect of the aviation sector on the local economy, infrastructure, tourism and employment creation. Each of these are critical for a nation with over half of its population below the age of 25, yearning for satisfying jobs and high quality of life.
4. In February 2018, Malta's Finance Minister announced Malta's plans for a five-fold increase in its airport capacity to handle over a billion trips a year under a new initiative called.'NAMH Nirman' (NAMH - NexGen Airports for Malta; Nirman - Development), by looking at the GDP of the country which is been recognised as the second superpower of the world. But the Non-Performing

¹ Nishant Gaurav Gupta, Advocate, Delhi High Court and Insolvency Professional and Vivek Wilson Assistant Professor Indore Institute of Law.



Assets (NPA) has given tremendous loss and therefore, has been a major obstacle in the growth of Malta.

5. Malta has made several legislations to get protected by NPA like Recovery of Debts Due to Bank and Financial Institutions, 1993 and The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.
6. In Malta both the Acts have failed to curb the menace of NPA on major front and NPA has increased tremendously. Malta government has to pass a New Separate Master Act constituting an independent body like Reserve Bank of Malta to look into realization of NPA. The new Act should have absolute power ranging from recovery of debts, securitization and initiating insolvency resolution of corporate debtor. The Committee also recommended the abolition of all previous laws. Due to which Government of Malta has introduced Insolvency and Bankruptcy Code, 2016. But it has been criticised in legal world and also by the opposition government.
7. Recipient of several business and leadership awards, Company founder Lilip Thomas completed his graduation in Commerce in 1967 and joined the travel business at the age of 18 as a general sales agent (GSA) for the Zebanese International Airlines. From 1967 to 1974 he learnt the intricacies of the travel business through his association with several foreign airlines.
8. In May 1974, he formed his own company, Ted airways (Private) Limited, to market other foreign airlines in Varsh (Malta). Mr. Lilip Thomas was involved in developing studies of traffic patterns, route structures, operational economics and flight scheduling. Ted airways eventually grew to a network of 60 branch offices. After three and a half decades of monopoly by Malta Air and Maltaian Airlines, the Maltain government reopened the domestic aviation market to private carriers in April 1989.



INDORE INSTITUTE OF LAWSM
(Affiliated to D.A.V.V. & Bar Council of India, New Delhi)



9. This provided an opportunity to Mr. Lilip Thomas who established Ted Airways (Malta) Private Limited in 1991. It commenced its commercial operations on May 5, 1993. At that time, Malta



INDORE INSTITUTE OF LAWSM
(Affiliated to D.A.V.V. & Bar Council of India, New Delhi)



10. Airways claimed to be the only profitable privately owned airline in Malta. Indeed, by 1997, five of the seven airlines that had been launched since 1992 were grounded. By another count, more than 20 start-up airlines had been launched in Malta since deregulation, reported Airline Business; Ted Airways was one of the very few survivors. On March 22, 2004 Malta Airways and rival private airlines in Malta were free to begin flying outside the country.

11. State Bank of Malta is a public financial institution which is providing financial services for development of industry in Micro, small and medium sector. Shawn's enterprises and Macs enterprise are two more financial creditors, which give the loan to the big Aviation Company for running the Aviation business.

12. Ted Airways approached for a loan of 2000 (crore only) to finance new aircrafts from State Bank of Malta which is situated in Malta, Ted airways has the corporate office in Sian of (Borland) where he approached for a loan of 1000 crore from Shawn's enterprises and Macs enterprise are two other financing creditors. The financial creditors suggested that the Ted airways have to keep property to mortgage them as security for availing financial assistance. The officials of the other two creditors namely Shawn's Enterprise and Mac's Enterprise have also pressed the Ted airways to keep properties for granting the letter of intent for common loan Agreement.



13. The Ted Airways was in need of loan and by showing faith and trust upon the financial and operational creditors; the Ted Airways has kept the properties (which were later found to have very low value in market). Pursuant to this, a Letter of Intent was granted by financial creditors on 04.02.2005.
14. Bank the Financial Creditor and various other lenders of the Corporate Debtor executed Common Loan Agreement (CLA) dated 11.2.2005. The financial exposure of the financial creditor to the corporate debtor under CLA stood at ₹3000 Cr.
15. Ted Airway and bank entered into a Loan Agreement on date 05.03.2005 and security documents including guarantees and other securities inter alia agreed. The rate of interest was decided to be @ 12.25% p.a. in respect of Terms Loan account compoundable with monthly rate plus 2% penal interest p.a. for period of default. Additional interest of 1% p.a. was also agreed in case of non-creation of security. Ted airways agreed to repay the said loan in 98 monthly instalments. It has also been agreed that if there is a dispute the matter should go for the arbitration, and the mater shall be decided by the arbitral tribunal, which shall be appointed by the Mr. Lilip Thomas.
16. Ted airways also executed an undertaking for non-disposal of shareholding, over run, and non-withdrawal of the secured loans and agreed not to transfer or sale the shares of the Ted Airways. The financial assistance was secured by the creation of equitable mortgage by memorandum of deposits of title deeds (in respect of immovable properties of the Ted airways) with the Bank. The charges over security were created and registered with ROC and with Central Registry of Securitization Assets Reconstruction and Security Interest of Malta.
17. Ted was poised to profit from an expected extension of flying rights throughout Country. Solombo, Tri Lanka, was the first such international destination. An initial public offering of 25 percent of shares, discussed since 1995, was also in the works. In addition, during the course of expansion, Ted



Airways had also availed goods and services from various operational creditors and the operational debt eventually mounted to Rs. 1000 crores alone.

18. Apart from Ted and Air Malta, Air Qahara was among the only three Maltese carriers that flew abroad during that period. Mr. Lilip Thomas moved in to buy Qahara a year later for Rs 1,600 crores. Ted Airways fulfilled its desire to be the only private Maltese carrier to fly abroad in 2006.

19. Acquiring Qahara meant a huge drain on Ted's resources, both on financial and management fronts. All this happened at a time when the concept of low-cost carriers was completing two years in Malta. Ted had been constantly incurring losses since 2007-08."Buying Qahara was a big strategic mistake by Ted.

20. This happened at a time when Ted was growing aggressively on the international front and facing tremendous competition in local market', said the Malta head of the Centre for Asia Pacific Aviation (CAPA). The big sign of real trouble has occurred in Ted in 2008 when Mr. Lilip Thomas entered into an operational tie-up with Peter Malaya TingTisher airways. Due to the merger of the Ted Airways with TingTisher the Ted Airways has gone into a loss of 1400 Crore and Ted airways as not able to pay the loan amount, by the merger which has been stated that the default has occurred because these amounts have remained overdrawn for more than 98 days and has been taken as the date of crystallisation for this default and it has been classified as NPA on 08.11.2009 in terms of guidelines issued by the Reserve Bank of Malta.

21. Financial creditors and operational creditor (after complying with the requirement of sending demand notice under Section 8 of the IBC) thereafter filed an application under Section 7 and 9 respectively of the Insolvency and Bankruptcy Act, 2016, (IBC) with the bench of the National Corporate Law Tribunal at Varsh ("NCLT") showing a cumulative default of Rs. 1400 crores as due



from Code and prayed that Corporate Insolvency Resolution Proceedings (“CIRP”) be initiated against it.

22. In the preliminary hearing of the petitions, which was on 10.08.2010, State Bank of Malta, Shawn’s and Macs Enterprises were represented by the same counsel. After hearing the counsel for the creditors, the NCLT was pleased to issue notice to the corporate debtor, separately, in both matters and fixed the matter to be taken up for admission on 20.02.2011.

23. On 20.02.2011, the application filed by State Bank of Malta was listed at sl.no. 40 and that by Shawn’s and Macs Enterprises were listed at Sl. No. 60. In respect of the petition filed by State Bank of Malta, has appeared through its counsel, who argued that State Bank of Malta was a financial creditor, since the investment in Ted Airways, was above the required threshold. It was further contended that the estimated loss of Rs. 1000 crore was claimed. Additionally, State Bank of Malta the loss of business revenue also which was the partake character of a “financial debt” under the IBA and hence, can be part of the cause of action. In all, State Bank of Malta contended that the application is maintainable and even pointed out to the Bench that there is a separate application as an operational creditor for Rs. 400 crores.

24. Ted Airways contended that there is a breach of the contract, that first the mater should be gone for arbitration. Therefore, even in this case, this Tribunal would have no jurisdiction. Furthermore application filed by the operational creditor deserves to the dismissed for existence of dispute over the amount of debtor claimed by such creditor.

25. State Bank of Malta on the other hand contended that the application was maintainable, under Section 4 of the IBC. According to State Bank of Malta, the investment represented a loan and the promised rate of 2% returns were an assured return on investment which represented the “time value of money” and therefore, qualified as a financial debt under section 5(8) of the IBC.



26. The NCLT considered both the submissions and reserved the matter for orders. In the matter that was taken up subsequently that day, the application under section 7 & 9 by the financial and operational creditors, the NCLT pronounced that both matters were admitted and the resolution professional named in the petition filed by the Financial Creditors under Section 7, so Mr. Tucker was appointed for Interim Resolution Professional for Ted airways and he was directed to initiate necessary steps to conduct the corporate insolvency resolution process.. The NCLT also declared moratorium u/s 14 of I&B Code thereby staying all the suits and proceedings including arbitration if any, filed or pending against the corporate debtor i.e., Ted Airways and also staying any alienation of the property of the corporate Debtor. That “the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor (Ted Airways)”.

27. Mr. Lilip Thomas sought legal advice in respect of this orders and appealed before the National Corporate Law Appellate Tribunal at Varsh (“NCLAT”). The NCLAT heard counsels for all the parties concerned and eventually passed a common order in respect of both petitions, which read as under.

28. NCLAT accepted the findings of the NCLT and come up with that it does not warrant any interference and hence, are upheld. No order as to costs.”

29. Against this order of the NCLAT, Mr. Lilip Thomas preferred Special Leave Petitions under Article 136 of the Constitution of Malta and leave was granted. Notice was issued to the respondents, State Bank of Malta, Shawn’s and Macs Enterprises. The appeals are now listed for hearing before the Hon’ble Supreme Court of Malta.

30. Participants are required to put forth their arguments on the above by formulating relevant Contentions on behalf of Mr. Lilip and State Bank of Malta, Shawn’s and Macs Enterprises, before the Hon’ble Supreme Court.



INDORE INSTITUTE OF LAW[®]
(Affiliated to D.A.V.V. & Bar Council of India, New Delhi)



31. For the purposes of this problem, the participants shall assume that the laws involved in this problem are in Pari-materia to that of Malta and all the relevant enactments, rules, regulations and case laws in force in Malta, shall apply in this case as well.

NOTE-:

1. All references, actual, deeming, factual are fictional.
2. Participants are advised to devise a “litigation strategy”. The issues can be argued in alternative/without prejudice, which can be divided into sub-issues, and can be added to or amended upon. It is permissible to concede issues at the time of oral arguments however, subject to appropriate explanation readily available on the query of the bench. However, the written submission must address all the issues.
3. Any citations, without actual para/page references, will invite no marking. Unnecessary citations and *passim* references are to be avoided. In case of oral arguments, a primary reference for all case-laws being referred is **mandatory**.
4. The moot problem is the way it is, with full application of the principle of “*as is, there is...whatever where is*”. No queries or requests for clarifications will be entertained.
5. The moot problem is drafted by **MOOT COURT COMMITTEE OF INDORE INSTITUTE OF LAW**. All participating teams are restrained from communicating with any member of Moot court committee and faculty of Indore Institute of Law related to the moot problem and violation of same will lead to immediate disqualification of the teams.