

VII SURANA & SURANA AND UPES SCHOOL OF LAW, NATIONAL INSOLVENCY LAW MOOT COURT COMPETITION 2024



10th August 2024 | 6th - 7th September 2024
HYBRID MODE

CASE RECORD

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INTRODUCTION

1. Malta, recognized as the world's largest democracy and the second fastest-growing economy, holds the second-largest GDP globally. Despite its robust economic status, Malta is grappling with significant setbacks due to the pervasive issue of Non-Performing Assets (NPA), which have emerged as a substantial hindrance to its economic progression. The capital city of Malta is Meħli, a vibrant metropolitan centre.
2. 70% of Countries GDP comes from domestic consumption. Malta is the 4th largest market consumer. Its GDP is also influenced by government spending on exports and investment. Malta in 2022 was the world's 8th largest importer and 10th largest exporter. Since 1995 Malta has been a member of the World Trade Organization (WTO). It ranks 63rd on the Ease of Doing Business Index and 40th on the Global Competitiveness Index.
3. Malta's post-independence beliefs included state intervention in the financial markets and the nationalization of the majority of its industries. Later, in 1991, the Liberalization, Privatization & Globalization (LPG) scheme was introduced, opening up the market to outside players and promoting the privatization of the country's primary sector. which saw the introduction of many legislation in response to societal requirements.

GENERAL CONTEXT

4. Insolvency and bankruptcy pose significant challenges to individuals, businesses, and economies worldwide. Insolvency denotes a situation where an entity is unable to meet its debt obligations as they fall due, while bankruptcy is a formal legal declaration of insolvency. These conditions can lead to severe repercussions, including financial distress, job losses, and economic instability.
5. Before the enactment of the Insolvency and Bankruptcy Code, 2016 (IBC, 2016), Malta's insolvency resolution framework was fragmented and inefficient. Various laws, such as the Sick Industrial Companies (Special Provisions) Act, 1985, and the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, existed but lacked the effectiveness required for a swift and comprehensive resolution process.
6. Later on through legislation and ordinances, various amendments were made to the act such as Upgrading homebuyers as financial creditors, amendments made regarding the eligibility criteria for a resolution applicant and other significant amendments under section 29A.

SCENARIO 1

7. The Applicant, Redsky Leasing Company Ltd. (hereinafter “Redsky”) is a global aircraft engine leasing company with one of their principal activities being leasing spare aircraft engines to operators. Redsky is incorporated under the laws of Nialand and is an indirect subsidiary of Lingsheng Financial Leasing Co., Ltd., a leading commercial aircraft leasing company with a fleet of 68 aircraft leased to over 25 airlines globally.
8. The Corporate Debtor, AirFly (Malta Ltd.) (hereinafter "AirFly"), is a commercial Airline in Malta. The Corporate Debtor entered into three Lease Agreements dated 27.07.2019 with Redsky for leasing three Airbus A320-271N aircraft, bearing manufacturer’s serial numbers 0001 (Aircraft 1), 0576 (Aircraft 2), and 9724 (Aircraft 3) (collectively referred to as "Subject Aircraft"). These agreements detailed the terms and conditions for leasing the aircraft to AirFly.
9. On 3rd and 4th October 2019, the Directorate-General of Civil Aviation (DGCA) issued Certificates of Registration and Maltaian Registration Marks for the Subject Aircraft.
10. On 18.06.2020, Redsky, the Applicant, and AirFly executed three Lease Novation and Amendment Agreements for the Subject Aircraft. These agreements transferred the obligations, duties, and liabilities of the subject aircraft from Redsky to the AirFly.
11. AirFly executed Irrevocable De-registration and Export Request Authorizations ("IDERA") for Aircraft 1 and Aircraft 2 in favour of the Applicant, pursuant to Article XIII of the Cape Town Convention. This recognized the Applicant as the sole entity entitled to deregister and export the Subject Aircraft from Malta.
12. Applicant on realizing the default of payment in the lease agreement on 13th December 2022, sent a First Default and Grounding Notice to AirFly, citing overdue payments since 15th April 2022 under the Lease Agreements. The amounts were due on 15th April 2022. AirFly failed to rectify the defaults.
13. On 27th February 2023 the Applicant issued another Default and Grounding Notice ("Second Grounding and Default Notice") mentioning the amount that was due. AirFly did not respond to these notices. Consequently, a Termination Notice was issued on 04.05.2023, terminating the lease of the Subject Aircraft. According to the notice, the Applicant will resume possession of the Engines and AirFly has no rights whatsoever in the Engines, including retainment, usage or operation of the engines and the AirFly has not disputed the Termination Notice.

14. On 05.05.2023, the Applicant notified Airbus S.A.S. that AirFly was no longer entitled to the benefits of the airframe warranties and that the Applicant was the new entitled party. Airbus acknowledged this change on 12.05.2023.
15. The Applicant then filed applications with the DGCA for deregistration of the aircraft under Rule 30(7) of the Aircraft Rules. Meanwhile, on 10.05.2023, the National Company Law Tribunal (NCLT) admitted a petition filed by AirFly, initiating the Corporate Insolvency Resolution Process (CIRP) and imposing a moratorium under Section 14(1) of the IBC putting a restraint on the recovery of any property by the owner or lessor (i.e. Applicant) where such property is occupied by or in the possession of the corporate debtor.
16. The applicant challenged this order before the National Company Law Appellate Tribunal (NCLAT). The NCLAT upheld the order.
17. On 11-05-2023 and 12-05-2023, the DGCA rejected the deregistration applications, citing the Insolvency Commencement Order. AirFly argued that the NCLT should adjudicate all disputes involving an entity undergoing insolvency, per Section 60(5) of the IBC.
18. Aggrieved by this decision, the Applicant approached the Welhi High Court. The High Court ruled that the termination of the lease agreements did not arise out of or related to the 'insolvency' of AirFly and ordered DGCA to process de-registration, thereby concluding that the NCLT lacked jurisdiction over issues unrelated to the insolvency process. Furthermore, the court held that the NCLT does not have the power of judicial review over governmental authorities, such as the DGCA, in this context.
19. Aggrieved by the decision of the High Court, AirFly filed an appeal to the Supreme Court of Malta.

SCENARIO 2

20. Wayne Enterprises is widely regarded as one of the most prestigious and large construction companies in the state. It gained recognition for its ability to execute some of the most challenging designs, making it an ideal partner for an architectural firm that specializes in unconventional designs.

21. Bruce Buildings Ltd on the other hand, is an up-and-coming architectural firm which has rapidly risen in popularity due to its ambitious, unconventional and innovative designs, often referred to as an engineer's nightmare, Bruce Building always challenges the status quo as to what qualifies as a good building, naturally Wayne Enterprises and Bruce Buildings were a match made in heaven.
22. Wayne Enterprises and Bruce Buildings Ltd. have enjoyed a long-standing and successful partnership. In 2024, they embarked on a landmark project to construct a state-of-the-art home within a cave, featuring modern furnishings and cutting-edge technology.
23. To finance this ambitious project, both companies entered into a Credit Furnishing Agreement (CFA) on June 9, 2024. Under the CFA, Bruce Buildings availed loan facilities from Wayne Enterprises.
24. The CFA was executed among:
 1. Wayne Enterprises (Applicant),
 2. Bruce Buildings Ltd. (Receiver),
 3. Luthor Retailers Ltd. (Developer),
 4. Mr. Clark Kent (Promoter 1),
 5. Ms. Lois Lane (Promoter 2).
25. Collectively, Bruce Buildings Ltd, Luthor Retailers, and the two Promoters were referred to as the "Obligors" in the CFA. The agreement was supported by various securities, including personal guarantees and mortgage deeds.
26. Bruce Buildings borrowed multiple loans at varying interest rates from Wayne Enterprises.
27. Luthor Retailers Ltd. (hereinafter referred to as the "Corporate Debtor") played a crucial role by supplying all the furniture required for the project. To secure the repayment of the default interest rates, Luthor Retailers mortgaged certain properties in favour of Wayne Enterprises. Luthor Retailers stipulated that its liability was confined to the mortgaged properties and that repayment was to be made exclusively through these properties. Additionally, certain loans were secured by personal guarantees from the Promoters, who pledged their shares in Bruce Buildings Ltd. as security.
28. Due to several project failures, Bruce Buildings encountered severe financial distress, resulting in substantial financial losses and multiple defaults on the loan facilities.

29. Consequently, Wayne Enterprises filed Company Petition No. xx of 2024 before the National Company Law Tribunal (NCLT) against Bruce Buildings Ltd. under Section 7 of the Insolvency and Bankruptcy Code (IBC). The petition was admitted, and Wayne Enterprises was classified as a “Financial Creditor” in the Corporate Insolvency Resolution Process (CIRP).
30. Wayne Enterprises initially approached the Promoters to execute their guarantees. The Promoters complied, relinquishing their liabilities, but the repayment was insufficient to cover the defaults fully. Then they sought to enforce the mortgage deed with Luthor Retailers, asserting that a covenant to pay remained and cited the relevant section within the Mortgage Deed and the CFA Respectively:
- “7. Pursuant to the Finance Documents and in consideration of the Principal Borrower having Availed the loan facilities, the Mortgagor covenants and agrees with the Mortgagee that the Mortgagor shall discharge the Secured Obligations in accordance with the terms and conditions in the Finance Documents ... ”*
- “8. Pursuant to the said loan facility availed and in consideration of the Principal Borrower having Availed loan facilities, the Obligors do hereby jointly and severally covenant with the Principal Borrower that they shall comply with the terms and conditions of the said CFA and that they shall discharge the Secured Obligations in accordance with the terms and conditions in the said CFA, inclusive of this loan ...”*
31. Wayne Enterprises filed a Company Petition against Luthor Retailers Ltd. under Section 7 of the IBC, claiming status as a “Secured Financial Creditor.”
32. The NCLT rejected the application, stating that Wayne Enterprises was "any other secured creditor" concerning Luthor Retailers Ltd. and did not have the right to file a Section 7 application due to the absence of having “Financial Debt” indebted to them, which is an essential ingredient required to maintain a section 7 application.
33. Wayne Enterprises defended itself by stating that on the default of the principal borrower, the liability towards the discharge was shifted to the “obligors” and considering it took in debt from the principal borrower, it still had incurred loss, the only factor was the change in the responsibility of discharge, and thus qualifies as to having taken on “Financial Debt”, but regardless of the defence put forth by Wayne Enterprises, NCLT stood strong on the rejection of the section 7 Application.
34. Aggrieved by this decision, Wayne Enterprises appealed to the National Company Law Appellate Tribunal (NCLAT), which upheld the NCLT's ruling. Wayne Enterprises then appealed to the Supreme Court of Malta.

SCENARIO 3

- 35.** The Corporate debtor Relcom Ltd. is a telecom company which is a pan-level integrated GSM operator offering Voice and Data services across 2G, 3G and 4G platforms. The Company continues to focus on its operations to improve cash generation in existing business and is among the growing companies in the market.
- 36.** In 2018, Relcom Ltd. signed a crucial investment agreement worth \$250 million with GMY Private Ltd., a multinational software company, which works on making gaming software and has made some of the notable games such as God of Hunt and Unresolved and is based in Malta and the agreement was to be executed in 2023. The investment was expected to increase the profitability of the company and its share in the market.
- 37.** On 26.12.2023, the company was to receive a refund of \$122 million from the Department of Telecommunications (DOT) under the Ministry of Communications and Information Technology, as per the orders of Malta Telecom Disputes Settlement and Appellate Tribunal (MTDSAT) on appeal no. 92 of 2023 for excess spectrum charges.
- 38.** The financial creditor, DFKL Bank is the successor of IARC Bank and is one of Malta's largest Public Sector Banks with over 20,000 branches and has a strong international presence, headquartered in the city of Tortuga, Malta's industrial capital. DFKL provided a loan of \$ 91 million to Relcom Ltd in the year 2017 with an interest of 5% per annum which the company defaulted to repay by the due date in the year 2023.
- 39.** As a result of this default, the financial creditor filed an application under Section 7 of the IBC for initiation of CIRP proceedings for repayment of the loan, before the National Company Law Tribunal (NCLT) dated 19.07.2023 which was rejected and further aggrieved by this, an appeal was filed before the National Company Law Appellate Tribunal (NCLAT) following the rejection of the application.
- 40.** The appeal dated 22.08.2023 was further rejected on the ground that NCLT has the discretion to accept or reject an application under Section 7 and it is not merely the default but other factual circumstances, viability and overall financial health of the corporate debtor are also required to be considered while passing an order based on application under Section 7 of Insolvency and Bankruptcy Code, 2016.
- 41.** An appeal was filed before Hon'ble Supreme Court challenging the order for refund passed by Malta Telecom Disputes Settlement and Appellate Tribunal (MTDSAT), which was further upheld by the Supreme Court, and the court further ordered to pay the refund amount by 04.08.24.

42. In furtherance of rejection of appeal before the NLCAT, DFKL Bank has filed an appeal before the Hon'ble Supreme Court challenging the rejection of the appeal, contending that Relcom Ltd. has defaulted to repay its loan and CIRP proceedings should be initiated for the repayment of debt.
43. Challenging the Impugned Order, this Appeal has been filed before the 2-judge bench. On 8th June 2023, the Hon'ble Chief Justice of Malta constituted a 5-member bench as it was felt that a larger bench needed to hear and decide the issues being raised in these appeals. The bench was to be presided over by the Hon'ble Chief Justice of Malta and would examine all the issues being dealt with in the matters of Redsky Leasing Company Ltd., AirFly (Malta Ltd.), Wayne Enterprises, and Luthor Retailers Ltd., Relcom Ltd and DKLf Bank.

Based on the foregoing, the Hon'ble Supreme Court after due deliberation has agreed to decide the following issues:

- I Whether the NCLT has exclusive jurisdiction to adjudicate disputes concerning the assets of a company undergoing CIRP, especially in light of the termination of lease agreements and IDERA issued before the initiation of CIRP?**
- II Whether the termination of the lease agreements by the Applicant and the subsequent actions taken, such as issuance of Default and Grounding Notices and Termination Notices, are related to the insolvency of AirFly, or if they are independent contractual issues?**
- III Whether the mortgage deed executed by the Corporate Debtor constitutes a contract of guarantee, thereby allowing Wayne Enterprises to file a Section 7 application under the IBC?**
- IV Whether the NCLT can reject an application for initiation of CIRP proceedings in the case there is a default in payment of dues?**

APPRECIATION FOR OUR DRAFTERS

The Moot Court Association, School of Law, UPES extends a warm gratitude to the drafters of the case record for the 'VII SURANA & SURANA AND UPES SCHOOL OF LAW, NATIONAL LAW MOOT COURT COMPETITION 2024'. Mr. Ashwaj Ramaiah, Principal Associate, Khaitan & Co. was assisted by the Research Team of Moot Court Association, UPES, comprising of Ananya Tripathi, Chahat Sharma, Saathvik Sharma and Arihant Dev Tiwari.