

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT) (Insolvency) No. 1330 of 2023

(Arising out of the Impugned Order dated 06th July, 2023 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Chandigarh Bench in CP(IB) No. 236/CHD/HRY/2021]

IN THE MATTER OF:

UNI CREDIT S.P.A.

EUROPEAN COMMERCIAL BANK

Incorporated under the laws of Milan, Italy

Via Julius, Durst-Strasse 4, Brixen-39042, Italy

Through its Attorney Holder:

Mr. Sahil Bhatia

S/o Shri Krishan Bhatia

R/o C-206 Vikas Puri, New Delhi-110018

Email: sb@ucs-mail.com

...Appellant

Versus

IR Exports Private Limited

(Formerly known as JR Apparel & Accessories Private Limited)

(formerly known as IR Accessories Private Limited)

Registered office at:

Plot No. 154M, Sector-7, Phase-2,

IMT Manesar, Gurgaon-122050, Haryana

Email: info@iracc.co

...Respondent

Present:

For Appellant : Mr. Preet Pal Singh, Ms. Tanupreet Kaur, Mr. Saurabh Sharma and Mr. Madhukar Pandey, Advocates

For Respondent : Ms. Karuna Sharma and Mr. Sagar Sharma, Advocates

J U D G M E N T
(Hybrid Mode)

[Per: Arun Baroka, Member (Technical)]

This Appeal has been filed by the Appellant Company, under Section 61(1) of the Insolvency and Bankruptcy Code, 2016 ("the Code") against Order

dated 6th July 2023 passed by the Ld. National Company Law Tribunal, Chandigarh Bench (hereinafter referred to as Adjudicating Authority), whereby the Ld. Adjudicating Authority has dismissed the application of the Appellant under Section 9 of the Code ("Impugned Order").

Factual Background

2. The dispute centers around a sales contract formed on March 20, 2017, between Hi Exports (Respondent) and Durst Phototechnik (Supplier) for the purchase of an industrial inkjet printer (Alpha 190-D). The agreed timeline for delivery was April 15, 2017, but the machine arrived significantly later on August 28, 2017. Upon receiving the machine, the Respondent discovered critical performance issues and defects that significantly hampered its functionality.

Appellant's Case:

3. Background and Initial Transaction:

3.1. The debt in question originates from a transaction involving the purchase of a disperse system digital textile-printer with 32ph with standard accessories (hereinafter referred to as the "Machine") by the Corporate Debtor from Durst Phototechnik AG (hereinafter referred to as the "Supplier").

3.2. In the course of business, the Corporate Debtor entered into a Sales Contract dated 20th March 2017 with the Supplier, which detailed the terms of sale of the Machine to the Corporate Debtor.

3.3. Upon executing the Sales Contract, the Supplier issued proforma invoice no. 90006348 dated 20 March 2017 for the sum of Euro 535,780.00, which was duly accepted by the Corporate Debtor.

3.4. As per the agreed terms, the Corporate Debtor made a down payment of Euro 135,780.00 and issued six promissory notes dated 11th May 2017 for the payment of Euro 421,000.00. This amount included Euro 400,000.00 for the remainder of the cost of the Machine and Euro 21,000.00 towards a 3% per annum special interest rate for financing the Machine over three years in six half-yearly instalments with the following maturity dates:

Sl. No.	Promissory Note Maturity Date	Value
1.	18.11.2017	72,666.67
2.	18.05.2018	71,666.67
3.	18.11.2018	70,666.67
4.	18.05.2019	69,666.67
5.	18.11.2019	68,666.67
6.	18.05.2020	67,666.65
Total Amount (Euro)		4,21,000.00

4. Issuance of Invoice and Delivery

4.1. In the course of the transaction, the Supplier issued invoice no. 21706064 dated 15th May 2017 for the total sum of Euro 535,780.00, adjusting for the advance payment of Euro 135,780.00 and agreeing on payment terms via the aforementioned promissory notes.

Sl. No.	Invoice No.	Dated	Invoice Amount (EURO)
1.	21706064	15.05.2017	535,780.00
Invoice Amount (EURO)			535,780.00
Down Payment (EURO)			(135, 780.00)
Original Outstanding Amount (EURO)			400,000.00
Agreed Interest @ 3% p.a. on the Original Outstanding Amount (EURO)			21,000.00
Outstanding Amount Including Interest (EURO)			421,000.00

4.2. The Supplier shipped the Machine to the Corporate Debtor via Bill of Lading No. 705EMA0446-EMA-170421 dated 18.05.2017. The Corporate Debtor accepted delivery of the Machine without protest or demur and issued an Acceptance Certificate dated 28th August 2017, acknowledging receipt of the Machine without objection and confirming that the Supplier's contractual obligations were duly executed.

5. Assignment of Obligations and non-payment

5.1. Subsequently, the Supplier assigned all its contractual obligations and endorsed the promissory notes in favour of the Operational Creditor (UniCredit S.P.A.) via the Cash Discount Agreement dated 23rd August 2017.

5.2. The Corporate Debtor was delinquent in making payments and released payment against the promissory note with a maturity date of 18th November 2017 for Euro 72,666.67 on 20th December 2017 to the Operational Creditor.

5.3. Despite multiple attempts by the Operational Creditor and the Supplier to obtain overdue payments, the Corporate Debtor, while making use of the Machine, failed to make payments towards the promissory notes.

6. Demand Notice and Application Under IBC

6.1. Consequently, the Operational Creditor, through its Advocate, issued a Demand Notice dated 19th May 2021 under Section 8(1) of the Insolvency and Bankruptcy Code, 2016 (as amended). The notice was sent electronically to the Corporate Debtor's email addresses info@iraa.com and info@iracc.co. The notice was duly delivered as no failure report was received by the

Operational Creditor's Advocate. Despite receiving the Demand Notice, the Corporate Debtor failed to respond. Adjudicating Authority erred in not appreciating that the Operational Creditor in the Affidavit of No Dispute dated 23.08.2021 in para 2 has categorically stated as under:

“the said demand notice was received at the above email addresses of the corporate debtor to which no failed delivery notification was received from the server and hence the same shall be deemed to be delivered.”

6.2. The Operational Creditor proceeded to file an application under Section 9 of the IBC before the Hon'ble NCLT Chandigarh Bench. The Corporate Debtor filed its Reply, and the Operational Creditor filed a Rejoinder.

7. Legal Arguments for the Appellant

Service of Demand Notice:

7.1. The Adjudicating Authority erred in observing that the demand notice dated 19th May 2021 under Section 8 of the IBC was not duly served upon the Corporate Debtor. The Authority failed to appreciate that the notice was served to the Corporate Debtor through email and no delivery failure notification was received. The Operational Creditor, in its Affidavit of No Dispute dated 23rd August 2021, clearly stated that the demand notice was received by the Corporate Debtor's email addresses and no failure notification was received, indicating successful delivery.

Acceptance of the Machine and Absence of Pre-existing Dispute:

7.2. The Adjudicating Authority incorrectly concluded that the Corporate Debtor had raised a dispute before the service of the demand notice. The Machine was delivered under the Sales Contract dated 20th March 2017, and

its receipt was accepted without objection via an acceptance certificate dated 28th August 2017. The Corporate Debtor's subsequent claims of non-performance are unsupported by evidence and do not constitute a pre-existing dispute as defined under the IBC. The Supplier's support rendered as a goodwill gesture has been misused by the Corporate Debtor to allege a purported dispute, which does not meet the criteria under the Act.

Independence of Arbitration Clause from IBC Remedies

7.3. The Adjudicating Authority further erred in dismissing the Petition on the ground of the existence of an arbitration clause. The remedy of arbitration is independent and does not preclude the statutory remedy available under the IBC. The mere existence of an arbitration clause cannot deprive the Operational Creditor of its statutory rights under the IBC.

Rebuttal to Corporate Debtor's Defense:

8. The Corporate Debtor, in an attempt to avoid payment obligations, falsely claimed non-receipt of the demand notice, questioned the Appellant's locus standi, and alleged a pre-existing dispute. These claims were duly rebutted by the Operational Creditor in its rejoinder.

Adjudicating Authority's Errors in Judgment

9. The Adjudicating Authority erred in dismissing the Petition based on the alleged pre-existing dispute, the arbitration clause, and the purported non-service of the demand notice. The Authority did not properly consider the Sales Contracts, the Corporate Debtor's acceptance of the Machine, and the fact that the demand notice was sent to the official email address listed with

the Ministry of Corporate Affairs. The Authority also failed to recognize that the arbitration remedy does not supersede the statutory rights under the IBC.

10. Being aggrieved by the Impugned Order dated 6th July 2023, the Appellant is seeking this Tribunal's intervention to set aside the Impugned Order and grant the relief sought by the Operational Creditor in accordance with the provisions of the IBC, 2016.

Respondent's Case:

11. The Respondent contends that the Supplier materially breached the sales contract in two ways:

- Delayed Delivery: The delay in delivering the machine beyond the agreed date of April 15, 2017, constitutes a breach of contract.
- Defective Machine: The Alpha 190-D exhibited substantial performance issues upon delivery. This constitutes a further breach, as the contract presumably obligated the Supplier to deliver a functional machine capable of performing its intended tasks.

12. Evidence supporting these breaches includes documented delays in delivery, emails outlining the performance issues experienced by the Respondent, and the Supplier's attempt to rectify the problems by sending a technician.

Pre-Existing Dispute and Improper Service of Demand Notice

13. The Respondent argues that a genuine dispute regarding the machine's performance existed well before the Appellant (formerly the Supplier) served

the demand notice for non-payment. This pre-existing dispute disallows the application filed under the Insolvency and Bankruptcy Code (IBC).

14. Evidence of Pre-Existing Dispute: The Respondent provides a detailed record of communication with the Supplier, including emails documenting performance issues, requests for return of the machine, and settlement discussions. These efforts demonstrate the Respondent's ongoing attempt to resolve the situation outside of formal legal proceedings.

15. Improper Service: The Respondent further argues that the demand notice, a crucial step in initiating IBC proceedings, was never properly served. The NCLT order itself acknowledges the improper service.

Supporting Case Law

16. The Respondent bolsters its arguments by citing relevant case law that establishes the legal principles at play:

- **Mobilox Innovative Private Limited v. Kirusa Software Private Limited (2018) 1 SCC 353**: This case clarifies that the Adjudicating Authority under the IBC must reject an application if a pre-existing dispute exists between the parties.
- **Innoventive Industries v. ICICI Bank and Anr (2018) 1 SCC 407**: This case reinforces the concept of a pre-existing dispute as a bar to initiating IBC proceedings. Here, the court highlights that the existence of such a dispute, not its merits, takes precedence at this stage.

- **Ahluwalia Contracts (India) Limited v. Raheja Developers Limited (Company Appeal (AT) (Insolvency) No. 703 of 2018):** This case emphasizes the need for a pre-existing dispute to be present before the demand notice is served.
- **Rajratan Babulal Agarwal v. Solartex India (P) Ltd. (2023) 1 SCC 115:** This case clarifies that the court, at this stage, does not need to be convinced of the defense's ultimate success. The existence of a plausible dispute, as evidenced by the communication record, is sufficient.
- **Deepak Modi versus Shalfeyo Industries Pvt. Ltd (2023 SCC OnLine NCLAT 169):** This case reiterates the concept of a genuine pre-existing dispute as a reason to reject an application under Section 9 of the IBC.

17. In conclusion, the Respondent argues that the NCLT's decision to dismiss the application was well-founded. The documented communication demonstrates a pre-existing dispute regarding the machine's performance, which falls outside the scope of the IBC. Additionally, the demand notice was improperly served, further weakening the Appellant's case. The Respondent maintains that the Supplier's breach of contract, including the delayed delivery and defective machine, justifies their position.

Appraisal:

18. Heard both sides and perused all documents on record.

19. The dispute stems from a sales contract formed on March 20, 2017, between Hi Exports (Respondent) and Durst Phototechnik (Supplier) for the

purchase of an industrial inkjet printer (Alpha 190-D). The agreed delivery date was April 15, 2017, but the machine arrived significantly later on August 28, 2017. Upon receiving the machine, the Respondent discovered critical performance issues that significantly hampered its functionality.

20. The Appellant argued that the Adjudicating Authority erred in its judgment on several grounds. First, they asserted that proper service of the demand notice, a critical step in IBC proceedings, was effectuated electronically on the Respondent's listed email addresses. Since no delivery failure notification was received, the Appellant maintained that service was valid. Second, the Appellant pointed to the Respondent's acceptance certificate dated August 28, 2017, as evidence that the machine was received without objection. This, according to the Appellant, negated the Respondent's claims of a pre-existing dispute regarding the machine's performance. Finally, the Appellant argued that the existence of an arbitration clause in the sales contract did not preclude their right to pursue a remedy under the IBC. They asserted that these remedies are independent of each other.

21. The Respondent countered the Appellant's arguments and presented a compelling case for upholding the Adjudicating Authority's decision. The Respondent argued that the core issue centered on the Supplier's material breaches of the sales contract. These breaches manifested in two ways: the delayed delivery of the machine beyond the agreed date and the machine's inherent performance issues. The Respondent maintained that these issues significantly impacted the functionality of the equipment. To substantiate their claims of a pre-existing dispute, the Respondent provided a detailed

record of communication with the Supplier. This record included emails documenting the performance problems encountered with the Alpha 190-D, requests for the return of the machine, and attempts to negotiate a settlement. The Respondent argued that these efforts demonstrably illustrated their ongoing attempts to resolve the situation outside of formal legal proceedings, highlighting a dispute that predated the filing of the insolvency application. Furthermore, the Respondent emphasized that the Adjudicating Authority rightly acknowledged the improper service of the demand notice. This procedural irregularity, according to the Respondent, further weakened the Appellant's case.

Issue:

22. The central question revolved around whether a pre-existing dispute, as argued by the Respondent, existed between the parties before the demand notice was served; basis which the NCLT dismissed the application under Section 9 of the IBC.

Reasoning:

23. Upon reviewing the facts and circumstances of the case, it is evident that a pre-existing dispute existed between the parties regarding the performance and quality of the machine supplied.

24. The Respondent provides a detailed record of communication with the Supplier, including emails documenting performance issues, requests for return of the machine, and settlement discussions.

25. It would be apposite to see the communication exchanged between the two parties:

a. Vide email dated 11.09.2017, the Respondent informed the Supplier that:

"Till date out(r) machine still not running position due to recipe and cannot take for production and all commitment fails. ... Unless and until my machine will not start and earn money how can I pay instalments pls explain."

b. Thereafter, the Supplier agreed to send a technical expert from Italy to resolve the performance issues/defects with the Machine. Furthermore, vide email dated 25.09.2017, the Respondent stated that:

"the same fabric we print from Rajdhani sublimation the results already shown to your team, it was perfect and you have seen the results.
The problem in ink or recipe.
If this machine already running in Italy/Germany then why are we not getting the same results."

c. In its reply also dated 25.09.2017, the regional office of the Supplier informed the Respondent that:

"... As I understood these trials at demo center have NO penetration and I am told that you need penetration and due to that reason we worked on penetration on a Fabric which is not ready for digital printing, we ended up in penetration but with bleeding so we had to limit the inks and then we entered into cycle of going altogether in wrong direction."

d. On 05.10.2017, the regional office of the Supplier informed the Respondent that there were still persistent performance issues with the Machine by stating that:

"Yesterday myself and Mr. Mario both started trials on the Poly Crepe fabric (IRA), we printed VBH Test Files, but could be able to steam and was till evening because of burner of steamer was not able to give proper temperature. Once we shifted the Gas from PNG to LPG than we got the temperature of 170 degree Celsius than we steamed the fabric and for further trials steamer temperature could not able to reach more than 170 degree Celsius."

e. On 7.11.2017, the Respondent emailed the Supplier stating that neither any process flow nor quality parameters were achieved till date nor any timeline was adhered to. The Supplier/Appellant was only extending the timelines committed by it in spite of huge business losses incurred by the Respondent. The Respondent also stated that the Machine was lying idle due to non-resolution of the various performance issues/defects and requested the Supplier/Appellant to take the Machine and return it only after it was fully compliant and functional.

f. Thereafter, the Supplier informed the Respondent vide email dated 23.01.2018 that further tests/trials needed to be undertaken on the Machine to which the Respondent replied vide email of the even date that it had already incurred significant expenditure which would have to be accounted for by the Supplier.

g. On 07.03.2018, the Respondent received the report of the technical expert (Mr. Mario) from the Supplier which specified various performance issues in relation to the Machine. This report was apparently a modified version of the final report. The Respondent thereafter informed the Supplier to take back the Machine due to persistent performance issues/defects which could not be rectified by the Supplier.

26. From the above it is quite evident that the Respondent has provided sufficient evidence of this dispute, including documented communication with the Supplier about the machine's defects and delayed delivery. The documented communication between the Respondent and the Supplier shows

that the Respondent had consistently raised concerns about the machine's performance well before the Appellant served the demand notice. It is clear that there was in fact a genuine and bona-fide pre-existing dispute before the (defective/improper) service of the demand notice dated 19.05.2021. The existence of these disputes is substantiated by emails, requests for returns, and settlement discussions.

27. We acknowledge the arguments presented by both parties. However, we place significant weight on the documented communication between the Respondent and the Supplier concerning the machine's performance issues. These communications, predating the demand notice, demonstrate a genuine dispute regarding the functionality of the machine.

28. The Respondent bolsters its arguments by citing relevant case laws:

a. ***Mobilox Innovative Private Limited v. Kirusa Software Private Limited (2018) 1 SCC 353*** wherein the Hon'ble Supreme Court held that:

"51. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5) (2) (d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere

bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."

This case clarifies that the Adjudicating Authority under the IBC must reject an application if a pre-existing dispute exists between the parties.

b. **Innoventive Industries v. ICICI Bank and Anr (2018) 1 SCC 407**

wherein the Hon'ble Supreme Court held that:

"29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned of a dispute or the record of the pendency of a suit or arbitration proceedings, which is pre-existing i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code."

This case reinforces the concept of a pre-existing dispute as a bar to initiating IBC proceedings.

c. **Ahluwalia Contracts (India) Limited v. Raheja Developers Limited (Company Appeal (AT) (Insolvency) No. 703 of 2018** wherein this Tribunal

had held that:

"18. From the aforesaid decision, it is clear that the existence of dispute must be pre-existing i.e. it must exist before the receipt of the demand notice or invoice. If it comes to the notice of the Adjudicating Authority that the 'operational debt' is exceeding Rs. 1 lakh and the application

shows that the aforesaid debt is due and payable and has not been paid, in such case, in absence of any existence of a dispute between the parties or the record of the pendency of a suit or arbitration proceeding filed before the receipt of the demand notice of the unpaid operational debt, the application under Section 9 cannot be rejected and is required to be admitted."

This case emphasizes the need for a pre-existing dispute to be present before the demand notice is served.

d. ***Rajratan Babulal Agarwal v. Solartex India (P) Ltd. (2023) 1 SCC***

115 wherein Hon'ble Supreme Court held that:

"75. When we speak about evidence, we must not overlook the law laid down in Mobilox (supra) that the court need not be satisfied that the defense is likely to succeed. The standard, in other words, with reference to which a case of a pre-existing dispute under the IBC must be employed cannot be equated with even the principle of preponderance of probability which guides a civil court at the stage of finally decreeing a suit."

This case clarifies that the court, at this stage, does not need to be convinced of the defense's ultimate success. The existence of a plausible dispute, as evidenced by the communication record, is sufficient.

e. ***Deepak Modi versus Shalfeyo Industries Pvt. Ltd (2023 SCC***

OnLine NCLAT 169 wherein this Appellate Tribunal has held that:

"13... It is true that under the provisions of Code if Adjudicating Authority is satisfied with pre-existing dispute at the time of entertaining an application filed under Section 9 of the Code there is no reason to initiate the same or admit the application. However, law is settled on the point that there must be pure pre-existing dispute. Meaning thereby that genuine pre-existing dispute must exist in rejecting an application Section 9 of the code."

This case reiterates the concept of a genuine pre-existing dispute as a reason to reject an application under Section 9 of the IBC.

29. We acknowledge the Appellant's arguments regarding service of the demand notice and the arbitration clause. However, in light of the established pre-existing dispute and legal precedents, these arguments do not hold sufficient weight to overturn the NCLT's decision.

Decision:

30. In light of the documented pre-existing dispute concerning the machine's performance, the Adjudicating Authority's decision to dismiss the application is upheld. The Appellant's arguments regarding service of the demand notice and the arbitration clause are immaterial given the presence of a pre-existing dispute.

Order:

31. The appeal filed by UniCredit S.P.A. is hereby dismissed. The order passed by the NCLT dated July 6, 2023, is upheld. No orders as to costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

**[Arun Baroka]
Member (Technical)**

**New Delhi
3rd July, 2024
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