

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI COURT – VI

CP-IB-722/(ND)/2021

Under Section 9 of the Insolvency and Bankruptcy Code, 2016 and Rule 6 of the
Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

IN THE MATTER OF:

M/s. Unox S.p.A

Registered Office at:

Via Majorana 22,

35010 Cadoneghe (Padua) – Italy

Email ID: info@unox.com

...Applicant/Operational Creditor

Versus

M/s. Ambro Asia Private Limited

Registered Office at:

16/17, S.F, LSC Road,

Opposite ESPN Sports

Madangir, New Delhi – 110062

Email ID: n.tomar@ambroasia.it

CIN: U7414DL2007PTC165276

...Respondent/Corporate Debtor

CORAM:

SHRI. MAHENDRA KHANDELWAL, HON'BLE MEMBER (JUDICIAL)

SHRI. RAHUL BHATNAGAR, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

Counsel for the Petitioner: Adv. Savinder Singh

Counsel for the Corporate Debtor: Adv. Abhishek Swarup

ORDER

PER: RAHUL BHATNAGAR, MEMBER (TECHNICAL)

Date: 18.04.2024

1. This is an application dated 10.11.2021 filed by the Petitioner i.e., M/s. Unox S.p.A (A company incorporated under the Laws of Italy) through Authorised Representative, Mr. Nikhil Kumar, duly authorised vide Power of Attorney dated 13.04.2021 which was executed by Mr. Nichola Michelin(CEO of M/s Unox S.p.A) ; to initiate Corporate Insolvency Resolution Process (“CIRP”) under Section 9 of the Insolvency and Bankruptcy Code 2016 of the Respondent i.e., M/s. Ambro Asia Private Limited for the alleged default on the part of the Respondent in clearing the debt of [1.49.090,70 **EUROS**] including simple interest @15% per annum from 1.05.2019 to 31.05.2020 as alleged by the Applicant. The total amount of operational debt mentioned above in **Euros** comes out to be equivalent to INR 1,27,63,000 as per prevalent exchange rate of [1 EURO = INR 85.60] as on 09.11.2021(day before filing of present application).
2. Both the parties herein have their associate companies incorporated overseas. Ambro Asia Private Limited (Respondent) has its associate company Ambro Asia S.r.L. (a company registered under Italian Laws). Similarly, the Petitioner herein

namely M/s. Unox S.p.A (A company incorporated under the Laws of Italy) has M/s Unox India Private Limited [CIN: U51505MH2019FTC325585] as its associate company incorporated under Indian Laws.

3. **The applicant Operational Creditor has made the following submissions: -**

- i. That the Operational Creditor is a company engaged in business of manufacture and supply of professional ovens and that the Corporate Debtor is a company engaged in wholesale selling of electronic products including professional ovens.
- ii. It is contended by the applicant that around the year 2017, Ambro Asia S.r.L. (a company registered under Italian Laws) approached the petitioner with proposal to purchase ovens and expand their market in India by acting as a reference point pursuant to which negotiations were conducted between parties regarding commercial aspects of the deal pursuant to which an agreement between the parties dated 20/02/2017 was entered into at Italy which was valid for a duration of 3 years effective from 01.03.2017 and expiring on 28.02.2020. The OC claims that the said agreement is not applicable to present proceedings because albeit sister concerns; those are independent legal entities and present case is of debt and default.
- iii. The OC contended that since it did not have a related company in India at that point of time, Ambro Asia S.r.L. proposed the OC to utilise its Indian Company

namely M/s Ambro Asia Private Limited (Corporate Debtor herein) for smooth execution of operations. Attention is drawn to the fact that Ambro Asia S.r.L. and the CD Company are controlled by almost the same set of shareholders of the Sahai family wherein Mr. Chetan Sahai and Mr. Vinod Behari Sahai have substantial stakes in the Ambro Group of Companies. OC emphasised that both Ambro companies dealt with OC through the same set of people.

- iv. Thereafter, based on representations that timely payments would be made by CD, purchase orders were placed by CD and ovens were supplied by OC which it contends were to the satisfaction of CD and received without any demur as to the qualitative/quantitative/pricing aspects of the ovens in question.

- v. The CD in discharge of its obligations had paid the invoices from time to time leaving **Six Invoices As Outstanding** in part leading to claim by OC worth **1.28.204,70 EUROS**. A specific condition was mentioned upon each invoice that payment had to be made within 180 days of the issuance of invoice. Since CD failed to make timely payment for the same, the OC claims that they are entitled to simple interest @15% per annum along with principal amount due and payable. Accordingly, the total outstanding as per applicant is **1.49.090,70 EUROS** including simple interest @ 15% per annum from 01.05.2019 to 31.05.2020 of **20.850,00 EUROS**. Details of the unpaid invoices admitted by CD are as follows: -

Sl. No.	Invoice No.	Date	Amount of Invoice (in Euro)	Amount Paid (in Euro)	Outstanding Amount(in Euro)	Date of Default
1.	1017032671	11.12.2017	5.480	----	5.480,00	09.06.2018
2.	1018300612	19.03.2018	67.461,90	Dt:05.10.2018 25.000,00 Dt:09.01.2019 30.404,80	12.057,10	15.09.2018
3.	1018301662	18.07.2018	2.989	-----	2.989,00	14.01.2019
4.	1018301680	23.07.2018	76.372,30	Dt:08.05.2019 29.975,00	46.397,30	19.01.2019
5.	1018302341	17.10.2018	61.243,30	-----	61.243,30	16.03.2019
6.	1019300910 (issued w.r.t. debit note)	29.04.2019	38	-----	38	29.04.2019
		TOTAL	€ 2.13.584,50	€ 85.379,80	€1.28.204,70	
		Simple Interest @ 15% p.a. from 01.05.2019 to 31.05.2020			€20.850,00	
		Grand Total			€1.49.090,70	

vi. A demand notice in Form 3 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 was issued by the OC to the CD dated **09.07.2020** by email and speed post as per Section 8 of the IBC, 2016.

vii. The OC alleged that the said demand notice addressed to the registered office of the CD was returned with remarks that “no such person at address” and highlighted the evasive conduct of CD herein. However, the Respondent CD vide its director and authorized representative Mr. Nitendra Kumar Tomar who has been

duly authorized by company Board Resolution dated 22.12.2021 have filed their reply on 16.07.2020 well within 10 days of demand notice dated 09.07.2020.

- viii. The OC submitted that **after the receipt** of above-mentioned demand notice, the CD around time period of December 2020 instituted a suit titled as “Ambro Asia Private Limited vs Unox India Private Limited & Ors.” Being **Original Suit No 38 of 2020** before the Hon’ble District Court, GautamBudhnagar, Greater Noida claiming relief for Permanent and Mandatory Injunction as a counterblast which does not pertain to adjudication of the six unpaid invoices. Since, the IBC acknowledges the concept of a “pre-existing dispute”, we are not inclined to take into account the above-mentioned suit for the purpose of adjudication of present petition as it is not a “pre-existing dispute” as per the terms of IBC.
- ix. The CD further drew attention to injunction suit dated 09.12.2019 filed by Ambro Asia S.r.L against the OC wherein the Hon’ble Court at Padua, Italy had passed a decree in favour of Ambro Asia S.r.L for a sum of Euro 62,013.36/- against the petitioner herein. Be that as it may, those proceedings are not relevant to present case because albeit sister concerns, both Ambro Companies have separate legal existence in the eyes of the law as independent entities. There appears to be some conflict regarding claims of whether the aforementioned decreed amount has been duly paid or not by concerned parties however we are not concerned with that fact for purpose of this case which pertains to Application under Section 9 of the IBC.

4. **The respondent Corporate Debtor has made the following submissions: -**

- (i) The Respondent CD contended that as per their own understanding, CD was entitled to be exclusive distributor within the Indian Territory of ovens manufactured by the OC and represent the OC before prospective as well as actual dealers. Further, the CD contends that he shall be having exclusive rights herein for import, stocking, marketing, sale, installation and technical support of ovens.
- (ii) On the other hand, the OC has rebutted the aforesaid contention stating that it already had presence in the Indian Market since 2015 itself and no exclusivity whatsoever was ever granted to CD and rather the role of CD was only a sales arm of the OC upon payment of fixed remuneration and commission on the executed sales. The OC further claimed that it already had various customers in Indian Market since the year 2015 namely International Equipment Co ; Jonree Equipment ; Pride Equipment ; Radha Krishan and Sons Private Limited ; Reliable Equipment ; Rhombus Equipment ; Wang Professional Private Limited ; Akanksha International ; Amba Cool Corner etc who were its active and regular vendors.
- (iii) The warranty in respect of the ovens had to be met by the OC by providing spare parts as and when necessary. Accordingly, it is the contention of the CD that he invested time, money and energy to create a network of approximately 17 dealers from scratch and few more were in the pipeline for dealing in ovens of OC's brand. The market was projected to increase at 30% over next 4 years.

- (iv) The CD contended that around 2019 it became aware of OC's plans to setup a company in India. When it confronted OC regarding purpose of formation of the said company, it contends that assurance was received that the objective was only to streamline storage of stocks and not to burden CD with paying duties and taxes etc thereby not changing the agreed terms between the parties.
- (v) The OC thereafter finally got the company Unox India Private Limited (UIPL) incorporated on 20/05/2019 because of callous attitude of CD in conducting business and settling payments, in due compliance with Indian Laws and argued that there is no bar in law or prohibition from incorporating such company.
- (vi) As per CD's contentions Unox Group breached the exclusivity despite assurance and started directly approaching dealers created by the CD to deal with itself and persuaded dealers to sever ties with CD thereby hijacking into its network and destroying its goodwill. Unox India Private Limited coerced dealers to deal with them by saying that it will not honor warranty if they still choose to buy ovens from CD due to which the stock with CD remained unsold. An email id was provided by the OC to an employee of CD namely krishna@unox.com which was revoked without advance notice or intimation. The CD alleges that same modus operandi has been used by the OC as unfair practice in South Korea & South Africa as well.

(vii) The OC rebutted these contentions mentioning that they were devoid of substantial evidence and further suggested that dishonouring warranty would spoil its own brand name in the market. The OC argued that the CD had a casual approach in conducting business which was detrimental to the long-term interests of OC in Indian Market.

(viii) Since the CD was left with unsold stock and proposed for an amicable settlement with the OC where pursuant to negotiations between the parties, the OC had agreed to buy back the unsold stock lying with the CD as evident between the constant exchange of mails between the parties in the month of December 2019. However, the proposed settlement could not be fructified as the OC allegedly did not honor its commitment of buyback of unsold ovens and hence the CD contends that the dispute is of an ongoing nature which is not yet resolved and that the accounts are yet to be reconciled. Although the OC has objected highlighting that **settlement not being reached does not absolve CD of its liabilities.**

5. **ISSUES INVOLVED AND FINDINGS**

A. **WHETHER THERE IS AN OPERATIONAL DEBT AND IF SO, WHETHER DEFAULT HAS BEEN COMMITTED BY THE CORPORATE DEBTOR?**

B. **WHETHER THERE IS A PRE-EXISTING DISPUTE BETWEEN THE PARTIES?**

5.1 It would be worthwhile to consider the following definitions provided under the Insolvency and Bankruptcy Code, 2016 for the purpose of adjudication of the present petition: -

- (i) Section 3(6) “claim” means (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured;
- (ii) Section 3(10) “creditor” means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;
- (iii) Section 3(21) “operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the 2 [payment] of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;
- (iv) Section 3(11) “debt” means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;
- (v) Section 3(12) “default” means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not 1 [paid] by the debtor or the corporate debtor, as the case may be;
- (vi) Section 5(21) “operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the 2 [payment] of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;

5.2 The fact that the **CD had paid certain invoices in partial amount** by releasing part payments without any dispute as to the receipt or quality/quantity of goods nor amount of invoice would be considered as an acknowledgment of debt on part of the Corporate Debtor and establishes the fact that there was a simple buyer-seller relationship between the parties, excerpt from agreement attached for reference below (not relied upon authoritatively but for overall context): -

9 COMPENSATION

- a. *As remuneration for all activities under this agreement, Ambro asia shall receive a fixed remuneration of € 4,000.00 (four thousand/00) + VAT per month, subject to the issuance of an invoice at the beginning of each quarter. This amount is to be considered inclusive of office costs, secretariat, accounting management, stock management, customs management etc.....*
- b. *Unox will pay Ambro Asia a monthly flat rate of € 600.00 (six hundred/00) + VAT.....*
- c. *Unox will recognize to AmbroAsia the reimbursement of expenses for all travel and activities carried out.....*
- d. *Ambro Asia shall also receive a Variable Compensation equal to 3% (three percent) on sales made by Unox in India, successful in delivery and payment.....*
- e. *All expenses arising from participation in trade fairs or for communication and advertising activities will be charged to UNOX..... "*

5.3 OC alleged that the last invoice pertained to 2019 for goods that were supplied in 2018. Had there been any genuine grievances, the CD could have raised it meanwhile till 2020 when the demand notice was actually sent. At such belated stage CD is raising false and frivolous pleas to escape due payment,

however interestingly has not disputed the invoice amount or existence of debt in their reply/rejoinder etc.

5.4 Hence, it becomes clear that there was the existence of an operational debt and subsequently default was committed on the part of Corporate Debtor in fulfilling its liabilities towards the Operational Creditor. The contention of the CD that it had to make payments to OC after further selling off the ovens does not hold ground as it was in the nature of a Principal to Principal relationship on an invoice basis.

5.5 In our considered opinion, the Operational Creditor has succeeded in establishing their case by proving the existence of an Operational Debt on which subsequently a default had occurred.

5.6 The decree granted in injunction suit dated 09.12.2019 in favour of Ambro Asia S.r.l against the OC (petitioner herein) by the Hon'ble Court at Padua, Italy had for a sum of Euro 62,013.36/- does not qualify as a pre-existing dispute because albeit sister concerns, both the Ambro Companies have separate legal existence in the eyes of the law. Furthermore, the suit filed by the respondent herein in the month of December 2020 titled "Ambro Asia Private Limited vs Unox India Private Limited & Ors." Being **Original Suit No 38 of 2020** before the Hon'ble District Court, GautamBudhnagar, Greater

Noida claiming relief for Permanent and Mandatory Injunction appears to be a counterblast filed after receipt of demand notice dated 09.07.2020 sent by the petitioner. Hence, we are of the opinion that there is no actual pre-existing dispute between the parties pertaining to the invoice amount or quality of goods supplied by the OC to the CD whereas only an hypothetical impression of it is being cast upon by the CD to avoid due payment.

5.7 Ld. Counsel for the OC placed reliance on the following precedent Judgements: -

- (i) The Hon'ble Supreme Court of India in the case of "Mobilox Innovations Private Limited versus Kirusa Software Private Limited" held that [relevant extracts mentioned as follows] – "*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.***" **AND** "*Therefore. merely the 'Corporate Debtor' has disputed the claim by showing that there is certain counter claim. it cannot be held that there is pre-existence of dispute. in **absence of any evidence to suggest that dispute was raised prior to the issuance of demand notice under Section 8(1) or invoice.***"
- (ii) G.T. Polymers Vs Keshva Medi Devices Private Limited (**Hon'ble NCLAT, Delhi**) MANU/NL/0257/2020 [Relevant Extract Mentioned below]

*“We find that in this case in reply to the notice the Respondent has raised vague and baseless allegations against the Appellant which are not supported by any documentary evidence. Therefore, we are of the view that the dispute is spurious or hypothetical, hence the **Adjudicatory Authority has to reject such defence.**”*

ORDER

6. In the light of the above said facts and after giving careful consideration to the entire matter and hearing the arguments of the learned counsel for the Operational Creditor as well as the reply filed by the Corporate Debtor and upon appreciation of the documents placed on record to substantiate their respective claims, this Adjudicating Authority **ADMITS** this application filed by the Operational Creditor under Section 9 of Insolvency and Bankruptcy Code, 2016.
7. The Petitioner (Operational Creditor) has proposed the name of Mr. Piyush Moona to act as the Interim Resolution Professional in the matter [Registration No. IBBI/IPA-001/IP-P00990/2017-18/11630]. The Authorisation for Assignment of the proposed RP is valid upto 05/11/2024 and written consent has been obtained from him. Accordingly, in exercise of powers conferred under Section 16 of the IBC, this Tribunal confirms the appointment of Mr. Piyush Moona as the IRP in this matter.
8. This Tribunal **declares a moratorium under Section 14** of The IBC with immediate effect. The necessary consequences of imposing the moratorium flows from the

provisions of Section 14(1)(a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed: -

- (i) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- (ii) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- (iii) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
- (iii) The recovery of any property by an owner or lessor, where such property is occupied by or in the possession of the corporate debtor.

[Explanation: - For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;]”

9. During the CIRP period, the management of the Corporate Debtor shall vest in the IRP/RP as per Section 17 of the IBC. The IRP is directed to make a public announcement in terms of Section 13(2) of the IBC immediately i.e. within 3 days from date of this order as clarified by Explanation to Regulation 6(1) of The IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The Operational Creditor shall deposit a sum of Rs. 2,00,000/- with the IRP to meet the expenses arising out of public notice and inviting claims from stakeholders. These expenses are subject to the approval of the CoC.
10. In terms of the Code, Registry is directed to communicate copy of this order to the Operational Creditor; Corporate Debtor; Interim Resolution Professional; AND with directions to Insolvency and Bankruptcy Board of India and Registrar of Companies (Delhi and Haryana) to update status of CD as undergoing CIRP.
11. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.
- No order as to costs.

-SD/-
(RAHUL BHATNAGAR)
MEMBER (TECHNICAL)

-SD/-
(MAHENDRA KHANDELWAL)
MEMBER (JUDICIAL)