Demand Notice Under IBC

**IF** A DEMAND NOTICE UNDER IBC RETURNS UNDELIVERED THEN WHAT ARE THE REMEDIES AVAILABLE?

As a matter of law, a demand notice must be effectively delivered upon whom it is intended for and issued for delivery.

Rule 5 (2) of Rules, 2016 requires the delivery of the demand notice to the corporate debtor in the following manner:

a.) at its registered office by hand, registered post or speed post with acknowledgement due or,

b.) by electronic mail service to a whole time director or designated partner or key managerial personnel, if any, of the corporate debtor.

In Alloysmin Industries Vs. Raman Casting Pvt. Ltd.,Company Appeal (AT) (Insolvency) No.684 of 2018, NCLAT has illustrated the essential requirement of service of demand notice under Section 8 of the Code upon the corporate debtor meaning that the corporate debtor should be made aware of the Demand Notice by duly serving it upon them.

It also held that as long as the demand notice is served upon the corporate debtor, either at the registered office or corporate office, or both, it shall be considered as a valid proof of service under Section 8 of IBC.

The NCLAT in The Sandesh Ltd vs. Realm Media Solutions Pvt. Ltd. Company Appeal (AT)(Ins) No. 222 of 2018, in its order dated 14.03.2019, held that
"when the Operational Creditor is able to prove that the Corporate Debtor is deliberately avoiding the service of the notice, then the Adjudicating Authority may allow for the publication of the notice in the newspaper and if even after that the Corporate Debtor fails to appear, then the Demand Notice may be deemed to have been served on the Respondent."

In Sh.Sharad Kesarwani Vs. M/s. Planetcast Media Services Ltd. & Anr. Company Appeal (AT) (Ins) No. 272 of 2018, NCLAT has elaborated the issue of service of Demand Notice under IBC. It was held that the Demand Notice under Section 8 has to be served at the current address of the Corporate Debtor for a valid service.

In Krystal Integrated Services Pvt. Ltd. vs. Indiaontime Express Private Limited[2019] 216 CompCas 61, NCLAT was of a different view and held that

"in absence of service of demand notice upon the Respondent – Corporate Debtor whose existence at the given address itself was doubtful, the Appellant – Operational Creditor was not entitled to seek triggering of Corporate Insolvency Resolution Process. Once application in prescribed form was filed by the Appellant, the Adjudicating Authority was empowered to reject the same for failure on the part of Operational Creditor to deliver demand notice to the Corporate Debtor."

The main aspect which needs to be met always is that a demand notice should not be served in a mechanical manner rather it should be in an effective manner so that other person for whom it is meant is really aware that such a notice has been issued and served upon him.

Hence, Courts have been diligent and always emphasised that it should be attempted and delivered with bona fide and it should reflect that it was only attempted technically to satisfy the pre-requirement of delivery of a demand notice under IBC before filing an application by an operational creditor.

Therefore, any operational creditor should be cautious and must observe the same where a demand notice under IBC is sent but returns undelivered, then they should try to effectively deliver the notice as per the laws laid down by the Court for an effective delivery of a demand notice.

WHO CAN SERVE A DEMAND NOTICE UNDER I&B CODE

A demand notice under Section 8(1) of the I & B Code can be delivered by the person himself or by his duly authorised representative.

CAN AN ADVOCATE SERVE A DEMAND NOTICE ON BEHALF OF AN OPERATIONAL CREDITOR?

In Macquarie Bank Limited Vs Shilpi Cable Technologies Ltd. 2018 (145) SCL 236, the SC dealt with the issue as to whether an advocate can issue a demand notice on behalf of an operational creditor.

The Court considered that the expression used is "demand notice is delivered" and not "issued". It also appreciated a vital aspect that Section 238 of I & B Code does not override the provisions of the Advocates Act. Hence, it validated the act to be as per the law.

It is worthwhile to note that most of the operational creditors prefer and insist that the demand notice is delivered under the signature of a lawyer.

The Court held that

"Since there is no clear disharmony between the two Parliamentary statutes in the present case which cannot be resolved by harmonious interpretation, it is clear that both statutes must be read together. Also, we must not forget that Section 30 of the Advocates Act deals with the fundamental right under Article 19(1)(g) of the Constitution to practice one's profession. Therefore, a conjoint reading of Section 30 of the Advocates Act and Sections 8 and 9 of the Code together with the Adjudicatory Authority Rules and Forms thereunder would yield the result that a notice sent on behalf of an operational creditor by a lawyer would be in order."

HOW MANY DAYS DOES AN OPERATIONAL CREDITOR HAS TO WAIT FOR BEFORE FILLING AN APPLICATION, AFTER SENDING A DEMAND NOTICE?

As per Section 9 of the Code, an Operational Creditor can file an application for initiation of CIRP against the Corporate Debtor only after the expiry of 10 days from the date of delivery of demand notice to the Corporate Debtor.

The SC in Macquarie Bank Limited (supra), held that it is only if, after the expiry of the period of the said 10 days, the operational creditor does not either receive payment from the corporate debtor or notice of dispute, that the operational creditor may trigger the insolvency process by filing an application before the adjudicating authority under Sections 9(1) and 9(2).

Therefore, the waiting period of 10 days is mandatory in nature and any application filed prior to the same will be premature and will be liable for rejection by the Adjudicating Authority.

A similar provision also exists under the Negotiable Instruments Act, 1881 wherein there is a restriction in filing complaint under Section 138 of the Act prior to the lapsing of the period of 15 days.

Validity of a demand notice under the Insolvency and Bankruptcy Code 2016 (“IBC”) issued by a lawyer on behalf of his client  came under the consideration of National Company Law Appellate Tribunal (“NCLAT”), the appellate tribunal under IBC, in recent cases. Section 8 of the IBC Code mandates that to initiate a corporate insolvency resolution process under IBC, an operational creditor has to serve a demand notice in the prescribed format to the operational debtor.

The issue came up for the first time before NCLAT in August 2017 in Uttam Galve Steels Limited v. DF Deutsche Forfait AG & Anr.[1] In this case, NCLAT was considering an appeal filed against an order of the National Company Law Tribunal, which admitted an application filed by the operation creditor under the IBC. One of the contentions of the appellant (debtor) was that the demand notice was not issued by the respondent (operation creditor) but through their lawyer, who was not an authorized person. While considering this contention, NCLAT examined the formats of demand notices under IBC and held that demand notice/invoice needs to be issued either by the operational creditor or by a person who is authorized to act on behalf of the operational creditor. NCLAT held that a demand notice is different from a lawyer notice. An advocate/company secretary/chartered accountant can send demand notice on behalf of corporate debtor only if he has the authority of the board of directors of the debtor. Further, he also has to state his position or relation with debtor in the demand notice. In the absence of such authority, his notice is not as per the format prescribed under IBC and not invalid.

While laying down the judgment, NCLAT stipulated the following:

On occurrence of default, the operational creditor is required to deliver the demand notice/invoice of unpaid operational debt to the corporate debtor in Form 3/Form 4 stipulated under Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

Through the said formats, the corporate debtor is to be informed of particulars of operational debt, with a demand of payment, with clear understanding that the operational debt (in default) is required to be repaid unconditionally within ten days from the date of receipt of notice, failing which the operational creditor will initiate a corporate insolvency process against the debtor.

Only if the demand notice is served in such form and manner, the corporate debtor will understand the serious consequences of non-payment of operational debt, which is the initiation of resolution process without any opportunity to contest unless there is any existing dispute. Otherwise, the debtor may decide to contest the demand notice, as in the case of any normal legal notice, at the time of filing the suit/case. Hence, it was held that a lawyer/chartered accountant/company secretary, in absence of any authority of the board of directors and holding no position with or in relation to the operational creditor, couldn’t issue a demand notice under Section 8 of the IBC.

The issue again came up before NCLAT in November 2017 in Senthil Kumar Karmegam v. Dolphin Offshore Enterprises & Anr[2]where it was held that insolvency resolution process cannot be initiated by a demand notice sent by an advocate of the operational creditor to the debtor when there was nothing on record to suggest that the advocate in question held any position with or in relation to the operational creditor.

The issue once again came up before NCALT in November in Goa Antibiotics & Pharmaceuticals Ltd v. Lark Chemichals Pvt.Ltd.[3] where it was held that initiation of insolvency resolution process on the basis of a demand notice issued by a law firm is invalid, even if the said law firm is authorized by a board resolution of the creditor. In the current case, the appellant debtor’s counsel submitted that the demand notice was not issued by the operational creditor but by a law firm and in the said demand notice, the law firm had not mentioned its position and relation with the operational creditor. The respondent operational creditor’s counsel, however, relied on board resolution of the respondent and submitted that by the said resolution the respondent authorized the concerned law firm to send the demand notice on behalf of the respondent to the appellant. NCLAT, reiterating its view taken in Uttam Galve Steels Limited, held that there was nothing on record to suggest that the law firm, which issued the demand notice, held any position with or in relation to the respondent and hence, the demand notice was not issued in mandatory Form 3/Form 4. Accordingly, NCLAT dismissed the initiation of resolution process against the Respondent.

The above judgments of NCLAT currently settle the law that a lawyer/company secretary/ chartered accountant cannot send a demand notices on behalf of operational creditor unless he is authorized by a board resolution (in the case of corporate creditor) and the demand notice has to clearly state the position or relation he holds with the operation creditor.

[1] Company Appeal (AT) (Insolvency) 39 of 2017

[2] Company Appeal (AT) (Insolvency) No. 154 of 2017

[3] Company Appeal (AT) (Insolvency) No. 184 of 2017

has filed an application Under Section 9 read with Rule 6 of the Insolvency and. Bankruptcy ... IBC,2016 disputing the whole claim. It is stated that the ... After pointing out to the corporate debtor that reply to the demand notice was given in time .