

DEMAND NOTICE BY OPERATIONAL CREDITOR

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When any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor.

In the Insolvency and Bankruptcy Code, 2016 a two-fold procedural requirement is prescribed for the initiation of insolvency resolution process by an operational creditor. The two-tier process for an operational creditor involves, first, the sending of a demand notice under section 8 of the Code demanding payment of the operational debt owed by the corporate debtor. The second arises only after the first step fails at the end of the corporate debtor, if the corporate debtor fails to pay the operational debt or to dispute the notice as provided under section 8. In that case the operational creditor may initiate the insolvency resolution process against the corporate debtor under section 9 of the Code

Operational creditor means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred¹. Operational debt means a claim in respect of the provision of goods or services including employment or a debt in respect of the 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 authority².

In this article it will be discussed how operation creditor make Application for initiation of corporate insolvency resolution process against the corporate debtor

An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed in Form 3.³ In accordance

¹ Section 5(20), Insolvency and Bankruptcy Code, 2016

² Section 5(21), Insolvency and Bankruptcy Code, 2016

³ Section 8 (1) Insolvency and Bankruptcy Code, 2016

with this section Operational Creditor is required to send Demand Notice on the default of Payment by Debtor in the prescribed form along with the required evidences of debt due.

According to Section 8 (2) of Insolvency and Bankruptcy Code, The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice, bring to the notice of the operational creditor existence of a dispute, record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute and the payment of unpaid operational debt by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor or by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

The Debtor shall within 10 days of receipt of demand notice inform to the Creditor of Existence of dispute, if any, or Pendency of suit or arbitration proceedings, and the payment of debt due, by sending an attested copy of Electronic Transfer of unpaid amount or sending an attested copy of record that payment has already been encashed.

“Demand Notice” means a notice served by an operational creditor to the corporate debtor demanding payment of the operational debt in respect of which the default has occurred.

If the information or Payment as par Section 8(2) is not received within 10 days An operational creditor, can make an application for initiating the corporate insolvency resolution process against a corporate debtor under section 9 of the Code in Form 5, accompanied with documents and records required therein and as specified in the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

The applicant shall dispatch, a copy of the application filed with the Adjudicating Authority, by registered post or speed post to the registered office of the corporate debtor.

Documents required to be attached along with Form 5⁴:

⁴ Rule 6, Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016

- Copy of the invoice / demand notice as in Form 3 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 served on the corporate debtor.
- Copies of all documents referred to in this application.
- Copy of the relevant accounts from the banks/financial institutions maintaining accounts of the operational creditor confirming that there is no payment of the relevant unpaid operational debt by the operational debtor, if available
- Affidavit in support of the application in accordance with the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
- Written communication by the proposed interim resolution professional as set out in Form 2 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
- Proof that the specified application fee has been paid.

In *Macquarie Bank Limited v. Uttam Galva Metallics Limited*⁵, the NCLAT declared that a demand notice by an advocate on behalf of the operational creditor shall not be deemed to be a demand notice within section 8 of the Code. It also declared that the notice under section 8 can be sent only by the operational creditor or a person who holds a position in the company (i.e., the operational creditor).

In *Uttam Galva Steels Limited v. DF Deutsche Forfait AG & Anr.*⁶, the NCLAT stated that it is clear that an Operational Creditor can apply himself or through a person authorised to act on behalf of Operational Creditor. The person who is authorised to act on behalf of Operational Creditor is also required to state “his position with or in relation to the Operational Creditor”, meaning thereby the person authorised by Operational Creditor must hold position with or in relation to the Operational Creditor and only such person can apply.

The law on demand notice under section 8 and its nuances seem to be settled for the time being but, it may require intervention as the time passes by in view of the difficulties that may come up

⁵ Company Appeals (AT) (Insol) No. 96 of 2017

⁶ Company Appeals (AT) (Insol) No. 39 of 2017

and be recognized judicially. It indeed is a novel piece of legislation, but care should be taken to ensure that procedural impediments may not override the substantial issues.