

L E X

# WITNESS

Volume 9 Issue 5 | December 2017

₹65 US \$6 UK £4

## let's arbitrate

Multi-Party and Multi-Contract International Arbitrations under SIAC 2016 Rules



**S. Ravi Shankar**  
Sr. Partner, Law Senate

P24

## expert speak



**Amit Mohaan Meharia**  
Managing Partner,  
MCO Legals LLP

P28



## Insolvency & Bankruptcy Code 2016:

### The Canvas So Far

P08

## + The Grand Masters 2018:

A Corporate Counsel Legal Best Practices Summit Series

P42

## expert speak

**Mohit Goel**  
Partner, Sim & San  
**Bharadwaj Jaishankar**  
Associate Partner, Sim & San

P36

## expert speak

**Varsha Banerjee**  
Associate Partner,  
Dhir & Dhir Associates

P20

## expert speak

**Niraj Singh**  
Partner,  
RNS Associates

P32

## expert speak

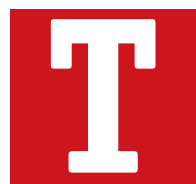
**Dr. Manoj Kumar**  
Founder,  
Hammurabi & Solomon  
**B. Sai Chandradhavan**  
Managing Director, H&S  
Sand Legal Compliance Services

P47



# IBC 2016 Amendments – An All New Ride for Creditors?

■ Varsha Banerjee



The Insolvency & Bankruptcy Code, 2016 (“the Code”) has introduced new measures to deal with insolvency and offers uniform, far reaching solutions to meet the Code’s

envisioned objective. The code has brought revolutionary transformations in the corporate realm. Amidst various amendments, an important aspect that needs to be addressed is whether an individual or a corporate body other than the Operational Creditor itself can act on behalf of the Operational Creditor when authorized for the same. Since the Code has far reaching consequences once the process is set in motion, one will get to learn and identify various checks and balances that need to be in place to abide by the rules of the code.

The Operational Creditors at the threshold need to meet the criterion of absence of any dispute qua the defaulted amount, place on record a certificate from the financial institution as defined under the Code along

with a demand notice as stipulated. The demand notice is strictly required in accordance with the Form as prescribed under the Regulations. There are quite a few instances wherein the concerned authorities have issued very strict instructions and reminded the parties of the rules laid down, failing abidance to which, the process may not be furthered at all. A few have been mentioned below for a better understanding of the same.

The National Company Law Appellate Tribunal (NCLAT) in the matter of Goa Antibiotics and Pharmaceuticals Ltd. v. Lark Chemicals Pvt. Ltd, while reiterating the law as laid down in the matter of Uttam Galva Steels Ltd. V. DF Deutsche Forfait AG, held that as the demand notice had been issued by a law firm and there was nothing on record to suggest that the said law firm held any position with or in relation to the respondent – Lark Chemicals Pvt. Ltd. Additionally the demand notice had not been issued as per Form 3 or Form 4, as stipulated under Rule 5



D-55, Defence Colony,  
New Delhi-110 024.  
Tel: 91(11) 42410000,  
Fax: 91 (11) 42410091  
E:expertspeak@dhirassociates.com

of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Keeping the aforesaid in mind, the initiation of resolution process at the request of such an operational creditor is not as per the law and accordingly set aside. The NCLAT in the said judgment also held that the resolution process cannot be either initiated/processed in the absence of justification regarding the delay on the part of the Operational Creditor.

In the matter of Uttam Galva Steels Ltd. V. DF Deutsche Forfait AG, the NCLAT further held that sub-section (1) of Section 8 states that during occurrence of any default, the Operational Creditor is required to deliver a demand notice of unpaid operational debt and a copy of the invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as prescribed. Rule 5 states the format in which the demand notice or invoice demanding payment is to be issued by the Operational Creditor. Therefore, in view of the provisions of the code, read with the said rules, a person, be it an Advocate or a Lawyer or Company Secretary or Chartered Accountant, in the absence of any authority by Board of Directors and holding no position with or in relation to the Operational Creditor cannot issue any notice under Section 8 of the code, which otherwise is a lawyer's notice as distinct from notice given by the Operational Creditor in terms of Section 8 of the code.


In the case of Goa Antibiotics (supra), the Adjudicating Authority admitted insolvency resolution process against the Company against debts which were due since 1998. The Appellant (Corporate Debtor) submitted that the demand notice made under sub-section (1) of Section 8 was not issued by the Operational Creditor but by a legal firm 'Dhruve Liladhar & Co., Advocates, Solicitors and Notary'. It was further submitted that the legal firm has not mentioned its position and relation with the Operational Creditor.

## **ANOTHER TOPIC OF CONTENTION IN THE CASE OF OPERATIONAL CREDITORS IS WHETHER TWO OR MORE OPERATIONAL CREDITORS HAVING SAME CAUSE OF ACTION CAN FILE AN APPLICATION JOINTLY.**

A notice under Section 8 of the Code is required to be issued by the operational creditor prior to filing of a petition under Section 9 of the Code by the Operational Creditor. Since the claim of different operational creditors are distinct and date of default for each operational creditor is also different, therefore, separate Section 8 notices are required to be issued independently by each of the Operational Creditors. It is only in the independent Section notices under Section 8 that each Operational Creditor can raise its claim and seek due payment of the amount in default.

In the case of Uttam Galva Steels Ltd. V. DF Deutsche Forfait AG, the NCLAT also held that a joint petition u/s 9 by one or more operational creditors is not maintainable. In the case of the joint petition which was filed by operational creditors, the respondents relied upon Rule 23A of NCLT Rules, 2016, however, since Rule 23A has not been adopted in terms of Regulation 10 of the Code, Rule 23A was held to be inapplicable by the NCLAT.

## **CLOSING STATEMENT**

The operational creditors have barely recovered from the ambiguity revolving around the term 'dispute', however, with each passing day the Operational Creditors continue to encounter other challenges. It is only after meeting the diverse requirements as envisaged under the Code that the Operational Creditor will be entitled to trigger the process and seek due resolution under the Code. Key amendments have triggered diverse speculations and while loopholes exist, efforts are being made continuously to plug in the same to safeguard the key provisions. 



**Varsha Banerjee** is an Associate Partner and has been in practice for the last 7 years and represents corporate entities, institutional creditors, shareholders etc. She focuses her litigation practice on corporate restructuring and insolvency matters with expertise in the rehabilitation of distressed entities, issues pertaining to recovery of debt, securitization-related matters and commercial disputes arising out of other contractual matters, civil suits and arbitration law arising in cases of distressed entities.