

Decoding the Code

Chapter-II: Corporate Insolvency (CIRP)

Topic-2 : Moratorium, Public Announcement and Time Limit

All about Moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 including judicial pronouncements

"The idea of moratorium is that it facilitates the continued operation of the business of the corporate debtor to allow it breathing space to organise its affairs so that a new management may ultimately take over and bring the corporate debtor out of financial sickness, thus benefitting all stakeholders, which would include workmen of the corporate debtor.((Report of the Insolvency Law Committee of February, 2020 para 8.2 & 8.11))"

1. Introduction

As soon as the application of CIRP is admitted under Section 7, 9 or 10 of the Code, a moratorium in terms of Section 14 of the Code is to be declared by the adjudicating authority and a public announcement under Section 13 is made stating the last date for submission of claims and the details of the interim resolution professional who shall be vested with the management of the corporate debtor and be responsible for receiving claims. The Adjudicating Authority, upon being satisfied that the resolution plan meets the requirements under section 30(2), approves the resolution plan and if any person is aggrieved by the said order, it can file an appeal before the NCLAT under section 32 read with section 61 of the IBC. Upon the resolution plan being approved by the Adjudicating Authority under section 31 of the IBC, the moratorium order passed by the Adjudicating Authority under section 14 of the IBC ceases to have its effect. The said moratorium is initiated on the date when the application under section 7 of the IBC for initiation of the insolvency process is admitted. During this period, institution of fresh suits or proceedings is prohibited and continuance of already instituted suits and proceedings is also suspended.

Since the enforcement of the Insolvency and Bankruptcy Code, 2016 ('IBC' or 'the Code'), the moratorium term has been constructed by various forum of judiciaries in numbers of judgments. This part of Decoding the Code elaborates the moratorium term and important judicial pronouncements on the Moratorium.

Hon'ble Supreme Court in *Swiss Ribbons Pvt. Ltd. & anr. Vs. Union of India & Ors.* [\[2019\] ibclaw.in 03 SC](#) held that the moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its

entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends.

This part of the Decoding the Code decodes:

- Legal content & purpose
- What is term Moratorium-analysis of Sec. 14(1)
- Logic behind *Explanation* to Sec. 14(1)
- Outside the purview of the Moratorium (sub-sec. 2, 2A & 3)
- Commencement & effective period of the Moratorium(Sub-sec. 4)
- Punishment for contravention (Sec. 74)
- Insolvency Law Committee recommendations

2. Legal wording, meaning and purpose of the Moratorium

The term moratorium is not defined under the Code. Definition of the word in the Oxford dictionary is "*a legal authorization to debtors to postpone payment*". In Cambridge Dictionary the expression 'Moratorium' has been defined to mean "*a stopping of an activity for an agreed amount of time*". In Merriam Webster Dictionary to mean "*legally authorized period of delay in the performance of a legal obligation or the payment of a debt; a waiting period set by an authority; or a suspension of activity*".

The moratorium means a period wherein no judicial proceedings for recovery, enforcement of security interest, sale or transfer of assets, or termination of essential contracts can be instituted or continued against the Corporate Debtor. Under section 13(1)(a) of the Code, the adjudicating authority is required to impose a moratorium for matters referred to in section 14.

The purposes of the moratorium include keeping the corporate debtor's assets together during the insolvency resolution process and facilitating orderly completion of the processes envisaged during the insolvency resolution process and ensuring that the company may continue as a going concern while the creditors take a view on resolution of default and the moratorium on initiation and continuation of legal proceedings, including debt enforcement action ensures a stand-still period during which creditors cannot resort to individual enforcement action which may frustrate the object of the CIRP.

2.1 Legal content of provisions related to the moratorium under the Code reproduced here before Decoding the Section 14:

"Declaration of moratorium and public announcement

13. (1) *The Adjudicating Authority, after admission of the application under [section 7](#) or [section 9](#) or [section 10](#), shall, by an order—*

*(a) declare a moratorium for the purposes referred to in **section 14**;*

(b) cause a public announcement of the initiation of corporate insolvency resolution process and call for the submission of claims under [section 15](#); and

(c) appoint an interim resolution professional in the manner as laid down in section 16.

(2) The public announcement referred to in clause (b) of sub-section (1) shall be made immediately after the appointment of the interim resolution professional."

"Moratorium

14. (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—

(a) 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;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

((Ins. by [the Insolvency And Bankruptcy Code \(Amendment\) Ordinance, 2019](#) (Ordinance No. 16 of 2019), w.e.f. 28-12-2019.))**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 license, 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 or a similar grant or right during moratorium period.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

((Ins. by [the Insolvency And Bankruptcy Code \(Amendment\) Ordinance, 2019](#) (Ordinance No. 16 of 2019), w.e.f. 28-12-2019.))(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

((Substituted by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, w.e.f. 06.06.2018(see **State Bank of India Vs. V. Ramakrishnan & Anr.-SC**). Prior to the substitution, sub-section (3) of section 14 as under:

"(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.") (3) The provisions of sub-section (1) shall not apply to –

(a) ((Subs. by the Insolvency And Bankruptcy Code (Amendment) Ordinance, 2019 Ordinance No. 16 of 2019, w.e.f. 28-12-2019. Before substitution, it stood as: “such transaction as may be notified by the Central Government in consultation with any financial regulator;”) *such transactions, agreements or other arrangement as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;*]

(b) *a surety in a contract of guarantee to a corporate debtor.*

(4) *The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:*

Provided *that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.*

3. What is the term Moratorium used under the Code - Interpretation of Sub-section (1) of Section 14

The provisions of section 14(1) of the Code are very wide and appear to be a complete bar against the institution or continuation of suits or any legal proceedings against a corporate debtor on the declaration of moratorium by the adjudicating authority. Sub-section (1) of the Section 14 is reproduced here:

Section 14(1):

(a) *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;”*

(b) *transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;*

(c) *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 Securitisation and Reconstruction of*

Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Hon'ble Supreme Court in landmark judgment, *P. Mohanraj & Ors. Vs. M/S. Shah Brothers Ispat Pvt. Ltd.* (2021) [ibclaw.in 24 SC](#), held that the expression “or” occurs twice in the first part of Section 14(1)(a) – first, between the expressions “*institution of suits*” and “*continuation of pending suits*” and second, between the expressions “*continuation of pending suits*” and “*proceedings against the corporate debtor...*”. The sweep of the provision is very wide indeed as it includes institution, continuation, judgment and execution of suits and proceedings. It is important to note that an award of an arbitration panel or an order of an authority is also included. This being the case, it would be incongruous to hold that the expression “*the institution of suits or continuation of pending suits*” must be read disjunctively as otherwise, the institution of arbitral proceedings and proceedings before authorities cannot be subsumed within the expression institution of “suits” which are proceedings in civil courts instituted by a plaint (see Section 26 of the Code of Civil Procedure, 1908). Therefore, it is clear that the expression “*institution of suits or continuation of pending suits*” is to be read as one category, and the disjunctive “or” before the word “*proceedings*” would make it clear that proceedings against the corporate debtor would be a separate category. What throws light on the width of the expression “proceedings” is the expression “*any judgment, decree or order*” and “*any court of law, tribunal, arbitration panel or other authority*”. Since criminal proceedings under the Code of Criminal Procedure, 1973 [“CrPC”] are conducted before the courts mentioned in Section 6, CrPC, it is clear that a Section 138 proceeding being conducted before a Magistrate would certainly be a proceeding in a court of law in respect of a transaction which relates to a debt owed by the corporate debtor.**(p14)**

Further, Hon'ble Court held that clause (b) of Section 14(1) also makes it clear that during the moratorium period, any transfer, encumbrance, alienation, or disposal by the corporate debtor of any of its assets or any legal right or beneficial interest therein being also interdicted, yet a liability in the form of compensation payable under Section 138 would somehow escape the dragnet of Section 14(1). While Section 14(1)(a) refers to monetary liabilities of the corporate debtor, Section 14(1)(b) refers to the corporate debtor's assets, and together, these two clauses form a scheme which shields the corporate debtor from pecuniary attacks against it in the moratorium period so that the corporate debtor gets breathing space to continue as a going concern in order to ultimately rehabilitate itself. Any crack in this shield is bound to have adverse consequences, given the object of Section 14, and cannot, by any process of interpretation, be allowed to occur.

Hon'ble Delhi High Court in *Power Grid Corporation Of India Ltd Vs. Jyoti Structures Ltd.* [2017] [ibclaw.in 12 HC](#) has interpreted terms “*proceedings*” “*including*” and “*against the corporate debtor*” used under Section 14 as under:

- (i) '**proceedings**' under Sec. 14(1)(a) do not mean 'all proceedings';
- (ii) the term '**proceeding**' would be restricted to the nature of action that follows it i.e. debt

recovery action against assets of the corporate debtor;

(iii) the use of narrower term '**against the corporate debtor**' in section 14(1)(a) as opposed to the wider phrase '**by or against the corporate debtor**' used in section 33(5) of the code further makes it evident that section 14(1)(a) is intended to have restrictive meaning and applicability.

(iv) term '**including**' is clarificatory of the scope and ambit of the term '**proceedings**';

Hon'ble Supreme Court in *Dena Bank Vs. C. Shivakumar Reddy and Anr.* [\(2021\) ibclaw.in 69 SC](#) held that the provisions of the IBC are designed to ensure that the business and/or commercial activities of the Corporate Debtor are continued by a Resolution Professional, post imposition of a moratorium, which would give the Corporate Debtor some reprieve from coercive litigation, which could drain the Corporate Debtor of its financial resources. This is to enable the Corporate Debtor to improve its financial health and at the same time repay the dues of its creditors.

3.1 All the proceedings pending before all court automatically stop and the RP is not required to take any further step

In the matter of *Haravtar Singh Arora Vs. Punjab National Bank & Ors.* [\[2018\] ibclaw.in 83 NCLAT](#) it is contended before the NCLAT that during the period of Moratorium cases pending against the Corporate Debtor has not been stopped by the Resolution Professional. NCLAT held that such submission cannot be accepted as in terms of Section 14 of the Code, all the proceedings pending before all court against the Corporate Debtor automatically comes to halt and cannot be decided. Therefore, the Resolution Professional is not required to take any further step.

NCLAT in *Mrs. Madhurima Mridul & Anr. Vs. Raj Infrastructures Development (India) Pvt. Ltd. & Ors.* [\(2018\) ibclaw.in 191 NCLAT](#) held that if any suit or other case has been filed by the Appellant (allottee of land) against the Corporate Debtor and pending before a Court of Competent Jurisdiction, may be taken up on completion of Moratorium period.

3.2 Initiation of CIRP against a subsidiary of a Corporate Debtor (under CIRP) will not be hit by Section 14(1)(a) moratorium

In *Axis Bank Limited Vs. Alok Infrastructure Limited* [\(2018\) ibclaw.in 22 NCLT](#), the Learned Counsel appearing on behalf of the Corporate Debtor submits that a Petition filed by State Bank of India against M/s. Alok Industries Ltd., which is the holding Company of this Corporate Debtor, was admitted by NCLT, Ahmedabad on 18.07.2017. Consequently, an Insolvency Resolution Professional has taken control over Alok Industries Ltd., thereafter the committee of Creditors of Alok Industries Ltd. approved a resolution plan on 20.06.2018 and the resolution plan is pending for approval before NCLT, Ahmedabad. The Counsel further submits that initiation of CIRP against subsidiary of holding Company which is under CIRP amounts to enforcement action or coercive action as contemplated under Section 14(1)(a) of the Code and hence the Petition deserves to be rejected.

NCLT held that the Section 14(1)(a) of the Code speaks about moratorium for prohibiting institution of suits or continuation of pending suits against the Corporate Debtor including execution of any

judgment, etc. It does not speak about initiation of CIRP against the subsidiary of the Corporate Debtor. Initiation of CIRP against a subsidiary of a Corporate Debtor (under CIRP) will not be hit by Section 14(1)(a) moratorium by any stretch of imagination. Further, in the eyes of law a subsidiary company is a distinct entity just like how a holding company is a distinct legal entity. In view of this the contention of the Corporate Debtor herein is far-fetching and cannot be accepted. Further, the present proceeding is completely different and as far as the Corporate Debtor is concerned there is a debt and there is a default. This is what is required to be seen as per law. NCLAT upheld the decision of the NCLT, reported at [\(2019\) ibclaw.in 275 NCLAT](#).

3.3 Any amount received during the CIRP when the moratorium is in force, is the asset of the Corporate Debtor and RP has to deal with the same as per the provisions of the Code

NCLT in *Mr. Sudip Bhattacharya RP of Reliance Naval & Engineering Ltd. Vs. UCO Bank* [\(2021\) ibclaw.in 50 NCLT](#) held that as per Section 14 of IB Code and in line with the decision of the Hon'ble NCLAT in the matter of *Indian Overseas Bank vs. Mr. Dinkar T. Venkatsubramaniam, Resolution Professional for Amtek Auto Limited*, [\[2017\] ibclaw.in 50 NCLAT](#), the amount received during the CIRP when the moratorium is in force, is the asset of the Corporate Debtor and RP has to deal with the same as per the provisions of the IB Code. The Respondent is not entitled to adjust the same when the moratorium is in force. If, he has any dues pending from the Corporate Debtor on the date of commencement of CIRP, it is open for him to file his claim before the RP. The instant IA is allowed with the above observations and accordingly disposed of. No order as to cost.

NCLAT in *Indian Overseas Bank(Supra)* held that after admission of an application under Section 7 of the IBC, once moratorium has been declared it is not open to any person including Financial Creditors & bank to recover any amount from the account of the Corporate Debtor, nor it can appropriate any amount towards its own dues.

3.4 Proceedings which are in the benefit of the corporate debtor or Suits are filed by Corporate Debtor

Hon'ble Delhi High Court in the matter of *Power Grid Corporation Of India Ltd Vs. Jyoti Structures Ltd.* [\[2017\] ibclaw.in 12 HC](#) held that in Jyoti Structures case for testing the applicability of Section 14 of Code one has to see the nature of proceedings and see if such proceedings are against the corporate debtor or is in its favour. In the light of the purpose or object behind the moratorium, Section 14 of the Code would not apply to the proceedings which are in the benefit of the corporate debtor. Stay of proceedings against an award in favour of the corporate debtor would rather be stalking the debtor's effort to recover its money and hence would not fall in the embargo of Section 14(1)(a) of the Code.

Hon'ble Supreme Court in *Malayan Banking Berhad Vs. Ushdev International Ltd. & Ors.* [\(2020\) ibclaw.in 35 SC](#) held that the suit has been filed by the corporate debtor and Section 14(1)(a) is not applicable.

3.5 High Court ought not to have proceeded with the auction of the property of the Corporate Debtor, once the proceedings under the IBC had commenced, and an Order declaring moratorium was passed by the NCLT

The Supreme Court in the matter of *Mr. Anand Rao Korada Resolution Professional Vs. M/s. Varsha Fabrics (P) Ltd. & Ors.* [\[2019\] ibclaw.in 04 SC](#) set aside the impugned Interim Orders dated 14.08.2019 and 05.09.2019 passed by the Odisha High Court and held that in view of the provisions of the IBC, the High Court ought not to have proceeded with the auction of the property of the Corporate Debtor, once the proceedings under the IBC had commenced, and an Order declaring moratorium was passed by the NCLT. The High Court was not justified in passing the Orders for carrying out auction of the assets of the Corporate Debtor before the NCLT. If the assets of the Company(Corporate Debtor) are alienated during the pendency of the proceedings under the IBC, it will seriously jeopardise the interest of all the stakeholders. The sale or liquidation of the assets of Respondent No. 4 will now be governed by the provisions of the IBC.

3.6 Impact on proceedings under the Arbitration and Conciliation Act, 1996

Hon'ble Supreme Court in *P. Mohanraj & Ors. Vs. M/S. Shah Brothers Ispat Pvt. Ltd.* [\(2021\) ibclaw.in 24 SC](#) held that it is important to note that an award of an arbitration panel or an order of an authority is also included. This being the case, it would be incongruous to hold that the expression “the institution of suits or continuation of pending suits” must be read disjunctively as otherwise, the institution of arbitral proceedings and proceedings before authorities cannot be subsumed within the expression institution of “suits” which are proceedings in civil courts instituted by a plaintiff (see Section 26 of the Code of Civil Procedure, 1908).

In the matter of *Alchemist Asset Reconstruction Company Ltd. Vs. M/S. Hotel Gaudavan Pvt. Ltd. & Ors.* [\[2017\] ibclaw.in 09 SC](#), Hon'ble Supreme Court held that after moratorium under Sec. 14 come into effect, arbitration proceedings cannot start or continue against the Corporate Debtor and further state that the effect of Section 14(1)(a) is that the arbitration that has been instituted after the aforesaid moratorium is *non est* in law.

Hon'ble Delhi High Court in the matter of *Power Grid Corporation Of India Ltd Vs. Jyoti Structures Ltd.* [\[2017\] ibclaw.in 12 HC](#) held that stay of proceedings against an award in favour of the corporate debtor would rather be stalking the debtor's effort to recover its money and hence would not fall in the embargo of Section 14(1)(a) of the Code. The High Court held that:

- (a) moratorium under section 14(1)(a) is intended to prohibit debt recovery actions against the assets of corporate debtor;
- (b) continuation of proceedings under sec. 34 of the Arbitration Act which do not result in endangering, diminishing, dissipating or adversely impacting the assets of corporate debtor are not prohibited under section 14(1)(a) of the code;
- (c) the Arbitration Act draws a distinction between proceedings under section 34 (i.e.

objections to the award) and under section 36(i.e. the enforceability and execution of the award). The proceedings under section 34 are a step prior to the execution of an award. Only after determination of objections under section 34, the party may move a step forward to execute such award and in case the objections are settled against the corporate debtor, its enforceability against the corporate debtor then certainly shall be covered by moratorium of section 14(1)(a).

a. An arbitral order passed post admission of CIRP against the Corporate Debtor is in violation of objective of the Code and is in contravention of moratorium under Section 14 of the Code:

NCLT in *Mr. Atul Rajwadkar Vs. HDFC Bank Limited & Ors.* ([2021 ibclaw.in 55 NCLT](#)) that the arbitral order passed on 23 of January, 2020, post admission of CIRP against the Corporate Debtor on 17.09.2019, is in violation of objective of the Code and is in contravention of moratorium under Section 14 of the Code. The arbitral award dated 23.01.2020 is hereby set aside.

NCLAT in *Ranjit Das & Ors. Vs. MSX Mall Pvt. Ltd.* ([2019 ibclaw.in 272 NCLAT](#)) held that the arbitration proceedings, if so pending may continue but the award, if any, passed by the Arbitral Tribunal against the Corporate Debtor be not given effect during the period of Moratorium.

b. Sale of Hypothecated Trucks pursuant to the Arbitral Award during the Moratorium under Section 14 of IBC

In *Tata Motors Finance Ltd. Vs. Jadoun International Pvt. Ltd. & Anr.* ([2019 ibclaw.in 401 NCLAT](#)), there was Hypothecation Agreement between the Corporate Debtor and the Appellant. CIRP had started on **25.01.2019** and the Appellant in pursuance to the Arbitral Award, proceeded to repossess two trucks belonging to the Corporate Debtor and sold one on **15.03.2019** and another on 8th April, 2019. The Appellant claims that the Appellant did not have knowledge of the moratorium. The Resolution Professional (RP) before the Adjudicating Authority (NCLT, Jaipur Bench) calling upon the Appellant to deposit the money and the Appellant filed IA 258 of 2019 that the Appellant was being restrained from filing claim with the RP who is insisting for first deposit of the value of the trucks already sold.

By the Impugned Order, the Adjudicating Authority has directed the Appellant to deposit Rs.25,10,000/- and then participate. The learned Counsel for the Appellant is submitting that the Appellant did not have knowledge of the initiation of CIRP process and so the fault cannot be found with the Appellant. The Counsel submits that if the Appellant had the trucks, the Appellant would have given possession of the same but the same have already been sold and if the Appellant is required to deposit the value of the trucks sold, the Appellant would have no assurance of getting back its money. NCLAT rejected the appeal and held that once Section 7 Application was admitted, from commencement date, moratorium got activated and any action of the present nature violating moratorium could not be upheld. However, if the Appellant deposits money with the RP within 15 days from today, the Appellant may be allowed by the RP to lodged its claim, against Corporate Debtor.

c. The Adjudicating Authority has no jurisdiction to set aside the order passed by the Indian Council of Arbitration

In *Sobodh Kumar Agrawal Vs. EIH Ltd* [[2019 ibclaw.in 154 NCLAT](#)] it is held that the Appeal is squarely covered by the decision of this Appellate Tribunal in *K.S. Oils Ltd. vs. The State Trade Corporation of India Ltd. & Anr.* [[2018 ibclaw.in 07 NCLAT](#)], NCLAT held that in the facts and circumstances, the order dated 3rd August, 2018 passed in **Jharkhand Bijli Vitran Nigam Ltd.** is not applicable to a Corporate Debtor not being the claimant and the claim petition of the Respondent cannot proceed during the period of Moratorium. In *K.S. Oils Ltd.(supra)* it was held that the arbitral proceeding pending between Corporate Debtor and Financial Creditor before the Indian Council of Arbitration cannot proceed during the moratorium period.

d. Once the Resolution Plan is approved, thereafter the Arbitral Proceeding may continue

In *C. Satyanarayana Vs. Sri Vasudevan, R.P. & Anr.* ([2019 ibclaw.in 314 NCLAT](#)) it was submitted that the Arbitral Tribunal may be allowed to pass the award but it will not be executed during the moratorium period. The Resolution plan has already been approved by the CoC and Resolution Professional has placed the same before the Adjudicating Authority for approval under Section 31. NCLAT held that instead of passing any specific order about the award, we direct the Adjudicating Authority to pass appropriate order under Section 31 in accordance with law on an early date. If the plan is approved, thereafter the Arbitral Proceeding may continue.

e. The handing over or showing any document to any party will not amount to violation of order of Moratorium

In *Mr. V. Nagarajan RP of M/s. Cethar Ltd. Vs. M/s. Meenakshi Energy Ltd.* [[2018 ibclaw.in 125 NCLAT](#)] Counsel for Applicant/RP raised an issue in the Application that has been filed by the Respondent before the Arbitral Tribunal for production of the certificates on completion of the project. The Arbitral Tribunal has given direction to the Applicant to produce the certificates in relation to the completion of the project in a sealed cover. It has been submitted by the Counsel for the Applicant that the Applicant is under the CIRP and any application cannot be filed before any Court in the light of the provisions of section 14 read with 60 of the IBC, 2016, because the Applicant (Corporate Debtor) will not be able to exercise the '*right of unpaid vendor lien*'. NCLAT held that the handing over or showing any document to any party will not amount to violation of order of Moratorium.

3.7 Impact on proceedings under the Negotiable Instruments Act, 1881

a. Whether the institution or continuation of a proceeding under Section 138/141 of the Negotiable Instruments Act can be said to be covered by the moratorium provision, namely, Section 14 of the IBC: Hon'ble Supreme Court in *P. Mohanraj & Ors. Vs. M/S. Shah Brothers Ispat Pvt. Ltd.* ([2021 ibclaw.in 24 SC](#)) held that given our analysis of Chapter XVII of the Negotiable Instruments Act together with the amendments made thereto and the case law cited hereinabove, it is clear that a quasi-criminal proceeding that is contained in Chapter XVII of the Negotiable Instruments Act would, given the object and context of Section 14 of the IBC, amount to a "*proceeding*" within the meaning of Section

14(1)(a), the moratorium therefore attaching to such proceeding.(p53).

The Court held that it can thus be seen that regard being had to the object sought to be achieved by the IBC in imposing this moratorium, a quasi-criminal proceeding which would result in the assets of the corporate debtor being depleted as a result of having to pay compensation which can amount to twice the amount of the cheque that has bounced would directly impact the CIRP in the same manner as the institution, continuation, or execution of a decree in such suit in a civil court for the amount of debt or other liability. Judged from the point of view of this objective, it is impossible to discern any difference between the impact of a suit and a Section 138 proceeding, insofar as the corporate debtor is concerned, on its getting the necessary breathing space to get back on its feet during the CIRP. **Given this fact, it is difficult to accept that *noscitur a sociis* or *ejusdem generis* should be used to cut down the width of the expression “proceedings” so as to make such proceedings analogous to civil suits.**(p24)

3.8 Impact of Moratorium on Criminal Proceedings and Prevention of Money Laundering Act, 2002

~~Sec. 14 is not applicable to the criminal proceeding or any penal action taken pursuant to the criminal proceeding or any act having essence of crime or crime proceeds:~~

~~Hon'ble Bombay High Court in the matter of *Tayal Cotton Pvt. Ltd. Vs. The State of Maharashtra & Othrs* [2018] [ibclaw.in 13 HC](#) interpreted the clause (a) of Section 14 (1) that word 'proceedings' used therein and even the words 'order' and 'in Court of law' will have to be interpreted as a proceeding arising in the nature of a suit and orders passed in such proceedings and suits. Apart from the fact that the Legislature has not conspicuously used the words 'criminal' as an adjective to the word 'proceedings' and as an adjective to the noun Court of law, it must be assumed that the Legislature in its wisdom has consciously omitted to use such adjectives since it must have intended to prohibit only the suits and execution of the judgments and decrees or a proceeding of the like nature. Therefore, applying the principle of interpretation, one cannot put any other interpretation on this provision contained in Section 14 of the Code except that it only prohibits a suit or a proceeding of a like nature and does not include any criminal proceeding.~~

In the matter of *Varrsana Ispat Limited Vs. Deputy Director Directorate of Enforcement* [2019] [ibclaw.in 67 NCLAT](#), NCLAT held that the Prevention of Money Laundering Act, 2002 relates to *proceeds of crime* and the offence relates to *money-laundering* resulting confiscation of property derived from, or involved in, money laundering and for matters connected therewith or incidental thereto. Thus, as the Prevention of Money Laundering Act, 2002 or provisions therein relates to *proceeds of crime*, the Section 14 of the Code is not applicable to such proceeding.

In *Rotomac Global Private Limited Vs. Deputy Director Directorate of Enforcement* [2019] [ibclaw.in 114 NCLAT](#) it is also held that Section 14 is not applicable to the PML Act, 2002.

NCLT in *Sterling SEZ and Infrastructure Limited Vs. Deputy Director Directorate of Enforcement, PMLA*

[\(2019\) ibclaw.in 15 NCLT](#) held that the attachment order issued by Directorate of Enforcement and as confirmed Adjudicating Authority under PMLA Court is a nullity and nonest in law in view of Sections 14(1)(a), 63 and 238 of IBC and the Resolution Professional can proceed to take charge of the properties and deal with them under IBC as if there is no attachment order.

3.9 Impact on Existing Contracts/ termination of the contracts

a. Statutory right of a financial institution to proceed under the SARFAESI Act, 2002 remains suspended for a limited period but the existing contracts between the surety, principal debtor and the creditor remains unaffected

Hon'ble Calcutta High Court in *Gouri Shankar Jain Vs. Punjab National Bank & Anr.* [\[2019\] ibclaw.in 01 HC](#) held that An application under Section 7 of the Code of 2016 once admitted under Section 7(5) thereof has two terminal points for the corporate debtor. The Code of 2016 does not contemplate withdrawal of an application under Section 7 once it is admitted under Section 7(5). The terminal points are, firstly, the approval of a Resolution Plan and secondly, the initiation of liquidation proceeding on a Resolution Plan not being approved. When a financial creditor applies under Section 7 of the Code of 2016 it is exercising a statutory right. The exercise of such statutory right does not depend upon the contractual obligations of the parties bound by the respective contracts between the creditor, principal debtor and the surety. Such contracts cannot be said to have rescinded, novated, frustrated, modified, altered or affected in any manner, on an application under Section 7 of the Code of 2016 being filed. After its admission under Section 7(5) of the Code of 2016, when an order under Section 14 is passed, then also only the statutory right of a financial institution to proceed under the SARFAESI Act, 2002 remains suspended for a limited period. The existing contracts between the surety, principal debtor and the creditor remains unaffected.

b. Whether the adjudication of the counter claim would be liable to be stayed in view of Section 14 of the Code

If continuation of the counter claim would not adversely impact the assets of the corporate debtor, Section 14 could not be triggered: Hon'ble Delhi High Court in the matter of *SSMP Industries Ltd Vs. Perkan Food Processors Pvt. Ltd* [\[2019\] ibclaw.in 07 HC](#) held that till the defence is adjudicated, there is no threat to the assets of the corporate debtor and the continuation of the counter claim would not adversely impact the assets of the corporate debtor. **Once the counter claims are adjudicated and the amount to be paid/recovered is determined, at that stage, or in execution proceedings, depending upon the situation prevalent, Section 14 could be triggered. At this stage, due to the reasons set out above, the counter claim does not deserve to be stayed under Section 14 of the Code.**

c. Absence of any agreement with the State Government in respect to any property, RP on behalf of the Corporate Debtor cannot claim that the property is under occupation or in possession of the Corporate Debtor

In the matter of *Monnet Ispat & Energy Ltd. Vs. Government of India, Ministry of Coal* [\[2018\] ibclaw.in 116 NCLAT](#), after initiation of the CIRP, the Government of India, Ministry of Coal(GoI), issued notice for termination of Coal Mines Development and Production Agreement between Monnet Ispat &

Energy Ltd.(Corporate debtor) and Gol. The Resolution Professional of Monnet Ispat & Energy Ltd. challenged this letter of termination on the ground that it is against the provisions of Section 14 of the Code where under moratorium has been declared by the NCLT. NCLAT has held that the vesting of the Coal Mines is not complete in absence of any agreement with the State Government in respect to the mines in question, therefore, the Resolution Professional on behalf of the Corporate Debtor cannot claim that pursuant to lease the mines are under occupation or in possession of the Corporate Debtor.

d. The existing contracts between the surety, principal debtor and the creditor remains unaffected during the moratorium under Section 14

Hon'ble High Court of Calcutta in *Gouri Shankar Jain Vs. Punjab National Bank & Anr.* [\[2019\] ibclaw.in 01 HC](#) held that when a financial creditor applies under Section 7 of the Code of 2016 it is exercising a statutory right. The exercise of such statutory right does not depend upon the contractual obligations of the parties bound by the respective contracts between the creditor, principal debtor and the surety. Such contracts cannot be said to have rescinded, novated, frustrated, modified, altered or affected in any manner, on an application under Section 7 of the Code of 2016 being filed. After its admission under Section 7(5) of the Code of 2016, when an order under Section 14 is passed, then also only the statutory right of a financial institution to proceed under the SARFAESI Act, 2002 remains suspended for a limited period. The existing contracts between the surety, principal debtor and the creditor remains unaffected.

Hon'ble Supreme Court in *Tata Consultancy Services Ltd. Vs. Vishal Ghisulal Jain, RP, SK Wheels Pvt. Ltd.* [\(2021\) ibclaw.in 167 SC](#) the residuary jurisdiction of the NCLT cannot be invoked if the termination of a contract is based on grounds unrelated to the insolvency of the Corporate Debtor. The NCLT does not have any residuary jurisdiction to entertain the present contractual dispute which has arisen dehors the insolvency of the Corporate Debtor. In the absence of jurisdiction over the dispute, the NCLT could not have imposed an *ad-interim* stay on the termination notice. The NCLAT has incorrectly upheld the interim order of the NCLT. Further, it held that even if the contractual dispute arises in relation to the insolvency, a party can be restrained from terminating the contract only if it is central to the success of the CIRP. Crucially, the termination of the contract should result in the corporate death of the Corporate Debtor.

3.10 Impact on property(ies)/Lease/Rent

a. Whether the order of Moratorium will be applicable to the lease hold property of a land-lord in which the Corporate Debtor is a tenant, particularly after decree of eviction passed in favour of the land lord against the Corporate Debtor

In *M/s. Navbharat Castings LLP. Vs. M/s. Moser Baer India Ltd. & Anr.* [\(2018\) ibclaw.in 148 NCLAT](#), the appellant has challenged the order dated 8th May, 2018 whereby and whereunder the application preferred by the appellant (landlord) for direction to the Corporate Debtor through the Resolution

Professional to vacate the premises belonging to the decree holder has been rejected in view of the order of moratorium passed. NCLAT held that in view of sub-clause (1) of clause (d) of Section 14 of the Code, the recovery of property by the owner occupied by the Corporate Debtor is not permissible during the period of moratorium.

b. Whether the land handed over in pursuant to joint development agreement can be treated as an asset of the Corporate Debtor under Section 14(1)(d)?

Hon'ble Supreme Court in *Rajendra K. Bhutta Vs. Maharashtra Housing and Area Development Authority and another* [2020] [ibclaw.in](https://www.ibclaw.in) 27 SC while referring to *Ude Bhan and Others v. Kapoor Chand and Others*, AIR 1967 P&H 53 (FB), *The Member, Board of Revenue v. Arthur Paul Benthall* [1955] 2 SCR 842 and other judgments, reaffirmed the Latin maxim 'Reddendo Singula Singulis' and held that the property which is 'occupied by' the Corporate Debtor under the joint development agreement will become the property over which actual possession of the Corporate Debtor is there. Thus, it will come under the ambit of Section 14(1)(d) the Code which talks about the actual possession of the assets of the Corporate Debtor rather than its interest over it, thereby setting aside the order of the NCLAT. It was further concluded that in case of clash between the MDHA Act and the Code, the latter shall prevail due to overriding provision of the IBC over other laws given under Section 238 of the Code.

c. Whether the amount of rent due to the Land Lord (Operational Creditor) has prejudicially affected on account of the moratorium imposed under Section 14(1)(d)

NCLAT in *JAS Telecom Pvt. Ltd. Vs. Eolane Electronics Bangalore Pvt. Ltd.* (2018) [ibclaw.in](https://www.ibclaw.in) 133 NCLAT held that from the regulation 31 of CIRP Regulations, 2016, it is clear that the amounts due to the person whose rights are prejudicially affected on account of the moratorium imposed under Section 14(1)(d), such amount to be included in the insolvency resolution process costs. So far as Appellant is concerned, the rent has not been paid by the Corporate Debtor since 1st January, 2017 that is much prior to order of moratorium. Learned counsel for the Resolution Professional (Respondent) rightly pointed out that the rent amount due to the Appellant was not prejudicially affected on account of the moratorium imposed under Section 14(1)(d). In fact it has not been paid since prior to the order of moratorium i.e. since 1st January, 2017. The order of moratorium was passed subsequently on 31st August, 2017, therefore, the Appellant cannot claim that its right has been affected prejudicially on account of moratorium imposed by the Adjudicating Authority.

Learned counsel appearing on behalf of the Respondent submits that the liquidation process has already been started therefore the claim of the appellant may be considered in terms of provision of I&B Code, 2016. In view of such development, the Appellant may take advantage of Section 53 of the I&B Code, which relates to distribution of assets. Therefore, as and when the proceeds from sale of the assets shall be distributed the Adjudicating Authority is required to pass order in terms of priority as mentioned in Section 53 of I&B Code. The appeal stands disposed of with aforesaid observations.

d. Whether a property(ies) which is/are not 'owned' by a Corporate Debtor shall come within the ambits of the Moratorium?

NCLT in *M/s. Schweitzer Systemtek India Private Limited Vs. Phoenix ARC Private Limited* [2017] [ibclaw.in 13 NCLT](#) held that the Moratorium has no application on the properties beyond the ownership of the Corporate Debtor. As a result, the Order of the Hon'ble Court directing the Court Commissioner to take over the possession shall not fall within the clutches of Moratorium. Even otherwise, the provisions of the SARFAESI Act may be having different criteria for enforcement of recovery of outstanding Debt, which is not the subject matter of this Bench. Before I Part with it is necessary to clarify my humble view that The SARFAESI Act may come within the ambits of Moratorium if an action is to foreclose or to recover or to create any interest in respect of the property belonged to or owned Debtor, otherwise not.

e. The property not owned by the Corporate Debtor do not fall within the ambit of the Moratorium

In *Alpha & Omega Diagnostics (India) Ltd. Vs. Asset Reconstruction Company of India Ltd. & Ors* [2017] [ibclaw.in 23 NCLAT](#), wherein Alpha & Omega Diagnostics (India) Ltd. filed an application under Section 10 of the Code for initiation of CIRP in so far it relates to Corporate Debtor with the Adjudicating Authority. The Adjudicating Authority by impugned order dated 10th July, 2017 admitted the application subject and to some qualifications. On the question is that whether a property(ies) which is/are not 'owned' by a Corporate Debtor shall come within the ambits of the Moratorium?, the NCLT held that "its" denotes the property owned by the Corporate Debtor. The property not owned by the Corporate Debtor do not fall within the ambits of the Moratorium. Even Section 10 is confined to the Book of the Accounts of the Corporate Debtor, due to the reason that Section 10(3) has specified that the Corporate Applicant shall furnish "its" Books of Accounts. This Bench has no legislative authority to expand the meaning of the term, "its" even under the umbrella of 'Ejusdem generis'. The outcome of this discussion is that the Moratorium shall prohibit the action against the properties reflected in the Balance Sheet of the Corporate Debtor. The Moratorium has no application on the properties beyond the ownership of the Corporate Debtor. For the sake of completeness, it is worth to refer that the provisions of The SARFAESI Act may be having different criteria for enforcement of recovery of outstanding debt, which is not the subject matter of this Bench. Before I past with it is necessary to clarify my humble view that the SARFAESI Act may come within the ambits of Moratorium if an action is to foreclose or to recover or to create any interest in respect of the property belonged to or owned by a Corporate Debtor, otherwise not. The impugned order dated 10th July, 2017 was under challenged before NCLAT.

NCLAT declined to interfere with the NCLT order and held that on careful reading of the provisions has come to the definite conclusion that on commencement of the insolvency process the "Moratorium" shall be declared for prohibiting any action to recover or enforce any security interest created by the 'Corporate Debtor' in respect of "**its**" property, no ground is made out to interfere with the said order.

3.11 Impact on other Laws

a. A moratorium under the IBC will apply to the order of the Income-Tax Appellate Tribunal

Hon'ble Supreme Court in *Pr. Commissioner of Income Tax Vs. Monnet Ispat and Energy Ltd.* [[2018](#)] [ibclaw.in 30 SC](#) upheld a Delhi High Court ruling that had held that a moratorium under the IBC will apply to the order of the Income-Tax Appellate Tribunal. The court relied on the *Dena Bank vs Bhikhabhai Prabhudas Parekh and Co & Ors (2000) 5 SCC 694* and its progeny, making it clear that income-tax dues, being in the nature of Crown debts, do not take precedence even over secured creditors, who are private persons.

b. How are dues under GST for pre-CIRP period be dealt?

CBEC has [clarified](#) that in accordance with the provisions of the IBC and various legal pronouncements on the issue, no coercive action can be taken against the corporate debtor with respect to the dues for period prior to insolvency commencement date. The dues of the period prior to the commencement of CIRP will be treated as 'operational debt' and claims may be filed by the proper officer before the NCLT in accordance with the provisions of the IBC. The tax officers shall seek the details of supplies made / received and total tax dues pending from the corporate debtor to file the claim before the NCLT. Moreover, section 14 of the IBC mandates the imposition of a moratorium period, wherein the institution of suits or continuation of pending suits or proceedings against the corporate debtor is prohibited. [Read More Clarifications of GST for Corporate Debtors.](#)

c. The moratorium declared under section 14 of the IBC also prevents the Adjudicating Officer (SEBI) from determining the liability of the Corporate Debtor for the alleged non-compliance of the LODR Regulations & other Rules

Securities Appellate Tribunal Mumbai in *Dewan Housing Finance Corporation Ltd. Vs. SEBI (2020)* [ibclaw.in 01 SAT](#) held that where a moratorium has been declared under section 14 of IBC, the authority which in the instant case is SEBI/AO will have no jurisdiction to institute any proceedings. Where a proceeding has already been instituted and during the pendency of the proceedings a moratorium order is passed under section 14 then the authority is prohibited from continuing with the proceedings. This is clear from a bare reading of the provisions of section 14(1) of the IBC. SAT held that in the contention of the respondent that the word 'proceedings' depicted in section 14(1) has to be given an expansive meaning cannot be considered either by the adjudicating officer as it would amount to contempt of court.

d. Prevents the Adjudicating Officer (SEBI) from determining the liability of the Corporate Debtor

In *Dewan Housing Finance Corporation Ltd. Vs. SEBI (2020)* [ibclaw.in 01 SAT](#), SAT held that the provision is clear and explicit and needs no further elaboration. Pursuant to a moratorium declared under section 14 the institution of suits or proceedings against the corporate debtor is prohibited or

continuation of a suit or proceedings. Further, execution of any judgement or order in any court of law, tribunal, arbitration panel or other authority is also prohibited. Thus, where a moratorium has been declared under section 14 of IBC, the authority which in the instant case is SEBI/AO will have no jurisdiction to institute any proceedings. Where a proceeding has already been instituted and during the pendency of the proceedings a moratorium order is passed under section 14 then the authority is prohibited from continuing with the proceedings. This is clear from a bare reading of the provisions of section 14(1) of the IBC.

e. SEBI or Stock Exchange cannot recover any amount nor can sell the assets of the Corporate Debtor during the moratorium period

From the Sec. 17, it is clear that the Interim Resolution Professional is responsible for complying with the requirements under any law for the time being in force on behalf of the Corporate Debtor, which includes the SEBI Act, 1992 and SEBI (Listing Obligations and Disclosure Requirements), Regulations, 2015 framed therein. In the matter of *Ms. Anju Agarwal Vs. Bombay Stock Exchange & Ors.* [2019] ibclaw.in 123 NCLAT, the question arises for consideration is whether on failure to perform the duties, if any, penal order is passed for penalty imposed on the Corporate Debtor or any recovery can be made in terms of Section 28A of the SEBI Act, 1992. NCLAT held that Section 14 of the Code will prevail over Section 28A of the SEBI Act, 1992 and SEBI cannot recover any amount including the penalty from the Corporate Debtor. The Bombay Stock Exchange for the same very reason cannot take any coercive steps against the Corporate Debtor nor can threaten the Corporate Debtor for suspension of trading of shares.

The same view has been considered in the matter of *Mr. Bohar Singh Dhillon Vs. Mr. Rohit Sehgal (Interim Resolution Professional) & Ors.* [2019] ibclaw.in 61 NCLAT and held that the application under Section 7 is maintainable while step has been taken by the SEBI the Resolution Professional is required to act in terms of Section 17(2)(e) of the Code for complying with the requirements under the SEBI Act and Regulations framed thereunder as well as the guidelines issued by the Regulatory Authority. ***It is also made clear that the SEBI is however entitled to take action against individual including the former Directors and Shareholders of the Corporate Debtor.***

f. Moratorium will not affect any suit or case pending before the Hon'ble Supreme Court under Article 32 or where an order is passed under Article 136 or the power of the High Court under Article 226

NCLAT in *Canara Bank Vs. Deccan Chronicle Holdings Limited* [2017] ibclaw.in 25 NCLAT held that there is no provision to file any money suit or suit for recovery before the Hon'ble Supreme Court except under Article 131 of the Constitution of India where dispute between Government of India and one or more States or between the Government of India and any State or States on one side and one or two or more States is filed. Some High Courts have original jurisdiction to entertain the suits, which may include money suit or suit for recovery of money. ***The Hon'ble Supreme Court has power under Article 32 of the Constitution of India and Hon'ble High Court under Article 226 of Constitution of India which power cannot be curtailed by any provision of an Act or a Court.*** In view of

the aforesaid provision of law, we make it clear that moratorium will not affect any suit or case pending before the Hon'ble Supreme Court under Article 32 of the Constitution of India or where an order is passed under Article 136 of Constitution of India. Moratorium will also not affect the power of the High Court under Article 226 of Constitution of India. *However, so far as suit, if filed before any High Court under original jurisdiction which is a money suit or suit for recovery, against the corporate debtor such suit cannot proceed after declaration of moratorium, under Section 14 of the Code.*

g. During the period of Moratorium, Union of India, Ministry of Petroleum & Natural Gas (Exploration Division), cannot recover any amount nor can issue demand notice to the Corporate Debtor through IRP to pay any amount

In *Union of India & Anr. Vs. Videocon Industries Ltd. & Ors.* ([2019 ibclaw.in 473 NCLAT](#)), the Adjudicating Authority rightly held that during the period of Moratorium, Union of India, Ministry of Petroleum & Natural Gas (Exploration Division), cannot recover any amount nor can issue demand notice to the Corporate Debtor through Interim Resolution Professional to pay any amount. NCLAT held that the Adjudicating Authority rightly stayed demand notice dated 22nd October, 2018 during the pendency of the resolution process as long as the Moratorium is applicable on the Corporate Debtor. The Adjudicating Authority rightly held that the Ministry of Petroleum can lodge its claim for any legally enforceable right of recovery through Resolution Professional, thereby not rendered it remediless. Chennai Petroleum Corporation Ltd.; Mangalore Refinery and Petrochemicals Limited; GAIL (India) Limited and Bharat Petroleum Corporation Ltd. have been rightly restrained from remitting the amount from the sale proceeds to the Union of India, which are due to the Corporate Debtor during the pendency of the Moratorium. In absence of any merit, the appeal is dismissed.

h. Whether moratorium issued under Section 14 of the IBC will come in the way of the contempt Court exercising its powers under Article 215 of the Constitution of India and the Contempt of Courts Act?

Hon'ble High Court in *Ved Prakash Abbot Vs. Kishore K. Avarsekar & Ors* [[2019 ibclaw.in 08 HC](#)] held that the argument is that moratorium issued under Section 14 of the IBC will not come in the way of the contempt Court exercising its powers under Article 215 of the Constitution of India and the Contempt of Courts Act. A bare reading of the judgment in the case of [Tayal Cotton](#) shows that in the said case a complaint under Section 138 of the NIA had been filed against the Company and its Directors and in that context, the question had arisen whether Section 14 of the IBC would come in the way of those criminal proceedings. It was in this background that the Court had held that criminal proceedings could continue despite a moratorium under Section 14 of the IBC. The said judgment would have no application in the present case as in this case, there are no criminal proceedings and what is filed before this Court is a petition under Sections 10 and 12 of the Contempt of Courts Act, 1971, read with Article 215 of the Constitution of India and is in the nature of civil contempt.

i. Once the Moratorium has been declared Custom Authority cannot sale the imported goods of Corporate Debtor

in terms of Section 48 of the Customs Act, 1962

In *Commissioner of Customs, (Preventive) West Bengal Vs. Ram Swarup Industries Ltd. & Ors.* [2019] [ibclaw.in 74 NCLAT](#), the imported goods of Corporate Debtor are in the custody of the Custom Authority, but the ownership remains with the Corporate Debtor, no step having taken for sale of goods in terms of Section 48 of the Customs Act, 1962. The order of Moratorium having passed by the Adjudicating Authority on 8th January, 2018, immediately thereafter it was not open to the Appellant, Commissioner of Customs or its authorities to issue an e-auction notice on 15th January, 2018, fixing date of auction of the goods on 19th January, 2018. Officers of the Customs show that after their knowledge of the order of Moratorium they intended to sell the machinery, in question, though it was lying with the Customs Authority since 13th April, 2009 / 27th April, 2009. In view of the aforesaid findings, no interference is called for against the impugned order dated 3rd July, 2018 passed by the Adjudicating Authority prohibiting the Customs Authority from selling the assets of the Corporate Debtor.

3.12 Other issues

a. Whether any dues can be set off as per Accounting Conventions when Moratorium under Section 14 is in force – Vijay Kumar V Iyer Vs. Bharti Airtel Ltd – NCLAT

NCLAT in *Vijay Kumar V Iyer Vs. Bharti Airtel Ltd* [2020] [ibclaw.in 18 NCLAT](#) held that Accounting Conventions cannot supersede any express provisions of the laid down provisions of the specific law on the subject. The Code, 2016 provides the mechanism of Moratorium during the CIRP till the Resolution Plan is approved or Liquidation order is passed. The Code has a provision to override other laws as enunciated above. Hence, even if there are some such provisions in any other law, the Code 2016 will prevail over that.

b. Can Bank set off dues from funds lying in current account during moratorium against the instruction of Resolution Professional?

In *Corporation Bank Vs. Amtek Auto Ltd* [2017] [ibclaw.in 17 NCLT](#), question before the NCLT that can Bank set off dues from funds lying in current account during moratorium against the instruction of resolution professional? NCLT answered the question that amount lying in the current account of the corporate debtor has to be placed at the disposal of the resolution professional without any scope of an adjustment in the manner, the respondent bank tried.

c. Once Resolution Plan is approved or rejected by the Adjudicating Authority under Section 31 of the Code and as the order of moratorium comes to an end, it is always open to the Bank to rewrite its ledger book including accrued of interest and may debit the amount as recorded in a separate record/ ledger

NCLAT in *ICICI Bank Ltd. Vs. Interim Resolution Professional for Ruchi Soya Industries Ltd.* (2018) [ibclaw.in 146 NCLAT](#) held that in another case of “*State Bank of India V/s Debashish Nanda*, (2018)

[ibclaw.in 204 NCLAT](#), the Appellate Tribunal by order dated 21.03.2018 observed that the Bank cannot debit any amount from the Corporate Debtor's account after the order of moratorium, as it amounts to recovery of amount after the order of moratorium. However, the Appellate Tribunal allowed to the Financial Creditor to incorporate the debited amount in a separate set of Ledger, in accordance with the 'RBI Guidelines', but not to be treat the amount debited for adjustment. This Appellate Tribunal further observed that the Bank cannot freeze the account nor can prohibit the 'Corporate Debtor' from withdrawing the amount, as available on the date of moratorium for its day to day functioning. However, once Resolution Plan is approved or rejected by the Adjudicating Authority under Section 31 of I&B Code and as the order of moratorium comes to an end, it is always open to the Bank to rewrite its ledger book including accrued of interest and may debit the amount as recorded in a separate record/ ledger.

d. Personal and individual assets of a Director is not the subject matter of the CIRP and the moratorium only extends to the assets of the Corporate Debtor

NCLAT in the matter of *Suresh Chand Garg Vs. Aditya Birla Finance Ltd.* [\[2018\] ibclaw.in 38 NCLAT](#) held that the personal and individual assets of a Director is not the subject matter of the corporate insolvency resolution process and the moratorium only extends to the assets of the Corporate Debtor.

Hon'ble Supreme Court *Anjali Rathi and Others Vs. Today Homes & Infrastructure Pvt. Ltd. and Others* [\(2021\) ibclaw.in 152 SC](#) clarify the right of the petitioners to move against the promoters of the first respondent Corporate Debtor, even though a moratorium has been declared under Section 14 of the IBC. In the judgment in *P. Mohanraj v. Shah Bros. Ispat (P) Ltd.* [\(2021\) ibclaw.in 24 SC](#), a three judge Bench of this Court held that proceedings under Section 138 and 141 of the Negotiable Instruments Act 1881 against the Corporate Debtor would be covered by the moratorium provision under Section 14 of the IBC. However, it clarified that the moratorium was only in relation to the Corporate Debtor and not in respect of the directors/management of the Corporate Debtor, against whom proceedings could continue. We thus clarify that the petitioners would not be prevented by the moratorium under Section 14 of the IBC from initiating proceedings against the promoters of the first respondent Corporate Debtor in relation to honoring the settlements reached before this Court. However, as indicated earlier, this Court cannot issue such a direction relying on a Resolution Plan which is still pending approval before an Adjudicating Authority.

e. Police cannot take further steps in the matter unless and until the CIRP culminates, in a resolution or otherwise

The Hon'ble High Court in the matter of *India Infoline Finance Limited & Anr. Vs. The State of West Bengal & Ors.* [\[2020\] ibclaw.in 18 HC](#) held that since any action of the police will have to be based on investigation on the subject matter of the transaction, which is directly within the purview of the CIRP, it is to be deemed that the police cannot take further steps in the matter unless and until the CIRP culminates, in a resolution or otherwise. In such view of the matter, the allegation, that the police are not taking sufficient steps on the complaint of the petitioners, cannot be accepted by this

court.

f. Attachment of the property of Corporate Debtor before the initiation of CIRP but encumbrance certificate was issued during Moratorium

In *Regional P.F. Commissioner Vs. T.V. Balasubramanian (RP) (Sholingur Textiles Ltd) & Anr* [2020] [ibclaw.in 127 NCLAT](https://www.ibclaw.in/127-NCLAT), it is held that it is also apparent that the Sub Registrar failed to incorporate the attachment in the register. Therefore, the attachment order of immovable property of the Corporate Debtor was made by the Recovery Officer Employees Provident Organization on 04th August 2017. The petition under Section 7 was admitted by the Adjudicating Authority by Order dated 04th February 2019. Thus it is apparent that the attachment of the immovable property in question had already existed prior to the initiation of CIRP of the Corporate Debtor. The Sub Registrar indeed failed in his duty to incorporate the attachment in the register, despite receiving the attachment order on 16th August 2017 and after that reminder letter DT 14th May 2018 and 29th November 2018. The Section 14 of the Code prohibits transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein by the Corporate Debtor. In this case, the alleged encumbrance certificate which was issued during Moratorium is only the incorporation of earlier Order in the record. But in fact attachment of the property was made much before the initiation of Corporate Insolvency Resolution Process. It is also clear that the Adjudicating Authority has passed the Order even without considering the submission and objections of the Appellant. Adjudicating Authority failed to consider the fact that attachment of the property was made much before the issuance of the CIRP. It is thus clear that the Adjudicating Authority failed to take notice that attachment of the property of the corporate debtor was made much before the initiation of CIRP, but it was only recorded in the register during CIRP. It is on record that the impugned order is passed without considering the objections of the Recovery Officer, EPFO, though the objection by EPFO was already filed in the Registry of NCLT. In the circumstances, we are of the considered opinion that Appeal deserves to be allowed.

g. Withdrawal of money by Director during CIRP can be treated as criminal misappropriation and criminal breach of trust

In *Manoj K. Daga Vs. ISGEC Heavy Engineering Limited* [2020] [ibclaw.in 266 NCLAT](https://www.ibclaw.in/266-NCLAT), it is pointed out that on enquiry conducted by the IRP, he came to know on 21st November, 2019 that Directors of Corporate Debtor had made huge withdrawals including cash withdrawals started within two days of taking Interim Orders dated 23.10.2019 from this Tribunal which were in violation of the same. The Counsel for IRP complained of Violation of Sections 14, 17 and 19 of IBC. NCLAT held that the Directors acted wholly illegally once moratorium had been applied, in going ahead and withdrawing monies from the accounts at the back of IRP by even issuing cheques “Self”. Prima facie, it appears to us that the illegal withdrawals can, inter alia, be treated as criminal misappropriation and criminal breach of trust.

NCLAT in *MSTC Limited Vs. Adhunik Metalliks Ltd. & Ors.* (2019) [ibclaw.in 261 NCLAT](https://www.ibclaw.in/261-NCLAT) held that Section

14 of the IBC will override any other provisions contrary to the same, Any amount due to the Operational Creditor prior to the date of CIRP(Admission) cannot be appropriated during the moratorium period.

h. The provisions regarding a moratorium cannot possibly apply to cash deposits made in High Court-Bombay High Court

The Hon'ble High Court in the matter of *Nahar Builders Ltd Vs. Housing Development and Infrastructure Ltd* [2020] [ibclaw.in 20 HC](#) held that the provisions regarding a moratorium cannot possibly apply to such cash deposits made in this Court. As Mr Dwarkadas for Nahar Builders put it, money has no colour. Once it is deposited in Court no party can automatically claim any right to it without an adjudication by a Court. There is no dispute that there is an unchallenged and unsatisfied award in favour of Nahar Builders against HDIL. There is also no dispute that an amount of Rs. 8 crores is available with this Court. There is no bar to this application for withdrawal. The application for withdrawal cannot be conceivably be considered a suit, proceeding or execution within the meaning of Section 14(1)(a).

i. Payment received from the Corporate Debtor on the basis of post dated cheques encashed during the CIRP is hit by Section 14 of the IBC

During the pendency of the CIRP two post dated cheques were encashed by Appellant – SREI Equipment Finance Ltd. withdrawing sum of Rs.11,56,396/- and another sum of Rs.11,01,590/-. In this background, the Resolution Professional moved an application before the Adjudicating Authority (NCLT), Mumbai Bench for direction against the Appellant to refund the aforesaid two amounts withdrawn during the period of moratorium. The Adjudicating Authority accepted the prayer and held that the payment received by the Appellant from the Corporate Debtor on the basis of post dated cheques encashed during the CIRP is hit by Section 14 of the Code. NCLAT in *SREI Equipment Finance Ltd. Vs. Amit Gupta* (2019) [ibclaw.in 269 NCLAT](#) upheld on ground that it is true that the cheque dates back to the date of handover but it cannot be encashed after the moratorium starts, in view of the specific provisions, to recover the amount from the Corporate Debtor.

j. If there are dues payable by the Appellant, the Corporate Debtor could exercise lien on the goods which were available with the Corporate Debtor

In *Orbit Lifescience Private Limited Vs. Raj Ralhan PwC Professional Services LLP* [2020] [ibclaw.in 169 NCLAT](#) it was held that there were goods owned by the Appellant lying at the plant of the Corporate Debtor but at the same it also found that there were dues payable by the Appellant. There was some overlapping as the Appellant appears to have acted in terms of the Bailment Agreement. It must be remembered that Section 9 Application was admitted on 23.08.2018 and thus there were occasions which were required to be taken note with regard to pro or post moratorium. The Appellant can find fault with the Resolution Professional if the claim as made by the Appellant did not get support from the Books of Accounts of the Corporate Debtor. At the time of argument,

learned Counsel for the Resolution Professional submitted that as there were dues payable by the Appellant, the Corporate Debtor could exercise lien on the goods which were available with the Corporate Debtor and thus, according to the learned Counsel, the Adjudicating Authority rightly protected the interest of the Appellant as well as Corporate Debtor by directing that while returning the goods, side by side the dues payable by the Appellant should come to the Corporate Debtor. Having gone through records and Impugned Order, NCLAT did not find any fault with the directions of the Adjudicating Authority. The actions taken by the Resolution Professional were placed before the CoC and even CoC had found that the Appellant should clear the outstanding dues of the Corporate Debtor before goods could be returned. NCLAT did not find any reason to interfere with the decisions taken by the Resolution Professional, CoC and the Adjudicating Authority to protect the interest of the Corporate Debtor while considering the interest of the Appellant.

k. Lien over the amount of bills not factored until and unless the entire remaining outstanding amount

In *Canbank Factors Ltd. Vs. Dharmendra Kumar* [2019] [ibclaw.in](http://www.ibclaw.in) 58 NCLAT, the Appellant/Financial Creditor held a statutory right towards the lien amount of Rs.7,52,63,564/- and the Appellant/Financial Creditor is entitled to exercise its lien over the amount of bills not factored until and unless the entire remaining outstanding amount is fully paid by the Corporate Debtor. It is stated that the aforesaid lien was imposed during the year 2017 i.e., much prior to the commencement of the Adjudicating Authority proceedings and the demand to make payment had also been made much earlier to the commencement of the 'Moratorium' period and therefore, Section 14 (1) (c) would not come into play in the present facts and circumstances of the case. NCLAT held that However, we do not accept such plea taken by the Appellant as Moratorium will be applicable for any recovery which is made after 28th February, 2018.

l. Margin money belongs to the Corporate Debtor which was kept in the FD account of the Corporate Debtor and the said account could not have been debited during the period of Moratorium

In *State Bank of India Vs. Punjab National Bank & Ors.* (2019) [ibclaw.in](http://www.ibclaw.in) 479 NCLAT, Learned Senior Counsel for the Appellant submits that the margin money was separately kept from the FD account prior to initiation of the CIRP. However, the said account could not have been debited during the period of Moratorium. NCLAT held that it will be open to the Resolution Professional to utilise the money for the purpose of Resolution Costs to keep Corporate Debtor a going concern and in such case, the State Bank of India may ask for appropriate relief from the Resolution Professional.

4. Continuation of Licenses, etc. granted by Government authorities during the Moratorium on the ground of insolvency [Explanation to Sec. 14(1)]

Section 14 of the IBC lists the conditions under which a moratorium can be imposed by the NCLT in terms of sub-sections (a) to (d). It further clarifies that a license, permit, quota, concession, grant or

right given by a government cannot be suspended or terminated **on the grounds of insolvency**, subject to certain exceptions. This clarification was added by way of an Explanation to Section 14(1) with effect from 28 December 2019. The Report of the Insolvency Law Committee dated 20 February 2020, noted that without such government grants “*the business of the corporate debtor would lose its value and it would not be possible to keep the corporate debtor running as a going concern during the CIRP period, or to resolve the corporate debtor as a going concern*”. **The Report further stated that the termination of such grants during CIRP on account of ipso facto clauses or non-payment of dues is in contravention of the purpose behind imposition of moratorium itself.**

Section 14 could not have any impact upon the right of the Government to refuse the extension of lease:

Hon'ble Supreme Court in *M/s Embassy Property Developments Pvt. Ltd. Vs. State of Karnataka & Ors.* [\[2020\] ibclaw.in 12 SC](#) held even Section 14 (1) (d), of IBC, 2016, which prohibits, during the period of moratorium, the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor, will not go to the rescue of the corporate debtor, since what is prohibited therein, is only the right not to be dispossessed, but not the right to have renewal of the lease of such property. In fact the right not to be dispossessed, found in Section 14 (1) (d), will have nothing to do with the rights conferred by a mining lease especially on a government land.

Hon'ble Supreme Court in the landmark judgment *Gujarat Urja Vikas Nigam Limited Vs. Mr. Amit Gupta & Ors* [\(2021\) ibclaw.in 44 SC](#) held that this Court's judgment in ***Embassy Property (supra)***, concluded that the non-renewal of a mining lease was not within the ambit of Section 14. The Explanation to Section 14(1) was added by Parliament to make the position clear, on whether the moratorium under Section 14 included government licenses, grants, permits, quotas and concessions.

Further, the Court added that the inclusion of the Explanation to Section 14(1) and Section 14(2A) indicates that Parliament has been amending the IBC to ensure that the status of a corporate debtor as a going concern is not hampered on account of varied situations, which may not have been in contemplation at the time of enacting the IBC.

Logic behind the explanation:

The moratorium period is critical for running the corporate debtor as a going concern during CIRP. The licenses, permits and quotas, concessions, registrations, or other rights that the corporate debtor enjoys, form the basis of its business, without which it will not be possible to resolve the corporate debtor as a going concern. For this reason, the legislative intent behind introducing the provision for moratorium was to bar termination or suspension of such grants by Government authorities. As a result, the termination or suspension of such grants during the moratorium period would be prevented by Section 14. However, in order to avoid any scope for ambiguity, IL Committee recommended that the legislative intent may be made explicit by introducing an

Explanation by way of an amendment to Section 14(1) regarding termination or suspension of grants on account of non-insolvency reasons.

What is term "on Grounds of Insolvency" and "On non-insolvency related grounds". See at the end of this part.**(Insolvency Law Committee recommendations on the Insolvency and Bankruptcy Code (Amendment) Act, 2020, w.e.f. 28-12-2019 Report published in Feb'2020:**

"8. THE MORATORIUM UNDER SECTION 14

Continuation of Licenses, etc. granted by Government authorities during the Moratorium period

Prohibition on Termination on Grounds of Insolvency

8.1. Section 14 of the Code provides for a moratorium to be put in place on the admission of an application for initiation of the CIRP. This moratorium prohibits inter alia, the institution of suits or continuation of proceedings, the transfer of its assets by the corporate debtor, the enforcement of a security interest and the recovery of property by an owner or lessor of the property.

8.2. The moratorium under Section 14 is intended to keep “the corporate debtor’s assets together during the insolvency resolution process and facilitating orderly completion of the processes envisaged during the insolvency resolution process and ensuring that the company may continue as a going concern while the creditors take a view on resolution of default.”(Insolvency and Bankruptcy Code Bill, 2015, Notes on Clauses, p. 118<https://www.prsindia.org/sites/default/files/bill_files/Insolvency_and_Bankruptcy_code%2C_2015.pdf> accessed 26 November 2019) Keeping the corporate debtor running as a going concern during the CIRP helps in achieving resolution as a going concern as well, which is likely to maximize value for all stakeholders. In other jurisdictions too, a moratorium may be put in place on the advent of formal insolvency proceedings, including liquidation and reorganization proceedings.(See Catherine Balmond and Katharina Crinson (ed.), Restructuring & Insolvency 2019 (12th edn, Law Business Research Ltd., 2018) <<https://gettingthedealthrough.com/download/area/35/restructuringinsolvency>> accessed 26 November 2019) The UNCITRAL Guide notes that a moratorium is critical during reorganization proceedings since it “facilitates the continued operation of the business and allows the debtor a breathing space to organize its affairs, time for preparation and approval of a reorganization plan and for other steps such as shedding unprofitable activities and onerous contracts, where appropriate.”(United Nations Commission on International Trade Law, Legislative Guide on Insolvency Law, (2005) p. 84<https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf> accessed 26 November 2019)

8.3. It was brought to the Committee that in some cases government authorities that have granted licenses, permits and quotas, concessions, registrations, or other rights (collectively referred to as “grants”) to the corporate debtor attempt to terminate or suspend them even during the CIRP period. This could be attempted in two ways: one, by relying on ipso facto clauses, by virtue of which these grants may be terminated on the advent of insolvency proceedings themselves, and

second, by initiating termination on account of non-payment of dues.

8.4. The Committee discussed that by and large, the grants that the corporate debtor enjoys form the substratum of its business. Without these, the business of the corporate debtor would lose its value and it would not be possible to keep the corporate debtor running as a going concern during the CIRP period, or to resolve the corporate debtor as a going concern. Consequently, their termination during the CIRP by relying on ipso facto clauses or on non-payment of dues would be contrary to the purpose of introducing the provision for moratorium itself. Thus, the Committee concluded that the legislative intent behind introducing the provision for moratorium was to bar such termination.

8.5. In this regard, the Committee noted that depending on the nature of rights conferred by them, these grants may constitute the “property” of the corporate debtor. Section 3(27) of the Code provides an inclusive definition of property which includes “money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property.” This definition is substantially the same as the definition of “property” under Section 436 of the Insolvency Act, 1986 (UK), which has been considered the widest possible definition of property. (Bristol Airport plc v Powdrill [1990] Ch 744) In India too, it is accepted that certain licenses and concessions can convey permission to use property, (See Mulla, The Transfer of Property Act (11th edn., LexisNexis 2013) p. 794-804) or may embody a lease, permit, etc. granting rights in the property. (See Shah & Singh, Commentary on Law of Mines & Minerals (Whytes & Co. 2016) para 1.5.9.C) Thus, their termination in certain circumstances, could have been considered contrary to an order of moratorium barring actions under Section 14(1)(d) or preventing alienation of property by any person. (See Punit Garg & Ors v Ericsson India Pvt. Ltd. & Anr., Company Appeal (AT) (Insolvency) Nos.255-260/2018, NCLAT. Decision date – 26 March 2019)

8.6. Similarly, in many circumstances, termination or suspension of grants, particularly registrations, would be through proceedings that follow due process of law. Such proceedings may be a form of enforcement that would deprive the corporate debtor of its assets. In this regard, The Committee noted that the Section 14(1)(a) prevents “the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority.” (Emphasis supplied). This provision has been given an expansive reading by the Appellate Authority and the Adjudicating Authority, that had passed orders preventing recovery by stock exchanges and regulators, (See Punit Garg & Ors v Ericsson India Pvt. Ltd. & Anr., Company Appeal (AT) (Insolvency) Nos.255-260/2018, NCLAT. Decision date – 26 March 2019) as well as the de-registration of aircrafts. (State of Bank India v Jet Airways (India) Ltd., MA 2360/2019 & Ors. in CP(IB) 2205(MB)/2019, NCLT(Mumbai). Decision date – 5 July 2019).

8.7. Relying on this, the Committee was of the view that termination or suspension of such grants during the moratorium period would be prevented by Section 14. However, to avoid any scope for

ambiguity and in exercise of abundant caution, the Committee recommended that the legislative intent may be made explicit by introducing an Explanation by way of an amendment to Section 14(1).

8.8. The Committee also agreed that the moratorium on termination or suspension of such grants during the CIRP period should not be taken to mean that the corporate debtor is not liable for payments of dues arising out of the continuation or use of such grants. As such, the corporate debtor must continue to be liable for such dues, which may either be paid during the CIRP or dealt with in the resolution plan. Since these dues would be attributable to the running of the corporate debtor as a going concern, they would be considered to be ‘insolvency resolution process costs’. However, the dues that arose for such grants prior to the commencement of the CIRP would not be required to be paid during the moratorium period and claims may be filed for such dues during the CIRP.

Termination on non-insolvency related grounds

8.9. In this context, the Committee also discussed if such grants may be terminated during the CIRP for reasons other than those related to the insolvency of the corporate debtor (for example, the initiation of insolvency, non-payment of dues, capital adequacy); such as, for violation of health and safety standards, noncompliance with environmental norms, etc.

8.10. The Committee discussed that even under the Code the resolution professional is responsible for keeping the corporate debtor running as a going concern and “complying with the requirements under any law for the time being in force on behalf of the corporate debtor.(Insolvency and Bankruptcy Code, 2016, Section 17(2)(e). See also Ministry of Corporate Affairs, Report of the Insolvency Law Committee (2018) para 8, <www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee_12042019.pdf> accessed 26 November 2019) As such, the moratorium under Section 14 is not intended to dispense with obligations to comply with non-pecuniary requirements during the moratorium period.

8.11. Further, the purpose of the moratorium is to keep the assets of the debtor together for successful insolvency resolution, and it does not bar all actions, especially where countervailing public policy concerns are involved. For instance, criminal proceedings are not considered to be barred by the moratorium, since they do not constitute “money claims or recovery” proceedings.(See Shah Brothers Ispat Pvt. Ltd. v P. Mohanraj & Ors., Company Appeal (AT) (Insolvency) No. 306/2018 (NCLAT). Decision date- 31 July 2018) In this regard, the Committee also noted that in some jurisdictions, laws allow “regulatory claims, such as those which are not designed to collect money for the estate but to protect vital and urgent public interests, restraining activities causing environmental damage or activities that are detrimental to public health and safety” to be continued during the moratorium period.(United Nations Commission on International Trade Law, Legislative Guide on Insolvency Law, (2005) p. 86

<https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf> accessed 26 November 2019)

8.12. Given this, the Committee was of the view that termination of grants for noncompliance with requirements that are not related to the insolvency of the debtor would not be hit by the moratorium under Section 14. However, the Committee agreed that for abundant caution, the Explanation referred to in paragraph 8.7 should also clarify that termination or suspension of grants on account of insolvency would be prohibited by the moratorium. However, termination or suspension of such grants on account of non-insolvency reasons would not be barred by the moratorium.))

5. Outside from the purview of Moratorium [Sec. 14(2), 14(2A) & (3)]

5.1 Continuation of Critical Supplies during the Moratorium period covered by section 14(2) & 14(2A)

Section 14(2) provides that supply of *essential goods or services*, as may be specified, cannot be terminated, suspended or interrupted during the moratorium. Section 14(2A) was added with effect from 28 December 2019. It provides that, where the IRP or RP considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage its operations as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

Section 30(2)(a) read with regulation 31(a) makes it clear that dues to suppliers for essential goods and services supplied during the moratorium period are a part of the IRP costs and are required to be paid back in priority to any other creditor as a part of the resolution plan.

As per regulation 32 of the [CIRP Regulations, 2016](#), essential supplies mean-

- (1) electricity;
- (2) water;
- (3) telecommunication services; and
- (4) information technology services,

to the extent these are not a direct input to the output produced or supplied by the corporate debtor.

Illustration- Water supplied to a corporate debtor will be essential supplies for drinking and sanitation purposes, and not for generation of hydro-electricity.

Further, Sub-section 2A inserted vide the Ordinance dated 28.12.2019 empowers the IPR or RP to decide which supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of

moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified. The changes have been made again for keeping the thrust of going concern and to maximise the value of a corporate debtor.

*Read more about logic behind section 2A at the end of the part***(Insolvency Law Committee recommendations on the Insolvency and Bankruptcy Code (Amendment) Act, 2020, w.e.f. 28-12-2019 Report published in Feb'2020:**

Continuation of Critical Supplies during the Moratorium period

8.13. Section 14(2) of the Code previously only provided that the supply of 'essential goods and services' shall not be terminated, suspended or interrupted during the moratorium period. The term 'essential goods and services' is defined in Regulation 32 of the CIRP Regulations to mean "electricity, water, telecommunication services and information technology services to the extent these are not a direct input to the output produced or supplied by the corporate debtor." These are basic supplies that are necessary for "ensuring orderly completion of the proceedings".(Insolvency and Bankruptcy Code Bill, 2015, Notes on Clauses, p. 118, <https://www.prsindia.org/sites/default/files/bill_files/Insolvency_and_Bankruptcy_code%2C_2015.pdf> accessed 26 November 2019)

8.14. However, the Committee noted that these supplies would not be sufficient to run the corporate debtor as a going concern. Other 'critical supplies' required to run the corporate debtor as a going concern, such as input supplies, would have to be procured by mutual agreement between the insolvency professional and the supplier, sometimes with the approval of the CoC. It was brought to the Committee that the procurement of these supplies by negotiation was proving to be difficult in some cases, and Adjudicating Authorities under the Code were being approached on a case-by-case basis for the continuation of critical supplies other than those defined as essential goods and services under the CIRP Regulations.(Canara Bank v Deccan Chronicle Holdings Ltd., CP No. IB/41/7/HDB/2017, NCLT (Hyderabad). Decision date – 19 July 2017)

8.15. The Committee had made recommendations on this issue in the First ILC Report as well, (Ministry of Corporate Affairs, Report of the Insolvency Law Committee (2018) paras 5.14, 5.15 <www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee_12042019.pdf> accessed 26 November 2019) and agreed once again that there is a need to facilitate the procurement of critical supplies that are essential to running the corporate debtor as a going concern. This would be especially necessary in cases where the critical supplies are not easily and efficiently replaceable, since there is a high possibility that these suppliers would demand 'ransom payments' which would prejudice the insolvency resolution of the corporate debtor. However, the Committee reconsidered its previous recommendation that Adjudicating Authorities should be approached on a case-by-case basis for continuation of critical supplies other than those defined as essential goods and services under the CIRP Regulations at present. In practice, the Committee felt that approaching the Adjudicating Authority in every case for continuation of critical supplies may constrain the use of precious judicial time further, and may result in the incurrance of significant litigation expenses.

8.16. Given this, the Committee recommended that a new sub-section be introduced in Section 14 to ensure that supplies that are critical to running the corporate debtor as a going concern, and would contribute to the preservation of the corporate debtor's value and success of the resolution plan should not be terminated, suspended or interrupted, except in certain specific circumstances.

8.17. The supplies that would be considered critical should be identified by the resolution professional, who is entrusted with the responsibility of running the corporate debtor as a going concern. In identifying critical supplies, the resolution professional should consider factors such as whether the supplies have a significant and direct relationship with keeping the corporate debtor running as a going concern, and whether the supplies may be replaced easily or efficiently.

8.18. However, the Committee was also conscious that mandating such supplies throughout the period of the moratorium, without payment, has a risk of resulting in counter-party distress if suppliers are not paid during this period. Given this, the Committee agreed that such critical suppliers should be paid for supplies made during the moratorium period on an on-going basis, generally on the same terms as those that existed pre-insolvency or on a reasonable commercial basis.

Consequently, the Committee recommended that if such payments are not made, suppliers should be permitted to terminate, suspend or interrupt these critical supplies. Further, in exercise of abundant caution, the Committee also recommended that the CIRP Regulations should specify that payments for these critical supplies would constitute insolvency resolution process costs. However, the Committee was also conscious that these suppliers should not be given an undue preference over other stakeholders of the corporate debtor. Consequently, the Committee agreed that they need not be paid for pre-CIRP dues at this stage. Claims may be submitted by suppliers in respect of the dues owed to them for supplies not compelled by the moratorium.

8.19. Further, the Committee was of the view that on implementation of this provision, additional circumstances may be identified in which it may be desirable to enable counter-parties to terminate the supply of such critical supplies. Given this, the Committee recommended that flexibility be retained to allow termination, suspension or interruption in the circumstances as may be specified in subordinate legislation."))

5.2 Judicial Pronouncements on sub-sec. (2) & (2A)

a. The Mumbai Bench of the NCLT in **ICICI Bank v. Innoventive Industries**(MA 157 in CP 01/I&BP/2016. Decision date- 23.08.2017), explained this position as follows “By reading this Regulation, it appears that electricity, water and telecommunication services and Information Technology service are to be considered as essential as long as these services are not a requirement to the output produced or supplied by the Corporate Debtor. Under this regulation, an illustration also been given saying that water is to be considered as essential service as long as it is used for drinking purpose and sanitization purpose but not for generating electricity. Whenever any illustration is given, it will be given to have an understanding about the provision of law. If supply of water for drinking and sanitization purpose is an

essential service, the supply of electricity is also deemed to be limited for lighting purpose and other domestic purposes, which are in modern days considered as essential service. If the same electricity is used as input for manufacturing purpose making huge bill of lakhs of rupees to get output from that industry, then to our understanding, supply of electricity is used as input for manufacturing purpose to get output from the factory and it obviously to make profits. Essential service is a service for survival of human kind, but not for making business and earn profits without making payment to the services used. When company is using it for making profit, then the company owes to make payment to the services/goods utilized in manufacturing purpose.”

b. NCLT, Hyderabad Bench in the matter of [Canara Bank v. Deccan Chronicle Holdings Limited \(2017\)](#) held that “Section 14(2) Of the IBC Code, 2016 already exempted supply of essential goods and services to the Corporate Debtor and in addition the Learned Counsels for the Respondent submitted that goods/services viz. Water, Electricity, **printing ink, Printing plates, Printing Blanket, Solvents etc.** will also come under the purview Of exemption and thus prayed to exempt above good/services from moratorium. We are convinced with the prayer of the Respondent that the above goods and services would come under exemption under this Section. Hence, we clarify that goods/services viz. Water, Electricity, **Printing ink, Printing plates, Printing Blanket, Solvents etc.** will come under this Section and these essential goods or services to Corporate Debtor shall not be terminated or suspended and interrupted during the moratorium period.”**[(para 3(c)(v)) (emphasis provided)]**

c. It is not open to a Electricity Board to disconnect the electric supply of a Corporate Debtor during CIRP

NCLAT in *Asset Reconstruction Company (India) Ltd. Vs. R. Venkatakrishnan & Anr.* [\[2019\] ibclaw.in 79 NCLAT](#) held that in it was not open to the Electricity Board to disconnect the electricity which is in violation of Section 14(2). If any amount due for the period of the CIRP’ was not paid, in such case, Electricity Board should have moved before the Adjudicating Authority for payment of current dues of CIRP, but it had no jurisdiction to disconnect the electricity in violation of Section 14(2) of Code. The Electricity Board provides services by supplying electricity and thereby comes within the meaning of Operational Creditor as defined under Section 5(20) read with Section 5(21) of the Code.

d. Whether the order of Moratorium will cover the current charges payable by the Corporate Debtor for supply of water, electricity etc. or not

NCLAT in *Dakshin Gujarat Vij Company Ltd. Vs. M/S. Abg Shipyard Ltd. & Anr.* [\[2018\] ibclaw.in 04 NCLAT](#) held that that the amount as is due towards supply of essential goods and services, including electricity, water, Telecommunication services and information technology services, if they are not a direct input to the output produced or supplied by the ‘Corporate Debtor’, require to be included towards ‘Insolvency Resolution Process Costs’ as per sub-section 13(e) of Section 5. From sub-section (2) of Section 14 of the ‘I&B Code’, it is also clear that essential goods or services, including electricity, water, telecommunication services and information technology services, if they are not a direct input to the output produced or supplied by the ‘Corporate Debtor’, cannot be terminated or suspended or interrupted during the ‘Moratorium’ period.

However, from the provisions of Code and Regulations, we find that no prohibition has been made or bar imposed towards payment of current charges of essential services. Such payment is not covered by the order of 'Moratorium'. Regulation 31 cannot override the substantive provisions of Section 14; therefore, if any cost is incurred towards supply of the essential services during the period of 'Moratorium', it may be accounted towards 'Insolvency Resolution Process Costs', but law does not stipulate that the suppliers of essential goods including, the electricity or water to be supplied free of cost, till completion of the period of 'Moratorium'. Payment if made towards essential goods to ensure that the Company remains on-going as made in the present case for the month of December, 2017, such amount can be accounted towards 'Insolvency Resolution Process Costs', but it does not mean that supply of essential goods such as electricity to be supplied free of cost and the 'Corporate Debtor' is not liable to pay the amount till the completion of the period of 'Moratorium'. If the 'Corporate Debtor' has no fund even to pay for supply of essential goods and services, in such case, the 'Resolution Professional' cannot keep the Company on-going just to put additional cost towards supply of electricity, water etc. In case the 'Corporate Debtor' (Company) is non-functional due to paucity of fund, and has become sick the question of keeping it on going does not arise.

e. Resolution Professional pay the current electricity charges only and Electricity charges dues prior to date of moratorium cannot be paid during CIRP, electricity supplier need to file claim before Resolution Professional for prior period charges

In *Uttarakhand Power Corporation Ltd. Vs. M/s. ANG Industries Ltd.* [2018] [ibclaw.in](http://www.ibclaw.in) 122 NCLAT, NCLAT held that the order of moratorium has been passed by the Adjudicating Authority on 31st August, 2017, we are of the view that the appellant – Uttarakhand Power Corporation Ltd. cannot recover any amount due for the period prior to 31st August, 2017 though it will be open the appellant to submit the claim before the Resolution Professional. Insofar as the current charges are concerned, we hold that the appellant is entitled to the electricity supply charges from the date of restoration of electricity i.e. from 12th October, 2017 and the Resolution Professional is required to pay the amount on behalf of the Corporate Debtor on month-to-month basis.

NCLAT in *Innoventive Industries Ltd. Vs. Maharashtra State Electricity Distribution Company Ltd. Company Appeal (AT) (Insolvency) No. 156 of 2017 & I.A. No. 612 of 2017* held that *Corporate Debtor or Resolution Professional are not liable to pay the dues of period prior to passing of order of moratorium, which can be considered at the time of payment of dues to the creditors (Resolution Plan).*

5.3. Moratorium does not apply [Sec. 14(3)]

The two exceptions to Section 14(1) are contained in sub-sections (2) and (3) of Section 14. Sub-section 3 of the section 14 has been substituted by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, w.e.f. 06.06.2018. That is a new clause has been inserted to carve out surety in a contract of guarantee to a corporate debtor on recommendation by the Insolvency Laws Committee in the report published in March, 2018(**The Committee recommendations as under:**

"5.10 The Committee further noted that a literal interpretation of Section 14 is prudent, and a broader interpretation may not be necessary in the above context. The assets of the surety are separate from those of the corporate debtor, and proceedings against the corporate debtor may not be seriously impacted by the actions against assets of third parties like sureties. Additionally, enforcement of guarantee may not have a significant impact on the debt of the corporate debtor as the right of the creditor against the principal debtor is merely shifted to the surety, to the extent of payment by the surety. Thus, contractual principles of guarantee require being respected even during a moratorium and an alternate interpretation may not have been the intention of the Code, as is clear from a plain reading of section 14.

5.11 Further, since many guarantees for loans of corporates are given by its promoters in the form of personal guarantees, if there is a stay on actions against their assets during a CIRP, such promoters (who are also corporate applicants) may file frivolous applications to merely take advantage of the stay and guard their assets. In the judgments analysed in this relation, many have been filed by the corporate applicant under section 10 of the Code and this may corroborate the above apprehension of abuse of the moratorium provision. **The Committee concluded that section 14 does not intend to bar actions against assets of guarantors to the debts of the corporate debtor and recommended that an explanation to clarify this may be inserted in section 14 of the Code. The scope of the moratorium may be restricted to the assets of the corporate debtor only.**)). Further Clause (a) of the Sub-Section (3) has been substituted by [the Insolvency and Bankruptcy Code \(Amendment\) Act, 2020](#), w.e.f. 28-12-2019. Amended Sub-section (3) is reproduced here:

Section 14(3): "(3) The provisions of sub-section (1) shall not apply to –

(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;]

(b) a surety in a contract of guarantee to a corporate debtor."

Section 14(3) of the Code (introduced vide 2018 amendment) is retrospective

The supreme Court in the matter of **State Bank of India Vs. V. Ramakrishnan & Anr.** [\[2018\] ibclaw.in 29 SC](#) held that Section 14(3) of the Code (introduced vide 2018 amendment) which states that provisions of moratorium shall not apply to a surety in a contract of guarantee for corporate debtor, **is retrospective.**

A. Notified Transactions by Central Government

The exception created in sub-section (3)(a) is important as it refers to "transactions" as may be notified by the Central Government in consultation with experts in finance. The expression "financial sector regulator" is defined by Section 3(18). The Central Government, in consultation with experts, may state that the moratorium provision will not apply to such transactions as may be notified. This is of some importance as Section 14(1)(a) does not indicate as to what the proceedings contained therein apply to. Sub-section 3(a) provides the answer – that such

“proceedings” relate to “transactions” entered into by the corporate debtor pre imposition of the moratorium. Section 3(33) defines the term “transaction” as “*transaction*” includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor; This definition being an inclusive one is extremely wide in nature and would include a transaction evidencing a debt or liability.

Hon'ble Supreme Court in *P. Mohanraj & Ors. Vs. M/S. Shah Brothers Ispat Pvt. Ltd.* (2021) [ibclaw.in 24 SC](https://www.ibclaw.in/2021/08/24/supreme-court-holds-that-the-only-light-thrown-on-the-subject-is-by-the-exception-provision-contained-in-section-143a-which-is-that-transactions-are-the-subject-matter-of-section-141-transaction-is-as-we-have-seen-a-much-wider-expression-than-debt-and-subsumes-it-also-the-expression-proceedings-used-by-the-legislature-in-section-141a-is-not-trammelled-by-the-word-legal-as-a-prefix-that-is-contained-in-the-moratorium-provisions-qua-individuals-and-firms/) held that the only light thrown on the subject is by the exception provision contained in Section 14(3)(a) which is that “transactions” are the subject matter of Section 14(1). “Transaction” is, as we have seen, a much wider expression than “debt”, and subsumes it. Also, the expression “proceedings” used by the legislature in Section 14(1)(a) is not trammelled by the word “legal” as a prefix that is contained in the moratorium provisions qua individuals and firms.

B. Moratorium on proceedings against surety to corporate debtor-amendment under Section 14 [Sec. 14(3)]

A contract of guarantee is between the creditor, the principal debtor and the surety, where under the creditor has a remedy in relation to his debt against both the principal debtor and the surety. The surety here may be a corporate or a natural person and the liability of such person goes as far as the liability of the principal debtor. As per section 128 of the Indian Contract Act, 1872, the liability of the surety is co-extensive with that of the principal debtor and the creditor may go against either the principal debtor, or the surety, or both, in no particular sequence.

Section 14(3)(b), by which a surety in a contract of guarantee of a debt owed by a corporate debtor cannot avail of the benefit of a moratorium as a result of which a creditor can enforce a guarantee, though not being able to enforce the principal debt during the period of moratorium – see **State Bank of India v. V. Ramakrishnan**.

Some courts((In *Alpha and Omega Diagnostics (India) Ltd. v. Asset Reconstruction Company of India*, the personal properties of the promoters were given as security to the banks. The issue was whether properties that are not owned by the corporate debtor would come within the scope of moratorium under section 14 of the Code. The NCLAT held that section 14 only applies to assets of the corporate debtor and would not bar proceedings or actions against assets of third parties. A literal interpretation of section 14 was undertaken, and it was noted that the word “its” in section 14(1)(b) and (c) is used in relation to the corporate debtor only. A similar issue came up in *Schweitzer Systemtek India Private Limited v. Phoenix ARC Private Limited*, and following its previous decision, the NCLAT noted that moratorium in Section 14 has no application on the properties beyond the ownership of the corporate debtor.

The Allahabad High Court subsequently took a differing view in *Sanjeev Shriya v. State Bank of India* by applying moratorium to enforcement of guarantee against personal guarantor to the debt. The rationale being that if a CIRP is going on against the corporate debtor, then the debt owed by the corporate debtor is not final till the resolution plan is approved, and thus the liability of the surety would also be unclear. The Court took the view that until debt of the corporate debtor is

crystallised, the guarantor's liability may not be triggered.)) have taken the view that section 14 may be interpreted literally to mean that it only restricts actions against the assets of the corporate debtor, a few others have taken an interpretation that the stay applies on enforcement of guarantee as well, if a CIRP is going on against the corporate debtor.

In *Sandip Kumar Bajaj & Anr. Vs. State Bank of India & Anr.* (2020) [ibclaw.in 51 HC](#) High Court of Calcutta held that it is clear from section 14(3)(b) that the prohibition on institution or continuation of suits and other proceedings against the corporate debtor do not extend to a surety. It is undisputed that both the petitioners are erstwhile guarantors of the Company, namely, the corporate debtor.

Whether a Bank/Financial Institution can institute or continue with proceedings against a Guarantor under the SARFAESI Act, when proceedings under the IBC have been initiated against the Principal Borrower & the same are pending adjudication

Delhi High Court in *Kiran Gupta Vs. State Bank of India & Anr* (2020) [ibclaw.in 38 HC](#) held that the view expressed by the Supreme Court amply demonstrates that neither Section 14 nor Section 31 of the IB Code place any fetters on Banks/Financial Institutions from initiation and continuation of the proceedings against the guarantor for recovering their dues. That being the position, the plea taken by the counsel for the petitioner that all proceedings against the petitioner, who is only a guarantor, ought to be stayed under the SARFESI Act during the continuation of the Insolvency Resolution process qua the Principal Borrower, is rejected as meritless. The petitioner cannot escape her liability qua the respondent/Bank in such a manner. The liability of the principal borrower and the Guarantor remain co-extensive and the respondent/Bank is well entitled to initiate proceedings against the petitioner under the SARFESI Act during the continuation of the Insolvency Resolution Process against the Principal Borrower.

5.4. Impact on Performance Bank Guarantees and Bank Guarantees

a. Whether the bank guarantee issued by Corporate Debtor is an asset of Corporate Debtor and Bank guarantee can be invoked even during moratorium period issued under section 14 of the IBC in view of the amended provision under Section 14(3)(b) of the IBC

In *Bharat Aluminium Co. Ltd Vs. M/S J.P. Engineers Pvt Ltd* (2021) [ibclaw.in 91 NCLAT](#), NCLAT in held that the Corporate Debtor has issued bank guarantee for ensuring the price of goods. The bank guarantee is irrevocable and unconditional and payable on demand without demur. The assets of the surety are separate from those of the corporate debtor, and proceedings against the corporate debtor may not be seriously impacted by the actions against assets of third party like surety. Bank guarantee can be invoked even during moratorium period issued under section 14 of the IBC in view of the amended provision under section 14 (3)(b) of the IBC. Ld. Adjudicating Authority has not considered the aforesaid amended provision. Therefore, the impugned order is not sustainable in law. Hence, the impugned order is hereby set aside.

b. Performance Bank Guarantee(PBG) given by the Corporate Debtor is not covered under Moratorium:

NCLAT in the matter of *GAIL (India) Limited Vs. Rajeev Manaadiar & Ors.* [2018] [ibclaw.in 43 NCLAT](#) held that from sub-section (31) of Section 3, it is clear that the security interest do not include the Performance Bank Guarantee(PBG), therefore, the security interest mentioned in clause (c) of Section 14(1) do not include the PBG. Thereby the PBG given by the Corporate Debtor in favour of the Appellant[GAIL (India) Ltd.] is not covered by Section 14. The Appellant is entitled to invoke its Performance Bank Guarantee in full or in part.

c. Whether the bank guarantee in question can be invoked during the moratorium declared under Section 14(1) of IBC 2016?

NCLT in the matter *Nitin Hasmukhlal Parikh (Diamond Power Transformers Ltd.) v. Madhya Gujarat Vij Company Ltd. & Others* (2018) [ibclaw.in 18 NCLT](#), wherein under Para No, 10 of the order Adjudicating Authority has observed as follows; – “The moratorium order passed by this Tribunal applies in respect of Bank Guarantees other than Performance Guarantees furnished by the Corporate Debtor in respect of its property since it comes within the meaning of ‘security interest’. Therefore, Respondent no. 1 is not entitled to invoke Bank Guarantees other than that comes within the meaning of performance Guarantees, during Moratorium period.”

d. The Corporate Debtor had no right to claim the margin money after the invocation of Bank Guarantee during the Moratorium under Section 14 of IBC

NCLAT in *Indian Overseas Bank Vs. Arvind Kumar Resolution Professional/Liquidator M/s Richa Industries Ltd* (2020) [ibclaw.in 285 NCLAT](#):

- The Bank Guarantee was invoked during the moratorium period, i.e. on 27th December 2018. Given Section 14(3) of the Code, 2016 invocation of the said guarantee could not be stopped by the Bank. From Sec. 14(1)(c) read with 3(31) and from the decision in *Gail (India) Limited Vs. Rajeev Manaadiar & Others* [2018] [ibclaw.in 43 NCLAT](#) it is clear that ‘Security Interest’ does not include the ‘Performance Bank Guarantee’. The Performance Bank Guarantee is not covered by Section 14 of the Code.
- The margin money is the contribution on the part of the borrower who seeks ‘Bank Guarantee’. The said margin money remains with the Bank, as long as the Bank Guarantee is alive. If the Bank Guarantee expires without being invoked, then the margin money reverse back to the borrower, and in case the bank guarantee is invoked by the beneficiary, the margin money goes towards payment of bank guarantee to the beneficiary, and nothing remains with the financial institutions, which can be reversed to the Corporate Debtor.
- In this case, Bank Guarantee was invoked on 27th December 2018 by the beneficiary M/s Tata Steel Processing & Distribution Limited, and the margin money amount was used towards the payment of the Bank Guarantee. Once this margin money was used to honour the bank guarantee, nothing remained with the Bank, and as such, the Respondent Resolution

Professional cannot demand that amount.

- The Resolution Professional/IRP is only entitled to those payments to which the Corporate Debtor is entitled if no orders of Moratorium would have been passed under Section 14 of the Code. The Corporate Debtor had no right to claim the margin money after the invocation of Bank Guarantee.

In *Mr V Nagarajan Vs. SKS Ispat and Power Ltd.* [\[2020\] ibclaw.in 17 NCLAT](#), NCLAT held that it is clear that the moratorium order passed under sub-section (1) to Sec 14 of the I & B Code does not apply to the surety in a contract of guarantee to a Corporate Debtor. Therefore, in the circumstances, the Adjudicating Authority passed the Order that “the performance guarantee given by the bankers on behalf of the Corporate Debtor, whereby simply to set off the money in the event of an order was passed in favour of the Corporate Debtor, cannot be interfered with the performance guarantee with regard to another contract”. Therefore, the Adjudicating Authority has rightly refused to grant an interim relief about the invocation of bank guarantee given by bankers on behalf of the Corporate Debtor.

e. A Bank Guarantee deposited with the Registrar General during the pendency of the challenge to Arbitral Award is an asset of the Corporate Debtor

In *Morgan Securities & Credits Pvt. Ltd. Vs. Resolution Professional of Videocon Industries Ltd.* [\(2020\) ibclaw.in 372 NCLAT, NCLAT](#) held that it is clear that the amount of Rs.20 Crores deposited by way of Bank Guarantee was against the sum of Rs.76.45 Crores awarded, therefore, said amount of Rs.20 Crores, if payable to the Financial Creditor will be out of Rs.76.45 Crores as awarded in its favour. Even if, it is accepted that said amount of Rs.20 Crores, as deposited with the Registrar General of Delhi High Court, is meant for payment to the Appellant – ‘Morgan Securities & Credits Pvt. Ltd.’ against the awarded amount of Rs.76.45 Crores, in light of the decision of Hon’ble Supreme Court in “*Himachal Pradesh Housing & Urban Development Authority Vs. Ranjit Singh Rana, (2012) 4 SCC 505*”, we hold that the Bank Guarantee of Rs.20 Crores given by the Bank on behalf of the Corporate Debtor, relates to the claim of the Appellant – ‘Morgan Securities & Credits Pvt. Ltd.’ which has been taken care by the Resolution Professional against the claim preferred in the CIRP. Such being the position, during the CIRP, the amount will be deposited with the Resolution Professional and the Appellant’s claim can be taken care by the Successful Resolution Applicant, if a resolution plan is approved. During the liquidation stage the amount of Rs.20 Crores cannot be treated as ‘Security Interest’, merely because it was deposited against award amount of Rs.76.45 Crores.

f. During the moratorium, a Resolution Professional can encash Bank Guarantee submitted by Operational Creditor

In *Thermax Limited Vs. Viswa Infrastructures Services Private Limited & Anr.* [\(2019\) ibclaw.in 462 NCLAT](#), it is held that if Corporate Debtor invoked the Bank Guarantee fault cannot be found. NCLAT further found that the claim of the Appellant has been admitted by the Resolution Professional, who can derive the benefit of the ‘Operational Creditor’ after the process is completed.

Hon'ble Allahabad High Court in *Sanjeev Shriya Vs. State Bank of India and 6 Others* [2017] [ibclaw.in](http://www.ibclaw.in) 09 HC held that Creditor can not be allowed to pursue proceedings under Section 19 (3) of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 for recovery of loan amount taken by the debtor (in liquidation) before Debt Recovery Tribunal against the guarantors when NCLT has already issued moratorium under **Section 14** of the IBC, 2016 and stayed proceedings in respect of the debtors (in liquidation).

6. Commencement & effective period of the Moratorium [Sec. 14(4)]

The moratorium comes into effects on the insolvency commencement date. The insolvency commencement date defines under section 5 (12) means **the date of admission of an application** for initiating CIRP by the Adjudicating Authority under sections 7, Section 9 or section 10, as the case may be and where the interim resolution professional is not appointed in the order admitting application under section 7, 9 or section 10, the insolvency commencement date shall be **the date on which such interim resolution professional is appointed by the Adjudicating Authority**.

Section 14(4) sets out the time limit for which the moratorium can be in effect, *i.e* until the completion of the CIRP or on the approval of a resolution plan by the adjudicating authority or on a resolution of the committee of creditors to liquidate the corporate debtor, whichever is earlier.

As per section 12 of the Code, the CIRP shall be completed within a period of 180 days from the date of admission of the application to initiate such process, and the period can only be extended by 90 days, subject to an application being made to the adjudicating authority after a resolution is passed at a meeting of the committee of creditors by a vote of seventy-five percent of the voting share.

a. NCLT has inherent power to impose Moratorium before initiation of CIRP

NCLAT in *NUI Pulp and Paper Industries Pvt. Ltd. Vs. M/s. Roxcel Trading GMBH* [2019] [ibclaw.in](http://www.ibclaw.in) 01 held that once an application under Sections 7 or 9 is filed by the Adjudicating Authority, it is not necessary for the Adjudicating Authority to await hearing of the parties for passing order of Moratorium under Section 14 of the Code. To ensure that one or other party may not abuse the process of the Tribunal or for meeting the ends of justice, it is always open to the Tribunal to pass appropriate interim order.

b. The moratorium continues to be in operation till it is revoked

In *Isgee Heavy Engineering Ltd. Vs. Bhushan Energy Ltd. Through its R.P. & Ors.* (2019) [ibclaw.in](http://www.ibclaw.in) 326 NCLAT, NCLT held that the present application shall be taken up with the main case. In the meanwhile, it is clarified that the moratorium under Section 14 of the Code, 2016 continues to be in operation till it is revoked. Apparently, there is no order of revocation of moratorium. NCLAT held

that the Adjudicating Authority should pass appropriate order in accordance with law on an early date preferably within 3 weeks. If the order is not passed within 3 weeks from the production of this order, then it will be open to the Appellant to file an application before the Adjudicating Authority for continuation of arbitration proceedings if permissible under the law.

Remedy under sec. 60(6) after completion of moratorium period

Sub-section (6) of Section 60 of the Code provides that where the claim of a creditor involves a disputed question or any other reason of fact as it cannot be decided by the Resolution Professional or the Adjudicating Authority, such creditor can raise such issue and claim at an before the Court of Competent Jurisdiction or an application before the appropriate forum after completion of the period of moratorium in accordance with Section 60(6) of the IBC. The sub section reproduced here:

"Section 60: Adjudicating Authority for corporate persons:

XXXX XXXXX XXXXX XXXX

(6) Notwithstanding anything contained in the Limitation Act, 1963 or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded."

The cases in which the Adjudicating Authority(NCLT) or Appellate Tribunal(NCLAT) could not decide the **claim on merit**, such claims or issues can be raised before an appropriate forum in terms of Section 60(6) of the Code. The Financial Creditors and the Operational Creditors whose claims have been decided by the Adjudicating Authority or Appellate Tribunal, such decision being final and is binding on all such Financial Creditors and the Operational Creditors in terms of Section 31 of the Code. If their total claims stand satisfied, they cannot avail any remedy under Section 60(6) of the Code. The Financial Creditors in whose favour guarantee were executed as their total claim stands satisfied to the extent of the guarantee, they cannot reagitate such claim from the Principal Borrower.

Hon'ble High Court in *M/s. Tata Steel BSL Ltd. Vs. Varsha W/o. Ajay Maheshwari (2019) ibclaw.in 15 HC* held that moratorium come to an end upon completion of the CIRP cannot lead to a conclusion that pending suits like the suit for recovery would be liable to be dismissed, upon the resolution process being undertaken.

[Read more about the Sec. 60\(5\) of the Code-click here.](#)

7. Maturity of Claims and Unmatured claims

a. Moratorium & Right of guarantor, who may not have claim on the date of initiation of

CIRP

- For instance, the right of guarantor, who may not have claim on the date of initiation of CIRP i.e. the date the application is admitted on behalf of the third party who has availed loan from the 'Financial Creditor'. In case of failure to pay the loan amount given to the third party by the person having obtained guarantee, such person/Creditor is entitled to invoke guarantee to recover the amount from the guarantor, but only after completion of the period of the 'Moratorium'.
- While 'Moratorium' is declared under Section 13, in terms of clause (b) public announcement of the initiation of CIRP should be caused and call for the submission of claims under Section 15 of the 'I&B Code'. In terms of Section 15, on public announcement of CIRP, the creditors may file claim. The 'Interim Resolution Professional' is casted with the duty under Section 18(1)(b) to receive and collate all the claims submitted by creditors to him pursuant to the said advertisement.

b. Maturity of Claims and unmatured claims

- **It is not necessary that all the claims as are submitted by the Creditor should be a claim matured on the date of initiation of Resolution Process/admission, even in respect of debt, which is due in future on its maturity, the 'Financial Creditor' or 'Operational Creditor' or 'Secured Creditor' or 'Unsecured Creditor' can file such claim. Therefore, the definition of 'Claim' as defined under Section 3(6) is to be read along with Section 13 read with Section 15 of the Code.**
- Even a creditor may choose not to file claim, if not matured and may decide to submit claim on its maturity, after completion of the period of 'Moratorium', subject to survival of the 'Corporate Debtor'. The debt which the 'Corporate Debtor' owes for payment in future, if not taken into consideration in the 'Resolution Plan' does not extinguish automatically and the creditors, including the 'Financial Creditor' or 'Operational Creditor' or 'Secured Creditor' or 'Unsecured Creditor' has rights to claim the same.
- For example, if there is a default, a 'Financial Creditor' or 'Operational Creditor' may file application under Sections 7 or 9 for initiation of CIRP. Once it is initiated, order of 'Moratorium' is passed and the advertisement is issued all claimants whether his claim is matured or not are supposed to file claim before the 'Resolution Professional'. The 'Resolution Professional' cannot reject one or other claim on the ground that only the person whose claim has been matured can be looked into and other claim not matured cannot be entertained.
- The only thing which is to be ascertained is whether the person who claimed to be 'Financial Creditor', whether his debt owed to him come within the meaning of 'Financial Debt' as defined under Section 5(8).

Case Reference : Andhra Bank Vs. M/s. F. M. Hammerle Textile Ltd. [\(2018\) ibclaw.in 119 NCLAT](#)

8. Punishment for contravention of moratorium or the resolution plan [Sec. 74]

Under Section 74 of the IBC, officials of the corporate debtor who violate provisions of moratorium can be imprisoned for a minimum of three years, which may be extended up to five years. Such officials will also be fined a minimum of Rs 100,000 but not more than Rs 300,000. Officials of creditors who knowingly and wilfully authorise or permit such contravention can be jailed for a minimum of one year, with a maximum tenure of five years. Such officials will also be fined a minimum of Rs 100,000, with the maximum penalty of up to Rs 10 million. Sec. 74 reproduced here:

Section 74: Punishment for contravention of moratorium or the resolution plan:

74. (1) Where the corporate debtor or any of its officer violates the provisions of section 14, any such officer who knowingly or wilfully committed or authorised or permitted such contravention shall be punishable with imprisonment for a term which shall not be less than three years, but may extend to five years or with fine which shall not be less than one lakh rupees, but may extend to three lakh rupees, or with both.

(2) Where any creditor violates the provisions of section 14, any person who knowingly and wilfully authorised or permitted such contravention by a creditor shall be punishable with imprisonment for a term which shall not be less than one year, but may extend to five years, or with fine which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both.

(3) Where the corporate debtor, any of its officers or creditors or any person on whom the approved resolution plan is binding under section 31, knowingly and wilfully contravenes any of the terms of such resolution plan or abets such contravention, such corporate debtor, officer, creditor or person shall be punishable with imprisonment of not less than one year, but may extend to five years, or with fine which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both.

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