PERSONAL GUARANTORS TO DEBTORS REQUIRED THE 'HOMERIC' MORATORIUM'S AEGIS

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Abstract: *Companies depend on financial borrowing for a flourishing business. Lenders hesitate less when the company's personnel assure repayment by becoming its guarantors. That is, such personnel are the kind of sureties who will pay if their company is unable to repay. If the company later becomes insolvent, they conserve the company's remaining funds by repaying on its behalf. Yet, the IBC punishes their well-meaning deeds by showering them with a stream of unjust implications. Firstly, the statute compels lenders to pursue the personnel-guarantors exclusively. Secondly, they shall get no reimbursement even if the insolvency resolution is successful. Lastly, the resolution process has been given a licence that exacerbates their overall predicament. During and for resolution, the personnel's properties may be used for extractive ends. This paper proposes that the existence of the first two problems, besides the third, must be a zero-sum game. That is, if personnel guarantors aid insolvency resolution, the obligation to act as a guarantor must be snoozed away. In other words, the IBC's 'moratorium' for insolvent companies should extend to such personnel-guarantors. This is more of an obvious inference than an assertion. Judiciary favours a complete warding off of legal events that may/aid insolvency resolution. Such guarantors surely serve this function. Applicability of the concept to such guarantors has another unexpected votary: the law of contracts. Moratorium's exclusion of personnel-guarantors, then, is a thread inexplicably snipped out of the woven pattern. This paper proposes that the solvent personnel-guarantors be placed on the steadier perch of Section 14. This revision shall bring moratorium to scale with its dimensions as supposed by the judiciary.*

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I. INTRODUCTION

On its surface, the Insolvency and Bankruptcy Code, 2016 ('IBC') does not declaim individual guarantors to be insignificant entities. It rather acknowledges their existence by devoting its Part III to resuscitating their solvency, if needed. However, the presence of Section 14(3)(b)[1] reveals the callous disregard it otherwise cloaks. The provision states that a moratorium's effects do not extend to solvent guarantors of an insolvent corporate debtor ('CD').

Governed by Section 14 of the IBC, a moratorium is a crucial bridge in taking a resolution plan to fruition. Put simply, it functions like a snooze button. It pauses the continuation or initiation of legal proceedings that may/conduce a diminution of the CD's financial health. As will be shown, the protection is extremely nuanced. It protects the debtor from any past, present, or future liabilities until the IBC finishes the insolvency proceeding. Apart from legal processes, their executable outcomes or the rights they may create against the CD, are all frozen in the moratorium's wake. By its explicit language, Section 14(3)(b) refuses to extend this

[1] "14. Moratorium
(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 (54 of 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 […]
(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 […]" (emphasis supplied).

conservatory effect on a CD's guarantors by denying them the benefit of a moratorium. Inexplicitly, Part II of the IBC, which contains Section 14, makes no references to the guarantors or their assets. Furthermore, the provision which may end the effect of a moratorium,[2] shuts down the moratorium only when the CD's insolvency is resolved. Furthermore, and as will be further shown, the intent of Section 14 has been found out to be in alleviating the financial health of the CD, to the greatest degree possible. In such a scenario, assets of the guarantors are best exposed to creditors as those may address a part of the liabilities owed by the CD. If they have enabled debt-financing by acting as guarantors, they now face the same creditors as the CD company. Constrained to proceed against the CD until an outcome under the IBC, creditors are likely to turn to the CD's guarantors.

When the guarantors or their assets do help discharge such liabilities, other implications of the IBC ensure that they cannot seek recompense from the CD. The IBC forecloses remedies under the law of contracts, otherwise available to guarantors. Guarantors belong to a class of legal personalities called sureties. Succinctly put, a surety helps secure a loan on behalf of the borrower by avowing repayment on the latter's behalf. In case of the borrower defaulting, the surety is equally accountable to the lender. A surety becomes a guarantor if the borrower defaults due to an inability.[3] Section 14, then, does not protect those who may be responsible for repaying the CD's debts. Hence, the effects of the provision in question, and other parts of the IBC, act as a huge disincentive to debt-financing to a company by its personnel.

The IBC's exclusionary text makes no distinction between guarantors who may bear a relation with the CD, and those who may not. The lack of this nuance denotes the provision's conceptual foundation: the fiscal health of such personnel-guarantors will be of no impact to a corporate

[2] The Insolvency and Bankruptcy Code, 2016, s 31(2)(a).
[3] Frank W Daykin, 'Guarantor Distinguished from Surety' (1949) 1(1) Case Western Reserve Law Review 75, 83 <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=3205&context=caselrev> accessed 31 October 2022.

insolvency resolution process ('CIRP'). Worsening this position is the judicial backing of the moratorium's circumscription. The judiciary views Section 14 as the CD's exclusive concern, and must not disrupt the operation of any law against 'other' parties.

The present paper opposes the moratorium's disapplication to a certain set of guarantors. This set is composed of the company-personnel who previously extended guarantees for the company's loan procurements. It is shown to ignore the judicial recognition of the role they may play in aiding the CIRP. More vitally, it is at cross-purposes with the presently recognised version of an aggressive moratorium.

The paper bases its analysis on the substance of Section 14(3)(b), which is both better captured and exhibited by certain precedents. Part II performs this function through two parts. Part II-A describes the three decisions which hold the ground on the provision's operation. This 'triumvirate' may not refer to Section 14(3)(b) but is shown as being the point of reference for interpreting its text. Accordingly, this Part suggests that the provision was only a manifestation of the preceding judicial thought. By breaking down each decision separately, this Part helps identify the nuances supplied by each. Part II-B stitches up their ratios to put forth their cumulative impact on the applicability of a moratorium to personnel-guarantors of a CD. Having established the present position, the paper attempts to reproduce arguments raised in certain other decisions in its Part III. These decisions are shown to be carrying analytical elements relevant to the position of personnel-guarantors. After discussing arguments of the past, the paper advances two key arguments not looked at by decisions that will have been explored by this point. Part IV does so in two cumulative parts. Part IV-A argues that the expanse of the moratorium's operational territory is immensely vast so as to keep the CIRP unperturbed. For this purpose, the exceptions to it are made only rarely, with further restrictions on their ability to act as exceptions. It will be argued that the personnel-guarantors do not qualify as any recognised exception. Part IV-B argues that the law of contracts strongly

buttresses an application of the moratorium, or a protection akin to it. Section 14(3)(b) is shown to be attacking two integral rights of the personnel-guarantors: the right to subrogation and indemnification. Applying the moratorium in such cases doubly preserves both, effectively preserving the law of contracts intact.

For the sake of fluency, the terms 'personal/guarantors' ought to be taken to mean personnel-guarantors of CDs throughout the paper, unless specified otherwise. Similarly, the term 'foreign proceedings' has been used throughout as a reference to non-IBC proceedings faced by such guarantors.

II. THE PREVAILING LAW

A. The determining 'triumvirate'

Moratorium's mechanical operation is governed by precedents. That position is best gleaned from a syndicated view of two decisions: *State Bank of India* v *V. Ramakrishnan*[4] ('*SBI*') and *Lalit Kumar Jain* v. *Union of India*[5] ('*Lalit*'). Reinforcing these is the seemingly unrelated decision in *Anjali Rathi* v *Today Homes & Infrastructure Pvt Ltd*[6] ('*Anjali Rathi*'). The position regarding personnel-guarantors and their exposure to moratorium is submitted to be collectively governed by these three decisions.

1. SBI

SBI dealt with circumstances preceding the enforcement of Section 14(3)(b). This provision excludes a CD's sureties from the moratorium's protection. Upon non-repayment of a loan by a promoter of the CD under CIRP, the concerned bank utilised the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act). In other words, it initiated recovery proceedings against the guarantor in the

[4] *State Bank of India* v *V Ramakrishnan* (2018) 17 SCC 394.
[5] *Lalit Kumar Jain* v *Union of India* (2021) 9 SCC 321.
[6] *Anjali Rathi* v *Today Homes & Infrastructure Pvt Ltd* (2021) SCC OnLine SC 729.

Debt Recovery Tribunal ('DRT'). The guarantor sought to stay the same by asking the concerned National Company Law Tribunal ('NCLT') to hit the pause button under Section 14, IBC. The core issue was whether the provision's sub-section (1)(c) applied in the guarantor's favour. This part of Section 14 precludes the enforcement of security interests against a CD. The interests, the text states, must be created by the CD on its own property and must illustratively resemble those recognized by the SARFAESI.

The NCLT decided in favour of the guarantor.[7] In its view, the permission of parallel proceedings under the SARFAESI inevitably may have pressurised the guarantor to fulfil its guarantee.[8] It speculated that this may have consequently involved the guarantor turning to the CD for its funds.[9] Hence, it reasoned that the guarantor may develop grounds to become a creditor and generate a security interest in the CD's assets.[10] This probable change in the guarantor's status was justified by citing the effect of Section 140 of the Indian Contract Act, 1872 ('ICA').[11] Succinctly put, the provision allows the guarantor to lawfully demand recompense for acting on the guarantee and paying up the lender on the borrower's (here, the CD's) behalf. Given that this development may upset the liabilities created in the beginning of the CIRP, the NCLT deemed it best to preserve *status quo*.[12] Accordingly, it interpreted Section 14 as giving pause to the parallel proceedings.[13] Personal-guarantors being one of the explicitly mentioned entities under the IBC, the moratorium's extension to them was seen as permissible.[14] The National Company Law Appellate Tribunal ('NCLAT') adopted the same view.[15]

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[7] *V Ramakrishnan v Veesons Energy Systems Pvt Ltd* (2017) SCC OnLine NCLT 11596.
[8] ibid para 5.
[9] ibid paras 5-6.
[10] ibid para 6.
[11] ibid paras 4, 5.
[12] ibid paras 6, 7.
[13] ibid paras 3, 6.
[14] ibid.
[15] *State Bank of India* v *V Ramakrishnan* (2018) SCC OnLine NCLAT 384.

The preceding courts were effectively stating that the SARFAESI proceedings fall under the bar created by Section 14(1)(c). Those proceedings may lead to the violation of Section 14(1)(b). That is, the guarantor may discharge its obligations under SARFAESI, but this may end up creating an obligation on the CD. Essentially, this means that there could be an encumbrance on the CD's assets despite the moratorium's operation.

The Supreme Court's analysis suggests that it found this implication-based approach unneeded. On a strictly textual view, it stated that Section 14(1) was conspicuously silent with regards to personal guarantors.[16] This conclusively denoted to it the provision's disapplication to them.[17] It was similarly unimpressed with a contention that Section 60 denoted an easy access of the moratorium to personal guarantors. *Inter-alia*, this provision in its sub-section (3) assimilates insolvency proceedings in non-NCLT fora with those in the NCLT/NCLAT. Its sub-section (2) congruously bars the initiation of those in any forum but the NCLT. The precise argument, then, was that Section 60 merged proceedings pertaining to a personal guarantor with the CIRP. Due to the non-enforcement of Part III at the time, the court hesitated to state that the provision's aim to be only merging the IBC and non-IBC proceedings pertaining to an insolvent personal guarantor. However, it found no impediment in holding the provision's sub-section (2) as the definitive indicator of the merger it intended: a personal guarantor's 'bankruptcy' proceedings with the CIRP.[18] The SARFAESI did not count amongst one of the erstwhile prevailing bankruptcy laws.[19] Accordingly, it concluded any proceedings under it to be outside the purview of Section 60 and, consequently, exempt from Section 14.[20]

The court then proceeds to tackle the argument based on Section 140, ICA. It limits its focus on Section 133 of the ICA as the only relevant provision for considering the application of the

[16] *SBI* (n 4) para 20.
[17] ibid paras 22, 26.1.
[18] ibid paras 22-24.
[19] ibid para 23.
[20] ibid para 24.

ICA in those circumstances.[21] This provision takes the slightest disturbance to the original lending agreement as a 'discharge'. Evidently, it deemed the provision to be the closest possible contract-law mode of discharging a guarantor in the facts of the case.[22] Under the provision, the discharge of a surety is induced by a change to the debt/lending agreement as it exists between the lender and the borrower. This ought to be a consensual change, strictly between the lender and the borrower. The court, however, suggests that an approval of a resolution plan under Section 31(1), IBC is a 'binding' legal outcome, as opposed to a wilful change of contractual terms.[23] It additionally endorses the view of the Insolvency Law Committee[24] as part of its reasoning. The committee had produced a report in the period intervening between the impugned judgment by the NCLAT and the court's consideration of it.[25] The report had shot down the NCLAT's judgment in this case citing an aberration from the jurisprudential principles on Section 128, ICA.[26] The report stated that those principles confer upon the lender an elective right to pursue the borrower and/or the guarantor.[27] The committee stated that the IBC does nothing to perturb this right.[28] The court agreed with the view.[29] In effect, the SARFAESI proceedings were excused from the application of the moratorium. The exclusion of personal guarantors from moratorium was stated as the law existing regardless of Section 14(3)(b), which was stated only to be a precautionary clarification.[30]

[21] ibid para 25.
[22] ibid. There exists no other perceivable reason why it did not address Section 140, ICA directly.
[23] ibid para 25.
[24] Ministry of Corporate Affairs, *Insolvency Law Committee under the Chairmanship of Mr. Injeti Srinivas* (26 March 2018).
[25] *See SBI* (n 4) para 32.
[26] ibid para 5.9. Section 128 of the ICA reads as follows: "The liability of the surety is co-extensive with that of the principal debtor […]".
[27] ibid.
[28] ibid.
[29] *SBI* (n 4) 33, 34.
[30] ibid para 33.

2. Lalit

Unlike *SBI*, *Lalit* was not dealing with the applicability of moratorium on personal guarantors, directly. This decision pertained to the constitutionality of an executive notification[31] enforcing Part III of the IBC.

The provision's utilisation to enforce Part III was claimed as arbitrarily targeting a sub-set in the larger class of guarantors.[32] The court rejected the argument. The court relied upon the amendments of 2018 in justifying the stratification of treatment towards different individuals under the IBC.[33] Those had amended Section 2(e) by bringing three sub-divisions in the category of individuals.[34] This included recognizing personal guarantors as one unto itself.

The amendments had additionally distinguished corporate from personal guarantors in the new text of Section 60.[35] To discern the cumulative implication of it all, the court first notes that the aim of the provision is a merger. It reads the initial phrasing of its text to firmly state that the provision only kicks in when a CIRP or a corporate liquidation proceeding ('CLP') is underway. Viewed with its new sub-section (2), two elementary components in its remaining text appeared. *Firstly*, Section 60 mentioned three kinds of proceedings: 'insolvency, bankruptcy and liquidation'. *Secondly*, it mentioned two legal personalities: 'corporate/personal'. Notably, individuals are incapable of liquidation, and this compelled the court to break down the text's language for a more sensible implication.[36] Accordingly, it applied a 'distributive interpretation' to avoid an absurd inference.[37] Section 60 was, thus, held to be merging a CIRP or corporate liquidation process ('CLP') with any of the three kinds of proceedings faced by the guarantor, only if that guarantor was a company. On the other hand,

[31] Ministry of Corporate Affairs, SO 4126(E) dated 15 November 2019 (w.e.f. 1 December 2019).
[32] *Lalit* (n 5) paras 11-11.2.
[33] ibid para 110.
[34] ibid para 95.
[35] ibid paras 96, 105.
[36] ibid para 101.
[37] ibid paras 100, 101.

the CIRP or CLP stood merged only with bankruptcy or insolvency proceedings of the guarantor, if that guarantor was an individual.[38] This may be termed as the 'distinct identity' argument, which focuses on the difference between individual and corporate personalities for interpreting a provision.

From this exercise, the court concluded that the IBC had specifically noted the existence of individual guarantors.[39] This was all the more evident to it from the express reference to personal guarantors in the IBC in its Sections 5(22) and 179.[40] The former defines 'personal guarantors', while the latter acknowledges the existence of 'individual debtors'. All of this suggested the futility of the argument of any arbitrary treatment towards individual guarantors.[41]

The proffered reason for personal guarantors as being an important focal point for the IBC was their indispensable role in a company's financial operations.[42] It simultaneously clarified that the foreign liabilities of such guarantors are still not covered by provisions on the CIRP.[43] To conclude, it traced the outlines of *SBI* as squarely aligning with those of a precedent[44] on surety's obligations under the law of contracts.[45] It held that an approval of a resolution plan selectively discharges the liability of the corporate debtor and not of the guarantors.[46] Contract

[38] ibid paras 101, 108-110.
[39] ibid para 104.
[40] ibid paras 105, 110, 114; Section 173 of the IBC lays down that the adjudicating authority may be the Debt Recovery Tribunal, as far as insolvency proceedings against individuals are concerned.
[41] ibid paras 94, 103, 126.
[42] ibid para 104; *see* Insolvency and Bankruptcy Board of India, *Report of the Working Group on Individual Insolvency (Regarding strategy and approach for implementation of the provisions of the Insolvency & Bankruptcy Code, 2016 to deal with the insolvency of Guarantors to Corporate Debtors and Individuals having business)*, para I.A.2 (August 2017) <https://ibbi.gov.in/uploads/resources/Final-Report_of_WG_on_Indiv_Insol-Aug_2017.pdf> accessed 11 June 2022.
[43] *Lalit* (n 5) paras 115, 118, 122.
[44] *Maharashtra SEB* v *Official Liquidator* (1982) 3 SCC 358.
[45] *Lalit* (n 5) paras 120-122.
[46] ibid para 125.

law apart, the underlying premise from the decision's text also seems to be the IBC's express concern being the CD, and not its management.[47]

The court then gave voice to a concept referred to as the 'clean slate theory'.[48] This theory holds that Section 31 extinguishes all the financial liabilities of the CD brought forth as part of the CIRP.[49] Note that Section 31 mandates that there be a schematic representation of how the insolvency resolution should take place. This blueprint is the 'resolution plan', and is the penultimate step in resolving the debtor's insolvency. *Lalit* holds that it does not extend the same beneficence to any of the debtor company's personnel.[50] The suggested reason is the specificity of Section 31's explicit references to the CD and not its management.[51] In parallel, the obligation to comply with the approved plan exists equally on the personnel-guarantors as it does on the company. The obligation's extension was suggested because of the personnel's corporate affiliation and its utility in aiding the CIRP.[52]

The implication is oblique but is nevertheless important for guarantors to a CD and their exposure to Section 14. The decision is suggesting a misapplication of Section 14 due to a perceived divorce between the two.

3. Anjali Rathi

Condensed to its essentials, this case dealt with a draft resolution plan. This unapproved plan suggested the discharge of liabilities by attaching properties of the CD and its promoters. The decision, then, revolved around two issues. *Firstly*, the court had to determine whether it could

[47] *See* ibid paras 62, 123.
[48] Satish Kumar Gupta and Ishana Tripathi, 'Treatment of Disputed Claims in Corporate Insolvency: Evolving Jurisprudence' (2021) JGILS Working Paper No. 4/2021 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3910991 > accessed 8 June 2022.
[49] ibid; *Lalit* (n 5) paras 118, 122; *SBI* (n 4) para 25; *Essar Steel India Ltd Committee of Creditors* v *Satish Kumar Gupta* (2020) 8 SCC 531, paras 105-107 ('*Essar Steel*').
[50] *Lalit* (n 5) paras 121-122.
[51] ibid.
[52] ibid paras 118, 120.

affect a specification in the resolution plan before it was approved under Section 31(1), IBC. *Secondly*, it had to consider whether Section 14 would play a part in determining the first issue.

Pertinent to the present paper are its portions which deal with the second issue. The court states that the execution of the draft plan is barred under a moratorium.[53] While this was not elaborated upon, unarticulated premises are arguably fathomable. Proposedly, the court is aware that execution of the plan may result in legal obligations, which could be litigated through proceedings in civil suits or under the IBC itself.[54] Else, it is suggesting that execution of a draft plan is likely to impact the CD's assets directly, and is hence barred.

Crucially, the promoters had attempted to rely on the moratorium and claim the protection available to the CD. This plea was rejected.[55] Section 14 IBC was stated to be exclusively pertaining to a CD.[56] The reasoning cited was a very reticent dependence on its previous decision in *P. Mohanraj* v *Shah Bros. Ispat (P) Ltd*[57] ('*Mohanraj*').[58]

In *Mohanraj*, the court primarily dealt with applying moratorium to criminal proceedings against the CD under the Negotiable Instruments Act, 1888 ('NIA'). The core of Section 14, IBC was held to be pausing any legal proceeding or implication aimed at recovering debt(s) from the CD.[59] It laid down that the criminal proceedings under Sections 138/141, NIA were effectively procedures to recover 'debts', even if they are a step-in probing criminal liability.[60] It found the text of Section 14 as singularly treating the CD as its legislative subject.[61]

[53] ibid para 16.
[54] Section 74 of the IBC allows creditors to pursue legal actions for violation of a resolution plan. There exists no palpable bar in its text for using the same for unapproved plans.
[55] ibid para 18.
[56] ibid paras 16-18.
[57] *P Mohanraj* v *Shah Bros. Ispat (P) Ltd* (2021) 6 SCC 258.
[58] *Anjali Rathi* (n 6) para 17.
[59] *Mohanraj* (n 57) para 18.
[60] ibid paras 19, 31.
[61] ibid paras 30-32, 101-102.

Mohanraj built another argument on a comparison of moratoriums under Parts II and III, IBC. It noted that Section 14(1)(d) conspicuously fails to secure even a passing reference in Sections 81, 85, 96 and 101 of the IBC.[62] This set of provisions is the operative setup for moratoriums when the subject of insolvency is an individual.[63] This was, thus, sufficient for the decision to consolidate its 'distinct identity' argument otherwise put forth by *Lalit*, for reading Section 60: Section 14 was seen to be drawing a wedge between corporate and individual guarantors/debtors.[64] Even the status of being the CD's personnel did not dissolve this distinction.[65]

Anjali Rathi borrows and cites these observations as its reasoning.[66] Accordingly, the promoters were held as exposed to 'remedies which are available in law' in spite of a moratorium in place.[67] While the nature of 'remedies' remains unspecified in the judgment, there are the two unspoken implications of this decision. *Firstly*, a reconciliation with *Embassy Property Developments (P) Ltd* v *State of Karnataka*[68] ('*Embassy*') compels an inference that the remedies must be emanating out of public law.[69] *Secondly*, a resolution plan and the NCLT are authorised to touch the personnel-guarantor's assets, but a moratorium is incapable of protecting those.

Succinctly put, the implications of *Anjali Rathi* reinforce the decisions in *SBI* and *Lalit*. *SBI* approved a non-IBC, but nevertheless, a public law remedy against the personal guarantors.

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[62] ibid para 35.3.
[63] Admittedly, this argument has force. Section 60 is a grey area similar to Section 14, insofar as its segregated applicability to Parts II and III of the IBC is unspecified. In what may be deemed as a hint towards solving this problem, Section 179 invites its application to (insolvent) personal guarantors under Part III. Hence, it may be argued that the code has specified the application of such ambiguous general parts whenever it has intended to. No such explicit invitation exists for Section 14 in Part III.
[64] *Mohanraj* (n 57) paras 37, 101-102.
[65] ibid paras 46, 101-102.
[66] *Anjali Rathi* (n 6) paras 17-18.
[67] ibid para 19; It applies the same reasoning to Section 31(1), but that was not an issue before the court.
[68] *Embassy Property Developments (P) Ltd* v *State of Karnataka* (2020) 13 SCC 308, paras 29, 37.
[69] The decision clarified that the overriding powers under Section 238, IBC are limited by lack of jurisdiction in matters unrelated to CIRP and that may possibly fall within the domain of public law. Hence, disputes falling within a domain of law that has a statutory remedy available must take a recourse to the same.

Lalit reiterated the exclusion of guarantors' 'parallel proceedings' from Section 14. *Anjali Rathi* approves of, and expands, both. The prior two decisions base their reasoning in the legal distinction between the identities of a CD and its personnel. *Anjali Rathi* legitimises a permissible breakdown of this distinction if the CIRP demands so.

B. Reifying the position generated by the 'triumvirate'

Demonstrably, the three decisions put forth the prevailing legal position on CD's personnel-guarantors, and their exposure to CIRP. Summarily put, a moratorium, under Section 14, does not extend to personal guarantors of the CDs. All public law remedies as against the personal guarantors remain intact and independently pursuable. Surety-law being one such remedy,[70] it cannot be subsumed within Section 14's ambit.

The only legal mode through which a pause like the one under Section 14 may apply to legal concerns of personal guarantors is when they are the subjects of an insolvency proceeding. On a whole, the position gleaned thus far preserves two dichotomies. *Firstly*, a mutual exclusivity is preserved between the distinct legal identities of a CD and its personnel. *Secondly*, this view acknowledges a difference between Part II and III of the code.

At the same time, the first distinction may be legitimately evaporated by a resolution plan for a CD. This would be valid given it may help secure finances for an effective CIRP. Contrarily, that distinction remains intact in the face of a moratorium under Section 14. Hence, the position is counterintuitive. On the one hand, the personal assets of the surety-giving personnel of the CD are suggested of possible use in a CIRP. Contrarily, the lack of a moratorium on those their assets is not taken to be harmful for the CIRP.

[70] *See* Part II.B.

III. THE BETTER FOCAL POINT: THE 'OTHER' VIEWS

Decisions other than those composing the triumvirate varied in their findings. But the triumvirate's specific concern of 'personnel-guarantors of a CD' was not necessarily the judicial subject in these. Yet, they do carry weight for the subject of this paper. The more central issue of scrutiny was the moratorium's interaction with the proceedings under the SARFAESI or its mostly cognate[71] Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ('RDDBFI') Acts.

To start with, the position on moratorium *vis-à-vis* proceedings SARFAESI was held to be a straightforward application of Section 14 read with Section 238[72] of the IBC. This is borne out by decisions of different NCLTs dealing with SARFAESI proceedings against insolvent CDs.[73]

However, it was the NCLAT that decided this conflict with regards to the guarantors of insolvent CDs.[74] It refused to extend Section 14 to the personal properties of guarantor-personnel in *Alpha & Omega Diagnostics (India) Ltd* v *Asset Reconstruction Company of India Ltd*[75] ('*Alpha*'). Therein, the guarantors were promoters of the CD. They were proceeded against under the SARFAESI Act, which meant an attempted possession of their property by the concerned bank. They sought a moratorium against the move. Previously, the NCLT had found the key to solving this riddle to be residing in Section 14(1)(c).[76] The text of Clause (c) does apply the moratorium against the recovery of any 'security interest' held by a CD.

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[71] Aparna Ravi, 'Indian Insolvency Regime in Practice: An Analysis of Insolvency and Debt Recovery Proceedings' (2019) 50(1) Economic and Political Weekly 46, 47-48, 50-51 <https://www.jstor.org/stable/pdf/44002991.pdf?refreqid=excelsior%3A8240c8be822224dc648ead9348150d00&ab_segments=&origin=&acceptTC=1 > accessed 9 June 2022.

[72] This provision enables the IBC to override a conflicting provision of another statute.

[73] *Somnath Textile Private Limited* v *State Bank of India* (2017) SCC OnLine NCLT 7562; *Gaytech Engineering Private Limited* v *Indian Bank* (2017) SCC OnLine NCLT 6759. This position has seen a very recent affirmation in *Indian Overseas Bank* v *RCM Infrastructure Ltd* (2022) SCC OnLine SC 634.

[74] *Alpha and Omega Diagnostics (India)Ltd* v *Asset Reconstruction Company of India*, (2017) SCC OnLine NCLAT 394.

[75] ibid paras 5-7.

[76] *Alpha and Omega Diagnostics (India)Ltd* v *Asset Reconstruction Company of India* (2017) SCC OnLine NCLT 6759, paras 6-8; Approved of in *Alpha* (n 74).

However, the text's juxtaposition of 'its' with 'corporate debtor' denoted to the court an acknowledgment of distinct identities between the CD and its personnel.[77] It also interpreted Section 10(3)[78] to state that the when the insolvent borrower is a CD, the implications of a moratorium should be restricted to assets singularly cited in its books of account.[79] The NCLAT chose not to deviate from the NCLT's reasoning.[80] The tribunal preserved its position in subsequent decisions dealing with similar facts.[81]

The first contrary decision to the 'distinct identity' argument is submitted to be Allahabad High Court's judgment in *Sanjeev Shriya* v *SBI*[82] ('*Sanjeev Shriya*'). The lender bank was given a green signal to pursue the concerned guarantors under Section 19(3) of the RDDBFI. The court stated that the scheme of the RDDBFI suggests the DRT is not a civil court.[83] This led to it holding DRT's jurisdiction as trumped by that of the NCLT due to Section 14, IBC.[84] It perceived the cause to be an overlap of proceedings as against the "*same cause of action*" before the DRT and the NCLT.[85]

Not yet notified at the time of the decision, the court had further placed reliance on Section 60, IBC. The provision was taken to denote a complete amalgamation the CIRP with proceedings of personnel-guarantors.[86] However, the line of reasoning carrying the most analytical weight is the court's 'crystallisation of liability' approach. It stated that a complainant under RDDBFI cannot claim violation of a guarantee, until, the debt is not defaulted upon by the principal

[77] *Alpha NCLT* (n 76) paras 7-8.
[78] This provision mandates that if the resolution applicant is the CD itself, it has to share the relevant data in its books of account.
[79] *Alpha NCLT* (n 76) para 8.
[80] ibid paras 5-6.
[81] *Schweitzer Systemtek India Pvt Ltd* v *Phoenix ARC Pvt Ltd* (2017) SCC OnLine NCLAT 235; *Suresh Chand Garg* v *Aditya Birla Finance Ltd* (2018) SCC OnLine NCLAT 332.
[82] *Sanjeev Shriya v SBI* (2017) SCC OnLine All 2717; Overruled in *SBI* (n 4).
[83] *Sanjeev Shriya* (n 82) paras 7, 25, 31.
[84] ibid paras 23-24, 31.
[85] ibid para 23.
[86] ibid paras 21, 24.

borrower.[87] That failure, in turn, cannot be said to be complete unless the CIRP culminates in non-resolution of the debt.[88] Hence, the proceedings challenging a failed invocation of guarantee was said to be cumulatively split in two stages: i) crystallisation of the borrower's liability, which leads to permissible circumstances for ii) the invocation of the guarantee. In a manner, moratorium and CIRP were suggested as devices enabling the principal debtor (the CD) to reverse its default of the principal debt, thereby giving the surety (personnel-guaranator) some breathing space.

The Bombay High Court in *Sicom Investments and Finance Limited* v *Rajesh Kumar Drolia*[89] ('*Sicom*') disagreed with the Allahabad High Court. It negated the 'crystallisation of liability' view with a counter of its own: the 'duality of implications' argument. It found the latter's reliance on Section 60 as wholly misplaced.[90] It stated that merging two proceedings pertaining to different legislative concerns is not the provision's permissible scope of operation.[91] The IBC was held as a medium to restore the CD's solvency, hinting that the resolution of the creditor's liabilities are ancillary.[92] On the other hand, the RDDBFI was stated to be a mechanism for tackling a different legal implication pertaining to the CD: recovery of debts owed or generated by it.[93] Furthermore, the RDDBFI nowhere declared its proceedings to be distinct from a civil suit for recovering money.[94] The Act was stated to be only a different version of suits, with a distinct forum, otherwise governed by the CPC for its operation.[95]

[87] ibid para 33.
[88] ibid paras 30, 33.
[89] *Sicom Investments and Finance Limited* v *Rajesh Kumar Drolia* (2017) SCC OnLine Bom 9725; Approved of in *SBI* v *V. Ramakrishnan* (2018) 17 SCC 394.
[90] *Sicom* (n 89) paras 57-62.
[91] ibid para 61.
[92] ibid.
[93] ibid.
[94] ibid para 15.
[95] ibid.

This was followed by the Supreme Court's decision in *Innoventive Industries Limited* v *ICICI Bank*[96] ('*Innoventive*'). This decision dealt the 'duality of implications' with respect to the IBC's conflicts with other, and similar, state-level statutes. While the decision is with respect to Section 238, it will be shown to impact the interpretation of Section 14.

Innoventive held that the non-obstante clause in the provision operates strictly in favour of the IBC in case of clearly identifiable conflicts.[97] Illustratively, if the conflicting state-statute also possesses moratorium provisions, the domain of operations would identifiably clash so as to halt the other statute.[98] The court further stated that this override does not occur if the perception of 'conflict' is either ambiguous or non-existent ('harmony exception').[99] That is, Section 238 was non-operative if both the statutes can be given a harmonised view. That would occur if the foreign statute could be established as satisfying a single pre-condition: it may pertain to the same transaction/ party before the IBC but for a separate legal implication.[100] This conditional dominance of the IBC through Section 238 was imported to its conflicts with later Parliamentary enactments.[101]

The decision was readily used to identify when a moratorium's effect could be recognised. Illustratively, when recoveries under SARFAESI were attempted against a CD, Section 238, IBC was said to be extending the moratorium it enjoyed to such recoveries.[102] Further read in the light of Section 63,[103] IBC and *Alpha*, Section 238 of the code was viewed as having a

[96] *Innoventive Industries Limited* v *ICICI Bank* (2018) 1 SCC 407.
[97] ibid paras 51.6-51.8.
[98] ibid para 60.
[99] ibid para 51.8.
[100] ibid.
[101] *Pioneer Urban Land and Infrastructure Ltd* v *Union of India* (2019) 8 SCC 416, para 24; *See* Sara Jain, 'Analysing the Overriding Effect of the Insolvency and Bankruptcy Code 2016' (2020) 13(1) NUJS Law Review 39, 44-60 <http://nujslawreview.org/2020/05/26/analysing-the-overriding-effect-of-the-insolvency-and-bankruptcy-code-2016/> accessed 14 June 2022.
[102] *IDBI Bank Ltd* v *BCC Estate Pvt Ltd* (2017) SCC OnLine NCLT 11324; *Sundaram BNP Paribas Home Finance Limited* v *MPL Motors Pvt Ltd* (2020) SCC OnLine NCLT 1197.
[103] "No civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any matter on which National Company Law Tribunal or the National Company Law Appellate Tribunal has jurisdiction under this Code".

cumulative implication. Notably, the former provision bars other civil courts to adjudicate claims already before the courts under the IBC. *Alpha*, as discussed previously, imparts an expansive understanding to the CD's assets, and declares that even its security interests are protected by the moratorium. Read with Section 238, the collective impact was taken to mean that any proceeding, which may diminish the CD's assets by extracting value out of them, are barred by the moratorium.[104] Hence, the applicability of Section 14 was expanded by *Innoventive*,[105] requiring that a proceeding under a foreign law merely carry the possibility of diminishing the value of CD's 'assets'.

Innoventive was also used to nullify an argument often used by creditors seeking the refuge of SARFAESI. Namely, the CIRP was a tactical tool adopted by CDs to invoke moratorium and stall pre-existing SARFAESI proceedings.[106] The judiciary, however, found the legislative intent in preventing harm to the CD's assets and the objectives for overriding foreign statutes, as spelled out in *Innoventive*. It reasoned if this were not to be the intention, there would have been an obligation on the resolution applicant to disclose information about pending SARFAESI or any such proceedings, prior to the insolvency application.[107] More significantly, it noted that any entities facing such proceedings under a foreign law were not disqualified to be the CDs by the otherwise verbose Section 11, IBC.[108] The reasoning, by citing *Innoventive* throughout, seems to suggest that the purposes of Section 238 and the above-cited features of

[104] *Anil Goel* v *Bank of Baroda* (2017) SCC OnLine NCLT 18469.
[105] *CIT* v *Monnet Ispat & Energy Ltd* (2017) SCC OnLine Del 12759, para 2; Approved of in *CIT* v *Monnet Ispat & Energy Ltd* (2018) 18 SCC 786.
[106] *Unigreen Global Private Limited* v *Punjab National Bank*, Company Appeal (AT) (Insolvency) No. 81 of 2017, paras 20, 24-27, 39); This decision was most recently followed in *JKS the Banyaan Private Limited* v *Bank of Baroda* (2021) SCC OnLine NCLAT 391.
[107] *Unigreen Global* (n 106) para 15; *See* Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, form 6.
[108] *Unigreen Global* (n 106) paras 21-23, 30, 43, 44; Section 11 is devoted to CDs. It lists disqualifications that bar them from initiating insolvency resolution against themselves. If the CD is a party to any of the six proceedings mentioned therein, the bar shall apply.

the IBC are the same. Namely, both definitively indicate an over-cautious approach of the legislature towards the CD's assets.

The text of these and similar decisions[109] show *Innoventive* compelling an easy displacement of a conflicting statute. A notable deviation occurs in *Small Industries Development Bank of India (SIDBI)* v *Mansa Print & Publishers Limited*[110] ('*Mansa*'). Effectively reiterating *SICOM*, it was stated that the IBC was only concerned with maximising the value of debtor's assets to make it solvent as opposed to making recoveries.[111] Whereas, the RDDBFI act dealt with ascertaining and addressing the debtor's liability for recovery purposes.[112] The respective proceedings were viewed as mutually exclusive and, thus, capable of co-existence.[113]

The most pertinent development with regards to personnel-guarantors in this post-*Innoventive* atmosphere unfolded before the Calcutta High Court. A novel version of the 'distinct-identity argument' was brought forth notably in *Ayan Mallick* v *SBI*[114] ('*Ayan*') which dealt with a clash between the law on wilful default and IBC. A wilful default is a deliberate failure in the repaying a loan and/or not executing a security given for that loan.[115] The concerned bank conducts an investigation to probe a failing borrower as a wilful defaulter.[116] The governing law for the same is found in the regulatory regime of the RBI.[117] The objective is instant dissemination of bad credit information throughout the banking system and aiding recovery under laws like the SARFAESI act.[118] *Ayan* was faced with a scenario of the bank's

[109] ibid para 26; *Vaman Fabrics Pvt Ltd* v *Punjab National Bank* (2018) SCC OnLine NCLT 29240, para 18.
[110] *Small Industries Development Bank of India (SIDBI)* v *Mansa Print & Publishers Ltd* (2019) SCC OnLine NCLT 4788.
[111] ibid paras 44, 46.
[112] ibid.
[113] ibid paras 44, 46-47.
[114] *Ayan Mallick* v *SBI* (2021) SCC OnLine Cal 463.
[115] *SBI* v *Jah Developers (P) Ltd* (2019) 6 SCC 787, para 24.
[116] ibid para 8.
[117] ibid paras 2-5; Reserve Bank of India, 'Master Circular on Wilful Defaulters' (July 2014) <https://www.rbi.org.in/commonperson/English/Scripts/Notification.aspx?Id=1458#:~:text=25%20lakhs%20and%20above%20by,details%20of%20the%20wilful%20defaulters.> accessed 1 December, 2023.
[118] ibid para 9; PIB Delhi, 'Curbing mechanism for wilful defaults' (July 2019) <https://pib.gov.in/PressReleasePage.aspx?PRID=1579959> accessed 10 June 2022; Albeit, wilful default

investigation under wilful default, during a moratorium. The court applied Section 14, IBC to the CD and not to its (ex-)management.[119] It premised its distinct-identity view in the implication of Section 17(1) of the IBC.[120] It was viewed as drawing a wedge between the CD and its (ex)directors specifically for the duration of the CIRP.[121] Collectively viewed with Sections 17, 18, 20 and 23,[122] the IBC was thus seen as completely cutting any umbilical cord between the directors and the company upon the initiation of a CIRP.[123] Logically extended, this was taken to imply a hard stop on extending the moratorium to the cut-off (ex)directors.[124]

The next significant decision is submitted to be *Nitin Chandrakant Naik* v *Sandhiya Industries LLP*[125] ('*Chandrakant*'). It had the benefit of *SBI*, *Lalit* and *Innoventive*. It precedes *Anjali Rathi* but similarly dealt with a resolution plan with the guarantors' assets factored in. Except, the plan was approved, and was the cause of dispute for the guarantors. No proceedings under the ICA, the SARFAESI or the RDDBFI Acts had been initiated against them. Recovery through a resolution plan was contended to be short-circuiting the legal procedure under the said statutes.[126] The decision accepted the contention that recovery of a surety-sum ought to be pursued separately due to *SBI*.[127] However, it objected to the inclusion of the guarantors' assets

proceedings are very preliminary in nature and do not compare with the much graver consequences of the SARFAESI act. *See Kejriwal Mining Pvt Ltd* v *Allahabad Bank* (2020) SCC OnLine Cal 1050, para 63.

[119] *Ayan* (n 114) paras 22, 26-27.

[120] ibid paras 23-25; Summarily put, Section 17(1), IBC cuts the prior management off of the CD during the resolution process. It further vests all powers of management in the resolution professional for the pendency of the CIRP.

[121] *Ayan* (n 114) paras 23-25.

[122] Sections 18, 20 and 23, akin to Section 17, deal with the intervening period between the appointment and discharge of an interim resolution professional. Section 18 spells out the professional's duties in the same. Section 20 obligates the professional to preserve and run the CD as a going concern to the best of her abilities. Section 23 casts an obligation on her to engineer a roadmap for the CD's insolvency resolution. Collectively, none speak of the CD's (ex-)personnel and singularly bestow the said professional with all the managerial powers.

[123] *Ayan* (n 114) para 24.

[124] ibid para 25; Albeit, a coordinate bench of the Calcutta High Court has later expressly disagreed with *Ayan*. It held wilful default proceedings as completely different from CIRP for all purposes. However, this was in the context of a moratorium under Part III, IBC. *See Adarsh Jhunjhunjwala* v *State Bank of India* (2021) SCC OnLine Cal 3351.

[125] *Nitin Chandrakant Naik* v *Sandhiya Industries LLP*, Company Appeal (AT) (Insolvency) No. 257 of 2020.

[126] ibid paras 17-18.

[127] ibid para 17.

in the plan.[128] The reason cited was that the creditors/lenders may otherwise not be able to effectively pursue their remedies under the SARFAESI and/or ICA.[129] It further justified its conclusion by way of the distinct-identities argument. According to the court, the pre-plan collation of data[130] and parameters for formulating the specifics of the plan[131] suggest the IBC's singular concern with the CD's assets.[132] It seemed to have perceived no conflict of statutes in such a case. In an important observation, it remarked that an enforced Part III, IBC would have made such a resolution plan even more unjustifiable.[133] It was stated to be the only site where the IBC envisages an inclusion of the guarantor's properties in affecting insolvency resolution.[134] Unfortunately, both the decision and its reasons seem to be unjustifiably disregarded in *Anjali Rathi*. However, it is submitted that *Anjali Rathi's* treatment of the personnel-guarantor's assets as amalgamable with those of the CD's is more logical in light of certain regulations.[135]

Hence, the position with regards to personal guarantors to CDs roughly coincides with the one discussed in the preceding part of the paper. CDs as borrowers are more or less exempted from parallel proceedings. Guarantors to insolvent CDs do not enjoy the same wide berth, mostly due to the distinct-identities view. However, the arguments and analyses were, cumulatively, much more wide-ranging than the ones advanced by the triumvirate. It is in this combined

[128] ibid paras 17, 23.
[129] ibid para 23.
[130] *See* the Insolvency and Bankruptcy Code, 2016, s 18(1).
[131] *See* the Insolvency Resolution Process for Corporate Persons Regulation, 2016, regs 36(2)(f), 37. Regulation 36(2)(f) of the regulations provides that the Information Memorandum should give details of guarantees that have been shown concerning the debts of the Corporate Debtor. This is only if the Guarantor is a party related to the CD. Thus, the guarantor's property is not envisaged to be considered as the property of Corporate Debtor, for which Section 36(2) (a) is provided. The decision in its para 13 inexplicably states that this does not induce a conceptual merger of the CD's and the personnel-guarantor's assets.
[132] *Chandrakant* (n 125) paras 13, 15.
[133] ibid para 20.
[134] ibid.
[135] *See* The Insolvency Resolution Process for Corporate Persons Regulation, 2016, reg 36(2)(f); This regulation requires that the resolution professional disclose to the court any information about 'related' guarantors of the CD.

context within which the moratorium's application to personnel-guarantors may be surgically scrutinised.

IV. TACKLING AN UNWANTED ABERRATION AND AN INJUSTICE

A. Territorially aggressive for a reason: The moratorium applies

1. Identifying the outer bounds of a moratorium

To check the tenability of Section 14(3)(b) and the triumvirate's position, the general leanings in the application of Section 14 have to be looked at. Proposedly, the 'how' and the 'when' of the moratorium's application seems to be carrying the answer to the query: what are the circumstances that make way for its seamless application?

As necessary preface, the very essentials from Section 14's text ought to be considered. The ambit of the provision is supposedly wide, as highlighted by sub-section (1)(a) itself. The 'or' intervening between 'suits' and 'proceedings' suggests the tone to be disjunctive.[136] Combined with the wide protection given to 'any' of the CD's assets or legal interest or beneficial interest in the following clause (b) leads to the formation of a force field.[137] This field guards the CD's assets from any pecuniary assaults, and, hence, ensure its hassle-free resuscitation.[138] Preservation apart, a moratorium also ensures that finances can be received by the debtor during CIRP and that they do not flow elsewhere in the scattered fulfilment of 'foreign' liabilities.[139] Such an interpretation of the moratorium explains why financial creditors are strictly obliged to recover their dues only by way of the insolvency proceedings.[140] Even with the most restrictive view advanced of the provision, the only evident restriction is the absence of Section

[136] *Mohanraj* (n 57) para 19.
[137] ibid paras 13, 32.
[138] ibid
[139] *Bank of India Through the Assistant General Manager* v *Bhuban Madan* (2021) SCC OnLine NCLAT 189, para 13.
[140] *Indian Overseas Bank* v. *Mr. Dinkar T. Venkatsubramaniam* (2017) SCC OnLine NCLAT 608.

33(5)'s[141] phraseology in Section 14(1)(a).[142] That is, the foreign proceedings/suits initiated 'by' a CD may elude the provision's application.[143] Howsoever probe-worthy it may seem, the proposition is beyond the enterprise of the paper.

The provision's inclination to halt proceedings against a CD are clear. However, its operational checkpoints do not disclose any such inclination. Arguably, they contradict the leaning found above and suggest moratorium's temporary and conditional nature. When a moratorium comes into play, all the specified legal events and implications in Section 14 come to an immediate and automatic halt.[144] In turn, it comes only as a consequence of a statutory right being exercised under Sections 7, 9 or 10.[145] Resultantly, its point of termination has to be discerned strictly within the confines of the code itself. The text of the IBC, in turn, suggests only two terminal points to an imposed moratorium.[146] The first exit is by way of an approval of a resolution plan under Section 31. The second method is its liquidation under Section 33 in the absence of an approved plan. Demonstrably, its definitive trigger and end-points makes it to be a transient phenomenon.

However, to determine which of the two leanings moratorium exhibits predominantly, it is best to judge by looking at another factor. Namely, the results of its clash with the foreign legal events pertaining to an insolvent CD.

The decisive implications were begun to be put in words by *Alchemist Asset Reconstruction Company Ltd* v *M/S. Hotel Gaudavan Pvt Ltd & Ors.*[147] ('*Alchemist*'). Any proceedings starting or continuing during the moratorium were held to be lacking legal recognition.[148]

[141] Section 33(5) imposes a bar akin to a moratorium in cases of liquidation proceedings.
[142] *Power Grid Corporation of India Ltd* v *Jyoti Structures Ltd* (2017) SCC OnLine Del 12189, para 14.
[143] ibid. The text of Section 14(1)(a) only imposes a moratorium on proceedings 'against' the CD.
[144] *Haravtar Singh Arora* v *Punjab National Bank* (2018) SCC OnLine NCLAT 543, para 4.
[145] *New Delhi Municipal Council* v *Minosha India Ltd* (2022) SCC OnLine SC 546, para 28; Sections 7, 9 and 10 each mark the initiation of insolvency proceedings, permitting different initiators.
[146] ibid.
[147] *Alchemist Asset Reconstruction Co. Ltd* v *Hotel Gaudavan (P) Ltd* (2018) 16 SCC 94.
[148] ibid paras 5, 7.

However, subsequent judicial denudations have rendered this straitjacket principle in *Alchemist* much less forceful. The subsequent positions have predominantly advocated for an 'implication based' test for checking Section 14's successful application to a foreign proceeding/implication. Crudely, but notably first put in *Power Grid Corporation of India Ltd* v *Jyoti Structures Ltd*[149] ('*Jyoti Structures*'), this test required a singular probe: whether the provision's application shall stem or boost the debtor's efforts to replenish its assets.[150]

Subsequently, the test seems to have been tacitly tweaked by the Supreme Court. A successful application of it was predicated upon checking if 'all' the stakeholders' interest of recovery would be aided.[151] An alternate view for the test was see if the moratorium's application would help maintain the CD as a going concern.[152] This was directed at preserving the debtor's consumption of legally available resources. These views lead to a significant conclusion. The decisions seem to be preoccupied with creating/preserving the liquidity of the CD's assets.[153] Accordingly, legally established debts and charges as against its assets are hit by the above-cited prompt, and strict, freezes.[154] Notably, circumstances so far discussed scenarios where a CD may be adversely affected by the absence of a moratorium. However, the same standards appear exist in cases where a CD may not be necessarily harmed by its absence, but will certainly gain from its application. Illustratively, a CD's assets may be frozen under Section 14 so that the CD can unhesitatingly exercise a lien over those.[155] *Embassy* carves out an exception

[149] *Jyoti Structures* (n 142).
[150] ibid paras 4, 8, 10.
[151] *Hirakud Industrial Works Ltd* v *Varsha Fabrics (P) Ltd* (2020) 14 SCC 198, para 6.
[152] *See* Amrit Mahal, 'Termination of contracts during the moratorium: Looking beyond the 'Going Concern' status' (2021) 7 NLS Business Law Review 153, 156-165 <https://www.nlsblr.com/_files/ugd/f10044_706e77a532984af4a29a5d760a0eea2f.pdf > accessed 11 June 2022.
[153] *See State Bank of India* v *Debashish Nanda* (2018) SCC OnLine NCLAT 1047.
[154] *MSTC Limited v Adhunik Metalliks Ltd* (2019) SCC OnLine NCLAT 146, para 24; *Canbank Factors Ltd v Dharmendra Kumar* (2019) SCC OnLine NCLAT 339, paras 3, 7.
[155] *Orbit Lifescience Private Limited v Raj Ralhan* (2020) SCC OnLine NCLAT 150, para 11.

to state that this will not extend to public law remedies like statutory renewal of property or mining leases.[156]

A similar pattern of 'strict preservation, with minimal exceptions', is found with regard to the enforcement of collateral-based obligations of the debtors. As demonstrated, a CD is mostly exempt from fulfilling its obligation under the SARFAESI or the RDDBFI proceedings.[157] However, it is not barred from invoking the same during a moratorium if the guarantees are in its favour.[158] Hence, one bar to the application of Section 14 is when a foreign proceeding/implication may benefit the CD. The other bars on Section 14 would encompass those which are readily and unequivocally inferable from the IBC's text. Illustratively, performance bank guarantees are conspicuously excluded from the definition of 'security interest'.[159] Consequently, Section 14(1)(c) is held as incapable of impeding recovery proceedings pertaining to performance bank guarantees as against the CD.[160]

The above discussion, then, shows how *Alchemist's* position has been qualified. As stated previously, it advocated a moratorium on 'any' proceedings against the CD. However, as shown above, the jurisprudence, while still interpreting Section 14's application liberally, has brought in a qualification which prevents Section 14 from applying readily. Namely, this is the implication based test. The best illustration of this transition is as follows. Arbitration proceedings started/continued during a moratorium were wholly bereft of any legal force as per the mechanical-temporal test of *Alchemist*. However, the implication-based test may conditionally permit the same. For it to be so, the said proceeding ought to be aiding the goals

[156] *Embassy Property* (n 68).
[157] *See* Part III at 16-21.
[158] *Thermax Limited* v *Viswa Infrastructures Services Private Limited* (2019) SCC OnLine NCLAT 904, paras 9, 12.
[159] The Insolvency and Bankruptcy Code, 2016, s 3(31).
[160] *GAIL (India) Limited* v *Rajeev Manaadiar* (2018) SCC OnLine NCLAT 374; *Nitin Hasmukhlal Parikh (Diamond Power Transformers Ltd)* v *Madhya Gujarat Vij Company Ltd* IA 340 of 2017 in CP(IB) No. 28 of 2017 NCLT (Ahmedabad Bench), paras 8-10.

of the CIRP.[161] If this condition is met, the foreign proceeding shall proceed to its logical and legal end.[162] Congruously, the judiciary has applied moratorium on the investigative stage of a criminal prosecution, merely because a trial may hurt the CD's assets.[163] Alternatively, the court/tribunal need not assess the probable implications itself. It can conditionally permit the proceedings, with an asterisk: the moratorium shall apply, presumably by itself, if they culminate in an unfavourable result for the CD.[164] Hence, the 'probability of negative implications' seems to be the most decisive factor for moratorium's application. At the same time, it is admitted that decisions tacitly following *Alchemist* also exist.[165]

It is proposed that the provision's interaction with certain foreign legal implications largely operates within the four corners of the position advanced above. The following table attempts a brief overview of its interactions with statutes not discussed above:

Name of the law	**Provision(s) of the law**	**Does Section 14, IBC apply to it?**	**What legal implication of the said law is supposed to be paused/pre-empted?**
The Code of Civil Procedure, 1908	Order VII	Yes[166]	Initiation of trial in a civil suit.

[161] *Jyoti Structures* (n 142) paras 14-15.
[162] ibid.
[163] *India Infoline Finance Ltd* v *The State of West Bengal* (2020) SCC OnLine Cal 2940, paras 3-5, 11.
[164] *See Ranjit Das* v *MSX Mall Pvt Ltd* (2019) SCC OnLine NCLAT 558, para 3.
[165] *Geodis Overseas Private Ltd (India)* v *Falcon Tyres Limited* (2018) SCC OnLine Mad 8139; *Chandra Prakash Jain* v *Intec Capital Ltd* (2018) SCC OnLine NCLT 21784.
[166] *Sheenlac Noroo Coatings India Private Ltd* v *TATA Steel BSL Ltd* (2019) SCC OnLine Mad 38467.

Arbitration and Conciliation Act, 1996	Sections 11(6), 23, 34	No[167]	The appointment of arbitrator(s), the right to file a counter-claim, and the right to challenge the award by arbitral award in a court of law.
	Section 37	Yes[168]	The right to appeal the decision of a court exercising its powers under Section 34.
Negotiable Instruments Act, 1881	Section 138	Yes[169]	Proceeding to prosecute the issuer of a dishonoured cheque.
Employees Provident Fund (EPF) and Miscellaneous Provisions (MP) Act, 1952	Section 11(1)(a)	No[170]	Statutory first charge on the assets of the establishment in relation to recovering dues under the 1952 Act.

[167] *Jharkhand Bijli Vitran Nigam Ltd* v *IVRCL Ltd* (2018) SCC OnLine NCLAT 891; *SSMP Industries Ltd* v *Perkan Food Processors Pvt Ltd* (2019) SCC OnLine Del 9339; Adjudication of counter-claims is not barred by the moratorium. Albeit, any recovery of property that may be found as a consequence may not be affected until the expiry of the moratorium; *Jyoti Structures* (n 142).
[168] *Alchemist* (n 147).
[169] *Mohanraj* (n 57).
[170] *Nagalingam Muthiah* v *Office of the Recovery Officer, Employee's Provident Fund Organization*, 2021 SCC OnLine NCLT 559.

Industrial Disputes Act, 1947	Section 33C	Yes[171]	Power to recover workman-dues in a manner akin to the recovery of arrears pertaining to land revenue.
Indian Telegraph Act, 1885	Section 4	Yes[172]	The currency of a prevailing telecom licence.
Securities and Exchange Board of India Act, 1992	Section 28A	Yes[173]	The recovery of amounts (in the capacity of a court of law) due by a person.
Karnataka Protection of Interest of Depositors in Financial Establishment Act, 2004	Section 7(1)	Yes[174]	The initiation of proceedings to determine assets and liabilities of the accused-financial institution.
(Indian) Aircraft Rules, 1937	Rule 30(7)	Yes[175]	The power of the Directorate General of Civil Aviation to de-register an aircraft upon a valid request.

[171] *Hirakud Industrial Works Ltd* v *Varsha Fabrics (P) Ltd* (2020) 14 SCC 198.
[172] *Edelweiss Asset Reconstruction Co. Ltd* v *Maxx Mobile Communications Ltd* (2019) SCC OnLine NCLT 2340.
[173] *Securities and Exchange Board of India* v *Kerala Housing Finance Ltd* (2020) SCC OnLine NCLT 6278; *Sobha Limited* v *Pancard Clubs Ltd* (2017) SCC OnLine NCLAT 606; *Bohar Singh Dhillon* v *Mr. Roghit Sehgal (IRP)*, CA (AT) (Insolvency) No. 65 of (2018); Awaiting final resolution in *SEBI* v *Monnet Ispat and Energy Ltd*, Civil Appeal No.4207/2020 (Supreme Court), *SEBI* v *Rohit Sehgal* Civil Appeal No(s). 5089/2019 (Supreme Court) and *SEBI* v *Raj Oil Mills Ltd* Civil Appeal No(s).2249/2021 (Supreme Court).
[174] *Dreams Infra India Pvt Ltd* v *Competent Authority Dreamz Infra India Pvt Ltd* (2021) SCC OnLine Kar 14695.
[175] *SBI* v *Jet Airways (India) Ltd* (2019) SCC OnLine NCLT 24944. The colliding substantive law relating to de-registration of aircraft is best gleaned from the decision *Awas 39423 Ireland Ltd* v *Directorate General of Civil Aviation* (2015) SCC OnLine Del 8177.

Securities Contract Regulations Rules, 1957	Rule 21(2)(b)	Either hit by Section 14 or Section 238, IBC	Power of a recognised stock exchange to delist an entity's shares on its platform.
Banking Regulation Act, 1949	Sections 35AA and 35AB	Yes[176]	Past sale of shares/equity for the purposes of restructuring the bank's holding.
Prevention of Money Laundering Act, 2002	Section 5	Disputed[177]	Provisional attachment of tainted property.
Electricity Act, 2003	Section 56	Yes[178]	The power of a licensed entity to withhold supply to a defaulting beneficiary.

[176] *Independent Power Producers Association of India* v *Union of India* (2018) SCC OnLine All 4612; The case does not apply Section 14(1)(c) only because the foreclosure had occurred before Section 14 set in.
[177] The NCLAT favours the extension of moratorium, while the Delhi High Court, NCLT, Mumbai Bench, and the Appellate Tribunal (PMLA) do not; *Directorate of Enforcement* v *Sh. Manoj Kumar Agarwal* (2021) SCC OnLine NCLAT 121; Deputy Director Directorate of Enforcement Delhi v. Axis Bank (2019) SCC OnLine Del 7854; *Andhra Bank* v *Sterling Biotech Ltd* (2019) SCC OnLine NCLT 1776; *Punjab National Bank* v *Deputy Director, Directorate of Enforcement* (2019) SCC OnLine ATPMLA 5.
[178] *ICICI Bank Ltd* v *M/s. ABG Shipyard Ltd* (2017) SCC OnLine NCLT 12031.

Maharashtra Housing and Area Development, 1976	Sections 4, 5, 37, 66 and 74	Yes[179]	The power of the Competent Authority to enter into joint development schemes of areas under its supervision.
Micro, Small, and Medium Enterprise Development Act, 2006	Section 19	Yes[180]	The provision for micro, small, and medium enterprises to file an appeal against any order, decree or award by any in institution as part of dispute resolution.
Consumer Protection Act, 1986 ('CPA')	Section 27	No[181]	The execution of decrees by the District Forum, the State Commission or the National Commission and their power of penalising non-compliances.
Merchant Shipping Act, 1958	Section 51(1)	No[182]	An *in rem* right of a mortgagee to take possession of the mortgaged ship and sell it.

[179] *Maharashtra Industrial Development Corporation* v *Santanu T Ray* (2022) SCC OnLine NCLAT 180; *Rajendra K. Bhutta* v *Maharashtra Housing and Area Development Authority* (2020) 13 SCC 208, para 28; Moratorium will only apply when the physical possession of the property is contested, and not other interests on it, which lack an immediate and tangible impact.
[180] *Lanco Infratech Limited* v *Isolloyd Engineering Technologies Ltd* (2017) SCC OnLine NCLT 12502.
[181] *Lotus Panache Welfare Association* v *M/s Granite Gate Properties Pvt Ltd* E.A. No. 25 of 2018 (NCDRC); *Emaar Mgf Land Ltd* v *Anita Jindal* (2020) SCC OnLine NCDRC 274.
[182] *Raj Shipping Agencies* v *Barge Madhwa* (2020) SCC OnLine Bom 651.

Moratorium evidently dominates most of the clashes it participates in. The relevant decisions show[183] that a disapplication of Section 14 is based in directly perceptible bars like Section 36(4)(a)(iii)[184] and not imagined restrictions.[185] That apart, judicial bars such as the one espoused by *Embassy* may stop Section 14 as well.[186]

Another takeaway is that more often than not, moratorium heavily relies on Section 238 to trump the foreign statute. Hence, *Innoventive* governs the provision's application in a manner. Consequently, it can be safely stated that Section 14 may not apply if the harmony exception deems no conflict of statutes in the first place. This occurs whilst exempting the DMA and the CPA.[187] In conclusion, there exist very few bars on a moratorium's suspension of a foreign legal event/effect.

2. Guarantors: Well within that vast expanse

With the benefit of the preceding Part's analysis, it is argued that personal guarantors to CDs do not fall in any of the largely accepted bars against the moratorium. Recovery proceedings by financial institutions are not *in rem* by nature.[188] Furthermore, it is suggested that there exists no harmony between the SARFAESI/RDDBFI Act(s) and the IBC if they pertain to guarantors of a CD. The contrary view espoused by *Mansa* and *Ayan* is wholly wrong in discounting the

[183] *Nagalingam Muthiah* (n 177).
[184] Through Section 36(4)'s text, the IBC bars recovery from certain assets during liquidation. Its clause (a)(iii) specifically bars this recovery using what is owed to the liquidating company's employees. The implication seems that they shall definitively get their share of dues during liquidation. Moratorium under Section 14 does not prevent this disbursal.
[185] This paper advances this argument disregarding the text of Section 14(3)(b). As submitted previously, the triumvirate does not concern itself with the provision. The foundational decision, *SBI*, treats it as a clarification otherwise bore out by the remainder of the text in Section 14; cf Part II.A.1 at 7.
[186] *Raj Shipping* (n 182).
[187] *Mormugao Port Trust* v *Om Prakash Kanoongo* (2018) SCC OnLine NCLT 10263; *Lotus Panache* (n 81).
[188] *M.D. Frozen Foods Exports (P) Ltd* v *Hero Fincorp Ltd* (2017) 16 SCC 741, para 31.

guarantor as a source of finances/liquidity in a CIRP.[189] Hence, the 'distinct-identities' argument as a facet of the harmony exception disregards the implication-based test.

To begin with, it is pertinent to note that the implication-based theory goes to the degree of dissolving the distinction between civil and criminal laws to protect the CD's liquidity.[190] That is, it allows the moratorium regardless of the source of damage being a criminal or a civl proceeding. Consequently, the arguments relying on Sections 63[191] and 231,[192] IBC to limit the moratorium's applicability to civil proceedings are fickle. Moratorium applies to recovery proceedings in the DRT, regardless of its nature, given it ought to be of consequence to the CD's assets.[193] The required implication may not be a legal fiction or a chose in action, but much more immediate in its consequences. That is, it arguably ought to be a more tangible interference with the enjoyment of assets, distinguishably, like a chose in possession. A mere creation of interest does not amount to an unfavourable implication.[194] Wresting of actual possession would be.[195]

A moratorium, thus, dissolves formal distinctions and comes to hold the field in case there is a real threat to the assets useful in a resolution plan. Prevailing opinion *per se* suggests that the CD's personnel play an important role in financing the company's transactions,[196] with the Reserve Bank of India promoting this notion.[197] *Anjali Rathi* does dissolve the distinct

[189] *See Anjali Rathi* (n 6); *Nitin* (n 125).
[190] *Mohanraj* (n 57); This holding of the decision is congruous with the larger shape the jurisprudence is taking as regards moratorium as discussed in this Part. Hence, *Mohanraj* is submitted to be partly sound in its decision.
[191] Section 63, IBC strips civil courts of their jurisdiction to handle anything which may pertain to an insolvency proceeding.
[192] Section 231, IBC imposes a bar similar to the one imposed by Section 63. Except, it bars the civil jurisdiction of courts to interfere any order or injunction passed during an insolvency proceeding.
[193] *See* Part III at 16-20.
[194] *Rajendra K Bhutta* v *Maharashtra Housing and Area Development Authority* (2020) 13 SCC 208.
[195] ibid.
[196] Anand Bhageria, 'Dealing with promoters' guarantees' *The Mint* (23 October 2017) <https://www.livemint.com/Opinion/qzt9gFib7Otk47pEyRKnrJ/Dealing-with-promoters-guarantees.html> accessed 11 June 2022.
[197] RBI Master Circular DOR.STR.REC.66/13.07.010/2021-22, para D.2.2.9 (9 November 2019) <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=12189&Mode=0> accessed 11 June 2022.

identities between a company's assets and those of the personnel to better affect a resolution plan. In doing so, it is recognising that the latter's assets may be of use to the CD. It is also tacitly acknowledging that the foreign recovery proceedings, pertaining to those assets, may have an impact on the resolution plan, thereby bringing a conflict of statutes to the surface. Yet, the three decisions counterintuitively refrain from preserving the personnel-guarantors under a moratorium.

The portion of *Mohanraj's* observation holding personal guarantors as severally liable is asserted to be bad in law, for the same reason. *Mohanraj* had incidentally applied moratorium on a CD facing criminal proceedings for the very reasons it is generally applied for. *Firstly*, the aim therein was to preclude any denudation of corporate assets (preservation of assets). *Secondly*, it emphatically included NIA proceedings under Section 14 to help the company evade any imposition of an interim compensation (preservation of liquidity in assets). If the assets of the company's personnel can be permissibly utilised for either reason, claiming Section 14's disapplication is self-defeating. *Anjali Rathi* is, thereby, additionally faulty insofar as it relies on these observations in *Mohanraj*.

Furthermore, the triumvirate draws a misleading dichotomy to base its conclusions on. According to *SBI* and *Lalit*, the IBC differentiates between insolvent and solvent personal guarantors, applying its resolution provisions to only the former.[198] This deceptive dichotomy is most strongly advanced by the very foundation of *Anjali Rathi* and *Lalit*: *SBI*. The decision perceives this split from within Section 60. More specifically, *Lalit* interprets *SBI* to link Section 60 with Section 179[199] and states that Section 60(4)[200] merges non-IBC proceedings of

[198] *SBI* (n 4) paras 18, 22, 26; *Lalit* (n 5) para 63.
[199] Section 60 deals with and vests the jurisdiction for CIRP to the NCLT. Whereas, Section 179 deals and vests the jurisdiction for insolvency proceedings against individuals to the DRT.
[200] "(4) The National Company Law Tribunal shall be vested with all the powers of the Debt Recovery Tribunal as contemplated under Part III of this Code for the purpose of sub-section (2)."

a guarantor only if it is a subject of insolvency.[201] However, it is argued that the IBC regime combined with an implication-based Section 14, instead, dichotomises as thus: i) solvent guarantors of CDs; and ii) insolvent guarantors of any entity. The unwitting exclusion by *Lalit* of the proposed group (i) from the ambit of CIRP negates the direction taken by the consequence-oriented approach on moratorium. Whereas, *Sanjeev Shriya* correctly notes that the provision has the larger intent of merging related proceedings pertaining to i) solvent guarantors that may have an impact on CIRP under Part II, IBC; and, separately, ii) all proceedings related to insolvent guarantors that may have an impact on IRP under Part III. This impact-based view better aligns Section 60 with a result-oriented Section 14. It is also stated that the tortuous method to justify the misperceived dichotomy does not seem to fall under the category of any of the 'readily inferable' restrictions discussed previously.

The interpretation advanced herein better aligns with an important implication flowing from the IBC's text: such personal guarantors are integral stakeholders to the CD, whose interests need to be looked after. As stated previously, all the stakeholders' interests are prime concerns for the applicability of a moratorium.[202] Stakeholders are persons interested in reviving the CD.[203] This class entails those qualifying under Sections 5(25)[204] and 29A[205] as resolution applicants, which the personnel very much are.[206] Hence, the special focus of the IBC on personal guarantors to CDs shall at least denote the special preservation of their interests. Not adopting either of the above-asserted meanings renders *Lalit's* view as wholly unjustifiable.

[201] ibid para 112.
[202] *Hirakud Industrial Works Ltd* v *Varsha Fabrics (P) Ltd* (2020) 14 SCC 198, para 6.
[203] *Innoventive* (n 96) para 33.
[204] Section 5(25) of the IBC defines the resolution applicant, subject to qualifications mentioned in the remaining text of the IBC.
[205] This provision delists certain parties from being resolution applicants.
[206] ibid.

B. Concessionary for a reason: The law on sureties favours a moratorium

A prickly contention carried from *SBI* to *Anjali Rathi* is the permissibility of simultaneous proceedings against personal guarantors to CDs based on contract law.[207] That is, the right of lender-creditors to electively pursue such guarantors emanates independently from the public law on sureties.[208]

At the very outset, *SBI* justifies this view on two of its assertions. *Firstly*, the debts are resolved as against a debtor in Part II.[209] In other words, it re-iterates the distinct identity argument.[210] *Secondly*, any attempt to view CIRP with a 'binding' resolution plan, as a 'voluntary' discharge of the guarantor's obligation of surety, was perceivably impossible.[211] Thus, the surety not acting to fulfil her obligations is a separate breach of contract, and remains unaddressed by the CIRP.[212] It is to be noted that the other two decisions only plagiarise *SBI's* reasoning on this front, and do not merit a response in this regard.

As shown previously, moratorium has been revealed to be relying heavily on Section 238 for its operation. For a successful reliance to override foreign proceedings, it only needs to circumvent *Innoventive's* harmony exception. *Gujarat Urja Vikas Nigam Limited* v *Amit Gupta*[213] states that the IBC may override rights emanating from the law of contracts through Section 238. The case adopts the implication-based test for probing the applicability of Section

[207] *SBI* (n 4) para 25; *Lalit* (n 5) paras 120-125; *Anjali Rathi* (n 6) para 18.
[208] *See* Part II.B.
[209] *SBI* (n 4) para 19.
[210] ibid para 26.1.
[211] ibid para 30.
[212] *See Essar Steel* (n 49).
[213] *Gujarat Urja Vikas Nigam Ltd* v *Amit Gupta* (2021) 7 SCC 209; While this paper is attempting to utilise this decision to argue that the implication based-test is the same for Sections 14 and 60(5), the court did not put it that way. In its para 91, the decision declares Section 60(5) as broader in scope than a moratorium. However, this concern is moot given that the sole takeaway aimed is the unwitting invitation of the implication-based test to negative contractual-implications. This is affirmed by the decision later noting the conspicuous silence of the Explanation to Section 14(1), which contains a list of exceptions to the pause induced by a moratorium. In other words, the argument sought to be put forth in by the paper is as thus: sub-section (3) apart, Section 14 nowhere exempts negative contract-law implications from its ambit.

60.[214] In the case itself, this was illustrated by merging a suit that attempted to terminate a contract with the concerned CD.[215] Given that the CD had a chance of drawing funds from the other party upon being successful, it was stated to have a shot at both replenishing its assets[216] and boosting its liquidity.[217] Existence of a probable implication as well as non-existence of a harmonised view, collectively, obliterate any independence of the law of contracts.[218] Given that moratorium also applies if the implication-based test demands it to, it is asserted that a moratorium is capable of suspending a right/proceeding under contract-law. The riddle to be solved is whether a personnel-guarantor may have implications for the CD. The answer is in the affirmative given the scope of resolution plans as the ones in *Chandrakanta* and *Anjali Rathi*.

Even otherwise, the surety-angle to stave off moratorium's effects is unconvincing. This is due to the inordinately unjust position such personal guarantors are put in due to Section 14(3)(b). It is proposed that the guarantors cannot become 'financial debtors' of the CD for a CIRP. In contract-law terms, guarantors are beneficiaries of a security interest.[219] This is because , if they pay a surety amount on the CD's behalf, they have a secured interest in the CD's compensation. Beneficiaries of a security interest cannot be admitted as 'financial debtors' as per the above-cited provision. For clarity, there is no 'debtor' in this case because no debt is advanced against the time value of money between the two.[220] Instead, guarantee is a collateral, which in turn is a security interest, and it only entitles the beneficiary/guarantor to be a 'secured

[214] ibid paras 158, 173, 176.
[215] ibid paras 158, 174, 176.
[216] ibid paras 69, 171.
[217] ibid paras 111, 165.
[218] ibid paras 69, 158, 173, 176.
[219] *See* Edward G Jennings, 'A Creditor's Rights in Securities Held by His Surety' (1938) Minnesota Law Review 316 <https://scholarship.law.umn.edu/mlr/1199> accessed 5 December 2023.
[220] Shruti Sethi, 'The Third Party Security Conundrum Under IBC: Whether 'Financial' or Just 'Secured'' (21 June 2021) *National Law School Business Law Review Blog* <https://www.nlsblr.com/post/the-third-party-security-conundrum-under-ibc-whether-financial-or-just-secured> accessed 12 June 2022.

creditor'.[221] The beneficiaries of the security interest, thus, owe this specific obligation to the security provider,[222] and cannot be termed as debtors.

This arguably leads to very amorphous circumstances. Illustratively, consider a bank being a financial creditor as against the borrowing CD, who is facing a CIRP. Further suppose that the personal assets of its guarantor-personnel are assimilated in the resolution plan. In this scenario, the same lender-creditor is arguably participating in the CIRP under a dual capacity. The assets of the personnel are equally susceptible to the mercy of the resolution plan as those of the CD. Hence, the bank is effectively acting like a secured creditor as against the guarantor-personnel. To top it all, the bank can initiate and continue proceedings outside of the IBC as against the personal guarantors this whole time. Thus, the lender is proceeding to recover the debt triply: against the CD's and their guarantors in the CIRP, and against the guarantors under laws like the SARFAESI. In lockstep, the guarantors are being acted against doubly. They will be held responsible for non-performance of the surety agreement, in case they await the outcome of the CIRP. Even in case of a partial-waiver of the debt owed by the CD using the personnel's assets in the resolution plan, the guarantor-personnel may nevertheless be saddled with paying off of the rest.

The anomalies do not end here. As regards the law of contracts on surety, there exists a right of subrogation. Simultaneously statutory and equitable in nature,[223] it entitles a guarantor discharging the borrower's liability to claim recompense from the latter.[224] Section 141, ICA provides that subrogation may be affected by the surety taking and retaining in her possession a security from the borrower. Disbursal of security by a corporate entity to its directors is barred in law, thus disadvantaging a large chunk of the umbrella category of 'personnel'.[225] In any

[221] *Phoenix ARC (P) Ltd* v *Ketulbhai Ramubhai Patel* (2021) 2 SCC 799.
[222] ibid; *Anuj Jain Interim Resolution Professional for Jaypee Infratech Ltd* v *Axis Bank Ltd* (2020) 8 SCC 401.
[223] *Morgan* v *Seymore* (1638) 1 Rep Ch 120.
[224] *Mulla: The Indian Contract Act* (Anirudh Wadhwa ed, 15th edn, 2015) 272-273 ("Mulla").
[225] Companies Act, 2013, s 185.

case, Section 141 demands that the security be real and substantial.[226] The substance in the security of a company which later turns out to be insolvent is arguably a weak collateral in law. Furthermore, it is asserted that the IBC's text does not envisage any priority for any such security owed by the CD to its personal guarantor whilst a plan is being engineered.

In any case, personal guarantors to CDs are presently prohibited from enjoying the right to subrogation, in general.[227] One reasoning given is that a CIRP is not a recovery proceeding, in which this right of a different nature can be conjoined.[228] The other view is that the permissibility of such a right, after the CIRP ends, may bear a negative implication on the freshly resuscitated CD.[229]

The ability of the surety to 'secure' her fulfilment of the guarantee is considered to be an extension of natural justice.[230] The absence of this security by a bar on subrogation makes for a highly infirm framework. This factor apart, the routes of a surety's discharge are also as good as closed as an impact of Section 14(3)(b). The most straightforward mode of discharge of a surety would be the surety's performance of the guarantee. In cases it doesn't occur, the coextensive liability of a surety has been taken to mean that she at least has to pay up the decretal amount.[231] That is, even if the borrower-CD is held as liable for violating a loan agreement, the court can ask the surety to pay the borrowed sum in its decree. Assume that the surety pays the obligated sum either by discharge of agreement or by court's order. In such a circumstance, it is very likely that this surety may not be permitted to claim a recompense from the CD. This is because surety is most likely to claim a recompense during the CIRP, with a

[226] *State of MP* v *Kaluram* (1967) 1 SCR 266, para 13.
[227] *Lalit Mishra* v *Sharon Bio Medicine Ltd* (2018) SCC OnLine NCLAT 862; *Essar Steel* (n 49) para 106.
[228] *Lalit Mishra* (n 227) paras 8-9; It was held that the guarantor cannot exercise its right of subrogation under the Contract Act as proceedings under the IBC are not recovery proceedings. The NCLAT effectively nullifies *Davinder Ahluwalia* v *Sumit Aviation*, IB No. (IB)-229 (ND)/2017 (NCLT, Delhi Bench), wherein personal guarantors were admitted as financial creditors in recognition of subrogation.
[229] *Essar Steel* (n 49) para 106.
[230] *Amrit Lal Goverdhan Lalan* v *State Bank of Travancore* (1968) 3 SCR 724, para 7; *Krishna Pillai Rajasekharan Nair* v *Padmanabha Pillai* (2004) 12 SCC 754, paras 9, 20.
[231] Mulla (n 224) 259.

moratorium acting against her.[232] To understand this, note that a lender may litigate against the surety only when the principal debtor 'defaults'.[233] However, the existence of a default[234] also amounts to permissible circumstances for the initiation of CIRP against a borrowing-CD. Hence, surety is always most likely to raise a claim against the CD when a CIRP is already underway, and a moratorium is in place. The amorphous bounds of the 'clean slate theory' is yet another source of similar injustice. The jurisprudence is silent on whether Section 31(1) also ends the CD's liability to pay a performing guarantor.

Apart from a straightforward payment by the surety, there exist two other notable routes of discharge. One requires that the primary contract between the borrower and the lender be altered without the surety's consent.[235] The other requires a voluntary contract between the lender and borrower which discharges the surety expressly or by implication.[236] *SBI* and *Lalit* rebut both, respectively, using long standing jurisprudential principles. *SBI* states that the outcome of a CIRP is a 'necessary legal occurrence' as opposed to a contractual development.[237] *Lalit* fails to find CIRP as insufficiently voluntary to attract the second route.[238] A recent proposition further shuts the door on discharge through the applicability of Section 134. This provision essentially requires that a new 'contract' between the lender and the borrower may/have an impact of discharging the surety. More recently, it has been decided

[232] Unlike the IBC, the UK has devised a judicial rule termed as 'double proofing'. It comes into play if a guarantor has indemnified a lender on the borrower's behalf to create a secured charge on the CD's assets. Moreover, the guarantor is further accorded a place in the Committee of Creditors as an additional consequence. The United States Bankruptcy Code through its section 547(b) categorises performing personnel-guarantors as creditors. It effectively affects a right to subrogation; *See In the matter of Kaupthing Singer and Friedlander Ltd*, 2011 UKSC 48; *See also* Vijay Rohan Krishna and Sambhawi Sanghamitra, 'Extinguishment of a Personal Guarantor's Right of Subrogation: A Critique' (*Indcorplaw*, 14 December 2020) <https://indiacorplaw.in/2020/12/extinguishment-of-a-personal-guarantors-right-of-subrogation-a-critique.html> accessed 12 June 2022.
[233] *Montosh Kumar Chatterjee* v *Central Calcutta Bank Ltd* (1952) SCC OnLine Cal 243, para 32.
[234] The deeper nuances for what constitutes 'default' for the IBC are better gleaned from *Swiss Ribbons (P) Ltd* v *Union of India* (2019) 4 SCC 17 and *Action Ispat & Power (P) Ltd* v *Shyam Metalics & Energy Ltd* (2021) 2 SCC 641. However, for the sake of argument, the author assumes there is a significant overlap between definitions traditionally accepted for the law of contracts and the IBC.
[235] Indian Contract Act, 1872, s 133.
[236] Indian Contract Act, 1872, s 134.
[237] *SBI* (n 4) paras 25, 32; *Bank of Bihar Ltd* v *Dr. Damodar Prasad* (1969) 1 SCR 620.
[238] *Lalit* (n 5) paras 120, 122; *Official Liquidator* (n 44).

that a resolution plan is not a contract to begin with.[239] The underlying reason being that it is not brought about by every stakeholder's consent, and is imposed with a binding force on the dissenting parties.[240]

The crystallisation of liability argument very apposite in these disproportionate circumstances. *Sanjeev Shriya* suggested that a guarantor's liability of fulfilling her obligation only comes into play when the borrower is unable to repay the debt. This inability to repay had to have the element of finality. *Sanjeev Shriya* viewed CIRP as a delay in the determination of this element. This is in fact the very essence of surety contracts: the surety's obligation ought to be substantially dependent on the principal borrower's default.[241] A co-extensive liability of the surety involves a real-time mirroring of the debtor's liability. That is, the former pauses or ends in exact synchronisation with the latter.[242] Under the IBC, only a resolution plan resolving the underlying debt brings it to a conclusive end as against the CD.[243] A surety contract does not exist if there is no debtor.[244]

This renders the holding of *SBI* as erroneous if it claims to preserve the law of contract but also refuses to extend moratorium to personnel-guarantors. Furthermore, and demonstrably, a personal guarantor may be rendered remediless, temporarily or permanently, in case of a fulfilment of guarantee. Given that the moratorium helps avoid either situation, it is best to follow *Sanjeev Shriya's* holding and to await the CIRP's outcome before a parallel proceeding ensues/continues. Moratorium in the interim avoids the problem of a guarantor compelled to

[239] *Ebix Singapore (P) Ltd* v *Educomp Solutions Ltd (CoC)* (2022) 2 SCC 401.
[240] ibid paras 115, 117.
[241] Mulla (n 224) 254.
[242] *Narayan Singh* v *Chhatar Singh* AIR (1973) Raj 347 (349); *Subramania Chettiar* v *Moniam P. Narayaswami Gounder*, AIR (1951) Mad 48.
[243] *Standard Chartered Bank* v *Satish Kumar Gupta*, Company Appeal (AT) (Ins.) No. 242 of 2019 (NCLAT), para 221.
[244] *Lakeman* v *Mountstephen* (1874) 7HL Cas 17, at 24-25.

pay without ascertaining whether she will have a right to subrogation. It may introduce a pause that could preserve the surety's modes of discharge from a guarantee.

It is conceded that the argument advanced may seem counter-intuitive to the very object of a guarantee. Namely, this is to put a lender on a steadier perch and provide her with a safe alternative in case the borrower is defaulting.[245] However, it is proposed that this is a position traditionally[246] held for circumstances where surety may claim the sum she pays on behalf of the borrower, and is shielded from suffering a damage due to the surety agreement. A guarantor of a CD should not face the same implications as envisaged by the traditional contract law.[247] Absence of security and a few closed routes of discharge demands a flexible tweak to restore some security to the personal guarantor. For instance, consider Sections 140 and 141, ICA. They bestow equal rights to both the creditor and the surety to proceed against the defaulting borrower. The implication of this has been taken to mean that 'both' are separately entitled to a temporary injunction against the borrower if either perceives a threat of the latter's asset dilution.[248] Hence, the guarantors deserved the benefit of an equivalent of a *quia timet* injunction, which the author proposes to be the moratorium.

V. CONCLUSION

The implication-based view of moratorium is a median ground between extreme view-points. The first extreme is the reasoning that personal guarantors to CDs are governed by imperviously independent laws. It argues that the independent legal regime may be upset by Section 14 only if its subject is the CD itself. Effectively, this view presupposes that the CD and its personal guarantors preserve their distinct identities permanently. It disregards that the

[245] *See Bank of Bihar* (n 237). A right of the lender to secure his repayment by either the borrower or the surety is the very object of a tripartite arrangement such as this.
[246] *See* (n 229) 253-257.
[247] *See* Swethaa Ballakrishnen, 'Enforceability of a Guarantee on the Winding up of a Guarantor-Company' (2005) 1 NALSAR Stud. L. Rev. 51 <https://nslr.in/wp-content/uploads/2019/03/NSLR-Vol-1-No-5.pdf > accessed 14 June 2022; *See also Patheja Bros Forgings & Stamping* v *ICICI Ltd* (2000) 6 SCC 545.
[248] *SBI* v *Fravina Dyes Intermediates* (1988) SCC OnLine Bom 13, para 2.

two are dissoluble into each other. The other extreme pertains to holding moratorium as having, strictly, a temporal-mechanical application. If a foreign legal proceeding/consequence occurs during the moratorium's existence, it is presumed as null. This view ignores that moratorium may protect foreign legal occurrences that may aid a CIRP.

The implication-based test gleans nuances in Section 14 to collectively avoid both these absurd positions. It explains that the purpose of suspending foreign legal consequences is to elude bad outcomes for the CIRP. The suspension of non-IBC proceedings against personal guarantors preserves their assets for discharging the liabilities of the CD. Hence, the lure of consequences compels a moratorium under Section 14 to include personnel-guarantors as its legislative subject. Consequently, if a foreign proceeding is hit by the temporal and consequence-based conditions of Section 14, it may be paused.

However, this is not the only reason why such a median view ought to be adopted. Section 14(3)(b) and the triumvirate inexplicably deviate from the judicial norm of preserving 'moratorium' as an expansive concept. Its restrictions have all been founded upon in easily identifiable restrictions in the text. Section 14(3)(b) is best understood through the triumvirate's view. The triumvirate never/could not have founded its conclusions in the provision, nor in any other identifiable bars. It instead claims that guarantors were not expressly made the subjects of a moratorium during CIRP. However, this is reading a bar by an exercise of inductive interpretation. This also defeats the expansive moratorium under Section14, which functions to aid the CIRP, which in turn, depends on the guarantors' assets. Hence, the present position violates the judicial norm doubly.

The most appealing reasoning in such exercises was that a guarantee ought to be governed by the law of contracts. It was suggested that such tripartite arrangements exist to provide security to lenders. However, therein, the concurrent remedy to proceed against a surety factors in a

recompense for the surety in the end. Apart from this security, contract law specifies multiple routes of discharge of the guarantee. The premise is the equality of the creditor and surety, *qua* the borrower. With diluted security and fewer routes of discharge for the surety, this parity takes a hit. In other words, the guarantee may end up performing the repayment without a recourse to claim it. This is precisely because a CIRP may club the assets of personnel-guarantors with those of the CD. Contract law cannot be applied differently for each of the parties involved. Instead, a moratorium on such guarantors takes them to a position of greater security, as intended by the law of contracts.

Hence, viewed from any prism, personnel-guarantors did not deserve the prevalent position of law. The present position lifts certain safeguards under Part II, IBC.