BANKING ON GUARANTEES:
THE QUANDARY OVER INVOCATION

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Introduction

Since the inception of Insolvency and Bankruptcy Code, 2016 ('**IBC**'), one of the most vexatious issues which confronted the insolvency practitioners alike, pertained to the enforceability of third party guarantees during the moratorium period of a corporate debtor in relation to which a corporate insolvency resolution process ('**CIRP**') has been initiated. This prompted the legislature to amend[1] sub-section (3) of Section 14 of the IBC, to specify that the moratorium during CIRP would not stand extended to preclude proceeding against a *surety in a contract of guarantee to a corporate debtor*[2].

Whilst, the aforesaid amendment clarified the ambiguity surrounding enforceability of third party guarantee during moratorium, the issue surrounding the invocation of bank guarantees (not being in the nature of *performance bank guarantees*) ("**Non-performance Bank Guarantees**" or "**NPBG**") continues to pose issues for the insolvency practitioners, primarily due to the fact that, legislature decided to specifically exclude performance guarantees ("**PBG**") from the ambit of definition of 'security interest' as defined under Section 3 (31) of the IBC.

The purpose of this paper is to examine and evaluate whether an NPBG, deserves a different treatment from PBG, in so far as, its invocation during moratorium period is concerned.

Judicial Pronouncements So Far

The issue of permissibility of invocation of NPBGs during moratorium probably first arose before the High Court of Gujarat[3], where a writ petition was moved by the resolution professional of a corporate debtor seeking injunction from invocation of bank guarantee issued on behalf of a corporate debtor undergoing CIRP. The Hon'ble High Court of Gujarat restrained the invocation of bank guarantee in question and observed as follows:

> "*normally the Court would decline to interfere with the invocation of the bank guarantee or the performance guarantee as it has been settled law that the Court should decline interference with the invocation of the bank guarantee except on limited grounds. However, the law declared, and observation made has reference to ordinary commercial transaction and performance guarantee. In the facts of the case, subsequent application of the Insolvency and Bankruptcy Code, 2016 will have to be considered, which provides for a separate procedure in case of such Company, which is under resolution process.*" *(emphasis supplied)*

If we turn our attention to the orders passed by various benches of the National Company Law Tribunal ("**NCLT**"), we note that in one of the first cases where the issue of invocation of NPBG was considered, the Kolkata Bench of NCLT, in the matter of *Berger Paints India Ltd. v. Precisions Engineers & Febricators Pvt. Ltd.*[4] denied the invocation of NPBG noting the following:

> "*7….Being found that the issuance of bank guarantee is subsequent to the declaration of moratorium it appears to us that no direction to be issued to the RP for re-consideration of the direction which he already given to the petitioner*." (*emphasis supplied*)

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[1] *The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018*, dated August 17, 2018. The amendment was made effective from June 6, 2018.
[2] Section 14(3)(b) of IBC.
[3] *ABG Shipyard Limited v. Government of India & Ors,* Gujarat High Court [Special Civil Application No. 17666 of 2017]; Order dated September 25, 2017. The writ petition was subsequently withdrawn.
[4] *Berger Paints India Ltd. v. Precisions Engineers & Febricators Pvt. Ltd.*, NCLT, Kolkata Bench [C.P. No. 173/KB/2017, I.A. No. 406/KB/2017]; Order dated November 30, 2017.

Interestingly, the order was premised on an erroneous assumption of the NPBG (which the order records to have been issued on March 15, 2017) was issued subsequent to the declaration of moratorium (which the order notes to be April 4, 2017), which was admittedly not the case. However, as the matter stood, the decision did not deliberate on whether such an NPBG was enforceable had it been issued prior to admission of CIRP, which coincides with the commencement of moratorium.

The issue again arose before NCLT, Ahmedabad Bench in the matter of *Mr. Nitin Hasmukhlal Parikh v. Madhya Gujarat Vij Company Limited & Ors*.[5] where encashment of *PBG* during moratorium was approved. While allowing such invocation, NCLT referred to the definition of '*security interest*' as defined under Section 3 (31) of the IBC, and observed as follows:

> "*Section 3 (31) clearly says that Performance Guarantees are not included in the Security Interest. What is covered by the order of this Authority under Section 14 (1) (c) is the Security Interest. Therefore, the moratorium order passed by this Tribunal is not applicable to the Performance Guarantees given by the Corporate Debtor…The moratorium order passed by this Tribunal applies in respect of Bank Guarantees other than Performance Guarantees furnished by the Corporate Debtor in respect of its property since it comes within the meaning of 'security interest'. Therefore, Respondent no. 1 is not entitled to invoke Bank Guarantee other than that comes within the meaning of performance guarantee, during moratorium period*." (*emphasis supplied*)

Notably, as is apparent from the aforesaid extract, the NCLT distinguished a *performance guarantee* and other forms of *bank guarantees*, by holding that NPBGs fall within the meaning of '*security interest'* and thus, deserving immunity during moratorium.

The next significant decision in this regard would be the decision of NCLT, Principal Bench in the matter of *Levcon Valves v. Energo Engineering Projects Limited*[6] which incidentally was rendered post the amendment to the IBC excluding invocation of guarantees from the purview of moratorium. In this case, the NCLT *allowed* the invocation of bank guarantees by observing as follows:

> "*9. A close examination of the aforesaid provision would make it patent that moratorium would not apply to a surety in a contract of guarantee to a Corporate Debtor. It is therefore evident that Section 14(1) of the Code, 2016 would not come in the way of the non-applicant-respondent no. 1 to encash the bank guarantee. Moreover, it is an independent agreement….."* (*emphasis supplied*)

It may be noted that, in the instant case also, it appears that the nature of guarantee proposed to be invoked was a PBG and not an NPBG one and thus, the decision does not seem to advance any case for treatment of NPBG similar to PBG.

The Principal Bench of NCLT, again in the case of *Gudearth Homes Infracon v. Veebro Technoplast*[7], allowed invocation of a bank guarantee during moratorium without seeking leave of the adjudicating authority, basis the amendment to the IBC allowing proceeding against surety during moratorium. *Unfortunately*, the order did not clarify whether the bank guarantee qualified as NPBG or a PBG.

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[5] *Mr. Nitin Hasmukhlal Parikh v. Madhya Gujarat Vij Company Limited & Ors.*, NCLT, Ahmedabad Bench [I.A. No. 340/2017 in C.P. (IB) No. 28/10/NCLT/AHM/2017]; Order dated February 9, 2018.

[6] *Levcon Valves v. Energo Engineering Projects Limited.*, NCLT, Principal Bench (CA No. 453(PB)/ 2017 in CP No. IB-160(ND)/2017); Order dated August 24, 2018

[7] *Gudearth Homes Infracon v. Veebro Technoplast* NCLT, Principal Bench (IB-159 (PB)/2017); Order dated September 6, 2018

The same bench, however, took a completely different view in the matter of *ICICI Bank Ltd. v. C & C Construction Ltd.*[8] where the invocation of bank guarantee was stayed keeping in view that moratorium period was under operation. Again, the order did not specify the nature of the bank guarantee which was stayed.

In so far as other benches are concerned, of significant interest would be the decision of NCLT, Mumbai Bench, rendered in the matter of *Kohinoor Crane Services v. Petron Engineering Construction Limited*, vide two orders dated April 26, 2018[9] and June 12, 2018[10], where it *even injuncted* invoking a PBG during moratorium stating that *alienation of any asset or recovery from any property of the corporate debtor is prohibited during moratorium and was against the provisions of the IBC and prejudice to the rights of the stakeholders*.

Notably, the aforesaid orders of NCLT was challenged before the National Company Law Appellate Tribunal ("**NCLAT**") and in the matter of *GAIL (India) Ltd. v. Rajeev Manaadiar & Ors*.[11], NCLAT set aside the aforesaid orders *allowing invocation* of the performance bank guarantee holding that,

> "*6. From sub-section (31) of Section 3, it is clear that the 'security interest' do not include the 'Performance Bank Guarantee', therefore, we hold that the 'security interest' mentioned in clause (c) of Section 14(1) do not include the 'Performance Bank Guarantee'. Thereby the 'Performance Bank Guarantee' given by the 'Corporate Debtor' in favour of the Appellant- 'GAIL (India) Ltd.' is not covered by Section 14. The Appellant- 'GAIL (India) Ltd.' is entitled to invoke its 'Performance Bank Guarantee' in full or in part*". (*emphasis supplied*)

Thus, as the law stands today, it appears that the predominant view amongst the different benches of the NCLT and NCLAT suggests no restriction on PBGs during moratorium. The same clarity, however, is missing in so far as NPBG is concerned, with NCLT Ahmedabad, in *Mr. Nitin Hasmukhlal Parikh v. Madhya Gujarat Vij Company Limited & Ors.*[12], supporting a differential treatment for NPBG.

With this background, let us now examine whether there is a justifiable reason to distinguish between a PBG and NPBG, in so far as their enforcement during moratorium is concerned, which can withstand legal scrutiny.

Distinction between 'PBG and 'NPBG' for Enforcement during Moratorium

The rationale behind distinguishing PBG and NPBG primarily comes from the treatment of *performance guarantee* in the definition of *security interest* which is extracted herein below for ease of reference:

> "*Section 3 (31) "security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment*

[8] *ICICI Bank Ltd. v. C & C Construction Ltd.*, NCLT, Principal Bench (IB-1367 (PB)/2018); Order dated April 08, 2018.
[9] *Kohinoor Crane Services v. Petron Engineering Construction Limited*, NCLT, Mumbai Bench [MA No. 384/(MB)/2018 in CP No.1374/I&BC/MNCLT/MB/MAH/2017]; Order dated April 26, 2018.
[10] *Kohinoor Crane Services v. Petron Engineering Construction Limited*, NCLT, Mumbai Bench [MA No. 521/2018 in CP No.1374/I&BC/MNCLT/MB/MAH/2017]; Order dated June 12, 2018.
[11] *GAIL (India) Ltd. v. Rajeev Manaadiar & Ors.* [Company Appeal (AT)(Insolvency) No. 319 of 2018]; Order dated June 26, 2018.
[12] *Mr. Nitin Hasmukhlal Parikh v. Madhya Gujarat Vij Company Limited & Ors.*, NCLT, Ahmedabad Bench [I.A. No. 340/2017 in C.P. (IB) No. 28/10/NCLT/AHM/2017]; Order dated February 9, 2018.

and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:

Provided that security interest shall not include a performance guarantee."[13]

(*emphasis supplied*)

As is apparent, the legislature has specifically excluded a PBG, prompting the authorities to distinguish a PBG from an NPBG. In the following paragraphs it would be our endeavour to establish that such distinction is not warranted under the provisions of the IBC.

Expressio Unius Est Exclusio Alterius

As we have noted in the preceding paragraphs, the legislature had consciously excluded PBG from the scope of '*security interest'*. Basis the same, a separate treatment for NPBG may very well be supported, if one recollects the well-known doctrine of expression '*unius est exclusio alterius*-the express prevention of the one thing implies the exclusion of another' and '*expressum facit cessare tacitum*-what is expressed makes what is silent to cease'.

However, one should also remember that whilst such maxim is a useful servant, it can turn out to be a dangerous master, if it is resorted to indiscriminately.[14] The following observation of the Supreme Court, *in Mary Angel v. State of Tamil Nadu*[15], is particularly apposite for understanding the aforesaid proposition:

"*19. Further, for the rule of interpretation on the basis of the maxim "expressio unius est exclusio alterius", it has been considered in the decision rendered by the Queen's Bench in the case of Dean v. Wiesengrund [(1955) 2 QB 120 : (1955) 2 All ER 432]. The Court considered the said maxim and held that after all it is no more than an aid to construction and has little, if any, weight where it is possible to account for the "inclusio unius" on grounds other than intention to effect the "exclusio alterius". Thereafter, the Court referred to the following passage from the case of Colquhoun v. Brooks [(1887) 19 QBD 400 : 57 LT 448] QBD at 406 wherein the Court called for its approval … The maxim "expressio unius est exclusio alterius" has been pressed upon us. I agree with what is said in the court below by Wills, J. about this maxim. It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The exclusio is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice. In my opinion, the application of the maxim here would lead to inconsistency and injustice and would make Section 14(1) of the Act of 1920 uncertain and capricious in its operation*."

(*emphasis supplied*)

Erstwhile Provision under SICA

Before we seek guidance from the provisions of IBC as to whether the legislature would have intended to exclude NPBG from the purview of *security interest*, in so far as enforcement during moratorium is concerned, let us first analyse the provisions of Section 22 of Sick Industrial Companies (Special Provisions) Act, 1985 ("**SICA**"), which may be considered as the precursor to Section 14 of IBC, to explore if the two types of guarantees can be provided differential treatment in for as their invocation during moratorium period is concerned.

[13] Part I, Section 3 (31) of *The Insolvency and Bankruptcy Code, 2016* (No. 31 of 2016)
[14] *Ramdev Food Products Private Limited v. State of Gujarat, Supreme Court* [AIR 2015 SC 1742]
[15] *Mary Angel v. State of Tamil Nadu, Supreme Court* [(1999) 5 SCC 209]

If one reads Section 22 (1) of SICA[16], one may note that in terms of the provision, where a proceeding is pending before the appropriate authority under SICA, the following were prohibited:

a) proceedings for the winding up of the industrial company, or

b) proceedings for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof, and

c) suit for the recovery of money or for the enforcement of any security against the industrial company or of *any guarantee in respect of any loans or advance granted to the industrial company.*

As is apparent, Section 22 (1) of SICA specifically prohibited enforcement of any guarantee in respect of any loans or advances granted. This provision has been interpreted by courts to distinguish the guarantees in respect of loans or advances from other guarantors, such as performance bank guarantee which are apparently not in respect of loans or advance granted to the industrial company. Reference may be drawn from the following judgements:

a) Delhi High Court in the matter of *Rashtriya Chemicals & Fertilizers Limited v. State Bank of Patiala*[17], held as follows:

> "*The guarantee in respect of outstanding sums in respect of aforesaid commercial transactions cannot, therefore, be said to be a guarantee in respect of any loan or advance extended by the plaintiff to M/s Montari Industry Limited. In my considered view, therefore, the present suit cannot be labelled as a suit for enforcement of a guarantee in respect of a loan or advance to the industrial company, but is a suit based on an independent contract between the plaintiff and defendant to which the industrial company viz. Montari Industries is not a party. The necessary corollary is that the sanction of the Board or the Appellate Authority under Section 22(1) of the SICA cannot be said to be a sine qua non for the institution of the suit*."

b) Madhya Pradesh High Court in the matter of *Allahabad Bank, Katni, Jabalpur v. M.P. Electricity Board, Rampur*[18] held that an irrevocable (bank) guarantee, furnished to secure performance of a contract by a company which is later declared as a sick company, can be encashed as its encashment is not barred by SICA.

Position under IBC

In the preceding paragraphs, we have noted how the erstwhile regime had distinguished between guarantees which were in respect of loans or advances from the bank guarantees in so far as

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[16] Section 22 of SICA: Suspension of legal proceedings, contracts, etc.—

> *(1) Where in respect of an industrial company, an inquiry under section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority.*
>
> …

[17] *Rashtriya Chemicals & Fertilizers Limited v. State Bank of Patiala*, Delhi High Court, [2008]81SCL461(Delhi).

[18] *Allahabad Bank, Katni, Jabalpur vs M.P. Electricity Board, Rampur*, Madhya Pradesh High Court [AIR 1996 MP 1].

enforcement during pendency of a reference under SICA was concerned. Whilst, one may be tempted to import such an understanding even in the IBC regime and would seek to draw support from the specific exclusion of PBG from the definition of '*security interest', in our view such a distinction is not warranted under the IBC.*

To substantiate our argument, let us first analyse the implication of a guarantee being invoked and the right of such person who has provided the guarantee. In this regard one may gainfully refer to the following observation of the Insolvency Law Committee, appointed by the Ministry of Corporate Affairs in its report dated March 26, 2018[19]:

> "*5.10. The Committee further noted that a literal interpretation of Section 14 is prudent, and a broader interpretation may not be necessary in the above context. The assets of the surety are separate from those of the corporate debtor, and proceedings against the corporate debtor may not be seriously impacted by the actions against assets of third parties like sureties. Additionally, enforcement of guarantee may not have a significant impact on the debt of the corporate debtor as the right of the creditor against the principal debtor is merely shifted to the surety, to the extent of payment by the surety. Thus, contractual principles of guarantee require being respected even during a moratorium and an alternate interpretation may not have been the intention of the Code, as is clear from a plain reading of Section 14…The Committee concluded that Section 14 does not intend to bar actions against assets of guarantors to the debts of the corporate debtor and recommended that an explanation to clarify this may be inserted in Section 14 of the Code. The scope of the moratorium may be restricted to the assets of the corporate debtor only." (emphasis supplied*)

Considering that right of the creditor against the principal debtor is shifted to the surety to the extent of payment by the surety, in the event the bank guarantee is invoked, the lender would be subrogated in the place of the original claimant and can maintain a claim to the extent of such payment made. Whilst, it is true that the possibility of recovering the entire amount may be remote, that does not justify a differential classification between banks providing NPBG and a third-party providing guarantee to the corporate debtor, especially when the IBC excludes guarantee from the purview of moratorium.

We can further substantiate our argument by analysing Section 14(1) of the IBC which deals with the moratorium.

> *Section 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*);

[19] *Report of the Insolvency Law Committee,* March 2018

(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*.

(*emphasis supplied*)

As is apparent, in terms of Section 14 (1) (c) what is prohibited is any action to foreclose, recover or enforce any *security interest created by the corporate debtor* in respect of its property. The language of Section 14 (1) (c) when contrasted with the definition of '*security interest'* under Section 3 (31) of IBC, one may note that whilst the definition *of security interest includes any right, title or interest or a claim to property, created in favour of, or provided for a secured creditor* (and thus admits a construct where third party security is also considered as security interest), Section 14 (1) (c) is limited to the *security interest created by the corporate debtor.*

In this regard, one may note that bank guarantees are contractual undertakings, normally granted by banks, to pay, or to repay, a specified sum in the event of any default in performance by the principal-debtor of some other contract with a third party, the creditor.[20] Therefore, it is perceptible that, whilst a bank guarantee would be security interest created on *behalf* of the corporate debtor, it *cannot be said to be a security interest created by the corporate debtor under Section 14 (1) (c).*

Let us for the time being ignore the subtle distinction between security interest created *by* and *on behalf* of the corporate debtor and try to examine, if our proposition can derive support from other provision of IBC.

To support our argument further, let us revisit Section 14(1)(c) of IBC again and note that, what is prohibited is *any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property*.

If one analyses if a bank guarantee can be treated to be a *property of the corporate debtor*, gainful reference may be made to the decision of High Court of Andhra Pradesh in the matter of *Haryana Telecom Ltd. and Ors. v. Aluminium Industries Ltd. and Ors*.[21], where it was held that *bank guarantee cannot be said to be the property of the debtor simply because it is indirectly going to be affected by enforcement of the said bank guarantee*. The relevant observations in this regard as follows:

> "*Similarly, proceedings to encash the bank guarantee cannot be said to be covered by the phrase "execution, distress or the like", contemplated under section 22(1) of the Act. A similar question came up for consideration before the learned single judge in Aluminium Industries Ltd. v. Hindustan Cables Ltd. (W.P. No. 9420 of 1992 dated 11-9-1992), which was rejected by the learned single judge by observing as follows:*
>
> > "*I will now dispose of the legal contention raised by the learned counsel for the petitioner that by virtue of section 22 of the Sick Industrial companies (Special Provisions) Act, 1985, the invocation of bank guarantees is barred. Learned counsel submits that the encashment of bank guarantees amounts to proceedings against the properties of the petitioner company and, therefore, it is prohibited by section 22. Learned counsel reinforces his argument by stating that the word 'property' bears a wide connotation in legal parlance and the word 'property' occurring in section 22 would encompass within its sweep the bank guarantees as well. It is difficult to accept this contention of learned counsel. In fact, the argument advanced on behalf of the petitioner-company that section 22 applies to a case of encashment of bank guarantees was negatived by the Division Bench in the writ appeal afore-mentioned. The Division Bench observed*:

[20] *Chitty on Contracts*, 28th Edition, Vol II, p 1303, paras 44-014.

[21] *Haryana Telecom Ltd. and Ors. v. Aluminium Industries Ltd. and Ors.* [1997]88 CompCase 735(AP)

> "*Learned counsel placed reliance on section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985. The same, however, has no application to the instant case. Invoking the bank guarantee by the second respondent does not come within the meaning of the words 'execution, distress or the like against any of the properties of the industrial company' in sub-section (1) of section 22 of the Act*."
>
> *I also share the same view. In elaborating further, I would add that the invocation of the bank guarantee by the beneficiary under the guarantee does not put in motion any proceedings for execution, distress or the like against the properties of the company. It is difficult to accept the contention of learned counsel that the bank guarantees constitute property of the petitioner. The mere fact that the petitioner had deposited some money with the bank as a prelude to obtaining the bank guarantees or that the petitioner is exposed to a future pecuniary liability as a consequences of encashment of bank guarantee, does not mean that the petitioner has some sort of proprietary right or interest in the bank guarantees as such and that a proceeding analogous to execution or distress is being taken against the properties of the company. It may be that as a result of the encashment of bank guarantee by the first respondent, the bank may proceed to recover the amount from the petitioner. But that is only an indirect though inevitable consequences of invoking the bank guarantee. In fact that stage has not yet reached....". (emphasis supplied)*

Therefore, taking into consideration the aforesaid extract, it can very well be argued that the bank guarantee cannot be termed as a property of the corporate debtor, and thus placing it outside the sweep of the prohibition under Section 14(1) of the IBC.

Concluding Remarks

It would be interesting to follow the development of jurisprudence in this regard and to examine, if the NCLTs choose to look beyond the nature of bank guarantees to ascertain whether invocation of such bank guarantees would be permitted during moratorium. But as the law stands today, any artificial distinction between PBG and NPBG, in so far as enforcement during moratorium is concerned, hardly merits.

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