

Security Interest: Meaning, forms, registration, enforcement, and effects of non-registration

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 - Based out of Kolkata, Mumbai, New Delhi and Bengaluru
- We are a team of qualified company secretaries, chartered accountants, lawyers and managers.

Our Organization's Credo:

Focus on capabilities; opportunities follow

Overview

- Understanding the concept of security interest
 - meaning, forms, types, etc.
- Creation and perfection of security interest
 - Various registration authorities
- Laws dealing with security laws and variation in terms of applicability, type of borrower, type of lender, etc.
 - Companies Act, 2013
 - SARFAESI Act
 - Enforcement of security interest
 - Inapplicability
- Multiple repositories for registration of security interest
 - Other debt information repositories
- Rights of secured creditor under IBC
 - Meaning and scope of secured creditor
 - Rights during resolution process
 - moratorium provisions
 - rights and priorities under resolution plan
 - Rights during liquidation process
 - realisation vs. relinquishment
 - proof of claim
 - rights under distribution waterfall
 - Effect of non-registration under various laws on -
 - eligibility to make application
 - prove itself as secured creditor



Understanding Security Interest



What is security interest?

■ Defined u/s 2 (1) (zf) of SARFAESI Act, 2002

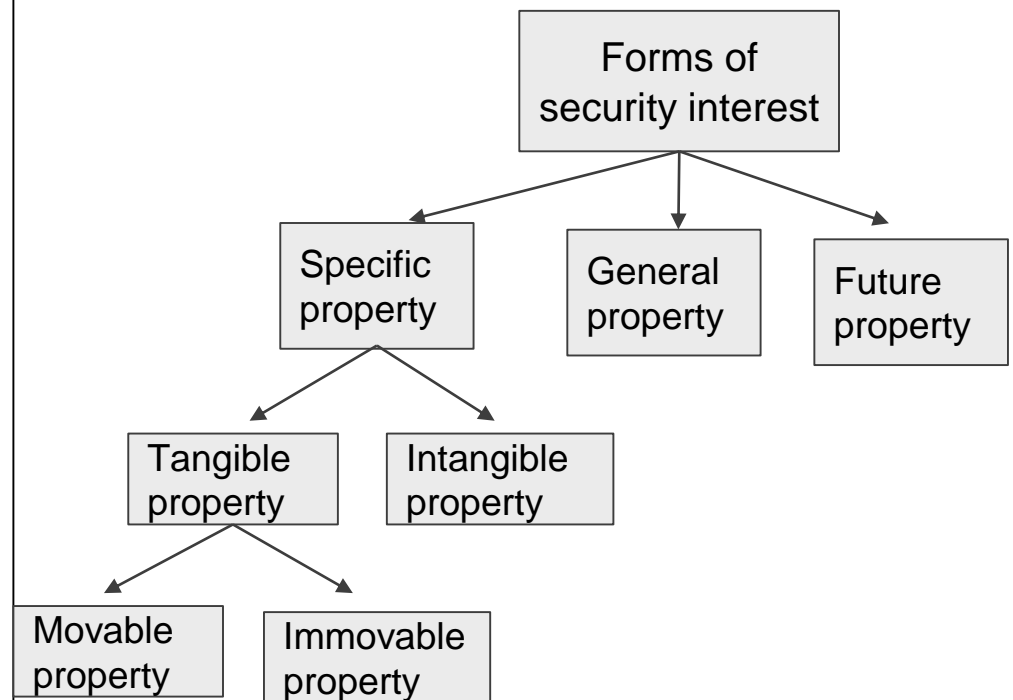
- means right, title or interest over a property
- created in favour of a secured creditor
- as collateral for financial assistance granted
- security interest includes -

On Tangible properties

- Right title *or* interest - obviously meaning those created for security
- Mortgage (Sec 58 of Transfer of Property Act, 1882)
- Charge (Sec 2(16) of Companies Act, 2013 & sec 100 of Transfer of Property Act, 1882)
- Hypothecation (Sec 2(n) of SARFAESI Act, 2002)
- Pledge (Section 172 of the Indian Contract Act, 1872)
- Assignment (Sec 130 of Transfer of property Act, 1882)
- Lien (Section 170 & 171 of the Indian Contract Act, 1872)

On Intangible properties

- Right title or interest- obviously meaning those created for security
- Assignment by way of security, and not assignment by way of transfer



Types of security interest

■ Mortgage

- Defined u/s 58 of Transfer of Property Act, 1882
- Transfer of interest in specific immovable property
- For securing loan advanced or to be advanced; existing or future debt; performance of engagement which may give rise to pecuniary liability

■ Charge

- under Companies Act, 2013
 - Defined u/s 2(16) of Companies Act, 2013
 - interest or lien created on the property or assets of a company or any of its undertakings or both as security and includes a mortgage
- under Transfer of Property Act, 1882
 - sec 100
 - interest created on immovable property for securing payment
 - does not amount to mortgage

■ Hypothecation

- Defined u/s 2(n) of SARFAESI Act, 2002
- Charge on any movable property, existing or future by the borrower as a security for financial assistance provide
- without delivery of possession to the creditor

■ Pledge

- Defined u/s 172 of the Indian Contract Act, 1872
- Bailment of goods as security for payment of a debt or performance of a promise.

■ Assignment

- Section 130 of Transfer of property Act, 1882
- Transfer of actionable claim through an instrument in writing duly executed

■ Lien

- Right to keep the possession of a property
- until the underlying debt is satisfied

Rights of lender vis-a-vis various forms of security interest

Type of Security Interest	Rights of lender				
	Title	Title Deed	Possession	Beneficial Interest	Right to cause sale on default
Simple Mortgage	Yes	Yes	No	No	Yes
Equitable Mortgage	No	Yes	No	No	Yes
Usufructuary Mortgage	Yes	Yes	Yes	Yes	Yes
Pledge	No	No	Yes	No	Yes
Hypothecation	No	No	No	No	Yes
Bailment	No	No	Yes	No	No

Perfection of Security Interest

- Creation of security interest is the first step towards securing debt
 - However, security creation alone may not suffice
 - Therefore, required steps are to be taken to make the same enforceable by law
- Registration is a manner of giving “public notice”, see -
 - sec. 77-81 of the Companies Act
 - sec. 26C of SARFAESI Act
- Similar provisions in other countries as well
 - Article 9-310 of UCC in the US (perfection by filing of all security interest and agricultural lien)
 - Section 859A of Companies Act, 2006 in the UK (charges created by a company)



Laws dealing with security interest and enforcement



Laws dealing with security interest

1

- Companies Act, 2013: Chapter VI Registration of Charges

2

- SARFAESI Act, 2002: Sections 13 onwards, 22, 23, 26B read with section 26D SARFAESI Act

3

- Section 215 of the Code read with reg. 21, 21A of the IBBI (Liquidation Process) Reg., 2016 and reg. 13 of IBBI (Insolvency Resolution Process for Corporate Persons) Reg., 2016

4

- Common laws including Transfer of Property Act, 1882, Sale of Goods Act, 1930, Motor Vehicle Act, 1988, etc.

Registration of charges under the Companies Act, 2013

- Chapter VI of CA, 2013 (sections 77 to 87) - Registration of charges
- Section 77:
 - sub-section (1): borrower company to register charge
 - Third proviso: Any subsequent registration of a charge shall not prejudice any right acquired in respect of any property before the charge is actually registered.
 - (Sub-section 3): Notwithstanding anything contained in any other law for the time being in force, no charge created by a company shall be taken into account by the liquidator **appointed under this Act or the Insolvency and Bankruptcy Code, 2016, as the case may be**, or any other creditor unless it is duly registered under sub-section (1) and a certificate of registration of such charge is given by the Registrar under sub-section (2).
 - In *Volkswagen Finance v. Shree Balaji Printopack*, the NCLAT held that registration of security interest (charge by way of hypothecation) with Motor Vehicle Authority u/s 51 of MV Act was not sufficient; a charge had to be registered in accordance with sec 77 of CA, 2013 in order for a creditor to be treated as a secured creditor.
- Charge to be registered within-
 - 30 days of its creation - with normal fees
 - 60 days of its creation - with additional fees
 - 120 days of its creation - with *advalorem* fees
- Primary responsibility to register the charge on borrower
 - If borrower fails to register within 30 days of creation
 - Lender may register the same (Sec 78)
- Modification of charges - section 79; satisfaction of charges - section 82
- Deemed notice of a registered charge: section 80
 - Where any charge on any property or assets of a company or any of its undertakings is registered under section 77, any person acquiring such property, assets, undertakings or part thereof or any share or interest therein shall be deemed to have notice of the charge from the date of such registration.
- Registration of charge with MCA applicable only when
 - borrower is a company
 - borrower is an LLP (optional) see MCA FAQs
- Charge is registered in form
 - CHG-1 (for other than debentures) & CHG-9 (for debentures) - In case of companies
 - Form-8 in case of LLPs
- If a company contravenes any provision relating to charge creation, penalty is levied on
 - company- Rs. 5,00,000 & officer in default- Rs. 50,000

Security interest, secured creditor and borrower under SARFAESI Act, 2002

- Forms of security interest under SARFAESI- Sec. 2(1)(zf) defines “security interest” as a right, title or interest created upon property. Forms of security interest include:
 - mortgage
 - charge
 - hypothecation
 - assignment
 - any other right, title or interest on tangible/intangible asset to secure payment
- Applicable only in case of ‘secured creditors’- defined in 2(1)(zd) as:
 - bank/financial institution holding an interest over an asset
 - NBFCs having asset worth Rs. 100 crore and above- entitled to enforce security interest in secured debts of Rs. 20 lac and above
 - debenture trustee appointed by a bank/finance institution;
 - debenture trustee appointed for secured (listed) debt securities
 - asset reconstruction company
- Borrower as defined in sec. 2(1)(f)- can be any person which:
 - has been granted financial assistance by a financial institution;
 - who has given a guarantee;
 - created any mortgage or pledge as security for financial assistance granted by bank/financial institution;
 - has raised funds through issue of debt securities;

Registration of Security interest under SARFAESI Act, 2002

- Central Registry of Securitisation Asset Reconstruction and Security Interest of India (CERSAI)
 - Provisions dealing with CERSAI in Chapter IV of SARFAESI
 - Obligation to file creation of security interest comes from section 23.
 - U/s 24 and sec 25, secured creditors have to file records pertaining to modification and satisfaction security interest, respectively, registered with CERSAI.
- Besides, RBI mandate for filing of details of security interest with CERSAI
 - RBI issued a circular advising financial institutions to register the creation, modification or satisfaction of security interest to immovable (other than equitable mortgage), moveable and intangible assets.
 - RBI issued a circular for registration of security interest including mortgage by deposit of title deeds (equitable mortgage).
 - NBFCs have to register records of all mortgages, including equitable mortgage, created in their favour, with CERSAI as per NBFC Master Directions for SI & NSI)
- Prior to amendments in 2016, there was no provision disabling enforcement of security interest on account of non-registration.
- Several amendments vide SARFAESI Amendment Act, 2016 (Notification dated 16.08.2016) were introduced:
 - Sec 26B gives rights to other creditors to file with CERSAI
 - Sec 26C, registration of security interest has two effects:
 - it is deemed as public notice
 - claim of secured creditor who has the security interest registered with CERSAI has priority over any subsequent security interest created over the same property
 - **Sec 26D links right of enforcement with registration of security interest-** a secured creditor which has not registered the security interest with CERSAI cannot exercise the right of enforcement under SARFAESI.
 - Section 26E accords priority to secured creditors over revenue, tax, cess, and all other Govt dues.
 - exception on account of IBC- *in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code*

Enforcement of Security interest under SARFAESI Act, 2002 (1/2)

- Enabled by section 13(1)
 - Non-obstante - overrides sec. 69 and 69A of the TP Act
 - which allows selling of mortgaged property without the intervention of courts only in few select cases such as where the mortgagee is government or where the mortgage is an English mortgage.
 - which mandates the appointment of receiver in order to sell the mortgaged property without the intervention of the court.
 - Can be enforced by a secured creditor in whose favour any security interest has been created
 - Can be enforced without intervention of court or tribunal.
- Sec. 13(2):
 - Borrower should be under liability to a secured creditor under a security agreement
 - makes any default in repayment of secured debt or any instalment thereof, **and**
 - his account in respect of such debt is classified by the secured creditor as NPA
 - NPA classification not required for debt securities, DT can take action as per security documents
- Requirement of notice before enforcement
 - Comes from sec. 13(2)
 - Essentials of notice: (Section 13(3))
 - Details of amount payable by the borrower
 - Details of the secured assets intended to be enforced in the event of default.
- Options before the borrower:
 - Pay within 60 days of the notice, or
 - raise representation/objection
 - to which secured creditor shall reply within 15 days or send revised notice within that time
 - Effect of notice: freeze on sale lease or transfer u/s 13(13)
 - Also, sec. 13(8) - secured creditor is restrained from making transfer and/or taking further steps if at any time before the date of publication of notice for public auction or inviting quotations or tender from public or private treaty for transfer by way of lease, assignment or sale of the secured assets, borrower tenders all amounts (including costs and charges).

Enforcement of security interest under SARFAESI Act, 2002 (2/2)

- Joint-financing - sec. 13(9)
 - restricts secured creditors to enforce the measures mentioned below unless it is agreed upon by the secured creditors representing not less than 60% in value of the amount outstanding as on record date.
- Measures of enforcement
 - take possession of secured assets, including right to transfer
 - taking possession does not amount to transfer of title- purpose is for realization of security.
 - takeover the management of borrower's business, including right to transfer by way of lease, assignment or sale for realising the secured asset
 - right to transfer exercisable only where the substantial part of the business of the borrower is held as security for the debt
 - appoint any person to manage the secured assets in possession of secured creditor
 - require through notice, a person who has acquired secured assets from borrower, to pay the secured creditor.
- Action against guarantors, etc. - sec. 13(11)
 - Allow secured creditors to take action against the guarantors or sell the pledged assets without taking recourse to any of the measures of enforcement stated above.
- Prohibition on alienation of asset [Sec. 13(13)]
 - Borrower is restricted (other than in ordinary course of business) to transfer by any manner any of the secured asset.
 - However, with prior written consent of the secured creditor the borrower can alienate the secured asset.
- Application u/s 17
 - Any person aggrieved by the measures for enforcement can approach the DRT within 45 days from the date of such measure
 - The DRT shall consider the legality of the action taken by the secured creditor vis a vis the provisions of SARFAESI Act.
 - Further, the DRT shall also have jurisdiction to adjudicate on claims of tenancy or leasehold rights created upon the secured assets.,
- Appeal u/s 18
 - Appeal to DRAT shall be made within 30 days from the date of receipt of order u/s 17.
 - Borrower is mandated to deposit 50% of the amount of debt due as claimed by the Secured Creditor with the DRAT unless otherwise agreed.

Procedural Action Points under SARFAESI (1/2)

■ Procedural Steps

- Have you evaluated options and want to take SARFAESI Act action?
 - Simultaneous proceeding under DRT law?
- Shooting of notice u/s 13 (2)
 - Contents
 - Demand for payment
 - Details of payment
 - Details of secured assets
 - Right of representation
 - Officer to whom representation may be filed
 - Signed by “authorised officer” (chief manager or above)
 - Service:
 - Several modes of service laid down in the Rules
 - Proof of delivery
 - At the registered office or branches
- Seeking consent of other secured creditors (wherever required)
- Preparing for action u/s 13 (4)
 - Identification of particulars of assets
 - Involving CMM/DM u/s 14
- Seeking symbolic possession or actual possession?
 - In either case, inventory of possessed assets required; symbolic possession would be inadvisable in case of movable properties
- At the time of taking possession:
 - Prior information to police always advisable
 - Panchnama signed by 2 witnesses
 - Inventory and service of inventory to borrower
- In case of immovable property taken in symbolic possession, possession notice on the property, and 2 newspapers; otherwise, actual possession of the property

Procedural Action Points under SARFAESI (2/2)

- Keeping care of the property
 - Rules make the lender liable to take as much care as an owner
 - Preservation and protection
- Valuation and fixation of reserve price
 - Rules say, after consulting the secured creditor; perhaps, the intent was to say, after informing the borrower
- Deciding upon method of selling
 - Dealer bids, public tender, public auction, private treaty
 - As sale price is always a contentious issue, in interest of transparency, public auction is the best way
- 30 days' notice prior to sale
 - public notice in case of public auction/tenders
- Detailed terms and conditions of sale to be put on the website of secured creditor
 - details of borrower, secured assets, reserve price, time and place of auction, deposit of earnest money, etc.
- Notice to other interested parties:
 - Other secured lenders
 - guarantor
- Public notice
 - Sale as per terms of the notice
 - What is the terms of the notice not complied with?
 - Sale to be ordered again
- Deposit of 25% of the sale consideration by the buyer on same day/next working day
- Payment of the balance consideration by the buyer within 15th day of confirmation of sale or such extended period as agreed (not later than 3 months)
- Issue of certificate of sale
- Claim for recovery of the balance amount under DRT law
- Sharing of pari passu/senior interest with other lenders
- Returning the excess to the borrower.

Simultaneous or Multiple Proceedings

- Proceedings under RDB Act and SARFAESI Act simultaneously
 - Clearly Possible; SC Ruling in (*M/S Transcore vs Union Of India & Anr*)
 - SARFAESI Act is in additional remedy to RDBFI Act and together they constitute one remedy, Doctrine of election does not apply (*Sho Designs & Ors. v. Allahabad Bank & Ors. [IV (2010) BC 55 (DRAT)*)
- Civil Proceedings and SARFAESI Act Proceedings
 - Possible: *Abdul Azeez v Punjab National Bank III (2006) BC 279 (Ker) (DB)s*
- Pendency of arbitration proceedings:
 - No bar: (*Sosanna Abraham v. State Bank of Travancore IV (2008) BC 233 (ker)*)
- Insolvency Bankruptcy Code vs SARFAESI
 - SARFAESI Proceedings cannot be continued against the Corporate Debtor once CIRP is admitted and Moratorium is ordered. (*Indian Overseas Bank vs RCM Infrastructure Limited 2022 SCC Online SC 634*)

Inapplicability of SARFAESI in certain cases [section 31]

- lien on any goods, money or security given under
 - Indian Contract Act, 1872
 - Sale of Goods Act, 1930
 - Any other law for the time being in force
- Pledge on movables u/s 172 of Indian Contract Act, 1872
- Creation of any security in any aircraft
- Creation of any security in any vessel
- In case of unpaid seller under Sale of Goods Act, 1930
- Any property not liable to attachment
 - except the property specifically charged with the debt recoverable under SARFAESI Act
- Security interest for securing repayment of any financial asset \leq Rs. 1,00,000
- Security interest in agricultural land
- Where amount due is $< 20\%$ of the principal amount and interest thereon

Recent ruling of Supreme Court in *PTC India*

- Section 12 of Depositories Act
 - Permits pledge and hypothecation of securities held by a depository.
 - Beneficial Owner has the right to create pledge or hypothecation subject to prior approval.
- Regulation 58 of SEBI (D & P) Regulations
 - Mandates Pawnee to be recorded as beneficial owner for invocation of the pledge.(See Sub Regulation 8)
 - Exercise of right on the part of the pawnee and consequent action on the part of the 'depository' recording the pawnee as the 'beneficial owner' is not 'actual sale'.(*In The Official Assignee of Bombay v. Madholal Sindhu and Others AIR 1947 Bom 217.*)

Impact of PTC India Financial Services Private Limited vs Venkateswarlu Kari & Ors

- Beneficial Ownership is not actual sale
 - Registration of the pawn viz the dematerialized shares in favour of the Pawnee as the beneficial owner does not have the effect of sale of shares by the Pawnee.
 - In general, right of redemption remains with pledgor until actual sale (subject to reasonable notice)
 - however, given the nature of listed securities, such right of redemption may be lost
 - other rights, e.g right to sue for not giving reasonable notice, remain
- Status of Pledgee Creditors
 - Status of Beneficial Owner will not affect the right of pledgee to initiate CIRP as a Financial Creditor.



Provisions dealing with security interest under IBC



Definition and scope under IBC

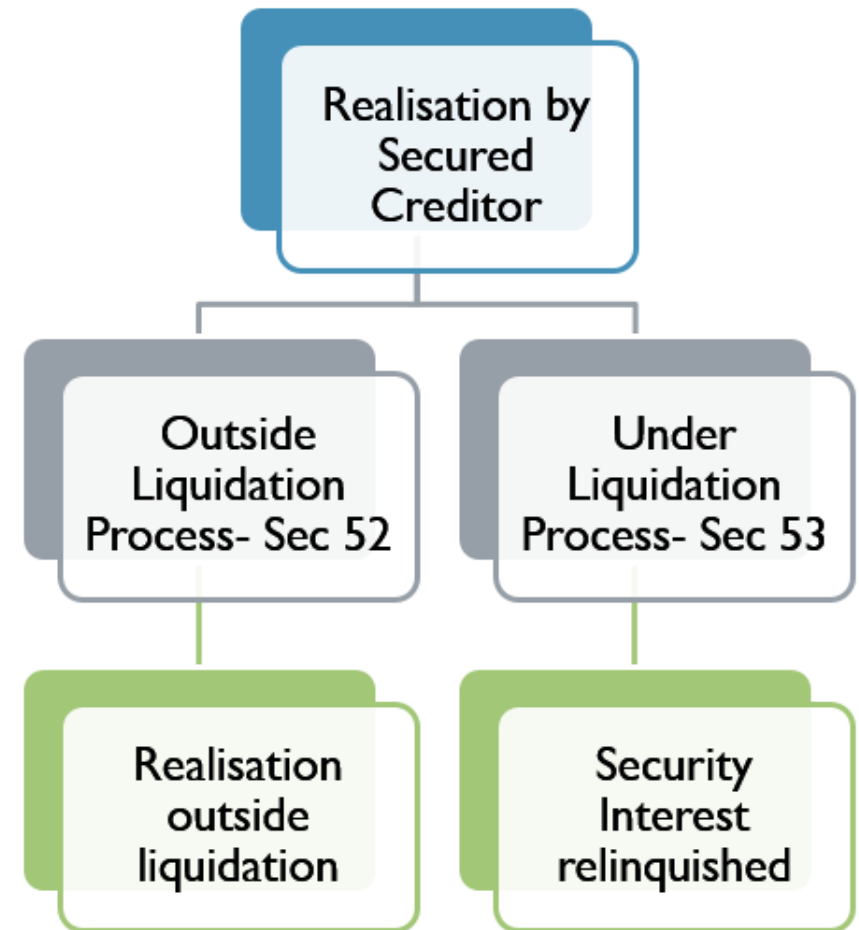
- 'Creditor' defined u/s 3(10)- includes:
 - financial creditor
 - operational creditor
 - **secured creditor**
 - unsecured creditor
 - decree holder
- 'Secured creditor' defined u/s 3(30) as *creditor in favour of whom security interest is created.*
- 'Security interest' defined u/s 3(31) as *right, 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
 - encumbrance
 - any other agreement or arrangement securing payment or performance of any obligation of any person.
- Proviso to sec 3(31)- security interest shall not include performance guarantee
- In a recent ruling, tax authorities were held to be secured creditors - *State Tax Officer vs. Rainbow Papers* - [our article here](#), as against earlier rulings in *Sundaresh Bhatt*, *Monnet Ispat*, and *Leo Edibles*.
- While the provisions under SOGA/ToPA are not contrary to IBC, however, if benefit is to be taken under IBC, it can be done if there was a contractual arrangement/transaction creating security interest in favour of the Creditor. It has to be a security interest which is "created" as such. See *BHEL v. Anil Goel, Liq. of Visa Power* (NCLAT)
- Third party security: For a person to be designated as a financial creditor of the corporate debtor, it has to be shown that the corporate debtor owes a financial debt to such person. Can be regarded as secured debt. Supreme Court in *Anuj Jain Interim Resolution Professional For Jaypee Infratech Limited v. Axis Bank Limited Etc. Etc.* held

Secured creditors under IBC: Rights during CIRP

- Bar on enforcement of security interest during moratorium
 - sec. 14(1)(c) - prohibits any action to **foreclose, recover or enforce any security interest** created by the corporate debtor in respect of its property including any action under SARFAESI Act, 2002
 - part payment of the sale consideration was made by the purchaser and no sale certificate was executed as on the date of admission of the CIRP application - sale is not completed under SARFAESI - FC cannot continue to enforce - Indian Overseas Bank v. RCM Infrastructure.
- Proof of claim
 - Financial creditor to submit the claim in Form C
 - Amount of claim covered by security interest, if any (Please provide details of security interest, the value of the security, and the date it was given)
 - where CD is a borrower / guarantor
 - Operational creditor to submit the claim in Form B - details to include: a. any security held, the value of security and its date
 - Evidence - may be proved on the basis of record of IU or 'other relevant documents' (inclusive clause)
- Treatment of secured creditors in the resolution plan
 - Priority and value to be considered by CoC- see sec 30(4)
 - The entitlement of such a dissenting financial creditor to receive the "amount payable" could also be satisfied by allowing him to enforce the security interest, to the extent of the value receivable by him and in the order of priority available to him. SC in Jaypee Kensington
 - However, his dealing with the security interest, if occasion so arise, would be conditioned by the extent of value receivable by him. The creditor cannot bring about an inequitable scenario, by receiving excess amount, beyond the receivable liquidation value proposed for the same class of creditors. India Resurgence Arc Pvt. Ltd. v. M/S Amit Metaliks Ltd
 - See SC ruling in Essar Steel India Limited v. Satish Kumar Gupta and Ors

Secured creditors under IBC: Rights during liquidation (1/2)

- Secured creditors during liquidation has option to
 - Realize the security interest outside liquidation process- sec 52 of Code; or
 - Relinquish security interest and receive proceeds u/s 53
 - priority under sec. 53(1)(b), pari passu with workmen
 - asset becomes part of liquidation estate - sec. 36
- Right to make an application to NCLT if any resistance is faced in the course of realising secured asset from the CD or any person connected therewith
- Where the proceeds of the realisation of the secured assets are not adequate, the unpaid debts of such secured creditor shall be paid by the liquidator in accordance with 53(1)(e)
 - In majority of cases, liquidation fund gets exhausted after paying the second layer u/s 53(1)
 - Therefore, this recovery is almost impossible

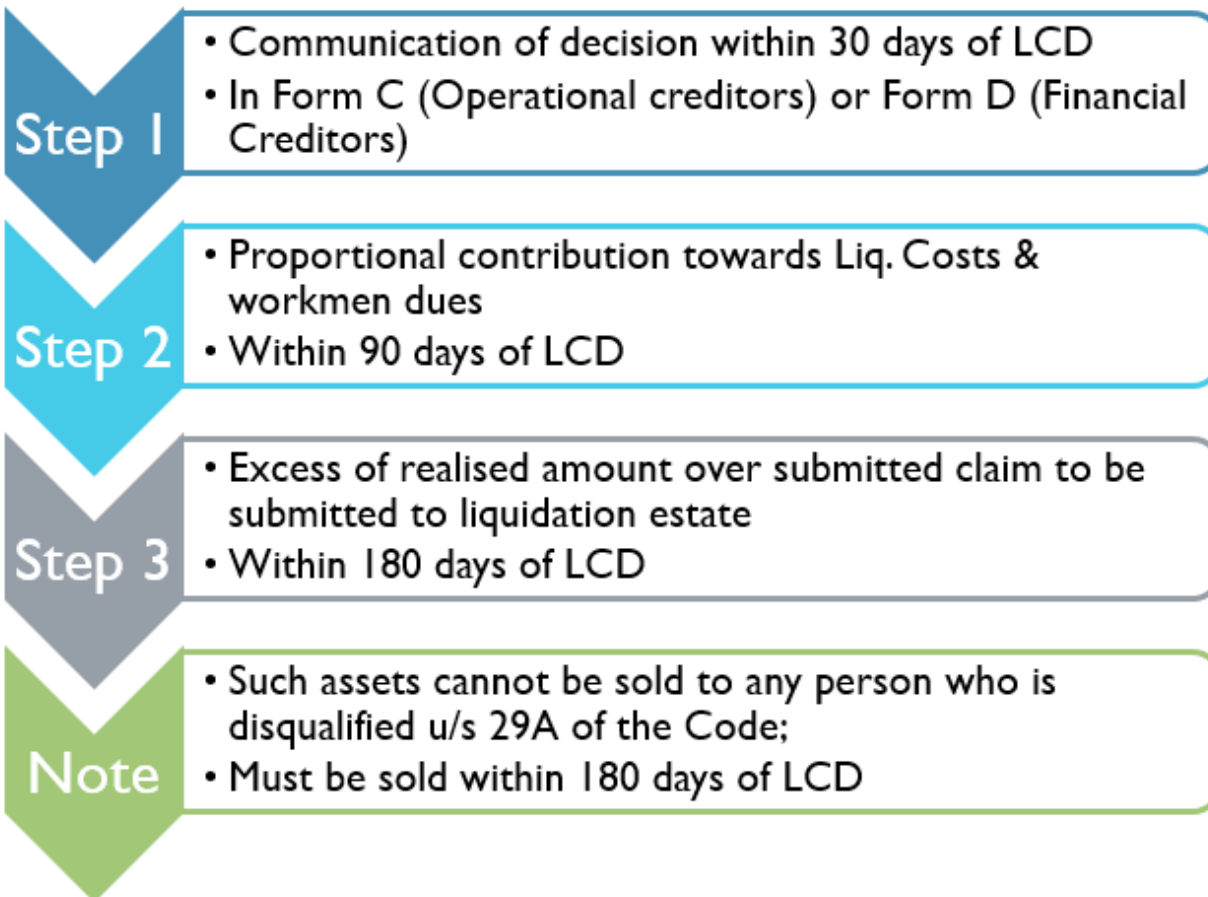


Secured creditors under IBC: Rights during liquidation (2/2)

- Secured creditor to inform liquidator, and liquidator to “verify” such security interest and “permit” the secured creditor to realise only “such” security interest, the existence of which may be proved by -
 - IU, ROC or CERSAI
 - however, what about sec. 77 of Companies Act?
- As financial creditor in Schedule II-D
 - Details of any security held, the value of security, and the date it was given
 - whether security interest relinquished
- As operational creditor in Schedule II-C
 - Details of any retention of title in respect of goods/properties or any other security
 - whether security interest relinquished
- Presumption of asset being part of liquidation estate
 - where a secured creditor does not intimate its decision within 30 days from the liquidation commencement date, the assets covered under the security interest shall be presumed to be part of the liquidation estate.
- A secured creditor who opts for realisation, shall also pay
 - CIRP/liquidation costs
 - share of workmen
 - excess of the realised asset
- *Inter-se* priorities during liquidation
 - First charge vs. second charge; priorities are also determined by registration
 - Right to realize security under Section 52 of IBC is restricted to a creditor that has an ‘exclusive charge’ or ‘sole first charge’ *IM Financial Asset Reconstruction Company Limited v Finquest Financial Solutions Private Limited and Ors.* [NCLAT]
 - Certain rulings hold that distribution would be irrespective of any charge they were holding prior to relinquishment of security interest - see *TDB v. Anil Goel* [NCLAT]

Realization of security interest outside liquidation process

Regulation 21A



- Reg. 37 of Liquidation process reg.: The secured creditor must intimate the liquidator the realisable price at which he proposes to realise the asset.
- Within 21 days of such intimation, liquidator shall
 - Of a person willing to buy the asset before the expiry of 30 days of intimation; and
 - At a higher price than intimated by the secured creditor
 - Secured creditor shall sell the asset to such person; and bear the cost incurred by the liquidator for identification of such person
- Reg. 37 applies only in cases outside SARFAESI Act

Secured creditors rights in insolvency and bankruptcy of personal guarantors

- Chapter III of IBC was made applicable to personal guarantors to corporate debtors vide a Notification dated 15 Nov, 2019.
- IRP can be initiated against a personal guarantor.
- sec. 110 - rights under repayment plan
 - secured and unsecured parts of debt to be treated differently
 - secured creditors are entitled to participate in meetings of creditors and vote.
 - secured creditor's right to enforce security is forfeited if he is exercising his right to vote in respect of repayment plan. If he does not forfeit this right, then the right to vote is exercisable only in respect unsecured part of debt.
 - The concurrence of the secured creditor shall be obtained if he does not participate in the voting on repayment plan but provision of the repayment plan affects his right to enforce security.
- Application for bankruptcy can be made [sec. 123]
 - subject to declaration that the secured creditor shall give up his security for the benefit of all the creditors of the bankrupt, or
 - only in respect of the unsecured part of the debt - in this case, secured and unsecured parts of debt shall be treated separately
- Proof of claim by secured creditors [sec. 172]
 - Where a secured creditor surrenders his security to the bankruptcy trustee for the general benefit of the creditors, he may produce proof of his whole claim.
 - Where a secured creditor realises his security, he may produce proof of the balance due to him.



Information utility



Information utility and related provisions (1/2)

- Information utility is regulated information agency which
 - accepts, electronically record, get authentication, maintain and provide access to financial information
 - Financial information means one or more of the following-
 - records of the debt of the person;
 - records of liabilities when the person is solvent;
 - records of assets of person over which security interest has been created;
 - records, if any, of instances of default by the person against any debt;
 - records of the balance sheet and cash-flow statements of the person; and
 - Such other information as may be specified.
- Information utility is registered under sec 210 of the Code read with reg. 4 of IU regulations
- Currently, there is only one IU in India named National E-Governance Services Ltd (NeSL)
- IU are responsible to provide core services & other services under the IU regulations
 - Core services means services rendered for-
 - accepting electronic submission of financial information
 - safe and accurate recording of financial information
 - authenticating and verifying the financial information submitted
 - providing access to information stored with the IU
- RBI Circular dated 19th Dec, 2017 read with Circular dated 4th Jan, 2018 mandates the following to file information with IU
 - Financial creditors regulated by RBI
 - Registered ARCs

Information utility and related provisions (2/2)

■ Process of authentication of default-

- IU to deliver information of default to debtor
- At least 3 reminders to be given to debtor for confirmation of information
- Information of default/ reminder is given by hand, post or electronic means

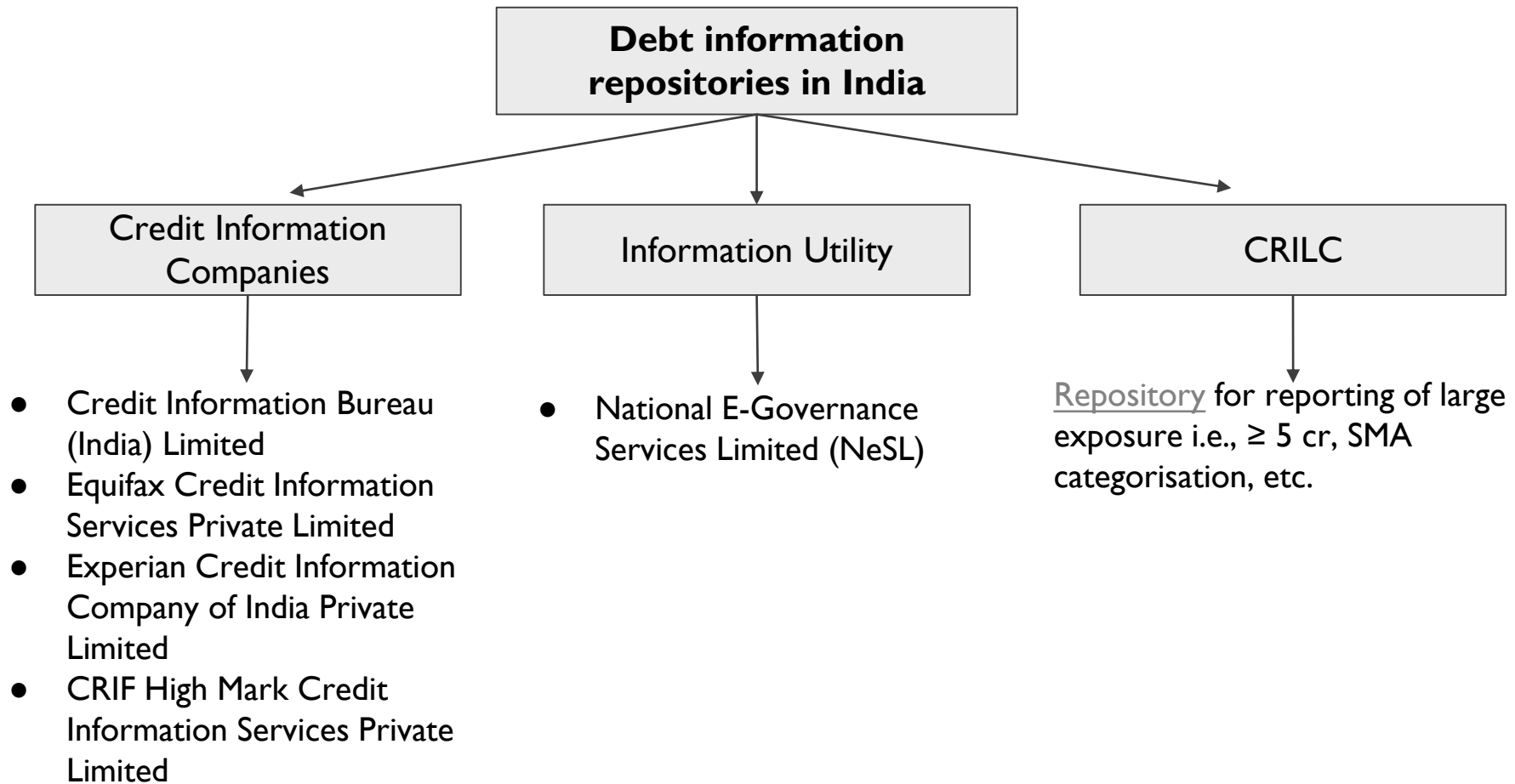
■ Mandate u/s 215(2) on financial creditor to file financial information with IU

- “ *A financial creditor shall submit financial information and information relating to assets in relation to which any security interest has been created, in such form and manner as may be specified by regulations*”
- Same is optional in case of operational creditor - sec 215(3)

■ Amendments made in the IU Regulations in June, 2022

- Reg. 20(IA): Makes it mandatory for both FC & OC to file the information of default with IU before filing CIRP application
- Three reminders are given to debtor for confirmation of information
 - If not confirmed, shall be “deemed to be confirmed”
 - However, in case of FC being banks, non confirmation after 3 reminders will be treated as “confirmed”
- Status of information of default to be communicated to in form D-
 - creditors of the debtor who has defaulted in payment of a debt
 - parties and sureties, if any

Debt information repositories in India





Multiple registrations: a comparative



Multiple registrations requirements of security interest for various assets

Nature of assets	Registration requirements
Immovable properties	<ul style="list-style-type: none">• Registration with CERSAI• Under Registration Act, e.g. equitable mortgage needs to be registered in <u>Maharashtra</u>• Submission of financial information with IU (eg. NeSL)• In case of borrower being a company, registration of charge creation with RoC
Dematerialized securities	<ul style="list-style-type: none">• Pledge of demat securities to be registered with Depository - Reg. 79 of SEBI (Depositories & Participants) Reg., 2018• Submission of financial information with IU (eg. NeSL)• In case of borrower being a company, registration of charge creation with RoC
Motor vehicles	<ul style="list-style-type: none">• Registration under Motor Vehicles Act, 1988- Sec 51 of the Act (Vahan Portal) and impact on CERSAI registration• Submission of financial information with IU (eg. NeSL)• In case of borrower being a company, registration of charge creation with RoC
Movable properties apart from motor vehicles	<ul style="list-style-type: none">• Submission of financial information with IU (eg. NeSL)• In case of borrower being a company, registration of charge creation with MCA in form CHG-I (In case of borrowers apart from co., if financial information not submitted to IU, debt may be proved through the agreement)

Comparison between registration requirements under RoC, CERSAI and IU (1/2)

Point of discussion	Registration under Companies Act, 2013	Registration under SARFAESI Act, 2002	Registration under IBC, 2016
Provision of law	Section 77 of the Companies Act	Sections 22, 23, 26B read with section 26D SARFAESI Act	Section 215 of the Code read with reg. 21, 21A of the Liquidation regulations and reg. 13 of CIRP regulations
Registration authority	Registrar of Companies	CERSAI	Information Utilities (eg. NeSL)
Applicable in case of borrower entity being	Companies [optional in case of LLPs, see FAQs on LLP e-filing]	Any entity	Corporate Debtor/Debtor under the Code
Lenders covered	Any lender	Banks/financial institutions	Mandatory for financial creditors (however, see reg. 20(1A) of CIRP regs.)
Borrowers covered	Companies and optional in case of LLPs	Any borrower	Corporate debtor / debtor under IBC

Comparison between registration requirements under RoC, CERSAI and IU (2/2)

Point of discussion	Registration under Companies Act, 2013	Registration under SARFAESI Act, 2002	Registration under IBC, 2016
Intent of registration	Validity of charge, priority	Enforcement and priority of security interest under sections 26C/26D/26E of the SARFAESI Act	Proof of debt, necessary to file application
Impact of non-registration on enforcement rights of the secured creditor	Charges become void. Loan becomes unsecured	SARFAESI rights become unenforceable; loss of priority	None. However, it is mandatory under law for the financial creditors. Also, can be used as a proof under IBC.
Charge registration obligation on	Borrower – section 77 of CA, 2013 Lender can do – section 78 of CA, 2013 [if borrower does not do within 30 days]	Secured creditor	Financial creditor
Impact on eligibility to file application under IBC	Non-registration of charge with ROC does not stop the creditor from filing application	Non-registration of charge with CERSAI does not stop the creditor from filing application	Creditor required to file information with IU before making application

Impact of registration/non-registration on proceedings- different scenarios

ROC	CERSAI	IU	Remarks
Yes	Yes	Yes	Enforcement/priority rights fully protected.
Yes	Yes	No	Though it is mandatory for FC to submit information to an IU, that does not impact the secured status of the creditor. Security can be proven by ROC/CERSAI registrations. May be required before filing insolvency application under IBC.
Yes	No	No	Non-registration of charge under CERSAI will disable the creditor from enforcing security interest under SARFAESI Act. However, the creditor can prove 'security' and stand in queue under the Companies Act/Code. IU registration may be required before making application.
No	Yes	Yes	Charge cannot be 'proved' under the Companies Act/Code. In winding up proceedings, the secured creditor may not be able to realise security interest. In going concern, CERSAI registration would enable enforcement of rights under SARAFESI.
No	No	Yes	Security rights would be hampered both in winding up proceedings & enforcement proceedings.
No	No	No	Security rights would be hampered both in winding up proceedings & enforcement proceedings. Also, non-filing of information with IU would be in violation of law.

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