



# INSOLVENCY & RESTRUCTURING

Monthly update | March 2020

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## STATUTORY UPDATES

Proactiveness of both government as well as regulator to streamline the corporate insolvency resolution process and prevent value destruction in instances of corporate distress has been paramount in making IBC simpler, speedier and sharper.

### RELAXATION TO NBFCs FOR TAKING ACTION UNDER THE SARFAESI ACT

- To address the liquidity crisis which has engulfed Non-banking Financial Companies (NBFCs), the Union budget 2020-21 had proposed to ease the eligibility criteria for NBFCs for debt recovery under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (Sarfaesi Act). To this end, Ministry of Finance issued Notification vide S.O 856(E) dated February 25, 2020 (Notification) to notify the proposed change
- **Relaxation in eligibility criteria:** The Notification relaxes the previous eligibility criteria where NBFC having an asset size of INR 500 crore or above and having loan size was of INR 1 crore or more was eligible to recover its debt under the Sarfaesi Act. Pursuant to the Notification, any NBFC having asset size of INR 100 crore is entitled for enforcement of security interest in secured debts of INR 50 lakh and above as 'financial institutions' as defined under the Sarfaesi Act
- **Reduced time taken for resolution:** High loan ticket limit made it tough for NBFCs to take action against defaulters in a time bound manner as civil suits usually take 3-4 years to be decided. The notification will allow a greater number of NBFCs to take the SARFAESI route, wherein asset recovery procedures take just one year as compared to a civil suit for recovery. Using the Sarfaesi option also predicates a substantial time to recovery, as there is 90 days' time for a debt to turn non-performing; there is a mandatory 60 days' notice before any repossession action; and there is a mandatory 30 days' time before sale

### IBBI (INSOLVENCY RESOLUTION PROCESS FOR CORPORATE PERSONS) (AMENDMENT) REGULATIONS, 2020

- Vide notification dated February 12, 2020, the IBBI (Insolvency Resolution Process for Corporate Persons) (Amendment) Regulations, 2020 were notified and accordingly Sub-Regulation (4) of Regulation 40B of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) was amended
- Regulation 40B of the CIRP Regulations provides for certain forms to be filed by the insolvency professional, interim resolution professional or resolution professional, as the case may be, with the IBBI as per the timelines mentioned in the said Regulation. Sub-Regulation (3) of Regulation 40B provides that the information in the forms should be accurate and complete. Further, Sub-Regulation (5) of Regulation 40B makes the concerned insolvency professional liable for action by the IBBI in case of failure to file a form or for mentioning inaccurate or incomplete information in the said form
- By way of the amendment, in case of filing of a form after the due date of submission, Sub-Regulation (4) of Regulation 40B levies a fee of INR 500 per form for each calendar month of delay after April 01, 2020

**Our viewpoint:** While rights have been conferred to a larger pool of NBFCs to enforce their security interest under the Sarfaesi Act, these NBFCs have not been given any powers to file suits for recovery before the Debts Recovery Tribunals (DRT) under the Recovery of Debts and Bankruptcy Act, 1993, which essentially means that even after filing the case under Sarfaesi and receiving a favourable outcome, the significant time to get permission from the revenue department to auction or otherwise sell the collateral will make it difficult for NBFCs to dispose of immovable property. At the same time, the move would likely lead to an increase in litigation before DRT, leading to pendency of proceedings.

**Our viewpoint:** In our opinion, the instant amendment would help to keep a check on the functioning of the insolvency professionals and would prevent any undue delay from their end. Moreover, the amendment would also ensure timely submission of the requisite information which, in turn, would help the IBBI to perform its role of being a key pillar of the ecosystem responsible for implementation of the IBC and regulator of the profession as well as the insolvency resolution process.



## RECENT JUDGEMENTS

By interpreting, clarifying and sometimes even modifying the Insolvency & Bankruptcy Code, judgements and orders by courts and other fora have played an important role in the evolution of the Insolvency & Bankruptcy framework in India.

### FLAT BUYERS ASSOCIATION WINTER HILLS – 77, GURGAON V. UMANG REALTECH PVT LTD THROUGH IRP AND ORS

COMPANY APPEAL (AT) (INSOLVENCY) No. 926 OF 2019

**Our viewpoint:** This case should come as a relief to the real estate developers as it limits the ambit of the insolvency proceedings to the specific projects of the real estate developer. Moreover, it gives leeway to promoters to help revive the company. However, this may also be a one-off as in the present case, the promoter was willing to assist in reviving the company and also most of the major entities i.e. the promoter, allottees and financial creditors, were in agreement regarding the way forward for the Corporate Debtor, as was consolidated by the NCLAT by the way of the present decision. It is also a win-win situation for allottees.

This judgment can also be a major setback for Banks and Financial Institutions, who have lent money to the Real Estate Developers against mortgage of the underlying asset. Transfer of flats in favour of Real Estate Allottees without the consent of Banks and Financial Institutions will be a deterrent to such Banks and Financial Institutions from investing in such projects as it may amount to a dilution of their security.

- **Issue at hand:** Whether CIRP proceedings initiated by a flat buyer against one project of a Real Estate Company will affect its other group projects?
- The appeal was preferred by one flat buyers' association against the order dated August 20, 2019 passed by the NCLT, Principal Bench for commencement of corporate insolvency resolution process (**CIRP**) against Umang Realtech Pvt Ltd. It is relevant to note that though the Appellants desired that the Corporate Debtor undergo insolvency proceedings, however, they did not want approval of a third-party resolution plan. Hence, the NCLAT experimented in attaining resolution of the Corporate Debtor without approving any third-party resolution plan.
- The NCLAT held that in a CIRP against a real estate developer, if allottees or other financial institutions or operational creditors of one project initiate CIRP against the Corporate Debtor, then it is confined to the particular project and it cannot affect any other project(s) of the same real estate company.
- Additionally, it was also held that a secured creditor, such as financial institutions/banks, cannot be provided with the asset (flat/apartment) by preference over the allottees (unsecured financial creditors) for whom the project has been approved.
- The Appellate Tribunal also held that the NCLT or the NCLAT does not have the power to direct refund to an allottee. However, after offering allotment, it is open for an allottee to request the Interim Resolution Professional/Promoter, whoever is in-charge, to find out a third party to purchase said flat/apartment and get the money back. After completion of the flats/project or during the completion of the project, it is also open to an allottee to reach agreement with the Promoter (not Corporate Debtor) for refund of amount.
- In the present case, Uppal Housing Pvt Ltd (**Uppal**), which was also one of the promoters, agreed to remain outside the CIRP but intended to play role of a Lender to ensure that the CIRP reaches success and the allottees take possession of their flats/apartments during the CIRP without any third party intervention. The Appellants also accepted the aforesaid proposal.
- The Appellate Tribunal directed Uppal to cooperate with the IRP and disburse amount from outside as Lender, not as Promoter, to ensure that the project is completed within the time frame. Further, the NCLAT inter alia directed that the disbursement of amount which has been made by Uppal and the amount as will be generated from dues of the allottees during the CIRP should be deposited in the account

of the Corporate Debtor to keep that as a going concern. The amount may be utilized only by issuance of cheque signed by the authorised person of the Corporate Debtor with counter signature by the Interim Resolution Professional.

- It was further directed that all processes pertaining to the flats/apartments should be completed by August 30, 2020. Thereafter, if completed, the CIRP be closed after intimating it to the NCLT. However, if the Promoter fails to comply with its undertakings, the NCLAT held that the NCLT will complete the CIRP.

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## NEERAJ JAIN, DIRECTOR OF FLIPKART INDIA PVT LTD V. CLOUDWALKER STREAMING TECHNOLOGIES PVT LTD

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COMPANY APPEAL (AT) (INSOLVENCY) NO. 1354 OF 2019

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- In the instant case, a director of Flipkart India Pvt Ltd (**Flipkart**), the Corporate Debtor, preferred an Appeal against the order dated October 24, 2019 passed by the NCLT, Bengaluru Bench, directing for commencement of insolvency proceedings against Flipkart. The case before the NCLT was initiated by one M/s Cloudwalker Streaming Technologies Pvt Ltd, an operational creditor which supplied LED TVs to Flipkart.
- The questions of law which were considered relevant to determine the instant Appeal were:
  - Whether it is the discretion of the operational creditor or the nature of the operational debt which determines the issuance of notice under Section 8(1) of the IBC, in Form 3 or Form 4 of the Insolvency and Bankruptcy (Adjudicating to Authority) Rules, 2016?
  - Whether it is mandatory to annex a copy of the invoice for issuance of a notice under Section 8(1) of the IBC in Form 3?
  - Whether the submission of a copy of the invoice is a mandatory requirement for filing an application under section 9 of the IBC, although the demand notice is served in Form 3?
- The NCLAT held that the choice of issuance of demand notice u/s 8(1) of the IBC, either in Form 3 or Form 4, depends on the nature of operational debt. The applicability of Form 3 or Form 4 depends on whether the invoices were generated during the course of transaction or not.
- Further, if the demand notice is sent in Form 3, then the operational creditor has to submit the documents to prove the existence of operational debt and the amount in default along with the notice. The said document may either be invoice or any other document to prove the existence of the operational debt and the amount in default.
- The NCLAT also held that when the operational debt involves transactions where corresponding invoices are generated, the operational creditor cannot choose to not file the invoice on the pretext that demand notice was sent in Form 3. The use of the word —'OR' in Section 8 cannot be interpreted as such that the IBC has provided a choice or a discretion to an operational creditor, to provide an escape route from submission of the invoice, which can be treated as the most relevant document to prove the debt and amount in default.
- It was also made clear that for filing an application under Section 9 of IBC, in case the demand notice is delivered in Form 3, then the submission of a copy of the invoice along with the application in Form 5 is not a mandatory requirement, provided the documents to prove the existence of operational debt and the amount in default are attached with the application.
- Regarding the facts of the case, the Appellate Tribunal observed inter alia that the demand notice delivered under Section 8(1) of the Code was not proper and was also incomplete. The operational creditor had failed to submit any documents to prove the existence of operational debt and the amount in default. The operational creditor also failed to submit the copy of invoices and all the documents referred in the application to be submitted in Form 5, under Section 9 of the IBC. Hence, the Impugned Order was set aside.

**Our viewpoint:** This is a significant decision in so far as it provides clarity regarding the specific forms under which demand notices are to be issued by or on behalf of operational creditors. However, one aspect that has not been dealt with is that in cases where demand notices have been issued in the wrong form and the consequent application under Section 9 of the IBC has been admitted, then can the CIRP be set aside only on the said ground in view of the instant judgment? If answered in the affirmative, then the same can lead to disastrous results as in many cases, small operational creditors issue the demand notices on their own accord, without the assistance of lawyers.



## ANUJ JAIN INTERIM RESOLUTION PROFESSIONALS FOR JAYPEE INFRATECH LTD V. AXIS BANK LTD ETC.

COMPANY APPEAL NOS. 8512-8527 OF 2019

**Our viewpoint:** This is definitely a significant decision as this is for the first time that the Supreme Court has comprehensively analyzed Sections 43, 45 and 66 of the IBC and has brought clarity to the ambit and key elements of the same.

- Appeals were directed against the order dated August 01, 2019 passed by the NCLAT wherein the Appellate Tribunal inter alia set aside the order dated May 16, 2018 passed by the NCLT, Allahabad Bench on the application moved by the Interim Resolution Professional (IRP) of the Corporate Debtor, Jaypee Infratech Limited (JIL) seeking avoidance of certain transactions, whereby the Corporate Debtor had mortgaged its properties as collateral securities for the loans and advances made by the lender banks and financial institutions to Jaiprakash Associates Limited (JAL), the holding company of the Corporate Debtor, as being preferential, undervalued and fraudulent, in terms of Sections 43, 45 and 66 of the IBC.
- In the present case, the Supreme Court made the following observations regarding preferential transactions under Sections 43 and 44 of the IBC:
  - A corporate debtor shall be deemed to have given preference at a relevant time if the twin requirements of clauses (a) and (b) of sub-section (2) coupled with either clause (a) or clause (b) of sub-section (4), as the case may be, are satisfied. Further, such transaction entered into by a corporate debtor would be regarded as preferential transaction with the attendant consequences as per Section 44 of the IBC, irrespective whether the transaction was in fact intended or even anticipated to be so.
  - In order to find as to whether a transaction falls squarely within the ambit of Section 43, ordinarily, the following questions shall have to be examined in a given case: (i) Whether such transfer is for the benefit of a creditor or a surety or a guarantor? (ii) Whether such transfer is for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor? (iii) Whether such transfer has the effect of putting such creditor or surety or guarantor in a beneficial position than it would have been in the event of distribution of assets being made in accordance with Section 53? (iv) If such transfer had been for the benefit of a related party (other than an employee), whether the same was made during the period of two years preceding the insolvency commencement date; and if such transfer had been for the benefit of an unrelated party, whether the same was made during the period of one year preceding the insolvency commencement date? (v) Whether such transfer is not an excluded transaction in terms of sub-section (3) of Section 43?
  - Regarding the phrase “ordinary course of business or financial affairs” as mentioned in Section 43 of the IBC, the Court observed that an activity could be regarded as ‘business’ if there is a course of dealings, which are either actually continued or contemplated to be continued with a profit motive.
- Further, the Apex Court made the following observations regarding the meaning of the terms ‘Financial Creditor’ and ‘Financial Debt’:
  - For financial debt and financial creditor, the definition cannot be read so expansively that the root requirements of ‘disbursement’ against ‘the consideration for the time value of money’ could be forsaken in a manner that any transaction could stand to become a financial debt.
  - Any person having security interest over the assets of a corporate debtor, even if falling within the description of secured creditor by virtue of collateral security extended by the corporate debtor, would nevertheless stand outside the sect of ‘financial creditors’ as per the definitions contained in Sections 5(7) and 5(8) of the IBC.
- In view of the above, the Apex Court set aside the Impugned Order dated August 01, 2019 and restored the Order dated May 16, 2018 passed by the NCLT, Allahabad Bench in regard to the findings that the transactions in question are preferential within the meaning of Section 43 of the IBC. The directions by NCLT for avoidance of such transactions were also upheld accordingly.



## RECENT DEALS

IBC safeguards and maximizes the value of company, and, consequently, value for all its stakeholders. It can help in setting up new standards of corporate governance, radically change how business exits unfold as a result of distress sale, add more certainty for creditors and thereby lead to more money getting pumped into Indian businesses.

### ACQUISITION OF JEKPL BY ATYANT CAPITAL

- After protracted litigation pertaining to the corporate debtor before the NCLT, the NCLAT as well as the Supreme Court, the resolution plan submitted by Atyant Capital India Fund – 1 (**Atyant**) in the Corporate Insolvency Resolution Process (CIRP) of JEKPL Pvt Ltd has been approved by the NCLT, Allahabad Bench, vide order dated February 04, 2020.
- JEKPL, formerly known as Jubilant Energy (Kharsang) Pvt. Ltd, has participating interests in oil blocks in Arunachal Pradesh and Manipur. The CIRP of the Corporate Debtor was initiated vide order dated March 17, 2017 passed by the NCLT, Allahabad Bench for admitting the application filed by the Corporate Debtor under Section 10 of the IBC.
- It is relevant to note that vide Order December 15, 2017, the NCLT, Allahabad Bench had earlier approved a resolution plan submitted by Atyant in the CIRP of the Corporate Debtor. However, vide judgment dated August 14, 2018 the NCLAT directed the resolution professional to reconstitute the committee of creditors and reconsider the resolution plans.
- The Final Resolution Plan submitted by Atyant, which is for an amount of INR 123.1 crore, was approved by 100% of the financial creditors on June 29, 2019 and thereafter, by the NCLT, Allahabad Bench w.e.f. February 04, 2020.

### RESOLUTION OF KALPATARU STEEL BY SHIVA FERRIC PVT LTD

- Vide Order dated February 14, 2020, the NCLT, Principal Bench, approved the resolution plan submitted by M/s Shiva Ferric Pvt Ltd in the CIRP of M/s Kalpataru Steel Rolling Mills Ltd, the Corporate Debtor.
- Andhra Bank, one of the Financial Creditors of M/s Kalpataru Steel Rolling Mills Ltd, had preferred an application under Section 7 of the IBC for initiating CIRP against the corporate debtor and the same was admitted by the NCLT vide Order dated August 14, 2018.
- The CoC of the Corporate Debtor consisted of Andhra Bank and M/s Andhra Pradesh State Financial Corporation (**APSFC**). The resolution plan submitted by M/s Shiva Ferric Pvt Ltd was put to vote on May 07, 2019, wherein it received 66.13% votes in its favour with Andhra Bank voting for and APSFC voting against the said resolution plan.
- Under the approved resolution plan, the resolution applicant proposes an amount of INR 26.19 crore as the resolution amount. The financial creditors will be paid INR 26.15 crore, subject to deduction of actual insolvency process cost, against the admitted claims of INR 136.59 crore. Out of the remaining amount of INR 4 lakh, INR 1 lakh each would be paid to the operational creditors, the statutory authorities, towards employees' dues and towards workmen liabilities respectively.

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## BLACKSTONE GROUP TAKEOVER OF GOLDEN JUBILEE HOTELS

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- The NCLT, Hyderabad Bench, vide order dated February 07, 2020, approved the resolution plan submitted by M/s BREP Asia II Indian Holding Co II (NQ) PTE Ltd, in the CIRP of Golden Jubilee Hotels Pvt Ltd (**GHPL**).
- It is relevant to note that the resolution applicant is fully owned by BREP Asia II Indian Super Holding I (NQ) PTE Ltd, which in turn is fully owned by BREP Asia II Holding I (NQ) L.P. Blackstone Group L.P. is the flagship company of the resolution applicant.
- The CIRP against Golden Jubilee Hotels – owned by Core Hotels of Lakshminarayan Sharma and East India Hotels of the Oberoi Group, with 84% and 16% equity holdings respectively – was commenced vide order dated February 27, 2018 passed by the NCLT, Hyderabad Bench wherein it allowed an application filed under Section 7 of the IBC by Bank of Baroda.
- The resolution plan for an amount of INR 584 crore was approved by the Committee of Creditors (**CoC**) in the e-voting dated December 21, 2018. The total votes in favour of the resolution plan submitted by the resolution applicant were 68.26% while 22.47% voted against the resolution plan and 9.27% of the financial creditors abstained from voting.
- As a part of its resolution plan, the resolution applicant will make upfront payment of INR 384 crore to clear the dues of the creditors and would infuse INR 180 crore as part of capital expenditure. The resolution applicant has also allotted INR 20.02 crore towards identified bank guarantees.

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## NBCC TAKEOVER OF JAYPEE INFRATECH LIMITED (JIL)

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- Vide Order dated March 03, 2020, the NCLT, Principal Bench approved the resolution plan submitted by NBCC (India) Ltd (**NBCC**) in the CIRP of Jaypee Infratech Ltd (JIL).
- It is relevant to note that the Reserve Bank of India had declared the corporate debtor as one among the infamous 'dirty dozen' NPAs and recommended for initiating IBC proceedings against the said corporate debtor. Thereafter, the NCLT, Allahabad Bench, vide order dated August 9, 2017, admitted an application under Section 7 of the IBC preferred by IDBI Bank, one of the financial creditors of JIL, and consequently ordered for commencement of CIRP against the corporate debtor. The total financial debt due from the corporate debtor towards the financial creditors on the insolvency commencement date stood at INR 9984.70 crore.
- On November 06, 2019, the Supreme Court directed for completion of the corporate debtor's CIRP within 90 days and that revised resolution plans be invited only from NBCC and Suraksha Realty Ltd. Thereafter, the resolution plan submitted by NBCC was approved by the CoC on December 16, 2019 with 97.36% voting in favour of the said resolution plan.
- As per the approved resolution plan, NBCC proposes to pay off the financial creditors by transferring 100% shareholding of the proposed land bank SPV, containing lands aggregating 1,526 acres worth INR 5,001 crore. They will also get 100% shareholding of the expressway SPV including concession rights of Yamuna Expressway and 4,798 acres of land. NBCC also proposes to pay an upfront amount to the financial creditors.
- Further, the Real Estate allottees will get payment in the form of penalty due to delay in handing over the flats at INR 5 per sq ft per month, payable after expiry of a moratorium period of one year from the delivery schedule. Those who have not filed their claims shall be treated in a manner similar to other buyers. Those seeking refund will get up to INR 62.40 crore of their admitted claim of INR 87 crore. Fixed-deposit holders will get their money back within 90 days from the date of approval of the resolution plan by the NCLT. The total debts towards operational creditors are proposed to be settled at INR 20 Crore.
- The NCLT also ordered that the INR 750 crore deposited by Jaiprakash Associates Ltd, the holding company of the Corporate Debtor, with the registry of the Supreme Court would be part of the present resolution plan.
- Also, by way of the approved resolution plan, NBCC would have to complete around 20,000 pending flats over the next three and a half years.



## SECTOR FOCUS: HOSPITALITY

The hospitality sector plays an important role in the economy of a country as it generates revenue, both directly and indirectly, and creates job opportunities. Unfortunately, this sector in India has faced significant headwinds of late – as per the latest Quarterly Newsletter of the Insolvency and Bankruptcy Board of India, CIRP against 85 Corporate Debtors has been admitted in Hotels and Restaurants sector, out of which 47 are still ongoing.

- **Some of the significant developments that took place in the recent months pertaining to the hospitality sector are as under:**
  - The NCLAT vide order dated December 11, 2019 set aside the order dated May 31, 2019 passed by the NCLT for commencement of CIRP against V Hotels Ltd in an application under Section 7 of the IBC filed by Asset Reconstruction Company (India) Ltd. In the Appeal, the NCLAT observed that the account of the corporate debtor was declared NPA in 2008 and thereafter, any document or acknowledgment, even after the completion of the period of limitation, cannot be relied upon. Further, the Appellate Tribunal observed that in absence of any record of acknowledgment, the Appellant cannot derive any advantage of Section 18 of the Limitation Act. For the said reason, the NCLAT set aside the Impugned Order on the ground that the application against the corporate debtor under Section 7 of the IBC was barred by limitation.
  - The NCLT, Jaipur Bench, vide order dated December 19, 2019 allowed for dissolution of M/s Shivdeep Hotels Pvt Ltd under Section 59(7) of the IBC. Earlier, the NCLT had allowed an application filed by M/s Shivdeep Hotels Pvt Ltd for initiation of voluntary liquidation proceedings under the IBC. Thereafter, the liquidator of Shivdeep Hotels approached the NCLT with the application for dissolution, on the ground that the affairs of the company have been completely wound up and the assets have been completely liquidated. Consequently, the NCLT vide order dated December 19, 2019 allowed for dissolution of the company.
  - Recently, the NCLT, Hyderabad Bench approved the resolution plan submitted by M/s BREP Asia II Indian Holding Co II (NQ) PTE Ltd for Golden Jubilee Hotels Pvt Ltd, which is owned by Core Hotels of Lakshminarayan Sharma and East India Hotels of the Oberoi Group. This resolution has been explained in greater detail in the ‘recent deals’ section.
  - As per reports, Conclave Infratech has filed an insolvency application before the NCLT, Ahmedabad Bench against Oravel Stays Pvt Ltd, the parent company of Oyo Rooms. It has been alleged that as per the terms of an agreement between the parties, Oyo rooms was liable to pay to Conclave Infratech (the owner of Conclave Hotel), an assured benchmark revenue of INR 12,96,000 every month, regardless of bookings. It has further been alleged that Conclave Infratech received the said payment only for two months between 2018 and May 2019. Thereafter, payments were made for lesser amounts. Hence, there are alleged outstanding dues of INR 82.50 lakh towards Conclave Infratech.
- The rapid spread of Coronavirus, which has been declared a pandemic by the World Health Organisation, has proved to be a major setback to the hospitality industry globally. International as well as domestic travel and tourism is at its lowest, and this may result in a surge of insolvency proceedings and subsequent casualties amongst the stakeholders in the hospitality sector.



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