

ESSAY ON

REFORMS BY RBI FOR RESOLUTION OF STRESSED ASSETS:

AN OVERNIGHT CHRONICLE?

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INTRODUCTION

Few of the best tools to deal with the overwhelming stressed assets that the Reserve Bank of India (hereinafter referred as “**RBI**”) had, were Corporate Debt Restructuring; Strategic Debt Restructuring; Change in Ownership outside the strategic debt restructuring, etc. which were implemented under the structure of Joint Lenders’ Forum. But with the enactment of the Insolvency and Bankruptcy Code of 2016 (hereinafter referred as “**IB Code**”), the speed of converting the Non-Performing Assets (hereinafter referred as “**NPA**s”) to either Performing Assets or eradicating them got amplified. Therefore, to cope up with the new regime for stressed assets, RBI passed a notification on 12th February, 2018 namely ‘*Resolution of Stressed Assets – Revised Framework*’ (hereinafter referred as “**Notification**”) whereby, it completely renovated the guidelines by withdrawing almost all its existing guidelines and schemes dealing with stressed assets, including the guidelines for Joint Lenders’ Forum, and framed new sets of rules.¹ This step has enhanced the jurisprudence of the IB Code as one of main regulatory body dealing with stressed asset has made the IB Code as the *Sudarshan Chakra* to wipe out the evils of NPA.

It was a big move, in a single sweep RBI had decided to move back a step and remove the framework that was backbone of its resolution policy. But looking at the move in isolation seems unfair to the broad picture the reform seems to angle itself towards. It is angled towards faster, quicker and diligent resolution without any legroom for thriftiness.² In August 2014, the Banking Law Reforms Committee (hereinafter referred as “**BLRC**”) was setup.³ It recommended the IB Code, while outlining the basic problem it dealt with – ‘The Non-Performing Assets’⁴

But the code wasn’t enough to prompt the 39 listed banks with an NPA valuation of over INR 4.38 trillions.⁵ The banks though weren’t using IBC for recovery because *firstly*, there was no

¹ *Resolution of Stressed Assets – Revised Framework*, RBI Notification (12-02-2018); Annexure 3.

² *RBI announces new bad-loan resolution framework*, Decidutta Tripathy & Euan Roch, <<https://in.reuters.com/article/india-banks-regulation/rbi-announces-new-bad-loan-resolution-framework-idINKBN1FW21B>>

³ *Banking Law Reforms Committee Report*, 2015

⁴ *Resolving NPA issue is top priority for government: Sanjeev Sanyal*, Gayatri Nayak, (Economic Times, 06 September 2017) <<https://economictimes.indiatimes.com/news/economy/policy/resolving-npa-issue-is-top-priority-for-government-sanjeev-sanyal/articleshow/60395700.cms>> accessed on 3 November 2017

⁵ Sumant Batra, *Corporate Insolvency: Law and Practice*, (1st edn., Eastern Book Company, 2017)

incentives for public sector banks to recognise loss. *Secondly*, the fear of investigation in case of low recoveries for corruption and *lastly* insufficient capital to absorb losses prompted most banks to not undertake IB Code.⁶ The need to empower the central bank was felt.

This called for more powers to RBI and a bigger role of our central bank in dealing with stressed assets, unprecedented anywhere else in the world. It has created a watchdog and an ancillary arm for RBI to focus on.

The authors in this paper review the recent move by RBI in the light of the bigger moves of the central bank and the government of India. Is it an overnight chronicle or a well thought out reform building from back in 2014. The authors review the role of the central bank since 2014 to understand the impact and involvement that RBI has played to revolutionize the debt market in India.

BANKING REGULATION AMENDMENTS OF 2017

Non-performing assets are those assets of the bank which has ceased to generate income for the bank.⁷ As per the 2014 Master Circular passed by the Reserve Bank of India on 1st July, 2014, the banks are required to classify their Non-Performing Assets into three categories on the credit weaknesses and the extent of dependence on collateral security for realisation of dues, *substandard assets*, *doubtful assets* and *loss assets*.⁸ The enactment of IB Code with a view to encourage the business by amplifying the exit route and safeguarding the investments of the creditors also acts as a reliable ally against the NPAs.

The RBI was bestowed with the power to direct the banks to file an insolvency procedure against any borrower who defaulted in his payment under §35AA and §35AB of the Banking Regulation Act, 1949 which was introduced by the recent Banking Regulation (Amendment) Act, 2017.

“35AA. The Central Government may, by order, authorise the Reserve Bank to issue directions to any banking company or banking companies to initiate insolvency resolution process in respect of a default, under the provisions of the Insolvency and Bankruptcy Code, 2016

⁶ *Economic Survey Vol II of India*, Government of India, Ministry of Finance (August 2017); Ch. 4

⁷ *Supra* Note 5, p. 8.

⁸ *Master Circular – Prudential norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances*, RBI Master Circular (01-07-2014); ¶ 4.

35AB. (1) Without prejudice to the provisions of section 35A, the Reserve Bank may, from time to time, issue directions to any banking company or banking companies for resolution of stressed assets. (2) The Reserve Bank may specify one or more authorities or committees with such members as the Reserve Bank may appoint or approve for appointment to advise any banking company or banking companies on resolution of stressed assets.”⁹

Both the sections literally allows the RBI to direct banks to initiate proceedings for recovery of NPAs and deal with their stressed asset. While RBI is allowed to issue direction in any ‘public interest’, the amendments give clarity to the stress the government is putting on making sure that everything is done to ensure that NPAs are eradicated. It allowed RBI to issue directions on two front: firstly on insolvency proceedings and secondly for resolution of stressed assets.¹⁰

The Amendments enabled the RBI to take a targeted approach and deal with NPAs quickly. An empowered Oversight Committee under the amendment will be able to bypass three factors that have so far slowed the resolution process. *Firstly*, it will stop the ‘free-riding’ by lenders who didn’t participate; *Secondly*, the compliances after an agreement has been arrived at; and *lastly*, certify the process in order to allay problems in future investigations.¹¹ Thus, there will be a direct visible impact on effective resolution of stressed assets, especially in consortium or multiple banking arrangements, as the RBI will intervene in specific cases of resolution of non-performing assets, to bring them to a definite conclusion.¹² This was challenged in the following case which has been analysed as under:

Essar Steel Limited v. Reserve Bank of India

Facts: The Banking Regulation (Amendment) Ordinance, 2017 empowered the RBI to issue directions to the banking companies to initiate the insolvency proceeding against those companies with have defaulted under the IB Code, 2016. With this, RBI came with a press note dated 13 June, 2017 asking the banks to file an insolvency proceedings against those companies with high stressed assets. Essar Steel Limited was one of the companies against which insolvency proceedings were initiated due to the said press note. Therefore, Essar Steel filed a

⁹ Banking Regulation (Amendment) Act, No. 30 of 2017 (India).

¹⁰ *Id.*

¹¹ *Supra* note 6; Box II of Ch 3.

¹² *Id.*

petition before the Gujarat High Court challenging the validity of the press note and the decision of the consortium of lenders.¹³

Issues: There were three issues before the Hon'ble Gujarat High Court in this matter:

1. Whether the RBI was within its constitutional limits while making this case a 'priority' over certain cases and in asking the banks to take actions against the Identified Accounts.
2. Whether RBI should have considered Essar like the other companies who's NPAs haven't met the criteria laid down on the press note and let them have 6 months to settle their ongoing consideration of a resolution plan.
3. Whether the press note dated 13 June, 2017 violated the fundamental right to equality of Essar enshrined under Article 14 of the Constitution.

Judgement: The Hon'ble Gujarat High Court recusing the RBI rejected the contentions of Essar Steel and held that the press note is valid as the consortium of lenders can approach the NCLT for insolvency procedure on their own.¹⁴ The Hon'ble Gujarat High Court observed that the governmental institutions cannot be guide the adjudicating authority under the IB Code, 2016. Therefore, RBI has issued a corrigendum which removed the direction given to NCLT to keep the companies in priority.¹⁵ The adjudicating authority keeping the principles of natural justice in their mind observed that they will give all the companies a reasonable chance of hearing as well as consider all the factual aspect including the fact that Essar has an on-going restructuring plan. The Hon'ble High Court held the amendment ordinance in Banking Regulation Act and press note to be constitutionally valid as the amendment was to recover the public money and the press note didn't infringe fundamental rights of the companies. All the press note did was provide a time schedule for filing the insolvency proceedings. Essar's main argument was that there was no need for initiating an insolvency procedure as they were undergoing a restructuring plan. But the court held that the IB Code gives the bank an inherent power to approach the adjudicating authority with or without the press note. Therefore, the insolvency proceeding will be initiated but the on-going corporate restructuring will be taken into consideration while deciding the merits of the case but cannot form a ground for rejection of the insolvency application.¹⁶

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Corrigendum*, Reserve Bank of India, (Reserve Bank of India, 8th July, 2017)

¹⁶ *Essar Steel v. Reserve Bank of India* [2017] Special Civil Application No. 12434/2017

It is further to be noted that Central Government was a majority shareholder in about 88% of the NPAs by public sector and could've moved against them without the amendment.¹⁷ In that light it was argued to be just a complimentary piece to IBC.¹⁸ The argument though now stands shot down in the light of para 20 of the notification:

“20. The above guidelines are issued in exercise of powers conferred under Section 35A, 35AA (read with S.O.1435 (E) dated May 5, 2017 issued by the Government of India) and 35AB of the Banking Regulation Act, 1949; and, Section 45(L) of the Reserve Bank of India Act, 1934.”¹⁹

It seems that there is a broader view to this notification. It seems to be a work in progress to move in a systematic way rather than in arbitrary method. The question is whether this is the right time to move towards a new regime? The government since has brought out IB Code, defaults are being resolved, is this move right time for RBI to up its ante?²⁰

PREVIOUS REGIME

RBI is waging a war against NPAs for a very long time and has developed strong strategies to fight them. Before we look at the new model and compare, let's look at the previous system and problems therein:

i. Corporate Debt Restructuring Scheme.

A Corporate Debt Restructuring Scheme (hereinafter referred as “**CDR**”) is a non-statutory mechanism which is a voluntary system based upon their Debtor-Creditor Agreement and Inter-Creditor Agreement. Therefore, the objective of CDR is to ensure a timely and transparent mechanism for restructuring of the corporate debts for the benefit of all concerned.²¹ Such scheme will only be applicable to standard and substandard accounts and there is no requirement for the account to be sick, NPAs or being in default. In other words, any secured creditor can take this recourse if it holds a minimum of 20% share in either working capital or

¹⁷ *Legislative Brief on Banking Regulation (Amendment) Ordinance, 2017*, Mandira Kala and Vatsal Khullar (PRS Legislative Research, 18 July 2017)

<<http://www.prsindia.org/uploads/media/Banking%20Ordinance%202017/Legislative%20Brief-%20Banking%20Regulation%20Ordinance.pdf>> accessed on 4th March, 2018.

¹⁸ *NPA Ordinance: Banker Cheer but there are Unanswered Question*, Salil Panchal (Forbes, 6 May 2017)

<<http://www.forbesindia.com/article/special/npa-ordinance-bankers-cheer-but-there-are-unanswered-questions/46907/1>> accessed 4th March, 2018.

¹⁹ *Supra* note 1, ¶ 20.

²⁰ 'The RBI got this one right,' V. Anantha Nageswaran,

<<http://www.livemint.com/Opinion/nF1Cze0j0Eiluzviiq9zcI/The-RBI-got-this-one-right.html>>

²¹ *Corporate Debt Restructuring*, RBI Notification (23-08-2001), ¶ 2.

term finance, irrespective of the status of the account. Further, this scheme also has incorporated the concept of moratorium whereby both the parties would be constraining itself for taking any other legal action during the period where CDR is being implemented.²²

ii. Flexible Structuring of Existing Long Term Project Loans.

The economic life of the assets in Long Term Project is highly unstable due to asset-liability mismatch and the need to provide them with some sense of lifeline, the bank decided to ease the structure in repayment in such long term loans. Further, the RBI allowed the banks to finance such long term loans by allowing a longer tenor amortisation of the loan with periodic refinancing of balancing debt. It is important to note that when the bank refinances the existing loans by way of take-out financing without a pre-determined agreement, it would not be considered as 'restructuring' and will make that loan out of the name of NPAs.²³

iii. Strategic Debt Restructuring Scheme.

The basic principle of restructuring should be that the owners or rather the shareholders bears the loss first rather than the debt holders.²⁴ Therefore, RBI decided to empower the banks with an enhanced competency to initiate the change of ownership for those accounts that failed to reach the project viability milestone by converting their loans due to equity shares, but such restructuring needs to be sanctioned by necessary authorisations and approval like the special resolution by the shareholders.²⁵ Further, there is another requirement to collectively hold at least 51% of the post-conversion equity shareholding of the company,²⁶ and the entire scheme shall not be treated as restructuring for the purpose of asset classification and provision norms. The conversion of debt to equity shareholding under the Strategic Debt Restructuring Scheme is exempted from the regulation 3 and 4 of the provisions of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulation, 2011 and Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulation, 2009.²⁷

iv. Scheme for Sustainable Structuring of Stressed Assets.

²² *Id.*, ¶ 4.3 of Annexure.

²³ *Flexible Structuring of Long Term Project Loans to Infrastructure and Core Industries*, RBI Notification (15-07-2014) ¶ 7.

²⁴ *Framework for Revitalising Distressed Assets in the Economy – Guidelines on Joint Lenders' Forum and Corrective Action Plan*, RBI Notification (26-02-2014) ¶ 5.3.

²⁵ *Strategic Debt Restructuring Scheme*, RBI Notification (08-06-2015), ¶ 3.

²⁶ *Id.*, ¶ 3(v).

²⁷ *Id.*, ¶ 5.

This scheme was notified to strengthen the lenders' ability to deal with stressed assets which are large commercial operating accounts. RBI felt the need to encourage the Lenders to have an active role in determining the future of such stressed accounts. But for this scheme to apply, the sustainable debt should not be less than 50 percent of current funded liabilities. The Notification asks the bank to bifurcate the sustainable debt into those debts which can be serviced within the respective residual maturities of existing debt called as *Part A*, while the difference between the aggregate current outstanding debt and the Part A will be called as *Part B*.²⁸ Such bifurcation will help in understand how to recover the stressed assets by providing certain financial assistance or providing them with a moratorium period.

THE RE-MODELLING

The Notification has completely remodelled the battling sword and embraced the armour created by IB Code in their war against NPAs. Such changes will help the regulatory bodies in co-operating and enhancing the conversion speed. Some of the major changes are:

i. The Processing of the Default.

The Notification defines the default to be any non-payment of debt which has become due and payable but has not been repaid by the debtor or the corporate debtor. It can't be helped but notice that the IB Code also defines the default just the same.²⁹ Further, the Notification is asking the lenders to classify all those accounts who created a default having an aggregate exposure of 50 million rupees as Special Mention Accounts and report them to Central Repository of Information on Large Credits (hereinafter referred as "CRILC") on weekly basis.³⁰ With this step, the regulatory body has ensured the early identification of any accounts that turns might turn into a non-performing asset.

ii. The Quick Resolution.

The Notification applies a therapy to the defaulted account before directing it for an insolvency procedure. It asks the lenders to initiate the Resolution Plan as soon as the borrower entity makes a default. Such a Resolution Plan may include any action or plan or reorganization to regularise the account by payment of all the overdue by the borrower, sale of the exposures, and change in ownership or restructuring.³¹ Further, the Notification gives a period of 180 days

²⁸ *Scheme for Sustainable Structuring of Stressed Assets*, RBI Notification (13-06-2016) ¶ 6.2.

²⁹ *The Insolvency and Bankruptcy Code*, No. 31 of 2016 (India); § 3(12).

³⁰ *Supra* Note 1, ¶ 3.

³¹ *Id.*, ¶ 4.

since the date of default in large accounts to implement the Resolution Plan, failing to which, the lenders are bound to file an insolvency application under the IB code within 15 days of the lapse of said timeline.

iii. The Definition of Restructuring.

The ambit of the norms established under the Notification will cover any restructuring, irrespective framework of IBC. Further, the Notification defines restructuring as:

“Restructuring is an act in which a lender, for economic or legal reasons relating to the borrower’s financial difficulty grants concessions to the borrower. Restructuring would normally involve modification of terms of the advances/securities, which may include, among others, alteration of repayment period / repayable amount; roll over of credit facilities; sanction of additional credit facility; enhancement of existing credit limits and compromise settlements where time for payment of settlement amount exceeds three months.”

Therefore, the definition of restructuring includes almost any change that could be made to the first established contract of loan by the lenders in terms of easing the burden on the borrower. Further, the repealing of paragraph 2 of the ‘*Framework for Revitalising Distressed Assets in the Economy – Refinancing of Project Loan, Sale of NPA and Other Regulatory Measures*’ ensured that any change regarding the repayment period of the existing projects without a pre-determined agreement with other banks should be treated as restructuring and curbs the power of the banks to refinance in the stressed assets.

iv. The Assets Classification.

Prior to the Notification, every account which has defaulted would get a grace time not exceeding 12 months before being degraded to the class of ‘Substandard Assets’³² from ‘Standard Assets’. But, if a borrower entity makes a default under the regime of the present Notification, the account would immediately be downgraded from ‘Standard Assets’ to ‘Substandard Assets’ and would follow the ageing criteria as before.³³

In case of upgrade of the NPAs, the account must ensure the payments are not in default at any point of time during the ‘specified period’. The Notification defines ‘specified period’ to be the period from the date of implementation of Resolution Plan to the date by which 20% of the

³² *Supra* Note 8, ¶ 4.1.1.

³³ *Supra* Note 1, ¶ 2 of Annexure 1.

outstanding principal debt is repaid.³⁴ Further, there is a requirement to get an investment grade of BBB- or above, at the end of the 'specified period' by Credit Rating Agencies accredited by RBI to be upgraded.

IMPACT

This Notification will shift a lot of focus of resolving the Stressed Assets towards IB Code as the notification at many places asks the bank to file a mandatory insolvency proceeding under the IB Code. This notification has made sure that the scheduled commercial banks are left with almost no other option then to take drastic steps to ease the stress on the account or abolish the NPAs by seeking a proceeding under IB Code.

At this juncture it is important to note that India Incorporation believes that RBI's move to bar all debt-recast schemes will disrupt debt recovery in India and will impede the revival track Industry was moving towards.³⁵ RBI seems to have without acknowledging any failures on part of its previous regime has imposed a new scheme. If a scheme is agreed and implemented, still SDR won't continue as RBI has dismantled the whole system.³⁶

On the other hand, banks are under a renewed fear of more loans that are yet to emerge, and the pressure that is to be faced in its balance sheets. Banks are likely to face issues with the existing accounts in the short term, and an increase in costs incurred on provisions and litigations likely to go up.³⁷

Like a measure towards market discipline, as soon as a default will occur the borrower will now face steps to initiate cure to default. In a system where even its biggest players like SBI have been known to skip around and play with divergence regarding amounts of default³⁸, this step to tighten its grip was only natural. It seemed that there was scope for better quality disclosures of bad loans where no hidden bad loan skeletons can rest.³⁹

³⁴ *Id.*, ¶ 10.

³⁵ *RBI's move to bar all debt-recast programmes will delay recovery: India Inc.*, Dev Chatterjee, (Business Standard; February 14, 2018).

³⁶ *For India's banks, the worst of their bad-loan woes may be yet to come*, Devidutta Tripathy, (Reuters, February 14, 2018)

³⁷ *RBI's rules on NPAs may add to provisioning burden but aid in loan recovery*, Anup Roy & Advait Palepu, (Business Standard, February 14, 2018)

³⁸ SBI reports divergence of Rs 23,239 crore, joining likes of HDFC Bank, Axis Bank, Yes Bank, Business Today, February 12, 2018 <<https://www.businesstoday.in/sectors/banks/sbi-quarterly-loss-q3-bad-loans-fy-2017-npas/story/270461.html>>

³⁹ *India's central bank will now seek weekly reports on toxic loans from lenders*, Nupur Anand (Quartz, February 13, 2018)

With the focus shifting from creditor protection to lender protection, maybe the lenders will take this exercise more seriously lending it the certainty it lacked in the previous regime. Bankers are likely to suffer hits on its balance sheet but perhaps this over by RBI is a late heartfelt apology for what it has done by throwing the Indian public to the crisis of bad debt.⁴⁰ Or maybe, now that RBI has powers through the form of amendments, it has moved towards a safer and healthier banking system with an efficient solution for bad debt.

CONCLUSION

The RBI has created a powerful ally with IB Code and this Notification is a fortification of their armour and weapon against the defaults and bad debts. Chapter 7 of the BLRC report listed all the legislations that would be hurdles to the implementation of IBC.⁴¹ Amongst them were the RBI Regulations. The introduction of the Banking Regulation Amendments has been one of the major policy decisions to tackle stressed assets and effectively implement IBC.⁴²

The recent notification on the other hand, is like the teeth it needed as a regulatory body and central bank to deal with the issue of stressed assets. While the policy decisions of government in introducing Banking Regulation Amendment have been immensely helpful in improving the situation of stressed assets resolution in India, it also goes a long way in showing the commitment of the present government in effectively bringing in multiple institutions of implementation to effectively create an ecosystem where all stakeholders are working toward the problem that the Banking Sector of the nation faces.

The changes in the overnight chronicle seem to be a long thought out process, from the amendment in Banking Regulation to the introduction of IB Code. The notification was just another radical addition to deal with an epitome of disease ailing our banking system. It clearly comes out as a systematic attack on the basics of economy, maybe for a short term loss but a long term gain.

⁴⁰ *RBI yanks the fig leaf off with new bad loan rules for banks*, Aparna Iyer, (Mint, February 14, 2018)

⁴¹ *IBC and Bank Regulations in Corporate Insolvency Resolution –The Path To Consensus*, Ms Leena Checko and Mr Dhananjay Humar (Ifrogs, 5 March 2016)
<https://ifrogs.org/EVENTS/PRESENTATIONS/IGIDR_CONFERENCE_BANKRUPTCY_LAWS/sl_2016_0304Leena_bankregs.pdf> accessed 3 March 2018

⁴² PTI, *Govt gives wide ranging powers to RBI to deal with Bad Loans*, (New Indian Express, 5 May 2017)
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