CHAPTER-3

CORPORATE DEBT RESTRUCTURING,
SEcurITIZATION AND ASSET
RECONSTRUCTION
CHAPTER-3.

CORPORATE DEBT RESTRUCTURING, SECURITIZATION AND ASSET RECONSTRUCTION

This chapter shall deal with:

- CORPORATE DEBT RESTRUCTURING
- COMPANIES DEBT RESTRUCTURING MECHANISM IN INDIA
- THE RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS
- ENFORCEMENT OF SECURITY INTERESTS AND RECOVERY OF DEBT LAWS AND MISCELLANEOUS PROVISIONS (AMENDMENT) ACT, 2016
Companies Debt Restructuring (CDR): Definition & Need

Companies debt restructuring can be defined as “the reorganization of a company’s outstanding obligations, which is often achieved by reducing the burden of debts on the company by decreasing the rates paid and increasing the time within which the company has to pay the obligation back or by providing the company with additional monetary support to continue its operation more efficiently. This allows a company to increase its potential to meet its obligations. In addition to this some of the debts may be forgiven by the creditors in exchange for an equity position in the company”.

The need for evolving an appropriate mechanism for a company’s debt restructuring often arises when a company and its creditors are of the view that the entities are potentially viable but the company is going through financial hardship and is having difficulty in meeting its obligation towards its creditors. It will ensure timely and transparent mechanism for restructuring the corporate debts of viable entities facing problems. If the financial hardship faced by a corporate entity are enough to pose a high risk of the company going bankrupt, it affords an opportunity to the company to negotiate with its creditors to reduce these burdens and increase its chances of survival. CDR will apply only to multiple banking accounts/syndicates/consortium accounts with outstanding exposure of Rs.20 crore and above with the banks and financial institutions.

CDR system in the country will have a three tier structure:

- CDR Standing Forum
- CDR Empowered Group
- CDR Cell

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1 Detailed guidelines issued by Reserve bank of India for CORPORATE DEBT RESTRUCTURING(CDR) on August 23, 2001; Available at: <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/22752.pdf> accessed on 26th November, 2016
2 ibid
3 ibid.
THE CDR STANDING FORUM

The CDR Standing Forum would be the representative general body of all financial institutions and banks participating in CDR system. All financial institutions and banks should participate in the system in their own interest. CDR Standing Forum will be a self empowered body, which will lay down policies and guidelines, guide and monitor the progress of corporate debt restructuring. The Forum will also provide an official platform for both the creditors and borrowers (by consultation) to amicably and collectively evolve policies and guidelines for working out debt restructuring plans in the interests of all concerned. 4 The CDR Standing Forum shall comprise Chairman & Managing Director, Industrial Development Bank of India; Managing Director, Industrial Credit & Investment Corporation of India Limited; Chairman, State Bank of India; Chairman, Indian Banks Association and Executive Director, Reserve Bank of India as well as Chairmen and Managing Directors of all banks and financial institutions participating as permanent members in the system. The Forum will elect its Chairman for a period of one year and the principle of rotation will be followed in the subsequent years. However, the Forum may decide to have a Working Chairman as a whole-time officer to guide and carry out the decisions of the CDR Standing Forum5

A CDR Core Group will be carved out of the CDR Standing Forum to assist the Standing Forum in convening the meetings and taking decisions relating to policy, on behalf of the Standing Forum. The Core Group will consist of Chief Executives of IDBI, ICICI, SBI, Bank of Baroda, Bank of India, Punjab National Bank, Indian Banks Association and a representative of Reserve Bank of India. 3.1.5 The CDR Standing Forum shall meet at least once every six months and would review and monitor the progress of corporate debt restructuring system. The Forum would also lay down the policies and guidelines to be followed by the CDR Empowered Group and CDR Cell for debt restructuring and would ensure their smooth functioning and adherence to the prescribed time schedules for debt restructuring. It can also review any individual decisions of the CDR Empowered Group and CDR Cell.6 The CDR Standing Forum, the CDR Empowered Group and CDR Cell (described in following paragraphs) shall be housed in IDBI. The administrative and other

4 Ibid.
5 Ibid.
6 Ibid.
costs shall be shared by all financial institutions and banks. The sharing pattern shall be as determined by the Standing Forum.\(^7\)

**CDR Empowered Group**

The individual cases of corporate debt restructuring shall be decided by the CDR Empowered Group, consisting of ED level representatives of IDBI, ICICI Limited and SBI as standing members, in addition to ED level representatives of financial institutions and banks who have an exposure to the concerned company. In order to make the CDR Empowered Group effective and broad based and operate efficiently and smoothly, it would have to be ensured that each financial institution and bank, as participants of the CDR system, nominates a panel of two or three EDs, one of whom will participate in a specific meeting of the Empowered Group dealing with individual restructuring cases. Where, however, a bank / financial institution has only one Executive Director, the panel may consist of senior officials, duly authorized by its Board. The level of representation of banks/ financial institutions on the CDR Empowered Group should be at a sufficiently senior level to ensure that concerned bank / FI abides by the necessary commitments including sacrifices, made towards debt restructuring.\(^8\) The Empowered Group will consider the preliminary report of all cases of requests of restructuring, submitted to it by the CDR Cell. After the Empowered Group decides that restructuring of the company is prima-facie feasible and the enterprise is potentially viable in terms of the policies and guidelines evolved by Standing Forum, the detailed restructuring package will be worked out by the CDR Cell in conjunction with the Lead Institution.\(^9\) The CDR Empowered Group would be mandated to look into each case of debt restructuring, examine the viability and rehabilitation potential of the Company and approve the restructuring package within a specified time frame of 90 days, or at best 180 days of reference to the Empowered Group.\(^10\) There should be a general authorisation by the respective Boards of the participating institutions / banks in favour of their representatives on the CDR Empowered Group, authorising them to take decisions on behalf of their organization, regarding restructuring of debts of individual corporates.\(^11\) The decisions of the

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7 Ibid.
8 Ibid.
9 Ibid.
10 Ibid.
11 Ibid.
CDR Empowered Group shall be final and action-reference point. If restructuring of debt is found viable and feasible and accepted by the Empowered Group, the company would be put on the restructuring mode. If, however, restructuring is not found viable, the creditors would then be free to take necessary steps for immediate recovery of dues and / or liquidation or winding up of the company, collectively or individually.\(^{12}\)

**CDR CELL**

The CDR Standing Forum and the CDR Empowered Group will be assisted by a CDR Cell in all their functions. The CDR Cell will make the initial scrutiny of the proposals received from borrowers / lenders, by calling for proposed rehabilitation plan and other information and put up the matter before the CDR Empowered Group, within one month to decide whether rehabilitation is prima facie feasible, if so, the CDR Cell will proceed to prepare detailed Rehabilitation Plan with the help of lenders and if necessary, experts to be engaged from outside. If not found prima facie feasible, the lenders may start action for recovery of their dues.\(^{13}\) CDR Cell will be constituted in IDBI, Mumbai and adequate members of staff for the Cell will be deputed from banks and financial institutions. The CDR Cell may also take outside professional help. The initial cost in operating the CDR mechanism including CDR Cell will be met by IDBI initially for one year and then from contribution from the financial institutions and banks in the Core Group at the rate of Rs.50 lakh each and contribution from other institutions and banks at the rate of Rs.5 lakh each.\(^{14}\)

**Reference to CDR Mechanism**

All references for corporate debt restructuring by lenders or borrowers will be made to the CDR Cell. It shall be the responsibility of the lead institution / major stakeholder to the corporate, to work out a preliminary restructuring plan in consultation with other stakeholders and submit to the CDR Cell within one month.\(^{15}\) The CDR Cell will prepare the restructuring plan in terms of the general policies and guidelines approved by the CDR Standing Forum and place for the consideration of the Empowered Group within 30 days for decision. The Empowered Group can approve or suggest modifications, so, however, that a final decision

\(^{12}\) Ibid.  
\(^{13}\) Ibid.  
\(^{14}\) Ibid.  
\(^{15}\) Ibid.
must be taken within a total period of 90 days. However, for sufficient reasons the period can be extended maximum up to 180 days from the date of reference to the CDR Cell.\textsuperscript{16}

**Legal basis of CDR**

The legal basis to the CDR mechanism shall be provided by the Debtor-Creditor Agreement (DCA) and the Inter-Creditor Agreement. The debtors shall have to accede to the DCA, either at the time of original loan documentation (for future cases) or at the time of reference to Corporate Debt Restructuring Cell. Similarly, all participants in the CDR mechanism through their membership of the Standing Forum shall have to enter into a legally binding agreement, with necessary enforcement and penal clauses, to operate the System through laid-down policies and guidelines.\textsuperscript{17}

One of the most important elements of Debtor-Creditor Agreement would be 'stand still' agreement binding for 90 days, or 180 days by both sides. Under this clause, both the debtor and creditor(s) shall agree to a legally binding 'stand-still' whereby both the parties commit themselves not to taking recourse to any other\textsuperscript{18} The legal action during the 'stand-still' period, this would be necessary for enabling the CDR System to undertake the necessary debt restructuring exercise without any outside intervention judicial or otherwise.\textsuperscript{19} The Inter-Creditors Agreement would be a legally binding agreement amongst the secured creditors, with necessary enforcement and penal clauses, wherein the creditors would commit themselves to abide by the various elements of CDR system. Further, the creditors shall agree that if 75\% of secured creditors by value, agree to a debt restructuring package, the same would be binding on the remaining secured creditors.\textsuperscript{20}

**Decision making and binding effect**

The decisions of the CDR Empowered Group are final. If restructuring of debt is found to be viable and feasible and approved by the CDR Empowered Group, the concerned companies is put on the restructuring mode. When the final restructuring plan is approved and confirmed by the CDR Empowered Group, a Letter of approval (LOA) is issued to all the concerned lenders for the restructuring package by the CDR Cell. Thereafter, the individual lenders are

\textsuperscript{16} Ibid.
\textsuperscript{17} Ibid.
\textsuperscript{18} Ibid.
\textsuperscript{19} Ibid.
\textsuperscript{20} Ibid.
required to sanction the restructuring package within 45 days from the date of issue of LOA and fully implement it in the next 45 days.\textsuperscript{21}

**Other features of CDR**

CDR will be a Non-statutory mechanism.

CDR mechanism will be a voluntary system based on debtor-creditor agreement and inter-creditor agreement.\textsuperscript{22}

The scheme will not apply to accounts involving only one financial institution or one bank. The CDR mechanism will cover only multiple banking accounts / syndication / consortium accounts with outstanding exposure of Rs.20 crore and above by banks and institutions.\textsuperscript{23}

The CDR system will be applicable only to standard and sub-standard accounts. There would be no requirement of the account / company being sick, NPA or being in default for a specified period before reference to the CDR Group. However, potentially viable cases of NPAs will get priority. This approach would provide the necessary flexibility and facilitate timely intervention for debt restructuring. Prescribing any milestone(s) may not be necessary, since the debt restructuring exercise is being triggered by banks and financial institutions or with their consent. In no case, the requests of any corporate indulging in wilful default or misfeasance will be considered for restructuring under CDR.\textsuperscript{24}

Reference to Corporate Debt Restructuring System could be triggered by (i) any or more of the secured creditor who have minimum 20% share in either working capital or term finance, or (ii) by the concerned corporate, if supported by a bank or financial institution having stake as in (i) above.\textsuperscript{25}

Banks should also disclose in their published Annual Accounts, under the “Notes on Accounts”, the following information in respect of CDR undertaken during the year :

\begin{itemize}
\item Total
\end{itemize}

\textsuperscript{21} CORPORATE DEBT RESTRUCTURING MECHANISM; Available at:<http://www.cdrindia.org/cdrcell.htm> accessed on 24\textsuperscript{th} November, 2016
\textsuperscript{22} Detailed guidelines issued by Reserve bank of India for CORPORATE DEBT RESTRUCTURING(CDR) on August 23, 2001; Available at:<https://rbidocs.rbi.org.in/rdocs/notification/PDFs/22752.pdf> accessed on 26\textsuperscript{th} November, 2016
\textsuperscript{23} Ibid.
\textsuperscript{24} Ibid.
\textsuperscript{25} Ibid.
amount of loan assets subjected to restructuring under CDR. · The amount of standard assets subjected to CDR. · The amount of sub-standard assets subjected to CDR.\textsuperscript{26}

\textsuperscript{26} Ibid.
INTRODUCTION

The Securitization and Reconstruction of Financial Assets and Enforcement of Securities Act, 2002 [SARFAESI] Act, 2002 was enacted to regulate securitization and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. Provisions of SARFAESI related to NPA The right of the banks/financial institutions to resort to the provisions of the SARFAESI arises only in the event where any borrower, who is under liability to a secured creditor under a security agreement, makes any default in payment of a secured debt or any installment thereof and his account in respect of such debt is classified by the secured creditor as non-performing asset. Therefore, classification of account as an NPA is a sine qua non and, the following eventualities can be called out for recovery under the provisions of SARFAESI, that is, — there must be a debt by a borrower from a secured creditor under a security agreement; — there must be a default in repayment of secured debt or any installment thereof by the borrower; — the borrower's account in respect of such debt is classified by the secured creditor as 'nonperforming asset'; — a notice in writing should be issued by the secured creditor to the borrower to discharge in full his liabilities within sixty days from the date of the notice; — in terms of sub-section (3) of Section 13, the notice shall also give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor.

It is mandatory by the Banks to follow the RBI guidelines on asset classification before any account can be classified as an NPA and any irregularity in this regard can be fatal and can nullify the proceedings initiated under the SARFAESI Act. Normally Bankers are giving enough opportunity & sufficient time like i) Following up for 90 days ii) Examining restructuring option for viable unit Bank voluntarily taking the action to save the account


28 THE INSTITUTE OF COMPANY SECRETARY OF INDIA, Professional programme, MODULEIII,ELECTIVE PAPERS,(June 2014);Available at:<https://www.icsi.edu/docs/webmodules/ELECTIVE%20PAPERS%20JUNE%202014.pdf> accessed on 15 August,2016

29 Ibid.
from NPA. The process runs nearly 6 to 9 months from date of surface of overdue.\textsuperscript{30} And only after exhausting all options to help the borrower & to save the economic value of assets, lenders resort to go for SARFAESI Action as last resort for recovery action. Hence we are of view that borrower are given enough opportunity voluntarily to take out account from NPA before SARFAESI Action. Under this act, the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-- (a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset; (b) substitution of management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset: (c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor; (d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.\textsuperscript{31}

Further the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. In view of the above, we may say that SARFAESI can be used as tool in management of NPAs. The promulgation of the SARFAESI Act has been a benchmark reform in the Indian banking sector. The progress under this Act had been significant, as evidenced by the fact that during 2002-03 when the Act came into effect, there was an overall reduction of non-performing loans to 9.4 per cent of gross advances from 14.0 per cent in 1999-2001.\textsuperscript{32} Currently, three legal options are available to banks for resolution of NPAs- the SARFAESI Act, Debt Recovery Tribunals and Lok Adalats. The SARFAESI Act has been the most important means for recovery of NPAs. For example: Banks have referred as many as 78,366 loan default cases for the year 2010 under the SARFAESI Act involving a loan amount of Rs 14,249 crores. Against this, banks managed to recover Rs 4,269 crores representing 30% of the loans.\textsuperscript{33}

**IMPORTANT PROVISIONS OF THE ACT**

\textsuperscript{30} Ibid.
\textsuperscript{31} Ibid.
\textsuperscript{32} Ibid.
\textsuperscript{33} Ibid.
Non-performing Assets [Sec.2 (1) (o)]

“Non-performing asset” means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, doubtful or loss asset,—
(a) in case such bank or financial institution is administered or regulated by any authority or body established, constituted or appointed by any law for the time being in force, in accordance with the directions or guidelines relating to assets classifications issued by such authority or body;
(b) In any other case, in accordance with the directions or guidelines relating to assets classifications issued by the Reserve Bank.”

Classification of non-performing Assets

Banks and financial institutions classify non-performing assets further into the subsequent three categories based on the time for which the asset has remained non-performing and the reliability of the dues: (a) sub-standard assets, (b) doubtful assets, and (c) loss assets.

The Andhra Pradesh High Court in *M/s. Sri Srinivasa Rice and Floor Mill Vs. State Bank of India,* held that there is no statutory layout, whether expressed or by essential connotation, which requires the bank to pursue a particular and formal declaration as a condition precedent to classification of debt as “NPA”.

What Sec. 13(2) r/w Sec. 2(1) (o) requires is a declaration of debt by a bank as “NPA” within the legislative guidelines spelt in the definition of NPA.

Asset Reconstruction Companies [ARC]

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35 Ibid.
36 Ibid.
37 [2008]81SCL66(AP)
38 Sec13(2) of SARFAESI ACT,2002- Where any borrower, who is under a 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 non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under subsection (4)
“Asset reconstruction company” means a company registered with Reserve Bank under section 3 for the purposes of carrying on the business of asset reconstruction or securitisation, or both.\textsuperscript{39}

The problem for non-performing loans created due to systematic banking crisis world over has become alarming. Enabling measures to assist the banking systems to rely its NPAs has resulted into creation of specialized bodies called asset management companies which in India have been named asset reconstruction companies (ARCs).\textsuperscript{40} The buying of impaired assets from bank and financial institutions by ARCs will make their balance sheet cleaner and they will be able to use their time, energy and funds for development of their business. In order to make the assets saleable, ARCs mix up their assets, both good and bad.\textsuperscript{41} The main objective of asset reconstruction company (ARCs) is to act as agent for any bank or financial institution for the purpose of recovering their dues from the borrowers on payment of fees or charges, to act as manager of the borrower’s asset taken over by banks, or financial institution, to act as the receiver of properties of any bank or financial institution and to carry on such ancillary or incidental business with the prior approval of Reserve Bank wherever required. If an ARC carries on any business other than the business of asset reconstruction or securitization or the business mentioned above, it shall cease to carry on any business within one year of doing such other business.\textsuperscript{42}

**Traditional process and Securitization**

In the process of lending which is traditional in nature, a bank gives out a loan, and keeps up the same as an asset on its balance sheet, and after words gathers principal in addition to the interest on the loan advanced, and keeps a close eye in the matter as to whether there is any decay in borrower’s creditworthiness. For this very reason the bank needs to hold assets (loans given) till it matures.


\textsuperscript{40} Company secretarial practice, Professional programme examination(June 2009), ; Available at:\url{http://www.icsi.edu/portals/126/gl/professional/PPJUN2009.pdf} accessed on 4\textsuperscript{th} November 2016

\textsuperscript{41} Ibid.

\textsuperscript{42} Ibid.
The assets of the bank are stuck in these loans and in order to meet its expanding fund requirement a bank needs to raise additional funds from the market. Securitization is the way towards opening these blocked funds.

**Meaning of Securitization**

“Securitization means acquisition of financial assets by any securitization company or reconstruction company from any originator, whether by raising of funds by such securitization company or reconstruction company from qualified institutional buyers by issue of security receipts representing undivided interest in such financial assets or otherwise.”[43]

“Securitization Company means any company formed and registered under the Companies Act, 1956 (1 of 1956) for the purpose of securitization.”[44]

Securitization is the insurance of marketable securities backed not by the expected capacity to repay of a private corporation or public sector entity, but by the expected cash flows from specific assets.[45]

There are two motives for securitization. One, the securitized assets go off the balance sheet of the originator and so the asset base is pruned down to that extent, thereby reducing the regulatory capital requirements to support the assets. Second, the assets portfolio is liquidated, releasing cash, which in turn reduces the need for demand and time liabilities that are subject to statutory reserves.[46]

**Acquisition of rights or interest in financial assets.**

Section 5 of SRFAESI Act, 2002, mandates that only banks and financial institutions can securitize their financial assets. If the bank or financial institution is a lender in relation to any financial assets acquired by the securitization company or the reconstruction company, then on such acquisition, such securitization company or the reconstruction company shall be

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[43] [Sec. 2(1) (z)].of SRFAESI ACT,2002
[44] [sec. 2(1) (za)].SRFAESI ACT,2002
[46] Ibid.
deemed to be the lender. All the rights of such bank or financial institution shall vest in such company in relation to such financial assets.\textsuperscript{47}

\textbf{Measures for assets reconstruction (section 9)\textsuperscript{48}}

“Without prejudice to the provisions contained in any other law for the time being in force, a securitization company or reconstruction company may, for the purposes of asset reconstruction, as per the guidelines framed by the Reserve Bank, may provide for any one or more of the following measures, viz.,:---

(a) The proper management of the business of the borrower, by change in, or takeover of, the management of the business of the borrower;

(b) The sale or lease of a part or whole of the business of the borrower;

(c) Rescheduling of payment of debts payable by the borrower;

(d) Enforcement of security interest in accordance with the provisions of this Act;

(e) Settlement of dues payable by the borrower;

(f) Taking possession of secured assets in accordance with the provisions of this Act.”

\textbf{Other functions carried out by Securitization Company or the reconstruction company in accordance with section 10 of the Act:}\textsuperscript{49}

“(a) Act as an agent for any bank or financial institution for the purpose of recovering their dues from the borrower on payment of such fee or charges as may be mutually agreed upon between the parties;

(b) Act as a manager referred to in clause (c) of sub-section (4) of section 13 on such fee as may be mutually agreed upon between the parties;

(c) Act as receiver if appointed by any court or tribunal:

Provided that no securitization company or Reconstruction Company shall act as a manager if acting as such gives rise to any pecuniary liability.”

\textsuperscript{47} Sec.5(2) of SARFAESI ACT,2002; available at:<http://lawmin.nic.in/ld/P-ACT/2002/The%20Securitisation%20and%20Reconstruction%20of%20Financial%20Assets%20and%20Enforcement%20of%20Security%20Interest%20Act,%202002.pdf> accessed on 15\textsuperscript{th} August 2017

\textsuperscript{48} Section 9 of SARFAESI ACT,2002

\textsuperscript{49} Section 10 of SARFAESI ACT,2002
Enforcement of security interest (Section 13)\textsuperscript{50}

Sec.13 of Securitization Act provides for the enforcement of security interest by a secured creditor straightaway, without the intervention of court, on default in repayment of instalments, and non compliance with the notice of the court, on default in repayment of instalments, and non compliance with the notice of 60 days after the declaration of the loan as a non performing asset. It must, however be remembered that the classification of assets as non-performing is not on the mere whims and fancies of the financial institutions. The Reserve bank of India has an elaborate policy providing guidelines or prudential norms in that regard.

The secured creditor has been defined to mean ‘any bank or financial institution or any consortium or group of banks or financial institutions and includes debenture trustees appointed by any banks of financial institutions or securitization company or reconstruction company or any other trustee holding securities on behalf of a bank or financial institution, in whose favour security interest is created for due repayment by any borrower of any financial assistance’.\textsuperscript{51}

The secured creditor has two options. It can either transfer the assets to a securitization or reconstruction company or exercise the powers under the Act. Sec. 13(4) of the Act empowers the recourse to one more of the following measures, after giving proper notice, for the recovery of the secured debts, namely:

“(a) Take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset;
(b) Take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset:
(c) Appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;
(d) Require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.”\textsuperscript{52}

\textsuperscript{50}Section 13 of SARFAESI ACT,2002
\textsuperscript{51}Sec.2(1)(zd) of SARFAESI ACT,2002
\textsuperscript{52}Sec.13(4) of SAFAESI ACT,2002
In case of joint financing under consortium or multiple lending arrangements if 75% of the secured creditors in value agree to initiate recovery action the same is binding on all secured creditors. In case of a company under liquidation, the amounts realized from the sale of the secured assets are to be distributed in accordance with the provisions of Section 529 A of the Companies Act, 1956.\(^\text{53}\) If the company is being wound up after the commencement of this Act, the secured creditor of such company, who chose to realize its security instead of relinquishing its security and proving its debts under proviso to Sub-section(1) of Section 529 of the companies Act, may retain the sale proceeds of its secured assets after depositing the workmen’s dues with the liquidator in accordance with the provisions of Section 529 A of that Act.\(^\text{54}\)

Where dues of the secured creditors are not fully satisfied with the sale proceeds of secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debt Recovery Tribunal(DRT) having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower.\(^\text{55}\) Secured creditor is entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specifies above in relation to the secured assets under this Act.\(^\text{56}\)

**Manner and effect of takeover of management (Section 15)**\(^\text{57}\)

Section 15 of Securitization Act provides for the manner and effect of takeover of management. When the management of business of a borrower is taken over by a [asset reconstruction company] under clause (a) of section 9 or, as the case may be, by a secured creditor under clause (b) of sub-section (4) of section 13, the secured creditor may, by publishing a notice in a newspaper published in English language and in a newspaper published in an Indian language in circulation in the place where the principal office of the borrower is situated, appoint as many persons as it thinks fit.\(^\text{58}\)

On publication of the notice all persons holding office as directors of the company and in any other case, all persons holding any office having power of superintendence, direction and control of the business of the borrower, shall be deemed to have vacated their offices.\(^\text{59}\) It also

\(^{53}\) Sec.13(9) of SARFAESI ACT,2002  
\(^{54}\) Ibid.  
\(^{55}\) Sec.13(10) of SARFAESI ACT,2002  
\(^{56}\) Sec.13(11) of SARFAESI ACT,2002  
\(^{57}\) Sec.15 of SARFAESI ACT,2002  
\(^{58}\) Sec.15(1) of SARFAESI ACT,2002  
\(^{59}\) Sec.15(2)(a) of SARFAESI ACT,2002
has the effect of termination of all contracts entered into by the borrower with such directors or the administrators.\textsuperscript{60}

Right to appeal (sec. 17)
Section 17 of the Securitization Act provides that “any borrower or any other person aggrieved by the action of secured creditors can file an appeal to the concerned Debt recovery tribunal (DRT). Any person aggrieved by the order of DRT, may prefer an appeal to the appellate tribunal within 30 days from the date of receipt the order of DRT.”\textsuperscript{61}

\textsuperscript{60} Sec.15(2)(b) of SARFAESI ACT,2002
\textsuperscript{61} Sec.17 of SARFAESI ACT,2002
THE RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS

Need and object

The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (henceforth the “Act”) was passed by the parliament of India to provide for the establishment of Tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions and for matters connected therewith or incidental thereto. With a view to help financial institutions recover their bad debts quickly, the government of India has constituted thirty three Debt recovery Tribunals and five Debt recovery Appellate Tribunals all over the country. The Act states that a tribunal shall be formed with only one person and he will be called the presiding officer, who will be appointed, by notification, by the Union government. Any individual who is, or who has been, or is qualified, a District Judge may be appointed as the presiding Officer, who shall, hold office for the term of five years from the date on which he enters his office or until he attains the age of sixty two years, whichever is earlier.

An Appellate Tribunal shall consist of one person to be called as the presiding officer of the Appellate Tribunal. Any person who is, or who has been, or is qualified, a Judge of High Court; or has been a member of the Indian Legal service and has held a post of Grade I of that service for at least three years. The Chairperson of an Appellate Tribunal shall hold office for a term of five years from the date on which he enters upon his office and shall be eligible for reappointment: Provided that no person shall hold office as the Chairperson of a Appellate Tribunal after he has attained the age of seventy years. Any person aggrieved by an order made, or deemed to have been made, by a tribunal under this Act, may prefer an appeal to an appellate tribunal having jurisdiction in the matter.

64 Sec.5 of THE RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS ACT, 1993
65 Sec.6 of THE RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS ACT, 1993
66 Sec.9 of THE RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS ACT, 1993
67 Sec.10 of THE RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS ACT, 1993
68 Sec. 11 of THE RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS ACT, 1993
69 Sec.20 of THE RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS ACT, 1993
Powers of the Tribunal and Appellate Tribunal

The Tribunal and Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908, but by the principle of Natural justice. As per the provision of Sec.25, “the Recovery officer shall, on receipt of the copy of certificate, proceed to recover the amount of debt specified in the certificate by one or more of the following modes, namely:

a) Attachment and sale of movable or immovable property of the defendant;

b) Arrest of the defendant and his detention in prison;

c) Appointing a receiver for the management of the movable or immovable properties of the defendant.”

A very recent development in this area is the passing of the Enforcement of Security Interests and Recovery of Debt Laws and Miscellaneous Provisions (Amendment) Act, 2016 by the Indian Parliament to improve the efficacy of Indian debt recovery laws.

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ENFORCEMENT OF SECURITY INTERESTS AND RECOVERY OF DEBT LAWS AND MISCELLANEOUS PROVISIONS (AMENDMENT) ACT, 2016

70 Sec. 22 of THE RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS ACT, 1993
71 Sec. 25 of THE RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS ACT, 1993
72 The Minister of Finance had issued a notification (S.O. 2831 (E)) dated September 01, 20162, through which the Act came into force on September 01, 2016. the Act seeks to amend SARFAESI Act, DRT Act, Indian Stamp Act and Depositories Act.
With increasing levels of non-performing or stressed assets in the Indian financial services sector, reforming the debt recovery and bankruptcy framework has been a key focus area for the Indian government. Following the recent enactment of the Insolvency and Bankruptcy Code, 2016 (Bankruptcy Code), the Indian parliament has now passed the Enforcement of Security Interests and Recovery of Debt Laws and Miscellaneous Provisions (Amendment) Act, 2016 to improve the efficacy of Indian debt recovery laws.  

This Act has been enacted to further amend the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Recovery of Debts due to Banks and Financial Institutions Act, 1993, the Indian Stamp Act, 1899, and the Depositories Act, 1996, and for matters connected therewith or incidental thereto.

AMENDMENTS TO THE SARFAESI ACT, 2002

The recent amendments to the SARFAESI Act demonstrate the Indian government's commitment to put in place an efficacious system for dealing with bad debts and making debt recovery easier and effective.

- The SARFAESI Act permits a secured creditor to take possession over collaterals, against which a loan had been provided, upon default in repayment in the loan. This process is to be undertaken with the assistance of the District Magistrate, and does not involve the intervention of courts or tribunals. The Act provides a time limit for concluding this procedure. The new Act has provided that this process will have to be completed within 30 days by the District Magistrate. The Joint Committee had further modified it to allow for the time limit to be extended to 60 days, if District Magistrate is unable to pass an order within 30 days, due to some circumstances.

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74 Objective of ENFORCEMENT OF SECURITY INTERESTS AND RECOVERY OF DEBT LAWS AND MISCELLANEOUS PROVISIONS (AMENDMENT) ACT, 2016; available at: <https://www.drt.gov.in/Bill.aspx> accessed on 12th January 2017
75 Supra n.215
77 Sec. 12 of ENFORCEMENT OF SECURITY INTERESTS AND RECOVERY OF DEBT LAWS AND MISCELLANEOUS PROVISIONS (AMENDMENT) ACT, 2016; available at: <https://www.drt.gov.in/Bill.aspx> accessed on 12th January 2017
While, under the SARFAESI Act, a central registry is created to maintain records of transactions related to secured assets, the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act required creating a central database to integrate records of property registered under various registration systems with this central registry. This will facilitate implementation of the Bankruptcy Code and will enhance overall transparency with respect to security interests over a debtor’s assets.

The new Act also empowers the District Magistrate to assist banks in taking over the management of a company in case the company is unable to repay loans. This will be done in case the banks convert their outstanding debt into equity shares and consequently holds 51% or more in the company.

The new Act further provides that secured creditors would be unable to take possession over the collateral unless it is registered with the central registry. Further, these creditors, after registration of security interest, will have priority over others in repayment of dues. The move will provide a better picture of assets to the existing and potential creditors.

Until now, only 'qualified institution buyers' (i.e. banks, financial institutions, insurance companies, state finance corporations, mutual funds and foreign portfolio investors) were permitted to purchase security receipts issued by ARCs. With the amendment, the scope of eligible investors has been widened to include non-institutional investors as identified by RBI from time to time.

It further provides to bring hire purchase and financial lease under the ambit of the SARFAESI Act, and enable secured creditors to take over a company and restore its business on acquisition of controlling interest in the borrower company.

**AMENDMENTS TO THE DRT ACT (1993)**

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78 Sec.20 of ENFORCEMENT OF SECURITY INTERESTS AND RECOVERY OF DEBT LAWS AND MISCELLANEOUS PROVISIONS (AMENDMENT) ACT, 2016

79 Supra n.215


81 Sec.26C(2) of ENFORCEMENT OF SECURITY INTERESTS AND RECOVERY OF DEBT LAWS AND MISCELLANEOUS PROVISIONS (AMENDMENT) ACT, 2016

82 Supra n.215

83 Supra n.222
The RDDBFI Act provides that banks and financial institutions will be required to file cases in tribunals having jurisdiction over the defendant’s area of residence or business. The new Act has enlarged the territorial jurisdiction. It allows banks to file cases in tribunals having jurisdiction over the area of bank branch where the debt is pending. (Section 32 amending Section 19 of Principal Act)

Revamping the DRT mechanism, the Bill proposed electronic filing of recovery applications, documents and written statements. (Section 33 inserting new Section 19A in the Principal Act). Making the process time bound, it prescribes a period of 60 days for the District Magistrate to clear an application by the creditor to take over possession of the collateral. DRTs will be the backbone of the bankruptcy code and deal with all insolvency proceedings involving individuals. The debtor will have to deposit 50% of the amount of debt due before filing an appeal at a DRT.

Finance Minister Arun Jaitley said that banks must be empowered to take effective legal action against defaulters and the recently enacted insolvency law, the current amendments to securitization law and DRT law would ensure fulfilment of that the objective. He however assured that the Banks would take a compassionate view on education. Alongside the new bankruptcy law which was passed earlier in the beginning of the year 2016, amendments that are concretized by the way of this Act will help to create an infrastructure which would effectively deal with non-performing assets in the banking sector.


85 Section 32 of Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 – “In the principal Act, in section 19, (i) in subsection (1), clause (a) shall be renumbered as clause (aa) and before clause (aa) so renumbered, the following clause shall be inserted, namely: (a) the branch or any other office of the bank or financial institution is maintaining an account in which debt claimed is outstanding, for the time being; or”;

86 Supra n.226

87 Section 33 of Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 – “After Section 19 of the Principal Act, the following sections shall be inserted, namely: Section 19A - Filing of recovery applications, documents and written statements in electronic form – ...

88 Supra n.226

system. The Act will help the financial institutions and banks to effectively and speedily recover their bad loans. The Act aims to encourage more Asset Reconstruction Companies to set up their business and would also help to revamp Debt Recovery tribunals. As the current laws are asymmetrical and favourable to the defaulters, the Act will help to strengthen the banking system more legally. The Act has empowered RBI with more powers.\textsuperscript{90}

\textsuperscript{90} Supra n.226