

ISSN: 2582-2942



LEXFORTI

Legal Journal

Vol-II Issue- II

December, 2020

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Role of NCLT in proposed FSDR BILL

Nandan Dhara, Bhupali Saikia

ABSTRACT

The central part of FSDR Bill 2019 revolves around the notion of establishing an effective resolution regime. It envisages the setup of machinery having critical powers for resolving banks, such as power to terminate contracts, record debt, modify liabilities or set up bridge institutions.

To bring the disputed institution into resolution the Prompt Corrective Action framework will be adopted also to ensure timely intervention on clearly defined triggers in the financial sector.

The Resolution Authority would set up a Prompt Corrective Action framework for all the institutions and be appointed to tackle the financial sector failures without superseding the burden to taxpayers while using a transparent mechanism. The concerned RA would be authorised to cancel or modify liabilities of the errant bank to its creditors and modify the insurance limit.

There have been several questions raised on the long term efficiency of the Resolution Authority as there is a possibility that excess power to any institution may lead to manipulation of the power. Once the Bill is implemented the RA may become a future financial Supremo for all financial operations all over the country. The result of concentrating power sometimes become devastating due to lack of proper checks and balances. Applying the same concept in the arena of the implementation of RA shows some clear indication that credibility and transparency would become paramount to retain the trust of the private depositors who otherwise have to shift to non-banking investments like gold or real estate. Without proper enforceable accountability of the incumbent, even a small misstep by this body could cause creditor to opt out of the banking system and find a safer option sometimes may be less profitable. FSDR Bill 2019 is a positive initiative aiming the development of country's financial structure but with certain drawbacks. The main fear revolves around the centralisation of power to RA in the financial sector. Therefore the article discusses about the role of quasi-judicial bodies i.e National Company Law Tribunal in regulating the arbitrary power if exercised by Resolution Authority established under the FSDR bill 2019.

Keywords

- *Financial Resolution and Deposit Insurance, Financial Sector Development and Regulation (Resolution), Financial Resolution Authority*

INTRODUCTION

In 2019, media reported that Government was preparing to table a new legislation, the Financial Sector Development & Regulation (Resolution) Bill (FSDR, hereafter).

Reportedly FSDR is meant to rescue banks, among other financial sector institutions, from collapse. ¹It replaces the Financial Regulation and Deposit Insurance Bill, 2017 (FRDI hereafter), which was withdrawn in 2018 following public outcry against a “bail-in” provision, which small depositors did not trust.

There was no formal declaration about the introduction of the act and hence what is known about FSDR is from articles and YouTube interviews.² The uncertainty of the provisions due to the lack of any formal draft presented by the concerned ministry makes it difficult to understand especially since the law when operationalized, can impact millions of individuals, institutions and public funds.

FSDR creates a Financial Resolution Authority (FRA) with absolute authority to undertake resolution measures.

- Its ambit will be “restricted to only orderly resolution and not to restoration and recovery.”
- It will have a representation of all financial sector regulators—RBI+ SEBI+ PFRDA+ (IRDAI)+ the Central government

Structure:

- Each regulator will be tasked with creating a PCA framework for institutions under their ambit.
- The Resolution Fund, which will replace DICGC, will collect premiums based on ‘risk-based assessment’. However, if there is a systemic issue, a government will bailout (to provide liquidity).³
- The FSDR has removed the controversial ‘bail-in’ provision
- Deposit insurance cover will be increased, it is the RA that will decide the extent of increase and will also have the power to modify the deposit insurance limit.

¹ S G Vombatkere, Author at Countercurrents, <https://countercurrents.org/author/s-g-vombatkere/>

² FSDR – The Ghost of FRDI: Rescuing failed banks at whose ... <https://countercurrents.org/2020/07/fsdr-the-ghost-of-frdi-rescuing-failed-banks-at-whose-cost/>

³ .ECONOMICS - Manifest IAS <https://www.manifestias.com/6-economicsp/page/58/>

Functions of RA

- The RA, along with sector regulators, will classify all service-providers into five categories, namely, low, moderate, material, imminent and critical.
- The power of the RA to initiate action against the entity will depend on the classification.

Tools of Resolution:

- These include the use of one or more of the following: 1) transferring the whole or part of the assets and liabilities to another entity; 2) creating a bridge service-provider; 3) cancellation /modification of liabilities; 4) Merger or amalgamation; 5) Acquisition; 6) Liquidation; 7) Run-off, in case of an insurance company, if deemed appropriate.
- Time frame for Resolution: Resolution has to be completed in one year, with the provision for an extension of one additional year, except in the case of liquidation.
- Administrator ship: When the resolution process kicks in, the RA will suspend the board and take over as the administrator.
- It is empowered to make executive decisions on behalf of the entity including appointment or removal of managers and act as a receiver. A decision on liquidation, however, has to be cleared by the NCLT, which will appoint the RA as liquidator.⁴

NATIONAL COMPANY LAW TRIBUNAL

The Indian economy has always been stroked by different phases of boom and depression. The expansion of Indian Corporate Sector with diversifying operations. With the ever-expanding functions and corporate transactions, Banks and the financial institutions are facing staggered recovery issues making them vulnerable to the Non-performing asset crisis. Specialized Tribunals like NCLT is mainly equipped for targeting the weak spots and promoting the interests of the banks, the financial institutions, the stakeholder and the Corporate sector itself.

Relating the power of NCLT in the context of the new FSDR Bill we can refer that according to FSDR, when financial sector entities like stock exchanges, clearing authorities and depositories or other capital market and insurance market intermediaries fail or are about to fail, the means for

⁴ Moneylife Exclusive - FRDI Bill To Come Back as FSDR: Many .. <https://www.moneylife.in/article/moneylife-exclusive-frdi-bill-to-come-back-as-fsdr-many-questions-unanswered/59010.html>

resuscitation are inadequate. FSDR establishes a comprehensive and effective resolution regime for the financial sector, of which banks are at the core. FSDR is a legislation to save financial institutions from bankruptcy caused by financial imprudence, mismanagement, defalcation, fraud, etc.

It will have a representation of all financial sector regulators--Reserve Bank of India (RBI), Securities and Exchange Board of India (SEBI), Insurance and Regulatory Development Authority of India (IRDAI), Pension Fund Regulatory and Development Authority (PFRDA), the Central government and will have three whole-time members and two independent members.

Critical analysis of the above mention structure of RA depicts the possibility of centralization of power, manipulation of which in a way would have harsh effect on the creditors. While the provisions looks very justifiable, the fact remains that the combination create a cocktail that without any notice could set off a chain of events that would end up in disaster for individual and families- the corporate in the finance sector, however, would not be affected.

Here comes the role of the quasi-judicial bodies as a redressal body to protect the interest of the aggrieved parties. The National Company Law Tribunal (NCLT) is a quasi-judicial body in India that adjudicates issues relating to Indian companies.

The Central Government has constituted National Company Law Tribunal (NCLT) under section 408 of the Companies Act, 2013 and was constituted on 1st June 2016. The NCLT was constituted on the basis of the recommendation of the justice Eradi committee on the law relating to insolvency and winding up of companies.

The power of NCLT includes the power to protection of interest of various stakeholders, especially non-promoter shareholders and depositors and also provide remedy of oppression and mismanagement by Authorities related to Corporate Sector.

Also, it has the Power to provide relief to the investors against a large set of wrongful actions committed by the company management or other consultants and advisors who are associated with the company which will include the actions of the aforementioned Resolution Committee established under the FSDR Bill.

Aggrieved depositors have the remedy of class actions for seeking redressal for the acts/omissions of the company which hurt their rights as depositors.

- The Tribunal is also empowered to investigate or for initiating investigation proceedings. Provisions are provided to assist investigation agencies and courts of other countries with respect to investigation proceedings.

- The NCLT has the power under the Companies Act to adjudicate proceedings pertaining to claims of oppression and mismanagement of a company, winding up of companies and all other powers prescribed under the Companies Act.

The RA expands its function as an administrator. It is empowered to make executive decisions on behalf of the entity including appointment or removal of managers and act as a receiver. A decision on liquidation, however, has to be cleared by the NCLT, which will appoint the RA as liquidator.

ROLE OF NCLT UNDER FSDR BILL

Relating the power of NCLT in the context of the new FSDR Bill we can refer that according to FSDR, when financial sector entities like stock exchanges, clearing authorities and depositories or other capital market and insurance market intermediaries fail or are about to fail, the means for resuscitation are inadequate.⁵ FSDR establishes a comprehensive and effective resolution regime for the financial sector, of which banks are at the core.

FSDR is a legislation to save financial institutions from bankruptcy caused by financial imprudence, mismanagement, defalcation, fraud, etc.

It will have a representation of all financial sector regulators--Reserve Bank of India (RBI), Securities and Exchange Board of India (SEBI), Insurance and Regulatory Development Authority of India (IRDAI), Pension Fund Regulatory and Development Authority (PFRDA), the Central government and will have three whole-time members and two independent members.

Critical analysis of the above mention structure of RA depicts the possibility of centralization of power, manipulation of which in a way would have harsh effect on the creditors. While the provisions looks very justifiable, the fact remains that the combination create a cocktail that without any notice could set off a chain of events that would end up in disaster for individual and families- the corporate in the finance sector, however, would not be affected.

Here comes the role of the quasi-judicial bodies as a redressal body to protect the interest of the aggrieved parties. The National Company Law Tribunal (NCLT) is a quasi-judicial body in India that adjudicates issues relating to Indian companies and with respect to the FSDR Bill it has certain roles specified in the bill.

⁵ FSDR -Rescuing Failed Banks At Whose Cost? - The Citizen
<https://www.thecitizen.in/index.php/en/NewsDetail/index/4/19088/FSDR--Rescuing-Failed-Banks-At-Whose-Cost>

The RA expands its function as an administrator.⁶ It is empowered to make executive decisions on behalf of the entity including appointment or removal of managers and act as a receiver. A decision on liquidation, however, has to be cleared by the NCLT, which will appoint the RA as liquidator.

The provision of Systemically Important Financial Institutions (SIFIs) states that institutions which fail will be designated as SIFIs and they can appeal against their liquidation to the National Company Law Tribunal (NCLT).

ROLE OF NCLT AS A REDRESSAL BODY IN FINANCIAL SECTOR

The power of NCLT includes the power to protection of interest of various stakeholders, especially non-promoter shareholders and depositors and also provide remedy of oppression and mismanagement by Authorities related to Corporate Sector.

Also, it has the Power to provide relief to the investors against a large set of wrongful actions committed by the company management or other consultants and advisors who are associated with the company which will include the actions of the aforementioned Resolution Committee established under the FSDR Bill.

Aggrieved depositors have the remedy of class actions for seeking redressal for the acts/omissions of the company which hurt their rights as depositors.⁷

Under **Section 245 of Companies Act, 2013** An application may be filed to the tribunal by either the members of the company or by the depositors or on the behalf of the members stating that affairs have been conducted in the manner which is prejudicial to the interest of the company.

On the application made by the members or the depositors the tribunal shall issue a public notice to be served on all of the members and depositors, where similar application is made from jurisdiction, the tribunal shall consolidate and consider it as one application and the class members or depositors shall be allowed to choose the lead applicant, and two class-action application filed for the same cause of application shall not be allowed.

⁶ lawmax – lawmax | NCLT and NCLAT (formerly CLB)<http://lawmax.in/>

⁷ National Company Law Tribunal - Powers & Jurisdiction <https://www.indiafilings.com/learn/national-company-law-tribunal-powers-jurisdiction/>

The orders which are passed by the tribunal shall be binding on the members, depositors, auditor which includes audit firm, advisors, expert or consultant and any other person associated with the company.

Also,

- The Tribunal is also empowered to investigate or for initiating investigation proceedings. Provisions are provided to assist investigation agencies and courts of other countries with respect to investigation proceedings.⁸
- The NCLT has the power under the Companies Act to adjudicate proceedings pertaining to claims of oppression and mismanagement of a company, winding up of companies and all other powers prescribed under the Companies Act.

Appeals can be made by an aggrieved party from any decision or order passed by NCLT within the period of forty-five days of the receipt of an order or decision to NCLAT. [Further, NCLAT gives its decision within six months from the date of receipt of the appeal.](#) No civil court has jurisdiction to decide the cases where NCLT and NCLAT are empowered to do so.

CONCLUSION

A brief analysis of the above article leads to the conclusion that though the FRDI bill has been renamed as the FSDR bill with certain modifications and has been reintroduced in 2020, and though it has removed the controversial 'bail-in' provision of the FRDI bill but has not reduced the worries linked to it.⁹ And the fear in is persisting. There are several harmful rules in the bill which may have a retrospective effect during their operation, like-

- 1) Transferring the whole or part of the assets and liabilities to another entity;¹⁰
- 2) Creating a bridge service-provider;
- 3) Cancellation /modification of liabilities;

⁸ End term | Bankruptcy | Liquidation <https://www.scribd.com/document/357248118/End-term>

⁹ Will the bank depositors be safe? | Times of India Blog <https://timesofindia.indiatimes.com/blogs/economic-update/will-the-bank-depositors-be-safe/>

¹⁰ .ECONOMICS - Manifest IAS <https://www.manifestias.com/6-economicsp/page/58/>

- 4) Merger or amalgamation;
- 5) Acquisition;
- 6) Liquidation;
- 7) Run-offs.

The forming of the RA is itself dangerous by removing all acts such as the Banking Regulations Act, Bank Nationalization Act, etc it can liquidate a bank, merge banks, modify rules and cause damage to the banks.

Data shows that 58% of bank deposits are the small deposits of millions of citizens, and the bail-in clause would trigger serious apprehensions. And 68% deposits are of senior citizens who will be badly affected.

At such a point the presence of quasi-judicial judicial body like NCLT is playing a prominent role in safeguarding their rights through regulating the liquidation appeals and accepting class action suits. NCLT not only put check and balances to such government actions but also boost the confidence of genuine depositors to become a part of the existing financial system. Also, the establishment of NCLT, has led to speedy remedy in resolving the company law disputes and will be disposed of expeditiously.