



June 2022

This Newsletter sets out some of the key legislative and regulatory updates in the banking and finance and insolvency space for the month of June 2022.

## **The Reserve Bank of India introduces a master direction on variation margin**

With a view to improve the safety of settlement of over-the-counter derivatives that are not centrally cleared, the Reserve Bank of India (**"RBI"**) has issued the Reserve Bank of India (Variation Margin) Directions, 2022 (**"Variation Margin Directions"**) dated June 1, 2022. The Variation Margin Directions will come into effect from December 1, 2022.

The Variation Margin Directions are in respect of variation margin for non-centrally cleared derivatives (**"NCCDs"**) i.e., derivative contracts whose settlement is not guaranteed by a central counterparty. Variation margin is the collateral that is collected or paid to reflect the current mark-to-market exposure resulting from changes in the market value of a derivative contract.

As per the Variation Margin Directions, domestic covered entities will exchange variation margin with a counterparty to an NCCD transaction if the counterparty is a domestic covered entity or a foreign covered entity. Further, if an NCCD transaction between a domestic covered entity and a foreign covered entity is subject to margin requirements in a foreign jurisdiction, then the domestic covered entity and its counterparty in the foreign jurisdiction may decide to comply with the Variation Margin Directions or the margin requirements implemented by the foreign jurisdiction. If the margin requirements in the foreign jurisdiction are proposed to be complied with, then the domestic covered entity should assess that the margining framework in the foreign jurisdiction is comparable to the requirements in the Variation Margin Directions.

The following entities are classified as domestic covered entities: (a) the entities regulated by a financial sector regulator (including branches of foreign banks operating in India) and having an average aggregate notional amount (**"AANA"**) of outstanding NCCDs of INR 250,00,00,00,000 and above, on a consolidated group-wide basis; and (b) other resident entities having an AANA of outstanding NCCDs of INR 600,00,00,00,000 and above, on a consolidated group wide basis.

Further the following entities are classified as foreign covered entities: (a) non-resident financial entities having an AANA of outstanding NCCDs of USD 3 billion and above, on a consolidated group-wide basis; and (b) other non-resident entities having an AANA of outstanding NCCDs of USD 8 billion and above, on a consolidated group-wide basis.

The Variation Margin Directions do not apply to an NCCD transaction in which one of the counterparties is the Government of India, a State Government, a Foreign Sovereign, a Central Bank, the Bank for International Settlements or a multilateral development bank.

The Variation Margin Direction will improve safety of settlement of over-the-counter (“**OTC**”) derivatives that are not centrally cleared and will strengthen the OTC derivative market in India. In order to further strengthen the OTC market, the RBI has also proposed to mandate the requirements for exchange of initial margin for NCCDs. The RBI has also issued the draft Directions on Exchange of Initial Margin for NCCDs for public comments on June 16, 2022.

## 5<sup>th</sup> Report of the Insolvency Law Committee

The Insolvency Law Committee (“**ILC**”) presented its 5<sup>th</sup> report dated May 20, 2022 (“**Report**”) to the Government of India. The Report was released to the public on June 15, 2022. The ILC made several recommendations with regard to the Insolvency and Bankruptcy Code, 2016 (“**IBC**”) and regulations made thereunder to improve the efficacy of the corporate insolvency resolution process (“**CIRP**”) and the liquidation process under the IBC.

Some of the key recommendations are in relation to:

1. mandating reliance on the records of the Information Utility (“**IU**”) for establishing default;
2. independence of avoidance proceedings from the CIRP proceedings;
3. linking the look back period under the IBC to the date of application and not admission;
4. mechanism to deal with unsolicited resolution plans and revisions of resolution plans;
5. timeline for approval of resolution plans by the adjudicating authority; and
6. mechanism for terminating a voluntary liquidation process.

For detailed analysis of the Report, please refer to the [Insolvency Law Prism](#).

## Amendments to the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016

The Insolvency and Bankruptcy Board of India (“**IBBI**”) has issued the IBBI (Insolvency Resolution Process for Corporate Persons) (Second Amendment) Regulations, 2022, dated June 14, 2022 (“**CIRP Amendment Regulations**”), amending the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (“**CIRP Regulations**”).

The key amendments introduced by the CIRP Amendment Regulations are as follows:

### 1. Treatment of avoidance transactions

It is mandatory for every resolution plan to provide the way proceedings in respect of avoidance transactions, if any, under Chapter III or fraudulent or wrongful trading under Chapter VI of Part II of the IBC will be pursued after the approval of the resolution plan and the manner in which the proceeds, if any, from such proceedings will be distributed.

This requirement will not be applicable to any resolution plan that has been submitted to the adjudicating authority under section 30(6) of the IBC on or before the date of commencement of the CIRP Amendment Regulations (i.e., June 14, 2022).

There are several cases where avoidance applications filed by resolution professionals have not been considered and disposed during the tenure of the CIRP. Therefore, it has been unclear how the avoidance applications will be taken to their logical conclusion after the resolution plan has been approved by the National Company Law Tribunal (“**NCLT**”) and the resolution professional has stepped down from his/her office. This amendment has clarified that it is mandatory for a resolution plan to clarify the manner in which avoidance applications and proceedings will be pursued after approval of the resolution plan by the NCLT.

## 2. Valuation

The CIRP Regulations provide that the fair value and liquidation value is required to be determined by two valuers in accordance with internationally accepted valuation standards in the manner set out in the CIRP Regulations.

The CIRP Amendment Regulations have introduced a concept of a third valuation which can be conducted where the two valuations of an asset class are significantly different or where the committee of creditors so requires. “Significantly different” is defined as a difference of 25% in liquidation value under an asset class, calculated as the difference of higher valuation of liquidation value and lower valuation of liquidation value (“LV”) divided by LV.

Further, “asset class” is defined as a distinct group of assets, such as land and building, machinery and equipment, displaying similar characteristics, that can be classified and requires separate set of valuers for valuation.

It should be noted that an average of the two closest estimates of a value will be considered the fair value or the liquidation value, as the case may be.

Prior to the amendment, the CIRP Regulations provided the resolution professional with the right to appoint a third registered valuer to conduct a valuation if, in its opinion, the valuations provided by the two valuers were significantly different. The assessment of difference in the valuation was left to the opinion of the resolution professional which led to a scope for discretion. Therefore, to remove ambiguity and provide a guiding factor in the appointment of a third valuer, the CIRP Amendment Regulations have introduced the threshold of 25%.

## QUICK SNAPSHOTS

### RBI prescribes provisioning for the standard assets held by an NBFC UL

Under the scale based regulatory framework for non-banking financial companies (“NBFCs”) introduced by the RBI, the RBI had stated that it would issue guidelines on differential provisioning to be held by NBFCs classified as NBFC-Upper Layer (“NBFC-UL”) towards different classes of standard assets. Pursuant to the circular dated June 6, 2022, on provisioning for standard assets by an NBFC-UL, the RBI has prescribed the provisioning for NBFC-UL in respect of standard assets for the funded amount outstanding.

The RBI circular also prescribes that the credit exposures arising on account of the permitted derivative transactions will also attract provisioning requirements as applicable to the standard loan assets of the concerned counterparties.

### No filings required for reporting guarantees under the structured obligations route

The RBI has discontinued the return on ‘details of guarantee availed and invoked from non-resident entities’. This return was required to be filed by authorised dealer banks to report the details of non-resident guarantees issued and invoked in respect of fund and non-fund based facilities between two persons resident in India. Pursuant to the RBI circular dated June 9, 2022, such discontinuation has come into force with effect from the quarter ending June 2022.

The RBI Master Directions on External Commercial Borrowings, Trade Credits and Structured Obligations, dated March 26, 2019, and the RBI Master Direction on Reporting under the Foreign Exchange Management Act, 1999, dated January 1, 2016, have been updated to reflect this change.

### Creditor to file the information of default with the IUs before filing application for CIRP

The IBBI has amended the IBBI (Information Utilities) Regulations, 2017 (“IU Regulations”) pursuant to the IBBI (Information Utilities) (Amendment) Regulations, 2022, dated June 14, 2022 (“IU Amendment Regulations”).

The key amendments introduced by the IU Amendment Regulations, *inter alia*, include the requirement for a creditor to file the information of default with the information utility before filing an application to initiate CIRP under section 7 or 9 of the IBC. The IU will be required to process the information for the purpose of issuing 'record of default' in accordance with regulation 21 of the IU Regulations. "Record of default" is defined as the status of authentication of default issued by the IU in the newly introduced Form D. This amendment is in keeping with one of the suggestions made by the ILC in its Report on increasing reliance on records maintained by IUs for establishing a default and speeding up the admission timelines.

### Dissemination of information regarding filing of insolvency applications

Under the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, a copy of any application to be made to the NCLT by a financial creditor, operational creditor or the corporate debtor for initiating the CIRP must be first provided to the IBBI by the applicant.

The IBBI has now decided that as soon as it receives the copy of such an application, it will forward the same to the IU. Upon receipt of the application, the IU must:

- (a) inform other creditors of the corporate debtor by sharing the application;
- (b) issue a notice to the applicant, requiring it to file 'information of default' in the specified format under the IU Regulations; and
- (c) process the 'information of default' for the purpose of issuing a record of default as per the IU Regulations.

### IBBI to form a panel of insolvency professionals to be appointed as resolution professional, liquidator, resolution professional or bankruptcy trustee

The IBBI has issued the Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (Recommendation) Guidelines, 2022 ("**IBBI IP Guidelines**") on June 8, 2022. The IBBI IP Guidelines have come into effect from July 1, 2022.

The IBBI IP Guidelines provide for constitution of a panel of insolvency professionals ("**IPs**") for the purpose of appointing an interim resolution professional ("**IRP**"), liquidator, resolution professional ("**RP**") or bankruptcy trustee ("**BT**") to avoid administrative delays in their appointment by the NCLT or the Debt Recovery Tribunal, as the case may be. As per the IBBI IP Guidelines, the IBBI will prepare a common panel of IPs for appointment as an IRP, liquidator, RP or BT, and will share the same with the adjudicating authority. Each panel will have a validity of six months and will be replaced with a new panel after six months.

The IBBI IP Guidelines are applicable in cases where the IBC provides that the adjudicating authority should make reference to the IBBI for appointment of IP as an IRP, liquidator, RP or BT such as sections 16(3) and 34(4) of the IBC in relation to corporate insolvency and sections 97(3), 98(2), 125(3), 146(2) and 147(2) of the IBC in relation to individual insolvency.

The IBBI IP Guidelines have been issued in supersession of the Insolvency Professionals to act as Interim Resolution Professionals, Liquidators, Resolution Professionals and Bankruptcy Trustees (Recommendation) (Second) Guidelines, 2021 dated December 1, 2021.

## Finance Practice

JSA has a widely recognised market leading banking & finance practice in India. Our practice is partner led and is committed to providing quality professional service combining domain knowledge with a constructive, consistent, comprehensive and commercial approach to issues. Clients trust our banking lawyers to take a practical and business-oriented approach to achieving their objectives. Our lawyers have a clear understanding of the expectations and requirements of both sides to a financing transaction and provide tailored advice to each client's needs. The practice is especially praised for its accessibility and responsiveness and its ability to work well with international firms and clients. We represent a variety of clients including domestic and global banks, non-banking finance companies, institutional lenders, multi-lateral, developmental finance and export credit institutions, asset managers, funds, arrangers and corporate borrowers in different sectors on a wide range of financing transactions.

Our full spectrum of services includes advising clients on corporate debt transactions (including term and working capital debt), acquisition finance, structured finance, project finance, asset finance, real estate finance, trade finance, securitisation, debt capital markets and restructuring and insolvency assignments.

Our practice has been consistently ranked in the top-tier for several years, and several of our partners are regarded highly, by international publications such as Chambers and Partners, IFLR, Asia Law, Legal 500, Asia Legal Business, IBLJ and Leaders League.

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13 Practices and  
22 Ranked Lawyers



15 Practices and  
18 Ranked Lawyers



7 Practices and  
2 Ranked Lawyers



**IFLR1000 India Awards 2021**



Among Top 7 Best Overall  
Law Firms in India and  
10 Ranked Practices

13 winning Deals in  
IBLJ Deals of the Year

6 A List Lawyers in  
IBLJ Top 100 Lawyer List



Banking & Financial Services  
Law Firm of the Year 2022

Dispute Resolution Law  
Firm of the Year 2022

Equity Market Deal of the  
Year (Premium) 2022

Energy Law Firm of the Year 2021

10 Practices and  
34 Ranked Partners

Banking & Finance Team  
of the Year

Fintech Team of the Year

Restructuring & Insolvency  
Team of the Year

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