ISDA Master Agreement Lawyer's Handbook

A Practical Guide for Indian Banking Lawyers on the 2002 ISDA Master Agreement

Prepared for Indian Banking & Finance Lawyers | Kondamgire Law Chambers Edition

June 2026

Contents

Disclaimer and Important Notice

This handbook is prepared as a practical educational and reference resource for qualified Indian legal practitioners, in-house counsel at banks, and compliance professionals dealing with over-the-counter (OTC) derivatives documentation. It is **not** a substitute for formal legal advice, a formal legal opinion from ISDA or Indian counsel, or professional judgment on specific transactions.

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Indian law aspects are based on publicly available information, RBI Master Directions (as of mid-2026), the Insolvency and Bankruptcy Code, 2016 (IBC), the Code of Civil Procedure, 1908, and general market practice. Enforceability of close-out netting, choice-of-law provisions, and foreign judgments in India remains subject to case-by-case analysis and evolving jurisprudence. Always obtain a current Indian law netting opinion and jurisdiction-specific advice before relying on any provision.

The authors and publishers accept no liability for any loss or damage arising from reliance on this material. This is a living document; regulatory changes (RBI, SEBI, IFSCA) and judicial developments can materially affect the analysis.

Recommended Practice: For every ISDA relationship, banks should:

1. Obtain ISDA Netting Opinion for India (updated periodically by ISDA).
2. Commission transaction-specific or counterparty-specific Indian legal opinions on enforceability, especially under IBC.
3. Ensure all counterparties are “eligible users” or “permitted counterparties” under relevant RBI directions.
4. Use only ISDA-licensed templates and confirmations.

Preface

The ISDA Master Agreement is the global standard for documenting OTC derivatives. In India, its use has grown significantly with the liberalization of the derivatives market, the push for hedging by corporates, and the participation of Indian banks in cross-border and domestic OTC markets (interest rate swaps, currency derivatives, credit derivatives, commodities, etc.).

For Indian banking lawyers, mastering the ISDA documentation suite is essential because:

- Banks act both as **providers** of hedging solutions to corporate clients ("users") and as **counterparties** in inter-bank and institutional markets.
- Documentation directly impacts credit risk mitigation (netting and collateral), capital relief under Basel III / RBI guidelines, regulatory compliance, and recovery in default scenarios.
- The interface between the contractual regime (English or New York law) and Indian insolvency, contract, and regulatory law creates unique risks and opportunities that generic international commentaries do not address.

This handbook is written specifically for the Indian context. It explains every major clause of the 2002 ISDA Master Agreement in plain English, highlights negotiation strategies from the perspective of an Indian bank (or a foreign bank dealing with an Indian counterparty), identifies lender/bank risks, typical borrower/client pushbacks, market practice in the Indian and Asian markets, and provides **actual suggested redline language** for the Schedule and other documents (always to be adapted by counsel).

The focus is practical and transaction-oriented rather than academic. Each chapter includes:

- Plain English explanation of the clause and its commercial purpose.
- Key risks for the bank (as the derivatives house or lender with hedging side).
- Counterparty (corporate or weaker bank) typical positions.
- Indian law overlay and enforcement considerations.
- Negotiation tips and redline suggestions.

Special emphasis is given to:

- Close-out netting and its interaction with the IBC.
- Choice of governing law and jurisdiction, and practical enforcement of foreign judgments/awards in India.
- Credit Support Annex (CSA) structures suitable for Indian counterparties (one-way vs two-way, INR collateral, haircuts).
- Cross-default and cross-acceleration linkages with loan, bond, and other financing documents.
- Regulatory compliance under RBI directions on OTC derivatives.

We hope this handbook becomes a desk reference for drafting, negotiating, and managing ISDA relationships in India.

Note on Page Count and Scope: A fully expanded professional handbook with 20+ detailed case studies, complete sample redlined Schedules for different counterparty types (corporate, NBFC, PSU, foreign bank), flowcharts, valuation dispute resolution procedures, tax gross-up matrices, and regulatory update appendices can easily exceed 250 pages. This edition provides a dense, practical core covering every clause with Indian-specific depth. Users can expand it internally with firm precedents and recent judgments.

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Chapter 1: Introduction to the ISDA Master Agreement in the Indian Market

1.1 What is the ISDA Master Agreement?

The ISDA Master Agreement is a pre-printed, standardized form agreement published by ISDA that serves as the "master" contract governing all OTC derivatives transactions between two parties. Once signed, every new derivative transaction (swap, option, forward, etc.) is documented by a short Confirmation that incorporates the Master Agreement by reference. All transactions are treated as a single agreement for purposes of close-out netting.

The 2002 version is the current market standard (the 1992 version is legacy). It improved upon the 1992 version primarily by:

- Introducing the "Close-out Amount" methodology (replacing the older Market Quotation + Loss approach).
- Adding Force Majeure Termination Event.
- Refining Illegality provisions.
- Improving the structure for multibranch parties and offices.

1.2 Why Indian Banks and Lawyers Need Deep ISDA Knowledge

Indian banks enter into derivatives for:

- Proprietary trading and market-making (subject to RBI limits).
- Hedging their own balance sheet (interest rate, FX, credit risk).
- Providing hedging products to corporate clients, NBFCs, and other permitted users.

Key drivers for robust documentation:

- **Credit Risk Mitigation**: Close-out netting reduces gross exposure to net exposure. This directly affects capital requirements and internal credit lines.
- **Collateral Efficiency**: CSA allows posting of cash or securities to secure mark-to-market (MTM) exposure.
- **Default Management**: Clear contractual rights to terminate, value, and net upon counterparty default or other trigger events.
- **Regulatory Capital and Liquidity**: RBI and Basel frameworks give preferential treatment to netted and collateralised exposures.
- **Cross-border and Inter-bank Business**: Most international counterparties insist on ISDA with English or New York law.

1.3 The Indian Regulatory Overlay

Unlike pure common law jurisdictions, Indian derivatives documentation operates under a layered regulatory framework:

- **RBI Master Direction – Risk Management and Inter-Bank Dealings** (and updates): Governs who can enter what derivatives, purpose (hedging vs trading), documentation standards, and reporting.
- **RBI Directions on Margin Requirements for Non-Centrally Cleared OTC Derivatives**: Phased implementation of initial margin (IM) and variation margin (VM) for banks and other entities.
- **Insolvency and Bankruptcy Code, 2016 (IBC)**: Contains certain protections for "financial contracts" and set-off/netting, but does not provide the comprehensive safe harbour that exists in the US (FDICIA) or UK (Financial Markets and Insolvency (Settlement Finality) Regulations). Close-out netting enforceability is therefore **qualified**.

- **FEMA and Foreign Exchange Management (Foreign Exchange Derivative Contracts) Regulations**: For cross-currency and foreign exchange derivatives.
- **SEBI / IFSCA** rules for certain market participants and products.
- **Companies Act, 2013** and **Limited Liability Partnership Act** for corporate authority and execution formalities.

Critical Point for Indian Lawyers: The contractual close-out and netting provisions in the ISDA are only as good as their enforceability under Indian law in an insolvency or resolution scenario. This is the single biggest documentation risk in Indian ISDA practice.

1.4 Netting Enforceability in India – Current Position (Mid-2026)

ISDA publishes periodic netting opinions for India. The opinion generally supports the enforceability of bilateral close-out netting under the ISDA Master Agreement for counterparties that are companies or banks, subject to qualifications. However:

- There is no dedicated "Netting Act" or "Financial Contracts Netting Act" in India (unlike Singapore, Hong Kong, or proposed models in other jurisdictions).
- Enforcement relies on general principles of contract law, the Indian Contract Act, 1872 (set-off and novation), and specific provisions in the IBC (Section 36 on liquidation estate exclusions, Regulation 29 of IBBI (Liquidation Process) Regulations on set-off, and certain carve-outs for financial service providers).
- In practice, Indian courts and insolvency professionals have respected contractual netting in many cases, but the position is not as clear or automatic as in G10 jurisdictions. Challenges can arise on grounds of public policy, fraudulent preference, or if the valuation methodology is attacked as unreasonable.
- For banks under resolution (e.g., under RBI's Prompt Corrective Action or specific resolution frameworks), additional complexities exist.
- **Recommendation**: Every Indian bank should maintain a current ISDA netting opinion and, for material exposures, obtain a specific enforceability opinion from Indian counsel addressing the particular counterparty's insolvency risk profile.

This handbook repeatedly returns to netting issues because they are central to the value of the ISDA for banks.

1.5 Typical Documentation Suite for an Indian Bank ISDA Relationship

1. **2002 ISDA Master Agreement** (English law or New York law – English law is more common for Asian and European counterparties).
2. **Schedule** to the Master Agreement (elections, amendments, additional provisions – this is where most negotiation happens).
3. **Credit Support Annex** (usually the 1995 English Law CSA or 2016 VM CSA; one-way or two-way depending on credit profile).
4. **Confirmations** for each transaction (short-form or long-form; often using ISDA templates or bank-specific forms incorporating ISDA Definitions).
5. **Transaction Supplements** or **Novation Agreements** when required.
6. **Side Letters** or **Amendments** for specific regulatory or relationship issues (e.g., FATCA, CRS, sanctions, RBI reporting consent).
7. **Corporate Authorisations**: Board resolutions, power of attorney, specimen signatures, sometimes articles of association extracts confirming derivative authority.

For Indian corporates, banks often also require linkage or cross-default to the main Facility Agreement / Loan Agreement.

Chapter 2: The ISDA Documentation Architecture

2.1 The "Single Agreement" Concept

One of the most important features of the ISDA Master Agreement is the "single agreement" concept. All transactions under the Master Agreement are treated as a single, indivisible contract. This is crucial for close-out netting because it allows the non-defaulting party to terminate all outstanding transactions and calculate a single net amount owing between the parties, rather than having to pursue each transaction separately.

Plain English: Instead of 50 separate swap contracts that you have to unwind one by one if the counterparty defaults, the ISDA treats them as one big contract. You close everything out together and end up with one number – either you owe them or they owe you.

This concept is reinforced in Section 1(c) of the 2002 Master Agreement.

Indian Law Note: Indian courts generally respect the freedom of contract and the parties' intention to treat multiple transactions as a single agreement for netting purposes. However, in insolvency, the liquidator or resolution professional may still scrutinise whether any particular transaction or the close-out itself constitutes a preferential transaction or undervalued transaction under the IBC. Robust documentation and contemporaneous records of commercial rationale help defend against such challenges.

2.2 Hierarchy of Documents

When interpreting the ISDA documentation, the following order of precedence generally applies (subject to specific Schedule amendments):

1. **Confirmation** for the specific transaction (overrides Master Agreement and Schedule for that trade).
2. **Schedule** to the Master Agreement (amends or supplements the pre-printed Master Agreement).
3. **Master Agreement** itself (the 2002 printed form).
4. **ISDA Definitions** booklets incorporated by reference (e.g., 2006 ISDA Definitions for interest rate and currency derivatives, as supplemented; 2014 ISDA Credit Derivatives Definitions, etc.).
5. **Credit Support Annex** (governs collateral; sits alongside but is often treated as a separate agreement for some purposes).

Negotiation Tip: Banks should ensure that the Confirmation explicitly states that it supplements and forms part of the Master Agreement and Schedule. Any special terms for a transaction should be clearly set out in the Confirmation to avoid disputes on whether they amend the Master Agreement.

2.3 Role of the Schedule

The Schedule is where the parties customise the Master Agreement. It has standard Parts:

- **Part 1**: Termination, Payment and other elections (e.g., Automatic Early Termination, which offices are covered, etc.).
- **Part 2**: Tax representations and agreements.
- **Part 3**: Documents to be delivered (authorisations, opinions, financial statements, etc.).
- **Part 4**: Miscellaneous (addresses for notices, process agent, etc.).
- **Part 5**: Other provisions (often used for additional Events of Default/Termination Events, gross-up modifications, etc.).

For Indian transactions, the Schedule is heavily negotiated. Typical additions include:

- Additional Events of Default linked to the borrower's loan agreements or financial covenants.
- Material Adverse Change (MAC) as a Termination Event or Event of Default.

- Specific Indian regulatory representations (compliance with RBI hedging guidelines, eligible user status).
- Provisions addressing stamp duty, execution formalities, and governing law nuances.
- Cross-default thresholds tailored to the client's group exposure.

Redline Suggestion Example (Schedule Part 5 – Additional Event of Default):

"**Additional Event of Default – Cross Default to Financing Documents**. An Event of Default shall occur if any borrower or guarantor under any loan, facility, bond, debenture, or other financing agreement with Party A or any of its Affiliates (a) fails to pay any amount when due (after any applicable grace period), or (b) breaches any financial covenant or other material obligation, and such failure or breach is not remedied within any applicable cure period, or results in acceleration or termination of such financing agreement. For this purpose, 'Affiliates' of Party A shall include [list Indian and foreign bank entities]. Threshold Amount: INR [X] crore or its equivalent."

This is a common protective provision for Indian banks that have both lending and derivatives relationships with the same client group.

Chapter 3: Section 1 – Interpretation

3.1 Overview of Section 1

Section 1 of the 2002 ISDA Master Agreement deals with how the agreement and its terms are to be interpreted. It includes:

- Definitions and interpretation rules.
- References to other documents and legislation.
- The single agreement provision.
- Inconsistency provisions.
- Headings and single agreement confirmation.

Plain English Purpose: This section makes sure everyone reads the contract the same way and that all the pieces fit together as one contract.

3.2 Key Sub-Provisions and Indian Context

3.2.1 Section 1(a) – Definitions

The agreement incorporates definitions from the ISDA Definitions booklets and defines its own terms. When negotiating, parties often add or modify definitions in the Schedule (Part 5 or specific definition amendments).

Negotiation Point: For Indian counterparties, it is useful to add definitions such as:

- “Indian Rupee” or “INR” with fallback to RBI reference rate.
- “Business Day” with Indian financial centres (Mumbai, Delhi, etc.) specified for INR payments.
- “Eligible Collateral” tailored to RBI margin rules (G-Secs, cash in INR, etc.).

3.2.2 Section 1(c) – Single Agreement

This is the core provision stating that all Transactions form a single agreement between the parties.

Bank Risk if Weakened: If a counterparty or insolvency official successfully argues that transactions are separate, the bank could be left with gross exposures on some trades while others are netted or terminated differently. This destroys the credit risk mitigation benefit.

Indian Law Overlay: While freedom of contract is respected, Indian insolvency law (IBC) has concepts of “avoidance transactions”. If the single agreement construct is seen as artificially linking transactions to prefer one creditor, there could be challenge risk. In practice, this risk is low if the linkage is genuine and documented from inception.

Redline Suggestion: In Schedule Part 5, add confirmation that the parties intend the single agreement concept to apply for all purposes, including insolvency set-off and netting, and that they have entered into the Master Agreement on the basis of that understanding.

3.2.3 Inconsistency and Amendment Provisions

Section 1 also addresses what happens if there is inconsistency between documents. Generally, the Confirmation prevails for the specific transaction.

Practical Tip for Indian Banks: When issuing Confirmations, use a standard template that expressly states it is subject to the Master Agreement and Schedule (as amended). Train front-office and middle-office staff to flag any non-standard terms that might inadvertently amend the Master Agreement.

3.3 Negotiation Strategies – Section 1

Bank (Stronger Party) Position:

- Resist any attempt to carve out specific transactions from the single agreement or netting.
- Ensure definitions of key terms (Business Day, Payment Date, etc.) are practical for INR and cross-border payments.
- Add Indian-specific definitions and interpretation rules (e.g., references to RBI circulars, Mumbai as financial centre).

Counterparty (Corporate Client) Position:

- May want certain legacy transactions or specific products (e.g., embedded derivatives in loans) excluded from netting or treated separately for accounting or regulatory reasons.
- May push for broader "Business Day" definitions or Mumbai/New York/London combined calendars.

Market Practice in India:

Most Indian bank ISDA Schedules contain additional interpretation provisions for INR payments, holiday calendars (including Mumbai, and sometimes other centres for cross-currency), and explicit single agreement affirmations. Cross-border counterparties usually accept these with minimal pushback if they are reasonable and market-standard.

Chapter 4: Section 2 – Obligations

4.1 General Payment and Delivery Obligations (Section 2(a))

Each party must make the payments and deliveries specified in each Confirmation, subject to the conditions precedent in Section 2(a)(iii).

Plain English: You pay what the Confirmation says you have to pay, on the dates and in the currencies specified, provided the other side isn't in default and other conditions are met.

Section 2(a)(iii) – Condition Precedent: A key protective provision for the non-defaulting party. It provides that a party's obligation to pay or deliver is subject to the condition that no Event of Default or Potential Event of Default has occurred and is continuing with respect to the other party.

Bank Perspective (Lender Risk): This is vital. If the counterparty is in default (e.g., missed a loan payment or breached a covenant), the bank can suspend its own payment obligations under the derivatives (e.g., stop paying floating leg on an IRS or delivering currency on an FX forward). This prevents "throwing good money after bad" and preserves the bank's set-off position.

Counterparty Pushback: Corporate clients sometimes argue that suspension should only apply to material defaults or after notice and cure period. Banks usually resist broad cure rights here because the condition precedent is a fundamental credit protection.

Indian Context: In practice, when a corporate client defaults on its loan facilities, Indian banks routinely rely on Section 2(a)(iii) to stop making payments under hedging swaps and to accelerate close-out. This is often coordinated with the lending team's enforcement actions.

Redline Suggestion (Schedule Part 5 – Clarification on 2(a)(iii)):

"For the avoidance of doubt, the condition precedent in Section 2(a)(iii) shall apply regardless of whether the relevant Event of Default or Potential Event of Default arises under this Agreement or under any other agreement between Party A (or its Affiliates) and Party B (or its Affiliates), including any loan, facility, guarantee or security document. Party A may exercise its rights under Section 2(a)(iii) without prior notice to Party B where it reasonably determines that an Event of Default or Potential Event of Default has occurred."

This strengthens the bank's hand in a deteriorating credit situation.

4.2 Netting of Payments (Section 2(c))

Section 2(c) provides for netting of payment obligations in the same currency on the same date across all Transactions.

Plain English: If on the same day you owe me INR 10 crore on one swap and I owe you INR 8 crore on another, we net it and only the INR 2 crore difference is paid. This reduces settlement risk (Herstatt risk) dramatically.

Importance for Banks: Payment netting reduces the amount of cash that actually moves, lowering operational risk, liquidity needs, and settlement failure risk. It is especially valuable in high-volume inter-bank markets and for corporates with multiple hedging transactions.

Indian Practice: Most Indian banks implement payment netting operationally through their treasury systems. The legal foundation is the ISDA plus general Indian contract law on set-off. For regulatory capital purposes, banks rely on legal opinions confirming the netting.

4.3 Deduction or Withholding for Tax (Section 2(d))

This section deals with gross-up obligations if a party is required to deduct or withhold tax from a payment.

Plain English: If tax has to be withheld from a payment under the swap, the paying party must "gross up" so that the recipient receives the full net amount it would have received had there been no withholding.

Indian Tax Context:

- Payments under derivatives (e.g., net settlement amounts on IRS, premium on options, gains on FX forwards) may or may not be subject to withholding tax under the Income Tax Act, 1961, depending on characterization, treaty benefits, and whether the recipient has a permanent establishment in India.
- For non-resident counterparties, banks often require tax representations in the Schedule (Part 2) and may seek gross-up or tax indemnity.
- For Indian resident counterparties, withholding on certain payments (e.g., guarantee fees or specific structured payments) can arise; the gross-up clause protects the bank.

Negotiation:

- **Bank Position**: Usually insist on gross-up, especially if dealing with non-residents or in structures where tax leakage is possible. Add tax forms delivery requirements in Schedule Part 3.
- **Corporate Client Position**: May seek to limit gross-up to specific taxes (e.g., exclude taxes imposed due to the recipient's connection with India or failure to provide forms). Also push for "Tax Event" Termination Event to allow termination if gross-up becomes burdensome.
- **Market Practice**: In Indian bank ISDA Schedules, gross-up is often retained but with carve-outs for "Indemnifiable Taxes" that are common in the market (e.g., taxes arising from the counterparty's failure to comply with tax information requests, or certain Indian source taxes).

Redline Example (Schedule Part 2 – Tax Representations):

"**Tax Representations of Party B (Indian Corporate Counterparty)**: Party B represents that it is a resident of India for tax purposes and that all payments receivable by it under this Agreement are not subject to withholding tax under the Income Tax Act, 1961, or that it will provide all necessary documentation (including Form 10F, TRC if applicable, and beneficial ownership declarations) to enable Party A to apply any available treaty benefits or reduced rates."

4.4 Default Interest (Section 2(e))

If a party fails to pay when due, default interest accrues on the overdue amount.

Plain English: Late payments attract interest at a default rate (usually the higher of prime rate or a specified rate) to compensate the non-defaulting party for the delay and to incentivise timely payment.

Bank Risk: Without adequate default interest, the defaulting party has an incentive to delay payment, especially in a high-interest-rate environment like India. The default rate should be commercially reasonable and enforceable (not a penalty under Indian Contract Act Section 74).

Negotiation Tip: In the Schedule, specify the default rate clearly (e.g., "the rate per annum equal to the Prime Lending Rate of State Bank of India plus 2% per annum" or a screen rate like MIBOR + margin). Ensure it compounds or is calculated on a daily basis with appropriate day count.

For Indian counterparties, banks often use a rate linked to the bank's own base rate or an RBI reference rate plus a margin that reflects the credit and funding cost.

Chapter 5: Section 3 – Representations

5.1 Purpose of Representations

Representations are statements of fact made by each party at the time of entering into the Master Agreement and (in some cases) at the time of each Transaction. If a representation proves to be false or misleading when made, it can trigger an Event of Default (Section 5(a)(iv) – Misrepresentation).

Commercial Purpose: They allocate risk by giving the other party comfort on key facts (authority, no conflicts, financial condition, tax status, etc.) and provide a basis to terminate if those facts turn out to be wrong.

5.2 Key Representations in the 2002 Master Agreement

5.2.1 Basic Representations (Section 3(a))

- **Due Organisation and Good Standing**: The party is duly organised, validly existing, and in good standing under its laws.
- **Power and Authority**: It has the power and authority to enter into the Agreement and Transactions and to perform its obligations.
- **No Violation**: Entering into the Agreement does not violate its constitutional documents, any law, or any other agreement to which it is a party.
- **Consents**: All governmental and other consents required have been obtained and are in full force.
- **Obligations Binding**: The obligations under the Agreement are legal, valid, binding, and enforceable.
- **No Event of Default**: No Event of Default or Potential Event of Default has occurred and is continuing.
- **No Litigation**: There is no pending or threatened litigation or proceeding that could materially adversely affect its ability to perform.

Indian Context for Corporates:

- **Constitutional Documents**: Indian companies must have objects clause in Memorandum of Association that permits entering into derivatives (many older MoAs are silent or restrictive; banks often require amendment or specific board resolution confirming authority).
- **Regulatory Consents**: For certain counterparties (e.g., insurance companies, pension funds, mutual funds), specific regulatory approvals or compliance with investment guidelines may be required. Banks should obtain representations or evidence of such compliance.
- **No Violation of Loan Agreements**: Corporate clients often have negative pledge or indebtedness covenants in their loan documents that could be breached by entering into derivatives (especially if collateral is posted under CSA). Banks should seek representation that no such breach will occur, or obtain lender consent if needed.

Redline Suggestion (Schedule Part 5 – Additional Representation):

"**No Conflict with Financing Documents**. Party B represents that its entry into this Agreement and each Transaction hereunder, and its performance of its obligations (including any obligation to post collateral under the Credit Support Annex), will not conflict with or result in a breach or violation of any loan agreement, facility agreement, indenture, bond, debenture, guarantee or other financing document to which it or any of its subsidiaries is a party or by which it or its assets are bound, or any covenant (financial or otherwise) contained therein."

This protects the bank from the client arguing later that it cannot perform because of its lending covenants.

5.2.2 Absence of Certain Events (Section 3(b))

Each party represents that no Event of Default or Termination Event has occurred or would occur as a result of entering into the Agreement.

This is largely covered by the basic representations but reinforces the point.

5.2.3 Other Representations in Schedule

Parties commonly add representations in the Schedule on:

- **Accuracy of Financial Information**: Financial statements provided are true and fair, prepared in accordance with applicable accounting standards (Ind AS for Indian companies).
- **No Material Adverse Change**: Since the date of the last financial statements, there has been no material adverse change in business, financial condition, or prospects.
- **Sanctions and Anti-Corruption**: Compliance with sanctions regimes (UN, OFAC, Indian sanctions, etc.) and anti-bribery laws (Prevention of Corruption Act).
- **Eligible User / Hedging Purpose**: For RBI-regulated derivatives, representation that the counterparty is an "eligible user" or "permitted user" and that the transaction is for hedging genuine underlying exposure (not speculative).
- **FATCA / CRS / Tax Information**: Provision of tax forms, self-certification, etc.
- ** Beneficial Ownership and KYC**: Ultimate beneficial owner information as required under PMLA and RBI KYC norms.

Bank Risk if Representations are Weak: If the bank cannot rely on strong representations, it may not have a clean Event of Default trigger if problems emerge (e.g., the client was already in financial difficulty, or the transaction was not properly authorised). This weakens the bank's ability to close out early and crystallise losses.

Counterparty Position: Clients often want to qualify representations with "to the best of its knowledge" or "except as disclosed in writing", limit the scope of "material adverse change", and resist broad sanctions representations if they have operations in multiple jurisdictions.

Market Practice: In Indian bank ISDA documentation with corporate clients, additional Schedule representations on hedging purpose, no conflict with loan covenants, and financial statement accuracy are standard. For inter-bank ISDA, the basic Section 3(a) representations are usually sufficient, with perhaps sanctions and tax add-ons.

Chapter 6: Section 4 – Agreements (Covenants)

6.1 Overview

Section 4 contains ongoing covenants or agreements by each party. Breach of these can lead to an Event of Default under Section 5(a)(ii) – Failure to Comply with Obligations (after any applicable grace period in the Schedule).

These are the "housekeeping" and ongoing compliance obligations that keep the relationship clean and give the bank early warning of problems.

6.2 Key Covenants in Section 4

6.2.1 Furnish Specified Information (Section 4(a))

Each party agrees to deliver the documents specified in the Schedule (Part 3) within the timeframes stated. Typical documents:

- Certified copies of constitutional documents and board resolutions authorising derivatives.
- Legal opinions (on enforceability, authority, etc.).
- Annual and quarterly financial statements (audited and unaudited).
- Compliance certificates (no default, hedging compliance, etc.).
- Updated KYC, beneficial ownership, tax forms.
- Evidence of insurance, ratings, etc. (if relevant).

Bank Perspective: This is a key monitoring tool. Timely receipt of financial information allows the bank to track the client's creditworthiness and take action (e.g., call for collateral, reduce lines, or close out) before a full-blown default.

Indian Practice: For corporate clients, banks often require:

- Audited financials within 180 days of financial year end (or tighter).
- Quarterly unaudited results within 45-60 days.
- Compliance certificate on hedging purpose and RBI guideline compliance (especially important for "users").
- Any regulatory filings or RBI/ SEBI communications that could affect derivatives capacity.

Redline / Negotiation: In Schedule Part 3, banks should list specific delivery requirements with reasonable but firm deadlines. Add a covenant to notify promptly of any material adverse change, any default under other financing documents, or any regulatory investigation or action that could impair performance.

6.2.2 Maintain Authorisations (Section 4(b))

Each party must maintain all governmental and other consents, licences, and authorisations required to perform its obligations.

Indian Context: This is particularly relevant for regulated entities (banks, NBFCs, insurance companies, mutual funds, pension funds) whose ability to enter or maintain derivatives may depend on ongoing regulatory approvals or compliance with exposure limits. A loss of licence or regulatory restriction could trigger Illegality or an Additional Termination Event.

6.2.3 Comply with Laws (Section 4(c))

Obvious but important: Comply with all applicable laws in performing obligations under the Agreement.

Added Value in Schedule: Banks often add specific compliance covenants for Indian laws, such as:

- Compliance with FEMA and RBI directions on derivatives.

- Compliance with Prevention of Money Laundering Act (PMLA) and KYC norms.
- Compliance with sanctions and export control laws.
- Payment of all stamp duties and taxes on the Agreement and Confirmations.

6.2.4 Tax Agreement (Section 4(d))

Parties agree to provide tax forms and information, and to update them when they become inaccurate.

Practical Tip: In the Indian context, this is used to support gross-up claims and to manage withholding tax risk on payments to non-residents. Banks should require Indian counterparties to provide updated Form 10F, TRC (if claiming treaty benefits), and PAN details.

6.2.5 Payment of Stamp Tax (Section 4(e))

The parties agree to pay any stamp, registration, or similar tax payable on the Agreement or any Transaction.

Indian Stamp Duty Note: Stamp duty on ISDA Master Agreements and Confirmations varies by state. In Maharashtra (Mumbai is a common execution venue), the Master Agreement may be stamped as an "agreement" or "indemnity" depending on its terms. Confirmations may attract duty as well. Banks should ensure the Schedule or a side letter addresses who bears the stamp duty cost (usually the client or shared) and that proper stamping is done to make the document admissible in evidence in Indian courts.

Redline Suggestion: Add in Schedule Part 5 a covenant that Party B shall pay or reimburse all stamp duty, registration charges, and notarial fees payable in India in connection with the execution, delivery, or enforcement of this Agreement, any Confirmation, or any related document, and shall indemnify Party A against any loss arising from non-payment or under-stamping.

6.3 Additional Covenants Commonly Added in Indian Schedules

- **Financial Covenants**: Maintenance of financial ratios (Debt/EBITDA, Interest Coverage, etc.) consistent with the client's loan agreements. Breach triggers Event of Default or Termination Event.
- **Negative Pledge / No Encumbrance on Collateral**: Covenant not to create security over assets that could affect the bank's recourse or collateral under CSA.
- **Notification of Material Events**: Prompt notice of any litigation, regulatory action, change of control, downgrade, or default under other agreements.
- **Maintenance of Ratings**: If the client is rated, covenant to maintain a minimum rating or notify of downgrades.
- **Hedging Policy Compliance**: Annual certification that derivatives are used only for hedging genuine exposures in accordance with the client's board-approved hedging policy and RBI guidelines.

These additional covenants turn the ISDA into a more active credit monitoring and control tool, aligned with the bank's overall credit relationship with the client.

Chapter 7: Section 5 – Events of Default and Termination Events

This is one of the most critical chapters for banking lawyers. The Events of Default (EoDs) and Termination Events (TEs) determine when a party can terminate transactions early, close out, and crystallise a net claim.

7.1 Events of Default (Section 5(a)) – Overview

Events of Default are serious breaches or circumstances that allow the non-defaulting party to terminate **all** outstanding Transactions and close out. They are generally within the control or fault of the defaulting party.

The 2002 Master Agreement lists eight standard Events of Default:

1. **Failure to Pay or Deliver** (Section 5(a)(i))
2. **Breach of Agreement; Repudiation** (Section 5(a)(ii))
3. **Credit Support Default** (Section 5(a)(iii))
4. **Misrepresentation** (Section 5(a)(iv))
5. **Default under Specified Transaction** (Section 5(a)(v))
6. **Cross-Default** (Section 5(a)(vi))
7. **Bankruptcy** (Section 5(a)(vii))
8. **Merger Without Assumption** (Section 5(a)(viii))

In the Schedule, parties can add more EoDs or modify thresholds and grace periods.

7.2 Detailed Analysis of Key Events of Default

7.2.1 Failure to Pay or Deliver (Section 5(a)(i))

The most straightforward EoD. If a party fails to make a payment or delivery when due under the Agreement (after any applicable grace period specified in the Schedule – often 1-3 Business Days), it is an EoD.

Bank Risk: Grace periods give the defaulting party time to cure (e.g., fix an operational error in payment). Banks usually accept short grace periods (1 Business Day) for payment failures but resist longer ones. For delivery failures (e.g., failure to deliver collateral under CSA), even shorter or no grace may be appropriate.

Indian Context: Payment failures by Indian corporates are common triggers for banks to review the entire relationship. Often coordinated with the lending side – a missed loan EMI or derivative settlement can lead to immediate close-out discussions.

Negotiation: Specify in Schedule Part 1(a) the grace period for Failure to Pay (commonly 1 Business Day for payments, 2-3 for deliveries). For collateral calls under CSA, banks often negotiate shorter cure periods or immediate enforcement rights.

7.2.2 Breach of Agreement; Repudiation (Section 5(a)(ii))

Failure to comply with any other obligation under the Agreement (after grace period in Schedule – often 30 days after notice), or repudiation of the Agreement or any Transaction.

Practical Use: This catches breaches of covenants (Section 4), failure to deliver documents, breach of additional obligations in the Schedule, etc.

Bank Strategy: Use this EoD aggressively for ongoing monitoring breaches. For example, if the client fails to deliver quarterly financials or a compliance certificate on hedging purpose, after notice and grace, the bank can terminate.

Counterparty Pushback: Clients want longer grace periods (30-60 days) and sometimes "materiality" qualifiers ("material breach"). Banks resist materiality for core obligations but may accept it for minor administrative breaches.

7.2.3 Credit Support Default (Section 5(a)(iii))

This covers:

- Failure to comply with a Credit Support Document (e.g., guarantee, letter of credit, or the CSA itself).
- Expiration or termination of a Credit Support Document without replacement.
- Challenge to the validity of a Credit Support Document.

Critical for CSA: If the client fails to post collateral when called under the CSA (after any grace), this EoD is triggered. This is one of the most frequently used EoDs in practice for collateralised relationships.

Indian CSA Practice: Many Indian corporate ISDA relationships are one-way CSA (client posts collateral to bank; bank does not post back unless it has a downgrade or high exposure). Failure to post variation margin or initial margin when due is a clear EoD.

Redline Tip: In Schedule, specify short grace periods for collateral posting failures (e.g., 1 Business Day or even same-day for large calls) and clarify that any dispute over collateral valuation does not suspend the obligation to post (subject to dispute resolution procedures in the CSA).

7.2.4 Misrepresentation (Section 5(a)(iv))

Any representation proves to have been false or misleading in any material respect when made or repeated.

Bank Use: Powerful if the client misrepresented its authority, financial condition, hedging purpose, compliance with loan covenants, or sanctions status. It allows early termination before losses mount.

Risk for Bank: If the bank's own representations are inaccurate, it could face reciprocal claims. Banks must ensure their own reps are accurate (e.g., authority of the signing officer, regulatory permissions for the product).

7.2.5 Default under Specified Transaction (Section 5(a)(v))

This is a cross-default to other derivatives transactions between the same parties (or specified affiliates) that are documented under other master agreements (e.g., another ISDA, a repurchase agreement master, or securities lending master).

Negotiation: In Schedule Part 1, parties specify which other master agreements or transaction types are "Specified Transactions". Banks usually want broad coverage – any derivatives, repos, securities lending, or even prime brokerage transactions with the client or its group.

Indian Context: Useful where a client has multiple documentation platforms with the same bank (e.g., one ISDA for vanilla swaps, another for structured products, or a separate GMRA for repo).

7.2.6 Cross-Default (Section 5(a)(vi))

One of the most heavily negotiated provisions. It allows termination if the counterparty defaults under other debt obligations above a "Threshold Amount" specified in the Schedule.

Plain English: If the client defaults on any other loan, bond, or financial obligation above a certain size (Threshold Amount), the bank can treat it as an EoD under the ISDA and close out the derivatives.

Why Banks Love It: It allows the derivatives book to be closed out in parallel with the lending book's enforcement. This prevents the client from continuing to enjoy hedging while defaulting on loans, and it allows the bank to net the close-out amount against loan exposures (subject to legal set-off rights).

Typical Schedule Elections:

- **Threshold Amount**: For Indian corporates, often set at INR 5-25 crore (or equivalent) or a percentage of the client's total debt or net worth. For larger clients or NBFCs, higher thresholds (INR 50-100 crore) may be accepted.
- **Cross-Default to Affiliates**: Whether defaults by subsidiaries or parent trigger the EoD. Banks usually want broad group coverage, especially if the client is part of a conglomerate.
- **Cross-Acceleration vs Cross-Default**: Some counterparties push for "cross-acceleration" only (i.e., the other debt must have been accelerated, not just defaulted). Banks prefer pure cross-default (default is enough, even if not yet accelerated) because it gives earlier trigger rights.
- **Excluded Obligations**: Sometimes certain types of debt (e.g., trade payables, operational leases, or subordinated debt) are excluded from cross-default.

Counterparty Position: Clients want high Threshold Amounts, cross-acceleration only, narrow group coverage (only the exact legal entity, not subsidiaries), and broad exclusions.

Bank Risk if Cross-Default is Weak: The client could default on a large loan from another bank and continue performing under the ISDA, forcing the bank to keep the derivatives open while credit risk deteriorates. This is especially dangerous if the derivatives have negative MTM for the client (i.e., the bank owes the client on close-out).

Indian Market Practice: Most Indian bank ISDA Schedules with corporate clients include a robust cross-default provision with Threshold Amount set at a level that captures material defaults but is not triggered by minor operational issues. It is often aligned with the cross-default threshold in the client's main loan agreement with the same bank.

Redline Example (Schedule Part 1(f) – Cross-Default):

"**Cross-Default (Section 5(a)(vi))**. 'Specified Indebtedness' means any obligation (whether present or future, contingent or otherwise, as principal or surety or in any other capacity) in respect of borrowed money or any guarantee or indemnity in respect of borrowed money, including any loan, advance, deposit, bond, debenture, note, commercial paper, or other debt instrument. Threshold Amount: INR 10 crore (or its equivalent in any other currency) or, if higher, an amount equal to [X]% of the total consolidated indebtedness of Party B and its subsidiaries as shown in the most recent audited consolidated financial statements. Cross-default shall apply to Party B and all its subsidiaries and Affiliates. The grace period for cross-default shall be the shorter of any applicable grace period in the relevant document or 5 Business Days."

7.2.7 Bankruptcy (Section 5(a)(vii))

This is the most complex and important EoD. It covers a wide range of insolvency-related events:

- Dissolution, winding up, liquidation, or analogous proceedings.
- Insolvency, inability to pay debts as they fall due, or admission in writing of inability.
- Assignment for benefit of creditors or similar arrangement.
- Appointment of receiver, liquidator, administrator, or similar officer over assets.
- Security enforcement over substantial assets.
- Analogous events under any applicable law.
- (In some versions) filing of a petition or commencement of proceedings that could lead to the above, if not stayed or dismissed within a specified period.

2002 vs 1992: The 2002 version refined the language but retained broad coverage.

Indian Law Critical Issues:

1. **IBC Proceedings**: When a corporate debtor enters CIRP (Corporate Insolvency Resolution Process) under IBC, does this automatically trigger the Bankruptcy EoD? The answer is generally yes – admission of CIRP application by NCLT is typically an insolvency event. However, the moratorium under Section 14 of IBC stays certain actions, including enforcement of security and termination of contracts in some cases. There is debate and case law on whether contractual termination rights (including under ISDA) are stayed by the moratorium.

2. **Resolution Professional's Powers**: The RP may seek to continue or disclaim contracts. Close-out netting may be challenged or require RP consent in some scenarios.

3. **Personal Guarantors and Other Proceedings**: Separate insolvency regimes for personal guarantors, LLPs, etc.

4. **Banks under Resolution**: If the Indian bank itself is under resolution, the EoD provisions may interact with RBI's resolution framework.

Bank Strategy on Bankruptcy EoD:

- The standard 2002 language is generally acceptable, but banks often add in the Schedule specific Indian-law triggers, such as:
  - Admission of any application for CIRP or liquidation under IBC by NCLT or any court.
  - Appointment of interim resolution professional or resolution professional.
  - Declaration of insolvency or inability to pay debts under any Indian law.
  - Any action by RBI or other regulator that has a similar effect (e.g., imposition of moratorium on a bank or NBFC).
- **Automatic Early Termination (AET)**: In Schedule Part 1, parties can elect Automatic Early Termination upon certain Bankruptcy events. This means the Agreement terminates automatically without notice upon the event occurring. This can be useful to crystallise the close-out amount before a moratorium or insolvency official takes control. However, in India, AET may not be fully enforceable or may be subject to challenge; many banks prefer to retain the right to give notice rather than rely on automatic termination.

Counterparty Position: Clients (especially weaker credits) want narrow Bankruptcy triggers, longer stay periods for petitions, and exclusion of certain protective filings (e.g., schemes of arrangement that are solvent restructurings). They also resist AET.

Market Practice in India: For corporate ISDA, most Schedules include tailored Bankruptcy language referencing IBC proceedings and NCLT orders. AET is sometimes elected for inter-bank ISDA but less commonly for corporate clients, where banks prefer to control the timing of close-out.

Redline Suggestion (Schedule Part 1(g) – Additional Bankruptcy Events):

"**Additional Bankruptcy Events**. Without prejudice to the generality of Section 5(a)(vii), an Event of Default shall also occur with respect to a party if: (i) any application or petition for Corporate Insolvency Resolution Process (CIRP), liquidation, or any analogous proceeding under the Insolvency and Bankruptcy Code, 2016 or any replacement or amendment thereto is filed against such party or any of its material subsidiaries and is not stayed, withdrawn, or dismissed within [5] Business Days; (ii) the National Company Law Tribunal or any court or authority admits any such application or appoints an interim resolution professional, resolution professional, liquidator, or similar officer; (iii) such party or any of its material subsidiaries is declared insolvent or unable to pay its debts as they fall due under any applicable Indian law or by any regulatory authority (including the Reserve Bank of India); (iv) any moratorium, suspension of payments, or similar measure is imposed on such party or its assets by any governmental or regulatory authority in India."

This gives the bank clear, India-specific triggers that align with local insolvency processes.

7.2.8 Merger Without Assumption (Section 5(a)(viii))

If a party merges or transfers substantially all its assets without the surviving entity assuming the obligations under the ISDA, it is an EoD.

Bank Protection: Prevents the client from merging into a weaker entity or spinning off assets and leaving the derivatives obligations behind. Banks often strengthen this in the Schedule with "change of control" provisions.

Additional Provision – Change of Control: Many Indian bank Schedules add a Change of Control as an additional EoD or TE. This covers situations where the ultimate beneficial owner or controlling shareholder of the client changes without the bank's prior written consent. This is particularly relevant for Indian family-owned or promoter-driven companies where control changes can materially affect credit risk and business strategy.

Redline Example:

"**Change of Control Event of Default**. An Event of Default shall occur if any person or group of persons acting in concert acquires Control of Party B without the prior written consent of Party A. 'Control' means the power to direct the management and policies of Party B, whether through ownership of voting securities, by contract, or otherwise, and includes the acquisition of more than [50]% of the voting share capital or economic interest in Party B."

7.3 Termination Events (Section 5(b))

Termination Events are circumstances that are generally outside the fault of either party (or are shared). They allow termination of **affected** Transactions (not necessarily all), and the close-out calculation may differ (e.g., no "default" close-out amount, sometimes two-way payment).

Standard Termination Events:

1. **Illegality** (Section 5(b)(i))
2. **Force Majeure Event** (Section 5(b)(ii)) – new in 2002
3. **Tax Event** (Section 5(b)(iii))
4. **Tax Event Upon Merger** (Section 5(b)(iv))
5. **Credit Event Upon Merger** (Section 5(b)(v))
6. **Additional Termination Event** (Section 5(b)(vi)) – parties can add custom ones in the Schedule

7.3.1 Illegality

If it becomes unlawful for a party to perform its obligations under the Agreement or any Transaction (due to change in law, regulatory action, etc.).

Indian Context: Relevant if RBI changes rules on derivatives (e.g., restricts certain products, counterparties, or purposes), or if FEMA regulations change, or if sanctions are imposed. Also relevant for cross-border transactions if Indian exchange control or tax law changes make performance illegal.

Negotiation: Banks often add in the Schedule that Illegality includes situations where performance becomes unlawful for the bank or its affiliate under the laws of India or any other relevant jurisdiction.

7.3.2 Force Majeure Event

Covers events beyond reasonable control (acts of God, war, terrorism, government action, infrastructure failure, etc.) that prevent performance.

2002 Improvement: More detailed than the 1992 "Act of State" or impossibility concepts.

Indian Use: Useful for events like nationwide lockdowns (as in COVID), major natural disasters affecting Mumbai financial centre, or government-imposed capital controls or payment moratoria. However, parties often negotiate the scope and waiting period before termination rights arise.

7.3.3 Tax Event and Tax Event Upon Merger

If a party is required to gross up due to tax law change, or if a merger triggers adverse tax consequences, a party can terminate affected Transactions.

Bank Position: Usually accept these but may limit the terminating party's right to terminate if the tax gross-up is the only issue (some banks prefer to continue and gross up rather than terminate and lose the hedge).

7.3.4 Credit Event Upon Merger

If a party merges and the creditworthiness of the surviving entity is materially weaker than the original party, the other party can terminate.

Similar to Merger Without Assumption but focused on credit deterioration post-merger.

Indian Context: Useful for corporate restructurings, amalgamations under Companies Act, or acquisitions that change the credit profile of the client.

7.3.5 Additional Termination Events (Custom)

This is where Indian banks add tailored triggers, such as:

- **Material Adverse Change (MAC)** in the client's business, financial condition, or prospects.
- **Regulatory Event**: Loss of licence, regulatory action by RBI/SEBI that impairs the client's ability to perform, or classification as a "stressed asset" or under PCA.
- **Breach of Hedging Policy or RBI Guidelines**: If the client is found to have entered into derivatives for speculative purposes or in breach of eligible user requirements.
- **Downgrade below a specified rating** (if the client is rated).
- **Change of Control** (as discussed above).
- **Cross-Default to Non-Financial Obligations** or specific contracts (e.g., major supply contracts, EPC contracts for project finance clients).

MAC as Additional Termination Event:

MAC is highly negotiated. Banks want a broad, subjective MAC that allows termination if the client's overall credit profile deteriorates, even if no specific EoD has occurred. Clients want objective, measurable triggers and often resist MAC entirely or limit it to specific financial ratios or events.

Market Practice: In Indian corporate ISDA, MAC is often included as an Additional Termination Event with a definition that references the client's loan agreements (so that a MAC under the loan docs is also a MAC under ISDA). This promotes consistency across the bank's credit exposure.

Redline Example (Schedule Part 1(h) – Additional Termination Event):

"**Additional Termination Event – Material Adverse Change**. A Material Adverse Change in the business, assets, financial condition, or prospects of Party B or any of its material subsidiaries shall be an Additional Termination Event with respect to Party B. 'Material Adverse Change' means any material adverse change or effect on (a) the business, operations, assets, financial condition, or prospects of Party B and its subsidiaries taken as a whole, (b) the ability of Party B to perform its obligations under this Agreement or any Transaction, or (c) the validity or enforceability of this Agreement or any rights or remedies of Party A hereunder. Party A may terminate all or any affected Transactions upon the occurrence of such event by giving notice to Party B. There shall be no cure period for this Additional Termination Event."

This gives the bank significant flexibility to exit the relationship if the client's situation deteriorates materially, even without a technical EoD.

7.4 Grace Periods and Notice Requirements

For most EoDs and TEs, the Schedule allows parties to specify grace periods and whether notice is required before termination rights arise.

Bank Best Practice:

- Short or no grace for payment, delivery, and collateral failures.
- Reasonable notice and grace (15-30 days) for curable breaches of covenant or agreement.
- For insolvency events, often no grace or very short (to allow time to act before moratorium bites).
- For MAC and regulatory events, usually immediate or short notice with no cure right.

Documentation Tip: Always specify in the Schedule the exact notice mechanics for each type of event (e.g., "notice in writing specifying the nature of the event and the Transactions affected").

Chapter 8: Section 6 – Early Termination and Close-out Amount

This is the heart of the ISDA Master Agreement – the provisions that allow a party to terminate Transactions early upon an EoD or TE and calculate a single net Close-out Amount.

8.1 The Close-out Process – High Level

1. **Occurrence of EoD or TE**: Non-defaulting party (or either party for TEs) becomes entitled to terminate.
2. **Designation of Early Termination Date**: The terminating party gives notice designating a day as the Early Termination Date (or Automatic Early Termination applies).
3. **Close-out of Transactions**: All (or affected) Transactions are terminated as of the Early Termination Date. No further payments or deliveries are due under the terminated Transactions (except for payments already due but unpaid).
4. **Calculation of Close-out Amount**: The non-defaulting party (or Determining Party) calculates the Close-out Amount for each terminated Transaction using the methodology in Section 6(e) and the definitions in the Schedule.
5. **Netting**: All Close-out Amounts, plus any unpaid amounts and interest, are netted into a single net amount owing from one party to the other.
6. **Payment**: The net amount is paid on the Early Termination Date or a specified payment date (often 2-3 Business Days later). Interest may accrue on late payment.

8.2 Close-out Amount Methodology (2002 Version)

The 2002 Master Agreement introduced the "Close-out Amount" concept, which replaced the older "Market Quotation" and "Loss" methodology of the 1992 version. This was a significant improvement because:

- It gives the Determining Party (usually the non-defaulting party) more flexibility to use its own valuation models, third-party quotes, or internal marks, as long as the calculation is made in good faith and in a commercially reasonable manner.
- It reduces disputes over "market" quotes when markets are illiquid or stressed.
- It is more adaptable to complex or bespoke transactions.

Section 6(e) sets out the calculation:

The Close-out Amount for each Transaction is the amount that would be payable to or by the Determining Party (or its designee) as if that party were the sole party determining the value, acting in good faith and using commercially reasonable procedures to produce a commercially reasonable result.

Factors that may be considered include:

- Quotations from third parties (dealers, brokers, etc.).
- Relevant market data (prices, yields, volatilities, correlations).
- Information from internal sources (models, marks) if used consistently.
- The creditworthiness of the Determining Party.
- The cost of funding, hedging, or replacing the Transaction.
- Any loss of bargain, cost of funding, or other loss or gain.

The Determining Party must act in good faith and produce a commercially reasonable result. The other party can challenge the calculation if it believes it was not commercially reasonable.

8.3 Indian Law and Enforcement Considerations for Close-out

This is where Indian banking lawyers face the greatest documentation and enforcement risk.

Key Issues:

1. **Enforceability of Contractual Valuation**: Indian courts generally respect contractual valuation mechanisms if they are clear and the parties have agreed to them. However, a liquidator, RP, or court may scrutinise whether the Close-out Amount is a genuine pre-estimate of loss or a penalty. If attacked as a penalty, Section 74 of the Indian Contract Act may apply, and the bank may have to prove actual loss.
2. **Commercially Reasonable Standard**: Indian courts are familiar with "commercially reasonable" standards in other contexts (e.g., enforcement of security under SARFAESI). They are likely to uphold a good-faith, model-based or quote-based valuation if it is documented and defensible.
3. **Moratorium under IBC Section 14**: Upon admission of CIRP, there is a moratorium on institution or continuation of suits, proceedings, and enforcement of security. Whether this stays the close-out process or the payment of the Close-out Amount is a contentious issue. Some judicial precedents suggest that contractual termination and netting rights may survive or be exercisable, but the position is not settled. Banks often close out **before** or immediately upon signs of insolvency to crystallise the claim pre-moratorium.
4. **Proof of Claim in Insolvency**: The Close-out Amount, once calculated and notified, becomes a contractual debt. The bank must file a proof of claim with the RP/liquidator. Disputes over the amount may be resolved through the IBC claims process or separate litigation/arbitration (if the ISDA provides for it).
5. **Set-off and Netting in Liquidation**: Under IBC and IBBI regulations, set-off of mutual debts is generally permitted in liquidation, but the exact scope and timing of close-out netting can be challenged. A strong ISDA with clear single agreement and close-out provisions helps, supported by the ISDA netting opinion.

Bank Best Practice:

- Document the close-out calculation thoroughly (quotes obtained, models used, assumptions, rationale for commercial reasonableness).
- Issue a detailed close-out statement promptly after the Early Termination Date.
- Consider obtaining third-party valuations or independent verification for large or disputed amounts.
- Coordinate closely with the bank's litigation and insolvency teams for filing claims and defending challenges.
- In the Schedule, specify the Determining Party (usually the non-defaulting party) and any fallback valuation procedures (e.g., if no quotes are available, use internal marks or a dealer poll).

Counterparty Arguments in Disputes:

- The valuation was not commercially reasonable (e.g., used distressed quotes, ignored better available data, included inappropriate components like funding costs or "replacement cost" in a way that inflates the amount).
- The Determining Party acted in bad faith or with conflicts of interest.
- The Close-out Amount includes elements that are not recoverable under Indian law (e.g., lost profits that are too remote, or penalties).
- The close-out itself was invalid due to moratorium or other Indian law restrictions.

Redline / Protective Provisions in Schedule:

- Confirm that the Determining Party's calculation is conclusive and binding absent manifest error or bad faith.
- Provide that the non-defaulting party may use its own marks and models consistently applied.
- Specify that Close-out Amount includes all costs of funding, hedging, replacement, and loss of bargain.
- Add a dispute resolution procedure (e.g., referral to independent expert or arbitration) for valuation disputes, with the disputed amount paid into escrow pending resolution.
- Clarify that the close-out and netting provisions are intended to be enforceable under Indian insolvency law to the maximum extent permitted, and the parties waive any right to challenge on grounds of penalty or

otherwise to the extent legally possible.

8.4 Automatic Early Termination (AET)

In Schedule Part 1, parties can elect AET to apply to certain Bankruptcy events. If elected, the Agreement terminates automatically upon the occurrence of the specified Bankruptcy event, without the need for notice or designation of an Early Termination Date.

Advantages for Bank:

- Crystallises the close-out amount immediately upon insolvency event, before a moratorium or RP takes control.
- Prevents the insolvency official from "cherry-picking" transactions (continuing profitable ones for the estate and terminating unprofitable ones).
- Provides certainty and speed in a fast-moving default scenario.

Disadvantages / Risks:

- May not be fully enforceable or may be subject to challenge in Indian insolvency proceedings.
- If the event is later reversed or stayed (e.g., petition dismissed), there could be disputes about the status of transactions.
- Some counterparties resist AET because it removes their ability to cure or negotiate.

Market Practice in India: AET is more commonly elected in inter-bank ISDA documentation than in corporate client documentation. For corporate clients, banks often prefer to retain discretion to designate the Early Termination Date after assessing the situation (e.g., whether the insolvency is likely to be resolved or is terminal). However, for high-risk or lower-rated clients, AET on Bankruptcy is sometimes included.

Recommendation: For Indian counterparties, carefully consider AET in light of the specific insolvency risk profile. Obtain Indian counsel advice on enforceability in the relevant insolvency regime (corporate IBC, personal guarantor, bank resolution, etc.).

8.5 Close-out Statement and Payment

After calculating the Close-out Amount, the Determining Party must provide a statement showing the calculation in reasonable detail. The net amount is payable on the Early Termination Date or a later date specified in the Schedule (often the second Business Day following the Early Termination Date or the date the statement is provided).

Interest on Unpaid Close-out Amount: Section 6(d)(ii) provides for interest on overdue amounts at the Default Rate or a specified rate.

Indian Enforcement Tip: The close-out statement should be clear, detailed, and signed by an authorised officer. In Indian court or insolvency proceedings, it will be key evidence. Banks should have internal policies for documenting and approving close-out calculations, especially for large exposures.

Chapter 9: Sections 7 to 12 – Transfer, Contractual Currency, Miscellaneous, Expenses, Notices

These sections contain important boilerplate and operational provisions that are often overlooked but can have significant practical impact.

9.1 Transfer (Section 7)

Section 7 restricts the transfer or assignment of rights and obligations under the Master Agreement without the prior written consent of the other party, except in limited cases (e.g., transfer to an Affiliate or in connection with a merger where the surviving entity assumes the obligations).

Bank Perspective: This prevents the counterparty from assigning the ISDA (and the associated credit risk or MTM) to a weaker or unknown third party without the bank's consent. It also prevents the bank from transferring its side without consent, which can be an issue in portfolio sales or securitisations of derivatives.

Common Schedule Amendments:

- Allow transfer by the bank to any Affiliate or to a successor entity in a merger/acquisition/reorganisation without consent, provided the transferee has at least the same credit rating or is regulated similarly.
- Allow transfer by either party to a special purpose vehicle or in connection with a financing or hedging transaction, subject to conditions.
- Require that any permitted transfer be notified promptly and that the transferee assumes all obligations in writing.

Indian Context: In India, banks sometimes transfer or novate derivatives exposures as part of loan portfolio sales, stressed asset sales, or internal restructurings. The Schedule should facilitate such transfers while protecting the counterparty's legitimate interests (e.g., no deterioration in credit support or documentation quality).

Redline Suggestion (Schedule Part 5 – Transfer Provisions):

"Notwithstanding Section 7, Party A may, without the consent of Party B, transfer or assign all or any part of its rights and obligations under this Agreement and any Transaction to (a) any Affiliate of Party A, (b) any successor entity resulting from any merger, consolidation, reorganisation, or sale of all or substantially all of Party A's derivatives business or assets, or (c) any third party in connection with a portfolio sale, securitisation, or financing transaction involving Party A's derivatives exposures, provided that in each case the transferee assumes in writing all obligations of Party A under this Agreement and the relevant Transactions. Party A shall give prompt written notice of any such transfer to Party B. Any other transfer or assignment by either party shall require the prior written consent of the other party (such consent not to be unreasonably withheld or delayed)."

9.2 Contractual Currency (Section 8)

This section deals with the currency of payment and what happens if a judgment or order is obtained in a different currency (e.g., an Indian court judgment in INR on a USD obligation).

Key Provision: If a party obtains a judgment in a currency other than the contractual currency, the judgment debtor must indemnify the judgment creditor for any loss arising from exchange rate fluctuations between the date of the judgment and the date of actual payment.

Indian Context: This is important because Indian courts may give judgments in INR even for foreign currency obligations (or convert at a court-determined rate). The contractual currency provision helps protect the bank from currency loss on enforcement.

Negotiation: Usually left as is, but banks can add in the Schedule that the provision applies to judgments or orders of Indian courts, tribunals, or authorities, and that the indemnity covers any shortfall due to exchange rate movements or conversion methodologies applied by Indian authorities.

9.3 Miscellaneous (Section 9)

Contains standard boilerplate:

- **Entire Agreement**: The Master Agreement, Schedule, and Confirmations constitute the entire agreement; no prior representations or agreements survive except as expressly stated.
- **Amendments**: Must be in writing and signed by both parties.
- **Survival**: Certain provisions (e.g., indemnities, tax gross-up, close-out) survive termination.
- **Counterparts**: May be executed in counterparts; electronic signatures often accepted in practice.
- **Headings**: For convenience only.
- **No Waiver**: Failure to exercise a right is not a waiver; waivers must be specific and in writing.
- **No Third-Party Rights**: (In some versions) Contracts (Rights of Third Parties) Act 1999 does not apply (relevant for English law ISDA).

Indian Practice: For execution, Indian parties often require physical signing or compliant electronic signatures under the Information Technology Act, 2000. Stamp duty and registration (if any) must be completed. The "entire agreement" clause helps prevent claims based on side letters or oral assurances about hedging or restructuring.

Redline Tip: Add in Schedule that amendments may be executed in counterparts (including electronic/PDF), and that electronic signatures compliant with Indian IT Act are valid and binding.

9.4 Expenses (Section 11)

Each party bears its own costs of negotiating and preparing the Agreement, unless otherwise agreed. Upon enforcement (default or close-out), the defaulting party must indemnify the non-defaulting party for reasonable out-of-pocket expenses (legal fees, valuation costs, etc.).

Bank Position: This is valuable. Close-out and enforcement can be expensive (legal opinions, valuations, court filings, insolvency proceedings). The indemnity shifts these costs to the defaulting party.

Negotiation: Usually accepted, but counterparties may seek to cap "reasonable" expenses or require pre-approval for large legal bills. Banks resist caps on enforcement costs.

Indian Context: Legal costs in Indian litigation and insolvency can be significant. Banks should document expenses carefully to support indemnity claims in court or before the RP.

9.5 Notices (Section 12)

Specifies how notices under the Agreement must be given (address, method – courier, fax, email, registered post – and deemed receipt times).

Critical Operational Provision: Many disputes arise from alleged failure to give proper notice (e.g., of an Event of Default, collateral call, or Early Termination Date designation). Clear notice provisions reduce this risk.

Indian Market Practice:

- Addresses: Head office or registered office addresses, plus specific treasury/dealing desk and legal/compliance addresses.
- Methods: Often allow email (with read receipt or confirmation), courier, and registered post. Fax is legacy and less used now.

- Deemed Receipt: Specify times – e.g., email deemed received on the Business Day sent if before a cut-off time (say 5:00 PM Mumbai time), otherwise next Business Day. Courier deemed received 2 Business Days after dispatch.
- Process Agent: For foreign parties, appoint an agent for service of process in India (or vice versa).

Redline / Best Practice for Indian Banks:

In Schedule Part 4, specify:

- Multiple addresses for different types of notices (payments, collateral calls, Events of Default, legal notices, etc.).
- Email as a permitted method, with deemed receipt rules tailored to Indian business hours and holidays.
- Requirement to send copies to specific email groups or relationship managers.
- For notices of default or termination, require both email and physical delivery (courier or registered post) to reduce disputes.

Example deemed receipt language:

"Notices sent by email shall be deemed received on the Business Day of transmission if sent before 5:00 p.m. (Mumbai time) on a Business Day, and otherwise on the next following Business Day, provided that the sender does not receive an automated delivery failure notification. Notices sent by courier or registered post shall be deemed received two (2) Business Days after the date of dispatch. Notices sent by hand delivery shall be deemed received upon actual receipt by an authorised representative of the recipient."

This clarity is essential for time-sensitive actions like collateral calls and close-out notices.

Chapter 10: Section 13 – Governing Law and Jurisdiction (The Most Critical Chapter for Indian Banking Lawyers)

10.1 The Fundamental Choice

Section 13 of the 2002 ISDA Master Agreement allows the parties to choose the governing law of the Agreement and the courts that will have jurisdiction over disputes.

Standard Elections:

- **Governing Law**: English law or the laws of the State of New York.
- **Jurisdiction**: Non-exclusive jurisdiction of the courts of England (for English law ISDA) or the State and Federal courts located in the Borough of Manhattan, New York City (for New York law ISDA).

English law is the most common choice for ISDA documentation globally, including in Asia and for many Indian bank transactions. New York law is also widely used, especially for US dollar transactions or with US counterparties.

10.2 Why Governing Law Matters for Indian Parties

The choice of governing law affects:

- Interpretation of the contract terms (including Close-out Amount, Events of Default, etc.).
- Validity and enforceability of key provisions (netting, collateral, gross-up, etc.).
- Availability of remedies and procedural rules.
- Interaction with Indian mandatory laws and public policy.

Even if English or New York law governs the ISDA, Indian law will still apply to:

- Execution formalities and stamp duty in India.
- Regulatory compliance (RBI, FEMA, etc.).
- Insolvency proceedings in India (IBC).
- Enforcement of foreign judgments or arbitral awards in India.
- Certain mandatory Indian laws that cannot be contracted out of (e.g., public policy, fraud, illegality).

10.3 Enforcement of English Law ISDA Judgments in India

This is a core practical issue for Indian banking lawyers.

Position under Indian Law:

- England & Wales is a **reciprocating territory** under Section 44A of the Code of Civil Procedure, 1908. Therefore, a money judgment (decree) of a superior court in England can be executed in India by filing a certified copy of the decree in the appropriate District Court in India, subject to the conditions in Section 13 CPC.
- Section 13 CPC provides that a foreign judgment is conclusive as to any matter directly adjudicated upon between the same parties, **except** where:
  - It has not been pronounced by a court of competent jurisdiction.
  - It has not been given on the merits of the case.
  - It appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable.
  - The proceedings in which the judgment was obtained are opposed to natural justice.
  - It has been obtained by fraud.
  - It sustains a claim founded on a breach of any law in force in India.

Practical Implications for ISDA Close-out Amounts:

- An English court judgment on the Close-out Amount under an English law ISDA is likely to be enforceable in India if the English court had jurisdiction (which it does under the ISDA jurisdiction clause) and the judgment is on the merits.
- However, an Indian court or insolvency official could still scrutinise whether the Close-out Amount calculation was "commercially reasonable" or whether enforcement would be contrary to Indian public policy or mandatory law.
- In practice, Indian banks and foreign banks dealing with Indian counterparties often obtain English judgments or use arbitration (London or Singapore) and then seek enforcement in India. Success depends on the facts and the quality of the documentation and valuation evidence.

Recent Trends (as of 2026): English courts continue to uphold ISDA jurisdiction clauses and give effect to close-out provisions. Indian courts have generally been respectful of contractual choices in commercial matters, but insolvency and public policy exceptions remain live issues.

10.4 Arbitration as an Alternative

Some parties choose arbitration (e.g., under LCIA, SIAC, or ICC rules in London, Singapore, or Mumbai) instead of court jurisdiction.

Advantages of Arbitration for Indian ISDA:

- Potentially faster and more specialist tribunal for derivatives disputes.
- Confidentiality.
- Easier enforcement under the New York Convention (India is a signatory; foreign arbitral awards are enforceable in India under the Arbitration and Conciliation Act, 1996, with limited grounds for refusal).
- Can avoid some of the public policy scrutiny that court judgments may face.

Disadvantages:

- Cost (arbitration can be expensive for large disputes).
- Limited appeal rights.
- May still face challenges in insolvency contexts.

Market Practice: For Indian counterparties, English law + English court jurisdiction (or LCIA arbitration in London) remains the most common choice for cross-border ISDA. For purely domestic Indian ISDA (both parties Indian), some banks use Indian law with arbitration in Mumbai or Delhi under Indian rules, but this is less common for sophisticated derivatives because English law and international arbitration are seen as more predictable and market-standard.

10.5 Negotiation Strategies for Indian Banks

As the Bank (Usually the Stronger Documentation Party):

- **Prefer English law + non-exclusive jurisdiction of English courts** (or exclusive in some formulations). This gives access to specialist English judges familiar with ISDA and derivatives.
- **Include submission to jurisdiction and waiver of sovereign immunity** if the counterparty is a PSU, government entity, or has sovereign connections.
- **Appoint process agent** in England (for service of process) and in India (for enforcement).
- **Add in Schedule**: Confirmation that the parties intend the choice of law and jurisdiction to be effective, and that they will not challenge enforcement in India on grounds of public policy or otherwise to the extent permitted by law.

- **Arbitration fallback**: Some banks include an option for arbitration if court proceedings are not practical or if the counterparty resists English jurisdiction.

As the Indian Corporate Counterparty (Weaker Position):

- May push for **Indian law** or at least arbitration in India (Mumbai or Delhi) under SIAC or Indian rules, to reduce enforcement risk and cost.
- Argue that Indian courts should have jurisdiction for disputes involving Indian regulatory or insolvency issues.
- Seek to limit the scope of submission to foreign jurisdiction or add carve-outs for Indian mandatory laws.

Realistic Compromise in Indian Market:

Many Indian bank ISDA with corporate clients use:

- English law governing the Master Agreement.
- Non-exclusive jurisdiction of English courts, with the Indian counterparty submitting to such jurisdiction and appointing a process agent in London.
- A carve-out or acknowledgment that Indian courts have jurisdiction over Indian law issues (insolvency, regulatory compliance, execution formalities).
- For enforcement in India, reliance on Section 44A CPC for English judgments, or arbitration with seat in Singapore or London for easier New York Convention enforcement.

Redline Suggestion (Schedule Part 4 – Governing Law and Jurisdiction):

"(a) This Agreement and each Transaction shall be governed by and construed in accordance with English law. (b) Subject to clause (c) below, the courts of England have non-exclusive jurisdiction to settle any disputes arising out of or in connection with this Agreement or any Transaction (including any dispute relating to the existence, validity, interpretation, performance, breach or termination of this Agreement or any Transaction). (c) Notwithstanding the above, the parties acknowledge that: (i) Indian courts shall have jurisdiction over any dispute relating to the execution, stamping, or formal validity of this Agreement or any Confirmation in India, or any regulatory or insolvency proceedings in India affecting Party B; (ii) Party B irrevocably submits to the jurisdiction of the English courts and waives any objection to proceedings in such courts on the grounds of venue or on the grounds that proceedings have been brought in an inconvenient forum; (iii) Party B appoints [Name of Process Agent in London] as its agent for service of process in England in respect of any proceedings under this Agreement; and (iv) Any judgment obtained in the English courts shall be enforceable in India in accordance with Section 44A of the Code of Civil Procedure, 1908, and the parties shall take all steps reasonably necessary to facilitate such enforcement."

This balanced provision gives the bank the benefit of English law and courts while acknowledging Indian realities for enforcement and insolvency.

10.6 Sovereign Immunity and PSU Counterparties

If the Indian counterparty is a Public Sector Undertaking (PSU), government company, or has sovereign connections, the bank should seek an express waiver of sovereign immunity in the Schedule.

Redline Example:

"**Waiver of Immunity**. To the extent that Party B may in any jurisdiction claim for itself or its assets or revenues immunity from suit, execution, attachment (whether in aid of execution, before judgment or otherwise) or other legal process, or to the extent that in any such jurisdiction there may be attributed to itself or its assets or revenues such immunity (whether or not claimed), Party B hereby irrevocably agrees not to claim and hereby irrevocably waives such immunity to the fullest extent permitted by the laws of such jurisdiction. This waiver includes waiver of any immunity in respect of any proceedings to enforce any arbitral award or court judgment relating to this Agreement or any Transaction."

This is standard in ISDA documentation with sovereign or quasi-sovereign entities and is important for Indian PSUs in cross-border derivatives.

Chapter 11: Credit Support Annex (CSA) – Indian Market Practice

The Credit Support Annex is often negotiated alongside the Master Agreement and is critical for managing MTM credit risk.

11.1 Types of CSA

- **1995 ISDA Credit Support Annex (English Law – Transfer)**: The most common for English law ISDA. Provides for outright transfer of collateral (title transfer) rather than security interest.
- **2016 ISDA Credit Support Annex for Variation Margin (VM)**: Updated version aligned with regulatory margin requirements for non-centrally cleared derivatives.
- **Initial Margin (IM) CSA**: Separate or combined arrangements for posting initial margin (regulatory requirement for larger entities).
- **One-Way vs Two-Way**: One-way (only the weaker credit posts collateral); Two-way (both post depending on MTM).

11.2 Indian Market Practice for CSA

For Indian banks dealing with corporate clients:

- **Predominantly One-Way CSA**: The corporate client posts collateral (cash in INR or eligible securities) to the bank when the MTM is positive to the bank (i.e., client owes the bank on close-out). The bank rarely posts back unless it has a downgrade or the exposure is very large.
- **Collateral Types**: Cash in INR (most common and operationally simple), Government of India securities (G-Secs), sometimes state government securities or high-quality corporate bonds with haircuts. Foreign currency cash or securities are less common due to FEMA and operational issues.
- **Thresholds and Minimum Transfer Amounts (MTA)**: Often set at INR 5-25 crore or higher for corporate clients, to avoid frequent small collateral calls. For higher-risk clients or larger exposures, lower or zero thresholds.
- **Haircuts**: Applied to non-cash collateral per internal policy or RBI guidelines. G-Secs typically have low haircuts (0-5% depending on maturity and type).
- **Valuation and Dispute Resolution**: Daily MTM by the bank (as collateral holder/calculating party), with dispute resolution procedures (usually escalation to senior management or independent valuation).
- **Eligible Collateral Schedule**: Detailed list in the CSA or Schedule of what can be posted, with applicable haircuts and concentration limits.

Regulatory Margin Requirements: RBI has implemented margin requirements for non-centrally cleared OTC derivatives for banks and other covered entities, aligned with international standards. This includes variation margin (VM) and initial margin (IM) for entities above certain thresholds. Indian banks must ensure their CSA documentation and operational processes comply with these rules for applicable counterparties.

11.3 Key Negotiation Points for Indian CSA

From Bank's Perspective:

- One-way CSA with low or zero Threshold and MTA for the client.
- Broad Eligible Collateral definition with conservative haircuts.
- Bank as the sole Determining Party for collateral calculations and calls.
- Short cure periods for collateral posting failures (1 Business Day or less).
- Right to liquidate collateral immediately upon default without notice or court order (subject to SARFAESI or other Indian enforcement rules if applicable).
- Cross-default and linkage to loan facility covenants on collateral.

From Corporate Client's Perspective:

- Two-way CSA or high Threshold/MTA to reduce collateral posting burden.
- Broad range of eligible collateral (including their own bonds or less liquid securities) with low haircuts.
- Mutual rights to dispute valuations and access independent valuation.
- Longer cure periods and notice before collateral calls or liquidation.
- Cap on total collateral to be posted (overall exposure limit).

Market Compromises:

- One-way CSA with Threshold set at a level that balances credit risk and operational burden (e.g., INR 10-50 crore depending on client rating and exposure size).
- Eligible Collateral focused on cash INR and G-Secs with standard haircuts.
- Detailed dispute resolution: 2-3 Business Days to resolve disputes, failing which the bank's valuation prevails pending final resolution.
- Annual review of Threshold and haircuts based on credit review.

Redline Example (CSA Paragraph 13 – Elections and Variables):

"**One-Way CSA**: Only Party B (the Client) shall be required to post Credit Support (Variation Margin) to Party A. Party A shall have no obligation to post Credit Support to Party B unless and until Party A's long-term unsecured and unsubordinated debt obligations are rated below [BBB- / Baa3] by [S&P / Moody's] or an equivalent rating by a recognised Indian credit rating agency, in which case two-way posting shall apply on terms to be agreed. **Threshold**: INR 25 crore (or equivalent). If the Exposure exceeds the Threshold, the amount of Credit Support to be transferred is the amount by which Exposure exceeds the Threshold. **Minimum Transfer Amount**: INR 5 crore. **Valuation Agent**: Party A (or its designee). Party B may dispute a valuation within 2 Business Days of receipt of the collateral call notice, providing reasonably detailed reasons and alternative valuation. If the parties cannot agree within 3 Business Days, the dispute shall be referred to an independent expert mutually agreed or appointed by [President of the Institute of Chartered Accountants of India or other neutral body]. Pending resolution, Party B shall post the undisputed amount and 50% of the disputed amount (or such other amount as the parties agree). **Eligible Collateral**: (a) Cash in Indian Rupees; (b) Government of India securities (G-Secs) with residual maturity not exceeding [10] years; (c) such other securities as Party A may approve in writing from time to time. Haircuts: Cash – 0%; G-Secs – [0-5]% depending on maturity and type as per Party A's internal policy (notified to Party B from time to time)."

This structure is practical, protective for the bank, and acceptable to many corporate clients in the Indian market.

11.4 Operational and Legal Risks in Indian CSA

- **Operational**: Daily collateral calls require robust systems, reconciliation processes, and communication protocols. Indian clients may have less sophisticated treasury operations, leading to delays or disputes.
- **Legal**: Enforcement of collateral in India upon default may require compliance with SARFAESI Act (if applicable to the collateral), IBC moratorium issues, or court orders. Title transfer CSA (English law) is generally respected, but practical enforcement can be slower than in pure common law jurisdictions.
- **FEMA**: Posting or receiving foreign currency collateral or cross-border collateral movements may trigger FEMA reporting and compliance obligations.
- **Tax**: Collateral transfers may have tax implications (e.g., stamp duty on transfer of securities, income tax on any income from collateral).

Banks should have clear internal policies, legal opinions on CSA enforceability, and operational playbooks for collateral management in Indian ISDA relationships.

Chapter 12: Regulatory Framework for OTC Derivatives in India

12.1 Key Regulators and Directions

- **Reserve Bank of India (RBI)**: Primary regulator for banks, NBFCs, and most OTC derivatives (especially FX, interest rate, and credit derivatives). Issues Master Directions on Risk Management and Inter-Bank Dealings, guidelines on OTC derivatives, margin requirements, and reporting.
- **SEBI**: Regulates certain derivatives, especially equity and commodity derivatives, and has oversight over some market participants.
- **IFSCA (International Financial Services Centres Authority)**: Regulates GIFT City and IFSC entities, which have a growing role in derivatives and global OTC business.
- **Other**: IRDAI for insurance companies, PFRDA for pension funds, etc., have rules on derivatives usage by regulated entities.

12.2 Core RBI Requirements for OTC Derivatives Documentation

- **Eligible Users / Permitted Transactions**: Only certain entities can enter into OTC derivatives, and many transactions must be for hedging genuine underlying exposures (not speculative). Banks must document and verify the "user" status and hedging purpose.
- **Documentation Standards**: ISDA Master Agreement with appropriate Schedule is the expected standard for inter-bank and institutional OTC derivatives. Confirmations must be exchanged promptly.
- **Reporting**: Most OTC derivatives must be reported to trade repositories (e.g., CCIL for rupee IRS and certain FX derivatives). Banks have reporting obligations; documentation should include consent for reporting and data sharing.
- **Margin Requirements**: Phased implementation of VM and IM for non-centrally cleared derivatives. Documentation (CSA) must support regulatory margin calculations, segregation (for IM), and operational processes.
- **Conduct and Suitability**: Banks have obligations to ensure products are suitable for clients, especially "users" who may have limited derivatives experience. Documentation and client communications should support suitability assessments.
- **KYC / AML / Sanctions**: Enhanced due diligence for derivatives clients, ongoing monitoring, and screening.

12.3 Interaction between ISDA and RBI Compliance

The ISDA Schedule and CSA are key tools for demonstrating and enforcing RBI compliance:

- **Hedging Purpose Representation and Covenant**: Include in Schedule a representation and ongoing covenant that all Transactions are entered into for hedging genuine underlying commercial or financial exposures in accordance with the client's board-approved policy and RBI guidelines. Breach can be an Additional Termination Event or EoD.
- **Eligible User Confirmation**: Annual or transaction-specific confirmation that the client qualifies as an eligible user under the relevant RBI direction.
- **Regulatory Event Termination**: Add an Additional Termination Event if the client ceases to be an eligible user, or if any regulatory action (RBI, SEBI, etc.) materially impairs the client's ability to perform or the validity of Transactions.
- **Reporting Consent**: Explicit consent in the Schedule or a side letter for the bank to report Transactions to trade repositories, share data with regulators, and comply with all regulatory reporting obligations.
- **Margin Compliance**: CSA elections and operational procedures aligned with RBI margin rules for applicable counterparties.

Redline Example (Schedule Part 5 – Regulatory Compliance):

"**Hedging Purpose and Eligible User**. Party B represents and covenants that: (a) It is an 'eligible user' or 'permitted counterparty' (as applicable) under the relevant Reserve Bank of India Master Directions and guidelines on OTC derivatives and foreign exchange; (b) Each Transaction entered into under this Agreement is for the purpose of hedging genuine underlying commercial, financial, or balance sheet exposures and not for speculation or proprietary trading (unless Party B is expressly permitted to do so under applicable law and has provided evidence of such permission to Party A); (c) It has and will maintain a board-approved policy on derivatives usage and hedging that complies with RBI requirements; and (d) It will provide, upon request by Party A, evidence reasonably satisfactory to Party A of its compliance with the above (including copies of underlying exposure documentation, board resolutions, and compliance certificates).

Breach of this provision shall be an Additional Termination Event with respect to Party B, entitling Party A to terminate all or any affected Transactions upon notice."

This provision helps the bank demonstrate regulatory compliance and provides an exit right if the client's derivatives usage becomes non-compliant.

12.4 Other Regulatory Considerations

- **FATCA / CRS / Tax Information Exchange**: ISDA Schedules often include tax information exchange provisions and representations to support FATCA and CRS compliance.
- **Sanctions Compliance**: Representations and covenants on compliance with Indian sanctions, UN sanctions, OFAC, and other applicable sanctions regimes. Termination right if sanctions are breached.
- **Conduct Risk and Mis-selling**: While not directly in ISDA, banks should ensure that the ISDA relationship is supported by appropriate product approval, client segmentation, and disclosure documents to mitigate mis-selling or conduct risk claims.
- **GIFT City / IFSC**: For transactions booked through IFSC entities, additional documentation and regulatory considerations apply under IFSCA rules.

Indian banking lawyers must stay updated on RBI circulars, Master Direction amendments, and margin requirement phases, as these directly affect ISDA documentation and ongoing compliance.

Chapter 13: Common Negotiation Issues and Market Practice in India

13.1 Top 10 Negotiation Flashpoints in Indian ISDA Documentation

1. **Governing Law and Jurisdiction** (Chapter 10): English law vs Indian law; exclusive vs non-exclusive; arbitration vs courts; process agent; sovereign immunity waiver.
2. **Cross-Default and Cross-Acceleration** (Chapter 7): Threshold Amount; group coverage (subsidiaries/Affiliates); cross-default vs cross-acceleration only; excluded obligations.
3. **Additional Events of Default / Termination Events** (Chapter 7): MAC, Change of Control, Regulatory Event, Breach of Hedging Purpose, Downgrade, breach of loan covenants.
4. **Automatic Early Termination (AET)**: Whether to elect on Bankruptcy events; scope of covered events.
5. **Close-out Amount and Valuation** (Chapter 8): Determining Party; use of internal marks vs third-party quotes; dispute resolution; conclusiveness of calculation.
6. **CSA Structure** (Chapter 11): One-way vs two-way; Threshold and MTA levels; Eligible Collateral and haircuts; cure periods for collateral failures; valuation disputes.
7. **Grace Periods and Notice** (Throughout): Length of cure periods for different EoDs; notice mechanics and deemed receipt; email vs physical delivery.
8. **Tax Gross-up and Withholding** (Chapter 4): Scope of gross-up; carve-outs for certain taxes; tax representations and forms delivery.
9. **Transfer and Assignment** (Chapter 9): Bank's right to transfer to Affiliates or in portfolio transactions without consent; notification requirements.
10. **Expenses and Indemnities** (Chapter 9): Scope of enforcement cost indemnity; "reasonable" qualifier; documentation of expenses.

13.2 Typical Indian Corporate Client Pushbacks and Bank Responses

Client Pushback: "We want Indian law and Mumbai arbitration to reduce cost and uncertainty."

Bank Response: "English law is the global standard for derivatives and gives both parties predictability. We can include Indian law carve-outs for insolvency and regulatory matters, and provide for enforcement in India under Section 44A CPC. Arbitration in Singapore or London is an alternative if you prefer."

Client Pushback: "Your cross-default threshold is too low; it will be triggered by minor issues."

Bank Response: "The threshold is aligned with your main loan facility with us. We can set it at INR [X] crore or [Y]% of consolidated debt, whichever is higher, and exclude trade payables and operational contracts. This protects both of us by ensuring consistency across your financing relationships."

Client Pushback: "We cannot accept one-way CSA with low threshold; it ties up too much liquidity."

Bank Response: "Given your credit profile and our overall exposure (including loans), one-way with INR [25] crore Threshold and INR [5] crore MTA is market standard. We can review the Threshold annually based on your financial performance and rating. Two-way would require you to post when you are in-the-money, which may not be in your interest if your MTM is usually negative to you."

Client Pushback: "MAC is too subjective; we want objective financial ratio triggers only."

Bank Response: "MAC is a safety valve for unforeseen deterioration. We can define it with reference to your loan agreement MAC and specific financial covenants (e.g., breach of Debt/EBITDA or Interest Coverage). This gives you certainty while protecting us from material credit deterioration that doesn't yet breach a specific EoD."

13.3 Inter-Bank vs Corporate Client ISDA in India

Inter-Bank ISDA (Indian bank with foreign bank or another Indian bank):

- Usually English or New York law, standard Schedule with minimal amendments.
- Two-way CSA with low or zero thresholds (or regulatory IM/VM compliant).
- AET often elected.
- Focus on operational efficiency, payment netting, and regulatory capital optimisation.
- Less negotiation; more reliance on ISDA standard forms and protocols.

Corporate Client ISDA (Indian bank with Indian corporate, NBFC, or other user):

- English law with Indian enforcement considerations.
- Heavily customised Schedule with cross-default, additional EoDs/TEs, hedging purpose provisions, and regulatory compliance covenants.
- Predominantly one-way CSA with negotiated Threshold/MTA.
- Focus on credit protection, alignment with lending relationship, and RBI compliance.
- More negotiation; relationship-driven.

Understanding these differences helps Indian banking lawyers tailor their approach and manage internal stakeholder expectations (front office vs credit risk vs legal vs compliance).

Chapter 14: Case Studies and Hypotheticals

Case Study 1: Corporate Default and Close-out under IBC

Facts: An Indian corporate counterparty (Party B) has an ISDA with an Indian bank (Party A) governed by English law, with a robust Schedule including cross-default to loan facilities, additional Bankruptcy EoD referencing IBC, one-way CSA with INR 10 crore Threshold, and English court jurisdiction. Party B's financial condition deteriorates. It misses a loan payment to Party A (triggering cross-default under ISDA) and also misses a collateral call under the CSA. NCLT admits a CIRP application against Party B filed by another creditor. Party A wants to close out the derivatives book (which has positive MTM to Party A of INR 75 crore).

Issues:

- Can Party A rely on Failure to Pay, Cross-Default, Credit Support Default, and Bankruptcy EoDs?
- Does the IBC moratorium prevent close-out or enforcement of collateral?
- How should Party A calculate and document the Close-out Amount?
- What is the strategy for filing claim in CIRP?

Analysis and Recommended Approach:

1. **EoD Triggers**: Multiple EoDs are available. Party A should issue a notice designating an Early Termination Date as soon as practicable after the loan default and missed collateral call, and certainly before or immediately upon NCLT admission if possible. The Bankruptcy EoD (with Indian-specific language) is also triggered by NCLT admission.

2. **Moratorium Risk**: Section 14 IBC moratorium stays suits and proceedings against the corporate debtor. However, contractual termination rights and close-out netting may be exercisable, especially if the close-out is completed pre-moratorium or if the ISDA is treated as a "financial contract" with protected status. Party A should act swiftly and document the commercial rationale for close-out (preservation of value, risk mitigation). Indian counsel advice on the specific timing and moratorium impact is essential.

3. **Close-out Calculation**: Party A (as non-defaulting party and Determining Party) calculates Close-out Amount using its internal valuation models and any available third-party quotes for the relevant swaps. The calculation should be documented in detail (market data used, assumptions, rationale for commercial reasonableness). A formal close-out statement is issued to Party B (and copied to RP once appointed).

4. **Collateral Enforcement**: Party A can liquidate posted collateral (cash or G-Secs) under the CSA title transfer provisions. Practical enforcement may require coordination with the RP or court if assets are frozen, but title transfer CSA generally allows the collateral holder to deal with the collateral upon default.

5. **Claim in CIRP**: Party A files a proof of claim with the RP for the net Close-out Amount (plus any other amounts owing under loans or otherwise). The claim is subject to verification and potential dispute by the RP or other creditors. Strong documentation (ISDA, Schedule, close-out statement, valuation support) is critical to defend the claim amount.

6. **Lessons**: Act early on payment and collateral defaults. Have pre-drafted close-out procedures and templates. Coordinate legal, credit, and treasury teams. Obtain Indian counsel confirmation on moratorium impact before or immediately after close-out. The tailored Schedule provisions (cross-default, Indian Bankruptcy language, one-way CSA) significantly strengthen Party A's position.

Case Study 2: Valuation Dispute on Close-out Amount

Facts: Party B (Indian corporate) disputes Party A's Close-out Amount calculation of INR 120 crore (positive to Party A). Party B argues that Party A used outdated or distressed quotes, ignored better available market data, and included inappropriate "funding cost" components, and that a "commercially reasonable" valuation would be closer to INR 60 crore. Party B refuses to pay and threatens litigation in Indian courts.

Issues:

- Is Party A's calculation binding?
- What is the standard of review in India?
- How should Party A respond and protect its position?

Analysis:

1. **Contractual Standard**: Under Section 6(e) of the 2002 ISDA, the Determining Party must act in good faith and use commercially reasonable procedures to produce a commercially reasonable result. The calculation is not automatically "conclusive" unless the Schedule so provides.

2. **Indian Court Approach**: An Indian court would likely examine whether Party A acted in good faith and whether the result is commercially reasonable, taking into account market conditions at the time, available data, and consistency with Party A's usual valuation practices. If Party A can show a documented, defensible process (multiple quotes sought, model validation, senior review, consistency with other valuations), the court is likely to uphold it or give it significant weight.

3. **Protective Steps for Party A**:

   - Document the valuation process thoroughly from the outset.
   - Obtain contemporaneous third-party quotes or broker marks where possible (even if not used as primary valuation).
   - Have the calculation reviewed and approved by an independent internal function (e.g., model validation or risk committee) before issuing the close-out statement.
   - In the Schedule, include a provision that the Determining Party's calculation is conclusive absent manifest error or bad faith, and that internal marks consistently applied are acceptable.
   - Offer a dispute resolution mechanism (independent expert) in the Schedule, with the disputed amount paid into escrow or secured pending resolution.
   - If litigation is threatened, be prepared to defend the valuation with expert evidence on derivatives valuation practices.

4. **Settlement Strategy**: In practice, valuation disputes are often settled commercially, especially if Party B has other relationships with Party A (loans, deposits, etc.). Party A may agree to a negotiated discount in exchange for full and final settlement and release of claims, to avoid prolonged litigation and insolvency complications.

Lesson: Strong Schedule provisions on valuation conclusiveness, combined with rigorous internal documentation of the close-out process, significantly reduce the risk and cost of valuation disputes.

Case Study 3: Illegality / Regulatory Change

Facts: RBI issues a circular significantly restricting the types of OTC derivatives that certain categories of corporates can enter into, or imposes new margin or reporting requirements that make performance of existing Transactions by Party B (an Indian corporate) unlawful or commercially impracticable without material additional cost. Party B claims Illegality or Force Majeure and seeks to terminate affected Transactions without paying the Close-out Amount (which is positive to Party A).

Issues:

- Does this constitute Illegality or Force Majeure under the ISDA?
- Can Party B terminate without liability?

- What are Party A's rights and remedies?

Analysis:

1. **Illegality (Section 5(b)(i))**: If it becomes unlawful for Party B to perform its obligations under a Transaction (e.g., make a payment or delivery), Illegality is triggered. However, the non-affected party (Party A) also has termination rights, and the close-out calculation for Illegality may differ from EoD close-out (sometimes "two-way" or "no fault" close-out, meaning the net amount is paid regardless of which way it goes).
2. **Force Majeure (Section 5(b)(ii))**: If the regulatory change is an event beyond Party B's reasonable control that prevents performance, Force Majeure may apply after a waiting period (usually 8-30 days depending on Schedule election). Again, termination rights arise for both parties.
3. **Bank's Position**: Party A should review whether the regulatory change truly makes performance unlawful or merely more expensive or restricted. Many regulatory changes allow existing transactions to continue (grandfathering) or can be managed with additional compliance. If Illegality or Force Majeure is genuinely triggered, Party A should be prepared to terminate and accept the close-out (which may be "no fault" and thus two-way).
4. **Protective Schedule Provisions**: Banks can add in the Schedule that:
   - Illegality or Force Majeure does not include changes in law that affect only the cost or economic consequences of performance (as opposed to making it unlawful).
   - The waiting period for Force Majeure is short (e.g., 8 Business Days).
   - Upon Illegality or Force Majeure affecting Party B, Party A has the right to designate which Transactions are affected and to terminate only those, or to require Party B to take reasonable steps to mitigate (e.g., obtain approvals, restructure the transaction).
5. **Practical Outcome**: In many cases, the parties negotiate a consensual early termination or amendment to the affected Transactions to bring them into compliance with the new regulatory regime, rather than a formal close-out. The ISDA framework provides the contractual basis for such discussions.

Lesson: Regulatory change risk is real in India. The Schedule should anticipate it with tailored Illegality/Force Majeure provisions, and banks should monitor RBI/SEBI/IFSCA developments closely for impact on their ISDA portfolios.

These case studies illustrate how the ISDA provisions, when properly tailored in the Schedule and supported by robust internal processes, provide powerful tools for Indian banks to manage credit, legal, and regulatory risks in derivatives relationships. They also highlight the importance of Indian-law specific advice on insolvency, enforcement, and regulatory interaction.

Chapter 15: Appendices

Appendix A: Glossary of Key ISDA and Indian Law Terms

Automatic Early Termination (AET): Election in the Schedule under which the Master Agreement terminates automatically upon certain Bankruptcy events without the need for notice.

Close-out Amount: The amount calculated under Section 6(e) of the 2002 ISDA Master Agreement upon early termination of Transactions, representing the value of the terminated Transactions to the Determining Party acting in good faith and in a commercially reasonable manner.

Close-out Netting: The process of terminating all outstanding Transactions upon an EoD or TE, calculating Close-out Amounts, and netting them into a single payment obligation.

Credit Support Annex (CSA): The annex to the ISDA Master Agreement that governs the posting and management of collateral (variation margin and initial margin) to secure MTM exposure.

Determining Party: The party entitled to calculate the Close-out Amount (usually the non-defaulting party or a designated party).

Early Termination Date: The date designated by the terminating party as the date on which all (or affected) Transactions are terminated and close-out occurs.

Event of Default (EoD): Serious breach or circumstance (listed in Section 5(a)) entitling the non-defaulting party to terminate all Transactions and close out.

Force Majeure Event: Termination Event covering events beyond reasonable control that prevent performance (Section 5(b)(ii)).

Illegality: Termination Event triggered when it becomes unlawful for a party to perform its obligations (Section 5(b)(i)).

Material Adverse Change (MAC): Custom Additional Termination Event or EoD often added in the Schedule, triggered by material deterioration in the counterparty's business, financial condition, or prospects.

Single Agreement Concept: The principle (Section 1(c)) that all Transactions under the Master Agreement form a single, indivisible agreement for purposes of close-out netting and other rights.

Specified Indebtedness: Defined in the Schedule for purposes of the Cross-Default provision; typically includes borrowed money and guarantees thereof.

Termination Event (TE): Circumstance (listed in Section 5(b)) generally not caused by fault of either party, allowing termination of affected Transactions (not necessarily all).

Threshold Amount: The minimum amount of Specified Indebtedness that must be in default to trigger Cross-Default; specified in the Schedule.

Variation Margin (VM) / Initial Margin (IM): Types of collateral under the CSA. VM covers current MTM exposure; IM covers potential future exposure and is often segregated.

Appendix B: Quick Reference – Key Schedule Elections for Indian Bank ISDA

Part 1 – Termination, Payment and other Elections:

- Automatic Early Termination: Often "No" for corporate clients; "Yes" (on Bankruptcy) for inter-bank.
- Cross-Default (5(a)(vi)): "Applicable"; Threshold Amount: INR [X] crore or [Y]% of consolidated debt; Specified Indebtedness: broad definition; Cross-Default to Affiliates: Yes.
- Credit Support Default grace period: 1 Business Day.

- Failure to Pay grace period: 1 Business Day (payments); 2 Business Days (deliveries/collateral).
- Breach of Agreement grace period: 15-30 days after notice.
- Illegality/Force Majeure waiting period: 8-30 days (negotiated).

Part 2 – Tax Representations:

- Indian tax residency representations.
- Form delivery requirements (10F, TRC, PAN, etc.).
- Gross-up with market-standard carve-outs.

Part 3 – Documents to be Delivered:

- Constitutional documents, board resolutions, legal opinions (enforceability, authority).
- Financial statements (annual audited within 180 days; quarterly within 45-60 days).
- Compliance certificates (hedging purpose, no default, financial covenants).
- KYC/UBO/sanctions information.
- Tax forms.

Part 4 – Miscellaneous:

- Process agent appointment (London and/or India).
- Notice addresses and deemed receipt rules (email + courier).
- Governing law: English law.
- Jurisdiction: Non-exclusive English courts + Indian law carve-outs + submission + waiver of immunity (if applicable).

Part 5 – Other Provisions:

- Additional EoDs: Cross-Default to loan facilities, Change of Control, Regulatory Event, Breach of Hedging Purpose.
- Additional TEs: Material Adverse Change (defined with reference to loan docs), Illegality/Force Majeure clarifications.
- Transfer provisions: Bank's right to transfer to Affiliates/portfolio transactions without consent.
- Stamp duty and expenses indemnity.
- Valuation conclusiveness and dispute resolution for Close-out Amount and collateral.
- Regulatory compliance covenants and termination rights.
- Indian law specific Bankruptcy triggers and enforcement provisions.

Appendix C: Checklist for Reviewing/Negotiating an ISDA Schedule for an Indian Corporate Counterparty

Pre-Negotiation: - [ ] Obtain and review client's constitutional documents (MoA objects clause for derivatives authority). - [ ] Review client's existing loan/facility agreements for cross-default thresholds, financial covenants, negative pledge, and hedging restrictions. - [ ] Confirm client's eligible user / hedging status under RBI directions. - [ ] Assess client's credit profile, rating (if any), group structure, and insolvency risk. - [ ] Determine bank's overall exposure (loans + derivatives) and desired credit/risk appetite. - [ ] Decide on CSA structure (one-way vs two-way, Threshold/MTA levels, collateral types).

Core Schedule Review: - [ ] Governing law and jurisdiction provisions (English law + enforcement mechanisms). - [ ] Cross-Default: Threshold, group coverage, cross-default vs acceleration, alignment with loan docs. - [ ] Additional EoDs/TEs: MAC, Change of Control, Regulatory, Hedging Purpose, Downgrade. - [ ] Bankruptcy language: India-specific IBC/NCLT triggers; AET election decision. - [ ] Grace periods: Appropriate for payment, collateral, covenant breaches, insolvency. - [ ] Tax gross-up and representations: Indian tax compliance, forms delivery. - [ ] Documents to be delivered: Financials, compliance certificates, opinions, KYC. - [ ] Notices: Multiple addresses, email deemed receipt, escalation contacts. - [ ] Transfer: Bank's flexibility for Affiliates and portfolio transactions. - [ ] Expenses and indemnities: Broad enforcement cost recovery. - [ ] CSA elections (if in Schedule or separate): One-way, Threshold, MTA, Eligible Collateral, haircuts, dispute resolution, valuation agent. - [ ] Regulatory compliance: Hedging purpose covenant, eligible user rep, reporting consent, sanctions.

Post-Negotiation / Execution: - [ ] Ensure all corporate authorisations (board resolution, POA) are in place and cover derivatives. - [ ] Complete stamping in relevant Indian state (usually Maharashtra for Mumbai execution). - [ ] Exchange executed copies and maintain proper records. - [ ] Set up operational processes (payments, collateral, reporting, monitoring). - [ ] Obtain any required Indian legal opinion on enforceability/netting. - [ ] Brief front office, credit, and operations teams on key Schedule provisions and triggers.

Appendix D: Comparison – 1992 vs 2002 ISDA Master Agreement (Key Differences)

Close-out Methodology: - 1992: Market Quotation (third-party quotes) + Loss (for unquoted transactions). More rigid; disputes common in illiquid markets. - 2002: Close-out Amount. More flexible; Determining Party can use internal models, quotes, market data; "commercially reasonable" standard. Preferred in modern market.

Force Majeure: - 1992: Limited "Act of State" or impossibility concepts. - 2002: Dedicated Force Majeure Termination Event with detailed definition and waiting period. Better for modern risks (cyber, infrastructure, pandemics, regulatory actions).

Illegality: - 2002: Refined provisions with clearer interaction with Force Majeure and waiting periods.

Multibranch and Offices: - 2002: Improved provisions for multibranch parties and Office elections.

Other: - 2002 generally cleaner drafting, better integration with Definitions booklets, and more adaptable to regulatory margin and collateral rules.

Indian Practice: Almost all new ISDA documentation in India uses the 2002 Master Agreement. Legacy 1992 documentation should be reviewed for close-out methodology and upgraded where possible (via amendment or novation).

Appendix E: Sample Additional Provisions for Indian Bank ISDA Schedule (Part 5)

(These are illustrative examples only; adapt to specific facts, obtain Indian counsel review, and do not use without proper legal sign-off.)

1. Additional Event of Default – Cross Default to Financing Documents

[As set out in Chapter 7 redline example]

2. Additional Event of Default – Change of Control

[As set out in Chapter 7 redline example]

3. Additional Termination Event – Material Adverse Change

[As set out in Chapter 7 redline example]

4. Additional Bankruptcy Events (India-specific)

[As set out in Chapter 7 redline example]

5. Hedging Purpose and Regulatory Compliance Covenant and Termination Right

[As set out in Chapter 12 redline example]

6. Transfer Provisions (Bank-friendly)

[As set out in Chapter 9 redline example]

7. Close-out Amount – Conclusiveness and Dispute Resolution

"The Determining Party's calculation of the Close-out Amount shall be conclusive and binding on the parties absent manifest error or bad faith. Without prejudice to the foregoing, if Party B disputes the Close-out Amount in good faith and provides reasonably detailed written reasons and an alternative calculation within 3 Business Days of receipt of the close-out statement, the parties shall attempt in good faith to resolve the dispute within a further 5 Business Days. If unresolved, either party may refer the dispute to an independent expert mutually agreed (or appointed by [neutral body, e.g., President of the Bombay Chamber of Commerce or a designated arbitration institution]). Pending resolution, Party B shall pay the undisputed portion of the Close-out Amount and such portion of the disputed amount as the parties agree or the expert directs. The expert's determination shall be final and binding. Each party shall bear its own costs of the dispute resolution unless the expert determines otherwise."

8. Indian Law Carve-outs and Enforcement Acknowledgment

[As set out in Chapter 10 redline example for governing law/jurisdiction]

9. Stamp Duty and Execution Formalities

"Party B shall be responsible for and shall pay or reimburse all stamp duty, registration charges, notarial fees, and other similar taxes and charges payable in India in connection with the execution, delivery, performance, or enforcement of this Agreement, any Schedule, any Confirmation, the Credit Support Annex, or any related document or amendment. Party B shall ensure that this Agreement and all Confirmations are properly stamped in accordance with the applicable stamp laws of the State of Maharashtra (or such other State as may be relevant) so as to be admissible in evidence in any Indian court or tribunal. Party B shall indemnify Party A against any loss, cost, or liability arising from any failure to comply with this provision or from under-stamping or non-stamping."

10. Notices – Additional Operational Provisions

[Email and deemed receipt language as in Chapter 9, plus requirement to send copies to designated email groups for Events of Default, collateral calls, and termination notices.]

These sample provisions illustrate the level of customisation typically seen in Indian bank ISDA Schedules with corporate counterparties. They are designed to protect the bank's credit, regulatory, and enforcement interests while remaining commercially acceptable in the Indian market.

Conclusion and Recommendations

The 2002 ISDA Master Agreement, when properly understood, negotiated, and tailored through the Schedule and CSA, is a powerful tool for Indian banks to manage credit risk, optimise capital, and document OTC derivatives relationships in a globally consistent yet locally adapted manner.

Key takeaways for Indian banking lawyers:

1. **Netting and Close-out are the Core Value**: Focus documentation and internal processes on ensuring close-out netting is robust and enforceable to the maximum extent possible under Indian law (supported by ISDA opinions and transaction-specific advice).
2. **The Schedule is Where the Battle is Won or Lost**: Do not accept a "standard" or "lightly amended" Schedule for corporate or higher-risk counterparties. Customise with cross-default, additional EoDs/TEs, regulatory compliance provisions, India-specific insolvency triggers, and strong CSA terms.
3. **Governing Law and Jurisdiction Require Thoughtful Compromise**: English law + English courts (with Indian enforcement mechanisms and carve-outs) remains the market standard and generally serves Indian banks well. Document the enforcement pathway clearly.
4. **CSA is a Credit and Operational Tool, Not Just a Regulatory Checkbox**: Structure one-way or two-way CSA with appropriate thresholds, collateral eligibility, haircuts, and dispute resolution to match the credit profile and operational reality of the Indian counterparty.
5. **Regulatory Compliance Must Be Embedded**: Use the Schedule to document and enforce RBI hedging purpose, eligible user status, margin requirements, and reporting obligations. Add termination rights for regulatory breaches or changes.
6. **Internal Coordination is Essential**: ISDA documentation touches front office (origination), credit risk, legal, compliance, operations, and treasury. Establish clear policies, playbooks for close-out and collateral enforcement, and escalation procedures.
7. **Stay Current**: RBI, SEBI, and IFSCA rules evolve. Monitor circulars, margin requirement phases, trade repository reporting changes, and judicial developments on IBC, netting, and foreign judgment enforcement. Update precedent Schedules and internal guidance regularly.
8. **Obtain Proper Opinions and Advice**: For material exposures or new counterparty types, commission Indian law opinions on netting enforceability, CSA effectiveness, and jurisdiction/enforcement issues. Do not rely solely on ISDA's generic opinions.

This handbook has provided a clause-by-clause explanation in plain English, negotiation strategies from the Indian bank perspective, identification of lender risks and borrower positions, market practice insights, and actual redline suggestions for the most common and critical provisions.

A truly comprehensive 200+ page edition would expand each chapter with additional case studies, full sample redlined Schedules for different counterparty categories (large corporate, mid-market, NBFC, PSU, foreign bank branch), valuation dispute playbooks, detailed regulatory matrices, and templates for close-out statements, collateral call notices, and enforcement filings. Such an expanded work is recommended for internal use by major Indian banks and law firms with significant derivatives practices.

For now, this practical core handbook should serve as a valuable desk reference and training resource for Indian banking lawyers negotiating, documenting, and managing ISDA Master Agreement relationships in India's dynamic financial markets.

End of Handbook

This document was prepared in June 2026 for educational and professional reference purposes. It does not constitute legal advice. Readers should consult qualified Indian counsel and obtain current ISDA and Indian law opinions before relying on any provision in actual transactions.