

CHAPTER 459**SET-OFF AND NETTING ON INSOLVENCY ACT**

To make provision for the enforceability of set-off and netting on bankruptcy or insolvency.

7th April, 2003

1st June, 2003

ACT IV of 2003, as amended by Act I of 2004.

1. The short title of this Act is the Set-off and Netting on Insolvency Act. Short title.

2. In this Act, unless the context otherwise requires - Interpretation.
"close-out netting provision" means a provision of a contract under which on the occurrence of a specified event, whether through the operation of netting or set-off or otherwise -

- (a) the benefit of time for the performance of relevant obligations by the debtor may no longer be claimed and, or the relevant obligations become immediately due and expressed as an obligation to pay an amount representing their estimated current value, or are terminated and replaced by an obligation to pay such an amount, and, or,
- (b) any obligation of a party to deliver property to the other is immediately performable notwithstanding any benefit of time granted to the debtor and expressed as an obligation to pay an amount representing its estimated current value or replacement value or is terminated and replaced by an obligation to pay such an amount, and
- (c) an account is taken of what is due from each party to the other in respect of such obligations and those obligations fall to be discharged by the payment of an aggregate net sum equal to the balance of account by the party from whom the larger amount is due;

"netting" means the conversion into one net claim or one net obligation of claims and obligations arising under any contract with the result that only a net claim can be demanded or a net obligation be owed.

3. (1) Notwithstanding the provisions of any other law, any close-out netting provision or any other provision in any contract providing for or relating to the set-off or netting of sums due from each party to the other in respect of mutual credits, mutual debts or other mutual dealings shall be enforceable in accordance with its terms, whether before or after bankruptcy or insolvency, in respect of mutual debts, mutual credits or mutual dealings which have arisen or occurred before the bankruptcy or insolvency of one of the parties, against: Set-off and netting.

- (a) the parties to the contract,
- (b) any guarantor or any person providing security for any party to the contract,
- (c) the liquidator, receiver, curator, controller, special controller or other similar officer of either party to the contract, and
- (d) the creditors of the parties to the contract.

(2) When a close-out netting provision is enforced, obligations expressed in different currencies are converted into a single currency and such obligations shall be discharged by the payment of an aggregate net sum equal to the balance of account by the party from whom the larger amount is due.

(3) Any authority or mandate in a contract to implement any close-out netting provision shall not be revoked by the declaration of bankruptcy or the insolvency of any other party to the contract.

(4) Subarticle (1) shall not apply in respect of any close-out netting agreement entered into at a time at which the other party knew or ought to have known that an application for the dissolution and winding up of the company by reason of insolvency was pending, or that the company has taken formal steps under any applicable law to bring about its dissolution and winding up by reason of insolvency.

(5) Subarticle (1) shall also not apply where the insolvent party is an individual or a commercial partnership other than a company and the other party knew or ought to have known of events of the same nature as stated in the preceding subarticle in relation to the insolvent party.

(6) Notwithstanding the provisions of any other law, nothing shall limit or delay the application of any provision of any contract providing for or relating to set-off or netting which would otherwise be enforceable and no order of any court nor any warrant or injunction or similar order issued by a court or otherwise and no proceedings of whatever nature shall have any effect in relation thereto.

(7) Nothing in subarticle (6) shall -

- (a) prevent the application of any law which would render netting or set-off unenforceable in any particular case on the grounds of fraud or on any similar ground, or
- (b) permit the enforceability of netting or set-off under this article if any provision of a contract between the parties concerned would make netting or set-off void because of fraud or any similar ground.

(8) Articles 303, 304 and 315 of the [Companies Act](#) and article 485 of the [Commercial Code](#) shall only be applicable in relation to a close-out netting provision where there is fraud on the part of the party to the agreement not being the insolvent party.

4. It shall be lawful for the parties to a contract, when entering into the contract -

Agreements in relation to obligations and transactions.

- (a) to agree on any system or mechanism which will enable the parties to convert a non-financial obligation into a monetary obligation of equivalent value and to value such obligation for the purposes of any set-off or netting;
- (b) to agree on the rate of exchange or the method to be used to establish the rate of exchange to be applied in effecting any set-off or netting when the sums to be set off or netted are in different currencies, and to establish the currency in which payment of the net sum is to be effected;
- (c) to agree that any transactions or other dealings carried out pursuant to any contract, whether identified specifically or by reference to a type or class of transactions or dealings, shall be treated as a single transaction or dealing for the purpose of the set-off or netting provisions in the contract and that all such transactions or dealings shall be treated as a single transaction or dealing by the parties or any liquidator, receiver, curator, controller or special controller or other officer acting for the parties and any court.

5. A close-out netting provision entered into by a party which is a branch in Malta of an oversea company shall be valid and enforceable in accordance with the provisions of this Act notwithstanding the provisions of any other law which may be applicable to such party, including the law under which such company is constituted.

Applicability to branches in Malta.

6. An assignment of a debt or an action forming a part of an agreement containing a close-out netting provision shall not be subject to the provisions of article 2013(3) of the [Civil Code](#).

Inapplicability of article 2013 of the Civil Code.
Cap. 16.

7. (1) The Minister may make regulations to give effect to the provisions of this Act and, without prejudice to the generality of the foregoing, may in particular make regulations to transpose and implement any Directive of the European Parliament and of the Council on financial collateral arrangements; and, in particular, regulations relating to any aspect concerning financial collateral agreements and similar arrangements; such regulations may define financial collateral, may provide for the rights and obligations of the collateral taker and the collateral provider, establish formal requirements and rules on the enforcement of financial collateral agreements and similar arrangements, the recognition of title and the non-applicability of certain rules of the [Civil Code](#) and of legal provisions relating to bankruptcy and insolvency, and such regulations may also provide for relative rules on conflict of laws and for any other matters as are incidental or connected thereto.

Power to make regulations.
Added by:
I. 2004.6.

Cap. 16.

(2) Regulations made under this article may be made and published in the English language only.

