

SUBSIDIARY LEGISLATION 459.01**FINANCIAL COLLATERAL ARRANGEMENTS
REGULATIONS**

1st May, 2004*

LEGAL NOTICE 177 of 2004, as amended by Legal Notices 388 and 417 of 2004, 53 and 401 of 2005, 179 of 2006, 118 of 2011, 283 of 2013 and 208 of 2023.

1. (1) The title of these regulations is the Financial Collateral Arrangements Regulations.

Citation.
Amended by:
L.N. 118 of 2011;
L.N. 208 of 2023.

(2) The purpose of these regulations is, in part, to implement the provisions of Directive 2002/47/EC on financial collateral arrangements and Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC, as currently in force and as may be amended from time to time, including any implementing measures that have been issued or may be issued thereunder and to provide for other matters relating to financial collateral arrangements and they shall be interpreted and applied accordingly.

(3) In the event of a conflict between any of these regulations and the provisions of any of the Directives mentioned in sub-regulation (2), the provisions of the Directives shall prevail.

(4) The provisions of these regulations shall be without prejudice to:

- (a) Directive 2008/48/EC of the European Parliament and the Council of 23 April 2008 on credit agreements for consumers, as amended from time to time, and the Consumer Credit Regulations; and
- (b) the BRRD, the CCP RRR, the relevant provisions of the Malta Financial Services Authority Act and Financial Markets Act transposing the CCP RRR, and the Recovery and Resolution Regulations..

S.L. 378.12.

Cap. 330.

S.L. 330.09.

2. (1) In these regulations, unless the context otherwise requires -

Interpretation.
Amended by:
L.N. 388 of 2004;
L.N. 417 of 2004;
L.N. 401 of 2005;
L.N. 118 of 2011;
L.N. 283 of 2013;
L.N. 208 of 2023.

"binding legal instrument" means any directly applicable measures, including, but not limited to, any implementing technical standards, regulatory technical standards or similar measures, issued under European Union legislation;

"book entry securities collateral" means financial collateral provided under a financial collateral arrangement which consists of instruments, title to which is evidenced by entries in a register or

*see regulation 1(2) of these Regulations as originally promulgated.

account maintained by or on behalf of an intermediary;

"BRRD" means Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, as amended from time to time, and includes any binding legal instruments, guidelines and other measures that have been or may be issued thereunder;

"cash" means money credited to an account in any currency, or similar claims for the repayment of money, including money market deposits;

"CCP RRR" means Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132, as amended from time to time, and includes any implementing measures that have been or may be issued thereunder;

"central counterparty" means an entity which is interposed between institutions and which acts as the exclusive counterparty of these institutions with regard to their transfer orders;

"clearing house" means an entity responsible for the calculation of the net positions of institutions, a possible central counterparty and, or a possible settlement agent;

"close-out netting provision" means a provision of a financial collateral arrangement, or of an arrangement of which a financial collateral arrangement forms part, or, in the absence of any such provision, any statutory rule by 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 collateral provider 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) an account is taken of what is due from each party to the other in respect of such obligations, and a net sum equal to the balance of the account is payable by the party from whom the larger amount is due to the other party;

"credit claims" means:

- (a) pecuniary claims arising out of an agreement whereby a bank or credit institution within the meaning of regulation 4(1) grants credit in the form of a loan; or

- (b) pecuniary claims due to a non-natural person, provided that the debtor of the claims granted as collateral is also a non-natural person;

"EEA State" means any State which is a contracting party to the agreement on the European Economic Area signed at Oporto on the 2nd May, 1992, as adjusted by the Protocol signed in Brussels on 17th March, 1993 and as amended by any subsequent act;

"equivalent collateral" means:

- (a) in relation to cash, a payment of the same amount and in the same currency; and
- (b) in relation to instruments:
 - (i) instruments of the same issuer or debtor, forming part of the same issue or class and of the same nominal amount, currency and description; or
 - (ii) any other assets provided as financial collateral where a financial collateral arrangement provides for the transfer of other assets following the occurrence of any event relating to or affecting any instruments provided as financial collateral;

"European Union" means the European Union referred to in the Treaty;

"Financial Collateral Arrangements Directive" means Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, as amended from time to time;

"financial collateral arrangement" means:

- (a) in the case of a title transfer financial collateral arrangement, an arrangement, including repurchase agreements, under which a collateral provider transfers full ownership of, or full entitlement to, financial collateral to a collateral taker for the purpose of securing or otherwise covering the performance of relevant financial obligations; and
- (b) in the case of a security financial collateral arrangement, an arrangement under which a collateral provider provides financial collateral by way of security for the purpose of securing or otherwise covering the performance of relevant financial obligations to or in favour of a collateral taker, and where the full or qualified ownership of, or full entitlement to, the financial collateral remains with the collateral provider when the security right is established;

whether or not these arrangements are covered by a master agreement, standard form contract or general terms and conditions;

"instrument" means:

Cap. 370.

- (a) shares in companies and other securities or participation interests or rights equivalent to shares in companies, partnerships and other entities;
- (b) bonds and other securities giving rise to or acknowledging indebtedness;
- (c) any other securities which give the right to acquire any such shares, bonds, or other securities or participation interests or rights by subscription, purchase or exchange or which give rise to a cash settlement (excluding instruments of payment), including units in collective investment schemes and money market instruments;
- (d) to the extent not already mentioned above, any instrument as defined in article 2 of the Investment Services Act; and
- (e) claims relating to, or rights in, or in respect of, any of the securities, participation interests or rights and instruments in terms of paragraphs (a), (b), (c) or (d) hereof;

"master agreement" means an agreement that provides the standard terms and conditions applicable to all or a defined subset of transactions that may be entered into from time to time, including the terms and conditions for close-out netting;

"Member State" means a State which is a member of the European Union;

"the Minister" means the Minister responsible for financial regulation;

"non-natural person" means any legal person, unincorporated firm or body of persons or partnership not being an individual;

"OECD country" means any country that is a member of the Organisation for Economic Co-operation and Development established in 1961;

"publicly guaranteed undertakings" means any company or partnership whose obligations are by law guaranteed by the Government;

"recognised jurisdiction" means:

- (a) an EU Member State or an EEA State;
- (b) any country that is a member of the Organisation for Economic Co-operation and Development (OECD);
- (c) a country that is a signatory of the IOSCO Multilateral Memorandum of Understanding; or
- (d) any other jurisdiction with whom the Authority established in terms of the Malta Financial Services Authority Act has a Memorandum of Understanding covering securities;

Cap. 330.

"registered instrument" means an instrument in respect of which the owner's name is recorded on the books of the issuer or the

issuer's agent;

"relevant account" in relation to book entry securities collateral means the register or account, which may be maintained by the collateral taker, in which the entries are made whereby such securities collateral is provided to the collateral taker and made subject to a financial collateral arrangement;

"relevant financial obligations" means the obligations which are secured by a financial collateral arrangement and which give a right to cash settlement and, or delivery of instruments, including:

- (a) present or future, actual or contingent or prospective obligations (including such obligations arising under a master agreement or similar arrangement);
- (b) obligations owed to the collateral taker by a person other than the collateral provider; or
- (c) obligations of a specified class or kind arising from time to time;

"reorganisation measures" means measures which involve any intervention by administrative or judicial authorities which are intended to preserve or restore the financial situation and which affect pre-existing rights of third parties, including but not limited to measures involving a suspension of payments, suspension of enforcement measures or reduction of claims. Such measures shall be deemed to include the appointment of a Special Controller in terms of article 329B of the Companies Act or the appointment of an equivalent or similar officer or controller under any other law;

Cap. 386.

"right of use" means the right of the collateral taker to use and dispose of financial collateral provided under a security financial collateral arrangement as the owner of it in accordance with the terms of the security financial collateral arrangement;

"settlement agent" means an entity providing to institutions and, or a central counterparty, settlement accounts through which transfer orders are settled and, as the case may be, extending credit to those institutions and, or central counterparties for settlement purposes;

"specified event" means an event of default or any similar event as agreed between the parties on the occurrence of which, under the terms of a financial collateral arrangement or by operation of law, the collateral taker is entitled to realise or appropriate financial collateral or a close-out netting provision comes into effect;

"the Treaty" has the same meaning assigned to it by article 2 of the European Union Act;

Cap. 460.

"winding-up proceedings" means collective proceedings involving realisation of the assets and distribution of the proceeds among the creditors, shareholders or members as appropriate, which involve any intervention by administrative or judicial authorities, including where the collective proceedings are terminated by a composition or other analogous measure, whether or not they are founded on insolvency or are voluntary or ordered by the court.

(2) References in these regulations to financial collateral being "provided", or to the "provision" of financial collateral, are references to the financial collateral being delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral taker or of a person acting on the collateral taker's behalf:

Provided that a collateral taker shall also be deemed to have control over financial collateral when this is held by a third party, non-natural person, who acts on the instructions of the collateral taker or of a person acting on his behalf, whether throughout the duration of the financial collateral arrangement or upon the occurrence of an event of default under the financial collateral arrangement:

Provided further that any right of substitution, right to withdraw excess financial collateral, right to give instructions in relation to an account until an event of default occurs, any right to exercise rights or receive the fruits attaching to or in respect of the financial collateral in favour of the collateral provider or, in the case of credit claims, any right to collect the proceeds thereof until further notice, shall not prejudice the financial collateral having been provided to the collateral taker as mentioned in these regulations:

Provided further that in the case of financial collateral included under a collateral arrangement affecting all the property, present and future, of the debtor, including general hypothecs, the right of the collateral provider to freely dispose of or otherwise have possession or control of such financial collateral until the collateral taker exercises its enforcement rights against such financial collateral, shall not prejudice the financial collateral having been provided to the collateral taker as mentioned in these regulations.

(3) References in these regulations to "writing" include recording by electronic means and any other durable medium.

3. (1) The provisions of these regulations shall apply solely and exclusively to:

- (a) financial collateral which consists of cash or instruments or credit claims;
- (b) financial collateral which has been provided and which can be evidenced in writing; and
- (c) financial collateral arrangements which can be evidenced in writing or in a legally equivalent manner:

Provided that the evidencing of the provision of financial collateral shall allow for the identification of the financial collateral to which it applies. For this purpose, it is sufficient to prove that the book entry securities collateral has been credited to, or forms a credit in, the relevant account and that the cash collateral has been credited to, or forms a credit in, a designated account:

Provided further that for credit claims, the inclusion of the claim in a list of claims submitted to the collateral taker in writing,

Applicability of
these regulations.
Amended by:
L.N. 118 of 2011;
L.N. 208 of 2023.

or in a legally equivalent manner, is sufficient to identify that credit claim and to evidence the provision of the claim provided as financial collateral between the parties.

(2) In addition and without prejudice to the foregoing, the inclusion of the claim in a list of claims submitted to the collateral taker in writing, is sufficient to identify that credit claim and to evidence the provision of the claim provided as financial collateral against the debtor or third parties.

(3) The provisions of Article 7(1) of Financial Collateral Arrangements Directive and of regulations 6, 7, 8, 9 and 10(1) shall not apply to:

- (a) any restriction on the enforcement of financial collateral arrangements or any restriction on the effect of a security financial collateral arrangement, any close out netting or set-off provision that is imposed by virtue of regulations 59 to 72 of the Recovery and Resolution Regulations or by virtue of the provisions under Title V, Chapter III, Section 3 or under Chapter IV of the CCP RRR or in terms of the relevant provisions of the Malta Financial Services Authority Act implementing the said provisions of the CCP RRR; or

S.L. 330.09.

Cap. 330.

- (b) any restriction which:

- (i) is imposed in terms of any applicable national law that facilitates the orderly resolution of:

- (aa) an insurance company, insurance undertaking and assurance undertaking in terms of regulation 4(1)(g);

- (bb) a central counterparty, settlement agent or clearing house, including similar institutions regulated under national law acting in the futures, options and derivatives markets to the extent not covered by Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems; or

- (cc) a non-natural person, who acts in a trust or representative capacity on behalf of any one or more persons that includes any bondholders or holders of other forms of securitised debt or on behalf of any institution as defined in regulation 4(1)(a) to (l); and

- (ii) is subject to safeguards at least equivalent to those set out in regulations 73 to 80 of the Recovery and Resolution Regulations or in Title V, Chapter V of the CCP RRR.

Validity of financial collateral arrangement.

Added by:
L.N. 388 of 2004.
Amended by:
L.N. 283 of 2013.
Cap. 16.

Cap. 16.
Cap. 12.
Cap. 386.
S.L. 386.02

Inapplicability of article 122(10) of the Companies Act.

Added by:
L.N. 118 of 2011.
Amended by:
L.N. 283 of 2013.
Cap. 386.
S.L. 386.02

Collateral taker and collateral provider.

Substituted by:
L.N. 388 of 2004.
Amended by:
L.N. 53 of 2005;
L.N. 401 of 2005;
L.N. 179 of 2006;
L.N. 118 of 2011;
L.N. 283 of 2013.

Cap. 371.

Cap. 370.

3A. (1) A financial collateral arrangement shall be valid and enforceable in accordance with its terms and with these regulations.

(2) Article 1357(2) of the Civil Code shall not apply to a financial collateral arrangement and the terms agreed upon between the parties shall prevail.

(3) Where any of the provisions of the Civil Code, the Code of Organization and Civil Procedure, the Companies Act, the Companies Act (Investment Companies with Variable Share Capital) Regulations or any other law is in conflict with any of these regulations, these regulations shall prevail.

3B. The obligations arising out of article 122(10) and (11) of the Companies Act as well as any obligation to offer shares on a pre-emptive basis to other shareholders in terms of the Companies Act (Investment Companies with Variable Share Capital) Regulations do not apply to pledges of shares provided in accordance with these regulations.

4. (1) For the purposes of these regulations, both the collateral taker and the collateral provider shall be:

- (a) a corporation or other legal person, in either case established by law;
- (b) a public authority, including:
 - (i) public sector bodies of Member States charged with or intervening in the management of public debt; and
 - (ii) public sector bodies of Member States authorised to hold accounts for customers;
- (c) a central bank, the European Central Bank, the Bank for International Settlements, a multilateral development bank as referred to in Annex VI, Part 1, Section 4 of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 on the taking up and pursuit of the business of credit institutions (recast), the International Monetary Fund and the European Investment Bank;
- (d) a bank or credit institution licensed under the Banking Act, or otherwise licensed or authorised by a foreign authority in a recognised jurisdiction or a credit institution within the meaning of article 4(1) of Directive 2006/48/EC including the institutions listed in article 2(1) of that Directive;
- (e) an investment services licence holder under the Investment Services Act, or otherwise licensed or authorised by a foreign authority in a recognised jurisdiction or an investment firm within the meaning of Article 4(1) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments;

- (f) a financial institution licensed in terms of the Financial Institutions Act or a financial institution within the meaning of Article 4 of Directive 2006/48/EC; Cap. 376.
- (g) an insurance company with head office in Malta authorised in terms of article 7 of the Insurance Business Act to carry on business of insurance or an insurance undertaking as defined in Article 1(a) of Council Directive 92/49/EEC of the 18 June, 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life insurance, an assurance undertaking as defined in Article 1(1)(a) of Council Directive 2002/83/EC of 5th November, 2002 concerning life assurance; Cap. 403.
- (h) an undertaking for collective investment in transferable securities (UCITS) as defined in article 1(2) of Council Directive 85/611/EEC of the 20th December, 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) whether licensed in terms of the Investment Services Act or authorised in a Member State or EEA State. Cap. 370.
- (i) a management company as defined in Article 1a(2) of Directive 85/611/EEC as amended by Directive 2001/107/EC;
- (j) any other collective investment scheme or management company of such scheme which is licensed or recognised in terms of the Investment Services Act or otherwise licensed or authorised by a foreign authority in a recognised jurisdiction; Cap. 370.
- (k) a securitisation vehicle as defined in article 2 of the Securitisation Act; Cap. 484.
- (l) a central counterparty, settlement agent or clearing house;
- (m) a non-natural person who acts in a trust or representative capacity on behalf of any one or more persons that includes any bondholders or holders of other forms of securitised debt or on behalf of any entity as defined in paragraphs (a) to (l); or
- (n) a non-natural person other than the entities mentioned in paragraph (a), provided that the other party is an entity as defined in paragraphs (a) to (m).

(2) For the purposes of sub-regulation (1), "public authority" shall not include publicly guaranteed undertakings except for those falling within the meaning of subregulation (1)(b) to (i).

Formal
requirements.
Amended by:
L.N. 388 of 2004;
L.N. 118 of 2011;
L.N. 283 of 2013.

5. (1) Without prejudice to the provisions of regulation 3, the creation, validity, perfection, enforceability or admissibility in evidence of a financial collateral arrangement or the provision of financial collateral under a financial collateral arrangement shall not be dependent on the performance of any formal act.

(2) Without prejudice to the provisions of regulation 3, when credit claims are provided as financial collateral the creation, validity, perfection, priority, enforceability or admissibility in evidence of such financial collateral between the parties is not dependent on the performance of any formal act such as the registration or the notification of the debtor of the credit claims provided as collateral.

(3) When credit claims are provided as financial collateral, and without prejudice to the foregoing subregulation, insofar as validity and enforceability of the financial collateral arrangement against debtors or third parties is concerned, notice of the financial collateral arrangement shall be given to the debtor by the collateral taker or the collateral provider. The notice shall not be necessary if the debtor has acknowledged the financial collateral arrangement.

(4) When credit claims are provided as financial collateral, for the purposes of this regulation the debtor shall be deemed to be notified of the financial collateral arrangement upon any one of the following events taking place at the option of the collateral taker or the collateral provider:

- (a) notification to the debtor in writing; or
- (b) on the publication of a notice as follows:
 - (i) in a daily newspaper circulating wholly or mainly in Malta, and
 - (ii) where it appears that the majority of the debtors reside outside Malta, in a daily newspaper circulating wholly or mainly in such other jurisdiction outside Malta; and
 - (iii) where there is doubt as to where the majority of the debtors reside, in a daily newspaper which has wide international circulation.

(5) Such notification shall be effective for all purposes and effects of the Civil Code with regard to third parties, including the debtor, as follows:

Cap. 16.

Cap. 12.

- (i) when notification is made in terms of article 187 of the Code of Organization and Civil Procedure, on the date of service and the provisions of the said Code of Organization and Civil Procedure shall determine such date of service; or
- (ii) when notification is made by mail, two days after dispatch by mail by the collateral provider or collateral taker of the notice in writing to the debtor's last known address; or
- (iii) when notification is made by publication in a newspaper, the time of the opening of business

in the place of publication of the notice in the newspaper, or

- (iv) when notification is made by any electronic means, one day after dispatch of the electronic notification,

as the case may be, unless the said notice expressly mentions a later date for the effects to commence.

(6) For the purposes of this regulation, "formal act" includes any judicial act, registration, notification, note in any public registry, acknowledgement, advertisement published in any newspaper or journal, any form of delivery, or any similar act upon which the creation, validity, perfection, enforceability or admissibility in evidence of a financial collateral arrangement or the provision of financial collateral under a financial collateral arrangement may be dependent:

Provided that any act required by law as a condition for effecting the transfer or creation of a security interest on instruments, other than book entry securities, including endorsement in the case of credit instruments, or any recording on the issuer's register in the case of registered instruments, shall not be considered as a formal act.

(7) Without prejudice to the provisions on unfair terms in consumer contracts in the Consumer Affairs Act, debtors of credit claims may validly waive, in writing: Cap. 378.

- (a) their rights of set-off against the creditors of the credit claim and against persons to whom the creditor assigned, pledged or otherwise mobilised the credit claim as collateral; and
- (b) their rights arising from article 34 of the Banking Act and article 3 of the Professional Secrecy Act in relation to confidentiality and professional secrecy that would otherwise prevent or restrict the ability of the creditor of the credit claim to provide information on the credit claim or the debtor for the purposes of using the credit claim as collateral. Cap. 371.
Cap. 377.

6. (1) On the occurrence of a specified event, the collateral taker may realise any financial collateral provided under, and subject to the terms agreed in, a security financial collateral arrangement as follows: Enforcement of
financial collateral
arrangements.
Amended by:
L.N. 118 of 2011;
L.N. 283 of 2013.

- (a) in relation to cash, by setting off the amount against or applying it in discharge of the relevant financial obligations; or
- (b) in relation to instruments, by sale or appropriation and by setting off their value against, or applying their value in discharge of, the relevant financial obligations;
- (c) in relation to instruments consisting of securities of a SICAV, the financial collateral may also be realised in the manner and in accordance with the value as

contemplated in regulation 14(6)(iii) of the Companies Act (Investment Companies with Variable Share Capital) Regulations; or;

- (d) in relation to credit claims, by sale or appropriation and by setting off their value against, or applying their value in discharge of, the relevant financial obligations.

(2) Appropriation shall only be possible if in the security financial collateral arrangement the parties have specifically agreed that appropriation may take effect and have agreed, in writing, on the manner of or mechanism for the valuation of the instruments and the credit claims.

(3) Unless the parties to a security financial collateral arrangement otherwise agree, the manner of realising the financial collateral in terms of sub-regulation (1) shall not require that:

- (a) prior notice of the intention to realise be given;
- (b) the terms of the realisation be approved by any court, public officer or other person;
- (c) the realisation be conducted by sale by auction or in any other prescribed manner; or
- (d) any additional time period must have elapsed.

(4) Unless the parties otherwise agree, the operation of a close-out netting provision shall not be subject to the requirements listed in subregulation (3).

(5) The provisions of this regulation shall apply notwithstanding the provisions of the Civil Code, the Companies Act, the Companies Act (Investment Companies with Variable Share Capital) Regulations, or any other law.

Cap. 16.
Cap. 386.
S.L. 386.02

Right of use of
financial collateral
under security
financial collateral
arrangements.
Amended by:
L.N. 118 of 2011.

7. (1) The collateral taker may exercise a right of use in relation to financial collateral provided under the security financial collateral arrangement if and to the extent that the terms of such arrangement so provide.

(2) Where the collateral taker makes use of the financial collateral provided under a security financial collateral arrangement, he shall:

- (a) by due date of performance of the relevant financial obligations, transfer equivalent collateral to replace the original financial collateral. Such equivalent collateral shall be subject to the same security financial collateral agreement to which the original financial collateral was subject and shall be treated as having been provided under the security financial collateral arrangement at the same time as the original financial collateral was first provided; or
- (b) on the due date for the performance of the relevant financial obligations, set off the value of the equivalent collateral against or apply it in discharge of the relevant financial obligations, if and to the extent

that the terms of a security financial collateral arrangement so provide.

(3) When, following the use of financial collateral, equivalent collateral is transferred in terms of sub-regulation (2)(a), the rights of the collateral taker shall remain valid and enforceable in relation to such equivalent collateral.

(4) Upon the occurrence of a specified event at a time when the collateral taker has not as yet transferred equivalent collateral in terms of sub-regulation (2)(a), the obligation to transfer such financial collateral may be the subject of a close-out netting provision.

(5) The provisions of this regulation do not apply to credit claims.

8. Upon the occurrence of a specified event at a time when the collateral taker has not as yet, under a title transfer collateral arrangement, transferred equivalent collateral, the obligation to transfer such financial collateral may be the subject of a close-out netting provision.

Recognition of title transfer financial collateral arrangements.

9. (1) On the occurrence of a specified event, the collateral taker shall ensure that any action taken in terms of these regulations, including any realisation or valuation of the financial collateral, be conducted in accordance with the terms of the financial collateral arrangement and in any event in a commercially reasonable manner and in good faith so as to ensure fair treatment to the collateral provider and the provisions of articles 122(6) to 122(9) of the Companies Act shall not apply. To the extent that they conflict with these regulations, the provisions of regulation 14(6) and (7) of the Companies Act (Investment Companies with Variable Share Capital) Regulations shall not apply.

Realisation or valuation.
Substituted by:
L.N. 388 of 2004.
Amended by:
L.N. 118 of 2011;
L.N. 283 of 2013.

Cap. 386.

S.L. 386.02

(2) Where a collateral taker carries out the realisation or valuation in terms of sub-regulation (1) and the value of the financial collateral differs from the amount of the relevant financial obligations then, as the case may be, the following shall apply:

- (a) the collateral taker shall reimburse to the collateral provider the amount by which the value of the financial collateral exceeds the relevant financial obligations; or
- (b) the collateral provider shall remain liable to the collateral taker for any amount remaining outstanding between the relevant financial obligations and the value of the financial collateral.

10. (1) A financial collateral arrangement shall be valid and enforceable in accordance with its terms notwithstanding the commencement or continuation of winding-up proceedings or reorganisation measures in respect of the collateral provider or collateral taker.

Enforceability of financial collateral arrangements.
Amended by:
L.N. 388 of 2004.

(2) Such a financial collateral arrangement and the provision of financial collateral under such arrangement, shall not be declared invalid or void or be reversed on the sole basis that the financial

collateral arrangement has come into existence, or the financial collateral has been provided:

- (a) on the day of the commencement of winding-up proceedings or reorganisation measures, but prior to the order making that commencement; or
- (b) in a prescribed period prior to, and defined by reference to, the commencement of such proceedings or measures or by reference to the making of any order or the taking of any other action or occurrence of any other event in the course of such proceedings or measures.

(3) Where on the day of, but after the moment of the commencement of winding-up proceedings or reorganisation measures -

- (a) a financial collateral arrangement has come into existence;
- (b) a relevant financial obligation has come into existence; or
- (c) financial collateral has been provided,

it shall be legally enforceable and binding on third parties if the collateral taker can prove that he was not aware, nor ought to have been aware, of the commencement of such proceedings or measures.

(4) Where a financial collateral arrangement contains an obligation to provide financial collateral or additional financial collateral in order to take account of changes in the value of the financial collateral or in the amount of the relevant financial obligations, or where such arrangement contains a right to withdraw financial collateral on providing, by way of substitution or exchange, financial collateral of substantially the same value, the provision of financial collateral, additional financial collateral or substitute or replacement financial collateral under such an obligation or right shall not be declared invalid or void or be reversed on the sole basis that:

- (a) such provision was made on the day of the commencement of winding-up proceedings or reorganisation measures, but prior to the order making that commencement or in a prescribed period prior to, and defined by reference to, the commencement of winding-up proceedings or reorganisation measures or by reference to the making of any order or the taking of any other action or occurrence of any other event in the course of such proceedings or measures; and, or
- (b) the relevant financial obligations were incurred prior to the date of the provision of the financial collateral, additional financial collateral or substitute or replacement financial collateral.

(5) Without prejudice to this regulation, the provisions of Title II of Part V of the Companies Act shall not render invalid or void the transactions entered into during the period referred to in sub-

regulations (2)(b) and (4)(a).

11. (1) Any issue arising in relation to book entry securities collateral with respect to -

- (a) the legal nature and proprietary effects of book entry securities collateral;
- (b) the requirements for perfecting a financial collateral arrangement relating to book entry securities collateral and the provision of book entry securities collateral under such an arrangement, and the completion of the steps necessary to render such an arrangement and provision effective against third parties;
- (c) whether a person's title to or interest in such book entry securities collateral is overridden by or subordinated to a competing title or interest, or a good faith acquisition has occurred; and
- (d) the steps required for the realisation of book entry securities collateral following the occurrence of an enforcement event;

shall be governed by the law of the country in which the relevant account is maintained.

(2) For the purposes of this regulation, the law of a country is a reference to its domestic law, disregarding any rule under which, in deciding the relevant issue, reference should be made to the law of another country.
