

L.N. 388 of 2004**SET-OFF AND NETTING ON INSOLVENCY ACT
(CAP. 459)****Financial Collateral Arrangements (Amendments) Regulations,
2004**

IN exercise of the powers conferred by article 7 of the Set-Off and Netting on Insolvency Act, the Prime Minister and Minister of Finance has made the following regulations:-

1. (1) The title of these regulations is the Financial Collateral Arrangements (Amendments) Regulations, 2004, and they shall be read and construed as one with the Financial Collateral Arrangements Regulations, 2004, hereinafter referred to as the principal regulations. Citation.
L.N. 177 of 2004.

(2) These regulations shall be deemed to have come into force on the 1st May, 2004.

2. Immediately after the definition “provision” in regulation 2 of the principal regulations, there shall be inserted the following new definitions: Amends regulation 2 of the principal regulations.

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

“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;”.

3. Immediately after regulation 3 of the principal regulations there shall be inserted the following new regulation:- Adds new regulation 3A to the principal regulations.

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

Cap. 16. (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.

Cap. 12. (3) Where any of the provisions of the Civil Code, the Code of Organization and Civil Procedure, the Companies Act or any other law is incompatible with any of these regulations, these regulations shall prevail.”.

Substitutes regulation 4 of the principal regulations.

4. For regulation 4 of the principal regulations, there shall be substituted the following:

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

“Collateral taker and collateral provider.

(a) 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;

(b) a central bank, the European Central Bank, the Bank for International Settlements, a multilateral development bank, the International Monetary Fund and the European Investment Bank;

(c) a credit institution as defined in Article 1(1) of Directive 2000/12/EC, including the institutions listed in article 2 (3) of that Directive;

(d) an investment firm as defined in Article 1 (2) of Council Directive 93/22/EC of the 10th May, 1993 on investment services in the securities field;

(e) a financial institution as defined in Article 1(5) of Directive 2000/12/EC;

(f) an insurance undertaking as defined in Article 1(a) of Council Directive 92/49/EEC of the 18th June, 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and a life assurance undertaking as defined in Article 1(a) of Council Directive 92/96/EEC of the 10th November, 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance;

(g) 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);

(h) a management company as defined in Article 1a(2) of Directive 85/611/EEC as amended by Directive 2001/107/EC; or

(i) a central counterparty, settlement agent or clearing house and a person, other than a 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 any institution as defined in paragraphs (a) to (i).

(2) For the purposes of subregulation (1), “public authority” shall not include publicly guaranteed undertakings except for those falling within the meaning of paragraphs (b) to (i) of subregulation (1) hereof.”.

5. Regulation 5 of the principal regulations shall be renumbered as sub-regulation (1) thereof and immediately after sub-regulation 5 (1) as renumbered there shall be inserted added the following new regulation:-

Amends regulation 5 of the principal regulations.

“(2) 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.”.

Substitutes
regulation 9 of the
principal
regulations.

6. For regulation 9 of the principal regulations, there shall be substituted the following regulation:

“Realisation
or valuation.

9. (1) Notwithstanding the provisions of article 122 (7) of the Companies Act, 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.

(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.”.

Substitutes
marginal note to
regulation 10 of
the principal
regulations.

7. For the marginal note to regulation 10 of the principal regulations, there shall be substituted the words “Enforceability of financial collateral arrangements.”.