
2002 MODEL NETTING ACT

Part I : Netting

1. Definitions

In this Act:

"Bank" means the Central Bank of *[insert applicable jurisdiction]*;

"collateral" means:

- (i) cash in any currency;
- (ii) securities of any kind, including (without limitation) debt and equity securities;
- (iii) guarantees, letters of credit and obligations to reimburse; and
- (iv) any asset commonly used as collateral in *[insert applicable jurisdiction]*;

"collateral arrangement" means any margin, collateral or security arrangement or other credit enhancement related to a netting agreement or one or more qualified financial contracts entered into thereunder, including (without limitation):

- (i) a pledge or any other form of security interest in collateral, whether possessory or non-possessory;
- (ii) a security arrangement based on the transfer of title to collateral, whether by outright sale or by way of security, including (without limitation) a sale and repurchase agreement or an irregular pledge; and
- (iii) any guarantee, letter of credit or reimbursement obligation by or to a party to one or more qualified financial contracts, in respect of those qualified financial contracts;

"insolvent party" is the party in relation to which an insolvency proceeding under the laws of *[insert applicable jurisdiction]* has been instituted;

"liquidator" means the liquidator, receiver, trustee or other person or entity which administers the affairs of an insolvent party during an insolvency proceeding under the laws of *[insert applicable jurisdiction]*;

"netting" means the occurrence of any or all of the following:

- (i) the termination and/or acceleration of any payment or delivery obligations or entitlements under one or more qualified financial contracts entered into under a netting agreement;
- (ii) the calculation or estimation of a close-out value, market value, liquidation value or replacement value in respect of each obligation or entitlement terminated and/or accelerated under (i);

(iii) the conversion of any values calculated or estimated under (ii) into a single currency; and

(iv) the offset of any values calculated under (ii), as converted under (iii);

"netting agreement" means (i) any agreement between two parties that provides for netting of present or future payment or delivery obligations or entitlements arising under or in connection with one or more qualified financial contracts entered into thereunder by the parties to the agreement (a "master netting agreement"), (ii) any master agreement between two parties that provides for netting of the amounts due under two or more master netting agreements (a "master-master netting agreement") and (iii) any collateral arrangement related to one or more of the foregoing;

"non-insolvent party" is the party other than the insolvent party;

"party" means a person constituting one of the parties to a netting agreement;

"person" includes [individuals], [partnerships], [corporations], [other regulated entities such as banks, insurance companies and broker-dealers], [governmental units];

"qualified financial contract" means any financial contract, including any terms and conditions incorporated by reference in any such financial contract, pursuant to which payment or delivery obligations that have a market or an exchange price are due to be performed at a certain time or within a certain period of time. Qualified financial contracts include (without limitation):

- (a) a currency, cross-currency or interest rate swap agreement;
 - (b) a basis swap agreement;
 - (c) a spot, future, forward or other foreign exchange agreement;
 - (d) a cap, collar or floor transaction;
 - (e) a commodity swap;
 - (f) a forward rate agreement;
 - (g) a currency or interest rate future;
 - (h) a currency or interest rate option;
 - (i) equity derivatives, such as equity or equity index swaps, equity options and equity index options;
 - (j) credit derivatives, such as credit default swaps, credit default basket swaps, total return swaps and credit default options;
 - (k) energy derivatives, such as electricity derivatives, oil derivatives, coal derivatives and gas derivatives;
 - (l) weather derivatives, such as weather swaps or weather options;
 - (m) bandwidth derivatives;
 - (n) freight derivatives;
 - (o) carbon emissions derivatives;
 - (p) a spot, future, forward or other commodity contract;
 - (q) a repurchase or reverse repurchase agreement;
 - (r) an agreement to buy, sell, borrow or lend securities, such as a securities lending transaction;
 - (s) a title transfer collateral arrangement;
 - (t) an agreement to clear or settle securities transactions or to act as a depository for securities;
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- (u) any other agreement similar to any agreement or contract referred to in paragraphs (a) to (t) with respect to reference items or indices relating to (without limitation) interest rates, currencies, commodities, energy products, electricity, equities, weather, bonds and other debt instruments and precious metals;
- (v) any derivative or option in respect of, or combination of, one or more agreements or contracts referred to in paragraphs (a) to (u); and
- (w) any agreement or contract designated as such by the Bank under this Act;

"title transfer collateral arrangement" means a security arrangement based on the transfer of title to collateral, whether by outright sale or by way of security, including (without limitation) a sale and repurchase agreement or an irregular pledge.

2. **Powers of the Bank.** The Bank may, by notice issued under this section, designate as "qualified financial contracts" any agreement or contract, or type of agreement or contract, in addition to those listed in this Act.

3. **Enforceability of a Qualified Financial Contract.** A qualified financial contract shall not be and shall be deemed never to have been void or unenforceable by reason of [*insert the applicable law*] relating to games, gaming and lotteries.

4. **Enforceability of a Netting Agreement.**

(a) **General rule.** The provisions of a netting agreement will be enforceable in accordance with their terms against the insolvent party and, where applicable, against a guarantor or other person providing security for the insolvent party and will not be stayed, avoided or otherwise limited by any action of the liquidator, by any other provision of law relating to bankruptcy, reorganization, composition with creditors, receivership, conservatorship or any other insolvency proceeding the insolvent party may be subject to or by any other provision of law that may be applicable to the insolvent party, subject to the conditions contained in the applicable netting agreement.

(b) **Limitation on obligation to make payment or delivery.** The only obligation, if any, of a party to make payment or delivery under a netting agreement shall be equal to its net obligation to the other party as determined in accordance with the terms of the applicable netting agreement.

(c) **Limitation on right to receive payment or delivery.** The only right, if any, of a party to receive payment or delivery under a netting agreement shall be equal to its net entitlement with respect to the other party as determined in accordance with the terms of the applicable netting agreement.

(d) **Limitation on powers of the liquidator.** Any powers of the liquidator to assume or repudiate individual contracts will not prevent the termination and/or acceleration of any payment or delivery obligations or entitlements under one or more qualified financial contracts entered into under a netting agreement, and will apply, if at all, only to the net amount due in respect of all of such qualified financial contracts in accordance with the terms of such netting agreement;

(e) **Limitation of insolvency laws prohibiting set-off.** The provisions of a netting agreement which provide for the offset of close-out values, market values, liquidation values or

replacement values calculated in respect of accelerated and/or terminated payment or delivery obligations or entitlements under one or more qualified financial contracts entered into thereunder will not be affected by any applicable insolvency laws limiting the exercise of rights to set off, offset or net out obligations, payment amounts or termination values owed between an insolvent party and another party.

(f) Preferences and fraudulent transfers. The liquidator of an insolvent party may not avoid

- (i) any transfer, substitution or exchange of cash, collateral or any other interests pursuant to a netting agreement from the insolvent party to the non-insolvent party, or
- (ii) any payment or delivery obligation incurred by the insolvent party and owing to the non-insolvent party pursuant to a netting agreement

on the grounds of it constituting a [preference] [transfer during a suspect period] by the insolvent party to the non-insolvent party, unless there is clear and convincing evidence that the non-insolvent party (i) made such transfer or (ii) incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the insolvent party was indebted or became indebted, on or after the date (i) such transfer was made or (ii) such obligation was incurred.

(g) Preemption. No stay, injunction, avoidance, moratorium, or similar proceeding or order, whether issued or granted by a court, administrative agency, liquidator or otherwise, shall limit or delay application of otherwise enforceable netting agreements in accordance with subsections (a), (b) and (c) of this section of this Act.

(h) Realization and liquidation of collateral. Unless otherwise agreed by the parties, the realization, appropriation and/or liquidation of collateral under a collateral arrangement shall take effect or occur without any requirement that prior notice shall be given to, or consent be received from, any party, person or entity, provided that this subsection is without prejudice to any applicable provision of law requiring that the realization, appropriation and/or liquidation of collateral is conducted in a commercially reasonable manner.

(i) Scope of this provision.

(i) For the purposes of this section, a netting agreement shall be deemed to be a netting agreement notwithstanding the fact that such netting agreement may contain provisions relating to agreements or transactions that are not qualified financial contracts in terms of Part I section 1 of this Act, provided, however, that, for the purposes of this section, such netting agreement shall be deemed to be a netting agreement only with respect to those contracts that fall within the definition of qualified financial contract in terms of Part I section 1 of this Act.

(ii) For the purposes of this section, a collateral arrangement shall be deemed to be a collateral arrangement notwithstanding the fact that such collateral arrangement may contain provisions relating to agreements or transactions that are not a netting agreement or qualified financial contract entered into thereunder in terms of Part I section 1 of this Act, provided, however, that, for the purposes of this section, such collateral arrangement shall be deemed to be a collateral arrangement only with respect to those contracts that fall within the definition of netting agreement or

qualified financial contract entered into under a netting agreement in terms of Part I section 1 of this Act.

(iii) For the purposes of this section, a netting agreement and all qualified financial contracts entered into thereunder shall constitute a single contract.

(iv) For the purposes of this section, the term netting agreement shall include the term multibranch netting agreement (as defined in Part II), provided, however, that in a separate insolvency of a branch or agency of a foreign party (as defined in Part II) in [*insert applicable jurisdiction*] the enforceability of the provisions of the multibranch netting agreement shall be determined in accordance with Part II of this Act.

Part II : Multibranch Netting

1. Additional Definitions

In this Act:

"branch/agency net payment entitlement" means with respect to a multibranch netting agreement the amount, if any, that would have been owed by the non-insolvent party to the foreign party after netting only those qualified financial contracts entered into by the branch or agency and the non-insolvent party under such multibranch netting agreement.

"branch/agency net payment obligation" means with respect to a multibranch netting agreement the amount, if any, that would have been owed by the foreign party to the non-insolvent party after netting only those qualified financial contracts entered into by the branch or agency and the non-insolvent party under such multibranch netting agreement;

"foreign party" is a party whose home country is a country other than [*insert applicable jurisdiction*];

"global net payment entitlement" means the amount, if any, owed by the non-insolvent party (or that would be owed if the relevant agreements provided for payments to either party, upon termination thereof under any and all circumstances) to the foreign party as a whole after giving effect to the netting provisions of a multibranch netting agreement with respect to all qualified financial contracts subject to netting under such multibranch netting agreement;

"global net payment obligation" means the amount, if any, owed by the foreign party as a whole to the non-insolvent party after giving effect to the netting provisions of a multibranch netting agreement with respect to all qualified financial contracts subject to netting under such multibranch netting agreement;

"home country" means the country where a party to a netting agreement is organized or incorporated;

"home office" means the home country office of a party to a netting agreement that is a bank;

"multibranch netting agreement" means a netting agreement between two parties under which at least one party enters into qualified financial contracts through - in addition to its home office - one or more of its branches or agencies located in countries other than its home country;

"party" means, for purposes of this Part II, a person constituting one of the parties to a multibranch netting agreement.

2. Enforceability of a Multibranch Netting Agreement in an Insolvency of a Branch or Agency of a Foreign Party.

(a) Limitation on the non-insolvent party's right to receive payment.

(i) The liability of an insolvent branch or agency of a foreign party or its liquidator under a multibranch netting agreement shall be calculated as of the date of the termination of such multibranch netting agreement in accordance with its terms and shall be limited to the lesser of (i) the global net payment obligation and (ii) the branch/agency net payment obligation. The liability of the insolvent branch or agency or the liquidator under this section shall be reduced by any amount otherwise paid to or received by the party in respect of the global net payment obligation pursuant to such multibranch netting agreement which if added to the liability of the liquidator under this section would exceed the global net payment obligation.

(ii) The liability of the liquidator of an insolvent branch or agency of a foreign party under a multibranch netting agreement to any party thereunder shall be reduced by the fair market value or the amount of any proceeds of collateral that secures and has been applied to satisfy the obligations of the foreign party pursuant to the multibranch netting agreement.

(b) No limitation on the insolvent party's right to receive payment based on the terms of the multibranch netting agreement. In the event that netting under the applicable multibranch netting agreement results in a branch/agency net payment entitlement, notwithstanding any provision in any such contract that purports to effect a forfeiture of such entitlement, the liquidator may make written demand upon the party to such contract for an amount not to exceed the lesser of (x) the global net payment entitlement and (y) the branch/agency net payment entitlement.

(c) Limitation on the insolvent party's rights to receive payment based on payments made in accordance with insolvency proceedings relating to the foreign party in other jurisdictions. The liability of the non-insolvent party under this section shall be reduced by any amount otherwise paid to or received by the liquidator or any other liquidator or receiver of the foreign party in respect of the global net payment entitlement pursuant to such multibranch netting agreement which if added to the liability of the non-insolvent party under this section would exceed the global net payment entitlement. The liability of the non-insolvent party under this section to the liquidator pursuant to such multibranch netting agreement also shall be reduced by the fair market value or the amount of any proceeds of collateral that secures and has been applied to satisfy the obligations of the non-insolvent party pursuant to such multibranch netting agreement to the foreign party.

(d) Limitation on the terms of the multibranch netting agreement relating to a collateral arrangement. The non-insolvent party to a multibranch netting agreement which has a

perfected security interest in collateral, or other valid title, lien or security interest in collateral enforceable against third parties pursuant to such multibranch netting agreement, may retain all such collateral and upon termination of such multibranch netting agreement in accordance with its terms apply such collateral in satisfaction of any claims secured by the collateral, provided that the total amount so applied to such claims shall in no event exceed the global net payment obligation, if any. Any excess collateral shall be returned to the insolvent party.