

ANGUILLA

REVISED STATUTES OF ANGUILLA

CHAPTER N3

NETTING ACT

Showing the Law as at 15 December 2006

This Edition was prepared under the authority of the Revised Statutes and Regulations Act, R.S.A. c. R55 by the Attorney General as Law Revision Commissioner.

This Edition revises Act 15/2006, in force 19 October 2006

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NETTING ACT

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NETTING ACT

Interpretation

1. (1) In this Act, unless the context otherwise requires—

"branch or agency net payment entitlement", in relation to a multibranch netting agreement, means 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 or agency net payment obligation", in relation to a multibranch netting agreement, means 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;

"collateral" means—

(a) cash in any currency;

(b) securities of any kind, including, without limitation, debt and equity securities;

(c) guarantees, letters of credit and obligations to reimburse; and

(d) any asset commonly used as collateral in Anguilla;

"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—

(a) a pledge or any other form of security interest in collateral, whether possessory or non-possessory;

(b) a security arrangement based on the transfer of title to collateral, whether by outright sale or by way of security, including but not limited to a sale and repurchase agreement or an irregular pledge; and

(c) 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;

"Commission" means the Anguilla Financial Services Commission established under section 2 of the Financial Services Commission Act;

"foreign party" is a party whose home country is a country other than Anguilla;

"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 organised or incorporated;

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

"insolvent party" means the party in relation to which an insolvency proceeding under the laws of Anguilla has been instituted;

"liquidator" means the liquidator, receiver, trustee or other person or entity who administers the affairs of an insolvent party during an insolvency proceeding under the laws of Anguilla;

"multibranch netting agreement" means a netting agreement between 2 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;

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

(a) the termination or acceleration of any payment or delivery obligations or entitlements under one or more qualified financial contracts entered into under a netting agreement;

(b) the calculation or estimation of a close-out value, market value, liquidation value or replacement value in respect of each obligation or entitlement terminated or accelerated under paragraph (a);

(c) the conversion of any values calculated or estimated under paragraph (b) into a single currency; and

(d) the offset of any values calculated under paragraph (b), as converted under paragraph (c);

"netting agreement" means—

(a) any agreement between 2 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");

(b) any master agreement between 2 parties that provides for netting of the amounts due under 2 or more master netting agreements (a "master-master netting agreement"); and

(c) any collateral arrangement related to an agreement referred to in paragraph (a) or (b);

"non-insolvent party" means the party other than the insolvent party in an insolvency proceeding;

"party" means a person constituting one of the parties to a netting agreement and, for the purposes of section 4, a person constituting one of the parties to a multibranch netting agreement;

"qualified financial contract" means any financial contract, including any terms and conditions incorporated by reference in any such financial contract, pursuant to which payments 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 and includes, 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;

(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 a qualified financial contract by regulations made under subsection (2);

"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) The Governor in Council may, on the advice of the Commission, for the purposes of paragraph (1)(w) in the definition of "qualified financial contract", designate any other agreement or contract, or type of agreement or contract, as a qualified financial contract.

Enforceability of a netting agreement

2. (1) 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, reorganisation, composition with creditors, receivership, 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.

(2) 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.

(3) 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.

(4) Any powers of the liquidator to assume or repudiate individual contracts will not prevent the termination 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.

(5) The provisions of a netting agreement which provides for the offset of close-out values, market values, liquidation values or replacement values calculated in respect of accelerated 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.

(6) The liquidator of an insolvent party may not avoid—

(a) 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

(b) 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 by the insolvent party to the non-insolvent party, unless there is clear and convincing evidence that the non-insolvent party made such transfer or 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 that such transfer was made or that such obligation was incurred.

(7) 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 (1), (2) and (3).

(8) Unless otherwise agreed by the parties, the realisation, appropriation 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 realisation, appropriation or liquidation of collateral is conducted in a commercially reasonable manner.

Scope of section 2

3. (1) For the purposes of section 2, a netting agreement shall be deemed to be a netting agreement notwithstanding the fact that the agreement may contain provisions relating to agreements or transactions that are not qualified financial contracts:

Provided that, for the purposes of section 2, the 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 section 1(1).

(2) For the purposes of section 2, 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 netting agreements or qualified financial contracts entered into thereunder in terms of section 1(1):

Provided 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 section 1(1).

(3) For the purposes of section 2, a netting agreement and all qualified financial contracts entered into thereunder shall constitute a single contract.

(4) For the purposes of section 2, references to "netting agreement" shall be construed as including references to "multibranch netting agreement"; but, in the event of a separate insolvency of a branch or agency of a foreign party in Anguilla, the enforceability of the provisions of the multibranch netting agreement shall be determined in accordance with section 4.

Enforceability of a multibranch netting agreement in an insolvency of a branch or agency of a foreign party

4. (1) 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—

(a) the global net payment obligation; and

(b) the branch or agency net payment obligation.

(2) The liability of the insolvent branch or agency or the liquidator under subsection (1) 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.

(3) 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.

(4) In the event that netting under the applicable multibranch netting agreement results in a branch or agency net payment entitlement, notwithstanding any provision in any 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 the global net payment entitlement and the branch or agency net payment entitlement.

(5) 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.

(6) The liability of the non-insolvent party under subsection (5) 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.

(7) 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—

(a) the total amount applied in this subsection to claims shall in no event exceed the global net payment obligation, if any; and

(b) any excess collateral is returned to the insolvent party.

Regulations

5. The Governor in Council may, on the recommendation of the Commission, make regulations to give effect to the provisions of this Act.

Citation

6. This Act may be cited as the Netting Act, Revised Statutes of Anguilla, Chapter N3.