

Financial Collateral Arrangements Act 2004

Principal Act

Act. No. 2004-32	<i>Commencement</i>	24.11.2004
	<i>Assent</i>	24.11.2004

Amending enactments	Relevant current provisions	Commencement date
Act. 2005-28	s. 2	23.5.2005
LN. 2008/097	<i>Corrigendum</i>	
2011/217	ss. 2-11	27.10.2011
2014/259	s. 3(8)-(9)	1.1.2015
2021/087	ss. 2, 3(1)-(2), (8)-(9), 4(1)(a)-(h), (j), (3), 5(3)(b), 9(1)	1.1.2021

Transposing:

Directive 2002/47/EC

ARRANGEMENT OF SECTIONS

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AN ACT TO IMPLEMENT EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE 2002/47 ON FINANCIAL COLLATERAL ARRANGEMENTS.

Part 1 *General*

Title.

1. This Act may be cited as the Financial Collateral Arrangements Act 2004.

Interpretation.

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

“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 account maintained by or on behalf of an intermediary;

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

“central counterparty” shall have the same meaning as under the Financial Services (Financial Markets and Insolvency: Settlement Finality) Regulations 2020;

“clearing house” shall have the same meaning as under the Financial Services (Financial Markets and Insolvency: Settlement Finality) Regulations 2020;

“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 an enforcement event, whether through the operation of netting or set-off or otherwise—

- (a) the relevant obligations of the parties are accelerated so as to 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; 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 pecuniary claims arising out of an agreement whereby a bank or credit institution within the meaning of section 4(1) grants credit in the form of a loan;

“enforcement 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;

“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;

“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” includes shares in companies and other securities equivalent to shares in companies, partnerships or other entities and bonds and other forms of debt instrument if these are negotiable on the capital market, and any other securities which give the right to acquire any such shares, bonds or other securities by subscription, purchase or exchange or which give rise to a cash settlement (excluding instruments of payment), whether or not issued in Gibraltar, including units in collective investment schemes, money market instruments and claims relating to or rights in or in respect of the foregoing;

“the Minister” means the Minister responsible for financial services;

“Part 7 permission” means permission under Part 7 of the Financial Services Act 2019;

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

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

“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;

“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” shall have the same meaning as under the Financial Services (Financial Markets and Insolvency: Settlement Finality) Regulations 2020;

“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 this Act 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.

(3) 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 this Act.

(4) References in this Act to “writing” include recording by electronic means and any other durable medium.

Application of Act.

3.(1) *Omitted.*

(2) The provisions of this Act are without prejudice to the Financial Services (Consumer Credit) Act 2011.

(3) The provisions of this Act shall apply solely and exclusively to—

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

(4) The evidencing of the provision of financial collateral shall allow for the identification of the financial collateral to which it applies and, 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.

(5) For the purpose of credit claims, the inclusion of the claim in a list of claims submitted to the collateral taker in writing, 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.

(6) Without prejudice to sub-sections (4) and (5), the inclusion of the claim in a list of claims submitted to the collateral taker in writing, 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 against the debtor or third parties.

(7) A financial collateral arrangement shall be valid and enforceable in accordance with its terms and with this Act and, without prejudice to sub-section (2), where any provision of any enactment is incompatible with this Act, this Act shall prevail.

(8) Sections 6 to 8 of this Act 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 Financial Services (Recovery and Resolution) Regulations 2020; or
- (b) any such restriction that is imposed by virtue of similar powers in Gibraltar law to facilitate the orderly resolution of any entity referred to in section 4(1)(f) and 4(1)(i) which is subject to safeguards at least equivalent to those set out in regulations 73 to 80 of the Financial Services (Recovery and Resolution) Regulations 2020.

(9) The provisions of this Act are without prejudice to the Financial Services (Recovery and Resolution) Regulations 2020.

Collateral taker and collateral provider.

4.(1) For the purposes of this Act, both the collateral taker and the collateral provider shall be—

- (a) a public authority, including—
 - (i) public sector bodies within Gibraltar charged with or intervening in the management of public debt; and
 - (ii) public sector bodies within Gibraltar authorised to hold accounts for customers;
- (b) any of the following—
 - (i) a national central bank (if such a bank is established in Gibraltar) or other monetary authority (if any) in Gibraltar;
 - (ii) the Bank of England;
 - (iii) any central bank (or other monetary authority) of a country or territory outside Gibraltar that is—

- (aa) a central bank (or other monetary authority) of an EEA state (including the European Central Bank); or
- (bb) a member of the Bank for International Settlements (including the Bank for International Settlements),

as may be designated by the Minister by notice in the Gazette; or
- (iv) a multilateral development bank as referred to in Article 117 of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, as it forms part of the law of Gibraltar after IP completion day;
- (c) a credit institution which has Part 7 permission to carry on the regulated activity of accepting deposits in paragraph 3 of Schedule 2 to the Financial Services Act 2019 or post office giro institutions;
- (d) an investment firm with Part 7 permission to carry on any investment services and activities specified by paragraphs 48 to 56 of Schedule 2 to the Financial Services Act 2019;
- (e) a financial institution within the meaning of section 2(2) of the Financial Services Act 2019;
- (f) an insurance undertaking with Part 7 permission to carry on the regulated activity in paragraph 24 of Schedule 2 to the Financial Services Act 2019 of effecting and carrying out contracts of insurance;
- (g) an undertaking for investment in transferable securities (or UCITS Scheme) as defined in section 292(1) of the Financial Services Act 2019;
- (h) a person with Part 7 permission to carry on the regulated activity in paragraph 93 of Schedule 2 to the Financial Services Act 2019 of managing a UCITS;
- (i) a central counterparty, settlement agent or clearing house and a legal person that 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); or
- (j) a person other than a natural person, including unincorporated firms and partnerships, provided that the other party is an entity as defined in paragraphs (a) to (i).

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

(3) For the purposes of sub-section (1)(i), the reference to central counterparty, settlement agent or clearing house shall include similar institutions regulated under the law of Gibraltar acting in the futures, options and derivatives markets to the extent not covered by the Financial Services (Financial Markets and Insolvency: Settlement Finality) Regulations 2020.

Formal requirements.

5.(1) 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 section 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 shall not be 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) Without prejudice to the provisions of the Unfair Terms in Consumer Contracts Act, debtors of credit claims may validly waive, in writing or in a legally equivalent manner–

- (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 under the laws of Gibraltar 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.

Enforcement of financial collateral arrangements.

6.(1) On the occurrence of an enforcement 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–

- (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;
or

(c) 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 on 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-section (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.

Right of use of financial collateral under security financial collateral arrangements.

7.(1) The collateral taker may exercise a right of use in relation to financial collateral provided under the security financial collateral arrangement but only 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 and such equivalent collateral shall be—
 - (i) subject to the same security financial collateral agreement to which the original financial collateral was subject; and
 - (ii) 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 pursuant to sub-section (2)(a), the rights of the collateral taker shall remain valid and enforceable in relation to such equivalent collateral.

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

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

Recognition of title transfer financial collateral arrangements and close-out netting provisions.

8.(1) Upon the occurrence of an enforcement 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.

(2) Close-out netting provision can take effect in accordance with its terms–

- (a) notwithstanding the commencement or continuation of winding-up proceedings or reorganisation measures in respect of the collateral provider or the collateral taker;
- (b) notwithstanding any purported assignment, judicial or other attachment or other disposition of or in respect of such rights,

(3) The operation of a close-out netting provision shall not be subject to any of the requirements set out in section 6(3) unless otherwise agreed by the parties.

Realisation or valuation.

9.(1) On the occurrence of an enforcement event, the collateral taker shall ensure that any action taken in terms of this Act, 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 under sub-section (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.

Enforceability of financial collateral arrangements.

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.

(2) 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—

- (a) 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
- (b) 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 any of the situations set out in sub-section (5) arise.

(5) Those situations are 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; 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.

(6) No statutory provision or rule of law shall render invalid or void the transactions entered into during the period referred to in sub-sections (2)(b) and (5)(a).

Governing law.

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 section, 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.