FINANCIAL COLLATERAL ARRANGEMENTS ACT 2004

Principal Act

Act. No. 2004-32

Commencement 24.11.2004
Assent 24.11.2004

Amending enactments	Relevant current provisions	Commencement date
Act. 2005-28	s.2	23.5.2005
LN. 2008/097	*Corrigendum*	
2011/217	ss. 2-11	27.10.2011
2014/259	s. 3(8), (9)	1.1.2015

English sources:
None cited

EU Legislation/International Agreements involved:
Directive 2002/47/EC

ARRANGEMENT OF SECTIONS.

Section.

Part 1
General

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 Markets and Insolvency (Settlement Finality) Regulations 2011;

"clearing house" shall have the same meaning as under the Financial Markets and Insolvency (Settlement Finality) Regulations 2011;

"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;

"competent authority" means the Financial Services Commission;

"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;

"EEA" and "EEA State" shall be interpreted in accordance with the provisions of the European Communities Act ;

"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;

"Financial Collateral 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;

"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;

"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 Markets and Insolvency (Settlement Finality) Regulations 2011;

"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) The purpose of this Act is to implement the provisions of the Financial Collateral Directive, 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.

(2) The provisions of these Regulations are without prejudice to Directive 2008/48/EC of the European Parliament and the Council of 23 April 2008 on credit agreements for consumers and 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) The provisions of this Act implementing Articles 4 to 7 of Directive 2002/47/EC 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 Title IV, Chapter V or VI of Directive 2014/59/EU of the European Parliament and of the Council or of the Recovery and Resolution Regulations 2014, or

(b) any such restriction that is imposed by virtue of similar powers in the law of a Member State to facilitate the orderly resolution of any entity referred to in points (c)(iv) and (d) of paragraph 2 which is subject to safeguards at least equivalent to those set out in Title IV, Chapter VII of Directive 2014/59/EU.

(9) The provisions of this Act are without prejudice to 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, and the Recovery and Resolution Regulations 2014.

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 the EEA charged with or intervening in the management of public debt; and

(ii) public sector bodies within the EEA authorised to hold accounts for customers;

(b) 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;

(c) a bank or credit institution licensed under the Financial Services (Banking) Act, or otherwise licensed or authorised by an EEA State, 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;

(d) an investment services licence holder under the Financial Services (Markets in Financial Instruments) Act 2006, or otherwise licensed or authorised by an EEA State, 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;

(e) a financial institution within the meaning of Article 4 of Directive 2006/48/EC;

(f) an insurance company with its head office in Gibraltar authorised under the Financial Services (Insurance Companies) 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, or an assurance undertaking as defined in Article 1(1)(a) of Council Directive 2002/ 83/EC of 5 November, 2002 concerning life assurance;

(g) an undertaking for collective investment in transferable securities (UCITS) as defined in section 3A of the Financial Services (Collective Investment Schemes) Act 2011;

(h) a management company as defined in section 2(1) of the Financial Services (Collective Investment Schemes) Act 2011;

(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 (k).

(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 or the law of an EEA State 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, as amended from time to time.

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 arising from the provisions of the Financial Services (Banking) 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.

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 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 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.