

**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

English sources:

None cited

EU Legislation/International Agreements involved:

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. In this Act—

“book entry securities collateral” means financial collateral provided under a financial collateral arrangement which consists of financial 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 a similar claim for repayment of money;

“close-out netting provision” means a term of a financial collateral arrangement, or of an arrangement of which a financial collateral arrangement forms part, or any legislative provision under which on the occurrence of an enforcement event—

- (a) the obligations of the parties are accelerated to become immediately due as an obligation to pay an amount representing the original obligation’s 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;

“corporate body” means any body with legal personality except a natural individual, including a body constituted under the law of a country or territory outside Gibraltar or a body constituted under international law;

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“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;
- (b) in relation to financial instruments, financial 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, where the financial collateral arrangement provides for the transfer of other assets following the occurrence of any event relating to or affecting any financial instruments provided as financial collateral, those other assets;

“financial collateral arrangement” means a title transfer financial collateral arrangement or a security financial collateral arrangement, whether or not these are covered by a master agreement or general terms and conditions;

“financial collateral” means either cash or financial instruments;

“financial instruments” means—

- (a) shares in companies and other securities equivalent to shares in companies;
- (b) bonds and other forms of instruments giving rise to or acknowledging indebtedness if these are tradeable on the capital market; and
- (c) any other securities which are normally dealt in and which give the right to acquire any such shares, bonds, instruments or other securities by subscription, purchase or exchange or which give rise to a cash settlement (excluding instruments of payment);

“intermediary” means a person that maintains accounts to which financial instruments may be credited or debited, for others or both for others and for its own account and is acting in that capacity;

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“relevant account” means, in relation to book entry securities collateral which is subject to a financial collateral arrangement, the register or account in which entries are made, by which that book entry securities collateral is transferred or designated so as to be in the possession or under the control of the collateral taker or a person acting on his behalf. The relevant account may be maintained by the collateral taker;

“relevant financial obligations” means the obligations which are secured or otherwise covered by a financial collateral arrangement and such obligations may consist of or include–

- (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;
- (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;

“security financial collateral arrangement” means an agreement, evidenced in writing, where–

- (a) the purpose of the agreement is to secure the relevant financial obligations owed to the collateral taker;
- (b) the collateral provider provides a security interest in the financial collateral to the collateral taker on terms that it may either–
 - (i) appropriate the financial collateral;
 - (ii) sell the financial collateral;
 - (iii) set off the value of the financial collateral; or
 - (iv) exercise any combination of the rights set out at (i) to (iii)

in order to discharge the relevant financial obligations;

- (c) the financial collateral is delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral taker or a person acting on his behalf. Any right of the collateral provider to substitute equivalent financial collateral or withdraw excess financial collateral shall not prevent the financial collateral being in the possession or under the control of the collateral taker; and
- (d) the collateral provider and the collateral taker are each corporate bodies.

“security interest” means any legal or equitable interest provided by way of security including-

- (a) a pledge;
- (b) a mortgage;
- (c) a fixed charge;
- (d) a floating charge where the collateral charged is delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral taker or a person acting on his behalf. Any right of the collateral provider to substitute equivalent financial collateral or withdraw excess financial collateral shall not prevent the financial collateral being in the possession or under the control of the collateral taker; and
- (e) a lien.

“title transfer financial collateral arrangement” means an agreement, evidenced in writing, where-

- (a) the purpose of the agreement is to secure or otherwise cover the relevant financial obligations owed to the collateral taker;
- (b) the collateral provider has transferred legal and beneficial ownership in financial collateral to a collateral taker on terms that when the relevant financial obligations are discharged the collateral taker must transfer legal and beneficial ownership of equivalent financial collateral to the collateral provider; and

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- (c) the collateral provider and the collateral taker are each corporate bodies.

“winding-up proceedings” means collective proceedings involving realisation of the assets and distribution of the proceeds among the creditors, shareholders or members of a body as appropriate, which involve any intervention by administrative or judicial authorities. They include such collective proceedings whether or not they are founded on insolvency and whether they are voluntary or compulsory. They further include such collective proceedings if they are terminated by a composition or other analogous measure;

“writing” includes recording by electronic means.

Part 2

Modification of legislation and court procedures for financial collateral arrangements

Certain legislation requiring formalities not to apply to financial collateral arrangements.

3. Section 128 of the Companies Act (certain charges void if not registered) shall not apply (if it would otherwise do so) in relation to a security financial collateral arrangement or any charge provided under a security financial collateral arrangement.

Certain legislation restricting enforcement not to apply.

4. Sections 9 and 57 of the Bankruptcy Act shall not apply to a security interest provided under a financial collateral arrangement.

No requirement to apply to court to foreclose on a mortgage to enforce a security financial collateral arrangement.

5. Where a legal or equitable mortgage is the security interest provided to the collateral taker under a security financial collateral arrangement on terms that include a power for the collateral taker to appropriate the collateral, the collateral taker may exercise that power in accordance with the terms of the security financial collateral arrangement, without any order for foreclosure from the courts.

Duty to value collateral in accordance with market price on appropriation.

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6. Where a collateral taker exercises a power contained in a security financial collateral arrangement to appropriate the financial collateral and it is necessary to value the collateral in order to discharge the relevant financial obligations outstanding under the security financial collateral arrangement, the collateral taker must value the financial collateral at the market price for the collateral at the time that he exercised the power.

Modification of the law on bankruptcy.

7. Section 42 of the Bankruptcy Act (avoidance of certain settlements) shall not apply (if it would otherwise do so) to any property or security interest transferred or provided under a financial collateral arrangement.

Part 3

Financial collateral arrangements to take effect in accordance with their terms

Right of use under security financial collateral arrangements.

8. If a security financial collateral arrangement provides for the collateral taker to use and dispose of any financial collateral provided under the arrangement, as the owner of it, the collateral taker may do so in accordance with the terms of the arrangement.

Close-out netting provisions to take effect in accordance with its terms.

9. If a financial collateral arrangement contains a close-out netting provision it shall take effect in accordance with its terms notwithstanding that the collateral provider or collateral taker under the arrangement is subject to winding-up proceedings or reorganisation measures.

Part 4

Conflict of laws

Standard test regarding which country's law is applicable to book entry securities financial collateral arrangements.

10.(1) Any question relating to the matters specified in subsection (2) of this section which arises in relation to book entry securities collateral which is provided under a financial collateral arrangement shall be governed by the domestic law of the country in which the relevant account is maintained.

(2) The matters referred to in subsection (1) are—

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- (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;
- (c) the requirements for rendering a financial collateral arrangement which relates to book entry securities collateral effective against third parties;
- (d) 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;
- (e) the steps required for the realisation of book entry securities collateral following the occurrence of an enforcement event.