

Bankruptcy (Netting, Contractual Subordination and Non-Petition Provisions) (Jersey) Law 2005

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Summary and comment

The Bankruptcy (Netting, Contractual Subordination and Non-petition Provisions) (Jersey) Law 2005 (the **Netting Law**) is a short law, expressed in seven articles, which gives statutory confirmation that netting, contractual subordination and non-petition provisions in agreements are enforceable in accordance with their terms before and after bankruptcy.

Without making existing agreements within its scope any less effective, the Netting Law puts beyond doubt the effectiveness and enforceability of the provisions it covers in all circumstances before and after bankruptcy, except where there has been fraud or misrepresentation. It is comprehensive both in the range of different types of provision it covers and also because it expressly covers matters ancillary to or necessary for the implementation of the provisions covered by it. It covers, for example, not only agreements providing for set-off but also the enforceability of agreements not to set-off.

The Netting Law offers transaction arrangers a number of advantages over analogous legislation in many other jurisdictions. Unlike the position under such legislation in other jurisdictions, the Netting Law applies to agreements whether executed before or after it came into force; it makes no stipulations as to types of counterparty which may benefit from it (for example, banks or securities clearing houses) nor as to the types of transaction in relation to which it is applicable (for example, particular types of financial contract). The Netting Law is not limited either to bilateral agreements and it expressly confirms that the provisions to be enforced can form part of a series of inter-related agreements between the same parties as well as agreements made between different branches of the same entity; a clearing house system need not be involved.

The parts of agreements covered by the Netting Law are fundamental to the operation of a huge range of international financial transactions and underpin their effectiveness both in terms of their operation and, where applicable, addressing issues that are important to the rating agencies giving the ratings vital to so many such transactions. It is believed that the Netting Law covers a wider range of these key provisions than comparable laws in many other jurisdictions and, by simplifying the legal issues around them, helps Jersey to preserve its place as a leading financial jurisdiction.

Scope of the Netting Law

The Netting Law defines each of the types of provisions with which it is concerned as follows:

'close-out netting provision', in respect of an agreement, means so much of the agreement as relates to;

- (i) there ceasing to be any time allowed for the performance of an obligation specified in the agreement on the occurrence of an event specified in the agreement (including its automatic termination);
- (ii) an obligation of the agreement to pay a specified amount but not immediately becoming an obligation to pay an amount determined pursuant to the agreement; or
- (iii) any combination of the matters mentioned in paragraphs (i) and (ii),

whether through the operation of netting or otherwise;

'contractual subordination provision', in respect of an agreement, means so much of the agreement as relates to contractual subordination;

'non-petition provision', in respect of an agreement, means so much of the agreement

- (i) that relates to a party to the agreement not taking any action to have a person declared bankrupt; or
- (ii) that limits the circumstances under which a party to the agreement may take any action to have a person declared bankrupt, and includes any provision ancillary to the non-petition provision or necessary to implement it; and

'set-off provision', in respect of an agreement, means so much of the agreement, other than a close-out netting provision in the agreement, as relates to the netting of amounts due from one party to the agreement to any other party to it.

For these purposes:

'netting', in respect of an agreement, means the conversion, into one net claim or one net obligation, of all claims and obligations arising under the agreement to the effect that only that net claim can be demanded or that net obligation is owed; and 'contractual subordination', in respect of an agreement, means the subordination or other deferral of all or any part of the claim of a party to the agreement against a debtor of that party to the claim of any other creditor of the debtor.

An agreement includes a series of inter-related agreements between the same parties (whether pursuant to a master netting agreement or otherwise) and an obligation may include an obligation to deliver property.

Effect of the Netting Law

The Netting Law states that each of the types of arrangement covered by it is enforceable in accordance with its terms, notwithstanding any enactment or rule of law to the contrary and that those arrangements survive bankruptcy, whether of a party to the agreement or of any other relevant person. The effect is that provisions covered by the Netting Law bind all persons who may be affected by them, whether as a party to the agreement containing them, as a guarantor or person granting security in relation to the agreement containing them or as a creditor of a party to the agreement and also bind any person conducting bankruptcy proceedings in relation to a relevant person.

The Netting Law expressly states that the Royal Court of Jersey shall refuse any application which if granted would have an effect inconsistent with any non-petition provision. In relation to close-out netting provisions, set-off provisions and contractual subordination provisions, the Netting Law also states that related provisions of the types listed below are enforceable and remain enforceable notwithstanding either bankruptcy of any relevant person or a lack of mutuality of obligations. The types of related provisions covered are those by which the parties to the agreement agree:

- on a system or mechanism to be used to convert a non-financial obligation into a monetary obligation of an equivalent value;
- on a system or mechanism to be used to value a non-financial obligation for netting purposes;
- on the rate of exchange or the method to be used to establish a rate of exchange to be applied for netting purposes when the sums to be netted are in different currencies;
- on the method to be used to establish the currency in which payment of a net sum is to be effected; or
- that certain transactions or other dealings or a type or class of transactions or dealings carried out pursuant to the agreement are to be treated as a single transaction or dealing for netting purposes, together with any provisions ancillary to those provisions and any provisions necessary for them to be implemented.

If there is fraud or misrepresentation, however, netting, contractual subordination and non-petition provisions may be unenforceable notwithstanding anything else in the Netting Law.

The Netting Law extends, for the purposes of Jersey law, to branches in Jersey of bodies corporate established outside Jersey even where there may be an enactment or rule of law (including under the law of the jurisdiction of its establishment) with a contrary effect.

Contacts

A full list of contacts specialising in corporate law can be found [here](#).

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