

STATES OF JERSEY

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DRAFT BANKRUPTCY (NETTING, CONTRACTUAL SUBORDINATION AND NON-PETITION PROVISIONS) (JERSEY) LAW 200

**Lodged au Greffe on 8th February 2005
by the Economic Development Committee**

STATES GREFFE



Jersey

**DRAFT BANKRUPTCY (NETTING, CONTRACTUAL
SUBORDINATION AND NON-PETITION PROVISIONS)
(JERSEY) LAW 200**

European Convention on Human Rights

The President of the Economic Development Committee has made the following statement –

In the view of the Economic Development Committee the provisions of the Draft Bankruptcy (Netting, Contractual Subordination and Non-Petition Provisions) (Jersey) Law 200- are compatible with the Convention Rights.

(Signed) **Deputy F.G. Voisin of St. Lawrence**

REPORT

It is common, particularly in sophisticated financing transactions, for the parties to the transaction to agree in advance matters relating to –

- (1) the manner in which the respective debits or credits between parties will be calculated upon the happening of a defined event so as to find a single payment to be made from one party to another (“Netting”);
- (2) the order in which the parties will have priority in respect of claims against another person (“Contractual Subordination”); and
- (3) the circumstances under which one or more parties may take an action to have another person declared insolvent (“Non-Petition”).

It is widely believed that provisions relating to Netting, Contractual Subordination and Non-Petition would be upheld by the Royal Court. However, many jurisdictions have specific laws on these matters, and an EU recommendation has been issued to the effect that, in the interests of financial stability, member states should implement legislation confirming the efficacy of netting provisions.

The Draft Law will confirm that contractual arrangements in respect of matters relating to Netting, Contractual Subordination and Non-Petition will be respected by the Royal Court. Such contractual arrangements will only bind those that are party to them, and cannot affect the rights of those who are not party to the contract in question.

The Draft Law has the unanimous support of the finance industry. The Draft Law has no implications for the financial or manpower resources of the States.

European Convention on Human Rights

Article 16 of the Human Rights (Jersey) Law 2000 will, when brought into force by Act of the States, require the Committee in charge of a Projet de Loi to make a statement about the compatibility of the provisions of the Projet with the Convention rights (as defined by Article 1 of the Law). Although the Human Rights (Jersey) Law 2000 is not yet in force, on 4th February 2005 the Economic Development Committee made the following statement before Second Reading of this projet in the States Assembly –

In the view of the Economic Development Committee the provisions of the Draft Bankruptcy (Netting, Contractual Subordination and Non-Petition Provisions) (Jersey) Law 200- are compatible with the Convention Rights.

Explanatory Note

The Law will confirm that netting, contractual subordination and non-petition provisions of agreements are enforceable in accordance with their terms and continue to be enforceable despite bankruptcy.

In brief, a netting provision of an agreement provides for the consolidation, in specified circumstances, of certain obligations between the parties so that only the difference in value between their obligations (the net amount) is taken into account should the circumstances occur.

A contractual subordination provision of an agreement is a provision by which a party to the agreement agrees to subordinate or otherwise defer a claim against a person to the claims of other creditors of the person.

A non-petition provision of an agreement is a provision by which a party to the agreement agrees not to bring an action to have a person declared bankrupt, or not to do so except in limited circumstances.

Article 1 provides for the interpretation of certain expressions used in the Law.

Article 2 provides for the enforceability of any close-out netting, set-off or contractual subordination provision of an agreement.

Article 3 provides for the enforceability of a non-petition provision of an agreement.

Article 4 provides that certain other provisions of an agreement remain enforceable despite bankruptcy.

Article 5 provides that nothing in the Law shall affect the application of any enactment or rule of law that renders any contractual subordination, netting, set-off, or non-petition provision of an agreement unenforceable on the grounds of fraud or misrepresentation.

Article 6 provides for the Law to apply to branches of bodies corporate not established in Jersey despite any other enactment or rule of law that may apply to the body corporate, including the law in the jurisdiction where the body corporate is established.

Article 7 provides the citation for the Law and for its commencement.



Jersey

DRAFT BANKRUPTCY (NETTING, CONTRACTUAL SUBORDINATION AND NON-PETITION PROVISIONS) (JERSEY) LAW 200

Arrangement

Article

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Jersey

DRAFT BANKRUPTCY (NETTING, CONTRACTUAL SUBORDINATION AND NON-PETITION PROVISIONS) (JERSEY) LAW 200

A LAW relating to the enforcement of netting, contractual subordination and non petition provisions of agreements.

Adopted by the States [date to be inserted]

Sanctioned by Order of Her Majesty in Council [date to be inserted]

Registered by the Royal Court [date to be inserted]

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

1 Interpretation

In this Law –

“agreement” includes –

- (a) an agreement between more than 2 parties;
- (b) a series of inter-related agreements between the same parties (whether pursuant to a master netting agreement or otherwise); and
- (c) an agreement made between parties whether or not acting through multiple branches and whether operated through a clearing house system or otherwise;

“bankruptcy” includes any procedure analogous to bankruptcy or any similar procedure under any applicable law;

“close-out netting provision”, in respect of an agreement, means so much of the agreement as relates to –

- (a) 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);
- (b) 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
- (c) any combination of the matters mentioned in paragraphs (a) and (b),

whether through the operation of netting or otherwise;

“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;

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

“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;

“non-petition provision”, in respect of an agreement, means so much of the agreement –

- (a) that relates to a party to the agreement not taking any action to have a person declared bankrupt; or
- (b) that limits the circumstances under which a party to the agreement may take any action to have a person declared bankrupt;

“obligation” means an obligation of any type, including an obligation to deliver property;

“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.

2 Close-out netting, set-off and contractual subordination provisions to be enforceable

- (1) Despite any enactment or rule of law to the contrary –
 - (a) a close-out netting provision of an agreement;
 - (b) a set-off provision of an agreement; or
 - (c) a contractual subordination provision of an agreement,is enforceable in accordance with its terms.
- (2) A provision mentioned in paragraph (1) remains enforceable despite–
 - (a) the bankruptcy of a party to the agreement or of any other person; and
 - (b) the lack of any mutuality of obligation between a party to the agreement and any other person.
- (3) Accordingly, any person dealing with the affairs of the bankrupt party or person shall, when dealing with the property of that party or person, give effect to any relevant provision of the type mentioned in paragraph (1).
- (4) The provision shall be enforceable against –
 - (a) the parties to the agreement;
 - (b) any guarantor or any person providing security for a party to the agreement; and
 - (c) any creditor of a party to the agreement.
- (5) Where this Article applies, any authority or mandate to implement a provision mentioned in paragraph (1), or Article 4(2) or (3) is not revoked by the bankruptcy of the person who gave the authority or mandate or of any other person.

3 Non-petition provisions to be enforceable

- (1) A non-petition provision of an agreement is enforceable in accordance with its terms.
- (2) A provision mentioned in paragraph (1) remains enforceable despite–
 - (a) the bankruptcy of a party to the agreement or of any other person; and
 - (b) the lack of any mutuality of obligation between a party to the agreement and any other person.
- (3) Accordingly, the Royal Court shall refuse to grant any application which, if granted, would be inconsistent with the provision.
- (4) A reference in this Law to a provision mentioned in paragraph (1) shall be taken to include–

- (a) any provision ancillary to the provision; and
- (b) any provision necessary to implement the provision in accordance with the other provisions of the agreement.

4 Other provisions enforceable despite bankruptcy

- (1) Where an agreement contains a provision of a type mentioned in Article 2(1) any further provision of the agreement of the type mentioned in paragraph (2) or paragraph (3) is enforceable and remain enforceable despite –
 - (a) the bankruptcy of a party to the agreement or of any other person; and
 - (b) the lack of any mutuality of obligation between a party to the agreement and any other person.
- (2) The further provisions mentioned in paragraph (1) are provisions by which the parties to the agreement agree –
 - (a) on a system or mechanism to be used to convert a non-financial obligation into a monetary obligation of an equivalent value;
 - (b) on a system or mechanism to be used to value a non-financial obligation for netting purposes;
 - (c) 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;
 - (d) on the method to be used to establish the currency in which payment of a net sum is to be effected; or
 - (e) 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.
- (3) The further provisions mentioned in paragraph (1) also include–
 - (a) provisions ancillary to those mentioned in paragraph (2); and
 - (b) provisions necessary for a close-out netting provision, set-off provision or contractual subordination provision to be implemented in accordance with the other provisions of the agreement.

5 Fraud and misrepresentation

- (1) This Article applies –
 - (a) to a netting, contractual subordination or non-petition provision of an agreement; and
 - (b) a provision mentioned in Article 4(2) and (3).
- (2) Nothing in this Law –
 - (a) affects the application of any enactment or rule of law that renders a provision to which this Article applies unenforceable, in a particular case, on the grounds of fraud or misrepresentation; or
 - (b) affects the enforceability of a provision of an agreement that provides that a provision to which this Article applies shall be void in the event of fraud or misrepresentation.

6 Law to prevail in respect of bodies corporate established outside Jersey

- (1) This Article applies to –
 - (a) a close-out netting provision;
 - (b) a contractual subordination provision;
 - (c) a non-petition provision;

(d) a set-off provision; and

(e) a provision of the type mentioned in Article 4(2) and (3),

contained in an agreement where one of the parties to the agreement is a branch in Jersey of a body corporate established outside Jersey.

- (2) The provision shall be valid and enforceable in accordance with this Law despite any other enactment or rule of law that may be applicable to the body corporate, including the law of the jurisdiction under which it is established.

7 Citation and commencement

(1) This Law may be cited as the Bankruptcy (Netting, Contractual Subordination and Non-Petition Provisions) (Jersey) Law 200-.

(2) It shall come into force on the seventh day following its registration.