

Netting Law, 2017

Part I

Title and Commencement, Application, Definition and Interpretation, Powers of the Central Bank

Article 1

Title and Commencement

1. This Law may be cited as the “Netting Law, 2017”.
2. This Law shall enter into force on the day following its publication in the Gazette.

Article 2

Replacement and Application, Definition & Interpretation

Replacement and Application:

1. This Law shall replace and supersede Resolution No. [44], 2014, promulgating Regulation (the “2014 Regulation”) for Close-Out Netting under a Market Contract, issued by the Central Bank on December 7, 2014.
2. All Qualified Financial Instruments (referred to in the 2014 Regulation as “Qualified Financial Contracts”) entered into prior to the commencement of this Law shall henceforward be governed by the provisions of this Law as if this Law had been in force on the date on which those Qualified Financial Contracts were entered into by the parties thereto.

3. In case of conflict or variance between the provisions of this Law and any insolvency provision in any law in force in the Kingdom the provisions of this Law shall apply.

Definition and Interpretation:

4. In this Law, a reference to:

- (a) a statutory provision includes a reference to a statutory provision as amended or re-enacted from time to time;

- (b) an obligation to publish or cause to be published a particular document shall, unless expressly provided otherwise in this Law, include publishing or causing to be published the said document in printed or Electronic form.

5. The headings in this Law shall not affect its interpretation.

6. In this Law, unless the context indicates otherwise, the defined terms below shall have the corresponding meanings:

“Cash” means money credited to an account in any currency, or a similar claim for repayment of money, such as a money market deposit;

“Central Bank” means the Central Bank of Bahrain;

“Collateral” means the following:

- (a) Cash in any currency;
 - (b) securities of any kind, including (without limitation) debt, securities, equity securities and sukuk, and any rights or claims associated with any such securities;

- (c) guarantees, letters of credit and obligations to reimburse;
- (d) commodities (including bullion); and
- (e) any asset commonly used as collateral by banks operating in the Kingdom;

“Collateral Arrangement” means any margin, collateral or security arrangement or other credit enhancement related to or forming part of a Netting arrangement or one or more Qualified Financial Instruments entered into thereunder or to which a Netting Agreement applies, including (without limitation):

- (a) a pledge, mortgage, charge or any other form of security interest in any Collateral or other asset, whether possessory or non-possessory;
- (b) a Title Transfer Collateral Arrangement; and
- (c) any guarantee, letter of credit or reimbursement obligation by or to a party to one or more Qualified Financial Instruments, in respect of one or more of those Qualified Financial Instruments;

“Electronic” has the meaning ascribed to it in Article 1 of Legislative Decree No. 28 (2002) relating to electronic transactions;

“Kingdom” means the Kingdom of Bahrain;

“Insolvency Proceeding” means any procedure or proceeding under any provision of law relating to bankruptcy, liquidation (including any compulsory winding up procedure or proceeding), reorganization, composition with creditors, receivership, conservator or any other similar procedure or proceeding;

“Insolvent Party” means a party in relation to which an Insolvency Proceeding under the laws of the Kingdom has been instituted;

“Law” unless the context indicates otherwise, means the Netting Law, 2017;

“Liquidator” means the liquidator, receiver, trustee, conservator or other Person or entity which administers the affairs of an Insolvent Party during any Insolvency Proceeding under the law of the Kingdom;

“Netting” means the occurrence of any or all of the following:

- (a) the termination, liquidation and/or acceleration of any payment or delivery obligations or entitlements, or obligations or entitlements to make, receive or require payments or deliveries, under one or more Qualified Financial Instruments entered into under a Netting Agreement or to which a Netting Agreement applies;
- (b) the calculation or estimation of a close-out value, liquidation value or replacement value or other relevant value (including the value of any damages which may arise from a party’s failure to enter into a transaction required to be entered into under or pursuant to the provisions of a Netting Agreement of the type referred to in paragraph 2 of Article 5 of this Law) in respect of each obligation or entitlement or group of obligations or entitlements terminated, liquidated and/or accelerated under (a) above;
- (c) the conversion of any values calculated or estimated under (b) above into a single currency;
- (d) the determination of the net balance of the values calculated under paragraph (b) above, as converted under

paragraph (c) above, whether by operation of law or otherwise; and

- (e) entry by the parties into a transaction pursuant to or by virtue of which such a net balance becomes payable directly or as part of the consideration for an asset or the provision for the payment of damages relating to any non-performance of any such transaction;

and the term “Netted” shall be construed accordingly;

“Netting Agreement” means:

- (a) any agreement between two parties that provides for Netting of present or future payment or delivery obligations or entitlements, or entitlements to make, receive or require payments or deliveries, arising under or in connection with one or more Qualified Financial Instruments entered into under the agreement by the parties to the agreement (a “Master Netting Agreement”);
- (b) any master agreement between two parties that provides for Netting or the aggregation and/or combination and/or set off of the amounts due under two or more Master Netting Agreements (a “Master-Master Netting Agreement”); and
- (c) any Collateral Arrangement related to or forming part of one or more of the foregoing;

“Non-insolvent Party” means the party other than the Insolvent Party;

“Person” includes individuals, partnerships, corporations, sovereign bodies, sovereign-owned entities, Central Bank-regulated entities such as banks, insurance companies and broker-dealers, or any other body corporate as well as other forms of business organization, whether organized under the laws of the Kingdom or under the laws of any other jurisdiction, and any international or regional development bank or other international or regional organization;

“Qualified Financial Instrument” means any financial agreement, contract or transaction, including any terms and conditions incorporated by reference in any such financial agreement, contract or transaction, and including any of the preceding which are Sharia-compliant, pursuant to which payment or delivery obligations are due to be performed or title to commodities or assets is to be transferred for consideration at a certain time or within a certain period of time and whether or not subject to any condition or contingency or pursuant to which obligations to make payments or deliveries, or transfer title to commodities or assets, in either case for consideration at a certain time or within a certain period of time and whether or not subject to any condition or contingency, are to be entered into or incurred. Qualified Financial Instruments shall also include (without limitation):

- (a) a currency, cross currency or interest rate swap or profit rate swap;
- (b) a basis swap;
- (c) a spot, future, forward or other foreign exchange transaction;
- (d) a cap, collar or floor transaction;
- (e) a commodity swap;
- (f) a forward rate agreement;
- (g) a currency or interest rate future;

- (h) a currency or interest rate option;
- (i) an equity derivative, such as an equity or equity index swap, equity forward, equity option or equity index option;
- (j) a derivative relating to bonds or other debt securities or to sukuk or to a bond or debt security index or a sukuk index, such as a total return swap, index swap, forward, option or index option;
- (k) a credit derivative, such as a credit default swap, credit default basket swap, total return swap or credit default option;
- (l) an energy derivative, such as an electricity derivative, oil derivative, coal derivative or gas derivative;
- (m) a weather derivative, such as a weather swap or weather option;
- (n) a bandwidth derivative;
- (o) a freight derivative;
- (p) an emissions derivative, such as an emissions allowance or emissions reduction transaction;
- (q) an economic statistics derivative, such as an inflation derivative;
- (r) a property index derivative;
- (s) a spot, future, forward or other securities or commodities transaction;
- (t) a securities contract, including a margin loan and an agreement to buy, sell, borrow or lend securities, such as a securities repurchase or reverse repurchase agreement, a securities lending agreement or a securities buy/sell back agreement, including any such contract or agreement relating to mortgage loans, interests in mortgage loans or mortgage-related securities;
- (u) a commodities contract, including an agreement to buy, sell, borrow, or lend commodities, such as a commodities repurchase or reverse repurchase agreement, a

commodities lending agreement or a commodities buy/sell back agreement;

- (v) a Collateral Arrangement;
- (w) an agreement to clear or settle securities transactions or to act as a depository for securities;
- (x) any other agreement, contract or transaction similar to any agreement, contract or transaction referred to in paragraphs (a) through (w) of this definition with respect to one or more reference items relating to (without limitation) interest rates, currencies, commodities, energy products, electricity, equities, weather, sukuk, bonds or other debt instruments, precious metals, quantitative measures associated with an occurrence, extent of an occurrence or contingency associated with a financial, commercial or economic consequence, or economic or financial indices or measures of economic or financial risk value;
- (y) any swap, forward, option, contract for difference or other derivative in respect of, or combination of, one or more agreements or contracts referred to in paragraphs (a) to (x) above or in paragraph (z) or any agreement, contract or transaction that is specifically designated by the Central Bank as a Qualified Financial Instrument under Article 3 of this Law; and
- (z) any Shari'a compliant agreement, contract, transaction or undertaking which may be specifically designated by the Central Bank as a Qualified Financial Instrument under Article 3 of this Law,

but do not include insurance or reinsurance contracts entered into by a licensed insurance company as part of its insurance business; and

“Title Transfer Collateral Agreement” means a margin, collateral or security arrangement related to a Netting Agreement based on the transfer of title

to collateral, whether by outright transfer or by way of security, including (without limitation) a sale and repurchase agreement, securities lending agreement, securities buy/sell-back agreement or an irregular pledge.

Article 3

Powers of the Central Bank

The Central Bank may, by notice issued under this Article 3, designate as a “Qualified Financial Instrument” any agreement, contract or transaction or type of agreement, contract or transaction in addition to those specifically provided for in this Law. Such designation by the Central Bank may be revoked by a further published notice provided that no revocation shall apply:

- (a) to any agreement, contract or transaction entered into prior to such revocation;
- (b) or to any transaction (whether entered into prior to or after such revocation) entered into under an agreement or contract entered into prior to such revocation or to which an agreement or contract entered into prior to such revocation applies.

Part II

Enforceability

Article 4

Enforceability of a Qualified Financial Instrument

1. A Qualified Financial Instrument:

- (a) shall not be and shall be deemed never to have been void or unenforceable by reason of being, or having the

characteristics of, a wager, lottery, gambling or gaming contract; and

- (b) shall not be subsequently challenged by a party on the basis that the Instrument is found or perceived to be inconsistent with any rule or principle of Sharia if the party had entered into the Qualified Financial Instrument or a particular transaction relating to the Qualified Financial Instrument or had incurred any obligation thereunder on the basis or the perception that, or where the party had represented or indicated that it was satisfied that the Qualified Financial Instrument was consistent with Sharia on the day on which the Qualified Financial Instrument or the particular transaction was entered into or the particular obligation incurred.

Article 5

Enforceability of a Netting Agreement

1. General Rule as to enforceability of a Netting Agreement

The provisions of a Netting Agreement will be enforceable in accordance with their terms, including against an Insolvent Party, and, where applicable, against a guarantor or other Person (including a guarantor or other Person that is insolvent) providing security for a party and will not be stayed, avoided or otherwise limited by:

- (a) The appointment of, or any application for the appointment of, a Liquidator, or any action of a Liquidator;
- (b) Any provision of law relating to bankruptcy, (including any compulsory winding up procedure or proceeding),

reorganization, composition with creditors, receivership, conservatorship or any other Insolvency Proceeding to which a party may be subject; or

(c) Any other provision of law that may be applicable to an Insolvent Party,

subject to the conditions contained in the applicable Netting Agreement.

2. Effectiveness of Netting Obligations to make Payments or Deliveries

After commencement of Insolvency Proceedings in relation to a party, any provisions of a Netting Agreement whereby obligations of the parties to make, or relating to making of, payments or deliveries under or pursuant to that Netting Agreement or under or pursuant to any Qualified Financial Instrument or contract or transaction to which that Netting Agreement applies are converted into net claims or obligations or otherwise Netted (including through entry by the parties into or the requirement that they enter into a transaction of the kind referred to in sub-paragraph (e) of the definition of “Netting” in paragraph (6) of Article 2) shall take effect in accordance with the terms of the applicable Netting Agreement.

3. Limitation on Powers of the Liquidator

Any powers of the Liquidator to assume or repudiate individual Qualified Financial Instruments, contracts, transactions claims or obligations will not prevent the termination, liquidation, acceleration and/or conversion into net claims or obligations of all payment or delivery obligations or entitlements, and all obligations or entitlements relating to the making of payments or deliveries, under one or more Qualified Financial Instruments entered into under a Netting Agreement, or to which a

Netting Agreement applies, and such powers will apply, if at all, only after having given effect to the terms of such Netting Agreement.

4. Limitation of Insolvency Laws Prohibiting Set-off

The provisions of a Netting Agreement which provide for the determination of, or for payment of or in respect of, the net balance of the close-out values, market values, liquidation values, replacement values or other relevant values (including the value of any damages which may arise from a party's failure to enter into a transaction required to be entered into under or pursuant to such provisions of the Netting Agreement) calculated in respect of accelerated and/or terminated payment or delivery obligations or entitlements, or accelerated and/or terminated obligations or entitlements relating to the making of payments or deliveries, in either case under one or more Qualified Financial Instruments entered into thereunder or to which such Netting Agreement applies (including a payment or delivery in respect of a contract or transaction required to be entered into under or pursuant to such provisions) will not be affected by any applicable insolvency laws limiting the exercise of rights to set off, offset or net out obligations, payment amounts or any such values between an Insolvent Party and another party.

5. Preferences and Fraudulent Transfers

(a) Subject to paragraph (b) of this paragraph 5 of Article 5, the Liquidator of an Insolvent Party may not avoid or render ineffective:

- (i) any payment, transfer, delivery, substitution or exchange of cash, collateral or any other interests or property under or in connection with a Netting Agreement from the Insolvent Party to the Non-insolvent Party; or

- (ii) any obligation incurred under or pursuant to a Netting Agreement, or to which a Netting Agreement applies, by the Insolvent Party and owing to the Non-insolvent Party to make any payment, transfer, delivery, substitution or exchange of cash, collateral or any other interest or property; or
- (iii) any transaction entered into by the Insolvent Party in accordance with the terms of such Netting Agreement in order to give effect to the Netting provided for by such Netting Agreement,

on the grounds of it constituting a preference by the Insolvent Party to the non-insolvent party.

(b) Nothing in this paragraph shall prevent a Liquidator of an Insolvent Party from exercising any power to avoid or render ineffective any payment, transfer, delivery, substitution or exchange or any obligation incurred or transaction entered into of the kind referred to in sub-paragraphs 5 (a) (i), (ii) and (iii) in circumstances where there is clear and convincing evidence that the Insolvent Party:

- (i) made such payment, transfer, delivery, substitution or exchange;
or
- (ii) incurred such obligation; or
- (iii) entered into such transaction,

with actual intent to hinder, delay, or defraud any Person to which the Insolvent Party was indebted or became indebted, on or after the date such transfer, delivery, substitution or exchange was made, or such obligation was incurred or such transaction was entered into.

6. Preemption

No stay, injunction, avoidance, moratorium or similar proceeding or order, whether issued or granted by a court, administrative agency, Liquidator or otherwise, shall limit or delay application or performance of otherwise enforceable Netting Agreements and transactions entered into thereunder or pursuant thereto or to which an otherwise enforceable Netting Agreement applies.

7. Realization and Liquidation of Collateral

Unless otherwise agreed by the parties, the realization, appropriation and/or liquidation of Collateral under a Collateral Arrangement shall take effect or occur without any requirement that prior notice shall be given to, or consent be received from, any party, Person or entity, provided that this paragraph 7 is without prejudice to any applicable provision of law in force in the Kingdom requiring that the realization, appropriation and/or liquidation of Collateral is conducted in a commercially reasonable manner.

8. Scope of this Law

(a) A Netting Agreement shall be deemed to be a Netting Agreement notwithstanding the fact that such Netting Agreement may contain provisions relating to agreements, contracts or transactions that are not Qualified Financial Instruments provided, however, that for the purposes of this Law, such Netting Agreement shall be deemed to be a Netting Agreement only with respect to those agreements, contracts or transactions that fall within the definition of “Qualified Financial Instrument” in paragraph (6) of Article 2.

(b) A Collateral Arrangement shall be deemed to be a Collateral Arrangement notwithstanding the fact that such Collateral

Arrangement may contain provisions relating to agreements, contracts or transactions that are not a Netting Agreement or Qualified Financial Instruments, provided that such Collateral Arrangement shall be deemed to be a Collateral Arrangement for the purposes of this Law only with respect to those agreements, contracts or transactions that fall within the definition of “Netting Agreement” or “Qualified Financial Instrument” entered into thereunder or that are agreements, contracts or transactions to which a Netting Agreement applies.

- (c) A Netting Agreement and all Qualified Financial Instruments entered into thereunder or to which a Netting Agreement applies shall constitute a single agreement.

Article 6

Governing Law

A Netting Agreement, all transactions thereunder or to which such Netting Agreement applies and all rights and obligations under such Netting Agreement or such transactions, shall be governed solely and exclusively by the law specified in such agreement as its governing law or, if no such governing law is specified, the law determined to be the governing law of the contract of such Netting Agreement.