



**AIFC NETTING REGULATIONS**

**AIFC REGULATIONS No. 8 OF 2017**

**December 20, 2017  
Astana, Kazakhstan**



**CONTENTS**

**PART 1: GENERAL**

1. Name
2. Date of enactment
3. Commencement
4. Legislative Authority
5. Interpretation

**PART 2: APPLICATION**

6. Application of these Regulations

**PART 3: ENFORCEABILITY AND NETTING**

7. Enforceability of Qualified Financial Instruments
8. General rule about enforceability of Netting Agreements
9. Effectiveness of Netting of obligations to make payments or deliveries
10. Limitation on Liquidator's powers
11. Limitation of insolvency laws prohibiting set off etc.
12. Preferences and fraudulent transfers
13. Pre-emption
14. Realisation and liquidation of Collateral
15. Scope of these Regulations

**SCHEDULE 1: INTERPETATION**

1. Definitions  
Examples of Qualified Financial Instruments



**PART 1: GENERAL**

**1. Name**

These Regulations are the *AIFC Netting Regulations 2017*.

**2. Date of enactment**

These Regulations are enacted on the day they are adopted by the Governor.

**3. Commencement**

These Regulations commence on 1 January 2018.

**4. Legislative Authority**

These Regulations are adopted by the Governor under article 4 of the Constitutional Statute and subparagraph 3) of paragraph 9 of the Management Council Resolution on AIFC Bodies.

**5. Interpretation**

Schedule 1 contains definitions and other interpretative provisions used in these Regulations.



**PART 2: APPLICATION**

**6. Application of these Regulations**

- (1) These Regulations apply to any Qualified Financial Instrument, Netting Agreement or Collateral Arrangement that is governed by the Acting Law of the AIFC or that is entered into by a Person incorporated or registered in the AIFC or organised under the Acting Law of the AIFC, irrespective of when Qualified Financial Instrument, Netting Agreement or Collateral Arrangement was entered into.
- (2) If a provision of these Regulations is inconsistent with a provision of the AIFC Insolvency Regulations or AIFC Insolvency Rules, the provision of these Regulations prevails to the extent of the inconsistency.
- (3) However, a provision must not be treated as inconsistent with another provision merely because the provisions deal with the same matter if each provision can be obeyed without contravening the other.



## PART 3: ENFORCEABILITY AND NETTING

### 7. General rule about enforceability of Netting Agreements

A Netting Agreement is enforceable in accordance with its terms, including against an Insolvent Party, and, if applicable, against a guarantor or other Person (including a guarantor or other Person who is insolvent) providing security for a party to the agreement, and, subject to any conditions of the agreement, is not 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; or
- (b) any provision of law relating to bankruptcy, liquidation (including any compulsory winding up procedure or proceeding), reorganisation, composition with creditors, receivership, conservatorship or any other Insolvency Proceeding to which a party to the agreement may be subject; or
- (c) any other provision of law that may apply to an Insolvent Party.

### 8. Effectiveness of Netting of obligations to make payments or deliveries

After the commencement of Insolvency Proceedings in relation to a party to a Netting Agreement, any provisions of the agreement under which any obligations of the parties to make, or relating to the making of, payments or deliveries under the agreement or under any Qualified Financial Instrument or contract or transaction to which the 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 mentioned in paragraph (e) of the definition of **Netting** in Schedule 1) must be given effect to in accordance with their terms.

### 9. Limitation on Liquidator's powers

Any power of a Liquidator to assume or repudiate individual Qualified Financial Instruments, contracts, transactions, claims or obligations does not prevent the termination, liquidation, acceleration 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 1 or more Qualified Financial Instruments entered into under a Netting Agreement or to which a Netting Agreement applies, and the power applies, if at all, only after having given effect to the terms of the Netting Agreement.

### 10. Limitation of insolvency laws prohibiting set off etc.

The provisions of a Netting Agreement that provide for the determination of, or for payment of or in respect of, the net balance of close-out values, market values, liquidation values, replacement values or other relevant values (including the value of any damages that may arise from a party's Failure to enter into a transaction required to be entered into under the provisions) calculated in respect of accelerated or terminated payment or delivery obligations or entitlements, or accelerated or terminated obligations or entitlements relating to the making of payments or deliveries, in either case under 1 or more Qualified Financial Instruments entered into under the agreement or to which the agreement applies (including a payment or delivery in respect of a contract or transaction required to be entered into under the provisions) are not be affected by any provisions of insolvency laws that would otherwise limit the exercise of rights to set off, offset or net out obligations, payment amounts or values between an Insolvent Party and a Non-insolvent Party.



## 11. Preferences and fraudulent transfers

- (1) The Liquidator of an Insolvent Party to a Netting Agreement may not avoid or render ineffective any of the following on the ground that it is a preference by the Insolvent Party to any other party:
  - (a) any payment, transfer, delivery, substitution or exchange of Cash, Collateral or any other interests or property under or in connection with the Netting Agreement from the Insolvent Party to the other Party;
  - (b) any obligation incurred under the Netting Agreement, or to which the agreement applies, by the Insolvent Party and owing to the other party to make any payment, transfer, delivery, substitution or exchange of Cash, Collateral or any other interest or property;
  - (c) any transaction entered into by the Insolvent Party in accordance with the terms of the Netting Agreement to give effect to the Netting provided for by the agreement.
- (2) However, this section does not 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 mentioned in subsection (1)(a) to (c) if there is clear and convincing evidence that the Insolvent Party:
  - (a) made the payment, transfer, delivery, substitution or exchange; or
  - (b) incurred the obligation; or
  - (c) entered into the transaction;

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

## 12. Pre-emption

No stay, injunction, avoidance, moratorium, or similar proceeding or order, whether issued or granted by a court, administrative agency, Liquidator or otherwise, may limit or delay application or performance of an otherwise enforceable Netting Agreement or any transaction entered into under the agreement or to which the agreement applies.

## 13. Realisation and liquidation of Collateral

- (1) Unless otherwise agreed by the parties, the realisation, appropriation or liquidation of Collateral under a Collateral Arrangement takes effect or occurs without any requirement that prior notice must be given to, or consent must be received from, any party or other Person.
- (2) However, this section does not affect any applicable law that requires the realisation, appropriation or liquidation of Collateral to be conducted in a commercially reasonable way.

## 14. Scope of these Regulations



- (1) A Netting Agreement is a Netting Agreement for these Regulations even though the agreement contains provisions relating to agreements, contracts or transactions that are not a Qualified Financial Instrument.
- (2) However, the agreement is a Netting Agreement for these Regulations only in relation to the agreements, contracts or transactions that are Qualified Financial Instruments.
- (3) A Collateral Arrangement is a Collateral Arrangement for these Regulations even though the Collateral Arrangement contains provisions relating to agreements, contracts or transactions that are not a Netting Agreement or Qualified Financial Instrument.
- (4) However, the Collateral Arrangement is a Collateral Arrangement for these Regulations only in relation to the agreements, contracts or transactions that are a Netting Agreement or Qualified Financial Instruments or that are agreements, contracts or transactions to which a Netting Agreement applies.
- (5) For these Regulations, a Netting Agreement and all Qualified Financial Instruments entered into under it, or to which the agreement applies, constitute a single agreement.

**15. Enforceability of Qualified Financial Instruments**

A Qualified Financial Instrument is not, and must be taken never to have been, void or unenforceable because of being, or having the characteristics of, a wager, a lottery or a gambling or gaming contract.



**SCHEDULE 1: INTERPETATION**

**1. Definitions**

In these Regulations:

**Acting Law of the AIFC** has the meaning given by article 4 of the Constitutional Statute.

**AFSA** means the Astana Financial Services Authority.

**AIFC** means the Astana International Financial Centre.

**Cash** includes money credited to an account in any currency or a similar claim for repayment of money in any currency, and includes a money market deposit.

**Constitutional Statute** means Constitutional Statute of the Republic of Kazakhstan dated 7 December 2015 entitled *On the Astana International Financial Centre*.

**Collateral** means any of the following:

- (a) Cash in any currency;
- (b) securities of any kind, including, for example, debt securities, equity securities and sukuk, and any right or claim associated with any securities of any kind;
- (c) guarantees, letters of credit and obligations to reimburse;
- (d) assets commonly used as Collateral in the AIFC.

**Collateral Arrangement** means any margin, Collateral or security arrangement, or other credit enhancement, related to or forming part of a Netting Agreement or 1 or more Qualified Financial Instruments entered into under a Netting Agreement or to which a Netting Agreement applies, including, for example, the following:

- (a) a pledge, mortgage, charge or any other form of security interest in Collateral, whether possessory or non-possessory;
- (b) a Title Transfer Collateral Arrangement;
- (c) any guarantee, letter of credit or reimbursement obligation, by or to a party to 1 or more Qualified Financial Instruments, in relation to 1 or more of the Qualified Financial Instruments.

**Fail** includes refuse.

**Insolvency Proceeding** means any procedure or proceeding under any law relating to bankruptcy, liquidation (including any compulsory winding up procedure or proceeding), reorganisation, composition with creditors, receivership, conservatorship or any other similar procedure or proceeding.

**Insolvent Party**, in relation to a Netting Agreement, means a party to the agreement in relation to which an Insolvency Proceeding under the laws of the AIFC has been commenced.

**Liquidator** means the liquidator, receiver, liquidation committee, nominee, trustee, conservator, supervisor or other Person who administers the affairs of an Insolvent Party



for a Netting Agreement during an Insolvency Proceeding under the laws of the AIFC.

**Management Council** means the Management Council of the Astana International Financial Centre.

**Management Council Resolution on AIFC Bodies** means *The Structure of the Bodies of the Astana International Financial Centre*, adopted by resolution of the Management Council on 26 May 2016, as amended by resolution of the Management Council, *The Amendments and supplementations to the Structure of the Bodies of the Astana International Financial Centre*, adopted on 9 October 2017.

**Netting**, in relation to a Netting Agreement, means the occurrence of any or all of the following:

- (a) the termination, liquidation or acceleration of any payment or delivery obligations or entitlements, or obligations or entitlements to make, receive or require payments or deliveries, under 1 or more Qualified Financial Instruments entered into under the Netting Agreement or to which the Netting Agreement applies;
- (b) the calculation or estimation of a close-out value, market value, liquidation value, replacement value or other relevant value (including the value of any damages that may arise from a party's Failure to enter into a transaction required to be entered into under provisions of the Netting Agreement of the kind mentioned in section 8 (Effectiveness of Netting of obligations to make payments or deliveries) in respect of each obligation or entitlement, or group of obligations or entitlements, terminated, liquidated or accelerated under paragraph (a);
- (c) the conversion of any values calculated or estimated under paragraph (b) into a single currency;
- (d) the determination of the net balance of the values calculated or estimated under paragraph (b), as converted under paragraph (c), whether by operation of set-off or otherwise;
- (e) entry by the parties into a transaction under or as a result of which the 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 a transaction.

**Netting Agreement** means:

- (a) any agreement between 2 or more parties that provides for Netting of present or future payment or delivery obligations or entitlements, or obligations or entitlements to make, receive or require payments or deliveries, arising under or in connection with 1 or more Qualified Financial Instruments entered into under the agreement by the parties to the agreement (a **master Netting Agreement**); or
- (b) any master agreement between 2 or more parties that provides for Netting of the amounts owing under 2 or more master Netting Agreements (a **master-master Netting Agreement**); or
- (c) any Collateral Arrangement related to or forming part of 1 or more agreements mentioned in paragraph (a) or (b).

**Non-insolvent Party**, in relation to a Netting Agreement, means a party to the agreement who is not an Insolvent Party.



**Person** includes any natural person or incorporated or unincorporated body, including a company, partnership, unincorporated association, government or state.

**Qualified Financial Instrument** means any financial agreement, contract or transaction (including any terms and conditions incorporated by reference in the agreement, contract or transaction) under which:

- (a) payment or delivery obligations are 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
- (b) obligations to make payments or deliveries, or to 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;

but does not include an insurance or reinsurance contract entered into by an appropriately licensed insurance company as part of its insurance business.

### **Examples of Qualified Financial Instruments**

- 1 a currency, cross-currency, interest rate swap or profit rate swap
- 2 a basis swap
- 3 a spot, future, forward or other foreign exchange transaction
- 4 a cap, collar or floor transaction
- 5 a commodity swap
- 6 a forward rate agreement
- 7 a currency or interest rate future
- 8 a currency or interest rate option
- 9 a metals future or option
- 10 an equity derivative, such as an equity or equity index swap, equity forward, equity option or equity index option
- 11 a derivative relating to bonds or other debt securities or to a bond or debt security index, such as a total return swap, index swap, forward, option or index option
- 12 a credit derivative, such as a credit default swap, credit default basket swap, total return swap or credit default option
- 13 a metals derivative
- 14 an energy derivative, such as an electricity derivative, oil derivative, coal derivative or gas derivative
- 15 a weather derivative, such as a weather swap or weather option



- 16 a bandwidth derivative
- 17 a freight derivative
- 18 an emissions derivative, such as an emissions allowance or emissions reduction transaction
- 19 an economic statistics derivative, such as an inflation derivative
- 20 a property index derivative
- 21 a spot, future, forward or other securities or commodities transaction
- 22 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 agreement relating to mortgage loans, interests in mortgage loans or mortgage related securities
- 23 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
- 24 a Collateral Arrangement
- 25 an agreement to clear or settle securities transactions or to act as a depository for securities
- 26 any other agreement, contract or transaction similar to any agreement, contract or transaction mentioned in examples 1 to 25 in relation to 1 or more reference items or indices, including reference items or indices relating to (without limitation) interest rates, currencies, commodities, energy products, electricity, equities, weather, bonds and other debt instruments, precious metals, quantitative measures associated with an occurrence, the extent of an occurrence, or a contingency associated with a financial, commercial or economic consequence, or economic or financial indices or measures of economic or financial risk or value
- 27 any Shari'a compliant contract or undertaking (including a murabaha, musawama or wa'ad) that individually or together with any other Shari'a compliant contract or undertaking has been or is entered into with a view to having an economic effect similar to any instrument of a kind mentioned in examples 1 to 26 or 28
- 28 any swap, forward, option, contract for differences or other derivative in respect of, or combination of, 1 or more agreements or contracts mentioned in examples 1 to 27

***Title Transfer Collateral Arrangement*** 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, for example, a sale and repurchase agreement, securities lending agreement, securities buy/sell-back agreement or an irregular pledge.