

UAE NETTING: A NEW FEDERAL-LEVEL NETTING LAW

As at 1 October 2024, the President of the United Arab Emirates promulgated a new Federal-level law on the netting of qualified financial contracts under Federal Decree Law No. 31 of 2024 (the "**New UAE Netting Law**"), which came into force on 2 January 2025.

The old netting law, Federal Decree Law No. 10 of 2018 (the "**old netting law**"), is repealed on the effective date of the New UAE Netting Law.

Background

The New UAE Netting Law was prepared taking account of the International Swaps and Derivatives Association's ("**ISDA**") 2018 Model Netting Act. The old netting law had been based on the ISDA 2006 Model Netting Act. The ISDA 2018 Model Netting Act contains updates to the ISDA 2006 Model Netting Act reflecting market developments and experience since the 2006 version.

Prior to the preparation stages of the New UAE Netting Law, the UAE Federal bankruptcy regime had been amended under Federal Decree Law No. 51 of 2023. The New UAE Netting Law regulates its relationship with other pieces of UAE legislation (including the amended bankruptcy law) in a manner which, it is hoped, should foster confidence in the enforceability of close-out netting amongst international market participants in the derivatives industry.

The New UAE Netting Law thus helpfully updates and extends the old netting law, and it introduces clarifications to address certain queries that had been raised regarding some content of the old netting law as well as that law's relationship with other laws.

This is therefore an important and positive development, although market participants should keep in mind that the New UAE Netting Law, including its elements carried forward from the old netting law, remains untested in the UAE courts.

The UAE's two financial free zones, the Abu Dhabi Global Market (ADGM) and the Dubai International Financial Centre (DIFC), continue to have their own respective netting legislation which are not affected by the New UAE Netting Law.

Persons that can be parties to a Netting Agreement

The definition of persons who can be party to a netting agreement covered by the New Netting Law has been expanded (in line with the ISDA 2018 Model Netting Act) from any "natural or juridical person" to expressly include supranationals such as international or regional organisations and

Key issues

- Persons that can be party to a "Netting Agreement" now expressly includes supranationals and political units or sub-departments affiliated with local or central governments
- Qualified Financial Contracts under "Netting Agreements" have been updated to include sukuk-linked products, digital assets, voluntary carbon credits and other types of carbon credits
- Qualified Financial Contracts are protected against prohibitions on aleatory contracts under the Civil Code as well as those under any other UAE law
- Retrospective claims that a Qualified Financial Contract is non-Shari'a compliant are prohibited if the parties have already confirmed Shari'a compliance at the outset of the contract
- Title transfer collateral arrangements to Qualified Financial Contracts should not be recharacterised as security interest arrangements
- The new law seeks to assert priority over future UAE laws unless expressly appealed by a future law, to minimise potential to be inadvertently overridden by a future UAE law
- The new law and the old netting law remains untested in the UAE courts.

development institutions, as well as political units or sub-departments that are affiliated to a central or regional government. Such bodies can be active and significant market participants, especially in newly developing markets, and this clarification that the New Netting Law can apply to them is valuable, although parties dealing with them should continue to undertake appropriate case-by-case due diligence.

Qualified Financial Contracts

The types of Qualified Financial Contracts that can be entered into under Netting Agreements that are protected by the New UAE Netting Law have been expanded to cover derivatives contracts based on the following new asset-classes with respect to which ISDA has published product-level terms since the old netting law was enacted:

- digital assets
- voluntary carbon credits
- other types of carbon credits.

The list of Qualified Financial Contracts in Article 5 of the New UAE Netting Law now also specifically includes derivatives linked to sukuk and sukuk indices and the definition of Collateral in Article 2 of the New Netting Law also specifically mentions sukuk as well as commodities and commodity contracts.

Under Article 7 of the New Netting Law, the list of Qualified Financial Contracts in Article 5 can be amended from time to time by the Central Bank (the "**CBUAE**") of the United Arab Emirates (the "**UAE**") in coordination with the Securities and Commodities Authority of the UAE and, at the CBUAE's discretion, in consultation with any other regulatory authority. In the old netting law, this responsibility fell to a committee. It is now clear that the CBUAE has primary authority for this.

The interpretation of the product-types listed in Article 5 (including article 5 of the old netting law) by a UAE court remains, to our knowledge, yet to be tested.

Netting Agreements and non-Qualified Financial Contracts

The ISDA Model Netting Acts include a provision confirming that an agreement which includes both Qualified Financial Contracts and contracts or transactions which are not Qualified Financial Contracts can still be a Netting Agreement in respect of the Qualified Financial Contracts.

This is now reflected in Article 4(5) of the New Netting Law and it is hoped that, although the interpretation of Qualified Financial Contracts is untested in the UAE courts, it should provide comfort to market participants that transactions included in a Netting Agreement that are found not to be Qualified Financial Contracts should not impact the enforceability of the netting of the other Qualified Financial Contracts.

Anti-gambling protections for Qualified Financial Contracts

In line with the ISDA Model Netting Acts, both the old netting law and the New UAE Netting Law include a provision addressing concerns over gambling or wagering contracts for Qualified Financial Contracts.

The old netting law had provided that a Qualified Financial Contract shall not be void or unenforceable on grounds of being an aleatory contract for the purposes of the prohibition on gambling under the Civil Code, but did not address the position on gambling under the UAE Penal Code.

Article 8(1) of the New UAE Netting Law goes further by stating that a Qualified Financial Contract shall not be void or unenforceable on grounds of being an aleatory contract under any law (and not solely under the Civil Code), including those related to games, matches, gambling, betting or lotteries.

Retrospective claims of non-compliance with Shari'a

Article 8(2) of the New UAE Netting Law replicates a similar provision under the ISDA 2018 Model Netting Act stating that, where a party to a Qualified Financial Contract has confirmed at the outset of that contract that it has considered the contract to be Shari'a compliant, then that party may not later disclaim, repudiate or reject, in whole or in part, its obligations under the relevant Qualified Financial Contract on the basis that the Qualified Financial Contract has ceased to be Shari'a compliant due to a change of interpretation of any relevant rule or principle of the Shari'a for any other reason.

This Article 8(2) does not negate the requirement for parties to carry out their own due diligence on Shari'a compliance at the outset of the contract.

Re-characterisation of Title Transfer Collateral Arrangements

The entry into collateral arrangements whereby title to the collateral assets is transferred to the collateral-taker (so-called "title transfer collateral arrangements") as Collateral Arrangements for obligations under Qualified Financial Contracts continue to be enabled under the New UAE Netting Law.

As with the old netting law, the provisions of the New UAE Netting Law referring to Collateral Arrangements are not intended to be a self-standing collateral regime governing matters such as the creation, perfection, priority and enforcement of the Collateral Arrangements. This means that Collateral Arrangements would still need to be considered in light of other UAE laws relevant to security over moveables assets, as well as those on private international law rules.

A potentially positive development in the New UAE Netting Law is Article 15, which provides that a title transfer collateral arrangement relating to a Netting Agreement should be effective and not recharacterised as a security interest arrangement. The interaction between Article 15 and wider UAE laws, including bankruptcy laws such as Federal Decree Law No. 51 of 2023, will remain to be tested.

Conflicting provisions from other UAE laws

A typical provision found in most UAE laws is a general "catch-all" that any provisions of other laws that conflicts with the provisions of that particular UAE law will be deemed repealed or void. This is no different in Article 18(1) of the New UAE Netting Law.

Article 18(2) goes further to assert the priority of the New UAE Netting Law over subsequent UAE laws, unless a subsequent UAE law expressly repeals the New UAE Netting Law (or any provision of it). This is intended to minimise

the potential of future legislation inadvertently overriding the New UAE Netting Law, although it is not possible to wholly eliminate such a possibility.

Concluding remarks

The enactment of the old netting law was the first national-level netting legislation across the Gulf Cooperation Council states (and more widely across the regional Middle East countries). The enactment of the New UAE Netting Law marks an evolutionary step in the developing maturity of netting legislation in the UAE, as the UAE legislators proactively evaluate the impacts of wider UAE laws on the old netting law and embrace up-to-date international best practices to foster confidence amongst international market participants.

Clifford Chance acted as legal counsel in the preparation of the New UAE Netting Law.

CONTACTS



Graham Brewer
Partner

T +971 4 503 2631
E graham.brewer
@cliffordchance.com



Nicola Reader
Partner

T +971 2 613 2383
E nicola.reader
@cliffordchance.com



Cheuk-Yin Cheung
Head of Structured
Products – Middle East

T +971 4 503 2722
E cheukyin.cheung
@cliffordchance.com



Habib Motani
Consultant to Clifford
Chance

T +44 2 070 061 718
E habib.motani
@cliffordchance.com



Ben Alexander
Senior Associate

T +971 2 613 2353
E ben.alexander
@cliffordchance.com

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Clifford Chance, Level 32, ICD Brookfield Place, Dubai International Financial Centre, P.O. Box 9380, Dubai, United Arab Emirates

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