

Close-out netting and set-off provisions comparison between jurisdictions

Service area / [Dispute Resolution, Restructuring and Insolvency](#)

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Comparative table across Bermuda, the British Virgin Islands (BVI), Cayman Islands, Guernsey and Jersey.

	Bermuda	British Virgin Islands	Cayman Islands	Guernsey	Jersey
Legal framework	Section 235 of the Companies Act 1981 and Section 37 of the Bankruptcy Act 1989.	Section 150 of the BVI’s Insolvency Act 2003 (the “ Insolvency Act ”) governs insolvency set-off, applicable to mutual dealings between a debtor and a creditor. Part XVII of the Insolvency Act contains a statutory framework recognising the enforceability of netting arrangements and master netting agreements, including those arising under broadly defined collateral arrangements and other “financial contracts”.	Section 140 of the Companies Act (as revised) (the “ Companies Act ”).	The Companies (Guernsey) Law, 2008 (the “ Companies Law ”); The Law of Property (Miscellaneous Provisions) (Guernsey) Law 1979 (the “ 1979 Law ”) and customary common law principles.	Bankruptcy (Netting, Contractual Subordination and Non-Petition Provisions) (Jersey) Law 2005 (the “ Netting Law ”).

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	Bermuda	British Virgin Islands	Cayman Islands	Guernsey	Jersey
Recognition of close out netting	Bermuda does not have a standalone statutory regime expressly governing close out netting, but it is recognised by contractual principles under Bermuda common law and the insolvency framework set out in the Companies Act. Whilst the Companies Act does not contain an express statutory endorsement of close out netting, it does not invalidate contractual netting arrangements.	<p>Section 435(a) of the Insolvency Act provides that the provisions relating to netting, the set off of money provided by way of security, the enforcement of a guarantee and the enforcement of a collateral arrangement and the set off of the proceeds thereof, as contained within a netting agreement or a guarantee provided for in such an agreement shall be legally enforceable against a party to the agreement and, where applicable, against a guarantor or other person providing security.</p> <p>Section 435(b) of the Insolvency Act provides that the provisions relating to set off of the net amounts due under netting agreements, the set off of money provided by way of security, the enforcement of a guarantee and the enforcement of a collateral arrangement and the set off of the proceeds thereof, as contained within a master netting agreement or a guarantee provided for in such an agreement shall be legally enforceable against a party to the agreement and, where applicable, against a guarantor or other person providing security.</p>	The Cayman Islands does not have a standalone statutory regime expressly governing close out netting, but it is recognised by contractual principles under Cayman Islands common law and the insolvency framework set out in the Companies Act (see below).	Guernsey does not have a standalone statutory regime expressly governing close out netting, but it is recognised by contractual principles under Guernsey common law and the insolvency framework set out in the Companies Law. Whilst the Companies Law does not contain an express statutory endorsement of close out netting, it does not invalidate contractual netting arrangements.	<p>Article 2 of the Netting Law states that an agreement containing close-out netting, set-off and contractual subordination provisions is enforceable and must be given effect in accordance with its terms despite the bankruptcy of a party to that agreement or lack of mutuality. Any such contractual provisions are effective despite any enactment or rule of law to the contrary.</p> <p>However, this only applies if an agreement is caught by the Netting Law. The definition of “netting” is technically complex and agreements should be carefully drafted so as to engage it. However, the Netting Law is agnostic to the governing law of the contract.</p> <p>If the Netting Law is not engaged, then Jersey customary law principles would apply (assuming that the agreement is governed by Jersey law).</p>

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Set off provisions	<p>Pursuant to section 235 of the Companies Act, in insolvent winding ups the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force under the law of bankruptcy.</p> <p>Under section 37 of the Bankruptcy Act, an account shall be taken of what is due from each party to the other in respect of mutual dealings, and the sums shall be set-off against each other. Statute prevents parties from contracting out of section 37 of the Bankruptcy Act.</p>	<p>Pursuant to section 150 of the Insolvency Act, subject to section 435, where, before the date a company enters liquidation, there have been mutual credits, mutual debts or other mutual dealings between a debtor and a creditor claiming or intending to claim in the liquidation:</p> <p>(a) an account shall be taken of what is due from each party to the other in respect of those mutual credits, mutual debts or other mutual dealings, as at the date of liquidation;</p> <p>(b) the sum due from one party shall be set-off against the sums due from the other party; and</p> <p>(c) only the balance of the account, if any, may be claimed in the liquidation or is payable to the debtor, as the case may be.</p>	<p>Section 140(2) of the Companies Act provides that the collecting in and distribution of assets in a liquidation of a company must take into account any applicable contractual rights of set-off or netting (whether bilateral or multi-lateral). This includes any contractual agreement limiting or waiving set-off or netting.</p> <p>Section 140(3) provides that in the absence of any such contractual arrangement, an account shall be taken of what is due from each party to the other in respect of mutual dealings, and the sums shall be set-off against each other.</p>	<p>The 1979 Law provides that where parties have an agreement (express or implied, written or oral) to set off mutual debts, only the net balance after set off is treated as enforceable. For these purposes, "debt" includes all debts and liabilities, present or future, certain or contingent; but does not include demands of unliquidated damages arising other than by reason of contract or breach of trust. This will apply unless the agreement constitutes a fraudulent or void preference within six months of material party being declared <i>en desastre</i> or the commencement of liquidation. The Royal Court of Guernsey or a liquidator may set aside such agreements if fraud or preference is suspected.</p>	<p>As above, Article 2 of the Netting Law also states that set-off provisions, within agreements caught by the Netting Law, are enforceable and must be given effect.</p> <p>If there is no such agreement in place, then Jersey customary law principles regarding set-off will apply (assuming that the agreement is governed by Jersey law).</p> <p>Where a person's property (including the property of a company) is declared <i>en desastre</i>, a statutory set-off is applicable under Article 34 of the Bankruptcy (Désastre) (Jersey) Law 1990. Under this provision, mutual dealings are set off as between the creditor and the bankrupt, such that only the net amount can be claimed or paid by either party.</p>

Continued

	Bermuda	British Virgin Islands	Cayman Islands	Guernsey	Jersey
Insolvency considerations	Where non-contractual insolvency set-off applies the usual Companies Act, Bankruptcy Act and common law principles regarding mutuality apply.	<p>A creditor is not entitled to claim the benefit of insolvency set-off if he had actual notice that the debtor was insolvent (a) at the time he gave credit to the debtor or received credit from the debtor; or (b) at the time he acquired any claim against the debtor or any part of or interest in such a claim.</p> <p>Netting agreements are enforceable in insolvency in accordance with section 435 of the Insolvency Act, but that is subject to the possible invalidity of a netting arrangement on grounds of fraud, misrepresentation etc.</p>	<p>See above.</p> <p>Where non-contractual insolvency set-off applies (ie in the absence of any contractual set-off or netting arrangement) the usual common law principles regarding mutuality apply.</p>	There is no statutory requirement for the set-off of mutual debts on insolvency. The liquidator will take account of any agreement between the company and any creditor as to set-off. The insolvency distribution rules will only then apply to the net balance.	<p>A netting agreement is enforceable despite bankruptcy if it falls within scope of the Netting Law, subject to any fraud or misrepresentation vitiating the agreement.</p> <p>Where there is non-contractual set off then Jersey customary law principles will apply (assuming that the agreement is governed by Jersey law).</p>
ISDA position	Although not statutory recognised, close out netting under the ISDA Master Agreement would be enforceable under Bermuda law, notwithstanding the insolvency of a party.	An ISDA Master Agreement and transactions entered into under it would fall within the broad definition of a "financial contract" for the purposes of the netting provisions in Part XVII of the Insolvency Act.	Any netting or set-off provisions in an ISDA Master Agreement or equivalent would be enforced in the event of the liquidation of the company pursuant to section 140(2) of the Companies Act.	Although not statutory recognised, close out netting under the ISDA Master Agreement would be enforceable under Guernsey law, notwithstanding the insolvency of a party.	An ISDA Master Agreement is likely to fall within scope of the Netting Law. Accordingly, provisions in the ISDA Master Agreement which relate to close-off netting, set-off and contractual subordination are likely to be enforceable and be given effect pursuant to the Netting Law.



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