

THE NATIONAL CLEARANCE AND SETTLEMENT SYSTEMS ACT

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ACT

To provide for the recognition, operation, regulation and supervision of systems for the clea

PART I PRELIMINARY

1. Short title

This Act may be cited as the National Clearance and Settlements Systems Act, (2001)

2. Interpretation

In this Act, unless the context otherwise requires "Central Bank" means the Bank of Botswana

'clearing/clearance' means the process of transmitting, reconciling and, in some cases, settling

'financial institution' means-

(a) a banking institution registered in terms of the Banking Act, 1995;

(b)

any other institution which lawfully engages in the banking activities specified in section 23 of the Banking Act, 1995;

(c) broker-

dealer, insurance company, investment scheme, central securities depository

"management body", in relation to a recognised payment system, means a body with the authority to manage the system

"netting" means an agreed offsetting of positions or obligations by participants in a payment system

"Clearing System" means a set of procedures whereby financial institutions present payment instructions to the Central Bank for clearing

"transfer instruction" means an order or electronic message requesting the movement of funds from one participant to another

"recognised system" means a system recognised by the Central Bank that facilitates the clearing and settlement of transfer instructions

"settlement system" means a system used to facilitate the settlement of transfer instructions

"system risk" means the risk that the failure of one participant in a clearance and settlement system will result in the failure of the system

"bilateral netting" means an arrangement to net obligations between two parties. The arrangement may be a contract or a law

"central bank settlement system" means a system established and operated by the Central Bank for the clearing and settlement of transfer instructions

"clearance and settlement system" means a system that facilitates the presenting and settling of transfer instructions

"funds" means legal tender in terms of sections 23 of the Bank of Botswana Act, 1995

"gross settlement" means the settlement of transfer instructions on an instruction-by-instruction basis.

"multilateral netting" means an arrangement among three or more parties to net their obligations

"obligation" means a duty imposed by contract or law. Such an obligation may arise from a contract or a law

“settlement” means an act of discharging obligations by transferring funds, securities

“transfer” means the sending of funds, securities or other financial instruments or a

- (i) Conveyance of funds or physical instruments;
- (ii) Accounting entries on the books of a financial intermediary; or
- (iii) Book-entry movement of funds or physical instruments through a recognized system

(The following terms, found in this document, have not been defined)

- I. *Payment System (Section 3)*
- II. *Set-offs (Section 3(1b))*
- III. *Government 3(1d)*
- IV. *Minister*
- V. *High Court (Part II, Section 9(3))*
- VI. *Government Gazette (Part IV, Section 17(4))*

PART II CLEARANCE AND SETTLEMENT SYSTEMS

3. Recognition of payment systems

[The objective of this section is to legally empower the Bank of Botswana to recognise]

(1)

Subject to this section, the Central Bank may recognise a system that has any of the

- (a) the clearing of payment instructions between financial institutions that are participants in the system;
- (b) the settling of obligations arising from the clearing of transfer instructions received from participants in the system;

- (i) netting;
- (ii) set-offs; and
- (iii) gross settlement.

(c) the final discharge of any indebtedness between participants in a clearance and settlement system;

(d) any of the following objects, to the extent that they are incidental to or connected with the operation of the system:

(i)

establishing a clearance system for the clearing of transfer instructio

- (ii) providing a forum for the consideration of matters of mutual interes
- (iii) acting as a medium of communication, on behalf of its participants, v
- (iv) dealing with other matters of interest to its participants and fostering operation between them.

(2) The Central Bank may in terms of subsection (1) recognise different clearance and s

- (a) in respect of different classes of financial institutions;
- (b) in respect of different areas of Botswana; or
- (c) for the clearance and settlement of different classes of obligations.

(3) The Central Bank shall not recognise a clearance and settlement system in terms of

- (a) only financial institutions and the Central Bank are permitted to become pa
- (b) the system fairly represents the interests of all financial institutions that are or will become participants in the system; and
- (c) the Central Bank will be able adequately to monitor and regulate the system
- (d) the constitution and any rules governing the system are fair, equitable and t
 - (i) admitting financial institutions into the system as participants, and r
 - (ii) controlling its participants' use of clearance and settlement systems c
 - (iii) appointing a management body or committee, representative of the p
 - (iv) appointing any person as a system operator within the system in orde

(v) criteria

according to which a participant may be authorised to introduce any

(e)

the Management Body has ensured provision of contingency plan in support

(4) Approval of amendments to constitution and rules of recognised system

No amendment to the constitution of any recognised system, or to the rules governin

(5) Constitution and rules of recognised system to be open to inspection

The constitution of every recognised system and any rules governing the system, tog

(a) the offices of the Central Bank; and

(b)

the head office in Botswana of every recognised system; and shall be open fo

(6) Withdrawal of recognition from clearance and settlement system

(1)

Subject to subsections (2) and (3), the Central Bank may by notice in writing to the

(a)

the system no longer fairly represents the interests of all financial institution

(b)

the management body has contravened any provision of this Act or of the sy

(c)

the manner in which the system is being conducted does not adequately prot

(2)

Before withdrawing its recognition from a system in terms of subsection (1), the Cer

(3)

The Central Bank shall not withdraw its recognition from a system in terms of subs

(7)

Establishment and operation of a clearance and settlement system by the Central B

(1)

The Central Bank shall establish and operate its own system for the settlement of ot

(2)

The Central Bank may specify rules, procedures and participant requirements for t

(8) Provision of information to Central Bank

In addition to any information that is required to be provided to the Central Bank in

- (a) the volumes and values of transfer instructions cleared in the system; and**
- (b) the volumes or values of the participants' payment obligations and settlement**
- (c) any other information regarding the operation of the system.**

(9) Control of undesirable conduct in regard to recognised system

(1) If the Central Bank has reasonable grounds to believe that a management body or a

- (a) results or is likely to result in systemic risk; or**
- (b) prejudices or will prejudice the integrity, effectiveness or security of the system**

the Central Bank may issue a written directive requiring that management body or

- (i) to cease engaging in the act, omission or course of conduct concerned**
- (ii) to do such things as the Central Bank may specify to remedy the situation**
- (iii) to provide the Central Bank with such information relating to the matter**

(2) Any person who contravenes or fails to comply with any provision of a directive in terms of

(3) If any person contravenes or fails to comply with any provision of a directive in terms of

(4) On an application in terms of subsection (3), the High Court may make such order as it thinks fit

(5) This section shall be construed as additional to, and not in substitution for, any provision of the law

PART III

FINALITY OF SETTLEMENTS WITHIN A RECOGNISED SYSTEM OR IN THE CENTRAL BANK

(10) Finality of transfer of funds, securities and other financial instruments.

(1) Notwithstanding any other law but subject to this section, a payment or transfer which is effected in accordance with a recognised system or

(a) the payment obligations or settlement obligations of a participant in the system

(b) what are believed by the person making the payment or transfer to be the payment obligations or settlement obligations of a participant in the system

shall be final and irrevocable and shall not be reversed or set aside for any reason whatsoever.

Provided that, if it subsequently appears that any amount or property so paid or transferred

(2) If the Central Bank considers that the making of a payment or transfer referred to in paragraph 1

(a) shall prohibit the making of the payment or transfer, if it has not already been made;

(b) shall set aside the payment or transfer, if it has already been made; and shall forthwith

Provided that no such payment or transfer shall be set aside more than twenty-four hours after it has been made.

(3) Where the Central Bank has prohibited the making of a payment or transfer in terms of paragraph 2

(4) Where the Central Bank has set aside a payment or transfer in terms of paragraph 2, the payment or transfer shall be treated as if it had not been made *ab initio*.

(11) Payments and transfers within settlement system not subject to interdict or stay

Notwithstanding any other law no interdict or other order of any court shall operate to

(a) prevent the payment obligations or settlement obligations of a participant in the system

(b)

what are believed, by the person who is required to make the payment or tra



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PART IV

WINDING UP, JUDICIAL MANAGEMENT OR CURATORSHIP OF PARTICIPANTS I



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(12) Central Bank to be notified of winding-up, judicial management or curatorship of participant in recognised system

Where a participant in recognised system is wound up or placed under judicial man

(12) Central Bank to be notified of winding-up, judicial management or curatorship of participant in recognised system

Where a participant in recognised system is wound up or placed under judicial management or the order placing the participant under judicial management or provisionally

(13) Winding up or judicial management of participant in recognised system not to affect finality of prior settlements

Notwithstanding anything to the contrary in the Insolvency Act, 1929, or the Companies Act, 1956, or any rules made thereunder, or any other law for the time being in force, or any

(14) Rules, etc., or recognised system binding on liquidator, judicial manager or curator

Notwithstanding anything to the contrary in the Insolvency Act, 1929, or the Companies Act, 1956, or any rules made thereunder, or any other law for the time being in force, or any

(a) is wound up or placed under judicial management or provisional judicial management

(b) is placed under curatorship in terms of the Banking Act, 1955;

Any provision relating to clearance or settlement which the participant is a party shall

(i) was determined through clearance or settlement before the issue of that order

(ii) was either-

(a) to be discharged or transferred on or after the issue of that order

(b) was overdue for settlement on the date of that order.

(15) Priority of certain instruments on winding up of participant in recognised systems

(1) In this section-

"priority transfer instruction" means a transfer instruction issued by a participant in a recognised system

(2) Notwithstanding anything to the contrary in the Insolvency Act, 1929, or the Companies Act, 1956, or any rules made thereunder, or any other law for the time being in force, or any

(a) undelivered transfer instructions, other than priority transfer instruction, shall not be enforceable against the participant in a recognised system

(b)
undelivered priority transfer instructions that were drawn on the participant
and cleared through the system
before the making of the winding up order; and shall rank in preference ab

(3)
No payment or transfer shall be made pursuant to subsection (2) in preference to an

(4)
Subsection (2) shall not be construed as permitting a transfer instruction to be satisfi

(a) certified by the participant concerned; or

(b)
in the case of a priority payment instruction, was issued by the participant c

PART V GENERAL

(16) Prohibition against unrecognised systems

(5)
Any person or entity operating or participating in an unrecognised system shall be g

(6)
Any financial institution that contravenes subsection (1) shall be guilty of an offence

(17) Prohibition against settlement intermediation

(1) Subject to subsection (3), no person other than-

(a)
a participant in a recognised system or the Central Bank system, acting in ac

(b)
a person introduced by a participant in a recognised system or Central Bank

shall, as a regular feature of his business, accept a transfer instruction from any oth

(2)
Any person who contravenes subsection (1) shall be guilty of an offence and liable to

(3) Subsection (1) shall not apply to-

(a) Botswana Savings Bank Act, 1962 as amended; or

(b)

a building society registered in terms of the Building Societies Act, 1961; or

(c) Botswana Postal Services Act, 1989; or

(d) a person who is acting as the duly appointed agent of the person to whom the

(e) the transmission of money or transfer instructions between companies which

(f) a licensed broker-dealer

(g) any person exempted by the Central Bank in terms of subsection (4).

(4) The Central Bank may by notice in the *Government Gazette* and other media exempt any person or class of persons from the provisions of subsection (3).

(5) For the purpose of paragraph (e) of subsection (3)-
“group of companies” means companies or other bodies corporate that are related to each other in terms of section 10 of the Companies Act, 1988.

(18) Settlement of disputes arising out of recognised systems or settlement systems

(1) In this section-

“business day” means any day other than a Sunday or public holiday.

(2) If-

(a) the management body of a recognised system is aggrieved by any decision of the Central Bank,

(b) any participant in a recognised system or the Central Bank system is aggrieved by any decision of the Central Bank,

(i) any decision taken by the Central Bank for the purposes of this section,

(ii) any decision, act or omission by the system’s management body or any participant in the system,

the matter shall be settled in accordance with this section.

(3) The aggrieved party shall provide the Central Bank, the management body of the system or the participant in the system with a written statement of the nature of the dispute and the grounds on which it is aggrieved.

(4) If the parties are unable to settle the matter as contemplated in subsection (3), the matter shall be referred to the Central Bank for settlement.

(a) the parties agree on a mediator; and

(b) the mediator familiarises himself with the parties' respective content

(c) the mediator and all parties discuss the matter at one or more meetings

(d) the parties share the mediator's costs equally.

(5)

If the parties are unable to settle the matter by consensus in terms of subsection (4), the arbitrator shall reach his decision in the matter within one month of the date of the appointment of the arbitrator.

Provided that the arbitrator shall reach his decision in the matter within one month of the date of the appointment of the arbitrator.

(6)

Any decision of an arbitrator on an arbitration in terms of subsection (5) shall be final and binding on the parties.

(19) Exercise of functions by Central Bank

(1)

Any function of the Central Bank under this Act may be exercised on behalf of the Central Bank by any of the following persons:

(a) by the Governor of the Central Bank; or

(b) subject to the directions of the Governor of the Central Bank, by any other person who is an officer or employee of the Central Bank.

(2)

The Governor of the Central Bank and any Deputy Governor or officer of the Central Bank may, in the exercise of his functions, require any person to furnish him with such information as he may require for the purposes of the Central Bank.

(3)

This section shall not be construed as limiting the Central Bank's power under section 18.

(20) Preservation of secrecy

(1) Subject to subsections (2) and (3), no person

(a) officer or employee of the Central Bank; or

(b) member or employee of a management body;

shall disclose any information which he has acquired in the performance of his functions under this Act.

(2)

The Central Bank may disclose any information whose disclosure, in the Central Bank's interest, is necessary for the purposes of the Central Bank.

(3) Subsection (1) shall not apply to-

- (a) any disclosure made by the person concerned in the performance of his functions;**
- (b) the disclosure of information that is generally known to members of the public;**
- (4) Any person who contravenes subsection (1) shall be guilty of an offence and**

(21) Use of confidential information for personal gain

(1) Subject to subsection (2), if-

- (a) officer or employee of the Central Bank; or**
- (b) member or employee of a management body;**

who for personal gain makes use of any information acquired in the performance of

(i) a fine not exceeding twenty-five thousand Pula (P25 000) or double the amount of his gain, whichever is the greater;

(ii) imprisonment for a period not exceeding five years; or to both such fine and such imprisonment.

(2)

It shall be a defence to a charge under subsection (1) for the person charged to

(22) Evidence

A document purporting to be signed by or on behalf of the Central Bank and stating

(a) that any system is or is not a recognised system; or

(b) that any financial institution is or is not a participant in any recognised system

shall be admissible in any proceedings in any court on its production by any person, *prima facie* proof of the facts stated therein.

(23) Unpaid items due to insufficient funds

Any person who knowingly draws or issues a cheque, or other payment instrument

The mere fact that the cheque or other payment instrument was returned unpaid wi

(24) Computer Entries

The entries in ledgers, day-books, cash books and other accounts of any financial institution, whether captured

(25) Imaging

Photographic images such as film, microfilm, microfiche, or computer images of ori

(26) Review of Act

The Central Bank shall establish a committee-

(a) to review this Act from time to time; and

(b)

to make recommendations to the Minister of finance with regard to amendm



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