

NATIONAL CLEARANCE AND SETTLEMENT SYSTEMS ACT, 2003



No. 5

of 2003

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An Act to provide for the recognition, operation, regulation and supervision of systems for the clearing of transfer instructions between financial institutions, for the settlement of obligations arising from such clearing, for the discharging of indebtedness arising from such settlements made in such clearing systems and to provide for matters connected with and incidental thereto.

Date of Assent: 24.03.03.

Date of Commencement: On Notice.

ENACTED by the Parliament of Botswana.

PART I — *Preliminary*

Short title **1.** This Act may be cited as the National Clearance and Settlement Systems Act, 2003.

Interpretation **2.** In this Act, unless the context otherwise requires —
“bilateral netting” means an arrangement to net obligations between two parties, where the obligations covered by the arrangement may arise from financial contracts, transfer instructions or both;

Cap. 55:01 “Central Bank” means the Bank of Botswana as defined in the Bank of Botswana Act;

“Central Bank system” means a system established and operated by the Central Bank in terms of section 7 for the discharge of settlement obligations between participants in the system;

“clearing” means the process of transmitting, reconciling and, in some cases, confirming transfer instructions regarding funds, securities or other financial instruments prior to settlement, including the netting of instructions and the establishment of final positions for settlement, and “clearance” shall be construed accordingly;

“clearance and settlement system” means a system that facilitates the presenting and exchanging of transfer instructions regarding funds, securities or other financial instruments and the settlement of those transfer instructions between participants in the system;

“clearing system” means a set of procedures —
(a) used by financial institutions to present and exchange information relating to the transfer of funds, securities or other financial instruments to other financial institutions through a centralised system or at a single location; and

(b) that include a mechanism for the calculation of participant's positions on a bilateral or multilateral basis with a view to facilitate the settlement of their obligations on net basis;

“financial institution” means —

(a) a person licenced under section 3 of the Banking Act to transact banking business in Botswana; or

Cap. 46:04

(b) a broker-dealer, insurance company, investment scheme, central securities depository or pension fund;

“funds” means legal tender in terms of sections 23 of the Bank of Botswana Act, cheque, bank draft, banker's acceptance, or an instruction for the electronic movement of funds through a financial intermediary, a recognized system or the Central Bank system;

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“gross settlement” means the settlement of transfer instructions on an instruction-by-instruction basis;

“management body” in relation to a recognised payment system, means a body which represents participants in the system and organises, and manages their participation in the system;

“multilateral netting” means an arrangement among three or more parties to net their obligations, where —

(a) obligations covered by the arrangement may arise from financial contracts, transfer instructions or both; and

(b) the multilateral netting of obligations normally takes place in the context of a multilateral net settlement system;

“netting” means an agreed offsetting of positions or obligations by participants in a clearance and settlement system, which has the effect of reducing a large number of individual positions or obligations to a smaller number of positions and may be conducted on a bilateral or a multilateral basis;

“obligation” means a duty imposed by contract or law that may arise from the clearing of transfer instructions through a clearing system or the submission of a transfer instruction to a settlement system;

“recognised system” means a system recognised by the Central Bank that facilitates the clearance or settlement of transfer instructions regarding funds, securities or other financial instruments;

“settlement” means an act of discharging obligations by transferring funds, securities or financial instruments between two or more parties;

“settlement system” means a system used to facilitate the settlement of transfer instructions regarding payments, securities or other financial instruments;

“systemic risk” means the risk of failure by one participant in a clearance and settlement system, or in financial markets generally, to meet its required obligation resulting in other participants or financial institutions being unable to meet their obligations (including settlement obligations in a clearance and settlement system) when due;

“transfer” means the sending of funds, securities or other financial instruments or a right relating to those funds, securities or other financial instruments from one party to another party by —

- (a) conveyance of funds or physical instruments;
- (b) accounting entries on the books of a financial intermediary; or
- (c) book-entry movement of funds or physical instruments through a recognized system or the Central Bank system; and

“transfer instruction” means an order or electronic message requesting the movement of funds, securities or other financial instruments or a right relating to those funds, securities or other financial instruments from one party to another party.

PART II — *Clearance and Settlement Systems*

Recognition
of clearance
and settlement
systems

3. (1) Subject to this section, the Central Bank may recognise a clearance and settlement system that has any of the following objects —

- (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 referred to in paragraph (a), whether by —
 - (i) netting;
 - (ii) set-offs; and
 - (iii) gross settlement;
- (c) the final discharge of any indebtedness between participants in a clearance and settlement system which arises from the clearance or settlement of obligations referred to in paragraphs (a) and (b) through a system established by the Central Bank in terms of section 7; or
- (d) any of the following objects, to the extent that they are incidental to or connected with an object specified in paragraph (a), (b) or (c) —
 - (i) establishing a clearance system for the clearing of transfer instructions between all or any of the participants in the system and for the provision of services that are incidental to such clearing;
 - (ii) providing a forum for the consideration of matters of mutual interest concerning participants in the system;
 - (iii) acting as a medium of communication, on behalf of its participants, with the Government, the Central Bank, and other persons and authorities;
 - (iv) dealing with other matters of interest to its participants and fostering co-operation between them.

(2) The Central Bank may, in terms of subsection (1), recognise different clearance and settlement systems —

- (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 subsection (1) unless it is satisfied that —

- (a) only financial institutions and the Central Bank are permitted to become participants in the system;
- (b) the system fairly represents the interests of all financial institutions that are or will become participants in the system;
- (c) the Central Bank will be able adequately to monitor and regulate the system and the activities of its participants in order to ensure compliance with this Act and the Banking Act;
- (d) the constitution and any rules governing the system are fair, equitable and transparent and make adequate provision for —
 - (i) admitting financial institutions into the system as participants, and regulating and terminating their participation;
 - (ii) controlling its participants' use of clearance and settlement systems or operations;
 - (iii) appointing a management body or committee, representative of the participants, to organise and manage the system and the participants' participation in it;
 - (iv) appointing any person as a system operator within the system in order to provide clearing processing services to or on behalf of participants; and
 - (v) criteria according to which a participant may be authorised to introduce any person to provide payment services; and
- (e) the management body has ensured the provision of a contingency plan in support of the operational clearance and settlement system.

4. No amendment to the constitution of any recognised system, or to the rules governing the system, shall have effect until they have been approved by the Central Bank.

5. The constitution of every recognised system and any rules governing the system, together with any amendments to that constitution and those rules, shall be kept at —

- (a) the offices of the Central Bank; and
- (b) the head office in Botswana of every recognised system, and shall be open for inspection there by members of the public at all times during normal office hours.

6. (1) Subject to subsections (2) and (3), the Central Bank may by notice in writing to the management body of the system concerned, withdraw its recognition of a recognised system if the Bank has reasonable grounds for believing that —

- (a) the system no longer fairly represents the interests of all financial institutions that are or should become participants in the system;
- (b) the management body has contravened any provision of this Act or of the system's constitution; or
- (c) the manner in which the system is being conducted does not adequately protect the system against systemic risk,

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Approval of amendments to constitution and rules of recognised systems

Constitution and rules of recognised system to be open for inspection

Withdrawal of recognition from clearance and settlement system

and that it is in the public interest to withdraw its recognition from the system concerned.

(2) Before withdrawing its recognition from a system in terms of subsection (1), the Central Bank shall notify the system's management body, in writing, that it is considering doing so and of its reasons for considering such a step, and shall give the management body an opportunity to make representations in the matter.

(3) The Central Bank shall not withdraw its recognition from a system in terms of subsection (1) without paying due regard to any representations made by the system's management body.

7. (1) The Central Bank shall establish and operate its own system for the settlement of obligations among banks and recognized systems.

(2) The Central Bank may specify rules, procedures and participant requirements for the Central Bank system established in terms of subsection (1), provided that no such rule, procedure or participant requirement shall be made without adequate consultation with the participants of the system.

8. (1) In addition to any information that is required to be provided to the Central Bank in terms of the Banking Act, the management body of every recognised system, and every participant in the system, shall provide the Central Bank with such reports, returns and other information as the Central Bank may reasonably require regarding —

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

(2) The Central Bank shall —

- (a) obtain reports from any person or institution which is involved in the business of payment intermediation, whether under this Act or any other law; and
- (b) require any such institutions concerned to adopt or conform to specified operating requirements.

9. (1) If the Central Bank has reasonable grounds to believe that a management body or a participant in a recognised system or a settlement system is engaging in or is about to engage in any act, omission or course of conduct which results or is likely to result in systemic risk, or prejudices or will prejudice the integrity, effectiveness or security of the system concerned the Central Bank may issue a written directive requiring that management body or participant, as the case may be, to do any one or more of the following —

- (a) to cease engaging in the act, omission or course of conduct concerned;
- (b) to do such things as the Central Bank may specify to remedy the situation;
- (c) to provide the Central Bank with such information relating to the matter as is specified in the direction.

Establishment and operation of clearance and settlement system by the Central Bank

Provision of information to Central Bank

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Control of undesirable conduct in regard to recognised system

(2) Any person who contravenes or fails to comply with any provision of a directive in terms of subsection (1) shall be guilty of an offence and liable to a fine not exceeding P150 000.00.

(3) If any person contravenes or fails to comply with any provision of a directive in terms of subsection (1), whether or not criminal proceedings have been or may be instituted against him for an offence in terms of subsection (2), the Central Bank may apply to the High Court for an order directing him to comply with the provision concerned.

(4) On an application in terms of subsection (3), the High Court may make such order as, in its opinion, will ensure proper compliance with the directive concerned.

(5) This section shall be construed as additional to, and not in substitution for, any provision of the Banking Act that permits the Central Bank to issue directions to financial institutions.

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PART III — *Finality of Settlements Within Recognised System in the Central Bank System*

10. (1) Notwithstanding any other law but subject to this section, a payment or transfer which is effected in accordance with a recognised system or the Central Bank system and which is intended to settle —

- (a) the payment obligations or settlement obligations of a participant in the system pursuant to a payment or settlement instruction, as the case may be; or
- (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:

Provided that, if it subsequently appears that any amount or property so paid or transferred was not in fact due, it shall constitute a fresh debt owed by the payee or transferee, as the case may be, to the person who made the payment or transfer.

(2) If the Central Bank considers that the making of a payment or transfer referred to in subsection (1) is likely to result in systemic risk, the Central Bank may, by written notice to the participants concerned —

- (a) prohibit the making of the payment or transfer, if it has not already been made; or
- (b) set aside the payment or transfer, if it has already been made, and shall forthwith provide the participants with a written statement of its reasons for doing so:

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 (a) of subsection (2), any transaction effected in contravention of the prohibition shall be void.

Finality of payments and transfers made within settlement systems

(4) Where the Central Bank has set aside a payment or transfer in terms of paragraph (b) of subsection (2), the payment or transfer concerned shall be void *ab initio*.

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

11. Notwithstanding any other law no interdict or other order of any court shall operate to stay any payment or transfer which is required to be made in accordance with a recognised system or the Central Bank system and which is intended to settle —

- (a) the payment obligations or settlement obligations of a participant in the system; or
- (b) what are believed, by the person who is required to make the payment or transfer, to be the payment obligations or settlement obligations of a participant in the system.

PART IV — *Winding-Up, Judicial Management or Curatorship of Participants in Recognised System*

Central Bank to be notified of winding-up, judicial management or curatorship Cap 42:01

Winding-up or judicial management not to affect finality of prior settlements Cap 42:02 Cap 42:01

Rules, etc., of recognised systems binding on liquidator, judicial manager or curator Cap 42:02 Cap 42:01 Cap. 46:04

12. Where a participant in a recognised system is wound up or placed under judicial management or provisional judicial management in terms of the Companies Act, the person at whose instance the winding-up order or the order placing the participant under judicial management or provisional management, as the case may be, was issued shall lodge a copy of the order with the Central Bank.

13. Notwithstanding anything to the contrary in the Insolvency Act or the Companies Act, the winding up of a participant in a recognised system, or the placing of such a participant under judicial management or provisional judicial management, shall not affect the finality or irrevocability of any payment or transfer which became final and irrevocable in terms of section 10 before the copy of the relevant order was lodged with the Central Bank in terms of section 14.

14. (1) Notwithstanding anything to the contrary in the Insolvency Act, or the Companies Act, where a participant in a recognised system —

- (a) is wound up or placed under judicial management or provisional judicial management in terms of the Companies Act; or
- (b) is placed under curatorship in terms of the Banking Act, any provision relating to clearance or settlement to which the participant is a party shall be binding upon the participant's liquidator, judicial manager, provisional judicial manager or curator, as the case may be.

(2) Subsection (1) shall apply to the extent that it applies to any payment obligation or settlement obligation which —

- (a) was determined through clearance or settlement before the issue of the winding up order or the order placing the participant under judicial management, provisional judicial management or curatorship, as the case may be; and

(b) was either —

- (i) to be discharged or transferred on or after the issue of that order; or
- (ii) was overdue for settlement on the date of that order.

15. (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 or the Companies Act, but subject to this section, where a participant in a recognised system is wound up in terms of the Companies Act, the following items shall be paid from the participant’s estate, in the following order —

- (a) undelivered transfer instructions, other than priority transfer instructions, that were drawn on the participant and cleared through the system before the making of the winding up order; and
- (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 above any other unsecured claim against the estate.

(3) No payment or transfer shall be made pursuant to subsection (2) in preference to any other claim against an estate unless a request for such payment has been made within sixty days after the making of the winding up order in regard to the participant concerned.

(4) Subsection (2) shall not be construed as permitting a transfer instruction to be satisfied in preference to any other claim against an estate, where the instruction was —

- (a) certified by the participant concerned; or
- (b) in the case of a priority payment instruction, was issued by the participant concerned,

with a view to giving the drawee of the instruction a preference over the participant’s other creditors.

PART V — *General*

16. Any person, financial institution or entity operating or participating in an unrecognised system shall be guilty of an offence and liable to a fine not exceeding P500,000.

Priority of certain instruments on winding-up of participant in recognised systems
Cap 42:02
Cap 42:01

17. (1) Subject to subsection (3), no person other than —

- (a) a participant in a recognised system or the Central Bank system, acting in accordance with the system’s constitution or rules; or
- (b) a person introduced by a participant in a recognised system or Central Bank system in accordance with a provision of the system’s constitution or rules referred to in section 3(3)(d)(v), shall, as a regular feature of his business, accept a transfer instruction from any other person for the purpose of making a transfer on behalf of that other person to a third person to whom the transfer is due.

Prohibition against unrecognised systems
Prohibition against settlement intermediation

(2) Any person who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding P200 000 or to imprisonment for a period not exceeding 10 year, or to both.

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

Cap 56:03

(a) Botswana Savings Bank Act;

Cap 42:03

(b) a building society registered in terms of the Building Societies Act;

Cap. 72:01

(c) Botswana Postal Services Act;

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

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

(4) The Central Bank may, by notice in the Gazette and other media, exempt any person or class of persons from the provisions of subsection (1), if the Bank is satisfied that such an exemption will be in the public interest and will not cause undue risk to any recognised payment system.

Settlement of disputes arising out of recognised systems or settlement systems

18. (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 taken by the Central Bank for the purposes of this Act, including a decision to withdraw recognition from the system; or

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

(i) any decision taken by the Central Bank for the purposes of this Act; or

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

the matter shall be settled in accordance with the provisions of this section.

(3) The aggrieved party shall provide the Central Bank, the management body or the other participant, as the case may be, with a written statement setting out full particulars of its grievance, and the parties shall thereupon attempt to settle the matter by consensus within seven business days.

(4) If the parties are unable to settle the matter as contemplated in subsection (3), they may attempt to settle it within a further period of ten business days by a process of mediation whereby —

(a) the parties agree on a mediator;

(b) the mediator familiarises himself with the parties’ respective contentions;

(c) the mediator and all parties discuss the matter at one or more meetings attended by them all, and attempt to settle the matter by consensus; and

(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 (3) or by mediation in terms of subsection (4), or if mediation in terms of subsection (4) has been unsuccessful, the matter shall be referred to a single arbitrator, and the Arbitration Act, shall apply in respect of the matter as if the parties had entered into an arbitration agreement contemplated by that Act:

Provided that the arbitrator shall reach his decision in the matter within one month after his appointment, unless the parties agree to an extension of that period.

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

19. (1) Any function of the Central Bank under this Act may be carried out on behalf of the Bank —

- (a) by the Governor of the Central Bank; or
- (b) subject to the directions of the Governor of the Central Bank, by any Deputy Governor or officer of the Central Bank specified by the Governor.

(2) The Governor of the Central Bank and any Deputy Governor or officer of the Central Bank specified in terms of paragraph (b) of subsection (1) shall carry out the functions referred to in that subsection in accordance with any general directions of policy that the board of directors of the Central Bank may give them.

(3) This section shall not be construed as limiting the Central Bank's power under any other law to delegate its functions under this Act to any person.

20. (1) Subject to subsections (2) and (3), no —

- (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 or the constitution or rules of any recognised system and which relates to the affairs of a particular financial institution.

(2) The Central Bank may disclose any information whose disclosure, in the Central Bank's opinion, is reasonably necessary to protect the integrity, effectiveness or security of a recognised payment system or a settlement system.

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

- (a) any disclosure made by the person concerned in the performance of his functions under this Act or under the constitution or rules of any recognised system, or when required to do so by a court or in terms of any other enactment; or
- (b) the disclosure of information that is generally known to members of the public or a substantial section of the public.

(4) Any person who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding P10 000 or to imprisonment for a term not exceeding one year or to both.

Cap 06:01

Exercise of functions by Central Bank

Preservation of secrecy

Use of
confidential
information
for personal
gain

21. (1) Subject to subsection (2), if an officer or employee of the Central Bank or a member or employee of a management body, who for personal gain makes use of any information acquired in the performance of functions under this Act or under the constitution or rules of any recognised system, and which relates to the affairs of a particular financial institution, shall be guilty of an offence and liable to a fine not exceeding P25 000 or double the amount of his gain, whichever is the greater or imprisonment for a period not exceeding five years or to both.

(2) It shall be a defence to a charge under subsection (1) for the person charged to show that the information used was generally known to members of the public or to a substantial section of the public.

Evidence

22. 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 systems or Central Bank,

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

Unpaid items
due to
insufficient
funds

23. (1) Any person who knowingly draws or issues a cheque, or other payment instrument against which there are no sufficient funds in his account at a financial institution on which the cheque or other payment instrument is drawn shall be guilty of an offence and liable to a fine not exceeding P1500 or 3 months imprisonment or to both.

(2) The mere fact that the cheque or other payment instrument was returned unpaid with the words “insufficient funds or other words to that effect” shall be *prima facie* evidence that the drawer had no funds in the account against which the cheque or other payment instrument was drawn and the burden of proof shall lie with the accused person.

Computer
entries

24. The entries in ledgers, day-books, cash books and other accounts of any financial institution, whether captured manually by handwriting or computerised shall be *prima facie* evidence of the matters, transactions and accounts therein recorded, on proof being given by the affidavit of one of the directors, managers, or officers of such financial institution or by evidence, that such manual or computerised ledgers, day books, cash books or other account books are or have been the ordinary books of such financial institution and that the said entries have been made in the usual and ordinary course of business, and that such books are in or come immediately from the custody or control of such financial institution.

Imaging

25. Photographic images such as film, microfilm, microfiche, or computer images of original documents such as cheques or other payment instruments, securities, certificates of deposits, account ledgers, Bank of Botswana certificates shall be admissible as *prima facie* evidence of the matters, and or transactions of the original instrument, on proof being given on written affidavit.

26. The Central Bank shall establish a committee — Review of Act
(a) to review this Act from time to time; and
(b) to make recommendations to the Minister responsible for finance and development planning with regard to amendments to this Act which, in the committee's opinion, have become advisable.

27. The Minister may make regulations providing for the better carrying out of the provisions of this Act. Regulations

PASSED by the National Assembly this 26th day of November, 2002.

C.T. MOMPEI,
Clerk of the National Assembly.