§ 618-a. Repudiation of contracts. 1. Except as otherwise provided in this section, when the superintendent has taken possession of the business and property in this state of a banking organization, unless the federal regulator or insurer is appointed as receiver or liquidator, the superintendent may assume or repudiate any contract, including an unexpired lease, of the banking organization: (a) to which such banking organization is a party, (b) the performance of which the superintendent, in the superintendent's discretion, determines to be burdensome, and (c) the repudiation of which the superintendent determines, in the superintendent's discretion, will promote the orderly administration of the banking organization's affairs. After the expiration of ninety days from the date that the superintendent takes possession of the banking organization, any party to a contract with the banking organization being liquidated may demand in writing that the superintendent assume or repudiate such contract. If the superintendent has not assumed or repudiated the contract within fifteen calendar days from the date of receipt of the demand by the superintendent, the affected party may bring an action in the supreme court in the judicial district in which the principal office of the banking organization is located to obtain an order requiring the superintendent to decide whether to assume or repudiate that contract. If the superintendent has not assumed or repudiated a contract by one month before the last date for filing claims against the banking organization being liquidated pursuant to section six hundred twenty of this article, such contract shall be deemed repudiated. Notwithstanding the foregoing, with respect to an unexpired lease of the banking organization for the rental of real property under which the banking organization was a lessee, if the superintendent remains in possession of the leasehold, the superintendent shall not be required to assume or repudiate such lease and may continue in possession of such leasehold for the remainder of the term of the lease in accordance with the terms of the lease; provided, however, that should the superintendent later repudiate the lease before the end of the lease term, any amounts that may be due the lessor due to such repudiation shall be calculated according to the provisions of paragraph (a) of subdivision three of this section. Notwithstanding any other provision contained in this subdivision, in liquidating a branch or agency of a foreign banking corporation, the

superintendent shall not assume or repudiate any qualified financial contract that the branch or agency entered into which is subject to a multi-branch netting agreement or arrangement that provides for netting present or future payment obligations or payment entitlements (including termination or close-out values relating to the obligations or entitlements) among the parties to the contract and agreement or arrangement and the superintendent shall not be required to assume or repudiate any other qualified financial contract that the branch or agency entered into; provided, however, that upon any repudiation of any qualified financial contract or the termination or liquidation of any qualified financial contract in accordance with its terms, the liability of the superintendent under such qualified financial contract shall be determined in accordance with subdivision two of this section.

2. (a) Except as otherwise provided in this section, upon the repudiation or termination of any contract pursuant to subdivision one of this section, the liability of the superintendent shall be limited to the actual direct compensatory damages of the parties to the contract, determined as of the date the superintendent took possession of the banking organization. The superintendent shall not be liable for any future wages other than severance payments (to the extent such payments are reasonable), or for payments for future services, costs of cover, or any consequential, punitive or exemplary damages, damages for lost profits or lost opportunity or damages for pain and suffering.

(b) Except as otherwise provided in this section, the liability of the superintendent upon the repudiation of any qualified financial contract, or in connection with the termination or liquidation of any qualified financial contract in accordance with the terms thereof, shall be limited as provided in paragraph (a) of this subdivision, except that compensatory damages shall be deemed to include normal and reasonable costs of cover or other reasonable measures of damages utilized among participants in the market for qualified financial contract claims, calculated as of the date of repudiation or the date of the termination of such qualified financial contract in accordance with its terms. Upon the repudiation of any qualified financial contract or in connection with the termination or liquidation of any qualified financial contract in accordance with the terms thereof, if the superintendent shall be

entitled to damages, such damages shall be paid over by the party to the superintendent upon written demand pursuant to subdivision two of section six hundred fifteen of this article, notwithstanding any provision in any such contract that purports to effect a forfeiture of such damages.

(c) In the case of the liquidation of a branch or agency of a foreign banking corporation by the superintendent, with respect to qualified financial contracts subject to netting agreements or arrangements that provide for netting present or future payment obligations or payment entitlements (including termination or close-out values relating to the obligations or entitlements) among the parties to the contracts and agreements or arrangements, the liability of the superintendent to any party to any such qualified financial contract upon repudiation or in connection with the termination or liquidation of such qualified financial contract in accordance with the terms thereof, shall be calculated as of the date of repudiation or the date of the termination of such qualified financial contract in accordance with its terms and shall be limited to the lesser of (i) the global net payment obligation and (ii) the branch/agency net payment obligation. The liability of the superintendent under this paragraph shall be reduced by any amount otherwise paid to or received by the party in respect of the global net payment obligation pursuant to such qualified financial contract which if added to the liability of the superintendent under this paragraph would exceed the global net payment obligation. The liability of the superintendent under this paragraph to a party to a qualified financial contract also shall be reduced by the fair market value or the amount of any proceeds of collateral that secures and has been applied to satisfy the obligations of the foreign banking corporation pursuant to such qualified financial contract to the party. In the event that netting under the applicable netting agreement or arrangement results in a branch/agency net payment entitlement, notwithstanding any provision in any such contract that purports to effect a forfeiture of such entitlement, the superintendent may make written demand upon the party to such contract under subdivision two of section six hundred fifteen of this article for an amount not to exceed the lesser of (x) the global net payment entitlement and (y) the branch/agency net payment entitlement. The liability of the party under this paragraph shall be

reduced by any amount otherwise paid to or received by the superintendent or any other liquidator or receiver of the foreign banking corporation in respect of the global net payment entitlement pursuant to such qualified financial contract which if added to the liability of the party under this paragraph would exceed the global net payment entitlement. The liability of the party under this paragraph to the superintendent pursuant to such qualified financial contract also shall be reduced by the fair market value or the amount of any proceeds of collateral that secures and has been applied to satisfy the obligations of the party pursuant to such qualified financial contract to the foreign banking corporation.

(d) A party to a qualified financial contract with a foreign banking corporation, the branch or agency of which the superintendent is liquidating, which party has a perfected security interest in collateral, or other valid lien or security interest in collateral enforceable against third parties pursuant to a security arrangement related to such qualified financial contract, may retain all such collateral and upon repudiation of that qualified financial contract, or in connection with the termination or liquidation of that qualified financial contract in accordance with its terms thereof, apply such collateral in satisfaction of any claims secured by the collateral, provided that the total amount so applied to such claims shall in no event exceed the global net payment obligation, if any.

(e) The following terms shall have the following meanings: (i) "qualified financial contract" means any securities contract, commodity contract, forward contract (including spot and forward foreign exchange), repurchase agreement, swap agreement, and any similar agreement, any option to enter into any such agreement, including any combination of the foregoing, and any master agreement for such agreements (such master agreement, together with all supplements thereto, shall be treated as one qualified financial contract), provided that such contract, option or agreement, or combination of contracts, options or agreements is reflected in the books, accounts or records of the banking organization or a party provides documentary evidence of such agreement; the superintendent may define by regulation securities contract, commodity contract, forward contract, repurchase agreement and swap agreement, and may by regulation or order determine any other

agreement to be a qualified financial contract for purposes of this paragraph; (ii) "global net payment obligation" means the amount, if any, owed by a foreign banking corporation as a whole to a party after giving effect to the netting provisions of a qualified financial contract with respect to all transactions subject to netting under such qualified financial contract; (iii) "global net payment entitlement" means the amount, if any, owed by a party (or that would be owed if the relevant agreements provided for payments to either party, upon termination thereof under any and all circumstances) to a foreign banking corporation as a whole after giving effect to the netting provisions of a qualified financial contract with respect to all transactions subject to netting under such qualified financial contract; (iv) "branch/agency net payment obligation" means with respect to a qualified financial contact the amount, if any, that would have been owed by the foreign banking corporation to a party after netting only those transactions entered into by the branch or agency and such party under such qualified financial contract; and (v) "branch/agency net payment entitlement" means with respect to a qualified financial contract the amount, if any, that would have been owed by a party to the foreign banking corporation after netting only those transactions entered into by the branch or agency and such party under such qualified financial contract. The superintendent shall have authority to prescribe such regulations relating to qualified financial contracts and netting thereof as the superintendent shall deem appropriate.

3. (a) If the superintendent repudiates a lease of the banking organization for the rental of real or personal property under which the banking organization was a lessee, the lessor under such lease shall be entitled to file a claim with the superintendent for whichever is the least amount of: (i) the amount designated as liquidated damages contained in the agreement between the banking organization and the lessor, (ii) an amount equal to one year's rent under the terms of the repudiated lease, or (iii) an amount equal to the rent for the remaining term of the lease.

(b) If the superintendent repudiates a lease of the banking organization for the rental of real property under which the banking organization was a lessor, and the lessee was not in default at the time

of repudiation, the lessee under such repudiated lease may either (i) treat the lease as terminated by such repudiation and vacate the premises, or (ii) remain in possession of the leasehold interest for the balance of the term of the lease, and for any renewal or extension of such term that is enforceable by such lessee under applicable non-insolvency law, unless the lessee defaults under the terms of the lease after the date of such repudiation. If the lessee remains in possession of the leasehold interest, the lessee shall continue to pay to the superintendent the contractual rent pursuant to the terms of the lease after the date of the repudiation of such lease, and may offset against such rent payment any damages which may accrue due to the nonperformance of any obligation of the banking organization under the lease after the date of repudiation. The superintendent shall not be liable to the lessee for any damages arising after such date as a result of the repudiation other than the amount of any offset allowed under this subdivision. Nothing stated herein shall prohibit the superintendent from entering into a new contract with the lessee for the rental of the leasehold which was the subject of the repudiated lease.

4. Except as otherwise provided, notwithstanding any provision in an unexpired lease or other contract, or in applicable law, a contract or unexpired lease of the banking organization may not be terminated or modified by any party other than the superintendent without the concurrence of the superintendent, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the superintendent's taking of possession, solely pursuant to a provision in such contract or lease that is conditioned on the superintendent's taking of possession, or the insolvency, financial condition or liquidation of the banking organization.

5. Nothing in this section shall affect the right of a party to a contract of a foreign banking corporation to seek performance of such contract or damages thereon in any other jurisdiction, provided, however, that the superintendent shall not be liable for the performance of such contract or damages thereon in any other jurisdiction.

6. The rights granted herein are in addition to any other rights

available to the superintendent under common law or any other law.