

International **Comparative** Legal Guides



Derivatives **2021**

A practical cross-border insight into derivatives

Second Edition

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Cayman Islands

Maples Group



Tina Meigh



Hailee Robinson

1 Documentation and Formalities

1.1 Please provide an overview of the documentation (or framework of documentation) on which derivatives transactions are typically entered into in your jurisdiction. Please note whether there are variances in the documentation for certain types of derivatives transactions or counterparties; for example, differences between over-the-counter (“OTC”) and exchange-traded derivatives (“ETD”) or for particular asset classes.

Cayman Islands entities tend to use market-standard documentation for all types of derivatives transactions. The 1992 and 2002 ISDA Master Agreements, including the appropriate Schedules and credit support documentation, are commonly used to document OTC derivatives transactions by Cayman Islands entities. There are no variances in contractual documentation for different types of Cayman Islands counterparties and there is typically no use of any Cayman Islands law-governed documentation.

1.2 Are there any particular documentary or execution requirements in your jurisdiction? For example, requirements as to notaries, number of signatories, or corporate authorisations.

No. Cayman Islands law will respect the governing law of the contract to determine execution requirements. The constitutional documents of each Cayman Islands entity will determine the legal authority to execute and deliver binding agreements. It is normal for Cayman Islands entities to authorise entry into the derivatives agreements by way of board resolution (or equivalent) and, where those agreements are executed and delivered by way of deed, to note that such agreement is executed and delivered by way of deed.

1.3 Which governing law is most often specified in ISDA documentation in your jurisdiction? Will the courts in your jurisdiction give effect to any choice of foreign law in the parties’ derivatives documentation? If the parties do not specify a choice of law in their derivatives contracts, what are the main principles in your jurisdiction that will determine the governing law of the contract?

New York law and English law are the principal governing laws specified in derivatives transactions. Cayman Islands courts will generally recognise the choice of governing law by the parties, assuming such governing law is legal, valid and binding

as a matter of such law. The courts of the Cayman Islands will not observe and give effect to a choice of the laws of a particular jurisdiction as the governing law of a document if to do so would be contrary to the public policy of the Cayman Islands.

2 Credit Support

2.1 What forms of credit support are typically provided for derivatives transactions in your jurisdiction? How is this typically documented? For example, under an ISDA Credit Support Annex or Credit Support Deed.

All generally accepted market-standard credit support is generally recognised in the Cayman Islands, including collateral in the form of cash and securities. A large number of derivatives transactions use an ISDA Credit Support Annex or Deed, although other forms of bespoke documentation can be used, depending on the nature of the transaction and commercial needs of the parties.

2.2 Where transactions are collateralised, would this typically be by way of title transfer, by way of security, or a mixture of both methods?

This is dependent on the type of derivatives transaction and the governing law of the arrangements. Cayman Islands entities enter into derivatives transactions using both outright title transfer with a right of re-transfer and the grant of security over assets. However, in line with market trends, more derivatives transactions utilise a grant of security over assets.

2.3 What types of assets are acceptable in your jurisdiction as credit support for obligations under derivatives documentation?

There are no specific prohibitions under Cayman Islands law in this regard. Most derivatives transactions involve liquid assets that are easy to take security over, such as cash or securities, but any asset capable of being secured can be used as credit support for obligations under derivatives documentation.

2.4 Are there specific margining requirements in your jurisdiction to collateralise all or certain classes of derivatives transactions? For example, are there requirements as to the posting of initial margin or variation margin between counterparties?

There are no specific margining requirements in the Cayman Islands as there are no specific derivatives regulations that are

generally applicable locally. Certain regulated entities, such as banks and insurance companies, may have requirements imposed by the local regulator under their business plans.

2.5 Does your jurisdiction recognise the role of an agent or trustee to enter into relevant agreements or appropriate collateral/enforce security (as applicable)? Does your jurisdiction recognise trusts?

Yes, to both parts of the question. Such arrangements are typically governed by laws other than the laws of the Cayman Islands and so Cayman Islands law will recognise those arrangements, assuming the same are validly made under the applicable governing law. A trust is not a separate legal entity as a matter of Cayman Islands law and it is typical, although not necessary, for a trustee to delegate certain functions to advisors, managers or other agents who have the authority to act on behalf of the trustee and execute documents on its behalf.

2.6 What are the required formalities to create and/or perfect a valid security over an asset? Are there any regulatory or similar consents required with respect to the enforcement of security?

Under Cayman Islands conflicts of law principles, the creation of the security interests would be determined by the governing law of the applicable credit support agreement. The law that determines the proprietary aspects of a security interest will depend, in part, upon the nature of the assets being secured. There are no specific perfection or priority formalities required by local law simply because the collateral provider is a Cayman Islands entity.

3 Regulatory Issues

3.1 Please provide an overview of the key derivatives regulation(s) applicable in your jurisdiction and the regulatory authorities with principal oversight.

There are no current derivatives exchanges or OTC markets being made from the Cayman Islands and consequently, no specific derivatives or swaps legislation in force. The main financial regulator is the Cayman Islands Monetary Authority (“CIMA”) who is directly responsible for the licensing and regulation of various financial services businesses such as banks, insurance companies, trust companies and funds. Those regulatory laws relate to the regulation of the various entities and for banks, insurance companies and trust companies that are licensed or registered with CIMA, there may be restrictions that relate to the entry of derivatives transactions by such entity. There are no such potential regulatory restrictions under the Mutual Funds Act (As Revised) for funds as licensed and registered funds are not required to file a business plan, but rather it is expected that any entry into derivatives transactions will be disclosed in offering documents to investors.

3.2 Are there any regulatory changes anticipated, or incoming, in your jurisdiction that are likely to have an impact on entry into derivatives transactions and/or counterparties to derivatives transactions? If so, what are these key changes and their timeline for implementation?

There are no developments pending that the current regulatory or legal environment relating to derivatives transactions may be expected to change in the foreseeable future.

3.3 Are there any further practical or regulatory requirements for counterparties wishing to enter into derivatives transactions in your jurisdiction? For example, obtaining and/or maintaining certain licences, consents or authorisations (governmental, regulatory, shareholder or otherwise) or the delegating of certain regulatory responsibilities to an entity with broader regulatory permissions.

It is common in derivatives documentation for Cayman Islands counterparties to provide representations and warranties with respect to their regulated status and compliance with any applicable regulations.

3.4 Does your jurisdiction provide any exemptions from regulatory requirements and/or for special treatment for certain types of counterparties (such as pension funds or public bodies)?

No; see our response to question 3.1.

4 Insolvency / Bankruptcy

4.1 In what circumstances of distress would a default and/or termination right (each as applicable) arise in your jurisdiction?

With respect to Companies, Limited Liability Companies (“LLCs”) and Exempted Limited Partnerships (“ELPs”), rights in favour of the liquidators arise upon an insolvency of such entity. However, most derivatives transactions, particularly those governed by ISDA Master Agreements, will provide for wider contractual rights of termination based on wider, contractually agreed defaults.

4.2 Are there any automatic stay of creditor action or regulatory intervention regimes in your jurisdiction that may protect the insolvent/bankrupt counterparty or impact the recovery of the close-out amount from an insolvent/bankrupt counterparty? If so, what is the length of such stay of action?

Although there is an automatic stay of proceedings against a Company, LLC or ELP when an order for winding up has been made and there is a discretionary stay on the appointment of a provisional liquidator, the stay does not prevent any contractually agreed netting arrangements or any secured creditor from enforcing its security or collateral interest.

4.3 In what circumstances (if any) could an insolvency/bankruptcy official render derivatives transactions void or voidable in your jurisdiction?

There are very limited circumstances in which a liquidator could void a derivatives transaction. Entry by a Company, LLC or ELP into a derivatives transaction at any time within the six months immediately preceding a liquidation, where such entity is unable to pay its debts as they become due from its own monies and there is deemed an intention to give such counterparty a preference over other creditors, will be invalid. In practice, we believe it is unlikely that the Company’s, LLC’s or ELP’s entry into a derivatives transaction on an arm’s length basis would be regarded as a voidable preference.

4.4 Are there clawback provisions specified in the legislation of your jurisdiction that could apply to derivatives transactions? If so, in what circumstances could such clawback provisions apply?

In the event of the insolvency of a Cayman Islands entity, the rights of a non-defaulting party may be affected by certain insolvency provisions of Cayman Islands law, including voidable preferences, transactions at an undervalue, fraudulent trading, fraudulent preference and fraudulent disposition.

4.5 In your jurisdiction, could an insolvency/bankruptcy-related close-out of derivatives transactions be deemed to take effect prior to an insolvency/bankruptcy taking effect?

No, it could not.

4.6 Would a court in your jurisdiction give effect to contractual provisions in a contract (even if such contract is governed by the laws of another country) that have the effect of distributing payments to parties in the order specified in the contract?

Absent insolvency (when the requirement for *pari passu* basis of distribution would apply), a Cayman Islands court would recognise the contractual right of parties to agree subordination and other types of contractual payment arrangements, assuming the same are legal, valid and binding as a matter of the governing law of the arrangements.

5 Close-out Netting

5.1 Has an industry-standard legal opinion been produced in your jurisdiction in respect of the enforceability of close-out netting and/or set-off provisions in derivatives documentation? What are the key legal considerations for parties wishing to net their exposures when closing out derivatives transactions in your jurisdiction?

Yes, Maples and Calder (Cayman) LLP prepare the industry-standard opinion for ISDA.

5.2 Are there any restrictions in your jurisdiction on close-out netting in respect of all derivatives transactions under a single master agreement, including in the event of an early termination of transactions?

Generally, the Cayman Islands is viewed as a creditor- and netting-friendly jurisdiction. For detailed specifics on netting, it is best to refer to the industry-standard opinion for ISDA.

5.3 Is Automatic Early Termination ("AET") typically applied/disapplied in your jurisdiction and/or in respect of entities established in your jurisdiction?

Not typically, but effective contractual arrangements for both AET and non-AET would be recognised and respected by Cayman Islands courts.

5.4 Is it possible for the termination currency to be denominated in a currency other than your domestic currency? Can judgment debts be applied in a currency other than your domestic currency?

A claim can be made in any proceedings in the Cayman Islands courts for an amount in a currency other than Cayman Islands dollars. A Cayman Islands court has jurisdiction to give judgments expressed in foreign currencies.

6 Taxation

6.1 Are derivatives transactions taxed as income or capital in your jurisdiction? Does your answer depend on the asset class?

There are no income or capital gains taxes applicable to Cayman Islands entities and therefore, as a matter of Cayman Islands law, this question is not applicable.

6.2 Would part of any payment in respect of derivatives transactions be subject to withholding taxes in your jurisdiction? Does your answer depend on the asset class? If so, what are the typical methods for reducing or limiting exposure to withholding taxes?

There are no withholding taxes applicable in the Cayman Islands.

6.3 Are there any relevant taxation exclusions or exceptions for certain classes of derivatives?

This is not applicable; see our responses to questions 6.1 and 6.2.

7 Bespoke Jurisdictional Matters

7.1 Are there any material considerations that should be considered by market participants wishing to enter into derivatives transactions in your jurisdiction? Please include any cross-border issues that apply when posting or receiving collateral with foreign counterparties (e.g. restrictions on foreign currencies) or restrictions on transferability (e.g. assignment and novation, including notice mechanics, timings, etc.).

The Cayman Islands is generally regarded as a creditor- and netting-friendly jurisdiction for derivatives counterparties to enter into transactions with Cayman Islands entities, such as funds and structured finance vehicles. There are no jurisdiction-specific cross-border issues and there are no specific Cayman Islands legislative restrictions. Any such restrictions would be asset-specific as opposed to jurisdictional. Market participants wishing to enter into derivatives transactions should have regard generally to cross-border issues such as anti-money laundering and beneficial ownership regimes.

8 Market Trends

8.1 What has been the most significant change(s), if any, to the way in which derivatives are transacted and/or documented in recent years?

From a Cayman Islands perspective, none. As noted in our answer to question 1.1, the majority of derivatives transactions

are documented under ISDA Master Agreements. Accordingly, developments in ISDA documentations, particularly with regard to new protocols to deal with new evolutions in the market, are generally followed.

8.2 What, if any, ongoing or upcoming legal, commercial or technological developments do you see as having the greatest impact on the market for derivatives transactions in your jurisdiction? For example, developments that might have an impact on commercial terms, the volume of trades and/or the main types of products traded, smart contracts or other technological solutions.

Ongoing regulation of, in particular, OTC derivatives transactions by EU and US regulatory authorities will likely have

the greatest impact on derivatives transactions entered into by Cayman Islands entities. The role the Cayman Islands plays in the international derivatives market is essentially through Cayman Islands entities (in particular, funds and structured finance vehicles), being counterparties, rather than as a market or governing law applicable to such derivatives transactions. Due to the nature of this role, we see the Cayman Islands continuing to be a creditor- and netting-friendly jurisdiction, receptive to market developments and, ultimately, a jurisdiction of choice for both financial institutions and counterparties in this commercial arena.



Tina Meigh is head of the Cayman Islands Finance team at Maples and Calder, the Maples Group's law firm. She specialises in finance transactions and has extensive experience in all aspects of fund finance, banking, derivatives and securitisations. Tina represents hedge funds, private equity funds and banks on lending transactions, bank products, deal structures and on all types of secured transactions. She advises a large number of international associations and financial institutions on derivatives and issues surrounding related collateral packages in the context of insolvency in the Cayman Islands. She also has significant experience of general corporate and commercial matters and the establishment of offshore investment funds.

Maples Group
Ugland House
South Church Street
PO Box 309
Grand Cayman KY1-1104
Cayman Islands

Tel: +1 345 814 5242
Email: tina.meigh@maples.com
URL: www.maples.com



Hailee Robinson is an associate in the Finance team at Maples and Calder, the Maples Group's law firm, and is based in the Cayman Islands. She has wide experience advising on all finance transactions including banking, fund financing (acting for both lenders and borrowers), aircraft financing, structured finance (in particular CLO transactions), and Cayman Islands Stock Exchange listings. Hailee also advises on general corporate and commercial matters.

Maples Group
Ugland House
South Church Street
PO Box 309
Grand Cayman KY1-1104
Cayman Islands

Tel: +1 345 814 5181
Email: hailee.robinson@maples.com
URL: www.maples.com

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