

International **Comparative** Legal Guides



Derivatives **2020**

A practical cross-border insight into derivatives

First Edition

Featuring contributions from:

Bonelli Erede Lombardi Pappalardo LLP

Borenus Attorneys Ltd

CARDIGOS

Carey

Credit Agricole Corporate and Investment Bank

Davis Polk & Wardwell LLP

Gilbert + Tobin

GSK Stockmann

Haynes and Boone, LLP

Hengeler Mueller

Jeanetet AARPI

Maples Group

Nagashima Ohno & Tsunematsu

Nishimura & Asahi

Paul, Weiss, Rifkind, Wharton & Garrison LLP

Shearman & Sterling LLP

Travers Smith LLP

ICLG.com

Expert Chapters

- 1** **Smart Contracts in the Derivatives Space: An Overview of the Key Issues for Buy-Side Market Participants**
Jonathan Gilmour & Vanessa Kalijnikoff Battaglia, Travers Smith LLP
- 4** **Close-out Under the 1992 and 2002 ISDA Master Agreements**
Donna Parisi, Azam Aziz, Geoffrey Goldman & Daniel Laguardia, Shearman & Sterling LLP
- 15** **Structural Considerations in Deal Contingent Hedges**
Meyer C. Dworkin & Michele Babkine, Davis Polk & Wardwell LLP
- 19** **Derivatives and Incentives for Opportunistic or Manipulative Behaviour: Related Issues and Responses**
Giorgio Bovenzi, Matthew Frankle, Matthew Howes & Brian Sung, Haynes and Boone, LLP
- 26** **Japanese Yen Interest Rate Benchmark Reform – Crossroad of the Local Movements in Japan and the Global Movement in the Derivatives Space**
Yusuke Motoyanagi & Toshiyuki Yamamoto, Nishimura & Asahi
- 32** **Cross-Border Derivatives for Project Finance in Latin America**
Felicity Caramanna, Credit Agricole Corporate and Investment Bank

Q&A Chapters

- 36** **Australia**
Gilbert + Tobin: Louise McCoach
- 43** **Cayman Islands**
Maples Group: Tina Meigh & Alasdair Robertson
- 48** **Chile**
Carey: Francisco Ugarte, Alejandra Daroch & Domingo Russi
- 55** **England & Wales**
Travers Smith LLP: Jonathan Gilmour & Vanessa Kalijnikoff Battaglia
- 64** **Finland**
Borenus Attorneys Ltd: Niina Nuottimäki & Jenny Shahnovskij
- 71** **France**
Jeantet AARPI: Jean-François Adelle, Thibault Mercier & Tamara Mammadova
- 80** **Germany**
Hengeler Mueller: Stefan Krauss & Christian Schmies
- 87** **Italy**
Bonelli Erede Lombardi Pappalardo LLP: Giuseppe Massimiliano Danusso, Angelica Spinelli Giordano & Matteo Bencic
- 94** **Japan**
Nagashima Ohno & Tsunematsu: Ichiro Oya, Masayuki Fukuda, Hideaki Suda & Tsutomu Endo
- 101** **Luxembourg**
GSK Stockmann: Andreas Heinzmann & Valerio Scollo
- 107** **Portugal**
CARDIGOS: Pedro Cardigos, Maria Almeida Fernandes & Sara Santos Dias
- 114** **USA**
Paul, Weiss, Rifkind, Wharton & Garrison LLP: Manuel S. Frey & Anastasia V. Peterson

Cayman Islands

Maples Group



Tina Meigh



Alasdair Robertson

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. If the 1992 or 2002 ISDA Master Agreements are not typically used, please describe the contracts which are used, as well as any appendices or annexures.

Typically, both the 1992 and 2002 ISDA Master Agreements (together with appropriate Schedules and credit support documentation, in the usual market form) are put in place by Cayman Islands entities to document derivative transactions.

1.2 Are there any variances in documentation for certain types of derivatives transactions or between certain types of counterparties in your jurisdiction? For example, what differences do you see 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. 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.

1.3 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. It is, however, normal practice for Cayman Islands entities to authorise entry into the derivative agreements by way of board resolutions (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.

1.4 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?

The most often specified are New York law and English law. 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.

2 Credit Support

2.1 What forms of credit support are typically provided for derivatives transactions in your jurisdiction?

All generally accepted market standard credit support is generally recognised in the Cayman Islands, including collateral in the form of cash and securities.

2.2 How is credit support for derivatives transactions typically documented in your jurisdiction? For example, under an ISDA Credit Support Annex or Credit Support Deed.

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.

2.3 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 really 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.

2.4 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 and so any asset capable of being secured can be. Most derivatives transactions involve liquid assets that are easy to take security over, such as cash or securities.

2.5 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.

2.6 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.

2.7 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 law which 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.

As there are no current derivatives exchanges or OTC markets being made from the Cayman Islands, there is no specific derivatives or swaps legislation in force. The main financial regulator is the Cayman Islands Monetary Authority who license and regulate 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 the Cayman Islands Monetary Authority, there may be restrictions that relates to the entry of derivatives transactions by such entity. There are no such potential regulatory restrictions under the Mutual Funds Law (2020 Revision) 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?

No, not at present.

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)?

In light of our answer to question 3.1, no.

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, LLCs and Exempted Limited Partnerships, rights in favour of the liquidators arise upon an insolvency of such entity. However, most derivatives transactions (and in particular 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 Exempted Limited Partnership, 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. This relates to the entry by a Company, LLC or Exempted Limited Partnership into a derivatives transaction at any time within the six months immediately preceding a liquidation, where such entity is essentially cash flow insolvent and the intention was to prefer such counterparty. In practice, we believe it is unlikely the Company's, LLC's or Exempted Limited Partnership'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 which 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 and fraudulent trading.

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) which have the effect of distributing payments to parties in the order specified in the contract?

Absent insolvency (when the *pari passu* principles come into play), 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 prepare the industry standard opinion for ISDA.

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

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?

Typically, no, but both AET and non-AET would be recognised 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?

Yes, to both parts of the question.

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?

As will be evident from the answers to questions 6.1 and 6.2, this is not applicable.

7 Bespoke Jurisdictional Matters

7.1 Are there any cross-border issues that apply when posting or receiving collateral with foreign counterparties? For example, are there any restrictions in your jurisdiction on the delivery or acceptance of foreign currencies?

No, there are no cross-border issues.

7.2 Are there any restrictions on transferability, for example, assignment and novation (including notice mechanics, timings, etc.)?

There are no specific Cayman Islands legislative restrictions. Any such restrictions would be asset specific as opposed to jurisdictional.

7.3 Are there any other material considerations which should be taken into account by market participants wishing to enter into derivatives transactions in your jurisdiction?

As noted in our answer to question 5.2, the Cayman Islands is generally regarded as a creditor and netting friendly jurisdiction for derivative counterparties to enter into transactions with Cayman Islands entities, such as funds and structured finance vehicles.

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 pure Cayman Islands perspective, none. As noted above in our answer to question 1.1, the majority of derivative transactions are documented under ISDA Master Agreements, and

so developments in ISDA documentations, in particular with regard to new protocols to deal with new evolutions in the market, are generally followed.

8.2 What, if any, ongoing legal, commercial or technological development do you see as having the greatest impact, positive or negative, on the market for derivatives transactions in your jurisdiction?

Ongoing regulation of, in particular, OTC derivative transactions by EU and US regulatory authorities will likely have the greatest impact on derivatives transactions entered into by Cayman Islands entities.

8.3 In your view, what are the key market trends likely to affect derivatives transactions in your jurisdiction in the upcoming years? For example, the key negotiated commercial terms, the volume of trades and/or the main types of products traded, smart contracts or other technological solutions.

As 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, 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 Maples and Calder's Finance team in the Maples Group's Cayman Islands office. 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



Alasdair Robertson is a partner of Maples and Calder's Finance team in the Maples Group's Cayman Islands office. Previously, he was the Global Managing Partner of the Maples Group and has also served as Global Head of the Finance group. Alasdair's practice focuses on structured finance, structured investment funds, derivatives, funds finance and corporate finance. He also advises on financial regulatory issues.

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

Tel: +1 345 814 5345
Email: alasdair.robertson@maples.com
URL: www.maples.com

The Maples Group, through its leading international law firm, Maples and Calder, advises global financial, institutional, business and private clients on the laws of the British Virgin Islands, the Cayman Islands, Ireland, Jersey and Luxembourg. With offices in key jurisdictions around the world, the Maples Group has specific strengths in areas of corporate commercial, finance, investment funds, litigation and trusts. Maintaining relationships with leading legal counsel, the Group leverages this local expertise to deliver an integrated service offering for global business initiatives. For more information, please visit: maples.com/services/legal-services.

www.maples.com



MAPLES GROUP

ICLG.com

Current titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Finance & Leasing
Aviation Law
Business Crime
Cartels & Leniency
Class & Group Actions
Competition Litigation
Construction & Engineering Law
Consumer Protection
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Tax
Cybersecurity
Data Protection
Derivatives
Designs

Digital Business
Digital Health
Drug & Medical Device Litigation
Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Family Law
Fintech
Foreign Direct Investment Regimes
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law

Oil & Gas Regulation
Outsourcing
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Renewable Energy
Restructuring & Insolvency
Sanctions
Securitisation
Shipping Law
Telecoms, Media & Internet
Trade Marks
Vertical Agreements and Dominant Firms