

**International
Comparative
Legal Guides**



Derivatives

2024

Fifth Edition

Contributing Editor:

Jonathan Gilmour
Travers Smith LLP

glg Global Legal Group

Expert Analysis Chapter

1

Trends in the Derivatives Market and How Recent Fintech Developments are Reshaping this Space
Jonathan Gilmour & Tom Purkiss, Travers Smith LLP

Q&A Chapters

7

Canada
Miller Thomson LLP: Ahmad Adam, Raquel Moses & Eugene Yeung

15

Cayman Islands
Maples Group: Tina Meigh & Hailee Robinson

20

Cyprus
Patrikios Legal: Angeliki Epaminonda & Angelos Onisiforou

28

England & Wales
Travers Smith LLP: Jonathan Gilmour & Elinor Samuel

38

France
Jeantet AARPI: Jean-François Adelle

46

Germany
Hengeler Mueller: Christian Schmies

53

Hong Kong
Mayer Brown: Vincent Sum & Sylvia Leung

63

India
Dave & Girish & Co: Mona Bhide

68

Ireland
Matheson: Richard Kelly, Alan Bunbury, John Adams & Nicole Burke

75

Japan
Nagashima Ohno & Tsunematsu: Ichiro Oya, Masayuki Fukuda, Hideaki Suda & Tsutomu Endo

82

Kenya
Lee, Kwesiga & Kiprono Advocates LLP:
Lee Mutunga & Joseph Mwine

87

Luxembourg
GSK Stockmann: Andreas Heinzmann,
Valerio Scollo & Angela Permunian

93

Netherlands
Keijzer & Cie: Nicole Batist & Marc Keijzer

101

Portugal
Morais Leitão, Galvão Teles, Soares da Silva & Associados: Maria Soares do Lago, Elmano Sousa Costa, Raquel Maurício & Carolina Nagy Correia

107

Spain
Cuatrecasas: Arnau Pastor Giribet & Jaime Juan (JJ) Rodríguez

117

USA
Paul, Weiss, Rifkind, Wharton & Garrison LLP:
Manuel Frey & Andrew MacLachlan

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, Annexes and credit support documentation in the usual market form, 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. There is no Cayman Islands legislation that requires any additional steps relating to due execution of derivatives trading documentation. 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. There is no legal requirement for a corporate entity to have a witness to their signature when executing by way of deed, and electronic signatures are permissible under Cayman Islands law.

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 (i) it is not pleaded and proved, and (ii) 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 ISDA Credit Support 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, promissory notes, corporate bonds, receivables 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 laws or regulations that are generally applicable locally. Certain regulated entities, such as banks, hedge funds, private funds, mutual funds 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, based on such delegation, 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?

In accordance with 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 whether the collateral provider is established in the Cayman Islands (and, if it is, whether it is a company, a limited liability company, a partnership or a trustee acting as trustee of a trust), the nature of the assets being secured and the location and governing law of the collateral. 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. There is also no regulatory authority in the Cayman Islands solely responsible for the regulation of such transactions. The main financial regulator is the Cayman Islands Monetary Authority (“CIMA”), which is directly responsible for the licensing and regulation of various financial services businesses such as banks, insurance companies, trust companies and funds (including hedge funds, private funds and mutual 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, warranties and undertakings 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 restructuring officers or liquidators arise upon the presentation of a petition for the appointment of a restructuring officer or the winding up 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?

The Companies Act (As Revised) of the Cayman Islands provides for a restructuring regime (similar to the regimes available in England and Wales and the United States of America) that would

allow debt to be restructured with the protection of a moratorium of claims against it by unsecured creditors. Upon the presentation of a petition for the appointment of a restructuring officer under Part V of the Companies Act, the restructuring moratorium will not prevent creditors from enforcing valid and enforceable contractual rights of set-off or netting outside of judicial proceedings. A Cayman Islands entity can present a petition to the court for the appointment of a restructuring officer and on the presentation of the petition, the Cayman Islands entity obtains an automatic moratorium on legal proceedings being continued or commenced by unsecured creditors against the Cayman Islands party and this stay, as a matter of Cayman Islands law, has worldwide application. Although there is an automatic stay of proceedings against a Company, LLC or ELP when an order of winding up has been made or a provisional liquidator has been appointed, the stay does not prevent any contractually agreed netting arrangements or any secured creditor from enforcing its security or collateral interest. Unlike the stay that applies on the presentation of a petition for the appointment of restructuring officers, the stay does not purport to have worldwide effect and extends to judicial proceedings only.

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 the commencement of 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 voidable upon the application of the Company's, LLC's or ELP's liquidator. 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, an insolvency/bankruptcy-related close-out of derivatives transactions could not be deemed to take effect prior to an insolvency/bankruptcy taking effect.

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 prepares the industry-standard opinion for ISDA and the most recent update was published on 2 August 2023.

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?

The robust and creditor-friendly legislation in the Cayman Islands provides counterparties with significant comfort in secured lending transactions, which continues to make the Cayman Islands a netting-friendly choice. 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; however, the Cayman Islands court would give judgment expressed either as an order to pay such currency or its Cayman Islands dollar equivalent at the time of payment or enforcement of the judgment. A Cayman Islands court has jurisdiction to give judgments expressed in foreign currencies under the Grand Court Rules Order 42, Rule 8.

6 Taxation

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

The Cayman Islands currently has no form of income, corporate or capital gains tax and no estate duty, inheritance tax or gift tax 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, counterparty due diligence, sanctions laws, economic substance regimes 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?

There have been no significant changes from a Cayman Islands law perspective. 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. There is a growing interest in digital asset derivatives using Cayman Islands entities as counterparties, and the publication of ISDA's Digital Asset Definitions brings clarity and standardisation to a relatively niche asset class. Furthermore, the development of smart contracts, such as via ISDA's ISDA Create platform, continues to streamline complex derivatives negotiations and drive the trend toward further standardisation of trading contracts.



Tina Meigh is global head of the Cayman Islands Finance team at Maples and Calder, the Maples Group's law firm, and is based in the Cayman Islands. She leads the Fund Finance and Derivatives practice groups and also has extensive experience in all aspects of banking and securitisations. Tina represents hedge funds, private equity funds and banks on fund finance and other 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
PO Box 309
Grand Cayman KY1-1104
Cayman Islands

Tel: +1 345 814 5242
Email: tina.meigh@maples.com
LinkedIn: www.linkedin.com/in/tina-meigh-b462654



Hailee Robinson is an associate in the Finance team at Maples and Calder, the Maples Group's law firm, and is based in Singapore. 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 as well as derivatives and insurance matters.

Maples Group
1 Raffles Place, #32-01 & 32-02
One Raffles Place
048616
Singapore

Tel: +65 6922 8415
Email: hailee.robinson@maples.com
LinkedIn: www.linkedin.com/in/hailee-robinson-01848694

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

International Comparative Legal Guides

The **International Comparative Legal Guide (ICLG)** series brings key cross-border insights to legal practitioners worldwide, covering 58 practice areas.

Derivatives 2024 features one expert analysis chapter and 16 Q&A jurisdiction chapters covering key issues, including:

- Documentation and Formalities
- Credit Support
- Regulatory Issues
- Insolvency / Bankruptcy
- Close-out Netting
- Taxation
- Bespoke Jurisdictional Matters
- Market Trends

