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Practical cross-border insights into derivatives law

Derivatives 2022

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Contributing Editor:
Jonathan Gilmour
Travers Smith LLP

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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.

OTC derivatives transactions with Dutch counterparties are typically documented under the terms and conditions produced by the International Swaps and Derivatives Association ("**ISDA**"), being a 1992 or 2002 ISDA Master Agreement and Schedule thereto. The most commonly used version nowadays is the 2002 version ("**ISDA Master Agreement**"). A wide variety of financial products are documented under the terms and conditions of the ISDA Master Agreement, such as, but not limited to, interest rate swaps, equity derivatives and FX forwards, all defined in the applicable ISDA Definitions.

The belonging collateral arrangements between the parties are typically documented under the ISDA 1995 Credit Support Annex and the updated ISDA 2016 Credit Support Annex to the ISDA Master Agreement for variation margin ("**VM**"). The ISDA 2016 Credit Support Annex facilitates the compliance of parties with new VM rules pursuant to Regulation (EU) 648/2012 of the European Parliament and of the Council of 4 July 2012 ("**EMIR**") and belonging Commission Delegated Regulation (EU) 2016/2251 ("**EMIR Collateral RTS**"), setting out regulatory standards and risk-mitigation techniques for OTC derivatives contracts not cleared by a central counterparty that, in principle, apply to all uncleared OTC derivatives transactions entered into after 1 March 2017. With respect to the exchange of any applicable initial margin ("**IM**"), various documentation is used depending on the custodian of the parties, such as the 2018 ISDA Credit Support Deed – English law and the 2019 ISDA Euroclear Collateral Transfer Agreement and Security Agreement.

OTC derivatives contracts that are eligible for clearing pursuant to EMIR and are accepted by a Clearing Member and submitted to a clearing house ("**CCP**") for clearing are typically documented under the ISDA/FIA Client Cleared OTC Derivatives Addendum ("**Cleared OTC Derivatives Addendum**") and the Addendum Annex including a separate Credit Support Annex ("**Clearing Addendum**") that itself supplements and forms part of the ISDA Master Agreement.

In a similar way, the European Federation of Energy Traders ("**EFET**") is the organiser of the European wholesale energy market contractual standards. The EFET Master Netting Agreement ("**EFET Master Agreement**") is the market standard for physically settled wholesale energy transactions in Europe. The belonging collateral arrangements between the parties are documented under a Credit Support Annex to the EFET Master Agreement. A wide variety of energy-related products, such as, but not limited to, electricity and natural gas, specific gas hubs and carbon emissions allowances, are documented thereunder, not only for spot transactions but also for future deals, which contain either a physical delivery option or a settlement in cash.

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.

Parties should be aware that there are several documentary and execution requirements that apply for Dutch counterparties.

With respect to authorisations, it is noted that under Dutch law, the directors of a legal entity should always act in the interest of the legal entity and not act *ultra vires* (*doeloverschrijdend*). This means that directors may not act beyond the scope of the powers and purposes of the articles of association of the legal entity. The articles of association or internal policies may also contain restrictive policies with regard to the number of signatories and a description and the size of transactions for which directors can validly bind the Dutch legal entity involved. Also, the articles of association may prescribe the prior approval of a supervisory board for certain decisions.

In addition to the above, we note that parties should be aware that transactions with certain Dutch counterparties may be subject to certain specific legal restrictions. Over the last decade, strict documentary requirements have been developed for certain Dutch counterparties in the (semi-)public sector, such as, but not limited to, Dutch housing associations (*toegelaten instellingen volkshuisvestiging*), Dutch educational institutions (*instellingen voor onderwijs, cultuur en wetenschap*) and Dutch healthcare institutions (*zorgaanbieders*) that are funded with public money. In some cases, parties are subject to a non-negotiable form of ISDA Master Agreement pursuant to a ministerial decree. In general, these ministerial decrees require dealers to (i) be based in the European Economic Area, (ii) have at least a single A rating of two of the following rating agencies: Moody's; Standard and Poor's; and Fitch, and (iii) settle their trades in EUR. Moreover, these (semi-)public entities may only enter into derivatives transactions for hedging purposes and not for speculative purposes. Dealers should be aware of these restrictions. Similarly, Dutch pension funds may only enter into derivatives transactions insofar as these transactions contribute to a reduction in investment risk or facilitate efficient portfolio

management. Pension funds are not allowed to enter into derivatives transactions for speculative purposes pursuant to the prudent person rule. Moreover, Dutch pension funds are bound by specific rules and regulations when outsourcing derivatives activities to third parties and should, at all times, be in a position to comply therewith.

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?

In the ISDA documentation, parties most often choose English law as the governing law. With respect to Dutch housing associations, parties should be aware that pursuant to a ministerial decree, parties may only elect Dutch or English law as the law governing the ISDA documentation.

A Dutch court will recognise and give effect to a choice of law made by the parties to govern the contractual aspects pursuant to Article 3 of Regulation (EC) 593/2008, as amended ("**Rome I**").

If no choice of law has been made by the parties, the law governing the contractual aspects shall be determined on the basis of Article 4 Rome I. This means that the applicable law will be the law of the country where the party required to give effect to the characteristic performance of the contract has its residence. If the governing law cannot be determined on such basis, the agreement shall be governed by the law of the country with which it is most closely connected.

However, it should be noted that if no international character can be established other than the choice of law, parties cannot impair the application of the provisions of the law of such country that all elements relevant to the situation at the time of the choice of law refer to. In theory, this could be the case in the event that two Dutch parties enter into derivatives documentation and choose English law as the governing law.

Under the EFET Master Agreement, parties are required to elect the governing law and may also opt for arbitration.

So far, there has not been a significant shift towards not choosing English law in derivatives documentation with Dutch counterparties to apply after Brexit.

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.

With respect to non-cleared OTC derivatives transactions, parties typically provide credit support in the form of the 1995 ISDA Credit Support Annex and the 2016 ISDA Credit Support Annex for VM, whereby parties transfer collateral as security for their respective obligations under the ISDA Master Agreement. Where parties are required to comply with the IM requirements under EMIR and the EMIR Collateral RTS, various documentation is used, such as a 2018 ISDA Credit Support Deed (see question 3.2).

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?

Under the terms of the ISDA Credit Support Annex, collateral is transferred by way of an outright transfer of title under the laws governing the ISDA Credit Support Annex, which is predominantly English law. In order to prevent any recharacterisation risk under Dutch law, parties should make sufficiently clear that the Credit Support Annex qualifies as a financial collateral arrangement within the meaning of Article 2 (1) (b) of Directive 2002/47/EU on Financial Collateral Arrangements ("**FCA Directive**"), as incorporated in the Netherlands in Section 7:51 (b) of the Dutch Civil Code (*financiële zekerheidsovereenkomst*). As IM collateral for non-cleared OTC derivatives transactions must be segregated from the collecting party's proprietary assets, security is provided through a separate security interest collateral arrangement (see questions 2.1 and 3.2).

Similar provisions apply to cleared OTC derivatives transactions, dependent on the requirements of the relevant CCP. For buy-side participants, collateral is often transferred by way of an outright transfer of title under the terms of an ISDA Credit Support Annex, supplemented by bespoke collateral terms to be included in separate appendices to the Addendum Annex of the Cleared OTC Derivatives Addendum. The Cleared OTC Derivatives Addendum explicitly expresses the intention of the parties that any collateral provided qualifies as a title transfer pursuant to the FCA Directive.

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

Usually, credit support is provided in the form of cash, sovereign debt securities, corporate debt securities, corporate equity securities and asset-backed securities. Non-centrally cleared OTC derivatives are subject to limitations as set out in the EMIR Collateral RTS, which includes asset class limits and concentration limits on IM and VM collateral.

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?

For non-centrally cleared OTC derivatives transactions, the requirements for IM and VM collateral are subject to EMIR and the EMIR Collateral RTS.

With respect to cleared OTC derivatives transactions, a principal-to-principal model is used, whereby the relevant CCP stipulates specific margining requirements with regard to the collateral to be provided by the Clearing Member to the CCP with respect to the transactions of their Clients. On the other hand, the Clearing Member collects collateral from the Client, which collateral is passed on by the Clearing Member to the CCP. Typically, the IM and VM collateral terms between the Clearing Member and the Client are set out in separate appendices to the Clearing Addendum.

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?

Dutch law does not have the doctrine or concept of an Anglo-American trust. However, any foreign trust validly created pursuant to, for instance, UK or US law will be recognised by Dutch courts pursuant to legislation implementing the Hague Convention on the Law Applicable to Trusts and on their Recognition.

The agency concept is recognised under Dutch law as a contractual arrangement. With regard to this, specific attention should be given to the interpretation of the legal concept of various types of Dutch legal entities entering into derivatives agreements and belonging collateral arrangements. It is noted that Dutch investment funds involved in entering into derivatives transactions are typically represented by an investment manager who acts as their agent. These investment funds can be structured in different ways. Some investment funds are structured as independent legal entities, such as a private company with limited liability or a public company (*besloten vennnootschap met beperkte aansprakelijkheid/naamloze vennootschap*) with their own legal rights and obligations, while other investment funds are structured as a mutual fund (*fonds voor gemene rekening*) ("**FGR**"). Although an FGR is often perceived as a trust structure by foreign counterparties, it actually qualifies as a contractual arrangement *sui generis* under Dutch law between (i) investors, (ii) a depositary (*bewaarder*), and (iii) the investment manager. The depositary owns the legal title to the assets and is the debtor of the obligations, who has a contractual obligation *vis-à-vis* the investors with respect to the assets. For that reason, the depository is the counterparty to the derivatives documentation, including any collateral arrangements. The investment manager acts merely as an agent of the investors. Therefore, under Dutch law, special care should be taken when drafting derivatives documentation to reflect the various positions correctly.

Special care should also be taken with respect to pension funds, housing associations and healthcare institutions, which are typically structured as independent legal entities under Dutch law having their own independent rights and obligations. Often these types of parties have also appointed an investment manager to act as their agent to enter into derivatives transactions. However, unlike an FGR, these legal entities have their own sole discretion to decide whether they manage their assets by themselves or outsource certain investment services to an investment manager and should in no event be restricted in their derivatives documentation to be able to switch swiftly and without excessive additional costs. Therefore, special attention should be paid to the authorisation of such agents (see question 1.2).

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?

The formalities required to create a valid security right under Dutch law depend on the type of asset that is used as security for the secured obligations. In general, under Dutch law, there are three types of security:

(i) a mortgage (*hypotheek*), which is created by a notarial deed with respect to, i.e., real estate or registered aircraft and vessels, and which must be registered with the Dutch Land Registry Office (*kadaster*);

(ii) a right of pledge created either by a notarial deed, i.e., a notarial deed of pledge of shares in a private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*) or public company (*naamloze vennootschap*), or by a private deed of pledge, i.e., a pledge on receivables or a bank account, which is registered with the Dutch tax authorities. A right of pledge can either be disclosed, meaning that the debtor of the receivable has been notified of the pledge, or undisclosed. In order to create a valid undisclosed right of pledge, the right of pledge must either be created by notarial deed or registered with the Dutch tax authorities; and

(iii) a financial collateral arrangement (*financiële zekerheidsovereenkomst tot overdracht*) whereby collateral is provided by means of a transfer of title and one of the parties is at least a financial institution, CCP or governmental institution and none of the parties is a natural person (*natuurlijke persoon*) (see questions 2.1 and 2.2).

With respect to derivatives transactions, it is noted that collateral is commonly provided by way of an ISDA Credit Support Annex as a financial collateral arrangement within the meaning of the FCA Directive (see questions 2.1 and 2.2). Upon an enforcement event under the derivatives documentation, the non-defaulting party has the contractual right to enforce the sale of the financial collateral provided under the financial collateral arrangement. However, pursuant to the EU Bank Recovery and Resolution Directive 2014/59 and Directive (EU) 2019/879, as amended ("**BRRD**") as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms, certain restrictions might apply if the defaulting party is a credit institution or investment firm. With respect to a Dutch right of pledge, the provided security may be enforced in accordance with the applicable provisions of Dutch law if the debtor is in default with respect to the secured obligations by means of (i) a public auction, (ii) a private sale authorised by the Dutch competent court, (iii) a private sale if the pledgor and pledgee have so agreed, or (iv) in the case of a disclosed pledge on receivables, by collecting such receivables. It should be noted that appropriations by the pledgee are not allowed.

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.

The key applicable derivatives regulations in the Netherlands are as follows:

(i) EMIR;

(ii) Regulation (EU) 2019/2099 amending EMIR, with respect to procedures and authorities involved for the authorisation of CCPs and the requirements for the recognition of third-country CCPs ("**EMIR II**");

(iii) Regulation (EU) 2019/834 amending EMIR regarding the clearing obligation, the suspension of the clearing obligation, the reporting requirements and risk-mitigation techniques for OTC derivatives contracts not cleared by a CCP ("**EMIR REFIT**");

(iv) the EMIR Collateral RTS;

(v) Regulation (EU) 600/2014 on markets in financial instruments and amending EMIR ("**MiFIR**");

(vi) Directive (EU) 2014/65 on markets in financial instruments and amending Directives 2002/92 and 2011/61 ("**MiFID II**");

(vii) the FCA Directive, whereby one of the parties must be a credit institution and the other party may not be private person; and

(viii) the Dutch Financial Supervisory Act (*Wet op het financieel toezicht*) ("**DFSA**") and various specific Dutch rules and regulations for various types of Dutch counterparties.

The European Securities and Markets Authority ("**ESMA**") is, at a European level, the main relevant authority in charge of safeguarding the stability of the EU's financial system. ESMA proposes regulatory technical standards to be approved by the European Commission. At a domestic level, the Dutch regulatory authority is set up in a twin peaks model of supervision, which is

divided between the Dutch Central Bank (*De Nederlandsche Bank*) ("**DNB**") and the Dutch Authority for the Financial Markets (*Autoriteit Financiële Markten*) ("**AFM**"). DNB is responsible for the prudential supervision, while the AFM is responsible for the conduct of business supervision.

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?

Under the sixth and final phase of the EMIR mandatory IM exchange requirement, parties will be required, in principle, to exchange IM as of 1 September 2022 in the event that a counterparty has an average month-end aggregate notional amount above EUR 8 billion in non-centrally cleared derivatives. It should be noted that the IM should be segregated from the receiving party's assets in order to mitigate any insolvency risk with respect to the receiving party. For this reason, various documentation is used depending on the party's custodian, such as the 2018 ISDA Credit Support Deed – English law and the 2019 ISDA Euroclear Collateral Transfer Agreement and Security Agreement.

Another important change that is likely to have an impact is ESMA's recommendation to the European Commission to start applying the clearing obligation for pension funds as of 19 June 2023 (see questions 8.1 and 8.2).

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.

The offering of derivatives transactions may constitute a financial service pursuant to the DFSA, for which a licence is required. Furthermore, certain Dutch counterparties are required to comply with specific Dutch rules and regulations. This is the case with respect to, for instance, housing associations, healthcare institutions and water authorities (*waterschappen*). In the event of Dutch pension funds, special care should also be taken with respect to Dutch mandatory outsourcing rules, when portfolio management tasks in relation to derivatives transactions are delegated to service providers, such as investment managers and custodians (see questions 1.2 and 2.5). Upon request, the authors can provide more detailed advice on this.

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)?

Dutch pension funds are required, in principle, to clear their OTC derivatives transactions. However, pension funds are still temporarily exempt from this clearing obligation until 18 June 2022 pursuant to Article 89 (1) EMIR. ESMA made a recommendation to the European Commission to further extend this exemption until 19 June 2023. As the Netherlands has by far the largest pension fund market in Europe, the clearing obligation will have a major impact on Dutch pension funds as they typically enter into interest rate derivatives transactions to hedge their interest risk. Pension funds are typically asset-rich but allocate little in cash. In order to avoid the likely negative impact of the clearing obligation on the retirement income of future pensioners, suitable technical solutions have to be developed to address the pension fund's desire not to divest a significant proportion of their assets for cash in order to meet the ongoing cash collateral requirements of the CCP. However, smaller Dutch pension funds may benefit from the small financial counterparty ("**SFC**") exemption regime from clearing under EMIR REFIT if the gross notional value for their interest rate derivatives contracts stays below a threshold of EUR 3 billion. Whether the latter shall be the case remains to be seen, as dealers may have a desire to clear OTC derivatives transactions due to Basel III requirements.

4 Insolvency / Bankruptcy

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

Termination rights with respect to a Dutch party typically arise upon the occurrence of (pre-)insolvency events. Netting agreements, such as the ISDA Master Agreement, contain various broadly drafted (pre-)insolvency events. In general, these events qualify as a mutual agreement under Dutch law, empowering the non-defaulting party to rescind the mutual agreement. Pursuant to Dutch law, this would include: (i) voluntary winding up or dissolution; (ii) being declared bankrupt (*failliet verklaard*); (iii) being granted a suspension of payment (*surseance van betaling*); (iv) appointment of an administrator, receiver or other similar official; and (v) the approval of a private composition for the benefit of its creditors preventing an insolvency, pursuant to the recently introduced Dutch Act on Court Confirmation of Extrajudicial Restructuring Plans (*Wet homologatie onderhands akkoord*). It is also noted that parties may agree on other rescissory conditions giving rise to a situation of distress, such as the occurrence of a cross-default event, a credit support default, or misrepresentations.

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?

In general, under Dutch law, several statutory freeze periods can be distinguished. In the event of bankruptcy (*faillissement*) or in the event of a suspension of payment (*surseance van betaling*) (the latter not being applicable to a Dutch bank or insurance company), a cooling-off period (*afkoelingsperiode*) of two months, which may be extended by another two months, may apply. In the event of a private composition for the benefit of its creditors preventing an insolvency (*homologatie onderhands akkoord*), a cooling-off period of four months, which may be extended by another four months, may apply. However, banks and insurance companies are out-of-scope entities for a private composition under the Dutch Act on Court Confirmation of Extrajudicial Restructuring Plans. Pursuant to Dutch law, it is likely that the contractual right of set-off (*verrekenen*) under a netting agreement is not affected by a freeze period. The same applies for financial collateral arrangements.

With respect to financial institutions and investment firms, DNB and the European Single Resolution Board, respectively, are empowered to intervene pursuant to the Financial

Institutions Special Measures Act (*Implementatiewet Europees kader voor herstel en afwikkeling van banken en beleggingsondernemingen*) incorporating the BRRD and the Single Resolution Mechanism Regulation (EU) 806/2014 regarding credit institutions and certain investment firms, as amended, which rules must be observed. Various intervention tools, such as an asset separation tool and a bail-in tool, could apply. However, the bail-in tool does not apply with respect to collateralised claims and the use of the asset separation tool may not have a negative impact on the rights under the netting agreements and financial collateral arrangements. In any event, a freeze triggered by an intervention is likely to cause a temporary delay.

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

Under Dutch law, a bankruptcy receiver (*curator*) may invoke a derivatives transaction to be void or voidable in the event the transaction does not comply with (i) the public order (*openbare orde*), (ii) good morals (*goede zeden*), or (iii) mandatory rules and regulations (*dwingende wetsbepalingen*). A bankruptcy receiver could also invoke derivatives transactions to be voidable on the grounds of threat (*bedreiging*), deception (*bedrog*), abuse of circumstances (*misbruik van omstandigheden*), or based on fraud or fraudulent conveyance. Moreover, any legal act that has not been duly authorised or is not in the interest of the insolvent legal entity could be invoked on the basis of *ultra vires*.

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?

Under Dutch law, clawback provisions could apply in the cases mentioned under question 4.3. The Dutch Bankruptcy Act provides, among others, for a rebuttal presumption of fraudulent conveyance in the event that (i) the derivatives transaction took place within one year of insolvency, (ii) there was no prior legal obligation to enter into the derivatives transaction, and (iii) the insolvent legal entity knew or should have known that the rights of other creditors would be impaired by the derivatives transaction.

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?

Netting agreements, such as the ISDA Master Agreement, contain various broadly drafted pre-insolvency events. These pre-insolvency events usually qualify as mutual agreements under Dutch law, empowering the non-defaulting party to rescind the mutual agreement. In general, there are no Dutch rules that prevent the contracting parties to validly enter into contractual obligations designating pre-insolvency trigger events (see question 4.3).

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?

Overall, the parties are free to determine the terms of an agreement save for any mandatory law provisions (see questions 1.3 and 4.1). Pursuant to Dutch law, parties may agree to contractual subordination. However, in the event of insolvency, certain preferred creditors have a statutory right of priority of payment, such as the tax authorities in respect of tax claims and employees in respect of certain claims and holders of security interests (right of pledge and mortgage).

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?

Industry-standard legal opinions have been produced with respect to the laws of the Netherlands regarding the enforceability of close-out netting and set-off provisions under master netting agreements (see question 4.5). Key legal considerations in the legal opinions relate to, *inter alia*, applicable law, insolvency and freezes and early termination clauses.

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?

In principle, the parties have the contractual freedom to determine that the various derivatives transactions form a single agreement between them under the terms of a master netting agreement, including in the event of an early termination of transactions. Under Dutch law, a debtor may set off his debt against a claim that corresponds to his debt owed to the creditor.

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

It is our understanding that it could be desirable for a party to designate an Early Termination Date themselves instead of choosing Automatic Early Termination, as this might be more favourable due to a change in the market conditions between the Event of Default and the affected designation of such Early Termination Date. However, in the Netherlands, the fixation principle applies in Dutch bankruptcies, meaning that the legal position of all creditors who have an interest in the bankruptcy estate become, in principle, fixed and unalterable. Therefore, it is possible that a Dutch court may rule that the Early Termination Date equals the date of the bankruptcy declaration. Parties wishing to avoid uncertainty may therefore wish to elect Automatic Early Termination with respect to a Dutch party. It is noted that pursuant to specific Dutch rules and regulations regarding certain Dutch counterparties, the application of Automatic Early Termination is required, whereby certain contractual restrictions are deemed to apply.

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?

In principle, the parties have the contractual freedom to determine the termination currency to be denominated in a currency

other than EUR. Outside insolvency proceedings, a termination amount not denominated in EUR is, in principle, enforceable in the Netherlands. In the event of an insolvency situation, the legal position of all creditors who have an interest in the bankruptcy estate become, in principle, fixed and unalterable upon declaration of insolvency. Hence, all claims not denominated in EUR against the Dutch bankruptcy estate must be filed in EUR against the exchange rate of the date of the bankruptcy declaration by the Dutch court.

6 Taxation

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

In general, remuneration for debt is deductible, while remuneration for equity is not deductible. Broadly, no withholding tax is levied on derivatives payments to non-residents of the Netherlands. A resident taxpayer is taxed on his trading profits derived from his derivatives transactions. In general, no withholding tax is levied on interest payments. Withholding tax is levied on dividends, which may be reduced or limited under tax treaties.

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?

See question 6.1 with respect to withholding taxes.

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

There are generally no specific tax exclusions for derivatives.

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.).

Derivatives transactions are highly regulated in the Netherlands. In the last decade, numerous court cases in the Netherlands have led to an increase in regulations with respect to trading in derivatives. Financial institutions are bound by strict regulations with respect to the facilitating of derivatives transactions, in particular with respect to non-professional counterparties, such as small and medium-sized counterparties. These restrictions include, *inter alia*, special warning obligations in the pre-contractual phase. The Supreme Court in the Netherlands (*Hoge Raad*) has ruled that a written declaration in derivatives documentation, stipulating that a party is eligible to trade and that it has knowledge and is aware of the risks involved with respect to the derivatives transactions and accepting all consequences thereof, is in itself insufficient. Also, special care should be taken by financial institutions in the event of a professional Dutch counterparty lacking the required knowledge and experience with respect to trading in derivatives, while the respective financial institution is or should be aware thereof. In addition, derivatives transactions entered into with (semi-)public institutions are subject to specific mandatory Dutch rules and regulations. For instance, on 1 January 2022, a ministerial decree for Dutch healthcare institutions entered into force, stipulating various requirements. Furthermore, it should be noted that the AFM may impose restrictions with respect to the trading of certain derivatives products to particular market participants and did so firstly on 18 April 2019.

When posting or receiving collateral with foreign counterparties, no cross-border issues apply other than the requalification risk as set out in question 2.2 above. When rights and obligations under derivatives documentation are to be transferred, Dutch private international law follows, in principle, the law governing the contract. In the event that Dutch law applies, contractual rights and obligations are typically transferred by way of an assignment (*contractsovername*), for which consent of the debtor is required. It should be noted that an assignment under Dutch law does not constitute a novation.

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 has been an increasing amount of regulatory requirements pursuant to EMIR. These changes have led to an increase in documentation and complexity thereof. Additionally, specific Dutch rules and regulations in order to protect buy-side counterparties have been produced. In particular, for (semi-)public counterparties who are funded with public money, such as housing associations, educational institutions, healthcare institutions and water authorities, specific rules and regulations apply. Moreover, many Dutch pension funds have documented their derivatives documentation under so-called "umbrella documentation", whereby an investment manager acts on behalf of various clients. As previously noted, Dutch pension funds are subject to mandatory outsourcing rules demanding them to be in a position to switch swiftly from investment manager. For this reason, special care should be taken when negotiating and documenting derivatives documentation under umbrella structures as this could lead to adverse situations, whereby pension funds might not be able to switch swiftly from investment manager without excessive additional costs. According to mandatory Dutch rules for outsourcing, there must be no legal impediment in this respect. The same applies for cleared OTC derivatives transactions as for non-cleared OTC derivatives transactions.

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.

UK CCPs have been granted equivalence access until 30 June 2025, which will allow EU parties to continue to clear derivatives transactions through UK CCPs. It is expected that the European Commission will provide measures in the second half of 2022 to (i) make EU CCPs more attractive to market participants, (ii) reduce the exposure to systemic non-EU CCPs, and (iii) enhance the supervision of EU CCPs. These developments will certainly impact the EU central clearing framework.

Another impact to be expected is that pension funds, although still temporarily exempt from the clearing obligation until 18 June 2022 pursuant to Article 89 (1) EMIR, will be required to start clearing as of 19 June 2023 pursuant to the recent recommendations of ESMA. As the Netherlands has by far the largest pension fund market in Europe, the clearing obligation will have a major impact on Dutch pension funds and the applicable derivatives documentation. However, some Dutch pension funds may qualify as SFCs under EMIR REFIT and, as such, may benefit from the SFC exemption for clearing (see question 3.4).

Furthermore, we expect that the recent developments with regard to energy trading will have an impact on the conduct of energy business and the applicable derivatives documentation. On 13 October 2021, the European Commission adopted guidelines to tackle the exceptional rise in global energy prices and asked ESMA to further enhance the monitoring of developments in the European carbon market. On 28 March 2022, ESMA published its final report on allowances and associated derivatives, whereby a series of policy recommendations were presented in order to contribute to the improvement of the transparency and monitoring of the EU carbon market, which plays an important role in the EU green transition.

Note

This chapter is for general information purposes only and therefore does not constitute legal advice.

Nicole Batist is a highly skilled and experienced lawyer in the field of financial and corporate law. In 1998, she began her career as a lawyer (*advocaat*) with a global leading law firm, after which she moved to an investment bank, heading the legal department. She was a member of the working group of the Dutch Federation of Banks (NVB) and chairman of the expert pool EMIR within DACSI. She has earned her reputation as an excellent practical lawyer within the field of cross-border financial transactions. She is committed to assisting clients with their business goals, understands their language and has a pragmatic approach. Nicole is admitted to the Dutch Bar as a registered lawyer (*advocaat*).

Keijzer & Cie
Apollolaan 151
1077 AR Amsterdam
Netherlands

Tel: +31 20 6700 895
Email: nicole.batist@kencie.nl
URL: www.kencie.nl

Marc Keijzer has considerable experience in the field of financial and corporate law. Since his graduation in 1997 from the University of Amsterdam (LL.M.), he has worked as a lawyer (*advocaat*) at global leading law firms and several financial institutions. Marc represents corporates, financial institutions and pension funds with (international) transactions. He is an excellent negotiator and is able to explain complex legal matters in a comprehensive way. Marc is admitted to the Dutch Bar as a registered lawyer (*advocaat*) and is admitted to the Senior Courts of England and Wales as a Solicitor (np).

Keijzer & Cie
Apollolaan 151
1077 AR Amsterdam
Netherlands

Tel: +31 20 6700 895
Email: marc.keijzer@kencie.nl
URL: www.kencie.nl

Keijzer & Cie is an independent law firm, specialised in financial and corporate law and, in particular, derivatives. Our team consists of highly skilled and experienced derivatives lawyers, who have gained unique expertise with leading international law firms and through high-profile in-house positions in the financial services industry.
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