

DERIVATIVES LAWS & REGULATIONS FOR ALTERNATIVE ASSET MANAGERS

A GERMAN PERSPECTIVE FROM HSBC



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Introduction

This chapter provides a practical overview of the legal and market frameworks relevant to derivatives transactions in Germany, with a particular focus on issues that matter most to alternative asset managers operating cross-border or engaging with German counterparties. While not intended as an exhaustive legal treatise, the aim is to equip readers with a working understanding of the contractual norms, regulatory touchpoints, and institutional structures that shape the German derivatives landscape.

Germany plays a central role in the broader EU financial system. As the bloc's largest economy and a key participant in euro-denominated derivatives markets, it serves as both a regulatory benchmark and a jurisdiction of strategic importance for asset managers with pan-European operations. At the same time, its legal and market conventions differ in meaningful ways from other financial centres—most notably from English law-based systems—which can present challenges in documentation, enforcement, and cross-border legal analysis.

For alternative asset managers, especially those accustomed to ISDA-governed frameworks or transacting through UK or US entities, engaging with German market participants often involves navigating local legal nuances, understanding the role of national regulators, and adjusting expectations around documentation, insolvency risk, and enforceability. This chapter is designed to clarify those points of divergence and provide a structured reference for key considerations, helping both legal and non-legal professionals make better-informed decisions when structuring or reviewing derivatives transactions involving German parties.

Contractual Framework

Derivatives transactions involving German counterparties are typically documented using the globally recognized ISDA Master Agreement framework. Most market participants—whether domestic institutions or international firms transacting in Germany—default to the 1992 or 2002 ISDA Master Agreement, supplemented by jurisdiction-specific elections in the Schedule and, where necessary, bespoke provisions tailored to German regulatory and insolvency law. English law remains the preferred governing law for many of these agreements, particularly in cross-border contexts, though German law-governed master agreements are not uncommon, particularly among domestic counterparties or in transactions involving German savings or cooperative banks.

While ISDA documentation forms the backbone of most OTC derivatives arrangements, its implementation in the German context is shaped by local market practice and a more civil law-oriented approach to interpretation and contractual formality. German parties may expect a greater degree of documentary precision and clarity in drafting. Boilerplate provisions that are taken for granted under English law may be subject to stricter scrutiny under German legal standards, particularly where standard terms may conflict with mandatory civil law protections or consumer-facing rules. In addition, German law generally does not recognize concepts such as “representations” in the common law sense, which can lead to differences in interpretation unless explicitly clarified in the contract.

Domestic frameworks such as the German Master Agreement for Financial Derivatives Transactions (Deutscher Rahmenvertrag für Finanztermingeschäfte), while less commonly used in international contexts, still see some use among local banks and institutions, particularly for plain vanilla products or where all parties operate under German law. That said, the general market trend has favoured harmonization around ISDA standards, given the growing cross-border nature of derivatives trading and regulatory convergence within the EU.

One notable area of divergence from English market practice is the approach to close-out and enforceability. While the ISDA close-out netting mechanism is generally recognized and enforceable in Germany, practitioners must be attentive to specific local requirements, including those under the German Insolvency Code (Insolvenzordnung) and the EU's Financial Collateral Directive. Legal opinions on enforceability—whether bilateral or as part of ISDA's standard netting opinion architecture—are often relied upon, but must be interpreted in light of German-specific insolvency and banking rules.

Ultimately, while the ISDA framework provides a common language for cross-border derivatives transactions, its application in Germany requires local sensitivity. Differences in formality, legal interpretation, and regulatory overlay mean that standard documentation must be carefully reviewed and adapted to ensure it is enforceable, operationally sound, and aligned with the expectations of German counterparties and regulators.

Clearing and Reporting Practices

Germany's derivatives market operates within the regulatory framework of the European Union, and as such, clearing and reporting obligations are governed primarily by the European Market Infrastructure Regulation (EMIR). For alternative asset managers transacting in or with German counterparties, understanding how these obligations are implemented and interpreted locally is key to managing compliance risk and operational complexity.

Central clearing is mandatory under EMIR for certain classes of standardized OTC derivatives, including interest rate and credit default swaps. In the German context, the dominant central counterparty (CCP) is Eurex Clearing, based in Frankfurt. Eurex provides clearing services for a wide range of listed and OTC derivatives and is closely integrated with the broader EU clearing infrastructure. Most large German financial institutions and asset managers clear through Eurex, either directly or via clearing members. For international firms, particularly UK-based managers post-Brexit, access to EU-recognized CCPs remains a point of legal and operational focus.

Trade reporting is another cornerstone of the EMIR regime. All counterparties—whether financial or non-financial—must report details of their derivatives trades to an authorised trade repository. In Germany, this requirement is typically fulfilled using platforms such as REGIS-TR or DTCC Derivatives Repository, depending on the counterparties' systems and operational preferences. While the reporting obligation is harmonized at the EU level, local regulators such as BaFin (the German Federal Financial Supervisory Authority) may take a more proactive stance in monitoring compliance, especially where reporting quality or consistency is found lacking.

German market participants are generally well-aligned with EMIR requirements, but certain local practices persist. For example, German counterparties often adopt a more conservative approach to collateralisation and margining, particularly when dealing with non-EU entities. This may influence negotiation dynamics and operational timelines in cross-border transactions. Additionally, some domestic firms may require more extensive documentation or assurances concerning counterparties' EMIR classification and compliance status, which should be factored into pre-trade diligence.

It is also worth noting that recent regulatory updates—including EMIR Refit and Basel III finalisation—continue to reshape reporting and clearing workflows. These developments have prompted German institutions to invest heavily in systems integration and regulatory technology, making regtech partnerships and infrastructure acquisitions increasingly attractive.

In summary, clearing and reporting practices in Germany are closely tied to the broader EU regulatory architecture but are also shaped by domestic risk culture, regulatory engagement, and infrastructural alignment with key EU platforms. For alternative asset managers engaging with German firms or operating under EU rules, a strong command of EMIR requirements—and an appreciation for local market expectations—is essential.

Cross Border Considerations

Cross-border derivatives transactions involving German counterparties present a range of legal and operational complexities that alternative asset managers must carefully navigate. While Germany is an active participant in the global derivatives market and adheres to many EU-level regulatory norms, there are important jurisdiction-specific nuances—particularly in the areas of insolvency law, recognition of foreign judgments, and resolution frameworks—that can materially impact transaction structuring and enforceability.

One of the most significant areas of focus is German insolvency law. The German Insolvency Code (Insolvenzordnung, or InsO) provides the legal framework for insolvency proceedings in Germany and differs in several respects from Anglo-American systems. Although ISDA close-out netting provisions are generally recognized and enforceable under German law, this enforceability hinges on satisfying the requirements of the EU Financial Collateral Directive and local insolvency protections. For instance, while contractual termination and set-off rights are broadly supported, clawback provisions (Anfechtung) may apply in certain circumstances where transactions can be challenged as preferential or detrimental to the estate. This underscores the importance of ensuring that collateral arrangements and termination mechanics are properly structured and supported by robust legal opinions.

Resolution planning, by contrast, plays a more limited role in most German derivatives transactions. While the EU's Bank Recovery and Resolution Directive (BRRD) applies to systemically important institutions, including large German banks, its relevance to typical alternative asset manager transactions remains low. German buy-side entities are generally not subject to BRRD themselves, and counterparties in the fund space tend to be outside the immediate scope of resolution authorities. Nonetheless, awareness of bail-in mechanics and contractual recognition requirements under BRRD Article 55 is essential when transacting with or through BRRD-subject entities, particularly where English-law documentation is involved.

The recognition and enforcement of foreign judgments is another area where cross-border complexity arises. Germany is a party to the Brussels Ia Regulation, which provides streamlined recognition procedures for judgments from EU member states. However, recognition of judgments from third countries—such as the UK post-Brexit or the US—requires a more involved analysis under German private international law. While English judgments may still be enforceable in Germany under bilateral or multilateral treaties or through general civil procedure, the process lacks the automaticity that was available pre-Brexit. This has practical consequences for the enforceability of close-out amounts, indemnities, and collateral enforcement where the governing law or forum is outside the EU. In transactions governed by English law, for example, enforceability in Germany is not necessarily precluded, but must be assessed on a case-by-case basis, and enforcement proceedings may take longer and face greater evidentiary requirements.

These issues, while manageable, require proactive legal structuring. Transaction documentation should be drafted with enforceability in mind, including clear choice-of-law and jurisdiction clauses, collateral documentation that aligns with German legal expectations, and dispute resolution provisions that take account of recognition risks. In some cases, dual-governing-law frameworks or arbitration clauses may be considered to mitigate enforcement uncertainty.

In summary, while Germany is fully integrated into the European financial and legal framework, its domestic legal system imposes specific requirements that can impact the structure, enforceability, and risk profile of cross-border derivatives trades. Legal counsel must remain attentive to these issues—particularly in the areas of insolvency law, recognition of foreign judgments, and the limited scope of resolution regimes—when advising alternative asset managers transacting with German counterparties.

Documentation Standards and Market Divergences

While Germany's participation in international derivatives markets means that much of the transactional infrastructure is globally harmonised, material differences in market conventions, terminology, and legal assumptions continue to create friction in cross-border deals. These divergences are particularly relevant for alternative asset managers accustomed to English law-based documentation, and they underscore the importance of legal and cultural fluency when negotiating with German counterparties.

A key point of divergence lies in the choice of governing law. Although English law remains widely used in international derivatives transactions—including those involving German parties—it is not always the default. German law continues to be preferred in purely domestic transactions, or where parties anticipate German courts as the forum for dispute resolution. The use of German law introduces different interpretative approaches grounded in the civil law tradition. For instance, while English law may tolerate a degree of ambiguity or rely on market custom to fill in gaps, German legal interpretation is far more literal, often requiring greater specificity and clarity in contractual terms. Terms considered boilerplate under an ISDA English law schedule may carry different implications—or raise enforceability questions—under German law.

These differences are amplified by variations in terminology and documentation styles. German transactional language often places greater emphasis on formalities, such as explicit references to statutory provisions, use of annexes for clarifications, and stricter requirements around evidence of contract formation. While these conventions are not incompatible with ISDA-based documentation, they can lead to tension when pre-printed templates are used without sufficient local adaptation. Similarly, terms such as “representation,” “material adverse change,” or “best efforts” may not carry direct equivalents under German law, and their inclusion without clarification can lead to differing expectations during performance or enforcement.

In practice, many German institutions are comfortable transacting under the ISDA Master Agreement governed by English law—particularly when dealing with large international counterparties—but will often insist on jurisdiction-specific modifications in the Schedule or Credit Support Annex (CSA). These may include changes to close-out methodology, collateral eligibility, valuation mechanics, or dispute resolution provisions. One area that frequently requires attention is the treatment of negative interest on collateral, which has historically been handled differently across jurisdictions and may be addressed explicitly in German-negotiated CSAs.

Points of misunderstanding also tend to arise around enforceability, particularly in the context of insolvency or collateral enforcement. Non-German counterparties may assume that German courts will automatically recognise and enforce all provisions of a standard ISDA framework. While this is often true, especially where robust legal opinions support netting and collateral arrangements, local courts will still apply German procedural and substantive law when assessing claims. This can affect not only the timing of enforcement but also the interpretation of contractual rights and obligations in distressed scenarios.

Ultimately, while the ISDA Master Agreement provides a common foundation for global derivatives trading, the practical application of that framework can differ significantly between jurisdictions. For asset managers transacting with German counterparties—or managing portfolios that include German-governed derivatives—it is essential to understand these documentation standards and divergences. Working with local counsel to localise contracts, clarify ambiguous terms, and align documentation with German legal expectations can significantly reduce the risk of disputes, delays, or enforcement complications.

BRRD (Bank Recovery and Resolution Directive)

One of the more underappreciated areas in cross-border derivatives transactions involving German counterparties is the relevance of the Bank Recovery and Resolution Directive (BRRD). While it may not feature prominently in day-to-day trading conversations, its operational and legal implications—particularly in the context of close-out netting and loss allocation—have become increasingly important for alternative asset managers interacting with systemically important financial institutions within the EU.

The BRRD was implemented to provide authorities with tools to manage the failure of banks and certain investment firms in an orderly manner, aiming to avoid systemic risk and the use of taxpayer funds for bailouts. In Germany, the directive has been implemented through the German Recovery and Resolution Act (Sanierungs- und Abwicklungsgesetz, or SAG), which is overseen by the Federal Agency for Financial Market Stabilisation (FMSA) in conjunction with BaFin and the Single Resolution Board (SRB) at the EU level.

For most fund managers, the BRRD's practical impact is indirect but nonetheless significant. One of the key concerns is the recognition of bail-in powers by contractual counterparties. Under Article 55 of the BRRD, EU-regulated institutions are required to include contractual terms in non-EU law-governed agreements acknowledging that the counterparty's claims may be subject to bail-in by resolution authorities. While this requirement is widely understood in UK and US markets, its implementation remains uneven—particularly where counterparties are not accustomed to incorporating resolution-specific language into standard derivatives documentation.

In Germany, major banks and financial institutions are subject to the full scope of BRRD resolution tools, including bail-in, bridge bank measures, and forced sales. However, in practical terms, these powers are rarely used. The German resolution framework is designed to preserve financial stability, and resolution is typically seen as a last resort after private-sector solutions—such as early intervention or capital raising—have been exhausted. For this reason, BRRD provisions may not be invoked frequently, but they must still be accounted for in documentation, especially in high-value or long-duration trades.

What makes the BRRD particularly challenging is that many market participants do not fully understand its scope or mechanics. Legal teams should therefore play an active role in educating clients and ensuring that required BRRD-compliant language is included where applicable. This is particularly important in cross-border trades involving English or New York law documentation, where the omission of Article 55 language could lead to compliance issues or weaken enforceability in the event of counterparty failure.

While BRRD may not be the driving issue in every transaction, its relevance continues to grow in regulatory audits and institutional risk reviews. As such, a working knowledge of Germany's resolution regime—and how it interfaces with derivatives documentation—has become a necessary part of legal strategy for any manager transacting with BRRD-covered institutions.

Market Trends and Regulatory Developments

The German derivatives market continues to evolve in response to macroeconomic conditions, post-Brexit regulatory realignments, and technological innovation. For alternative asset managers, particularly those operating cross-border, understanding these trends is essential for anticipating market shifts, compliance obligations, and potential strategic opportunities.

One notable development is the increasing use of derivatives by German alternative asset managers to support more sophisticated portfolio strategies. As regulatory clarity improves and infrastructure matures, there has been a marked rise in the use of OTC derivatives for hedging currency, interest rate, and credit exposures, particularly among private debt, real estate, and infrastructure funds. German managers are also exploring structured products and total return swaps more actively, often with an emphasis on risk transfer and balance sheet optimization. At the same time, there is a growing emphasis on operational due diligence, driven by the expectation that fund managers not only understand their exposures but can demonstrate compliance with collateral management and reporting obligations under EMIR and AIFMD.

Post-Brexit repositioning has also played a significant role in shaping derivatives flows into and out of Germany. With the UK's exit from the EU, many institutions have restructured their trading books and legal entities to ensure continued access to EU markets. Frankfurt has emerged as a key beneficiary of this shift, with several global banks expanding their EU operations in Germany and relocating derivative trading desks from London to continental Europe. This transition has implications for legal documentation, as counterparties reassess governing law, jurisdiction clauses, and collateral arrangements to ensure enforceability under EU frameworks. The use of EU-based central counterparties, such as Eurex Clearing, has also increased as firms look to future-proof their clearing obligations within the bloc.

Regulatory developments at the EU level have further accelerated change. The phased implementation of EMIR Refit has introduced more nuanced requirements for counterparty classification, clearing thresholds, and risk mitigation techniques, all of which must be carefully monitored and operationalized. Similarly, proposed revisions to MiFID II and the Capital Markets Union (CMU) agenda have signalled the EU's intention to deepen integration and reduce reliance on third-country infrastructure—goals that align closely with Germany's traditionally risk-averse regulatory stance.

At the same time, market infrastructure is undergoing rapid digitalisation. German financial institutions and regulators alike are actively engaging in initiatives to explore distributed ledger technology (DLT) for settlement, collateral management, and trade reporting. BaFin has shown cautious openness to innovation, with a focus on ensuring that new products and platforms meet existing legal and prudential standards. Pilot projects involving tokenized securities and smart contract-based derivatives are beginning to take shape, although adoption remains measured. For asset managers, this creates a need to stay informed—not just about the legal implications of new technologies, but also their operational viability and integration with traditional market systems.

Finally, there is a broader policy shift underway within the EU to coordinate financial regulation more effectively across member states. Germany, as a regulatory heavyweight, is actively contributing to the standardization of supervisory practices and the development of shared frameworks for ESG integration, digital asset oversight, and systemic risk monitoring. These efforts are likely to impact the derivatives landscape indirectly by influencing product innovation, reporting frameworks, and counterparty risk assessment. In sum, the German derivatives market is in a state of steady, policy-driven transformation. For alternative asset managers, staying ahead of these developments requires a proactive legal and regulatory strategy, one that is not only grounded in current rules but anticipates where the market—and its regulators—are headed next.

Netting and Legal Opinions

Netting remains a cornerstone of risk management in derivatives markets, and its enforceability is particularly critical in assessing the legal soundness of transactions involving German counterparties. For alternative asset managers engaging in OTC derivatives, understanding how netting functions under German law—and where potential legal uncertainties lie—is essential for evaluating counterparty risk and ensuring regulatory compliance.

In Germany, close-out netting arrangements are generally enforceable, provided they meet the requirements set out under the German Insolvency Code (InsO) and conform with the EU's Financial Collateral Directive. The ISDA Master Agreement, whether governed by English or German law, is widely used and supported by legal opinions affirming the enforceability of its netting provisions in a German insolvency scenario. However, as with many aspects of cross-border derivatives law, enforceability is not merely a theoretical issue—it must be demonstrable, jurisdiction-specific, and supported by up-to-date legal analysis.

Accessing reliable and consolidated public information on netting enforceability in Germany can be a challenge. While ISDA publishes legal opinions for key jurisdictions, including Germany, these are not typically available to non-members or the general public. For smaller managers or counterparties without in-house legal capacity, this can create an information gap. Moreover, enforceability is not static—it may be influenced by legislative developments, court decisions, or changes in insolvency practice. Legal certainty therefore requires ongoing monitoring and the ability to access jurisdiction-specific insights.

This is where the role of national industry associations becomes particularly valuable. In Germany, the Bundesverband Deutscher Banken (Association of German Banks) plays a key role in providing guidance on the enforceability of netting, collateral, and other market infrastructure topics. While it does not function as a direct equivalent to ISDA, it serves a parallel function in the domestic market—liaising with regulators, issuing position papers, and contributing to the standardization of market practices. For asset managers, referencing the work of such associations, or even engaging with them directly, can provide an additional layer of legal and practical confidence.

In addition, many German financial institutions rely on bespoke or bilateral legal opinions commissioned from leading domestic law firms. These opinions often cover not only netting and collateral enforceability, but also BRRD bail-in recognition, the treatment of CSAs under German law, and the impact of local regulatory frameworks on contractual provisions. For asset managers entering into higher-value or longer-duration transactions, requesting access to such opinions—or commissioning their own—can be a prudent step in legal risk assessment.

In summary, while Germany broadly supports the enforceability of close-out netting and related protections under ISDA documentation, the practical application of these protections must be verified through legal analysis tailored to the specifics of the counterparty, transaction structure, and governing law. Industry association guidance and legal opinions remain indispensable tools in this process, supporting the operational and legal certainty that underpins derivatives market integrity.

Let me know if you'd like to supplement this with a short guide to navigating ISDA's netting opinion architecture or a sidebar explaining how to interpret the key elements of a German netting opinion.

Role of Industry Associations

Industry associations play a vital role in shaping market practice, guiding legal interpretation, and facilitating dialogue between market participants and regulators. In the German derivatives market, the Bundesverband Deutscher Banken (Association of German Banks) serves as a central point of reference for both domestic institutions and international counterparties seeking to understand local legal and regulatory expectations.

The Bundesverband Deutscher Banken represents private banks in Germany and acts as an influential policy voice on financial regulation, market infrastructure, and prudential supervision. Its work is highly relevant in the context of derivatives trading, particularly in the areas of netting enforceability, collateral practices, resolution planning, and legal certainty in insolvency scenarios. The association routinely publishes position papers, consultation responses, and technical guidance—resources that are widely regarded as authoritative within the German financial community.

While ISDA remains the dominant force in setting global derivatives standards, the Bundesverband serves a complementary role within the German market. Unlike ISDA, which focuses heavily on global documentation standards (such as the ISDA Master Agreement and Credit Support Annexes) and provides legal opinions for netting and collateral enforceability across jurisdictions, the Bundesverband's influence lies more in domestic regulatory engagement and interpretation of EU-level rules as applied within Germany. Its work is particularly valuable when navigating areas where German law or regulatory practice diverges subtly—but materially—from other EU or international norms.

For example, the Bundesverband often engages directly with BaFin, the Deutsche Bundesbank, and the Single Supervisory Mechanism (SSM) to represent industry views on issues ranging from EMIR implementation to digital finance regulation. These insights can be critical for alternative asset managers transacting with German counterparties or operating within a German legal entity, especially when preparing for regulatory changes or assessing the local enforceability of contractual provisions.

In addition to its technical output, the Bundesverband also acts as a forum for peer engagement and market coordination. It hosts working groups, roundtables, and briefing sessions that bring together legal, compliance, and business professionals from across the industry. These forums often serve as early indicators of emerging issues or consensus positions, and provide a practical space to exchange views on how to manage complex legal and regulatory challenges.

For alternative asset managers, engaging with or staying informed through the Bundesverband can offer significant benefits. Whether by accessing its publications, following its regulatory commentary, or leveraging its guidance as part of internal legal reviews, the association provides a reliable and jurisdiction-specific complement to global resources like ISDA.

In a regulatory environment that is increasingly dynamic and multi-layered, the Bundesverband Deutscher Banken remains an essential institution for those seeking to navigate the German derivatives market with confidence and clarity.

Let me know if you'd like to add a short appendix with links to publicly available Bundesverband resources or a chart comparing its functions to ISDA's by topic area.

Conclusion

Engaging with German derivatives counterparties offers access to a mature, stable, and systemically important financial market at the heart of the European Union. However, for non-German parties—particularly those accustomed to English law documentation and common law legal assumptions—doing so requires careful attention to local legal frameworks, market conventions, and regulatory expectations.

As this chapter has outlined, the German derivatives landscape is both globally connected and distinctly local. While ISDA documentation is widely used, enforceability and interpretation are shaped by civil law principles, insolvency rules, and regulatory structures that do not always align with those of other jurisdictions. Key areas of potential friction include differences in contract formalism, governing law preferences, the treatment of close-out netting, and the operationalisation of EMIR and BRRD requirements.

Cross-border transactions further complicate this picture, introducing additional considerations around jurisdiction, enforceability of foreign judgments, and the recognition of resolution and bail-in powers. In this context, legal certainty cannot be assumed; it must be actively built into the transaction through informed structuring, jurisdiction-specific documentation, and appropriate reliance on legal opinions and industry guidance.

To that end, non-German parties are strongly advised to seek localized legal input at the outset of any transaction involving German counterparties. Even where standard ISDA frameworks are used, tailoring the documentation to reflect German-specific legal realities—especially in areas such as collateral, netting, and insolvency—is critical to ensuring enforceability and avoiding post-trade disputes.

Finally, it is worth acknowledging Germany's evolving but measured approach to EU-wide and global market harmonization efforts. While German regulators and institutions actively support initiatives such as EMIR, MiFID, and the Capital Markets Union, implementation often reflects Germany's cautious and risk-averse regulatory culture. For market participants, this creates a landscape that is predictable and institutionally robust—but also one where legal and regulatory conservatism must be factored into deal strategy and counterparty engagement.

Author Biography



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Michael Bergfort is a senior legal expert in derivatives at HSBC Germany, with extensive experience in documentation, regulatory frameworks, and transactional structuring across the European financial markets. He brings deep expertise in derivatives documentation developed over decades at a global financial institution, with a particular focus on German law and regulatory regimes. His core areas of specialization include EMIR compliance, collateral management, financial benchmarks, and the transition from IBOR to risk-free rates (RFR).

Michael maintains a broad network within Germany's financial and legal community and is widely recognized for his knowledge of German law-governed derivatives documentation and its integration with international standards such as ISDA. He has contributed to legal opinions and industry discussions on key regulatory reforms affecting the European derivatives market, including the implementation of the Bank Recovery and Resolution Directive (BRRD) and EMIR Refit.