

Contents

<i>Preface</i>	<i>page</i> ix
<i>Table of Cases</i>	xiv
<i>Table of Legislation</i>	xxvi
Introduction	1
1 Thirty Years of Derivatives Litigation	4
2 The Financial Courts	7
3 The Capacity of the Financial Courts	11
1 The Modern Derivatives Markets	14
1.1 Introduction	14
1.2 ‘Over-the-Counter’ Derivatives: Definitions and Uses	14
1.3 From Glossary to Alchemy: OTC Derivatives since Hazell	17
1.3.1 The Size of the OTC Derivatives Markets	18
1.3.2 Concentration and Diversification	21
1.4 Regulation of the OTC Derivatives Markets before the Financial Crisis	25
1.4.1 Public Sector Regulation	25
1.4.2 Self-Regulation by Contract	30
1.4.3 The Dominance of the ISDA Master Agreement	33
1.5 OTC Derivatives and the Global Financial Crisis	41
1.5.1 OTC Derivatives and the Causes of the Crisis	41
1.5.2 Regulatory Reform of the OTC Derivatives Markets	43
2 Global Markets and the English Courts	50
2.1 Introduction	50
2.2 Drivers of Derivatives Litigation	50
2.3 ISDA Master Agreement: Choice of Law and Jurisdiction	60
2.4 Policy and the English Courts	62

2.4.1	Litigation Involving the UK's 'Strategic Industries'	62
2.4.2	An Analogy with Macroprudential Regulation	67
2.5	Conclusion	75
3	Interpreting The ISDA Master Agreement	76
3.1	Introduction	76
3.2	Case Studies	79
3.2.1	Section 2(a)(iii), ISDA MA 1992 Version	79
3.2.2	The Definitions of 'Loss' and 'Market Quotation', ISDA MA 1992 Version	85
3.2.3	Credit Events in the ISDA Credit Derivatives Definitions	93
3.3	The Modern Approach to Interpreting Commercial Contracts	97
3.3.1	Literal v Contextual?	98
3.3.2	The Investors Compensation Scheme Re-statement	99
3.3.3	Standard Form Contracts: from Ships to Swaps	105
3.4	The 'Correct Approach' to Interpreting the ISDA MA	107
3.4.1	'Clarity, Certainty and Predictability'	108
3.4.2	Sources of Contextual Information	112
3.4.3	1992 and 2002 Versions of the ISDA MA	116
3.5	Conclusion	119
4	The Regulatory Framework for Mis-selling Claims	120
4.1	Introduction: The Regulatory Context	120
4.1.1	The UK Regulatory Framework	122
4.1.2	A COBS Case Study	125
4.2	Statutory Routes to Redress	127
4.2.1	Internal Complaints Procedures	128
4.2.2	The Financial Ombudsman Service	129
4.2.3	Section 138D of the Financial Services and Markets Act 2000	131
4.3	The 'Interest Rate Hedging Products' Compensation Scheme	141
4.3.1	IRHP Mis-selling	142
4.3.2	Features of the IRHP Review	144
4.3.3	Legal Challenges to the IRHP Scheme	147
4.4	Conclusion	152
5	Private Law Claims for Mis-selling	154
5.1	Introduction	154
5.2	Mis-selling Litigation	155
5.2.1	Defining Mis-selling Litigation	155
5.2.2	Concurrent Claims	156
5.3	Contract	158
5.4	Misrepresentation	160
5.4.1	Fraud	161

5.4.2	Section 2(1) Misrepresentation Act 1967	164
5.4.3	Negligent Misrepresentation at Law	165
5.4.4	Representations: Express and Implied	166
5.4.5	Inducement	171
5.4.6	The Role of Appellate Courts	174
5.5	Banks' Duties of Care	175
5.5.1	Establishing a Duty of Care	175
5.5.2	Breach	187
5.5.3	Quantum	188
5.6	Fiduciary Duties: The 'Moral Standards of the Vicarage'?	191
5.6.1	Banks' Fiduciary Duties	191
5.6.2	Fiduciary Duties and Equitable Remedies	193
5.6.3	Reform	196
6	Defensive Drafting	200
6.1	Introduction	200
6.2	Categorising Defensive Drafting	201
6.2.1	Typical Defensive Drafting	202
6.2.2	Exclusion or 'Basis' Clauses?	203
6.3	Exclusion Clauses and UCTA Controls	205
6.3.1	UCTA Controls	205
6.3.2	Reasonableness	207
6.4	'The Contract Itself Gives Rise to an Estoppel'	211
6.5	Effects in Mis-selling Litigation	217
6.5.1	The 'Disclaimer Effect' of Standardised Drafting	218
6.5.2	Swaps Litigation	220
6.5.3	Beyond the Financial Markets	224
6.5.4	A High Water Mark?	225
6.6	Conclusion	239
7	Challenging Decision-making	241
7.1	Introduction	241
7.2	Express Standards of Decision-making	242
7.2.1	The 1992 MA	244
7.2.2	The 2002 MA	250
7.2.3	Conclusion	252
7.3	Regulating Contractual Discretion	254
7.3.1	Implied Terms	254
7.3.2	Reviewability	258
7.3.3	Standards	262
7.3.4	Significance	267
7.4	The Potential for Judicial Review	269
7.4.1	Amenability	269
7.4.2	Grounds of Review	274

7.4.3	Remedies	276
7.5	Conclusion	277
8	Challenging Choice of Jurisdiction	279
8.1	Introduction	279
8.2	ISDA MA: Choice of Law and Jurisdiction	282
8.3	Challenging the Jurisdiction of the English Courts	283
8.3.1	Multiple Contracts	284
8.3.2	Parallel Proceedings	291
8.3.3	Legal Capacity	294
8.4	Insolvency	297
8.4.1	The English Courts as the Contractual ‘Courts of Record’	299
8.4.2	Conflicting Judgments	302
8.4.3	The Jurisdictional Puzzle	307
9	Challenging Choice of Law	312
9.1	Introduction	312
9.2	Default Position	313
9.3	Mandatory Rules	315
9.4	Applying Foreign Law	321
9.5	The New Capacity Claims	323
9.5.1	Applicable Law	324
9.5.2	Determining Capacity	328
9.5.3	Redress	334
10	The Future of the Financial Courts	337
10.1	Introduction	337
10.2	Fragmentation Since the Financial Crisis	338
10.2.1	OTC Derivatives Market Reform	338
10.2.2	Brexit	339
10.2.3	‘Deglobalisation’	346
10.3	New Choices	347
10.3.1	New Master Agreements	347
10.3.2	New Developments in Dispute Resolution	348
10.4	English Responses	357
10.4.1	The Business Property Courts	357
10.4.2	The Financial List	358
10.5	Concluding Remarks	362
	Appendix: Legislative Framework for Contractual Jurisdiction Provisions	365
	Index	369