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金融法律热点问题

期货法草案观察：关于其他衍生品交易的单一协议及净额结算条款

近日，《中华人民共和国期货法(草案)》(简称“**期货法草案**”)首次亮相，引发了业界的极大关注。期货法草案的亮点颇多，其中就包括设专章规定了“其他衍生品交易”（即区别于期货的非标准化场外衍生品交易)[1]，该等立法模式也有利于构建我国统一金融衍生品市场。而“其他衍生品交易”章节中最引人瞩目的无疑是我国首次在法律层面对单一协议以及终止净额结算制度作出了规定，本文系笔者对于相关规定的观察及初步思考。

一、期货法草案有条件地认可了单一协议制度

期货法草案第三十五条规定：“依照本法规定备案的主协议、主协议项下的全部补充协议以及交易双方就各项具体交易做出的约定等，共同构成交易双方之间一个完整的单一协议，具有法律约束力。”该条涉及衍生品交易领域的支柱制度之一——单一协议，该制度旨在对抗破产企业管理人（以下简称“**管理人**”）依据《破产法》享有的拣选权。[2]具体而言，单一协议制度能够避免衍生品交易双方之间达成的每一笔具体交易被视为独立的合同，进而避免管理人可以选择继续履行对破产企业有利的交易，而选择解除对破产企业不利的交易。期货法草案原则性地认可了单一协议制度适用于其他衍生品交易。

同时，期货法草案对于单一协议制度的生效也规定了一定的限制条件，即按照期货法草案规定备案后的主协议才能与其补充协议、具体交易约定构成有效的单一协议。期货法草案第三十四条同时规定：“行业协会或者组织开展其他衍生品交易的机构应当将其他衍生品交易中采用的主协议等格式合同文本，报送国务院授权的部门备案”。就行业协会发布的标准主协议而言，国内行业协会发布的主协议通常已经在国务院授权的相关监督管理机构备案或者经相关机构认可，前述备案要求对国内行业协会发布的主协议影响不大。例如，中国银行间市场交易商协会发布的《中国银行间市场金融衍生产品交易主协议》。[3]

但是，期货法草案设置的备案条件未充分考虑国际行业协会发布的主协议。不同于国内行业协会，国际行业协会制定的主协议历史悠久，发布之初也未经我国相关监管部门授权或者同意，要求国际行业协会进行主协议备案势必会引发一些实操问题。由于国际行业协会的主协议在市场上被广泛运用(例如国际掉期及衍生工具协会发布的主协议)，可能涉及由不同部门监督管理的衍生产品品种，正式落地的期货法及其配套规则应当积极考虑

[1] 《中华人民共和国期货法（草案）》第三条：本法所称其他衍生品，是指价值依赖于标的物价值变动的、非标准化的远期交割合约，包括非标准化的期权合约、互换合约和远期合约。

[2] 《中华人民共和国企业破产法》第十八条：人民法院受理破产申请后，管理人对破产申请受理前成立而债务人和对方当事人均未履行完毕的合同有权决定解除或者继续履行，并通知对方当事人。管理人自破产申请受理之日起二个月内未通知对方当事人，或者自收到对方当事人催告之日起三十日内未答复的，视为解除合同。

[3] 中国银行间市场交易商协会公告[2009]第5号：《主协议》文本已经交易商协会第一届常务理事会第三次会议审议通过，并在中国人民银行和国家外汇管理局备案，现予以发布。

并回应国际行业协会的主协议是否需要备案以及如何备案的问题。此外，实践中还存在开展衍生品交易的金融机构自行制定主协议的情况，为保障其中单一协议约定的法律效力，金融机构需要根据制定主协议所适用的衍生品交易类型，判断如何向相关的监督管理机构备案，或者退而选择使用行业协会经过备案的标准化主协议。

最后，实践中出于种种考量，金融机构在开展某些简单衍生品交易时(例如外汇远期交易)可能不会与交易相对方签署主协议。虽然在司法实践中，已有部分法院认定交易双方未签订独立的衍生品交易主协议并不能否认双方之间形成衍生品交易合同关系，[4]但依据期货法草案第三十五条所规定的原则，未签署主协议的当事人之间达成的多笔衍生品交易能否适用单一协议制度将存在较大的法律风险。

二、期货法草案突破性地认可了终止净额结算制度

在有条件地认可单一协议制度地基础上，期货法草案第三十七条进一步认可了终止净额结算制度。期货法草案明确以单一协议方式从事其他衍生品交易的，可以依照协议约定终止交易，并按净额对协议项下的全部交易盈亏进行结算。同时更进一步明确，前述做出的终止净额结算行为不因交易任何一方依法进入破产程序而无效或者撤销。中国是否承认终止净额结算的可执行性是衍生品市场长久关注的问题，在此前的司法实践中虽然已有法院在不涉及破产的情况下明确表示了对于净额结算的支持[5]，但在交易对手发生破产事件时，主协议项下涉及多笔交易的终止净额结算是否能得到中国法院的认可仍有不确定性。在2020年9月中央国债登记结算有限责任公司和国际掉期及衍生工具协会联合发布的白皮书《使用人民币债券充抵场外衍生品交易保证金》中仍提到，国际市场仍认为中国是不支持终止净额结算的司法管辖区。[6]

从此次期货法草案的相关规定看，如果终止净额结算行为在交易任何一方进入破产程序之前已经完成的，其法律效力应当是明确得到了法律的认可，这无疑是突破性的进展。但需要注意的是，从期货法草案第三十七条第二款的内容看，似乎仅明确了已经完成的终止净额结算行为不会因为破产程序而被无效或者撤销，但如果在终止净额结算行为完成前交易一方即进入破产程序的，终止净额结算制度能否得到完全的保障仍有待立法机关进一步明确。具体而言，终止净额结算行为的完成通常是需要一系列步骤的，以国际掉期及衍生工具协会主协议规定为例，在违约事件确定发生后，享有提前终止权的一方需要发出提前终止通知提前终止所有交易并指定提前终止日，随后在合理可行的最短时间内发出提前终止款项计算报告。而由于交易一方发生破产这一违约事件时并无公开信息，享有提前终止权的一方很有可能是在交易对方进入破产程序后才能发出提前终止通知(即便是在适用自动提前终止条款的情况下，当事人通常也只能在交易对方进入破产程序后发出提前终止款项计算报告，完成终止净额结算行为)。因此，我们期望正式施行的期货法能够进一步澄清并回应该等现实问题，明确交易一方进入破产程序后，当事人仍然可以按照协议的约定提前终止衍生品交易并进行终止净额结算，且终止净额结算并不需要受制于《破产法》的相关限制性规定(特别是《破产法》

[4] (2012)穗中法民四初字第13号
[5] (2015)浦民六（商）初字第S2958号

[6] 中央国债登记结算有限责任公司、国际掉期及衍生工具协会著，《使用人民币债券充抵场外衍生品交易保证金》：近年来，尽管中国司法机关和监管机构在多场合表示对终止净额结算条款的效力持积极态度，但因相关制度缺位，国际市场仍认为中国是不支持终止净额结算的司法管辖区：一是因为中国法未明确认可“单一协议”概念，亦未对破产情况下的终止净额结算规则予以特别保护，提前终止权可能无法对抗破产管理人的挑拣履行权。二是中资金融机构破产流程有待进一步完善，暂未充分考虑在实际风险处置中，如何能够有效实现终止净额结算权利，给快速、有序处置危机银行提供充分保障。三是与净额结算安排相关的机制建设，如配套的资本缓释计量管理办法等有待明确。

第 18 条关于管理人选择权的规定以及第 40 条关于抵销权限制的规定）。

我们的观察

期货法草案关于其单一协议及终止净额结算制度的规定无疑是突破性的，为我国建立与国际接轨的衍生品交易市场体系迈出了坚实的一步。当然，期货法草案目前关于衍生品交易主协议的备案要求如何落地、终止净额结算制度的可执行性是否需要进一步明确和澄清也是立法机关需要考虑的问题，我们将持续保持关注。

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Financial

Single Agreement and Netting Provisions Concerning Other Derivatives Trading – Our Observations of the Draft Futures Law

Recently, *the Futures Law of the People's Republic of China (Draft)* (the "Draft Futures Law") was issued for public comments for the first time, which immediately garnered wide attention from the industry. It has many promising aspects, conducive to the development of a unified financial derivatives market. In particular, a separate chapter governing "Other Derivatives Trading" (i.e., any non-standardized OTC trading aside from listed futures)[1] embeds provisions related to *single agreement* and *close-out netting* mechanisms for the first time in a law at a national level. Below are our observations and preliminary views of the relevant key provisions of the Draft Futures Law.

I. The Draft Futures Law conditionally recognizes the single agreement mechanism

Article 35 of the Draft Futures Law stipulates that "the master agreement filed pursuant to provisions of this Law, all supplementary agreements thereunder, together with agreements entered into by the parties with respect to each specific trading, shall constitute an entire single agreement between the parties and shall be legally binding". This article relates to one of the pillars of derivatives transactions, the single agreement mechanism, which is designed to combat the administrator from cherry-picking favorable agreements under Article 18 of *the Enterprise Bankruptcy Law of the People's Republic of China* (the "Bankruptcy Law")[2]. To be specific, the single agreement mechanism prevents each specific derivative transaction entered into between the parties under a single master agreement from being treated as individual separate contracts, thereby preventing the administrator's discretion in determining to continue to perform transactions favorable to the insolvent enterprise while terminating those unfavorable ones. Notably, the Draft Futures Law recognizes in principle that the single agreement mechanism shall apply to the Other Derivatives Trading.

The Draft Futures Law further sets out a prerequisite for the adoption of the single

[1] Article 3 of the Futures Law of the People's Republic of China (Draft): The term *other derivatives* referred to in this Futures Law means non-standardized forward delivery contracts whose value depends on the changes in the value of subjects, including non-standardized option contracts, swap contracts and forward contracts.

[2] Article 18 of the Enterprise Bankruptcy Law of the People's Republic of China: After the commencement of a bankruptcy proceeding, the administrator has the power to determine whether to terminate or continue the performance of a contract that entered into prior to acceptance of the bankruptcy application and has not been fully performed by the debtor and its counterparty, subject to the administrator's obligation to notify the counterparty. Where the administrator does not notify the counterparty of its decision at the earlier of two months after the commencement of the bankruptcy proceeding; or 30 days after the counterparty requests for such decision, the contract shall be deemed terminated.

agreement mechanism, that is, only the master agreement filed for record in accordance with this Law may constitute, together with its supplementary agreements and agreements with respect to each specific trading, an effective single agreement. Article 34 of the Draft Futures Law also stipulates that industry associations or institutions that organize Other Derivatives Trading, shall file the master agreement and other such standard agreements adopted in the Other Derivatives Trading with the department authorized by the State Council. Given that master agreements issued by industry associations in China in general have already been filed with the relevant department authorized by the State Council, the aforesaid filing requirements may not impact these master agreements issued by the domestic industry associations, e.g., Master Agreement on the Financial Derivatives Trading in the Inter-bank Market of China released by the National Association of Financial Market Institutional Investors.[3]

Notwithstanding the above, it is noteworthy that the filing requirements set out in the Draft Futures Law have not been tailor-made for the master agreements issued by international industry associations. Unlike domestic master agreements, master agreements formulated by international industry associations have a long history and have never been authorized or approved by the relevant Chinese regulatory authorities when they were first issued. Therefore, requiring international industry associations to file the master agreements with PRC regulators would inevitably cause certain practical problems. As the master agreements of international industry associations are widely used in the market (for example, the master agreements issued by the International Swaps and Derivatives Association (ISDA)) for various derivatives transactions under the administration and supervision by different regulatory authorities, the Draft Futures Law and its detailed implementation rules, once formally promulgated, should be proactively prepared to address the issue of whether master agreements issued by international industry associations shall be filed and how they would be filed with the PRC regulators. In addition, as a practical matter, the financial institutions engaging in derivatives transactions may formulate its own master agreement template. To ensure the binding force of the single agreement provision under such a template, the financial institutions shall, based on the type of derivative transactions covered under its template, determine whether to file such master agreements with the relevant regulatory authorities, or to alternatively use the prevailing standard master agreement filed by industry associations.

Furthermore, out of various practical considerations, the financial institutions engaging in some simple derivative transactions (e.g., foreign exchange forward transactions) may not enter into any master agreement at all with its trading counterparties. In judicial practice, some courts have ruled that any derivative transaction conducted without a separate master agreement entered into between the trading counterparties shall not deny a de facto contractual relationship between the parties with respect to the derivative transaction.[4] However, in accordance with the principle provided by Article 35 of the Draft Futures Law, such multiple derivative transactions entered into between the parties in the absence of a master agreement will be exposed to a relatively high legal risk regarding whether the single agreement mechanism can be applied thereto.

II. The Draft Futures Law makes a breakthrough recognition of close-out netting

[3] *Announcement of the National Association of Financial Market Institutional Investors* [2009] No. 5: The text of the Master Agreement, which has been resolved and adopted at the third meeting of the first standing council of the National Association of Financial Market Institutional Investors and has been filed with the People's Bank of China and the State Administration of Foreign Exchange, is hereby released to the public.

[4] (2012)Sui Zhong Fa Min Si Chu Zi No.13

On the basis of the conditional recognition of the single agreement mechanism, Article 37 of the Draft Futures Law further recognizes the close-out netting mechanism. It is specified that the Other Derivatives Trading conducted by entering into a single agreement as stipulated under this Law, may be terminated upon occurrence of agreed circumstances, and the net amount of gains and losses arising from all trading activities under such agreements shall be settled. Meanwhile, it is further clarified that the aforesaid applied close-out netting shall not be invalidated or rescinded as a result of the commencement of bankruptcy procedures with respect to either trading counterparty. Whether the PRC law recognizes the enforceability of close-out netting has long been a concern of the global derivatives industry. In judicial practice, although several PRC courts have explicitly ruled in favor of close-out netting in the absence of any bankruptcy circumstance[5], it is still uncertain whether the close-out netting involving multiple derivative transactions under a master agreement can be recognized by PRC courts in the event of the bankruptcy of the trading counterparty. In a joint white paper titled "Use of RMB-denominated Chinese Government Bonds as Margin for Derivatives Transactions" released by the China Central Depository & Clearing Co., Ltd. and the ISDA in September 2020, the international market still considers China a jurisdiction that does not support the use of close-out netting.[6]

It is undoubtedly a breakthrough that the Draft Futures Law clearly recognized the enforceability of close-out netting if it has been completed before either party enters into the bankruptcy proceedings. However, the second paragraph of Article 37 seems only to specify that the completed close-out netting will not be invalidated or rescinded due to the bankruptcy proceedings, whilst providing no clarification on whether close-out netting can apply to a circumstance where either party enters into the bankruptcy proceedings before completion of close-out netting. In particular, completion of a close-out netting generally requires a series of steps. As an example, the ISDA Master Agreements allow the non-defaulting party to effectively initiate early termination of all the outstanding transactions thereunder upon occurrence of any Events of Default by serving an early termination notice and designating an early termination date, followed by providing a calculation statement specifying any early termination amount receivable or payable as soon as would be reasonably practical. Given that an Event of Default that submission and acceptance of a bankruptcy petition against the defaulting party may not be in the public domain, it is possible that a non-defaulting party with the right of early termination would serve the early termination notice after being aware that a bankruptcy petition against its counterparty has been filed and accepted by a PRC court (even if the "Automatic Early Termination" provision has been applied, the non-defaulting party usually can complete the close-out netting by providing the calculation statement only after the counterparty enters into bankruptcy proceedings). Therefore, we expect that the Draft Futures Law would clarify upon its official promulgation that after any trading counterparty enters into bankruptcy proceedings, the other counterparty can still initiate early termination of the derivative transactions and apply close-out netting as agreed under the master agreement, so that the close-out netting would not be subject to the relevant stipulations of the Bankruptcy Law (in particular, the

[5] (2015) Pu Min Liu (Shang) Chu Zi No. S2958

[6] *Use of RMB-denominated Chinese Government Bonds as Margin for Derivatives Transactions* issued by **China Central Depository & Clearing Co., Ltd. and** International Swaps and Derivatives Association: Although in recent years Chinese judicial authorities and regulators have expressed their support for close-out netting in principle on various occasions, many international market participants consider China a non-netting jurisdiction, as there is no netting legislation addressing the following issues. First, Chinese law currently does not expressly recognize the concept of 'single agreement' or offer statutory recognition of close-out netting in the event a Chinese counterparty enters into bankruptcy proceedings. As a result, there is a residual legal risk that a non-defaulting party's right to early termination may be suspended or deemed unenforceable against an administrator's right to cherry-pick favorable agreements. Second, implementing rules that apply the Bankruptcy Law to Chinese financial institutions have not so far been enacted. In addition, there are uncertainties about how close-out netting will be protected and enforced under a bank resolution regime. Third, the application of close-out netting in related capital rules is yet to be clarified.

administrator's right to cherry-pick favorable agreements under Article 18 and the restrictions on the statutory right of set-off under Article 40).

III. Our Observations

The proposed provisions of the Draft Futures Law pertaining to the single agreement mechanism and the close-out netting mechanism are a breakthrough and a solid step forward for the establishment of China's own derivatives market ecosystem adapting to international practices. Nevertheless, the implementation of the proposed filing of derivative master agreements and the enforceability of the close-out netting mechanism still remain to be further considered and clarified by the PRC legislative authorities. We will continue to monitor the situation and keep our clients apprised of any important developments.

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