



The Wondering Boy 2 by Du Feichen

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# THE FUTURE IS NOW: CHINA ENACTS HISTORIC FUTURES AND DERIVATIVES LAW

未来已来：《中华人民共和国期货和衍生品法》  
的历史性颁布

AUTHORS: RICHARD MAZZOCHI, MINNY SIU, ANDREW FEI  
作者：马绍基、萧乃莹、费思

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The passage of China’s Futures and Derivatives Law (FDL) is arguably the most significant legal development in Asian derivatives markets over the past two decades. The FDL will make China a ‘clean netting jurisdiction’, thus marking an exciting new chapter in the development of derivatives markets in the world’s second largest economy. This article explores some key takeaways from the FDL for OTC derivatives.

《中华人民共和国期货和衍生品法》(“《期货和衍生品法》”)的通过,可以说是过去20年亚洲衍生品市场最为重大的法律进展。《期货和衍生品法》将使中国成为一个“干净的净额结算管辖区”,从而标志着世界第二大经济体衍生品市场的发展即将开启激动人心的新篇章。本文将总结《期货和衍生品法》对于场外衍生品而言的一些关键性要点,以飨读者。

## 1. WHAT IS THE FDL AND WHY IS IT IMPORTANT? 《期货和衍生品法》及其重要性

The FDL is a significant legal milestone because, for the first time in China’s modern history, the legal enforceability of close-out netting will be expressly recognized at a national legislative level. The FDL takes effect on 1 August 2022.

Close-out netting basically involves terminating individual derivatives transactions documented under a master agreement and reducing them to a single net amount due from one party to the other. It is a very important mechanism for the reduction of counterparty credit risks associated with derivatives transactions, and close-out netting enforceability is critical for safe and efficient derivatives markets.

The enactment of the FDL means the People’s Republic of China (“**China**”) will become a clean netting jurisdiction, meaning that reputable legal counsel in China will be able to issue an industry legal opinion (called a “**clean netting opinion**”) concluding that close-out netting is legally enforceable in China before and during bankruptcy proceedings involving a Chinese entity. Significantly, this conclusion will not depend on the parties to the relevant master agreement switching on automatic early termination (“**AET**”), which is a mechanism under which derivatives transactions will automatically terminate immediately before certain bankruptcy events occur.

Based on the clean netting opinion, financial institutions will measure their credit and risk exposures to Chinese derivatives counterparties on a net (as opposed to gross) basis for a wide range of risk management, quantitative and regulatory purposes, including for the purposes of calculating their regulatory capital ratios and other regulatory metrics. Measuring derivatives exposures on a net basis can significantly reduce transaction and regulatory costs, thereby promoting the further growth and development of China’s derivatives markets.

《期货和衍生品法》作为一个重要的立法里程碑,代表着中国现代史以来第一次在国家立法层面明确认定终止净额结算的法律可执行性。《期货和衍生品法》将于2022年8月1日实施。

简言之,“终止净额结算”是指交易双方终止主协议项下的衍生产品交易,并合并计算单一净应付款项的机制。这是一个降低衍生品交易对手方信用风险的重要机制,因此终止净额结算的法律可执行性对于衍生品市场的安全与效率来说至关重要。

《期货和衍生品法》的颁布意味着中国将成为干净的净额结算管辖区——中国法律顾问将能够出具相关的行业法律意见(“**干净的净额结算意见**”),论证终止净额结算机制在涉及中国主体的破产程序开始之前及之后都是具有法律可执行性的。重要的是,这一结论将不取决于相关主协议的双方是否选择适用自动提前终止(**automatic early termination “AET”**)。根据之前市场普遍建议的AET机制,衍生品交易将在某些破产事件发生前立即自动终止。

基于干净的净额结算意见,金融机构将在净额(而非全额)的基础上衡量其对于中国衍生品对手方的信用和风险敞口,以实现风险管理和监管合规等各种目的,包括计算其监管资本比率和其他监管指标。以净额为基础计量衍生品风险敞口还可以显著降低交易和监管合规成本,从而推动中国衍生产品市场的进一步增长与健康发展。

## 2. HOW DOES THE FDL RECOGNIZE AND PROTECT CLOSE-OUT NETTING? WHAT ABOUT THE FILING REQUIREMENT? 《期货和衍生品法》对终止净额结算的认定与保护及相关备案要求

Two key provisions of the FDL recognize and protect the legal enforceability of close-out netting – Article 32 and Article 35.

In the final version of the FDL, Article 32 provides that where derivatives trading is effected using a master agreement, that master agreement, its schedules and the derivatives transactions under it constitute a legally binding single agreement. This statutory recognition of the single agreement concept is designed to prevent a bankruptcy official from ‘cherry picking’ individual derivatives transactions under a master agreement.

In the final version of the FDL, Article 35 provides that, where derivatives trading is effected “in accordance with law” using a master agreement (in Chinese: “依法采用主协议方式从事衍生品交易”) close-out netting shall not be stayed, invalidated or revoked because one of the parties has entered into Chinese bankruptcy proceedings.

Those closely following the development of the FDL are aware that, in the previous draft of the FDL, the legal protection for the close-out netting and single agreement concepts conferred by Articles 32 and 35 was expressly made conditional upon the template master agreement (such as the pre-printed version of the ISDA Master Agreement) being filed with Chinese financial regulators (“**Filing Requirement**”).

While the Filing Requirement has been retained (albeit in modified form) in the final version of the FDL, compliance with the Filing Requirement is no longer stated to be a pre-requisite for the legal protections under Articles 32 and 35 to apply. Rather, Article 33 of the final version of the FDL simply refers to the master agreement described in Article 32 (i.e., the master agreement used to effect derivatives trading), and states that a template of such master agreement should be filed in accordance with rules promulgated by the relevant Chinese regulator. We understand that these changes in the final version of the FDL are intended to clarify that legal protections conferred by Articles 32 and 35 of the FDL are not conditional upon satisfaction of the Filing Requirement. This is a significant change in the final version of the FDL and will be welcomed by the market.

《期货和衍生品法》有两个关键性条款认定并保障终止净额结算机制的法律可执行性——第32条与第35条。

在《期货和衍生品法》的最终版本中,第32条规定:“衍生品交易采用主协议方式的,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作出的约定等,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”。以立法方式认可单一协议概念,旨在防止破产管理人在主协议项下对衍生品交易行使“挑选履行权”。

在《期货和衍生品法》的最终版本中,第35条规定,“依法采用主协议方式从事衍生品交易的”,净额结算“不因一方当事人进入破产程序而中止、无效或撤销”。

密切关注《期货和衍生品法》立法进程的从业者不难发现在之前的征求意见稿中,第32条和第35条对于“终止净额结算”和“单一协议”机制的法律保护是明确以“将主协议等合同范本(如ISDA主协议合同范本)报送国务院授权的部门或者国务院期货监督管理机构备案”(“备案要求”)作为前提条件的。

《期货和衍生品法》的最终版本虽然保留了备案要求(该要求在内容上有所调整),但不再表示备案要求是适用第32条及第35条项下法律保护的先决条件。《期货和衍生品法》最终版本的第33条只是提到了第32条中描述的主协议等合同范本(即用于进行衍生品交易的主协议),并要求该等合同范本应当按照国务院授权的部门或者国务院期货监督管理机构的规定报送备案。我们理解《期货和衍生品法》最终版本中的这些变化旨在阐明《期货和衍生品法》第32条及第35条所赋予的法律保护并不以满足备案要求为前提条件。这是《期货和衍生品法》最终版本中的重大变化之一,将受到市场欢迎。





### 3. WHAT ABOUT LEGAL PROTECTION FOR COLLATERAL ARRANGEMENTS?

#### 各类履约保障安排的法律保护

Article 34 of the FDL provides for statutory recognition of the ability to collateralize derivatives transactions by methods such as creating pledges. This wording covers the exchange of initial margin (“**IM**”) under applicable regulatory margin rules, because IM is usually subject to a security interest in favor of the collateral taker. However, Article 34 does not expressly refer to title transfer collateral arrangements, which are commonly used in connection with the exchange of variation margin (“**VM**”) under applicable regulatory margin rules. Despite the absence of any express reference to title transfer collateral arrangements in the FDL, we believe that such arrangements, when used to provide credit support for derivatives transactions, are legally valid and enforceable in China.

《期货和衍生品法》第34条对于通过“质押等方式”对衍生品交易“提供履约保障”予以立法认可。由于初始保证金(**initial margin, “IM”**)通常以为担保品接收方设立担保权益的方式提供, 该条表述也涵盖了在适用的监管保证金规则下交换初始保证金的情形。然而, 第34条没有明确提及转让式履约保障安排, 而这种安排通常用于变动保证金(**variation margin, “VM”**)的交换。尽管《期货和衍生品法》中没有明确提及转让式履约保障安排, 但我们认为, 为衍生品交易提供信用支持时采用的转让式履约保障安排在中国法下应当具有合法性且具有可执行性。

### 4. HOW DOES CHINA BECOMING A CLEAN NETTING JURISDICTION IMPACT REGULATORY MARGIN DOCUMENTATION?

#### 中国成为干净的净额结算管辖区对监管保证金文件制备有何影响?

Currently, under the regulatory margin rules in certain jurisdictions, a regulated financial institution may be exempt from the requirement to exchange VM or IM with a counterparty that is based in a non-netting jurisdiction. With China becoming a clean netting jurisdiction, international financial institutions should carefully re-assess their regulatory margin arrangements with their Chinese counterparties. We have been working closely with our financial institution clients to get ready to negotiate and enter into margin documentation with their major international counterparties in anticipation of the FDL. Our bilingual FAQs on regulatory margin requirements and legal documentation issues is available [here](#).

For completeness, we note that China has not yet implemented any regulatory margin requirements for OTC derivatives. However, a consultation paper published by Chinese financial regulators last year proposed, in principle, that margin be posted for OTC derivatives.

目前, 根据某些司法管辖区的监管保证金规则, 受监管金融机构可以豁免与位于非净额结算管辖区对手方交换VM或IM的要求。随着中国成为一个干净的净额结算管辖区, 国际金融机构应重新仔细评估其与中国对手方的监管保证金安排。我们一直在与我们的金融机构客户密切合作, 并已在《期货和衍生品法》生效实施之前为他们与主要国际交易对手的谈判和制备保证金文件作好了充分准备。请参见我们关于监管保证金要求和法律文件问题的中英文双语版[常见问题解答](#)。

值得一提的是, 中国尚未针对场外衍生品实施任何监管保证金要求。然而, 中国有关金融监管机构已于去年发布征求意见并建议原则上场外衍生品交易应当交纳保证金。



## 5. WHAT ELSE IS COVERED IN THE FDL BESIDES LEGAL RECOGNITION OF CLOSE-OUT NETTING AND COLLATERAL ARRANGEMENTS?

除了从法律层面认可终止净额结算和履约保障安排，《期货和衍生品法》还涵盖了哪些内容？

The FDL has over 150 articles and covers a broad range of topics relating to both futures and OTC derivatives. These topics include licensing and authorization, conduct of business, central clearing, trade reporting, regulatory cooperation, insider trading and other market misconduct, trading venues as well as the trading and listing of futures contracts.

On the topic of licensing and authorization, compared to previous drafts, the final version of the FDL introduces a new Article 31. New Article 31 provides that financial institutions conducting derivatives trading business must obtain approval in accordance with the law and comply with trader/counterparty suitability management obligations as well as relevant Chinese supervisory and regulatory requirements. These approvals could include, in the case of Chinese commercial banks, derivative licenses granted by the CBIRC, and in the case of Chinese securities firms, no-objection letters from the China Securities Regulatory Commission (“**CSRC**”) or filing records with the Securities Association of China (“**SAC**”).

《期货和衍生品法》的155个条文涵盖了与期货和场外衍生品相关的诸多问题, 包括开展衍生品交易业务的批准与核准、业务行为准则、中央清算安排、交易报告、监管合作、内幕交易及其他不当市场行为的防范、交易场所, 以及期货合约的交易与上市。

就衍生品交易业务的批准和核准而言,《期货和衍生品法》的最终版本与以前的征求意见稿相比新加入了第31条。第31条规定:“金融机构开展衍生品交易业务,应当依法经过批准或者核准,履行交易者适当性管理义务,并应当遵守国家有关监督管理规定”。就中国的商业银行而言, 该等批准或核准可能包括中国银行保险监督管理委员会 (“**银保监会**”) 授予的衍生品交易资格; 就中国的证券公司而言, 则可能包括中国证券监督管理委员会 (“**证监会**”) 的无异议函或在中国证券业协会 (“**证券业协会**”) 的备案记录。

## 6. WHAT’S IN STORE IN THE POST-FDL WORLD? 后《期货和衍生品法》时代的到来

The significant legal certainty that the FDL provides for close-out netting and collateral enforceability opens up an exciting new era for the growth, development and further opening-up of China’s derivatives markets in particular, and its financial sector in general.

China’s status as a clean netting jurisdiction will encourage more domestic and international end-users and financial institutions to turn to China’s derivatives market to hedge and manage all types of risks. The size of China’s derivatives market is not yet commensurate with China’s status as the world’s second largest economy. But the FDL has the potential to change all that over time.

Derivatives and related financial products will play a greater role in supporting China’s real economy, including China’s five-year plan and development goals. For example, as Chinese companies expand their international activities and as foreign companies increase their business dealings with their Chinese counterparts, they will look to more sophisticated FX and related hedging solutions offered by China’s derivatives markets. Domestic and international investors will also increasingly look to credit derivatives to manage credit risks associated with Chinese issuers, which is important to support the healthy growth and internationalization of China’s bond markets, especially now when there is a growing need to mitigate such credit risks. The development of carbon emissions derivatives and other ESG-related derivatives will also have an important role to play in helping China meet its climate and other social objectives. As more Chinese entities exchange VM and IM with their international counterparties, we may also see greater use of RMB-denominated assets as collateral, thereby promoting the internationalization of the Chinese currency.

《期货和衍生品法》为终止净额结算和履约保障可执行性提供了重要的法律确定性, 为中国衍生品市场以及中国金融业的增长、发展和进一步开放, 开辟了一个令人兴奋的新时代。

中国净额结算管辖区的地位将鼓励更多的国内外衍生品终端用户及金融机构转向中国衍生品市场对冲和管理各类风险敞口。尽管目前中国衍生品市场的规模与中国作为全球第二大经济体的地位尚不相称, 但随着时间的推移, 《期货和衍生品法》将有望为此带来翻天覆地的变化。

衍生品和相关金融产品将在支持中国实体经济发展的进程中发挥更大的作用, 包括中国的五年规划和各项发展目标等。例如, 随着中国企业“走出去”等国际活动的扩张以及外国企业与中国对手方业务往来的增加, 它们将寻求在中国衍生品市场中进行更为成熟可靠的外汇交易和有关的对冲策略。国内外投资者也将越来越多地通过信用衍生品来管理其与中国发行人有关的信用风险, 这对于中国债券市场的健康发展与国际化尤为重要, 在当前缓释信用风险的需求日益增强的大背景下, 这一重要性尤甚。碳排放衍生品和其他ESG (环境、社会与治理) 相关衍生品的发展也将在帮助中国实现其气候和其他社会目标方面发挥重要作用。随着越来越多的中国主体与它们的国际对手方交换VM和IM, 我们可能也会看到人民币资产越来越多被用作担保品, 从而进一步促进人民币的国际化。



## 7. WHERE CAN I LEARN MORE ABOUT THE FDL AND ITS IMPACT ON MY BUSINESS?

如何进一步获得《期货和衍生品法》知识并评估其对您业务的影响？

We at KWM are here to help you. During the consultation process for the draft FDL, KWM acted as ISDA's counsel and has been actively participating in Chinese legal developments relating to the enforceability of close-out netting and collateral arrangements. We have advised the derivatives industry and key market participants extensively on the legal, regulatory, compliance, documentation and transactional implications of the FDL.

Besides our expertise in all things FDL, we regularly assist international and PRC-based financial institutions and corporates with ISDA, NAMFII, CSA, VM and IM margin document negotiations, as well as with designing, structuring and documenting innovative and complex cross-border derivatives and structured products.

We are familiar with the unique legal and practical issues faced by Chinese entities and their international counterparties and would be pleased to share our insights with you.

Please feel free to contact our core team members below.

金杜愿为您提供专业的金融衍生品法律服务。在《期货和衍生品法》草案向社会征求公众意见的全过程中，金杜作为ISDA在中国的法律顾问一直积极参与并紧跟中国终止净额结算可执行性、担保品隔离和所有权转让履约保障安排等各项法律发展。截至目前，我们已就《期货和衍生品法》的法律、监管、合规、文件制备和交易影响向衍生品行业以及市场关键参与者提供了大量的专业性意义与建议。

除了在《期货和衍生品法》方面的专业性，我们还经常协助中外金融机构及企业进行ISDA、NAMFII、CSA、VM与IM保证金文件的审阅与谈判。我们在最为复杂和最具创新性的跨境衍生工具和结构化融资领域引领市场。

我们熟悉中国主体及其国际对手方所面临的独特的法律和实践问题，并很乐意与您分享我们的见解。

请随时联系我们的核心团队成员（联系方式如下）。

## CHINA HONG KONG SAR 中国香港特别行政区



RICHARD MAZZOCHI 马绍基

PARTNER 合伙人

TEL +852 3443 1046  
MOB +852 6056 8488  
EMAIL richard.mazzochi@hk.kwm.com



MINNY SIU 萧乃莹

PARTNER 合伙人

TEL +852 3443 1111  
MOB +852 6390 4561  
EMAIL minny.siu@hk.kwm.com



ANDREW FEI 费思

REGISTERED FOREIGN LAWYER (NEW YORK, USA)  
注册外地律师(美国纽约)

TEL +852 3443 1157  
MOB +852 3443 1299  
EMAIL andrew.fei@hk.kwm.com

## MAINLAND CHINA 中国内地



STANLEY ZHOU 周昕

PARTNER 合伙人

TEL +86 21 2412 6000  
MOB +86 1391692182  
EMAIL stanley.zhou@cn.kwm.com



JAMES GUAN 关峰

PARTNER 合伙人

TEL +86 21 2412 6025  
MOB +86 13816090608  
EMAIL guanfeng@cn.kwm.com



DAVID MU 牟牧

PARTNER 合伙人

TEL +86 755 2216 3396  
MOB +86 18938961134  
EMAIL david.mu@cn.kwm.com

## AUSTRALIA 澳大利亚



SCOTT FARRELL

PARTNER

TEL +61 2 9296 2142  
MOB +61 409 042 883  
EMAIL scott.farrell@au.kwm.com



MAX ALLAN

PARTNER

TEL +61 2 9296 2152  
MOB +61 434 012 596  
EMAIL max.allan@au.kwm.com





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