上 海 金 融 法 院
金 融 市 场 案 例 测 试 机 制

第 三 方 意 见 书

上海金融法院：

贵院正在审理的申请人投资者I、信托管理人C与被申请人A公司、B1公司关于区块链簿记发行的自贸区离岸债券违约处置的测试案例（案号（2024）沪74测试1号，下称“**测试案例**”或“**本案**”），**香港特区天博大律师事务所（Temple Chambers）杜淦堃资深大律师（Victor Dawes SC）、黄汇烺大律师（William Wong）、上海虹桥正瀚律师事务所卢晓成、王正、许诚及上海虹桥正瀚（临港新片区）律师事务所郭勒洋、钱前**[1]阅看了相关材料，经共同研究讨论，就本案涉及的争议焦点，依据《上海金融法院关于金融市场案例测试机制的规定》（试行）第十五条之规定，特此提出第三方意见，供贵院在审理过程中予以参考，并授权贵院在互联网平台公布本意见。

其中上海虹桥正瀚律师事务所、上海虹桥正瀚（临港新片区）律师事务所针对区块链簿记发行债券等中国法相关事项[2]发表意见，杜

[1] 南京大学在读硕士研究生龙耀镕、厦门大学在读硕士研究生樊佳颖、复旦大学在读硕士研究生洪天旭亦有贡献。

[2] 本第三方意见书所称中国法，均因出具本第三方意见书之目的，考虑到香港特别行政区司法体系的差异，仅指中国内地的司法管辖区内的法律。

淦堃资深大律师（Victor Dawes SC）、黄汇烺大律师（William Wong）针对本案中原告适格性、债券违约触发等香港法[3]相关事项发表意见。

[3] 本第三方意见书所称的香港法，系指中国香港特别行政区在其司法管辖区内所适用的法律。

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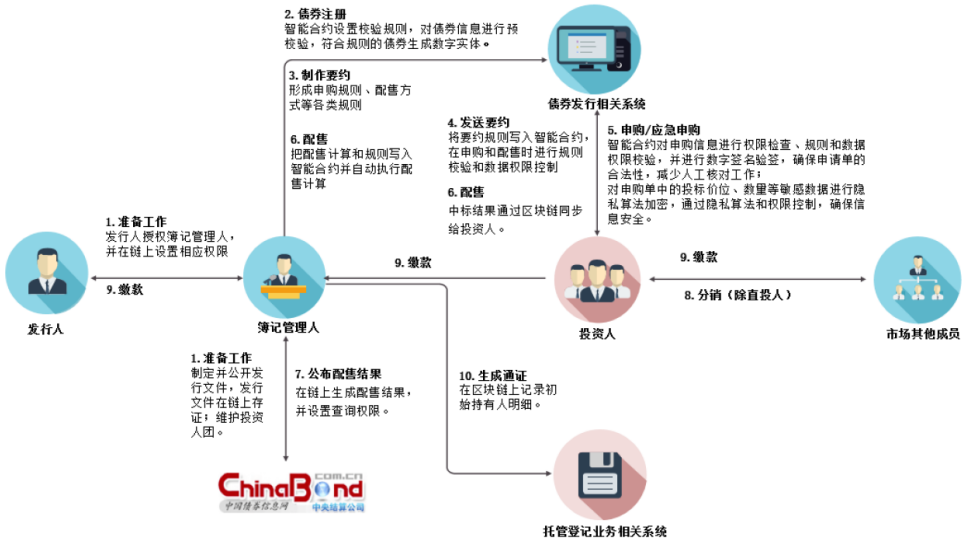
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第一部分：中国法相关事项

1. 从操作流程来看，案涉区块链簿记发行未涉确权登记环节，不会因采取区块链簿记发行而对确认登记产生影响

1.1. 根据中央国债登记结算有限责任公司（下称“**中债登**”）上海分公司所提交的《第三人意见书》，案涉债券系适用《中债区块链数字债券发行平台规范》，借助中债登推出的区块链数字债券公用平台进行的簿记发行，该平台的主要核心功能包括：发行前信息披露存证、债券注册、申购要约制作、债券申购、配售、公布结果、生成通证等。

1.2. 《中债区块链数字债券发行平台规范》中进一步对区块链数字债券发行业务流程以图示发行予以说明。



1.3. 由前述可见，案涉债券确如其名称“区块链簿记发行数字债券”，区块链贯穿于簿记发行阶段，至于后续的债券托管登记等，并不上链。因此，从上述业务描述，我们理解，目前中债登区块链数字债券没有涉及任何法律上的确权，确权仍有赖于中债登

以传统模式进行登记。

1.4. 同时，在中债登于2024年10月发布的《区块链数字债券白皮书》中，亦指明：

> ***在区块链数字债券确权法律法规尚未明确的情况下，区块链系统发行的债券仍需在传统系统登记托管，****这就要求区块链系统和传统系统必须进行数据交互。且在区块链数字债券发展初期，区块链数字债券规模较小，投资人有限，区块链系统只有和传统系统联通，才能打通“小池”和“大海”，拓展投资人和应用范围，提高市场流动性，形成持续发展的活力。*

进一步印证，区块链技术集中运用于簿记发行阶段，债券确权并未运用区块链技术，也不属案涉债券所使用块链数字债券公用平台所能提供的业务范畴。

1.5. 因此，基于案涉债券（区块链簿记发行数字债券）前述的业务模式及流程，我们认为，既然区块链技术并未应用于案涉债券的确权，且相关确权托管仍使用传统系统，故案涉债券的持有人应当是明确的，且不会因区块链簿记发行而产生法律上的不明确性。

1.6. 当然，任何技术或者金融创新都不可能完美，若因区块链技术不足引发簿记发行的执行结果发生错误或区块链系统与传统系统交互时发生错误，导致中债登确权登记产生错误，对此，我们认为严格意义上并非法律问题，而是技术层面的瑕疵，不

应以此可能全面否定区块链簿记发行，或根本性质疑后续债券确权登记的效力。

2. 区块链数字债券的法律效力应当适用与传统债券相同的监管规则进行审查，不能仅因使用了区块链技术而认为簿记发行效力存在瑕疵

2.1. 根据《中华人民共和国民法典》第469条规定，我国法律允许以数据电文形式订立合同。债券簿记发行本质上属于以要约、承诺方式达成债券合同，而采取的区块链技术可属于数据电文方式。因此，《民法典》为区块链簿记发行债券提供了基础的有效性依据。但由于债券发行还受到金融监管，区块链簿记发行债券的效力还需要考虑债券领域的特别法律法规。

2.2. 鉴于我国对区块链数字债券之明确法律规制尚处空白，而全球主要司法辖区已就该类债券已逐步形成具有参考价值的实践经验，因此，有必要以“对标全球最优、嵌入中国场景”之范式，参考境外最佳市场实践，分析案涉债券的法律效力。

2.3. 在我国香港特区，香港证券及期货事务监察委员会（Security and Future Commission，SFC）于2023年11月2日发布《Circular on intermediaries engaging in tokenised securities-related activities》，明确：

第7条：At the outset, given that the nature of Tokenised Securities are fundamentally traditional securities with a

tokenisation wrapper, the existing legal and regulatory requirements governing the traditional securities markets continue to apply to Tokenised Securities.

第8条：The overarching principle of the SFC's regulatory approach is "same business, same risks, same rules."

即通过发布通函，明确代币化产品的法律属性不变，需遵循传统投资产品的监管标准，监管方针的总体原则是"相同业务、相同风险、相同规则"。

2.4. 在新加坡，新加坡金融管理局（Monetary Authority of Singapore，MAS）于2025年5月26日发布《A Guide To Digital Token Offerings》，其中：

第2.4条：Offers of digital tokens which constitute securities, securities-based derivatives contracts or units in a CIS are subject to the same regulatory regime under Part XIII of the SFA, as offers of securities, or securities-based derivatives contracts or units in a CIS respectively made through traditional means.

即通过发布指南，明确构成证券的数字代币的发售，受到证券法对传统产品相同监管制度的约束。

2.5. 在美国，美国证券交易委员会（United States Securities and Exchange Commission，SEC）创新与金融科技战略中心（Strategic Hub for Innovation and Financial Technology）发布

《Framework for "Investment Contract" Analysis of Digital Assets》，其中提出：

> *The so-called 'Howey test' applies to any contract, scheme, or transaction, regardless of whether it has any of the characteristics of typical securities...Therefore, issuers and other persons and entities engaged in the marketing, offer, sale, resale, or distribution of any digital asset will need to analyze the relevant transactions to determine if the federal securities laws apply.*

虽该份文件不构成美国证券交易委员会（United States Securities and Exchange Commission，SEC）的任何正式监管文件或意见，但仍可发现，美国监管部门或倾向于采取与香港特区、新加坡一致的监管模式，即应统一适用传统判例法中的"Howey Test"判断是否构成证券，构成证券则受到联邦证券法律约束。

2.6. 结合前述境外实践经验，我们认为，从法律规制层面，现有债券相关法律体系应当然适用于案涉债券，区块链簿记发行本身并不会导致案涉债券的发行行为存在瑕疵，案涉债券的法律效力仍应当与传统证券适用相同的法律及监管规则进行审查。

2.7. 根据《中华人民共和国证券法》《企业债券簿记建档发行业务指引》等法律法规，对于簿记发行过程予以规范，并提出原则性要求，其中，并未对簿记发行所采取的技术作出限制。可见，

只要能够满足前述指引，能够保证簿记发行遵守“公开、公平、公正”原则，遵守相关管理规定，不存在不正当利益输送、破坏市场秩序等行为，该等簿记发行应当有效。

2.8. 因此，不能仅因使用了区块链技术而认定案涉债券簿记发行存在效力瑕疵，亦不能以引入区块链技术为由否认案涉债券效力。

2.9. 投资者I仅以采用区块链技术为由主张债券簿记发行无效，并不充分，其仍需根据现有债券相关法律体系指明案涉债券存在何种具体的违法违规行为。

2.10. 虽然，区块链债券簿记发行存在有效的论证路径，且实践中发行试点已获行业认可甚至监管奖项，但专门性上位法规范仍处于空白状态。因此，为避免争议，我们建议仍需尽快结合我国实践及境外经验，通过立法或发布权威监管文件，进一步明确区块链数字债券的法律地位与效力判定规则。

3. 案涉债券跨境发行具备复杂性，案涉债券违约处置的相应法律制度或难以完全适配

3.1. 针对案涉债券所发生的违约处置行为，中债登在其《第三人意见书》中陈述，该等违约处置的制度依据为《银行间债券市场债券登记托管结算管理办法》第5条、第7条及第31条。根据中国人民银行的指定中债登作为相应的债券登记托管结算机构履行提供债券等抵押物的管理服务，包括债券质押登记等。

3.2. 但《银行间债券市场债券登记托管结算管理办法》第2条规定：

*固定收益类有价证券（以下简称债券）在**银行间债券市场**的登记、托管和结算适用本法。*

银行间债券市场通常指向投资者在我国境内进行债券交易的市场。中债登基于《银行间债券市场债券登记托管结算管理办法》取得担保品的违约处置权限，似限于该类在银行间债券市场交易的债券。

3.3. 案涉债券属于遵循发行端、投资端“两头在外”原则的上海自贸区离岸债券（明珠债），从其发行审批管理及债券要素等，更为偏向外债，是否能够纳入银行间债券市场或有争议。同时，案涉债券系面向自贸区投资者和境外机构投资者，投资者范围似更为限缩，亦与银行间债券市场的投资者范围有所不同。

3.4. 因此，中债登当前所采取的担保品违约处置与《银行间债券市场债券登记托管结算管理办法》或难以完全适配，有待进一步完善。

4. 案涉担保品违约处置行为是否可将业务规则纳入其中，并成为相应合同依据，仍有待结合案件事实进一步分析

4.1. 我们注意到，C公司与B2公司已签订《中央国债登记结算有限责任公司担保品处置业务指引（试行）》，且其中亦通过概括性描述将《中央国债登记结算有限责任公司担保品处置业务指引（试行）》纳入，据此C公司及中债登认为案涉担保品违约处置行为具有相应的合同依据。

4.2. 但该等业务指引是否能够通过当事人之间的协议引致适用后，仍需满足一定的条件，才能视为协议的一部分，对签约主体产生约束力，具体可参照（2022）沪74测试1号司法意见书中总结出的4项条件。该案中，上海清算所《清算协议》引致适用《业务规则》《违约处置细则三文件》，约定业务文件成为合同的组成部分。贵院认为：

《业务规则》《违约处置细则三文件》经由《清算协议》引致适用，属于双方合同的组成部分。又因上述规则系上海清算所单方制定，客观上存在不当侵害清算会员利益的可能。故对于上述规则应如何订入合同、又该如何确保规则内容的公平合理，确需通过法律加以控制。

审理庭认为，案涉规则欲对包括机构A在内的清算会员产生法律拘束力，需具备以下四项条件（1）向清算会员进行合理告知。（2）清算会员同意遵守规则。（3）对于需经监管批准方能生效的规则，应当获得监管部门的批准。（4）规则内容公平合理。其中第一、二项为规则订入的要件；第三、四项为规则内容的生效要件。

4.3. 在本意见书中，我们仅提出前述观点并引述相关司法裁判观点，案涉担保品违约处置行为是否具有相应合同依据有待于结合案件事实进一步分析。

5. 区块链数字债券的观察及思考：技术适用与制度冲突

5.1. 国内区块链数字债券的概念及实践

5.1.1. 目前，国内立法层面并未对区块链数字债券或与其类似的概念予以规定。《区块链数字债券白皮书》及《中债区块链数字债券发行平台规范》将区块链数字债券定义为：数字债券的一种，是应用区块链技术，具有通证形式，可支持账户松耦合的数字债券。

5.1.2. 该等概念定义侧重于技术描述较为抽象，但结合《区块链数字债券白皮书》及《中债区块链数字债券发行平台规范》中的业务描述，如前述，当前的区块链数字债券实践可以理解为在簿记发行阶段通过区块链技术完成的债券，其他环节与传统债券并无实质差异。

5.2. 境外区块链数字债券的概念及实践

5.2.1. 境外实践中，更为常见的概念表述为“分布式账本技术债券”（Distributed Ledger Technology Bond，DLT Bond），虽然分布式账本技术并不完全等同于区块链，区块链仅是分布式账本的一种运用形式，并非所有的分布式账本都是区块链，但我们亦注意到，DLT Bond也会被称为Blockchain Bonds（区块链债券），因此，我们认为在该类债券实际中可以予以概念等同。

5.2.2. 国际行业自律组织国际资本市场协会（International Capital Market Association，ICMA）在《Frequently Asked Questions on DLT and blockchain in bond markets》中，将DLT Bond定义为：

What are DLT bonds?

Whilst there is no single, widely accepted definition, the term "DLT bonds" is understood to be an instrument whose register of ownership is stored using DLT (see Q&A 1).

While the nature of DLT bonds continues to evolve, two different models can be distinguished:

a) *Bonds issued natively onto a distributed ledger or blockchain. Such securities are held and traded through the DLT or blockchain environment, ie* ***outside the traditional market infrastructure****. The creation and existence of such bonds will be specific to each transaction and will likely differ across transactions. This type of instrument could also be referred to as a "native digital asset", "security token" or "bond token" depending on the deal structure.*

b) *Traditional bonds which are immobilised from an operational perspective* ***ie held by an (I)CSD or custodian and represented through a token on a blockchain or DLT network*** *(see also Q&A 6). Whether a token holds legal value or not depends on the specific jurisdiction and the underlying operational configuration. This type of instrument could be referred to as a "tokenised bond", or "non-native security token".*

即国际资本市场协会（International Capital Market Association，ICMA）认为DLT Bond包括两类：第一类原生于分布式账本或区块链，并完全通过分布式账本或区块链环境，**脱离传统金融基础设施进行交易；第二类仍属于传统债券由中央存管机构或托管人持有，并由区块链或分布式账本技术网络上的“代币”表示。**其中，第二类DLT Bond与通常认知的债券相同，有赖于金融基础设施，仅是采用分布式账本技术或区块链技术将债券数字化。

5.2.3. 在我国香港特区，香港金融管理局对DLT Bond亦持有与国际资本市场协会（International Capital Market Association，ICMA）基本一致的定义，并在其发布的《香港债券市場代幣化》中，有如下说明：

“原生”和“非原生”代幣化發行

*在數字化債券發行中，**債券可直接在DLT 平台上發行（即“原生”發行），或先在平台外發行，然後在DLT平台上代幣化（即“非原生”發行）**。*

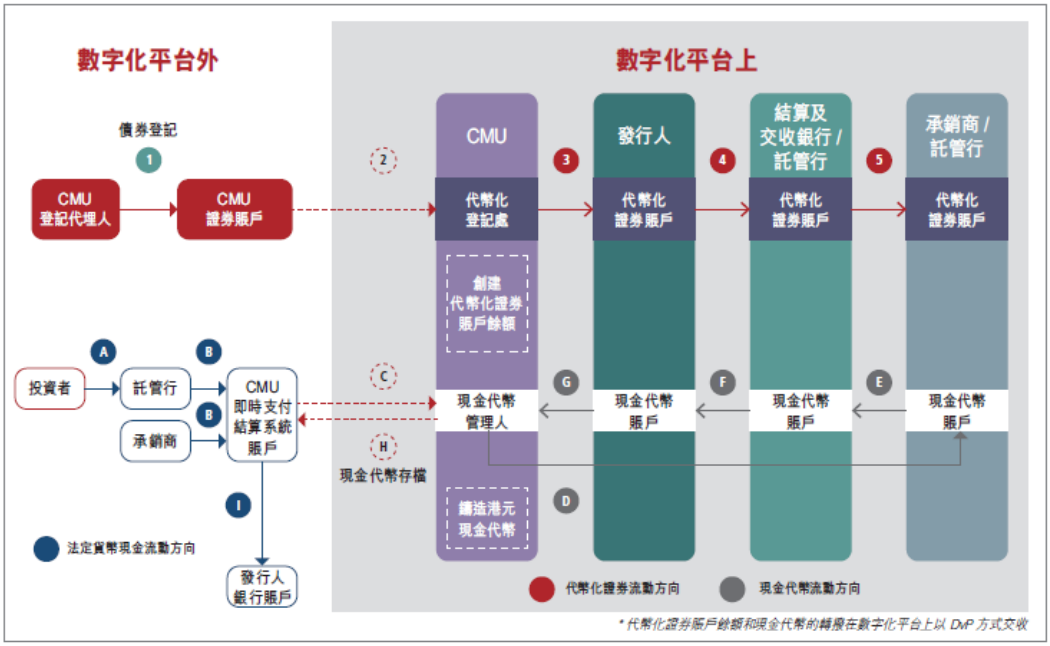
*Evergreen項目採用“非原生”發行方式。代幣化綠色債券採用記名形式，最初於發行日在平台外的CMU系統的證券數據庫中以電腦化帳簿條目形式記錄。代幣化綠色債券的實益權益之後於發行日記錄在數字化平台的代幣化證券賬戶中。**一些發行人可能較為傾向“非原生”的代幣化發行，由中央證券託管機構(CSD)的傳統系統按照其現行操作規***

则进行债券的代幣化，因為這種發行方式可能更加貼近現有市場慣例。

结合香港金融管理局的前述说明，可更为清楚的发现，两类DLT Bond的主要区分之一在于，是否有传统的金融基础设施（中央托管机构）参与其中。若为“非原生”代币化发行的债券，其发行方式与传统债券无异，只是后续将由金融基础设施按其规则将债券代币化，并未改变传统债券实质。

5.2.4. 考虑到“原生”DTL债券与传统债券实质差异较大，故我们在本意见书不予展开，仅就与传统债券更为类似的“非原生”DTL债券在意见书中进一步举例说明。如：香港金融管理局在《香港债券市場代幣化》所为例说明的Evergreen项目，区块链技术不仅贯穿簿记发行阶段，还结合货银对付制度（DvP），实现债券代币化登记、结算等功能。

圖 1總結了以 DvP 方式交收的 Evergreen 項目一級發行的工作流程程



又如：新加坡交易所发行的基于区块链的Olam公司数字债券，该债券的权利义务以智能合约形式记录，并实现了与传统债券同等效力的交收与服务，利用智能合约来掌握参与发行和资产服务各方的权利和义务，允许以多种货币进行无缝结算，实现发行人、安排人和投资托管人之间的进行收益转账。

5.3. 境内外区块链数字债券的差异及影响

5.3.1. 通过前述的举例，可见即便是与传统债券更为类似的“非原生”DTL债券，在具体业务模式中，境外DTL债券并非仅局限于簿记发行阶段，而是更为全流程“代币化”，区块链技术运用更为充分、上链程度更高，与案涉债券有较大差异

5.3.2. 我们理解，该等更为“保守化”的区块链技术运用，与我国当前全面禁止代币的司法实践保持一致。我国区块链数字债券逐步加强区块链技术的使用，将面临与代币模糊边界的情况，在法律制度仍持严格否认态度，区块链技术在债券中的适用仍需审慎研判，在避免风险及金融创新的两端寻求平衡。

5.4. 区块链技术的运用需要与现行债券相关法律体系匹配，避免因技术特性导致效力风险

5.4.1. 根据《中华人民共和国证券法》《证券登记结算管理办法》等法律法规，只有证券登记结算机构有权为证券交易提供集中登记、存管与结算服务。

5.4.2. 《中债区块链数字债券发行平台规范》中，案涉债券使用的区块链技术系中债登和市场机构共建共治理的联盟链。根据第

3.5条、5.4条、5.5.4条的定义，联盟链内部会指定多个预选节点为共识节点，每个块的生成由所有共识节点共同决定。而中债登会甄选市场机构以全节点方式接入，即该市场机构将部署共识节点。

5.4.3. 上述操作意味着，每个块的生成，需同时获得中债登和（全节点接入的）市场机构节点的一致意见，否则新生成的块无法加入到区块链中。从形式上理解，一个事项只有获得中债登和市场机构的一致同意，方可上链。

5.4.4. 若后续债券确权登记亦通过区块链技术完成，则上述操作可能被理解为中债登和市场机构共同履行登记职能，无疑将与我国法律法规构成冲突，影响区块链簿记的合法性。在技术平台涉及上，需考虑如何在使用分布式记账和共识机制的同时，确保证券登记结算机构依法独立履责。

第二部分：香港法相关事项

6. 原告适格性

6.1. 《募集说明书》第16(a)条约定:

适用法律： 债券、信托契据、代理协议、保证协议、国际债券 ISIN：US303280EU28 的担保契约受香港法律管辖。中国银行间债券市场交易的债券的担保协议受中华人民共和国法律管辖，为本条款之目的，不包括 香港特别行政区、澳门特别行政区及中国台湾地区法律。

6.2. 《信托契据》第15.1条亦约定债券、信托契据适用香港特别行政区法律。

6.3. 《信托契据》第9.1条约定：

法律程序 *在发生违约事件后，信托管理人可随时自行决定对发行人、保证人或担保提供者提起其认为适当的诉讼，以追讨债券下未支付的任何到期金额，或强制执行其在本信托契约或条件下之 任何权利，但没有义务根据第8条宣布债券立即到期应付，或提起任何诉讼，除非：（a）经特别决议指示，或至少四分之一未支付的债券本金的持有人书面要求，且（b）信托管理人已就其可能因此而承担的所有责任、诉讼、索赔和要求以及可能因此而产生的所有成本、费用和开支（包括但不限于获得其酌情认为合适的任何咨询意见）获得补偿和/或担保和/或预先筹集资金，且信托管理人对采取任何此类行动的后果不承担任何责任，并*

*可在不考虑此类行动对个别债券持有人的影响的情况下采取此类行动。**只有信托管理人可以执行债券或本信托契据的规定，任何债券持有人无权直接对发行人、保证人或担保提供者提起诉讼，除非信托管理人有义务提起诉讼，但未能在合理时间内提起诉讼，而且这种情形持续存在。***

6.4. 《募集说明书》第12条约定：

信托管理人可在任何时间依其自由裁量权并无需通知，提起其认为适当的法律程序，以执行其在《信托契据》项下关于债券、任何保证契据或任何担保协议的权利。但信托管理人并无义务采取该等行动，除非：（a） 已由不少于全部未偿债券本金总额25%的持有人以书面形式提出请求，或经特别决议指示；及（b）信托管理人已获得令其满意的赔偿和/或担保和/或预先资金安排。”

6.5. 在香港法下以及其他普通法司法管辖区，此类“禁诉条款”(no action clause) 债券发行中已属普遍，背后的法理基础和商业考量如下：

6.5.1. 设立信托管理人是一种有效集中债券的管理与执行的方法。债券持有人通过信托管理人行事，并在投资的成败中按比例（pari passu）分享，而非彼此竞争。信托管理代表并保护债券持有人，债券持有人被视为一个整体，并通过一定比例的持有人向信托管理人发出指示。此种安排促进了债权的流动性，个别债券持有人依赖信托管理作为唯一的执行渠道，并可确信在执行时，

本金与利息将按比例分配。若债券的个别终端投资者可以自由提起诉讼，则势必导致多重诉讼，或出现信托管理人与个别债券持有人同时提起重复诉讼的情况：见**Re Leading Holdings Group Ltd** [2023] 4 HKLRD 71第57至58段；引用英国上诉法院**Elektrim SA v Vivendi Holdings Corp** [2009] 2 All ER (Comm) 213一案。

6.6. 信托管理人作为债券的直接持有人，享有直接执行债券项下权利的资格。债券的终端投资者仅为该信托关系下的受益人（beneficiary）。根据衡平法原则，受益人无权直接就信托财产提起诉讼，也无资格就信托关系下的债权提出诉讼或公司清盘申请：**Re Leading Holdings**第75至79段；

6.7. 举例而言，在**Re China Oceanwide Group Ltd** [2023] HKCFI 455一案，提起呈请的债权人基于某些债券债务人公司进行清盘。高等法院原讼法庭法官陈静芬认为，提起呈请的债权人不是债券的直接持有人，因为其姓名和地址并未记录在债券登记册中。因此，提起呈请的债权人无权就债券展开法律程序或提起诉讼以执行债券项下的付款义务。法院因此撤销了清盘呈请。

6.8. 因此，一般而言，债券的终端投资者唯一可诉的对象为信托管理人。若信托管理人未能履行其受信责任（fiduciary duties），终端投资者可向其提起诉讼。此类法律关系被称为“不透视原则”（no look through principle），即每一方仅对其直接交易对手享有权利：**Re Leading Holdings**第60段；**Secure Capital SA**

v Credit Suisse AG [2017] 2 CLC 428第10段。

6.9. 当然，我们亦注意到，案涉债券与境外常见登记于信托管理人名下的债券有所不同，案涉债券直接登记于投资者I名下，但我们倾向于认为，该等差异并不会导致前述香港法规则完全失效，各方当事人之间的权利义务应按合同约定予以执行。

6.10. 因此，我们认为C公司有权在A公司未如约兑付SHA债券本息时以其名义向A公司、B1公司提起诉讼，但投资者I无权起诉。

7. 担保责任

7.1. 被申请人答辩状（C v. A、B1）第2.2至2.5段引用**Holme v Brunskill**一案确立的原则，以论证主债务加速到期系债权人行使变更权的结果，使债务履行期限变短， 期限利益降低， 属于加重债务人债务之情形。

7.2. 我们认为SHA 债券下的加速到期，并不属于可解除担保人责任的情形。

7.3. 在**AVC Property Development Co Ltd v Joyful Grace Trading Ltd** [2018] 3 HKC 47一案中，香港上诉法庭对**Holme v Brunskill**所确立的衡平法原则作出如下解释：若主合同当事人之间就主债务合同作出“变更”（alteration），担保人必须被征询意见；否则，如该变更可能对担保人造成不利，担保人即获解除责任，除非该变更属“无关紧要”。启动该原则的门槛颇高，要求该修改可能导致担保人承担额外风险：**AVC**

Property Development Co Ltd v Joyful Grace Trading Ltd [2018] 3 HKC 47第35至37段[4]。

7.4. 换言之，适用此原则的大前提是债权人与主债务人之间需就主债务合同作出“变更”。只有在此情况，才有可能对担保人造成不公。

7.5. 然而，本案中，C公司向A公司发出《SHA债券加速到期通知函》是按照《募集说明书》第8条帽子条款项下的“违约事件”发出。这属于信托管理人对其合同权利的履行，而非变更；而《募集说明书》第11条对《募集说明书》下条文的修改亦另有明确约定。

8. 交叉违约/预期违约

8.1. 被申请人答辩状（C v. A，B1）第1.4.2段指出：A公司主张其并未明确作出拒绝履行合同义务意思表示，不应适用预期违约条款进行救济，且HKA债券和有关银行贷款并非本案债务，A在其他合同下的履行情况， 不必然延及SHA债券的履行。

8.2. 被申请人答辩状（C v. A，B1）第1.4.2.2-1.4.2.3段引用了**Mersey Steel** 及**Woodar**等英国判例，以论证拒绝履行（repudiation）是一项严苛的认定， 其仅应在明确拒绝履行合同义务， 且该拒绝行为关乎合同根本的情形下，方可被认定成立。

[4] 以上原则亦跟被申请人答辩状第 2.4 段中引用的 **Balram Chainrai v Lakshmi Premises Private Ltd** [2023] 2 HKC 1 案吻合。

8.3. 然而，我们认为本案焦点在于，《募集说明书》第8(c)条的交叉违约条款约定情形是否存在：

8.3.1. 从申请人信托管理人C公司请求书第3.5至3.6段及申请人投资者I请求书第3.7至3.8段可见，C公司的请求基础为HKA公司未偿付到期HKA债券、 A公司未承担HKA债券的保证责任，触发了《募集说明书》第8(c)(i), (ii), (iii)条的交叉违约条款，而根据第8条的总则条款，债券立即到期应付。

8.3.2. 换言之，由于缔约方已经明确约定债券立即到期应付的情形，严格而言，申请人的申索并不需依赖普通法下拒绝履行（repudiation）及/或预期违约（anticipatory breach）的原则。

8.3.3. 我们理解，目前A公司与HKA债券投资人之间就偿付方案仍在沟通磋商阶段，尚未形成最终违约确认，且香港法院尚未就HKA债券违约问题作出不利判决。

8.3.4. 然而，香港法院是否已经就HKA债券违约问题作出不利判决，并不影响贵院独立审视相关条款及有关事实，从而判断第8(c)条下的交叉违约情形是否已被触发：

8.3.4.1. 事实上，950万美元的HKA债券确实未能在到期日完成付款实，且A公司的人民币500万贷款亦逾期未返还，确实已触碰第8(c)(i)条，即 “*发行人、保证人、担保人或其各自的任何主要子公司的任何**其他当前或未来债务未在到期时或（视情况而定）在任何最初适用的宽限期内未支付***”。

8.3.4.2. 在没有更多关于香港诉讼细节的前提下，我们注意到香港法院尚未形成违约确认似乎主要归因于A公司与HKA债券投资人之间证就偿付方案沟通（而非提出了任何实质的抗辩理由）。因此，我们认为申请人有一定基础认定第8(c)条已被触发。

8.4. 另外，虽然合同缔约方已在《募集说明书》第8条约定交叉违约条款，这并不代表双方已排除申请人依赖普通法下拒绝履行及/或预期违约的权利。以下，我们简单总结香港法下的相关法律原则，供贵院参考：

8.4.1. 如果在合同履行期限尚未到来之前，一方当事人表示其有意违约，或其行为足以使一个理性的人得出其不打算履行合同义务的结论，则构成预期违约：见**Chao Keh Lung v Don Xia** [2004] 2 HKLRD 11第26(4)段。

8.4.2. 若一方当事人因其自身的行为或过失，使其在某些关键方面丧失履行合同义务的能力，则另一方有权视合同为解除：**Chao Keh Lung**第26(5) 段。

8.4.3. 是否可以从一方的行为或不作为推断其拒绝履行，必须以客观标准进行评估，并结合双方全部交易背景予以考量：**Nobleseed Partners Ltd v Zhang Qian Qian** [2025] HKCFI 753 第24(2)段。

8.5. 考虑到上文第8.3.3至8.3.4段的分析，我们初步倾向认为由于A公司及其子公司HKA公司在多笔债务上出现到期未支付行为，鉴于金额可观，该等情形或可能使客观第三人合理认为其履行

合同的意图存在疑问。

此致

上海金融法院

本页为《金融市场案例测试机制三方意见书》的签署页

意见提供人：杜淦堃资深大律师（Victor Dawes SC）

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上海虹桥正瀚（临港新片区）律师事务所

郭勒洋 钱前

日期：二〇二五年十一月二十五日

附件二

中国法相关事宜
参考资料

ICS 03.060
CCS A 11

Q/CCDC

中央国债登记结算有限责任公司企业标准

Q/CCDC 00009—2023

中债区块链数字债券发行平台规范

Specification for blockchain digital bond issuance platform of CCDC

2023-07-13 发布　　2023-07-13 实施

中央国债登记结算有限责任公司　　发布

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前　言

本文件按照GB/T 1.1—2020《标准化工作导则　第1部分：标准化文件的结构和起草规则》的规定起草。

本文件由中央国债登记结算有限责任公司提出并归口。

本文件起草单位：中央国债登记结算有限责任公司。

本文件为首次制定。

引　言

中央国债登记结算有限责任公司（以下简称“中央结算公司”）作为重要国家金融基础设施，致力于为市场提供安全、高效、专业的债券全生命周期服务。为贯彻落实新发展理念和数字化战略，向市场提供区块链数字债券发行公用平台，中央结算公司探索研发区块链数字债券发行方案，并于2022年初入围国家区块链创新应用试点。在管理部门的指导和市场机构的支持下，中央结算公司的区块链数字债券发行平台已于2022年上线应用。

区块链数字债券生态培育和高质量发展，离不开标准体系的建设。中央结算公司在探索实践中积累总结经验，提炼形成本文件。在发行业务基础上，中央结算公司还将探索区块链支持债券生命周期业务。随着区块链数字债券的探索深化和应用拓展，中央结算公司将完善本文件，并适时制定区块链数字债券系列标准。

中债区块链数字债券发行平台规范

1 范围

本文件规定了区块链数字债券发行平台的基本要求、平台架构、功能要求、数据要求、性能要求、安全要求和运维要求等内容。

本文件适用于中央结算公司通过区块链技术构建的数字债券发行平台。

2 规范性引用文件

下列文件中的内容通过文本中的规范性引用而构成本文件必不可少的条款。其中，注册日期的引用文件，仅该日期对应的版本适用于本文件；不注日期的引用文件，其最新版本（包括所有的修订单）适用于本文件。

GB/T 22239—2019 信息安全技术 网络安全等级保护基本要求

JR/T 0184—2020 金融分布式账本技术安全规范

JR/T 0193—2020 区块链技术金融应用 评估规则

3 术语和定义

下列术语和定义适用于本文件。

3.1

区块链 blockchain

一种由多方共同维护，使用密码学保证传输和访问安全，能够实现数据一致存储、防篡改、防抵赖的技术体系。

[来源：JR/T 0193—2020，3.1]

3.2

智能合约 smart contract

一种旨在以信息化方式传播，验证或执行合同的计算机协议，其在分布式账本上体现为可自动执行的计算机程序。

[来源：JR/T 0184—2020，3.20]

3.3

共识节点 consensus node

负责账本数据一致性的节点。

[来源：JR/T 0184—2020，3.24]

3.4

记账节点　accounting node

负责账本数据完整性的节点。

[来源：JR/T 0184—2020，3.25]

3.5

联盟链　consortium blockchain

通过权限控制，对特定的组织团体开放的区块链，由联盟内部指定多个预选节点为共识节点，每个块的生成由所有共识节点共识决定，其他接入节点在权限许可的情况下可参与记账，可通过该区块链开放的接口进行交易调用及限定查询。

3.6

簿记管理人　book runner

负责实际簿记建档发行的操作者，一般由主承销商担任。

[来源：Q/CCDC 00004.1—2020，3.4]

3.7

参与者　participant

接入区块链数字债券发行平台的各类机构，包括债券市场的相关监管部门、金融机构和非金融企业。其中，金融机构和非金融企业统称为市场机构。

3.8

用户　user

参与者以发行人、承销团成员、投资人等角色开立的业务账户。

3.9

数字债券　digital bond

数字形态的债券，是以债券要素指标的标准化为基础，以数字技术为实现手段，以账户或通证为存储形式的债券。

3.10

区块链数字债券　blockchain digital bond

数字债券的一种，是应用区块链技术，具有通证形式，可支持账户松耦合的数字债券。

3.11

区块链数字债券发行平台　blockchain digital bond issuance platform

基于区块链底层技术和运维管理服务构建的数字债券发行应用系统，供监管部门、发行人、承销团成员、投资人和中央结算公司相关业务人员使用。

3.12

区块链即服务　blockchain as a service

区块链框架嵌入云计算平台，利用云服务基础设施的部署和管理优势，为开发者提供便捷、高性能的区块链生态环境和生态配套服务，支持开发者的业务拓展及运营支持的区块链开放平台。

4 缩略语

下列缩略语适用于本文件。

BaaS：区块链即服务（Blockchain As A Service）。

5 基本要求

5.1 与业务规则相协调

区块链数字债券发行平台建设以现有业务规则为基础，和现有业务规则相协调。当业务规则发生变化时，区块链数字债券发行平台应及时升级。

5.2 共建共治

中央结算公司和市场机构共建共治联盟链，共同促进区块链数字债券发行平台安全稳健运行。

共建过程中，市场机构在中央结算公司的主导组织下，积极参与区块链数字债券发行平台的方案设计、系统建设、上线应用、运行维护等全过程。

共治过程中，中央结算公司负责制定业务运行规则，编写升级智能合约，建立完善联盟治理机制。市场机构在遵守联盟制度的基础上，有序开展业务创新，提供有益反馈和合作监督。

5.3 中心化管理

中央结算公司履行法定中央托管机构职责，对区块链数字债券发行平台实施中心化管理，在关键业务环节实施裁决机制，同时接受市场机构的监督，合理采纳并及时回复市场机构的意见建议。

5.4 参与者接入方式

参与者接入区块链数字债券平台的方式，包括全节点接入、轻节点接入和无节点接入。中央结算公司通过技术文件明确各类接入方式的技术要求。

——全节点接入：既部署记账节点，又部署共识节点的接入方式。

——轻节点接入：仅部署记账节点的接入方式。

——无节点接入：不部署共识或记账节点，通过客户端形式接入。

5.5 上链机构

5.5.1 监管节点

监管部门根据业务需要，选择全节点、轻节点或者无节点方式上链。

5.5.2 上链市场机构的基本要求

上链市场机构应是银行间债券市场的参与者，上链市场机构应覆盖所有参与者类型。上链市场机构可根据自身情况向中央结算公司申请以全节点、轻节点或者无节点方式上链。

5.5.3 轻节点市场机构的选择

中央结算公司合理甄别和选择以轻节点方式上链的市场机构。以轻节点上链的市场机构应具备一定的区块链技术基础。

5.5.4 全节点市场机构的选择

中央结算公司应从业务规模、技术能力、企业属性等多方面严格甄选外部全节点机构。以全节点上链的市场机构应是债券市场的主要参与者，具有较强的区块链技术能力，具备维护节点数据安全的意愿和实力。

5.6 系统审计

5.6.1 审计依据

区块链数字债券发行平台应按照 JR/T 0193—2020，通过第三方审计机构的审计。

5.6.2 审计范围

审计范围包含区块链底层平台、运维管理平台和上层应用平台的技术标准遵循情况。

5.6.3 审计机构

审计机构应是注册成立 3 年以上、具备专门的信息科技审计团队、有固定的工作场所、商业信誉良好的专业组织。

5.7 系统评估要求

5.7.1 评估依据

区块链数字债券发行平台应根据中央结算公司相关要求，在上线前开展安全评估；按照 JR/T 0193—2020，在上线后开展专项评估。

5.7.2 评估内容

评估以系统为单位，上线前的安全评估主要包括渗透测试、代码审计评估、漏洞扫描等；上线后的专项评估主要包括区块链基础技术测评和区块链安全性测评。

5.7.3 评估机构

评估机构应具备金融机构同类项目信息安全评估经验，评估案例达 3 个以上，具有网络安全等级测评与监测评估机构服务认证证书，过去 3 年无重大违法违规行为。

5.8 备案要求

区块链数字债券发行平台应按《区块链信息服务管理规定》（国家互联网信息办公室令第 3 号）的相关要求进行首次、变更和终止备案。

6 平台架构

6.1 总体架构

区块链数字债券发行平台采用联盟链，主要架构包括：基础设施、区块链网络、区块链 BaaS 平台、业务应用系统等四大核心层级，见图 1。

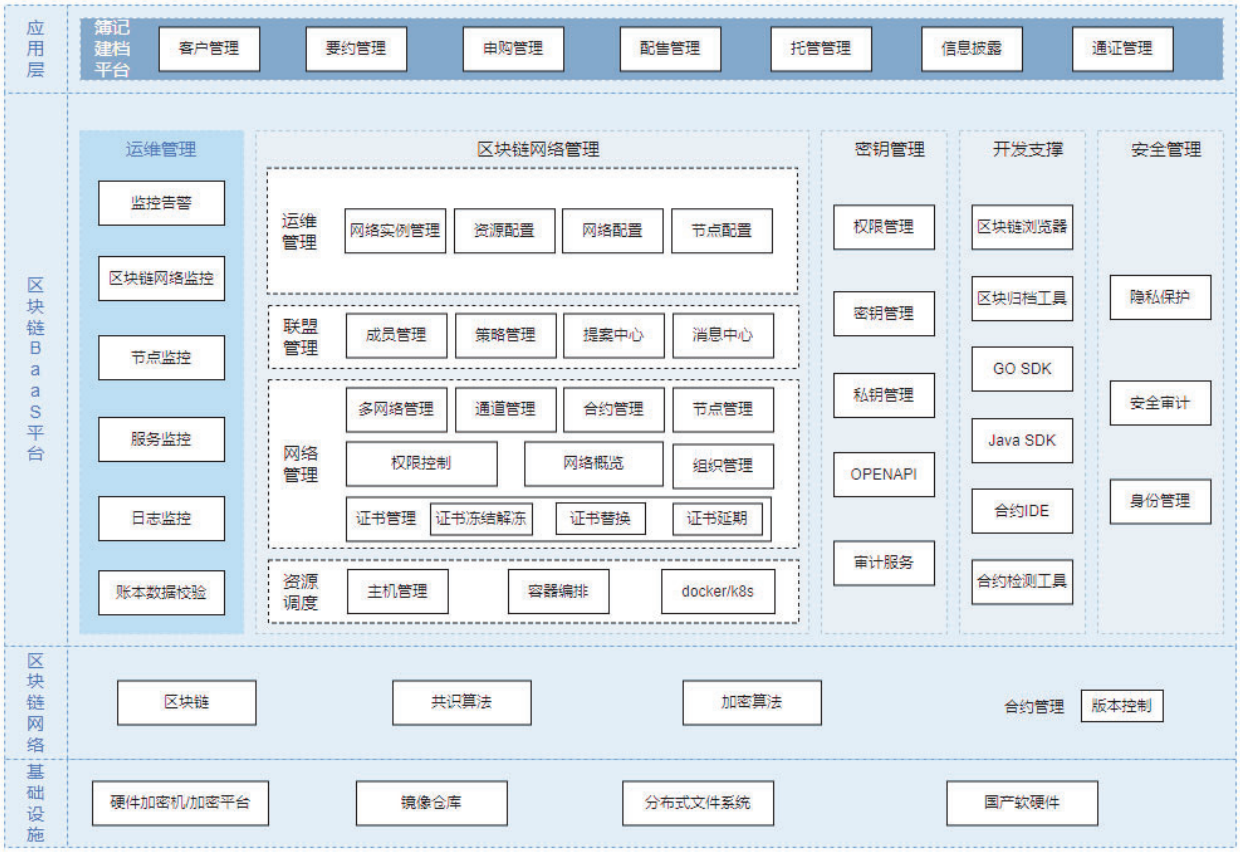


图1 区块链数字债券发行平台总体架构

6.2 基础设施

基础设施层提供平台正常运行所需的运行环境和基础组件，如硬件加密机、分布式文件系统、镜像仓库和国产软硬件等。

6.3 区块链网络

区块链网络由各参与方组成的分布式节点系统构成，具备合约管理模块、加密算法模块、共识算法模块等基础能力，在共识前提下执行交易数据读写，并对数据进行加密，实现交易数据的安全和分布式存储，为区块链应用提供运行环境。

6.4 区块链 BaaS 平台

区块链 BaaS 平台层负责提供运维管理、网络管理、密钥管理、开发支撑和安全管理功能。

6.5 业务应用系统

业务应用系统为用户提供发行服务和应用。

7 功能要求

7.1 核心功能

区块链数字债券发行平台应具备发行前信息披露文件存证、债券注册、制作申购要约、债券申购、配售、公布配售结果和生成通证等七大核心功能，见图 2。

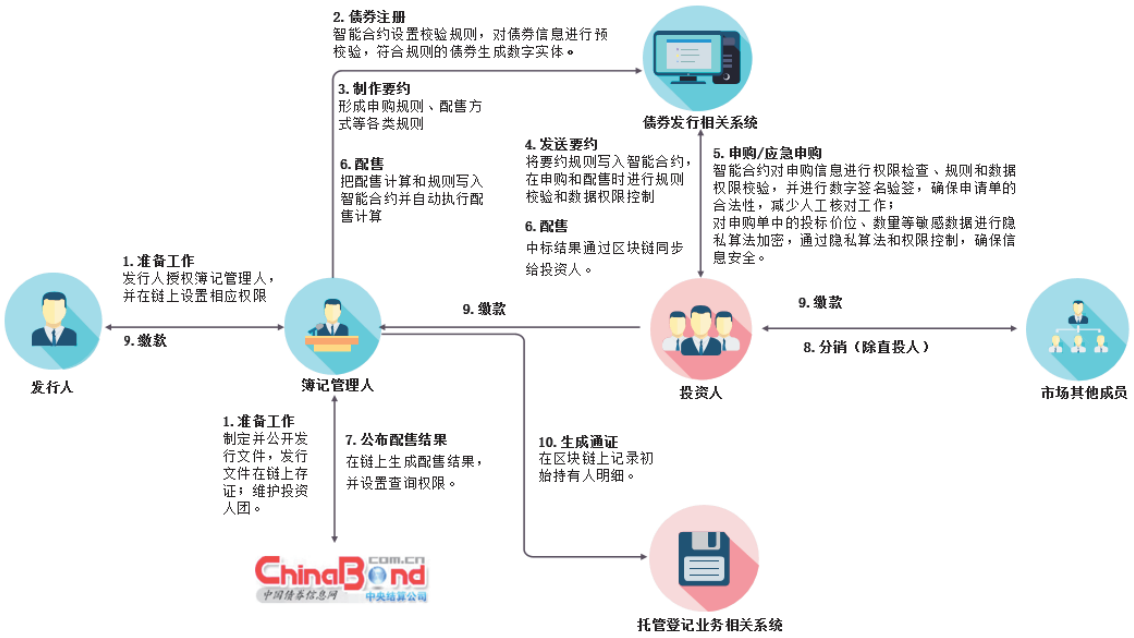


图 2 区块链数字债券发行业务流程图

7.2 发行前信息披露存证

支持信息披露文件上链存证，并支持存证查询。

7.3 债券注册

用智能合约实现债券注册模块的主要功能，在债券注册环节对数据要素等规则进行预检查和校验，符合规则的债券，上链存储，不符合规则的信息，则无法上链。

7.4 制作申购要约

在智能合约里实现要约申购、配售方式等各类规则，投资人和簿记管理人等角色在进行申购和配售时，系统根据不同角色自动校验申购数据字段规则和数据读写权限，校验通过后才可操作。

7.5 债券申购

用区块链进行规则校验、数据权限校验、申购数据的数字签名验证，确保申购数据真实、可追溯。用隐私保护算法对申购方账号、联系人、联系方式、申购价位、申购数量等申购明细信息进行加密存储。

7.6 配售

根据投资人的申购情况，调用利率簿记建档、价格簿记建档配售算法进行计算。计算完成后，对配售结果数据进行加密后上链，严格设置市场机构的操作权限和配售数据查阅权限，实现不同角色的差异化隐私保护机制。

7.7 公布配售结果

支持生成整场配售结果并导出。

7.8 生成通证

支持发行结果信息上链登记。

8 数据要求

8.1 数据格式

数据格式应符合中央结算公司的相关要求。

8.2 数据存储

发行业务数据存储采用分布式区块链技术存储。

8.3 数据权限

参与者按照各类券种业务指引、规则的要求提供并访问业务数据。

8.4 数据接口

支持通过数据接口和其他系统之间实现互操作。

中央结算公司应明确数据接口标准，通过白名单限定确保数据交互对象的真实可信，通过适当技术手段确保数据安全和不可篡改。

9 性能要求

9.1 系统容量

应支持至少 100 个参与者同时接入。

9.2 交易吞吐量

应支持至少 800TPS。

9.3 并发用户量

应支持在 200 个并发用户量下平稳运行。

9.4 响应时间

响应时间应满足如下要求：

——在网络畅通情况下，应保证业务系统与区块链系统交互的响应时间不超过 3 秒。

——在业务高峰时段网络拥堵情况下，应保证业务系统与区块链系统交互的响应时间不超过 10 秒。

9.5 节点存储规模

单节点存储规模应至少支持 100GB。

9.6 互操作性

应支持互操作，包括应用层互操作、链间互操作和链下互操作。

通过应用层互操作实现区块链数字债券发行平台业务应用和底层链的对接交互。

通过链间互操作实现区块链数字债券发行平台和其他区块链系统之间的数据互通、身份互认和治理协同。

通过链下互操作实现区块链数字债券发行平台和链下系统的安全可信交互。

10 安全要求

10.1 基础软件

应符合 GB/T22239—2019 中三级以上的主机安全、应用安全、数据安全及备份恢复相关规定。

应采用联盟链的结构，对接入节点或参与者进行一定限制的身份验证。

应采用白名单控制区块链网络节点与业务系统的相互访问。

应具备平台操作和运营日志管理功能，支持对平台历史使用情况进行追踪和审计。

10.2 节点管理

应具备节点准入控制机制，节点通过授权后才能加入或退出网络。

应采用 SSL/TLS 保障节点间通信安全。

应支持兼容环境部署，可部署于主流的 Linux 操作系统的服务器。

10.3 账本数据

10.3.1 完整性

应保证账本数据在生成、传输、存储和调用过程中的完整性，不被非法篡改。

10.3.2 一致性

应保证各节点的账本数据写入、修改、存储和调用的一致性。

参与者和中央结算公司坚持共建共治原则，共同维护账本数据的一致性。若存在不一致，中央结算公司履行系统维护管理职责，对不一致情况进行核查。

10.3.3 保密性

应通过权限控制、密码学技术保证敏感数据无法被非授权方读取。

10.3.4 授权使用

应确保数据的访问使用符合认证授权和访问控制要求，仅授权方可访问账本数据。

10.4 智能合约

智能合约应遵照 JR/T 0184—2020 中针对智能合约的相关要求。

中央结算公司根据相关业务规则编写智能合约，按参与者类型制定相应的智能合约调用权限，阻止智能合约的非法访问。

10.5 共识机制

共识协议应遵照 JR/T 0184—2020 中针对共识协议的相关要求。

参与者和中央结算公司通过智能合约高效实现业务流程中的共识形成。

10.6 裁决机制

区块链数字债券发行平台在节点增加删减、智能合约升级等关键业务环节，实施裁决机制。

实施裁决机制时，若各节点意见一致，则系统自动执行；若各节点意见不一致，中央结算公司基于职责合理判断进行裁决，并将裁决意见在链上向全节点和裁决事宜相关节点公开。

10.7 密码算法

密码算法应遵照 JR/T 0184—2020 中针对密码算法的相关要求。

业务数据通过基于国密算法构造的混合加密算法进行隐私保护和安全共享。

10.8 身份管理

10.8.1 身份鉴权

应在参与者接入网络前，颁发参与者身份凭证。

10.8.2 访问控制

参与者应在授权的前提下，凭身份凭证访问区块链网络，非授权机构不能访问区块链网络。

应采用最小权限原则，最小化参与者权限，只允许参与者在权限范围内操作和访问数据。

应支持监管机构接入，对业务有效性和发行流程合规性进行监督和审核。

10.9 隐私保护

应通过隐私保护组件为业务数据提供加解密和细颗粒度访问权限控制功能。

10.10 运维安全

运维安全应遵照 JR/T 0184—2020 中针对运维安全的相关要求。

10.11 治理机制

在中心化管理的基础上，中央结算公司和参与者共建共治。

11 可维护性要求

11.1 智能合约的可维护性

智能合约升级，应保持历史数据的可迁移性、正确性、可用性。

在满足业务规则和相关制度的前提下，市场机构参与智能合约的升级管理，并及时检测升级智能合约。

11.2 节点可维护性

增加或删减节点时，其他节点不需要停止或重启。

在满足业务规则和相关制度的前提下，市场机构参与节点的增加、删减的管理。

11.3 参与者可维护性

增加或删减参与者时，整个区块链网络的节点不需要停止或重启。

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区块链数字债券白皮书

中央国债登记结算有限责任公司

2024 年 10 月

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前　言

近年来，数字金融浪潮席卷全球，数字证券和数字货币迅速发展，国际主要金融基础设施纷纷尝试使用区块链技术提供数字证券服务，促进金融市场的数字化发展。作为数字证券的组成部分，区块链数字债券被普遍认为是债券市场数字化发展的重要探索方向。国际国内实践表明，区块链技术在数字债券领域的应用具有可行性，金融基础设施以其庞大的用户基础和在债券市场的枢纽地位，在区块链数字债券的应用探索方面发挥不可替代的作用。

中国债券市场监管部门和金融基础设施高度重视新技术的创新应用，始终致力于为市场提供安全高效的服务。为推动债券市场数字化转型，满足市场的多样化需求，中国金融基础设施开展区块链数字债券试点，于 2022 年推出国内首个区块链数字债券平台，成功支持多只债券发行。2023 年，中国金融基础设施持续扩大区块链数字债券的试点应用，为离岸金融提供债券发行服务；加强标准建设，发布两项区块链数字债券细分领域的标准，推动市场规范发展；探索跨链合作，与代表性金融机构实现跨链对接功能，提高数据交互效率；深化技术预研，形成区块链支持债券生命周期业务的思路。

在监管部门、金融基础设施和市场机构的共同努力下，中

国在区块链数字债券的业务、技术、联盟治理和标准建设等方面体现出一定的国际先进性。为总结宣介中国区块链数字债券发展实践经验，加强与各界沟通交流，广泛听取意见建议，共同培育市场生态，助力金融强国建设，发布本白皮书。

一、债券市场数字化发展进入新时代

（一）数字经济发展需要数字化金融基础设施

随着区块链、大数据、人工智能、云计算等新一代信息技术的发展，全球数字经济快速兴起，数字化转型成为重要的发展导向。金融是经济的血脉。金融基础设施是承载金融资源交易运行的道路桥梁，其数字化转型可引领、加快金融市场的数字化发展，促进数据要素市场的培育和形成，提升金融服务的效率和覆盖范围，促进数字经济和实体经济深度融合。

（二）市场需要金融基础设施提供数字债券公用平台

在数字化发展背景下，市场机构有区块链数字债券业务需求。近年来，有市场机构尝试自建区块链数字债券发行系统，但因中立性、权威性、组织力有限，自建系统难以形成产业生态，也不具有规模经济效益，成本较高，还可能导致市场碎片化发展。此外，商业机构因不具有法定登记托管职能，无法在区块链上开展生命周期业务。市场强烈呼吁由金融基础设施提供公用平台。

（三）中国鼓励开展区块链技术创新应用

党中央、国务院高度重视区块链技术应用和产业创新发展。

十九届中共中央政治局会议就区块链技术发展现状和趋势进行第十八次集体学习，强调要加快推动区块链技术和产业创新发展。“十四五”规划将区块链作为数字经济重点产业之一，提出以联盟链为重点发展区块链服务平台和金融科技、供应链金融、政务服务等领域的应用方案。2022 年至 2023 年，中央网信办等十六个部门联合部署了国家区块链创新应用试点工作。

（四）国际主要金融基础设施积极探索区块链数字证券

区块链应用被普遍认为是推动数字资产发展的可行方式。近年来，国际主要金融基础设施积极探索区块链数字证券业务。中央国债登记结算有限责任公司（CCDC，以下简称中央结算公司）试点应用区块链数字债券平台，支持债券发行业务。美国证券托管结算公司（DTCC）使用区块链支持股票交易结算业务。欧清银行上线区块链数字债券发行系统，支持债券发行、分销和结算业务。明讯银行负责运行德意志交易所的区块链数字债券交易后处理平台，功能覆盖发行、托管、结算等。瑞士证券交易所集团（SIX）专门成立瑞士数字资产交易所（SDX），提供数字资产（包括数字债券）的全生命周期服务。

二、区块链数字债券试点取得积极成效

（一）数字技术进步推动数字债券发展

按照我们的定义，数字债券是数字形态的债券，是以债券要素指标的标准化为基础，以数字技术为实现手段，以账户或通证为存储形式的债券。区块链数字债券是数字债券的一种，是应用区块链技术，具有通证形式，可支持账户松耦合的数字债券。在市场发展早期，金融基础设施应用电子技术，促进债券市场无纸化，为市场高效稳健运行提供坚实保障。上世纪 90 年代中期，中国债券市场利用信息技术的后发优势，建成电子系统对债券进行生命周期管理，至 2001 年全面实现债券无纸化，并以电子债券为基础建立中央登记托管体制，结束了实物债券分散托管的历史。随着信息技术发展，金融基础设施持续以数字技术提升市场服务质效与安全。随着以区块链技术为代表的新兴数字技术兴起，金融基础设施顺应技术发展趋势和市场多元化需求，探索区块链数字债券。

（二）区块链数字债券试点有序开展

2018 年，以中央结算公司为代表的中国金融基础设施开始探索区块链技术研究和创新应用。2022 年，中央网信办、中国人民银行、原银保监会等十六个部门从各行业中择优筛选出

国家区块链创新应用试点单位，中央结算公司被列入试点。为落实国家试点任务，中央结算公司于 2022 年推出中国首个区块链数字债券公用平台，成功支持多只债券发行。2023 年，持续扩大试点应用范围，为离岸金融提供债券发行服务，发布区块链数字债券标准，与两家代表性机构成功实现同构和异构跨链对接，并形成区块链支持债券生命周期业务的技术思路。项目获得多项荣誉，在国家区块链创新应用试点评估中获评优秀，被中国信通院评为“2023 年优秀行业链”，被国际著名媒体《环球金融》评为“金融领先创新奖”（Top Innovations）。项目还被收录在中央网信办、中国信通院等多份报告中，作为区块链技术创新应用的示范案例。

（三）公用平台建设形成良好示范效应

经过探索实践，中国区块链数字债券公用平台在相关业务、技术、联盟治理和标准建设等方面体现特色和先进性，在全球数字化金融基础设施建设中形成良好的示范效应。**业务方面，**已经实现生产应用和价值上链。系统建设不改变业务规则，使得新技术应用和监管业务规则可以兼容；参与主体和支持券种较为丰富，支持的债券发行规模领先国际同业。**技术方面，**采用联盟链设计，自建平台，支持全节点、轻节点、无节点方式接入，支持行业主流同构/异构链跨链对接，实现链上链下互操

作；在外部部署多个全节点，记录多份全量账本，设计了基于中心化管理的权重共识机制和分离式权限控制治理机制。**联盟治理方面，**系统运营实行中心化管理下的共建共治。联盟链不改变金融基础设施的法定中央确权属性和成员准入管理权限，但通过智能合约高效实现业务流程中的共识形成。市场机构在遵守联盟治理的前提下，开展业务创新，提供有益反馈和合作监督。**标准建设方面，**发布《中债区块链数字债券发行平台规范》和《中债区块链数字债券发行平台接口规范》两项标准，为参与国际规则制定提供基础。

三、区块链数字债券探索收获宝贵经验

（一）遵循市场规律和基本原则

区块链数字债券的探索实践遵循“依法合规、安全高效、开放包容、协同共享”的基本原则。

一是依法合规。新技术应用不改变业务规则。区块链数字债券平台建设以现有业务规则为基础，和现有业务规则相协调。当业务规则发生变化时，区块链数字债券平台应及时升级。

二是安全高效。为保障业务安全高效运行，金融基础设施应对区块链数字债券平台实施必要的中心化管理，在关键业务环节实施裁决机制，同时接受市场机构的监督，合理采纳并及时回复市场机构的意见建议。区块链数字债券平台在可支持相关业务开展的前提下，尽可能复用传统系统资源，降低开发成本。债券市场区块链系统和传统系统在融合发展的过程中，应确保传统系统安全稳健运行。

三是开放包容。区块链数字债券平台应提供多种接入方式，满足市场机构差异化需求。全节点机构应从业务规模、技术能力等多方面严格甄选。区块链数字债券平台应支持互操作，包括应用层互操作、跨链互操作和链上链下互操作，实现信息安全可信交互。

四是协同共享。区块链数字债券平台由金融基础设施在监

管部门指导下，联合市场参与者共同建设，共享成果。各方凝心聚力，协同一致，为区块链数字债券探索发展注入活力。鼓励积极参与国际交流合作，与国际同业共同探讨，互相启发，共促发展，携手营造全球数字债券良好生态。

（二）形成关键规律性认识

通过在实践中不断思考、归纳和验证，形成以下规律性认识，得到各方广泛认可。

一是区块链数字债券运营仍需要中心化管理。区块链数字债券的系统建设、智能合约编写、技术创新、联盟治理、市场培育、风险监测、冲突解决等离不开中心化管理。在业务运行过程中，中心化管理有助于保障业务稳健、规范、高效运行，是实现有效共建共治的重要前提，也可合理权衡参与者隐私保护要求与信息透明共享，是一种集约高效模式。

二是金融基础设施应责无旁贷为市场提供数字债券服务。债券在发行后仍需在金融基础设施机构登记托管，只有金融基础设施能够依法合规提供数字债券的全生命周期服务。相较普通市场机构，金融基础设施专业性、中立性、组织力更为明显，不仅可以整合现有资源，避免重复建设，还可作为市场枢纽，搭建互联互通平台，支持跨平台互操作，进而实现共建共治、相融相促发展。

三是系统融合发展是数字化发展的必然方向。探索期内，债券业务运行仍需要以传统系统为主。金融基础设施探索区块链数字债券业务，主要是将区块链系统作为创新业务的试验载体。在探索发展的过程中，区块链系统应该和传统系统融合发展，而不是全盘取代传统系统。

（三）各方形成互利共赢局面

通过业务机制设计和技术优势的挖掘，各参与方在探索实践中形成合作共赢格局。

一是助力市场机构节约成本并提升效率和安全。金融基础设施提供的区块链数字债券平台具有公共属性，不以营利为目的，供市场机构选择使用，满足其数字化发展需求，并节约开发资源；区块链数字债券平台的智能合约支持业务智能化处理，可降低业务执行过程中可能存在的操作风险和人工成本；市场机构深度参与区块链数字债券平台建设和联盟治理，增强市场运行的透明度。除自贸区债券外，其他离岸债券多为自办发行。金融基础设施提供公用的区块链数字债券平台，可降低市场自办发行的风险，缩短境外投资者的跨境结算周期，提升业务效率，降低交易成本。

二是协助监管部门以数字化实现穿透监管。区块链数字债券平台可以助力监管部门实时掌握业务运行数据，有利于提

升业务透明度，强化穿透监管，提高风险识别能力。若监管部门在链上开展业务审批、材料审核等工作，还可推动相关业务的无纸化和数字化，提升处理效率和便利性。总体而言，区块链数字债券平台可加速推动债券市场全业务流程数字化转型。

三是提升金融基础设施包容性、公信力和健壮性。区块链数字债券系统在建设和应用过程中，需要市场机构的深度参与，对金融基础设施进行监督。相较传统治理体系，区块链的联盟合作体系可进一步提升金融基础设施的包容性和公信力。此外，金融基础设施在外部部署的全节点，可对全量业务数据进行备份，这种多账本技术设计可进一步提升金融基础设施业务系统的健壮性。外部全节点机构的账本数据已进行加密处理，机构仅可见自己相关的业务数据。

四、积极稳妥推动区块链数字债券深化探索

（一）拓展区块链数字债券探索应用

中央网信办等十六部门在通报国家区块链创新应用试点终期评估情况时，提出下一步要坚持需求导向，推动应用拓展深化。为此，应在监管部门指导下扩大区块链数字债券试点业务范围，逐步拓展区块链数字债券系统功能至债券全生命周期业务，并推动在跨境业务场景中的应用。应高度重视法律制度层面的基础构建，推动明确区块链数字债券和传统电子债券具有同等法律效力，为深化应用提供制度保障。

（二）促进区块链系统与支付系统对接

以区块链为底层技术构建的数字债券系统，可通过跨链、链上链下互操作等系统互联，兼容传统货币支付手段和数字货币支付手段。从现有的实践经验看，区块链数字债券可使用数字货币结算，也可使用传统货币结算。相比较而言，探索使用数字货币结算，有利于拓展数字货币应用场景，充分挖掘区块链技术在债券全生命周期服务中的应用潜力，提升金融基础设施服务数字化水平。下一步，可考虑在监管框架下拓展数字人民币的应用场景至数字债券领域，探索使用数字货币结算数字债券。

（三）推进区块链系统和传统系统融合发展

在区块链数字债券确权法律法规尚未明确的情况下，区块链系统发行的债券仍需在传统系统登记托管，这就要求区块链系统和传统系统必须进行数据交互。且在区块链数字债券发展初期，区块链数字债券规模较小，投资人有限，区块链系统只有和传统系统联通，才能打通“小池”和“大海”，拓展投资人和应用范围，提高市场流动性，形成持续发展的活力。

（四）以标准建设促进市场统一规范发展

区块链数字债券在国内外都处于探索阶段，相关的专业术语、业务逻辑、技术平台等缺乏规范标准。金融基础设施作为系统提供机构和中心化管理机构，可在探索实践中总结提炼，推动建立相关标准体系，促进市场统一规范发展，同时也为国际规则制定贡献中国经验和智慧。

（五）增强国际金融基础设施交流合作

中国金融基础设施前期的探索取得了积极成效，在数字化服务方面具备与国际同业交流合作的能力。下一步，应以更加开放的心态加强与国际主要金融基础设施交流分享，探讨在区块链数字债券方面的认识、理念和经验，积极倡导各国金融基

础设施之间深化交流合作，形成发展共识，推动国际规则建立，促进国际金融基础设施数字化系统间的互联互通。

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SECURITIES AND FUTURES COMMISSION
證券及期貨事務監察委員會

2 November 2023

Circular on intermediaries engaging in tokenised securities-related activities

1. The Securities and Futures Commission (**SFC**) has observed financial institutions' growing interest in tokenising traditional financial instruments in the global financial markets, with an increasing number of intermediaries entering the space to explore the tokenisation of securities and the distribution of tokenised securities to their clients.

2. Tokenisation generally involves the process of recording claims on assets that exist on a traditional ledger onto a programmable platform, which includes the use of distributed ledger technology (**DLT**) in the security lifecycle. This can be seen as digital record-keeping with integration of rules and logic governing the transfer process for the asset[1]. The SFC sees the potential benefits of tokenisation to the financial markets, particularly in increasing efficiency, enhancing transparency, reducing settlement time and lowering costs for traditional finance, but it is also aware of the new risks arising from the use of this technology.

3. Many intermediaries have already been conducting pilots to experiment with tokenisation of securities. For example, traditional brokers are already dealing in or advising on tokenised securities. Fund managers are issuing and distributing tokenised funds and managing funds investing in tokenised securities. Licensed operators of virtual asset trading platforms have been experimenting with and integrating tokenisation in their business operations. The SFC is supportive of intermediaries taking the initiative to tokenise traditional securities and believes the industry has made encouraging progress so far in coming up with scalable and interoperable tokenisation solutions.

4. The SFC considers it timely to provide more guidance on tokenised securities-related activities. This will help to clarify regulatory expectations for intermediaries engaged in such activities, thereby providing regulatory certainty to support continued innovation with appropriate safeguards from an investor protection perspective. This circular focuses on providing guidance to intermediaries in addressing and managing the new risks arising from the use of this new tokenisation technology so that the tokenisation marketplace could be developed in a healthy, responsible and sustainable manner. For SFC-authorised investment products, this circular should be read in conjunction with the SFC's Circular on tokenisation of SFC-authorised investment products.

A. Terminology

5. There is currently no universal definition or taxonomy for categorising tokenised securities and many different structures may exist in the market. For the purpose of this circular, tokenised securities are traditional financial instruments (eg, bonds or funds) that are "securities" as defined in section 1 of Part 1 of Schedule 1 to the Securities and

[1] For the key concepts surrounding tokenisation, please refer to "Annual Economic Report 2023", Bank of International Settlement, June 2023 (Part III).

Futures Ordinance (Cap. 571) (**SFO**) which utilise DLT (such as blockchain technology) or similar technology in their security lifecycle (**Tokenised Securities**).

6. Tokenised Securities are a subset of a broader set of digital securities, the latter of which in this circular are "securities" as defined in section 1 of Part 1 of Schedule 1 to the SFO that utilise DLT or similar technology in their security lifecycle (**Digital Securities**). Digital Securities which are not Tokenised Securities may be structured in more bespoke, novel or complicated forms, with some existing exclusively on a DLT-based network with no links to extrinsic rights or underlying assets and having no controls to mitigate the risks that ownership rights may not be accurately recorded[2]. Some of them may fall under the definition of an interest in a CIS. For example, Digital Securities which are not Tokenised Securities may include tokenisation of fractionalised interests in real world or digital assets such as artwork or land in a manner different from a traditional fund but such that the arrangement would amount to a CIS, or tokenisation of a profit sharing arrangement which is not in the form of traditional securities.

B. Nature of Tokenised Securities

7. At the outset, given that the nature of Tokenised Securities are fundamentally traditional securities with a tokenisation wrapper, the existing legal and regulatory requirements governing the traditional securities markets continue to apply to Tokenised Securities. In particular, offerings of Tokenised Securities would be subject to the prospectus regime under the Companies (Winding up and Miscellaneous Provisions) Ordinance (Cap. 32) (**C(WUMP)O**) and the offers of investments regime under Part IV of the SFO. Conduct of intermediaries in the distribution of or advising on Tokenised Securities, management of Tokenised Securities in the form of tokenised funds, management of funds investing in Tokenised Securities and secondary market trading of Tokenised Securities on virtual asset trading platforms are also governed by existing conduct requirements for securities-related activities.

C. New risks arising from tokenisation

8. The overarching principle of the SFC's regulatory approach is "same business, same risks, same rules". In addition to complying with existing legal and regulatory requirements applicable to traditional securities, intermediaries should manage the new risks, which are not typically associated with traditional securities, especially ownership risks (eg, how ownership interest relating to the Tokenised Securities is transferred and recorded) and technology risks (eg, forking, blockchain network outages and cybersecurity risks) in activities involving tokenisation.

[2] For example, a native token with all the characteristics of a collective investment scheme (**CIS**) (but not simply a tokenised fund) trading on a public-permissionless network. Under the SFO, a CIS generally has four elements: (i) it must involve an arrangement in respect of property; (ii) participants do not have day-to-day control over the management of the property; (iii) the property is managed as a whole by or on behalf of the person operating the arrangement and/or the contributions of the participants and the profits or income from which payments are made to them are pooled; and (iv) the purpose or effect of the arrangement is for participants to participate in or receive profits, income or other returns from the acquisition or management of the property.

9. The SFC notes that there are several common archetypes of DLT networks, including: (a) private-permissioned, which is a closed-loop private network characterised by a centralised authority that controls and restricts access to predetermined users, and is typically governed by rules that apply to all users; (b) public-permissioned, which is a public network with a centralised authority that controls and restricts access through authentication, for example; and (c) public-permissionless which is an open, public network that does not restrict access for privileges and has defining characteristics such as decentralisation, pseudonymity and large-scale user base[3]. Risks vary depending on the type of DLT network used, and should be addressed through the implementation of adequate controls.

10. In the case of Tokenised Securities in bearer form[4] issued using permissionless tokens on public-permissionless networks, there may be heightened cybersecurity risks. Due to the lack of restrictions for public access and the open nature of these networks, investors may suffer substantial losses without recourse and may also have practical difficulties recovering their assets or pursuing claims for losses in the event of theft, hacking or other cyberattacks. Further, as a result of such Tokenised Securities' relative ease of transfer which would result in a change in ownership and their anonymity, they have potentially higher exposures to money laundering and know-your-client issues compared with Tokenised Securities in registered form.

D. Considerations for engaging in Tokenised Securities-related activities

11. Intermediaries engaging in Tokenised Securities-related activities should have the necessary manpower and expertise to understand the nature of such businesses, especially the new risks relating to ownership and technology, and manage such risks appropriately.

12. Intermediaries should act with due skill, care and diligence, and perform due diligence on the Tokenised Securities based on all the available information to identify the key features and risks of the Tokenised Securities. This would include intermediaries' existing obligation to conduct due diligence on the product itself (eg, on the underlying bond or fund which is being tokenised) and also on the technology aspects given the use of tokenisation technology.

Issuance of Tokenised Securities

13. Where intermediaries issue (eg, fund managers of tokenised funds) or are substantially involved in the issuance of the Tokenised Securities which they intend to deal in or advise on, they remain responsible for the overall operation of the tokenisation arrangement notwithstanding any outsourcing to third-party vendors/service providers.

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[3] For more information on different archetypes of DLT networks, please refer to "Impact of Distributed Ledger Technology in Global Capital Markets" published by Global Financial Markets Association in May 2023 (pages 20 and 21).
[4] Where the holder of the Tokenised Securities (ie, who has the practical control of the token according to the blockchain records) can exercise the rights to which the token holder is entitled (eg, the right to repayment of the principal for a tokenised bond).

14. In assessing the risks related to the technical and other aspects of Tokenised Securities, an intermediary is suggested to take into account the list of non-exhaustive factors set out in Part A of the Appendix to this circular.

15. For custodial arrangements, intermediaries should take into account the features and risks of the Tokenised Securities in considering the most appropriate custodial arrangement for the Tokenised Securities to manage ownership and technology risks. Additional considerations for the custodial arrangement for bearer form Tokenised Securities which use permissionless tokens on public-permissionless networks are set out in Part B of the Appendix to this circular.

16. For tokenisation of SFC-authorised investment products, please also refer to the requirements under the Circular on tokenisation of SFC-authorised investment products issued by the SFC.

Dealing in, advising on, or managing portfolios investing in Tokenised Securities

17. Where intermediaries deal in, advise on, or manage portfolios investing in Tokenised Securities, intermediaries are reminded to conduct due diligence on the issuers and their third-party vendors/service providers involved in the tokenisation arrangement as well as the features and risks arising from the tokenisation arrangement.

18. Intermediaries should understand and be satisfied with the controls implemented by the issuers and their third-party vendors/service providers to manage ownership and technology risks of the Tokenised Securities before they engage in related activities. Please refer to Parts A and B of the Appendix to this circular for a non-exhaustive list of factors for consideration.

E. Information for clients

19. Intermediaries should make adequate disclosure of relevant material information specific to Tokenised Securities (including the risks of the Tokenised Securities) and communicate such information in a clear and easily comprehensible manner.

20. Intermediaries are expected to provide clients with material information on the tokenisation arrangement, for example: (a) whether off-chain or on-chain settlement is final; (b) the limitations imposed on transfers of the Tokenised Securities (if any); (c) whether a smart contract audit has been conducted before deployment of the smart contract (if any); (d) key administrative controls and business continuity planning for DLT-related events[5]; and (e) the custodial arrangement (if applicable).

[5] Eg, cyberattacks, network failures, forks, loss of administrative cryptographic keys or investor's cryptographic keys, or unauthorised transfers.

F. Clarifications regarding SFC's previous Statement on Security Token Offerings (Statement)

21. On 29 March 2019, the SFC issued the Statement as a reminder about the legal and regulatory requirements applicable to parties engaging in security token offerings. For the avoidance of doubt, this circular will supersede the Statement.

Complex product categorisation

22. In the Statement, the SFC reminded intermediaries which market or distribute security tokens to ensure compliance with all existing legal and regulatory requirements. At that time, the SFC took the stance that security tokens would be regarded as "complex products" and therefore additional investor protection measures would apply.

23. Tokenised Securities are fundamentally traditional securities with a tokenisation wrapper. Further, intermediaries are required to ensure that the new risks arising from the use of the new technology should be effectively mitigated and would not impact on investors. Hence, tokenisation should not alter the complexity of the underlying security.

24. Based on the above (ie, the risks arising from the use of the new technology are effectively mitigated), whether a Tokenised Security is a complex product or not is based on an assessment of the complexity of its underlying traditional security. In other words, a see-through approach should be adopted in assessing complexity. Accordingly, an intermediary should determine whether a Tokenised Security is complex or not by assessing the underlying traditional security having regard to the factors set out in Chapter 6 of the Guidelines on Online Distribution and Advisory Platforms and paragraph 5.5 of the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission. The guidance issued by the SFC from time to time should also be taken into consideration[6]. An intermediary distributing a Tokenised Security which is a complex product should comply with requirements governing the sale of complex products, including ensuring suitability irrespective of whether there has been any solicitation or recommendation.

Professional investors (PI)-only restriction

25. In the Statement, the SFC also imposed a PI-only restriction on the distribution and marketing of security tokens. At the time of issuance of the Statement, security tokens were a novel asset class and were not in the form of Tokenised Securities that are now available in the market.

26. As Tokenised Securities are fundamentally traditional securities with a tokenisation wrapper, the SFC is of the view that there would be no need to impose a mandatory PI-only restriction.

[6] For example, please see the SFC's website: https://www.sfc.hk/en/Rules-and-standards/Suitability-requirement/Non-complex-and-complex-products.

27. However, intermediaries are reminded that the requirements of the prospectus regime under the C(WUMP)O and the offers of investments regime under Part IV of the SFO would apply to the offering of Tokenised Securities to the public of Hong Kong (**Public Offering Regimes**). This means that an offer of Tokenised Securities that is not authorised under Part IV of the SFO or which has not complied with the prospectus regime could only be made to PIs or pursuant to any other applicable exemption under the Public Offering Regimes.

G. Clarifications of other requirements

Fund managers managing portfolios which may invest in Tokenised Securities

28. In the Joint circular on intermediaries' virtual asset-related activities, the SFC has clarified that the "de minimis threshold"[7] under the Terms and Conditions only applies to virtual assets as defined in section 53ZRA of the AMLO. In other words, the SFC would not impose the Terms and Conditions on fund managers managing portfolios investing in Tokenised Securities meeting the "de minimis threshold" unless the portfolios also invest in virtual assets meeting the "de minimis threshold".

29. Fund managers managing portfolios which may invest in Tokenised Securities are nevertheless reminded that they should comply with the requirements set out in this circular when the portfolios they manage invest in Tokenised Securities. In particular, these fund managers should refer to the requirements in paragraphs 17 to 18 above.

Virtual asset trading platform operators (VATPs) licensed by the SFC and the applicable insurance/compensation arrangement

30. VATPs are required to put in place a compensation arrangement approved by the SFC to cover the potential loss of security tokens in compliance with paragraph 10.22 of the Guidelines for Virtual Asset Trading Platform Operators. The SFC wishes to clarify that it may consider, on application by a VATP, to exclude certain Tokenised Securities from the required coverage on a case-by-case basis.

31. In assessing the application, the VATP will need to demonstrate to the SFC's satisfaction that the risk of financial loss to its clients holding those Tokenised Securities can be effectively mitigated if the Tokenised Securities become lost. For example, the VATP may demonstrate that administrative controls (eg, transfer restrictions or whitelisting) have been implemented by the issuer to protect the holders of Tokenised Securities which use public-permissionless networks against the risks of theft and hacking.

[7] Under the terms and conditions for licensed corporations or registered institutions which manage portfolios that invest in virtual assets (**Terms and Conditions**), "de minimis threshold" refers to the situation where either: (a) the stated investment objective of a fund is to invest in virtual assets or (b) the intention of a fund is to invest 10% or more of its gross asset value (GAV) in virtual assets. "Virtual asset" is as defined in section 53ZRA of the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap. 615) (**AMLO**).

H. Digital Securities-related activities

32. Intermediaries are reminded that Digital Securities cannot be offered to retail investors in breach of the Public Offering Regimes. Where Digital Securities are distributed on an online platform, it must be properly designed and have appropriate access rights and controls to ensure compliance with selling restrictions which may be applicable to those Digital Securities.

33. In view of the bespoke nature, terms and features as well as heightened legal uncertainties of certain Digital Securities which are not reasonably likely to be understood by a retail investor, Digital Securities which are not Tokenised Securities are likely to be regarded as "complex products". Intermediaries distributing such Digital Securities should comply with requirements governing the sale of complex products, including ensuring suitability irrespective of whether there has been any solicitation or recommendation.

34. Intermediaries are reminded to implement adequate systems and controls to ensure compliance with the applicable legal and regulatory requirements before they engage in activities relating to Digital Securities. In addition to the requirements relating to Tokenised Securities stated in this circular, intermediaries should exercise their professional judgment to assess each Digital Security which they deal with but is not a Tokenised Security, and implement appropriate additional internal controls to address the specific risks and unique nature of the Digital Security in order to protect the interests of their clients.

I. Notification and provision of information to the SFC

35. Intermediaries[8] which are interested in engaging in any activities involving any Digital Securities (including Tokenised Securities) should notify and discuss their business plans with their case officer in the SFC in advance. They should provide any information in relation to the services requested by the SFC[9] from time to time.

36. Please contact the SFC Fintech unit at fintech@sfc.hk for enquiries relating to this circular.

Fintech unit
Intermediaries Division
Securities and Futures Commission

Enclosure

End

[8] Registered institutions should notify the SFC and the Hong Kong Monetary Authority (**HKMA**).
[9] Registered institutions should also provide any information in relation to the services requested by the HKMA from time to time.



Monetary Authority of Singapore

A GUIDE TO DIGITAL TOKEN OFFERINGS

[Last updated on 26 May 2020]

A GUIDE TO DIGITAL TOKEN OFFERINGS

1 PURPOSE

1.1 This paper provides general guidance on the application of the relevant laws administered by MAS in relation to offers or issues of digital tokens in Singapore.

1.2 For purposes of this guide, the securities laws refer to the Securities and Futures Act (Cap. 289) ("**SFA**") and the Financial Advisers Act (Cap. 110) ("**FAA**").

1.3 This guide will also refer to the Payment Services Act 2019 (Act 2 of 2019) ("**PS Act**").

1.4 The contents of this guide are not exhaustive, have no legal effect and do not modify or supersede any applicable laws, regulations or requirements.

2 APPLICATION OF SECURITIES LAWS ON OFFERS OR ISSUES OF DIGITAL TOKENS IN SINGAPORE

2.1 Offers or issues of digital tokens may be regulated by MAS if the digital tokens are capital markets products[1] under the SFA. Capital markets products include any securities, units in a collective investment scheme, derivatives contracts and spot foreign exchange contracts for purposes of leveraged foreign exchange trading.

Digital tokens which constitute capital markets products

2.2 MAS will examine the structure and characteristics of, including the rights attached to, a digital token in determining if the digital token is a type of capital markets products under the SFA.

[1] Under section 2(1) of the SFA, "capital markets products" includes any securities (which includes shares, debentures and units in a business trust), units in a collective investment scheme, derivatives contracts (which includes derivatives of shares, debentures and units in a business trust), spot foreign exchange contracts for the purposes of leveraged foreign exchange trading, and such other products as MAS may prescribe as capital markets products.

2.3 For instance, a digital token may constitute –

2.3.1 a share [2], where it confers or represents ownership interest in a corporation[3], represents liability of the token holder in the corporation[4], and represents mutual covenants with other token holders in the corporation *inter se*[5];

2.3.2 a debenture, where it constitutes or evidences the indebtedness[6] of the issuer of the digital token in respect of any money that is or may be lent to the issuer by a token holder;

2.3.3 a unit in a business trust[7], where it confers or represents ownership interest in the trust property of a business trust;

2.3.4 a securities-based derivatives contract[8], which includes any derivatives contract of which, the underlying thing is a share, debenture or unit in a business trust; or

2.3.5 a unit[9] in a collective investment scheme[10] ("**CIS**"), where it represents a right or interest in a CIS, or an option to acquire a right or interest in a CIS.

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[2] Under section 2(1) of the SFA, read with section 4(1) of the Companies Act (Cap. 50), "share" means "a share in the share capital of a corporation and includes stock except where a distinction between stocks and share is expressed or implied.".

[3] *Halsbury Laws of Singapore* vol 6, (LexisNexis, 2010) at paragraph 70.343

[4] *Ibid.*

[5] *Ibid.*

[6] *Ibid.,* at paragraph 70.394

[7] As defined under section 2(1) of the SFA, read with section 2 of the Business Trusts Act (Cap. 31A). Under section 2 of the Business Trust Act, a "unit", in relation to a business trust, means "a share in the beneficial ownership in the trust property of the business trust".

[8] Under section 2(1) of the SFA, "securities-based derivatives contract" includes any derivatives contracts of which the underlying thing or any of the underlying things is a security or securities index, but does not include any derivatives contract that is, or that belongs to a class of derivatives contracts that is, prescribed by regulations made under section 341 of the SFA. Please see section 2(1) of the SFA for the definition of "derivatives contract".

[9] Under section 2(1) of the SFA, a "unit", in relation to a collective investment scheme, means "a right or interest (however described) in a collective investment scheme (whether or not constituted as an entity), and includes an option to acquire any such right or interest in the collective investment scheme.

[10] Under section 2(1) of the SFA, a "collective investment scheme" includes an arrangement in respect of any property:

a) Under which the participants do not have day-to-day control over management of the property, whether or not the participants have the right to be consulted or to give directions in respect of such management;

b) Under which either or both of the following characteristics are present:
(i) the property is managed as a whole by or on behalf of a manager;
(ii) the contributions of the participants, and the profits or income out of which payments are to be made to the participants, are pooled; and

c) The effect (or the purpose, purported purpose or purported effect) of the arrangement is to enable participants to participate in or receive profits, income or other payments or returns arising from acquisition, holding, management or disposal of, the exercise of, the redemption of, or the expiry of any right, interest, title or benefit in the property or any part of the property; or to receive sums paid out of such profits, income, or other payments or return.

Please also note that the characteristics described in paragraph 2.3 are not exhaustive.

Offerors of digital tokens which constitute securities, securities-based derivatives contracts or units in a CIS

2.4 Offers of digital tokens which constitute securities [11], securities-based derivatives contracts or units in a CIS are subject to the same regulatory regime under Part XIII of the SFA, as offers of securities[12], or securities-based derivatives contracts[13] or units in a CIS[14] respectively made through traditional means.

2.5 A person may only make an offer of digital tokens which constitute securities, securities-based derivatives contracts or units in a CIS ("**Offer**"), if the Offer complies with the requirements under Part XIII of the SFA[15]. This includes the requirements that the Offer must be made in or accompanied by a prospectus that is prepared in accordance with the SFA and is registered with MAS ("**Prospectus Requirements**").

2.6 In addition, where an offer is made in relation to units in a CIS, the CIS is subject to authorisation or recognition requirements [16] ("**Authorisation / Recognition Requirements**"). An authorised CIS or a recognised CIS under the SFA must comply with investment restrictions[17] and business conduct requirements[18]. Please refer to the Securities and Futures (Offers of Investments) (Collective Investment Schemes) Regulations 2005 ("**SF(OI)(CIS)R**"), the Code on Collective Investment Schemes ("**Code on CIS**") and the Practitioner's Guide to the CIS Regime under the SFA, for details.

2.7 An Offer may nevertheless be exempt from the Prospectus Requirements and, in the case of units in a CIS, the Authorisation/ Recognition Requirements, where, amongst others –

[11] Includes shares, debentures and units in a business trust. Please see section 2(1) of the SFA for the definition of "securities" under the SFA.
[12] Division 1 of Part XIII of the SFA
[13] Division 1 of Part XIII of the SFA
[14] Division 2 of Part XIII of the SFA
[15] Please see sections 240 and 296 of the SFA.
[16] Please see sections 286 and 287 of the SFA. Please also refer to Part II of the Securities and Futures (Offers of Investments)(Collective Investment Schemes) Regulations 2005.
[17] Please refer to Appendix 1 of the Code on CIS.
[18] Please refer to the Code on CIS.

2.7.1 the Offer is a **small (personal) offer**[19] that does not exceed S$5 million (or its equivalent in a foreign currency) within any 12-month period, subject to certain conditions;

2.7.2 the Offer is a **private placement** offer[20] made to no more than 50 persons within any 12-month period, subject to certain conditions;

2.7.3 the Offer is made to **institutional investors**[21] only; or

2.7.4 the Offer is made to **accredited investors**[22], subject to certain conditions.

The exemptions for a small (personal) offer, a private placement offer and an offer made to accredited investors, are respectively subject to certain conditions which includes advertising restrictions[23].

Intermediaries[24] who facilitate offers or issues of digital tokens

2.8 MAS has observed that one or more of the following types of intermediaries typically facilitate offers or issues of digital tokens:

2.8.1 a person who operates a platform on which one or more offerors of digital tokens may make primary offers or issues of digital tokens ("**primary platform**");

2.8.2 a person who provides financial advice in respect of any digital tokens;

[19] Please see sections 272A and 302B of the SFA. A small offer must be a personal offer that satisfies section 272A(3) and 302B(3) respectively. A personal offer is one that is made to a pre-identified person, which includes offers made to persons who have previous professional or other connection with the offeror. As the word "personal" suggests, each personal offer must be made personally by the offeror, or by a person acting on its behalf, to the pre-identified person, and may only be accepted by the pre-identified person to whom the offer was made. Please refer to the Guidelines on Personal Offers made pursuant to the Exemption for Small Offers for further details.

[20] Please see sections 272B and 302C of the SFA.

[21] Please see sections 274 and 304 of the SFA. Please refer to section 4A(1)(c) of the SFA for the definition of "institutional investor".

[22] Please see sections 275 and 305 of and the Sixth Schedule to the SFA. Please refer to section 4A(1)(a) of the SFA for the definition of "accredited investor" and regulation 2 of the Securities and Futures (Prescribed Specific Classes of Investors) Regulations 2005.

[23] Please refer to section 272A(10) and 302B(10) of the SFA for the definition of "advertisement". For more information on the advertising restrictions with respect to offers of shares and debentures, please refer to the Guidelines on the Advertising Restrictions in Sections 272A, 272B and 275 (Guideline No. SFA13-G15).

[24] A corporation that wishes to apply for a capital markets services licence may refer to the Guidelines on Criteria for the Grant of a Capital Markets Services Licence (Guideline No. SFA 04-G01) and the Guidelines on Licence Applications, Representative Notification and Payment of Fees (Guideline No. CMG-G01).

2.8.3 a person who operates a platform at which digital tokens are traded ("**trading platform**").

2.9 A person who operates a primary platform in Singapore in relation to digital tokens which constitute any type of capital markets products, may be carrying on business in one or more regulated activities[25] under the SFA. Where the person is carrying on business in any regulated activity, or holds himself out as carrying on such business, he must hold a capital markets services licence for that regulated activity under the SFA, unless otherwise exempted[26].

2.10 A person who provides any financial advice[27] in Singapore in respect of any digital token that is an investment product[28], must be authorised to do so in respect of that type of financial advisory service by a financial adviser's licence, or be an exempt financial adviser[29], under the FAA[30].

2.11 A person who establishes or operates a trading platform in Singapore in relation to digital tokens which constitute securities, derivatives contracts or units in a CIS, may be establishing or operating an organised market[31]. A person who establishes or operates an organised market, or hold himself out as operating a market, must be approved by MAS as an approved exchange or recognised by MAS as a recognised market operator under the SFA[32], unless otherwise exempted.

Extra-territoriality of the SFA and the FAA

[25] Please see the Second Schedule to the SFA for the types of activities regulated as "regulated activities" under the SFA.
[26] Please section 82 of the SFA.
[27] Please see section 6, read with the definition of "financial adviser" under section 2(1), of the FAA. Please note that a financial adviser does not include any person specified in the First Schedule to the FAA.
[28] Under section 2(1) of the FAA, an "investment product" means (a) any capital markets products as defined in section 2(1) of the SFA; (b) any spot foreign exchange contracts other than for the purposes of leveraged foreign exchange trading; (c) any life policy; or (d) any other product as may be prescribed.
[29] Please see section 6 of FAA.
[30] A corporation that wishes to apply for a FA licence may refer to the Guidelines on Criteria for the Grant of a Financial Adviser's Licence (Guideline No. FAA-G01) and the Guidelines on Licence Applications, Representative Notification and Payment of Fees (Guideline No. CMG-G01).
[31] Please refer to Part I of the First Schedule to the SFA for the definition of an "organised market".
[32] A person operating a platform facilitating secondary trading of tokens which constitute securities may refer to the Guidelines on the Regulation of Markets (Guideline No. SFA02-G01) for guidance on whether it should apply to be an approved exchange or a recognised market operator under the SFA.

2.12 Where a person operates a primary platform, or trading platform, partly in or partly outside of Singapore, or outside of Singapore, the requirements of the SFA may nevertheless apply extra-territorially to the activities of that person under section 339 of the SFA[33]. Please refer to the Guidelines on the Application of Section 339 (Extra-Territoriality) of the SFA (Guidelines No. SFA15-G01), for details.

2.13 Where a person who is based overseas, engages in any activity or conduct that is intended to or likely to induce the public, or a section of the public, in Singapore to use any financial advisory service provided by the person, the person is deemed to be acting as a financial adviser in Singapore[34].

3 APPLICATION OF ANTI-MONEY LAUNDERING AND COUNTER FINANCING OF TERRORISM LAWS

3.1 MAS emphasises that the relevant MAS Notice on Prevention of Money Laundering and Countering the Financing of Terrorism ("**AML/CFT requirements**") will apply if the person is deemed to be an intermediary conducting one or more of the regulated activities identified in paragraphs 2.8 – 2.11 and is a:

3.1.1 holder of a capital markets services licence under the SFA;
3.1.2 fund management company[35] registered under paragraph 5(1)(i) of the Second Schedule to the Securities and Futures (Licensing and Conduct of Business) Regulations (Rg. 10) ("**SF(LCB)R**");
3.1.3 person exempted under paragraph(s) 3(1)(d), 3A(1)(d) and/or 7(1)(b) of the Second Schedule to the SF(LCB)R from the requirement to hold a capital markets services licence;
3.1.4 licensed financial adviser under the FAA[36];
3.1.5 registered insurance broker which is exempt under section 23(1)(c) of the FAA from holding a financial adviser's licence to act as a financial adviser in Singapore in respect of any financial advisory service[36]; or

[33] Please refer to the Guidelines on the Application of Section 339 (Extra-Territoriality) of the SFA (Guideline No. SFA15-G01)
[34] Please see section 6(2) of the FAA.
[35] Please note that the SFA was amended on 8 October 2018 and the definition of "fund management" in the Second Schedule to the SFA has been expanded to include management of CIS.
[36] Please refer to the Notice to Financial Advisers on Prevention of Money Laundering and Countering the Financing of Terrorisim (MAS Notice FAA-N06) for the scope of persons covered and the applicable AML/CFT requirements.

3.1.6 person exempt under section 23(1)(f) of the FAA read with regulation 27(1)(d) of the Financial Advisers Regulations (Rg. 2) from holding a financial adviser's licence to act as a financial adviser in Singapore in respect of any financial advisory service[36].

3.2 Applicable AML/CFT requirements on such persons broadly include the following:

3.2.1 take appropriate steps to identify, assess and understand their money laundering and terrorism financing (ML/TF) risks;
3.2.2 develop and implement policies, procedures and controls – including those in relation to the conduct of customer due diligence and transaction monitoring, screening, reporting suspicious transactions and record keeping – in accordance with the relevant MAS Notices, to enable them to effectively manage and mitigate the risks that have been identified;
3.2.3 perform enhanced measures where higher ML/TF risks are identified, to effectively manage and mitigate those higher risks; and
3.2.4 monitor the implementation of those policies, procedures and controls, and enhance them if necessary;

3.3 Digital tokens that perform functions which may not be within MAS' regulatory purview may nonetheless be subject to other legislation for combating ML/TF. MAS would like to highlight in particular the following which all persons would have to abide by:

3.3.1 Obligations to report suspicious transactions with the Suspicious Transaction Reporting Office, Commercial Affairs Department of the Singapore Police Force pursuant to section 39 of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap. 65A) (**"CDSA"**); and
3.3.2 Prohibitions from dealing with or providing financial services to designated individuals and entities pursuant to the Terrorism (Suppression of Financing) Act (Cap. 325) (**"TSOFA"**) and various regulations giving effect to United Nations Security Council Resolutions (**"UN Regulations"**).

3.4 The Payment Services Act ("**PS Act**") came into effect on 28 January 2020. A person carrying on a business of providing any service of dealing in digital payment tokens or any service of facilitating the exchange of digital payment tokens must be licensed and will be regulated under the PS Act for AML/CFT purposes only and will be required to put in place policies, procedures and controls to address its ML/TF risks. For more information relating to the PS Act, you may refer to our website here.

4 ILLUSTRATIONS OF APPLICATION OF THE RELEVANT LAWS TO OFFERS OR ISSUES OF DIGITAL TOKENS

4.1 The case studies below illustrate how the relevant laws administered by MAS may apply. MAS emphasises that these case studies are for the purpose of illustration only. They are not indicative or conclusive of how the relevant laws will apply to a particular case involving an offer or issue of digital tokens. The illustrations in the case studies are also not exhaustive and deliberately avoid labelling using terms like "utility token" or "stablecoin".

4.2 If you wish to offer digital tokens in Singapore or operate a platform involving digital tokens in Singapore, you are encouraged to seek professional advice from qualified legal practitioners to ensure that your proposed activities are in compliance with all applicable laws, rules and regulations in Singapore. When applying the law to your case, you and your legal advisers should look beyond labels and examine the features and characteristics of each token.

Case study 1

Company A plans to set up a platform to enable sharing and rental of computing power amongst the users of the platform. Company A intends to offer digital tokens ("**Token A**") in Singapore to raise funds to develop the platform. Token A will give token holders access rights to use Company A's platform. The token can only be used to pay for renting computing power provided by other platform users. Token A will not have any other rights or functions attached to it and is not or is not intended to be, a medium of exchange accepted by the public, or a section of the public, as payment for goods or services or for the discharge of a debt. Company A intends to offer Token A to any person globally, including in Singapore.

Application of relevant laws administered by MAS in relation to an offer of Token A

- A holder of Token A will only have rights to access and use Company A's platform, and the right to use Token A to pay for rental of computing power provided by other users. Token A will not provide its holder any other rights or functions attached to it. Hence, Token A will not constitute capital markets products under the SFA.

- Company A's offer of Token A will not be subject to any requirement under the SFA or the FAA. However, Company A must abide by all Singapore laws, including the CDSA, the TSOFA and the UN Regulations, in the conduct of its business.
- Token A is not considered a digital payment token under the PS Act as it is not or is not intended to be, a medium of exchange accepted by the public, or a section of the public, as payment for goods or services or for the discharge of a debt.

Case study 2

Company B is in the business of developing properties and operating commercial buildings. It plans to raise funds to develop a shopping mall by offering digital tokens ("**Token B**") to any person globally, including in Singapore. Token B will be structured to represent a share in Company B, and will be a digital representation of a token holder's ownership in Company B. Company B also intends to provide financial advice in relation to its offer of Token B.

Application of relevant laws administered by MAS in relation to an offer of Token B

- Token B will be a share and constitute securities under the SFA.
- The offer of Token B will need to comply with Prospectus Requirements, unless the offer is otherwise exempted under the SFA.
- Holders of a capital markets services licence that carry on business in dealing in tokens that are securities are required to comply with AML/CFT requirements under MAS Notice SFA04-N02.
- Company B will not require a capital markets services licence for dealing in capital markets products that are securities under the SFA if (a) it is not in the business of dealing in capital markets products that are securities or (b) it is in the business of dealing in capital markets products that are securities, but an applicable exemption applies. For example, if it is carrying on business in dealing in capital markets products that are securities for his own account through certain financial institutions regulated by MAS[37], such as a holder of capital markets services licence to deal in capital markets products that are securities.
- To provide financial advice in relation to its offer of Token B, Company B will need to be a licensed financial adviser, unless otherwise exempted[38].

[37] Please refer to paragraph 2(1)(a) of the Second Schedule to the Securities and Futures (Licensing and Conduct of Business) Regulations (Rg 10).

[38] If Company B holds a capital markets services licence for dealing in capital markets products under the SFA, Company B is exempt from holding a financial adviser's licence to act as a financial adviser in Singapore in respect of any financial advisory service. Instead, Company B will be subject to certain reporting requirements, including the requirement under regulation 37(1) of the Financial Advisers Regulations (Rg2) to lodge a notification to MAS that it is commencing business in a financial advisory service under the FAA.

- Licensed financial advisers are required to comply with AML/CFT requirements under MAS Notice FAA-N06.

Case study 3

Company C intends to offer digital tokens ("**Token C**") to any person globally, including in Singapore. Company C will pool funds raised from the offer of Token C and use the funds to invest in shares in FinTech start-up companies as well as in mining equipment or real estate for purpose of diversification ("**Portfolio**"). Company C will also manage the Portfolio. Holders of Token C will not have any powers relating to the day-to-day operations of Company C or the management of the Portfolio. Profits arising from the Portfolio will be pooled and distributed as payments to the token holders. The purpose of this arrangement is to enable token holders to receive profits arising from the Portfolio.

Application of relevant laws administered by MAS in relation to an offer of Token C

- The arrangement established by Company C in relation to Token C will be a CIS ("**Arrangement**").
- On this basis, the Arrangement will have to be authorised under section 286 of the SFA, or recognised under section 287 of the SFA depending on whether the arrangement is constituted in Singapore or outside Singapore, unless otherwise exempted under the SFA. The Arrangement will also be subject to the applicable requirements under Division 2 of Part XIII of the SFA, the SF(OI)(CIS)R and the Code on CIS, unless otherwise exempted under the SFA.
- On this basis, Token C will be a unit in a CIS under the SFA.
- Company C will likely require a capital markets services licence for carrying on business in the regulated activity of fund management under the SFA, unless otherwise exempted.
- Holders of a capital markets services licence are required to comply with AML/CFT requirements under MAS Notice SFA04-N02.
- As no financial advisory service will be provided by Company C in respect of Token C, the FAA will not apply in relation to the offer of Token C.

Case study 4

Company D is a Singapore-incorporated company with operations in Singapore. It intends to offer digital tokens ("**Token D**") to members of the public, but the offering will not be accessible by persons in Singapore. Company D will pool the funds raised

from the offer and use the funds to invest in a portfolio of shares in FinTech start-up companies. Company D will manage the portfolio of shares. Holders of Token D will not have any powers relating to the day-to-day operations of Company D or the management of the portfolio of shares. Profits arising from the portfolio of shares will also be pooled and distributed as payments to holders of Token D. The purpose of this arrangement is to enable token holders to receive profits arising from the portfolio of shares.

Application of relevant laws administered by MAS in relation to an offer of Token D

- As the offer of Token D will only be made to persons based overseas (i.e. Token D will not be offered to any person in Singapore), Part XIII of the SFA will not apply to the offer.
- Company D may nevertheless be carrying on the business of fund management in Singapore for example, if it operates the management of the portfolio of shares in Singapore. If so, Company D will require a capital markets services licence for carrying on business in fund management, unless otherwise exempted.
- Holders of a capital markets services licence are required to comply with AML/CFT requirements under MAS Notice SFA04-N02.
- As no financial advisory service will be provided by Company D in respect of Token D, the FAA will not apply in relation to the offer of Token D.

Case study 5

Company E plans to set up a platform that helps start-ups raise funds from investors through digital token offerings ("**Offerings**"). To facilitate the Offerings, Company E will set up one entity ("**Entity**") which will be used as a vehicle to make investments into a start-up, for every start-up that will make Offerings. Investors who wish to invest into a start-up will provide a loan to the respective Entity ("**Loan**"). In return, the Entity will issue to the investors, digital tokens that are unique to the start-up ("**Token E**"). Token E will be offered to any person globally, including in Singapore. Token E will represent the rights of an investor as a creditor of the Loan provided to the Entity. Company E's platform will also operate as a market to facilitate secondary trading of Token E among investors using Company E's platform. In addition, Company E intends to provide financial advice to investors on the Offerings.

Application of relevant laws administered by MAS in relation to an offer of Token E

- Token E will be a debenture, and constitute securities under the SFA.

- An Entity will need to comply with Prospectus Requirements in respect of an Offering, unless otherwise exempted under the SFA.
- Company E, in facilitating the purchase or sale of Token E on its platform, may require a capital markets services licence for dealing in capital markets products that are securities under the SFA, unless otherwise exempted.
- Depending on the business activities that an Entity undertakes on Company E's platform, the Entity may require a capital markets services licence for dealing in capital markets products that are securities under the SFA, unless otherwise exempted.
- Holders of a capital markets services licence are required to comply with AML/CFT requirements under MAS Notice SFA04-N02.
- To provide financial advice to investors in relation to an offer of Token E by an Entity, Company E must be a licensed financial adviser unless otherwise exempted[39].
- Licensed financial advisors are required to comply with AML/CFT requirements under MAS Notice FAA-N06.
- Company E is likely be operating an organised market in relation to the secondary trading of Token E. On this basis, Company E will have to be approved by MAS as an approved exchange or recognised by MAS as a recognised market operator under the SFA, unless otherwise exempted.

Case study 6

Company F is planning to set up a digital payment token exchange platform that allows users to exchange digital payment tokens (such as Bitcoin) that do not constitute securities, derivatives contracts or units in CIS, to fiat currencies. In its initial years of operation, the platform will be configured such that trading of digital tokens constituting securities, derivatives contracts or units in CIS will not be allowed. This restriction may be lifted after a few years.

Application of relevant laws administered by MAS in relation to Company F's digital payment token exchange

- On the basis that Company F's digital payment token exchange will not allow trading of any products regulated under the SFA, the SFA will not apply.

[39] If Company E holds a capital markets services licence for dealing in capital markets products under the SFA, Company E is exempt from holding a financial adviser's licence to act as a financial adviser in Singapore in respect of any financial advisory service. Instead, Company E will be subject to certain reporting requirements, including the requirement under regulation 37(1) of the Financial Advisers Regulations (Rg2) to lodge a notification to MAS that it is commencing business in a financial advisory service under the FAA.

- Company F should re-assess its position should it intend to trade in any digital tokens that constitute securities, derivatives contracts or units in CIS under the SFA. For instance, upon lifting the abovementioned restriction, Company F will likely be operating an organised market in relation to the trading of digital tokens that constitute securities, derivatives contracts or units in CIS. On this basis, Company F will then need to be approved by MAS as an approved exchange or recognised by MAS as a recognised market operator under the SFA, unless otherwise exempted.
- The activity of establising or operating a digital payment token exchange is regulated by MAS under the PS Act. Entities licensed under the PS Act to perform such activities are required to comply with AML/CFT requirements, including those relating to identification and verification of customer, ongoing monitoring, screening for ML/TF concerns, suspicious transaction reporting, record keeping, and ongoing business conduct, regulatory reporting and technology risk management requirements. Company F must also abide by all Singapore laws, including the CDSA, the TSOFA and the UN Regulations, in the conduct of its business.

Case study 7

Company G is incorporated and has its principal place of business in the United States of America. Company G intends to offer digital tokens ("**Token G**") to any person globally, including in Singapore. Token G is governed by a Simple Agreement for Future Tokens ("**SAFT**") and is an "investment contract" (and therefore constitute securities) under US laws (or the "Howey Test"[40]). Token G will be tradeable in the secondary market on an over-the-counter basis or on third party cryptocurrency exchanges.

Application of relevant laws administered by MAS in relation to an offer of Token G

- The ability for a digital token to be traded on the secondary market alone does not result in a digital token being construed as capital markets products under the SFA.
- The treatment of a token under the Howey Test is not a consideration for deciding whether a token is a product regulated under the SFA.
- Company G must separately assess whether its offer of Token G in Singapore would comply with the securities laws administered by MAS despite its assessment of Token G under US laws.
- Token G may be considered a digital payment token under the PS Act if it is, or is intended to be, a medium of exchange accepted by the public, or a section of the public, as payment for goods or services or for the discharge of a debt.

[40] *Securities and Exchange Commission v W. J. Howey Co. 328 U.S. 293 (1946)*

- If Token G is a digital payment token, then Company G may be carrying on a business of providing the service of dealing in digital payment tokens.
- Company G should consider whether its services are regulated under the PS Act, and if so, to apply for the relevant licence under the PS Act.

Case study 8

Company H plans to build a decentralised platform to collect user data on consumer spending on various e-commerce websites. This forms an ecosystem where retailers rely on consumer behaviour data to execute targeted advertisements. To fund the development of the platform, Company H intends to raise funds from investors through an offering of digital tokens ("**Token H**"). Token H only gives rights to investors to vote on features of the platform. There are no other rights attached to Token H. Company H will also distribute Token H as rewards to investors for participating in surveys on consumer spending. The amount of Token H to be rewarded to an investor is based only on his or her usage and activity on the Platform, and not through further investment in the platform.

Application of relevant laws administered by MAS in relation to an offer of Token H

- Token H is not a share as it does not represent any legal or beneficial title in the shares of any company. As the rewards are distributed in proportionate to investor's usage and activity on the platform, it does not represent a right to claim dividends or return on capital.
- Token H is not a debenture as it does not create or acknowledge debt on the part of Company H.
- Token H is not a unit in a CIS as there is no management of property by a manager ("**Scheme Property**"), and investors are rewarded based on their participation on the platform with new Token H and not profits, income or other payments or returns relating to Scheme Property. Token H also does not involve pooling of contributions, or income or profits from which payments are to be made to the investors.
- As Token H does not constitute capital markets products under the SFA or an investment product under the FAA, the requirements under the SFA or the FAA will not apply to Company H's offer of or dealings in Token H.
- That said, Company H must abide by all Singapore laws, including the CDSA, the TSOFA and the UN Regulations, in the conduct of its business. Company H may also wish to seek legal advice on the applicability of the Personal Data Protection Act 2012 (Act 26 of 2012) on its business model.

Case study 9

Company I provides advisory services on the entire digital token offering process from pre-offering to post-offering. These services include reviewing whitepapers and suitability of concept and goals, introducing lawyers and developers, advising on token security protocol and post-offering delivery of tokens. Company I's clients ("**Clients**") are companies that raise funds by offering digital tokens ("**Token I**") to support the development of the products and services that the Clients intend to offer. Company I has strict client selection criteria, and will only offer their services to Clients who issue Token I that can only be used in exchange for the products or services offered by the Clients without entitling the holder of Token I to receive payments of any kind from any person. Apart from redeeming the Client's products and services, there are no other functions or rights attached to the Token I. Company I does not provide legal advice on the application of Singapore laws to the digital token offerings. In addition, Company I does not advise on the risks or suitability of the digital token offerings to investors or make any recommendations on which digital token offerings to invest. The services that Company I provide to investors of the digital tokens are operational in nature, such as conducting training and seminars on how to participate in the offerings, creation and encryption of wallets, token transfers etc.

Application of relevant laws administered by MAS in relation to digital token offering advisory services

- Token I is unlikely to constitute capital markets products under the SFA, as it can only be used to redeem the Clients' products or services.
- Company I is unlikely to be conducting the regulated activity of advising on corporate finance as its advisory services do not relate to the raising of funds involving securities, units in a CIS or specified securities-based derivatives contracts.
- As Company I is not providing financial advice to the Clients or the investors of digital token offerings, the FAA will not apply.
- That said, Company I must abide by all Singapore laws, including the CDSA, the TSOFA and the UN Regulations, in the conduct of its business.
- Token I may be considered a digital payment token under the PS Act if it is, or is intended to be, a medium of exchange accepted by the public, or a section of the public, as payment for goods or services or for the discharge of a debt.
- If Token I is a digital payment token, then Company I may be carrying on a business of providing the service of dealing in digital payment tokens.
- Company I should consider whether its services are regulated under the PS Act, and if so, to apply for the relevant licence under the PS Act.

Case study 10

Company J plans to set up a platform that allows investors to invest in physical diamonds through the tokenisation of physical diamonds. Company J intends to offer digital tokens ("**Token J**") in Singapore to raise funds to develop the platform. Token J will give holders the right to use the platform and to sell their Tokens J back to Company J at any time. Token J does not represent a right to physical diamonds or any other functions or rights other than the use of the platform. All unsold Tokens J will be destroyed.

Application of relevant laws administered by MAS in relation to an offer of Token J

- As Company J is under an obligation to buy-back Token J from the holders, Token J may constitute a debenture if Token J represents Company J's indebtedness to the holder to pay back the holder a certain amount.
- Depending on the business activities of Company J and whether Token J is a debenture, Company J may require a capital markets services licence for dealing in capital markets products that are securities under the SFA, unless otherwise exempted.
- Holders of a capital markets services license are required to comply with AML/CFT requirements under MAS Notice SFA04-N02.
- As no financial advisory service will be provided by Company J in respect of Token J, the FAA will not apply in relation to the offer of Token J.

Case study 11

Company K intends to offer digital tokens ("**Token K**") to any person globally, including in Singapore, for US$1 per Token K. Company K aims to achieve a relatively constant price for Token K by pegging its value to the US dollar. To do so, Company K will only accept payments for Tokens K in the form of electronic deposits of US dollars into its US-dollar denominated bank account. These deposits will serve as a fiat currency reserve to back the purported US$1 value of each Token K in circulation. Holders of Tokens K will have the right to exchange Tokens K with Company K for US$1 per Token K. Company K will not have any rights to cancel or redeem Token K from token holders. Company K may consider future tie-ups with retail shops to enable Token K to be used to pay for purchases.

Application of relevant laws administered by MAS in relation to an offer of Token K

- As Company K is under an obligation to the buy-back of Token K from the holders, Token K may constitute a debenture if Token K represents Company K's indebtedness to the holder to pay back the holder US$1 per Token K. However, if Token K falls within the definition of "e-money" under the PS Act, MAS' general regulatory stance is to not regulate Token K as a debenture.
- Token K may be considered "e-money" under the PS Act. Company K should consider if Token K also meets the other elements of "e-money" as defined in the PS Act, and whether it is carrying on a business of providing "e-money issuance service" as defined in the PS Act. If Company K is carrying on a business providing e-money issuance services, it must be licensed under the PS Act, unless the person is exempted from holding such a licence to provide the specific payment service in question.

5 APPLICATION OF SANDBOX CRITERIA ON DIGITAL TOKENS THAT ARE REGULATED BY MAS

5.1 Any firm that is applying technology in an innovative way to provide financial services that are regulated by MAS can apply for the regulatory sandbox. MAS expects that interested firms would have done their due diligence, such as testing the proposed financial service in a laboratory environment and knowing the legal and regulatory requirements for deploying the proposed financial service, prior to submitting an application. Please refer to the evaluation criteria outlined in the "FinTech Regulatory Sandbox Guidelines".

5.2 If an application is approved, MAS will provide the appropriate regulatory support by relaxing specific legal and regulatory requirements prescribed by MAS, which the applicant would otherwise be subject to, for the duration of the sandbox.

6 DIGITAL TOKEN OFFERINGS ENQUIRIES

6.1 You should read this Guide carefully to assess if you are required to comply with the relevant laws administered by MAS. You should also answer all the Critical Questions in **Appendix 1,** which will help you determine if it is necessary to write to us**.** MAS will only review legal opinions and engage digital token offering issuers where the structure of the proposed digital token, or the proposed business model is not similar to that described in the case studies in this Guide. Going through all the case studies and answering all the Critical Questions will guide you in considering whether there is a need to contact the MAS.

6.2 If it is still necessary to write to us after going through the Guide and the Critical Questions, you may submit an application to us enclosing all the information stated in the Checklist in **Appendix 2**. MAS reserves the right to ask for more information as may be necessary for us to consider whether the digital token offerings are subject to MAS' regulations. MAS wishes to clarify that we do not have a digital token offerings registration or approval regime. Our reply is not an endorsement of your proposed digital token, offering or business model. Our reply also does not preclude us from taking any enforcement action against you for a contravention of any provision in any

legislation administered by us. This includes situations where there are omissions in or changes to the facts represented in your correspondence with us.

Appendix 1

CRITICAL QUESTIONS (YES/NO)

- Have I sought independent legal advice from a Singapore-qualified lawyer who is familiar with MAS-administered laws?
  (*If 'No', please consider doing so before proceeding further.*)

- Is the structure of my proposed digital token or my proposed business model similar to that described in the case studies?
  (*If 'Yes', no need to approach MAS.*)

- Do the rights and entitlements attached to the digital tokens in this case contain characteristics and features of "capital markets products" under section 2(1) of Securities and Futures Act (Cap. 289) or "investment product" under section 2(1) of the Financial Advisers Act (Cap. 110)?
  (*If 'No', no need to approach MAS.*)

- Are my activities subject to the regulatory requirements in Singapore pursuant to the extra-territorial legislation in paragraphs 2.12 and 2.13 of the Guide?
  (*If 'No', no need to approach MAS.*)

Appendix 2

CHECKLIST

Please provide all the information below to MAS for the digital token offering enquiry.

Case identification

- ☐ Project name and token name
- ☐ Issuer's name, legal form, country of constitution, unique entity/identification number, address and website
- ☐ Issuer's contact(s), including names, emails, telephone numbers

Offering details

- ☐ Target start and end dates of offering
- ☐ Target offering size, if any (optional)
- ☐ Whether the offering will be accessible by any person in Singapore (Yes/No), and if 'No', reasons explaining how such access will be effectively blocked
- ☐ Nature and scope of project to be funded by offering
- ☐ Whether the token represents any value, function, rights or benefits (Yes/No respectively), and if 'Yes' to any of these, a detailed description of each
- ☐ Whether fiat currency will be used to purchase the token (Yes/No), and if 'Yes', names of the fiat currency(ies)

Documents

- ☐ Terms and conditions of offering that will be executed and be legally binding on issuer and token holders
- ☐ Whitepaper
- ☐ Other relevant information e.g., screenshots of websites or social media showing information to be disseminated for the purpose of the offering
- ☐ Legal opinion from a Singapore-qualified lawyer applying all relevant laws administered by MAS to the facts of the offering and of the issuer's business. The opinion should cross-reference or cite specific clauses in accompanying supporting documents which are relevant.
- ☐ Brief description of AML/CFT policies (if any)

Specific issues for MAS to address

- ☐ Specific actions sought from MAS, i.e., clarification on applicability of specific aspects of the law, application for licences, request for exemptions or waivers

Framework for "Investment Contract" Analysis of Digital Assets[1]

I. Introduction

If you are considering an Initial Coin Offering, sometimes referred to as an "ICO," or otherwise engaging in the offer, sale, or distribution of a digital asset,[2] you need to consider whether the U.S. federal securities laws apply. A threshold issue is whether the digital asset is a "security" under those laws.[3] The term "security" includes an "investment contract," as well as other instruments such as stocks, bonds, and transferable shares. A digital asset should be analyzed to determine whether it has the characteristics of any product that meets the definition of "security" under the federal securities laws. In this guidance, we provide a framework for analyzing whether a digital asset has the characteristics of one particular type of security – an "investment contract."[4] Both the Commission and the federal courts frequently use the "investment contract" analysis to determine whether unique or novel instruments or arrangements, such as digital assets, are securities subject to the federal securities laws.

The U.S. Supreme Court's *Howey* case and subsequent case law have found that an "investment contract" exists when there is the investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others.[5] The so-called "*Howey* test" applies to any contract, scheme, or transaction, regardless of whether it has any of the characteristics of typical securities.[6] The focus of the *Howey* analysis is not only on the form and terms of the instrument itself (in this case, the digital asset) but also on the circumstances surrounding the digital asset and the manner in which it is offered, sold, or resold (which includes secondary market sales). Therefore, issuers and other persons and entities engaged in the marketing, offer, sale, resale, or distribution of any digital asset will need to analyze the relevant transactions to determine if the federal securities laws apply.

The federal securities laws require all offers and sales of securities, including those involving a digital asset, to either be registered under its provisions or to qualify for an exemption from registration. The registration provisions require persons to disclose certain information to investors, and that information must be complete and not materially misleading. This requirement for disclosure furthers the federal securities laws' goal of providing investors with the information necessary to make informed investment decisions. Among the information

that must be disclosed is information relating to the essential managerial efforts that affect the success of the enterprise.[7] This is true in the case of a corporation, for example, but also may be true for other types of enterprises regardless of their organizational structure or form.[8] Absent the disclosures required by law about those efforts and the progress and prospects of the enterprise, significant informational asymmetries may exist between the management and promoters of the enterprise on the one hand, and investors and prospective investors on the other hand. The reduction of these information asymmetries through required disclosures protects investors and is one of the primary purposes of the federal securities laws.

II. Application of *Howey* to Digital Assets

In this guidance, we provide a framework for analyzing whether a digital asset is an investment contract and whether offers and sales of a digital asset are securities transactions. As noted above, under the *Howey* test, an "investment contract" exists when there is the investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others. Whether a particular digital asset at the time of its offer or sale satisfies the *Howey* test depends on the specific facts and circumstances. We address each of the elements of the *Howey* test below.

A. The Investment of Money

The first prong of the *Howey* test is typically satisfied in an offer and sale of a digital asset because the digital asset is purchased or otherwise acquired in exchange for value, whether in the form of real (or fiat) currency, another digital asset, or other type of consideration.[9]

B. Common Enterprise

Courts generally have analyzed a "common enterprise" as a distinct element of an investment contract.[10] In evaluating digital assets, we have found that a "common enterprise" typically exists.[11]

C. Reasonable Expectation of Profits Derived from Efforts of Others

Usually, the main issue in analyzing a digital asset under the *Howey* test is whether a purchaser has a reasonable expectation of profits (or other financial returns) derived from the efforts of others. A purchaser may expect to realize a return through participating in

distributions or through other methods of realizing appreciation on the asset, such as selling at a gain in a secondary market. When a promoter, sponsor, or other third party (or affiliated group of third parties) (each, an "Active Participant" or "AP") provides essential managerial efforts that affect the success of the enterprise, and investors reasonably expect to derive profit from those efforts, then this prong of the test is met. Relevant to this inquiry is the "economic reality"[12] of the transaction and "what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect."[13] The inquiry, therefore, is an objective one, focused on the transaction itself and the manner in which the digital asset is offered and sold.

The following characteristics are especially relevant in an analysis of whether the third prong of the *Howey* test is satisfied.

1. Reliance on the Efforts of Others

The inquiry into whether a purchaser is relying on the efforts of others focuses on two key issues:

- Does the purchaser reasonably expect to rely on the efforts of an AP?
- Are those efforts "the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise,"[14] as opposed to efforts that are more ministerial in nature?

Although no one of the following characteristics is necessarily determinative, the stronger their presence, the more likely it is that a purchaser of a digital asset is relying on the "efforts of others":

- An AP is responsible for the development, improvement (or enhancement), operation, or promotion of the network,[15] particularly if purchasers of the digital asset expect an AP to be performing or overseeing tasks that are necessary for the network or digital asset to achieve or retain its intended purpose or functionality.[16]
    - Where the network or the digital asset is still in development and the network or digital asset is not fully functional at the time of the offer or sale, purchasers

would reasonably expect an AP to further develop the functionality of the network or digital asset (directly or indirectly). This particularly would be the case where an AP promises further developmental efforts in order for the digital asset to attain or grow in value.

- There are essential tasks or responsibilities performed and expected to be performed by an AP, rather than an unaffiliated, dispersed community of network users (commonly known as a "decentralized" network).
- An AP creates or supports a market for,[17] or the price of, the digital asset. This can include, for example, an AP that: (1) controls the creation and issuance of the digital asset; or (2) takes other actions to support a market price of the digital asset, such as by limiting supply or ensuring scarcity, through, for example, buybacks, "burning," or other activities.
- An AP has a lead or central role in the direction of the ongoing development of the network or the digital asset. In particular, an AP plays a lead or central role in deciding governance issues, code updates, or how third parties participate in the validation of transactions that occur with respect to the digital asset.
- An AP has a continuing managerial role in making decisions about or exercising judgment concerning the network or the characteristics or rights the digital asset represents including, for example:
    - Determining whether and how to compensate persons providing services to the network or to the entity or entities charged with oversight of the network.
    - Determining whether and where the digital asset will trade. For example, purchasers may reasonably rely on an AP for liquidity, such as where the AP has arranged, or promised to arrange for, the trading of the digital asset on a secondary market or platform.
    - Determining who will receive additional digital assets and under what conditions.
    - Making or contributing to managerial level business decisions, such as how to deploy funds raised from sales of the digital asset.

- Playing a leading role in the validation or confirmation of transactions on the network, or in some other way having responsibility for the ongoing security of the network.
- Making other managerial judgements or decisions that will directly or indirectly impact the success of the network or the value of the digital asset generally.

- Purchasers would reasonably expect the AP to undertake efforts to promote its own interests and enhance the value of the network or digital asset, such as where:
  - The AP has the ability to realize capital appreciation from the value of the digital asset. This can be demonstrated, for example, if the AP retains a stake or interest in the digital asset. In these instances, purchasers would reasonably expect the AP to undertake efforts to promote its own interests and enhance the value of the network or digital asset.
  - The AP distributes the digital asset as compensation to management or the AP's compensation is tied to the price of the digital asset in the secondary market. To the extent these facts are present, the compensated individuals can be expected to take steps to build the value of the digital asset.
  - The AP owns or controls ownership of intellectual property rights of the network or digital asset, directly or indirectly.
  - The AP monetizes the value of the digital asset, especially where the digital asset has limited functionality.

In evaluating whether a digital asset previously sold as a security should be reevaluated at the time of later offers or sales, there would be additional considerations as they relate to the "efforts of others," including but not limited to:

- Whether or not the efforts of an AP, including any successor AP, continue to be important to the value of an investment in the digital asset.
- Whether the network on which the digital asset is to function operates in such a manner that purchasers would no longer reasonably expect an AP to carry out essential managerial or entrepreneurial efforts.
- Whether the efforts of an AP are no longer affecting the enterprise's success.

2. Reasonable Expectation of Profits

An evaluation of the digital asset should also consider whether there is a reasonable expectation of profits. Profits can be, among other things, capital appreciation resulting from the development of the initial investment or business enterprise or a participation in earnings resulting from the use of purchasers' funds.[18] Price appreciation resulting ***solely*** from external market forces (such as general inflationary trends or the economy) impacting the supply and demand for an underlying asset generally is not considered "profit" under the *Howey* test.

The more the following characteristics are present, the more likely it is that there is a reasonable expectation of profit:

- The digital asset gives the holder rights to share in the enterprise's income or profits or to realize gain from capital appreciation of the digital asset.
    - The opportunity may result from appreciation in the value of the digital asset that comes, at least in part, from the operation, promotion, improvement, or other positive developments in the network, particularly if there is a secondary trading market that enables digital asset holders to resell their digital assets and realize gains.
    - This also can be the case where the digital asset gives the holder rights to dividends or distributions.
- The digital asset is transferable or traded on or through a secondary market or platform, or is expected to be in the future.[19]
- Purchasers reasonably would expect that an AP's efforts will result in capital appreciation of the digital asset and therefore be able to earn a return on their purchase.
- The digital asset is offered broadly to potential purchasers as compared to being targeted to expected users of the goods or services or those who have a need for the functionality of the network.

- The digital asset is offered and purchased in quantities indicative of investment intent instead of quantities indicative of a user of the network. For example, it is offered and purchased in quantities significantly greater than any likely user would reasonably need, or so small as to make actual use of the asset in the network impractical.

- There is little apparent correlation between the purchase/offering price of the digital asset and the market price of the particular goods or services that can be acquired in exchange for the digital asset.
- There is little apparent correlation between quantities the digital asset typically trades in (or the amounts that purchasers typically purchase) and the amount of the underlying goods or services a typical consumer would purchase for use or consumption.
- The AP has raised an amount of funds in excess of what may be needed to establish a functional network or digital asset.
- The AP is able to benefit from its efforts as a result of holding the same class of digital assets as those being distributed to the public.
- The AP continues to expend funds from proceeds or operations to enhance the functionality or value of the network or digital asset.
- The digital asset is marketed, directly or indirectly, using any of the following:
  - The expertise of an AP or its ability to build or grow the value of the network or digital asset.
  - The digital asset is marketed in terms that indicate it is an investment or that the solicited holders are investors.
  - The intended use of the proceeds from the sale of the digital asset is to develop the network or digital asset.
  - The future (and not present) functionality of the network or digital asset, and the prospect that an AP will deliver that functionality.

- The promise (implied or explicit) to build a business or operation as opposed to delivering currently available goods or services for use on an existing network.
- The ready transferability of the digital asset is a key selling feature.
- The potential profitability of the operations of the network, or the potential appreciation in the value of the digital asset, is emphasized in marketing or other promotional materials.
- The availability of a market for the trading of the digital asset, particularly where the AP implicitly or explicitly promises to create or otherwise support a trading market for the digital asset.

In evaluating whether a digital asset previously sold as a security should be reevaluated at the time of later offers or sales, there would be additional considerations as they relate to the "reasonable expectation of profits," including but not limited to:

- Purchasers of the digital asset no longer reasonably expect that continued development efforts of an AP will be a key factor for determining the value of the digital asset.
- The value of the digital asset has shown a direct and stable correlation to the value of the good or service for which it may be exchanged or redeemed.
- The trading volume for the digital asset corresponds to the level of demand for the good or service for which it may be exchanged or redeemed.
- Whether holders are then able to use the digital asset for its intended functionality, such as to acquire goods and services on or through the network or platform.
- Whether any economic benefit that may be derived from appreciation in the value of the digital asset is incidental to obtaining the right to use it for its intended functionality.
- No AP has access to material, non-public information or could otherwise be deemed to hold material inside information about the digital asset.

3. Other Relevant Considerations

When assessing whether there is a reasonable expectation of profit derived from the efforts of others, federal courts look to the economic reality of the transaction.[20] In doing so, the courts also have considered whether the instrument is offered and sold for use or consumption by purchasers.[21]

Although no one of the following characteristics of use or consumption is necessarily determinative, the stronger their presence, the less likely the *Howey* test is met:

- The distributed ledger network and digital asset are fully developed and operational.
- Holders of the digital asset are immediately able to use it for its intended functionality on the network, particularly where there are built-in incentives to encourage such use.
- The digital assets' creation and structure is designed and implemented to meet the needs of its users, rather than to feed speculation as to its value or development of its network. For example, the digital asset can only be used on the network and generally can be held or transferred only in amounts that correspond to a purchaser's expected use.
- Prospects for appreciation in the value of the digital asset are limited. For example, the design of the digital asset provides that its value will remain constant or even degrade over time, and, therefore, a reasonable purchaser would not be expected to hold the digital asset for extended periods as an investment.
- With respect to a digital asset referred to as a virtual currency, it can immediately be used to make payments in a wide variety of contexts, or acts as a substitute for real (or fiat) currency.
    - This means that it is possible to pay for goods or services with the digital asset without first having to convert it to another digital asset or real currency.
    - If it is characterized as a virtual currency, the digital asset actually operates as a store of value that can be saved, retrieved, and exchanged for something of value at a later time.

- With respect to a digital asset that represents rights to a good or service, it currently can be redeemed within a developed network or platform to acquire or otherwise use those goods or services. Relevant factors may include:
    - There is a correlation between the purchase price of the digital asset and a market price of the particular good or service for which it may be redeemed or exchanged.
    - The digital asset is available in increments that correlate with a consumptive intent versus an investment or speculative purpose.
    - An intent to consume the digital asset may also be more evident if the good or service underlying the digital asset can only be acquired, or more efficiently acquired, through the use of the digital asset on the network.
- Any economic benefit that may be derived from appreciation in the value of the digital asset is incidental to obtaining the right to use it for its intended functionality.
- The digital asset is marketed in a manner that emphasizes the functionality of the digital asset, and not the potential for the increase in market value of the digital asset.
- Potential purchasers have the ability to use the network and use (or have used) the digital asset for its intended functionality.
- Restrictions on the transferability of the digital asset are consistent with the asset's use and not facilitating a speculative market.
- If the AP facilitates the creation of a secondary market, transfers of the digital asset may only be made by and among users of the platform.

Digital assets with these types of use or consumption characteristics are less likely to be investment contracts. For example, take the case of an online retailer with a fully-developed operating business. The retailer creates a digital asset to be used by consumers to purchase products only on the retailer's network, offers the digital asset for sale in exchange for real currency, and the digital asset is redeemable for products commensurately priced in that real currency. The retailer continues to market its products to its existing customer base, advertises

its digital asset payment method as part of those efforts, and may "reward" customers with digital assets based on product purchases. Upon receipt of the digital asset, consumers immediately are able to purchase products on the network using the digital asset. The digital assets are not transferable; rather, consumers can only use them to purchase products from the retailer or sell them back to the retailer at a discount to the original purchase price. Under these facts, the digital asset would not be an investment contract.

Even in cases where a digital asset can be used to purchase goods or services on a network, where that network's or digital asset's functionality is being developed or improved, there may be securities transactions if, among other factors, the following is present: the digital asset is offered or sold to purchasers at a discount to the value of the goods or services; the digital asset is offered or sold to purchasers in quantities that exceed reasonable use; and/or there are limited or no restrictions on reselling those digital assets, particularly where an AP is continuing in its efforts to increase the value of the digital assets or has facilitated a secondary market.

III. Conclusion

The discussion above identifies some of the factors market participants should consider in assessing whether a digital asset is offered or sold as an investment contract and, therefore, is a security. It also identifies some of the factors to be considered in determining whether and when a digital asset may no longer be a security. These factors are not intended to be exhaustive in evaluating whether a digital asset is an investment contract or any other type of security, and no single factor is determinative; rather, we are providing them to assist those engaging in the offer, sale, or distribution of a digital asset, and their counsel, as they consider these issues. We encourage market participants to seek the advice of securities counsel and engage with the Staff through www.sec.gov/finhub.

[1] This framework represents the views of the Strategic Hub for Innovation and Financial Technology ("FinHub," the "Staff," or "we") of the Securities and Exchange Commission (the "Commission"). It is not a rule, regulation, or statement of the Commission, and the Commission has neither approved nor disapproved its content. Further, this framework does not replace or supersede existing case law, legal requirements, or statements or guidance from the

Commission or Staff. Rather, the framework provides additional guidance in the areas that the Commission or Staff has previously addressed. *See, e.g., Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO* (Exchange Act Rel. No. 81207) (July 25, 2017) ("*The DAO Report*"); William Hinman, *Digital Asset Transactions: When Howey Met Gary (Plastic)*, Remarks at the Yahoo Finance All Markets Summit: Crypto (June 14, 2018), available at https://www.sec.gov/news/speech/speech-hinman-061418.

[2] The term "digital asset," as used in this framework, refers to an asset that is issued and transferred using distributed ledger or blockchain technology, including, but not limited to, so-called "virtual currencies," "coins," and "tokens."

[3] The term "security" is defined in Section 2(a)(1) of the Securities Act of 1933 (the "Securities Act"), Section 3(a)(10) of the Securities Exchange Act of 1934, Section 2(a)(36) of the Investment Company Act of 1940, and Section 202(a)(18) of the Investment Advisers Act of 1940.

[4] This framework is intended to be instructive and is based on the Staff's experiences to date and relevant law and legal precedent. It is not an exhaustive treatment of the legal and regulatory issues relevant to conducting an analysis of whether a product is a security, including an investment contract analysis with respect to digital assets generally. We expect that analysis concerning digital assets as securities may evolve over time as the digital asset market matures. Also, no one factor is necessarily dispositive as to whether or not an investment contract exists.

[5] *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946) ("*Howey*"). *See also United Housing Found., Inc. v. Forman*, 421 U.S. 837 (1975) ("*Forman*"); *Tcherepnin v. Knight*, 389 U.S. 332 (1967) ("*Tcherepnin*"); *SEC v. C. M. Joiner Leasing Corp.*, 320 U.S. 344 (1943) ("*Joiner*").

[6] Whether a contract, scheme, or transaction is an investment contract is a matter of federal, not state, law and does not turn on whether there is a formal contract between parties. Rather, under the *Howey* test, "form [is] disregarded for substance and the emphasis [is] on economic reality." *Howey*, 328 U.S. at 298. The Supreme Court has further explained that that the term security "embodies a flexible rather than a static principle" in order to meet the "variable schemes devised by those who seek the use of the money of others on the promise of profits." *Id.* at 299.

[7] Issuers of digital assets, like all issuers, must provide full and fair disclosure of material information consistent with the requirements of the federal securities laws. Issuers of digital assets should be guided by the regulatory framework and concepts of materiality. What is material depends upon the nature and structure of the issuer's particular network and circumstances. *See TSC Industries v. Northway*, 426 U.S. 438, 449 (1976) (a fact is material "if there is a substantial likelihood that a reasonable shareholder would consider it important" in making an investment decision or if it "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available" to the shareholder).

[8] *See The DAO Report*.

[9] The lack of monetary consideration for digital assets, such as those distributed via a so-called "bounty program" does not mean that the investment of money prong is not satisfied. As the Commission explained in *The DAO Report*, "[i]n determining whether an investment contract exists, the investment of 'money' need not take the form of cash" and "in spite of *Howey's* reference to an 'investment of money,' it is well established that cash is not the only form of contribution or investment that will create an investment contract." *The DAO Report* at 11 (citation omitted). *See In re Tomahawk Exploration LLC*, Securities Act Rel. 10530 (Aug. 14, 2018) (issuance of tokens under a so-called "bounty program" constituted an offer and sale of securities because the issuer provided tokens to investors in exchange for services designed to advance the issuer's economic interests and foster a trading market for its securities). Further, the lack of monetary consideration for digital assets, such as those distributed via a so-called "air drop," does not mean that the investment of money prong is not satisfied; therefore, an airdrop may constitute a sale or distribution of securities. In a so-called "airdrop," a digital asset is distributed to holders of another digital asset, typically to promote its circulation.

[10] In order to satisfy the "common enterprise" aspect of the *Howey* test, federal courts require that there be either "horizontal commonality" or "vertical commonality." *See Revak v. SEC Realty Corp*., 18 F.3d. 81, 87-88 (2d Cir. 1994) (discussing horizontal commonality as "the tying of each individual investor's fortunes to the fortunes of the other investors by the pooling of assets, usually combined with the pro-rata distribution of profits" and two variants of vertical commonality, which focus "on the relationship between the promoter and the body of investors"). The Commission, on the other hand, does not require vertical or horizontal commonality *per se*, nor does it view a "common enterprise" as a distinct element of the term "investment contract." *In re Barkate*, 57 S.E.C. 488, 496 n.13 (Apr. 8, 2004); *see also* the Commission's Supplemental Brief at 14 in *SEC v. Edwards*, 540 U.S. 389 (2004) (on remand to the 11th Circuit).

[11] Based on our experiences to date, investments in digital assets have constituted investments in a common enterprise because the fortunes of digital asset purchasers have been linked to each other or to the success of the promoter's efforts. *See SEC v. Int'l Loan Network, Inc.*, 968 F.2d 1304, 1307 (D.C. Cir. 1992).

[12] *Howey*, 328 U.S. at 298. *See also Tcherepnin*, 389 U.S. at 336 ("in searching for the meaning and scope of the word 'security' in the [Acts], form should be disregarded for substance and the emphasis should be on economic reality.")

[13] *Joiner*, 320 U.S. at 352-53.

[14] *SEC v. Glenn W. Turner Enter., Inc.*, 474 F.2d 476, 482 (9th Cir.), *cert. denied*, 414 U.S. 821, 94 S. Ct. 117, 38 L. Ed. 2d 53 (1973) ("*Turner*").

[15] In this guidance, we are using the term "network" broadly to encompass the various elements that comprise a digital asset's network, enterprise, platform, or application.

[16] We recognize that holders of digital assets may put forth some effort in the operations of the network, but those efforts do not negate the fact that the holders of digital assets are relying on the efforts of the AP. That a scheme assigns "nominal or limited responsibilities to the [investor] does not negate the existence of an investment contract." *SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473, 483 n.15 (5th Cir. 1974) (citation and quotation marks omitted). If the AP provides efforts that are "the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise," and the AP is not merely performing ministerial or routine tasks, then there likely is an investment contract. *See Turner*, 474 U.S. at 482; *see also The DAO Report* (although DAO token holders had certain voting rights, they nonetheless reasonably relied on the managerial efforts of others). Managerial and entrepreneurial efforts typically are characterized as involving expertise and decision-making that impacts the success of the business or enterprise through the application of skill and judgment.

[17] *See, e.g., Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce Fenner & Smith*, 756 F.2d 230 (2d Cir. 1985).

[18] *See Forman*, 421 U.S. at 852.

[19] Situations where the digital asset is exchangeable or redeemable solely for goods or services within the network or on a platform, and may not otherwise be transferred or sold, may more likely be a payment for a good or service in which the purchaser is motivated to use or consume the digital asset. *See* discussion of "Other Relevant Considerations."

[20] As noted above, under *Howey*, courts conduct an objective inquiry focused on the transaction itself and the manner in which it is offered.

[21] *See Forman*, 421 U.S. at 852-53 (where a purchaser is not "'attracted solely by the prospects of a return' on his investment . . . [but] is motivated by a desire to use or consume the item purchased . . . the securities laws do not apply.").

上海金融法院
金融市场案例测试机制

司法意见书

（2022）沪 74 测试 1 号

审理庭成员： 肖 凯、符 望、童 蕾、李正强、汪 滔

审理庭助理： 刘 蒙、徐佳云、赵丹阳

申请人：机构 A

代理律师：王正，上海虹桥正瀚律师事务所律师

代理律师：钱前，上海虹桥正瀚（临港新片区）律师事务所律师

被申请人：银行间市场清算所股份有限公司

代理律师：朱黎庭，北京国枫（上海）律师事务所律师

代理律师：袁晓东，北京国枫（上海）律师事务所律师

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司法意见书摘要

一、本案基本事实

2021 年 10 月，申请人机构 A（由四家银行代表）与被申请人银行间市场清算所股份有限公司（以下简称上海清算所）签订《中央对手方清算协议》（以下简称《清算协议》），由机构 A 作为人民币外汇交易的普通清算会员，参与上海清算所中央对手方清算业务。《清算协议》约定，机构 A 接受并同意遵守上海清算所已发布的规则及今后的修改和补充；如发生违约，上海清算所有权依据其规则进行违约处置，机构 A 应自行承担因违约处置产生的相关费用和损失。上海清算所制定的违约处置相关规则包括《银行间市场清算所股份有限公司集中清算业务规则》（需经中国人民银行批准，以下简称《业务规则》），以及《银行间市场清算所股份有限公司集中清算业务指南》（第八版，2022 年 7 月发布，以下简称《业务指南》）《银行间市场清算所股份有限公司集中清算业务违约处置指引》（第二版，2022 年 9 月发布，以下简称《违约处置指引》）《银行间市场清算所股份有限公司违约处置专家组工作章程》（2022 年 9 月第二版，以下简称《专家组工作章程》）。《业务指南》《违约处置指引》及《专家组工作章程》以下合称《违约处置细则三文件》。

2022 年 9 月 19 日，机构 A 未能按期缴纳保证金，至 9 月 20 日仍未能补缴。9 月 21 日，上海清算所根据规则对机构 A 作出永久性违约认定，并对其所持头寸启动违约处置流程。违约时，机

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构A共持有一笔掉期及四笔远期人民币外汇合约，净头寸为-10.8亿美元。为对冲上述风险敞口，上海清算所召集的违约处置专家组拟定了如下对冲方案：先执行两笔名义本金为5亿和5.8亿美元的即期交易，再执行五笔最接近原持仓远端清算日的标准期限掉期交易，每笔交易均进行1对3询价。上海清算所经审核，于一小时后批准方案，并执行对冲交易。其后，上海清算所对机构A原持仓头寸及对冲新增头寸进行组合拍卖，并从机构A交纳的保证金中扣除了处置损失，9月23日，违约处置完成。

二、双方诉辩意见

机构A不服违约处置，要求上海清算所赔偿因违约认定及处置不当而造成的损失人民币4,300余万元。理由为：首先，《违约处置细则三文件》对机构A不发生效力。（1）《违约处置细则三文件》对《业务规则》进行了重大修改，但未经监管审批。（2）《违约处置细则三文件》属于格式条款，但上海清算所未作提示说明，且存在不合理免责情形，根据《中华人民共和国民法典》（以下简称《民法典》）相关规定，应属无效。其次，上海清算所的违约处置行为不当：（1）即期交易的头寸分割过大，导致成交价格不合理；（2）询价次数少于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品交易主协议(2009年版)》（以下简称《NAFMII主协议》）规定的四次；（3）掉期对冲交易与机构A原持仓在日期和金额上不匹配；（4）对冲方案审核存在不合理拖延。

上海清算所答辩意见：首先，《违约处置细则三文件》对机构A

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具有约束力。（1）上述规则是对《业务规则》的操作细化，并非重大修改，无需报监管审批，且内容公平合理。（2）《清算协议》《违约处置细则三文件》属于共同法律行为，不适用《民法典》格式条款规则。其次，违约处置行为合理。（1）中央对手方的决策权应受尊重，不应单纯以事后数据复盘进行评判。（2）本案对冲方案结合市场行情、处置效率、保密需要等多项因素制定，具备合理性。（3）上海清算所可对专家组对冲方案进行实质审核，相应耗时未超出合理范围。

三、审理庭意见

本案涉及金融市场基础设施，在法律适用上应当遵循以下原则：（1）在符合《民法典》等民事法律基本原则的前提下，优先适用金融法具体规则；（2）充分尊重国内外金融市场惯例；（3）全面考量金融监管与金融审判的规则协同。本案争议发生时，《中华人民共和国期货和衍生品法》（以下简称《期货和衍生品法》）已施行。而支付结算体系委员会与国际证监会组织联合发布之《金融市场基础设施原则》（Principles for Financial Market Infrastructures, PFMI）的相关规定，也已通过中国人民银行的明确遵守指令及国内市场的长期实践，转化为我国金融市场惯例，司法应予尊重。本案的审理应当适用《民法典》《期货和衍生品法》以及《金融市场基础设施原则》的相关规定。

本案的争议焦点有二。第一，《业务规则》《违约处置细则三文件》对机构 A 是否发生效力。第二，上海清算所的违约处置行为是否具有合理性。

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关于争点一。从场外衍生品中央对手方机制的运行特点看，其主要目的即在于防控金融市场系统性风险。违约处置机制为实现该目的所必须，清算所相关规则需对所有清算会员一体适用。基于下列原因，《民法典》格式条款规则不宜适用。（1）《金融市场基础设施原则》原则 23 要求金融市场基础设施参与者在了解规则及参与风险方面负有首要责任，机构 A 作为专业金融机构应当自行查阅并了解规则，无需依赖上海清算所的提示或说明。（2）格式条款规则的适用，可能导致中央对手方清算规则在适用上的不统一，进而影响集中清算机制的完整性和有效性。（3）《期货和衍生品法》与《金融市场基础设施原则》的相关规定在功能上已能实现格式条款规则的规制目的。根据《民法典》《期货和衍生品法》以及《金融市场基础设施原则》的相关规定，《业务规则》《违约处置细则三文件》对包括机构 A 在内的全体清算会员发生法律拘束力的条件如下：（1）向清算会员进行合理告知；（2）清算会员同意遵守规则；（3）对于需经监管批准方能生效的规则，应当获得监管部门的批准；（4）规则内容公平合理。关于条件一，上海清算所已通过官网公布等方式就相关规则进行了合理告知。关于条件二，机构 A 在《清算协议》中，明确同意遵守上海清算所的规则及其后的修改和补充。关于条件三，相关监管规定要求上海清算所“风险管理制度”的制定和重大修改应当报监管审批，该“风险管理制度”应指基本业务规则层面的制度。《业务规则》属于该位阶，已经监管部门审批，而《违约处置细则三文件》相关条款虽涉及风险管理，但属于实施细则，且并未妨害监管目的之实现，不构成对《业务规则》的重

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大修改，无需报批。关于条件四，参照《期货和衍生品法》及《金融市场基础设施原则》的相关规则，各清算参与方在规则制定修改过程中有无渠道表达意见是判断规则是否公平合理的重要参考因素，上海清算所在本案中已对利益相关方的意见进行了较为充分的考虑；非违约会员和中央对手方的利益在违约处置过程中优先于违约会员利益，为此需要赋予中央对手方对违约处置过程的控制权，《违约处置细则三文件》相关条款符合违约处置目的，与国际金融市场惯常实践兼容。综上，《业务规则》《违约处置细则三文件》对机构 A 发生法律拘束力。

关于争点二。处置行为的合理性应从程序、实体两方面进行判断。程序上，本案违约处置流程符合《业务规则》《违约处置细则三文件》的规定。实体上的合理性审查应当限于：上海清算所的违约处置行为是否存在有违诚信的明显不合理之处。对此，应以处置之时的具体情况而非以处置之后市场价格的事实变化来加以判断。具体到机构 A 提出的四项处置异议。（1）关于即期对冲交易头寸分割，其合理性应以上海清算所是否旨在当时的市场状况下取得相对更好的交易价格为判断标准，而非是否达到绝对最优价。（2）关于对冲交易的询价次数，《NAFMII 主协议》的相关规定系用于确定被终止交易的公允市场价值，不适用于本案中旨在达成真实成交的询价。（3）关于掉期对冲交易与原持仓的匹配度，本案中掉期交易选择了与原持仓到期日相同或接近的标准期限，有利于提高处置效率和价格。其中一笔掉期交易与原持仓存在名义本金差额，系为解决期限错配导致的利率风险，亦属合理。（4）关于上海清算所的审核时间，其作为违约处置的

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最终决定方，有权根据具体情况自行决定审核方式，结合本案中待平仓头寸的具体情况及具体审核内容和步骤，尚不能认定上海清算所已构成不诚信、不合理的拖延。综上，上海清算所的违约处置行为不存在明显不合理之处。

作为结论，审理庭认为：上海清算所《业务规则》《违约处置细则三文件》对机构 A 发生法律拘束力；上海清算所的违约处置行为不存在明显不合理之处。审理庭对申请人机构 A 的请求事项不予支持。

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1. 案例简介

1.1 《上海金融法院关于金融市场案例测试机制的规定（试行）》（以下简称《案例测试机制规定》）系依据《最高人民法院关于人民法院支持和保障浦东新区高水平改革开放 打造社会主义现代化建设引领区的意见》（法发〔2022〕1号）制定，旨在通过测试案例的审理，对各类主体拟开展或已开展的金融业务中存在的、对金融市场具有重大影响的潜在法律争议提供明确的规则指引。

1.2 本次案例测试由上海清算所与交通银行股份有限公司、上海浦东发展银行股份有限公司、兴业银行股份有限公司、法国兴业银行（中国）有限公司（以下简称四银行）根据《案例测试机制规定》第二条之规定，共同向本院申请启动。

1.3 本案申请测试的法律争议为：场外衍生品交易的集中清算业务中，作为中央对手方的清算所对违约清算会员适用的违约处置规则是否合法有效，采取的违约处置措施在何种情况下可被认定为合理。争议的利益双方，一为集中清算业务的运营机构上海清算所，一为集中清算业务的参与方即清算会员（由四银行代表）。

1.4 经审查，上海清算所为银行间市场的本外币及其衍生产品交易等提供集中清算服务，是经中国人民银行批复认

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定的合格中央对手方，也是具有系统重要性的金融市场基础设施。《金融市场基础设施原则》原则 1“法律基础”，要求：“在所有相关司法管辖内，就其活动的每个实质方面而言，金融市场基础设施应该具有稳健的、清晰的、透明的并且可执行的法律基础”[1]。上海清算所制定的规则、程序和签订的合同，是否符合所在国的法律规定，能否被司法认可，关涉到其法律基础是否坚实、业务运营是否安全，也因此对于维护金融市场稳定，保护各直接和间接参与方的合法利益具有重要意义。本案双方选取的违约处置争议，所涉及的违约处置规则、程序和执行方式是上海清算所实现良好运营必须的核心制度之一，在缺乏法律明确规定的情况下，有必要通过测试案例机制为其适用提供相应的法律指引。而且，本案所涉之绿色金融交易，为《上海市浦东新区绿色金融发展若干规定》所规定适用金融市场案例测试机制的范围。鉴此，本院认为，本案符合《案例测试机制规定》第五条规定的受理条件，故于 2022 年 10 月 13 日决定予以受理。

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[1] “Principle 1: Legal basis *An FMI should have a well-founded, clear, transparent, and enforceable legal basis for each material aspect of its activities in all relevant jurisdiction*.” *See* Committee on Payment and Settlement and Settlement Systems, International Organization of Securities Commission (CPSS-IOSCO), *Principles for financial market infrastructures*, Bank for International Settlements (BIS) website (Apr.16, 2012), https://www.bis.org/cpmi/publ/d101a.pdf.《金融市场基础设施原则》由支付结算体系委员会（CPSS，现已改名为国际清算银行支付与市场基础设施委员会，即 Committee on Payments and Market Infrastructures，CPMI）和国际证监会组织（International Organization of Securities Commissions, IOSCO）技术委员会联合发布，中国为 CPSS 及 IOSCO 的正式成员，并承诺在管辖范围内最大限度地采纳《金融市场基础设施原则》，参见《中国人民银行办公厅关于实施<金融市场基础设施原则>有关事项的通知》（银办发〔2013〕187 号）第三（三）条。

1.5 由于迄今尚无真实的清算会员违约事件发生，经四银行与上海清算所共同商定，本案设定机构 A 发生违约，上海清算所依据相关规则对其进行违约处置，机构 A 作为申请人提起诉讼，请求判令被申请人上海清算所赔偿因违约处置所致损失。

1.6 2022 年 10 月 19 日、11 月 1 日、12 月 5 日，审理庭分别组织申请人机构 A 与被申请人上海清算所召开了三次审前会议，确认了本案的无争议事实，并固定了争议焦点。审理中，审理庭先后收到多份由独立第三方提供的《第三方意见书》。2022 年 12 月 12 日，本案正式开庭审理。金杜律师事务所金融衍生品团队关峰律师作为团队代表，出庭发表独立第三方意见。上海清算所风险管理委员会委员、本案违约处置专家组成员鲁琦作为被申请人证人到庭作证。鉴于所有《第三方意见书》及审理笔录均已在本院网站测试案例栏目公布，故司法意见书对于第三方意见和证人证言不再单独列明，将于本意见书第四部分择要述之。

1.7 最后，需要特别说明的是，经双方确认的无争议事实中，机构 A 的违约行为及同时期人民币外汇交易市场行情均为拟制，由各方参照场外衍生品集中清算业务实践共同商定；上海清算所与会员签订的《清算协议》内容、上

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海清算所相关规则的制定、发布及修改情况、各规则的具体内容，以及上海清算所开展违约处置演练的情况等均为真实发生。

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2. 基本事实

双方概况及《清算协议》约定内容

2.1 申请人机构 A 为众多浦东自贸区绿色能源企业的进出口业务提供结售汇和汇率风险管理服务，并在银行间市场开展外汇平盘交易。

2.2 被申请人上海清算所为公司制法人[2]，于 2009 年经中国人民银行批准设立，是为银行间市场的场外衍生品交易提供集中清算服务的金融市场基础设施（业务经营范围包括：为金融市场提供直接或间接的本外币交易及其衍生产品交易清算服务，包括清算、结算、交割、保证金管理、抵押品管理；信息服务、咨询业务；中国人民银行批准的其他业务）。

2.3 2016 年 1 月 13 日，中国人民银行经评估，认为上海清算所提供的集中清算服务符合《金融市场基础设施原则》要求，批复同意认定其为合格中央对手。

2.4 2021 年 10 月 15 日，上海清算所（甲方）与机构 A（乙方）签订《清算协议》。2021 年 10 月 29 日，上海清算所向机构 A 发送《关于上海清算所清算会员认定的通知》，同意机构 A 作为上海清算所 C 类普通清算会员，开展人民币外汇交易中央对手清算自营业务。2021 年 11 月 11 日，上海清算所向机构 A 发送《关于参与人民币外汇交易中央对手清算业务有关事宜的通知》，同意机构 A 自 2021 年 11 月 22 日起，参与人民币外汇交易中央对手清

[2] 股东包括中国金融交易中心有限责任公司、中央国债登记结算有限责任公司等。

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算业务，清算品种为即期、掉期、远期、期权。

2.5 双方签订的《清算协议》约定了下列相关内容:

(1) 签署本协议即表明乙方已认真阅读了甲方发布的（包括但不限于甲方通过其官方网站 http://www.shclearing.com.cn 发布的）关于各项中央对手方清算业务所有相关文件，并已充分理解相关信息。同时，签署本协议即视为乙方已完全接受并同意遵守甲方已发布的甲方相关规则及甲方今后对其不时进行的修改和补充。经制定、修改或补充后发布的甲方相关规则，自公告中指定的日期开始生效[首部“特别提示”、第二条(二)3]。

(2) 本协议适用于甲方（上海清算所）提供、乙方（机构A）自愿参与的各项中央对手方清算业务（包括但不限于债券产品、汇率产品、利率产品、信用产品、航运及大宗商品等）。乙方可以申请成为甲方普通清算会员，也可以申请成为甲方综合清算会员，乙方参与甲方的中央对手方清算业务或者代理非清算会员参加甲方的中央对手方清算业务的，以获得甲方的书面或电子通知为准（第一条）。

(3) 乙方自愿申请成为甲方的清算会员，具体清算会员资格类型由资格认定通知文件确定。乙方作为甲方的清算会员，可参与甲方所提供的与乙方所

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属清算会员资格相关的服务，并需向甲方交纳清算会员注册费、会员年费、清算产品清算费、各种设施使用费等相关费用（第十一条）。

(4) 就纳入中央对手方清算的交易，原交易对手方之间不再有任何的债权债务关系，仅适用本协议和甲方相关规则，并履行相应的权利和义务[第十条（二）]。

(5) 协议双方共同确认：本协议、本协议补充协议（若有）、本协议下有效单据（包括但不限于资格认定通知文件、清算通知单、资金结算单、保证金清单、清算基金交纳通知单以及费用清单等等，简称本协议下有效单据）共同构成单一和完整的协议。双方承诺严格遵守该协议、甲方制定及不时修改或补充的甲方相关规则、以及其他对中央对手方清算业务有约束力的相关文件。对上述任一文件的违反即可视为对本协议的违反，并应承担相应的违约责任。法律、法规或监管部门另有强制性规定的除外[第二条（一）、第三条]。

(6) 乙方应根据本协议下有效单据，按时、足额向甲方交纳自营、代理中央对手方清算业务保证金、清算基金，并支付结算资金、清算费用等。乙方如有确切证据证明本协议下有效单据存在错误，应及时向甲方提出异议，否则视为接受本协议下有效单据的内容。在甲方接受并认可上述异议之

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前，乙方应根据相关单据进行结算[第七条(一)、第十条（六）]。

(7) 乙方未能在甲方相关规则规定的时点前交纳中央对手方清算业务保证金、清算基金，或支付结算资金、清算费用等，无论是基于自身原因或是乙方代理的非清算会员的原因，均构成中央对手方清算业务违约，应向甲方承担违约责任。乙方出现违约时，甲方有权根据甲方相关规则暂停为乙方提供一项或几项中央对手方清算业务、冻结其保证金账户和清算基金账户、处置保证金和清算基金、处置清算业务资金和债券等标的资产、计收违约金、取消一项或几项清算业务资格等甲方相关规则规定的处理程序。甲方按照甲方相关规则的规定进行违约处置，乙方应自行承担因甲方处置其违约产生的相关费用和损失，且应承担甲方采取违约处理措施的一切不利后果[第十四条（一）1、（二）（三），第八条（一）3]。

(8) 乙方出现本协议约定或甲方相关规则规定的违约情形，且在甲方规定的期限内未纠正的，甲方有权单方终止本协议，并根据甲方相关规则完成对业务的后续处理。协议终止不影响双方已经完成的结算。本协议终止，乙方应与甲方结清本协议下产生的所有债务。乙方未能结清其债务的，甲方有权处置乙方的保证金、清算基金和债券等标

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的资产冲抵其债务，或从其对乙方所负的任何其他付款义务或从乙方任何应收清算款项中抵扣，不足部分，甲方有权依法依约继续追偿[第十二条（二）2、（四）]等。

上海清算所制定的《业务规则》及相关内容

2.6 2020 年 1 月 6 日，中国人民银行金融市场司作出银市场〔2020〕1 号《关于同意上海清算所发布<银行间市场清算所股份有限公司集中清算业务规则>的批复》（以下简称《批复》），同意上海清算所发布《业务规则》，《批复》第四条规定：“你单位应当严格遵守有关业务监督管理规则，制定制度或进行重大制度修改，开展新业务或变更现有业务模式等，应当报中国人民银行同意后实施；其中，涉及外汇管理的，应当报国家外汇管理局批准后实施”。《业务规则》发布后，上海清算所原施行的《清算会员管理办法》《保证金管理办法》《清算基金和风险准备金管理办法》《银行间市场人民币外汇询价交易净额清算风险管理规则》等 14 件管理办法及集中清算业务规则同时废止。2020 年 1 月 9 日，国家外汇管理局综合司作出汇综复〔2020〕1 号《关于外汇集中清算业务违约处置方案的批复》，同意上海清算所报送的上述处置方案。2020 年 2 月 13 日，上海清算所在其官网发布《业务规则》（清算所发〔2020〕33 号），该规则在制定时除公开征求意见外，还曾提交业务管理委员会进行审议。

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2.7 《业务规则》中，与本案相关的主要条款列明如下：

(1) 第三条“中央对手方”：中央对手方（Central Counterparty）是指在一个或多个市场中，通过合约替代或其他具有法律约束力的安排，介入交易的对手方之间，成为卖方的买方和买方的卖方，并据此确保履行合约的金融市场基础设施。上海清算所是中国人民银行认定的合格中央对手方。

(2) 第四条“合约替代”：合约替代是指中央对手方针对已成交的交易充当买方的卖方和卖方的买方的一种法律安排，并据此与买方和卖方建立两个新合约，以清偿买卖双方之间的初始债务。

(3) 第七条“清算参与者”：上海清算所集中清算业务实行清算会员制度，集中清算参与者分为普通清算会员、综合清算会员、特殊清算会员和非清算会员。普通清算会员可参与集中清算自营业务，分为A类、B类和C类普通清算会员；其中，A类普通清算会员可参与所有集中清算自营业务，B类普通清算会员可参与两项或两项以上集中清算自营业务，C类普通清算会员只能参与一项集中清算自营业务……。

(4) 第九条“普通清算会员的权利与义务”：普通清算会员拥有以下权利：直接参与相应的集中清算自营业务；获得与自身业务相关的集中清算自营业务信息；使用上海清算所提供的业务终端等设

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施；……参与上海清算所举办的业务培训……。普通清算会员应履行以下义务：遵守集中清算业务的相关规定，履行结算交收义务；按时、足额交纳保证金、清算基金等风险准备资源，会员年费、注册费及清算费等相关费用；……按要求如实提交机构信息、财务信息、配合上海清算所资信评估和自营业务评估等；及时报告发生或可能发生影响其履行清算会员义务的重大事项并提供相关的书面证明材料……。

(5) 第十二条“清算会员资质变更与终止”第（一）项：清算会员有权申请变更或终止清算会员资质。清算会员申请变更或终止其清算会员资质的，应符合拟变更或终止的条件，具体条件由上海清算所制定，经上海清算所评估同意的，书面通知清算会员。第（三）项：清算会员有以下情形之一的，上海清算所有权终止其清算会员资质：……违反本规则、中央对手方清算协议、风险管理或其他有关规定，在规定时间内未完成整改或拒不整改……。

(6) 第十六条“风险管理措施”：集中清算业务实施清算会员资信评估、清算限额、合规检查、保证金、逐日盯市、清算基金、风险准备金、违约处理等风险管理措施。

(7) 第二十条“保证金”：保证金用于弥补清算会员

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集中清算业务违规违约造成的损失，保证金包括初始保证金、盯市保证金和特殊保证金。上海清算所每日根据参与者所持头寸净额或风险敞口、盯市盈亏以及其他特殊风险因素计算保证金要求。清算会员应在上海清算所规定时间内向上海清算所足额交纳保证金……。

(8) 第二十一条“初始保证金”：初始保证金用于弥补清算会员违约情况下，上海清算所进行违约处理所产生的一定置信度下的潜在损失。初始保证金又分为最低保证金和超限保证金。最低保证金根据清算限额核定。超限保证金是清算会员所持头寸净额或风险敞口超出清算限额时交纳的保证金，用于弥补清算会员违约时，上海清算所进行违约处理所产生的潜在损失中最低保证金无法覆盖的部分。

(9) 第二十二条“盯市保证金”：盯市保证金用于弥补清算会员持有头寸的盯市亏损。每日日终上海清算所根据清算会员盯市盈亏情况执行盯市盈亏的结算或保证金的追加和释放。若清算会员在日间出现大额盯市亏损的，或清算会员的资信情况发生变化的，上海清算所有权进行日间保证金追加。

(10) 第二十三条“特殊保证金”：特殊保证金用于弥补异常情况下清算会员违约给上海清算所造成的

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潜在额外损失。异常情况包括：（一）市场价格出现异常波动；（二）清算会员持有头寸过度集中；（三）连续假期；（四）上海清算所认定的其他情况。

(11) 第二十六条“逐日盯市”：盯市是指上海清算所根据清算参与者头寸的成交价与最新公允价值，计算其各项清算业务的浮动盈亏的过程。所有集中清算业务至少在日终进行一次盯市计算，对风险较高、波动较大的清算产品还会进行一次或多次的日间盯市。

(12) 第二十七条“清算基金”：清算基金用于弥补相关集中清算业务过程中出现的违约损失中违约会员保证金覆盖不足的部分，上海清算所以各项集中清算业务为单位分别设立清算基金。

(13) 第三十一条“风险准备金”：风险准备金是指上海清算所根据主营业务收入的一定比例提取的专项资金，用于弥补清算会员重大违约损失以及与上海清算所金融市场清算业务活动有关的重大风险事故损失。

(14) 第三十八条“净额计算”：上海清算所根据具体业务规定，对集中清算业务按照同一清算参与者、同一结算日、同一币种、同一资产类型等原则进行净额轧差，计算清算参与者应收应付资产；生成并向清算会员发送业务单据，包括但不限于资

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金结算清单、保证金清单、债券结算清单和实物交割清单等。清算会员应严格按照业务单据履行资产收付义务。

(15) 第四十七条“违约判定”：清算会员出现包括但不限于下述情形时，上海清算所有权认定该清算会员违约：（一）未按照规定履行保证金交纳或结算义务；（二）经营状况、财务状况严重持续恶化，不能清偿到期债务或明显缺乏清偿能力；（三）解散（出于联合、合并或重组目的而发生的解散除外）；（四）监管部门启动针对其的停业整顿、破产、清算、托管、接管、机构重组、行政重组、撤销等行政或司法程序；自身或其债权人启动针对其的接管、重整、破产、清算等行政或司法程序；（五）通过停业、清算或申请破产的决议；（六）就自身或自身的全部或大部分资产寻求任命临时清算人、托管人、受托人、接管人或其他类似人员，或被任命了任何前述人员；（七）其债权人作为担保权人采取行动取得了其全部或大部分资产，或使其全部或实质部分资产被查封、扣押、冻结或强制执行；（八）被其他清算机构、交易所判定违约或被暂停、终止会员资质，并可能导致其无法履行对上海清算所的清算义务；（九）可能导致其无法履行对上海清算所相关义务的其他情况。

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(16) 第四十八条“违约分类”：清算会员违约事件分为运营性违约和永久性违约。（一）运营性违约：若清算会员因操作失误、系统故障、短期流动性不足等而导致暂时无法履约的为运营性违约。（二）永久性违约：若清算会员出现除第四十七条第（一）款中所列情形以外的违约事件，发生运营性违约但违约清算会员未在违约处置关键时点（各业务均设有违约处置的关键时点）前履行承诺，则上海清算所可将该违约事件认定为永久性违约。

(17) 第五十条“永久性违约处理”：清算会员被判定为永久性违约后，除第四十九条相关措施外，上海清算所还可根据各集中清算业务具体情况，采取以下一项或多项措施：（一）终止该违约清算会员参与业务的资质。……（三）召集违约处置专家组，协助上海清算所进行违约处置……（五）通过强行平仓等措施快速处理违约清算会员的未平仓头寸，并执行资产和头寸的转移。（六）使用风险准备资源弥补对违约清算会员头寸强行平仓造成的损失。（七）关闭违约清算会员在上海清算所的相关账户，终止其清算会员资质。（八）向监管机构报告违约清算会员的违约及处置情况。（九）及时向市场披露违约清算会员的违约及处置情况。

(18) 第五十一条“风险准备资源使用”：上海清算所

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按以下顺序使用风险准备资源，以弥补清算会员违约行为造成上海清算所的损失：（一）违约清算会员在涉及违约的集中清算业务中交纳的保证金……。（二）违约清算会员在涉及违约的集中清算业务中交纳的清算基金。（三）部分上海清算所风险准备金。（四）未发生违约的清算会员在涉及违约的集中清算业务中交纳的清算基金。（五）未违约的清算会员根据上海清算所规定交纳的补充清算基金。（六）上海清算所剩余的风险准备金。（七）其他上海清算所指定的风险准备资源。

(19) 第五十二条“强行平仓”：强行平仓分为平仓拍卖和合约多边净额终止两种方式。优先采用平仓拍卖方式，若平仓拍卖失败，可采用合约多边净额终止。上海清算所按照以下流程执行平仓拍卖：头寸分割、风险对冲、风险资源分摊（拍卖激励池）、头寸拍卖。

上海清算所制定的《业务指南》及相关内容

2.8 《业务指南》“六、人民币外汇交易中央对手方清算业务”中规定了下列相关内容：

(1) 第 6.1 条“外汇清算业务要素规定”：人民币外汇即期交易指交易双方以约定的外汇币种、金额、汇率，在交易日（T 日）后两个工作日（T+2 日）及以内结算的外汇对人民币的交易。人民币外汇

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掉期交易指交易双方约定一前一后两个不同的起息日、方向相反的两笔本外币交易，在前一次交易（近端交易）中，一方用外汇按照约定汇率从另一方换入人民币（或人民币换入外汇）；在后一次交易（远端交易）中，该方再用人民币按照另一约定汇率从另一方换回外汇（或外汇换回人民币）。人民币外汇远期交易指交易双方以约定的外汇币种、金额、汇率，在约定的未来某一日期结算的外汇对人民币的交易。人民币外汇期权交易：指在未来某一交易日以约定汇率买卖一定数量外汇资产的权利。期权的买方以支付期权费的方式拥有权利，期权卖方收取期权费，并在买方选择行权时履行义务。

(2) 第 6.4.1 条“保证金结算处理”：上海清算所于每个工作日进行清算参与者日终保证金计算，18:30 以后可供清算参与者在客户端下载。清算参与者根据收到的日终保证金清单确定每一种类的保证金追加和释放冻结金额以及双向盯市损益结算金额……。人民币日终保证金（包括超限保证金和盯市损益结算）追加截止时点为次一工作日 15:00。……未能在规定时间内成功交纳保证金的清算参与者，构成保证金违约，按保证金违约程序处理……。

(3) 第 6.5.1.2 条“超限保证金”：超限保证金＝

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$\mathrm{Max}(\mathrm{Max}(\mathrm{VaR}_1, \mathrm{VaR}_2, \mathrm{VaR}_3) \times \mathrm{C} - \mathrm{L} \times \mathrm{C}, 0)$。其中：$\mathrm{VaR}_1$为不含 T+2 日、T+1 日及逾期结算头寸的风险敞口；VaR_2为不含 T+1 日及逾期结算头寸的风险敞口；VaR_3为所有存续头寸的风险敞口；$\mathrm{Max}(\mathrm{VaR}_1, \mathrm{VaR}_2, \mathrm{VaR}_3)$为会员风险敞口；L为风险敞口限额；C为会员资信因子。

(4) 第 6.5.2 条“盯市损益结算”：上海清算所日终进行双向盯市损益金额结算。盯市损益金额的结算币种为人民币。双向盯市仅适用于远期、掉期、期权及期权行权生成的即期交易或差额现金流的盯市损益，普通即期交易不计算盯市损益。双向盯市损益结算金额以清算参与者为出发点计算。双向盯市损益结算金额为正，体现在保证金清单的盯市应收金额一栏，清算参与者收取双向盯市损益结算资金；双向盯市损益结算金额为负，体现在保证金清单的盯市应付金额一栏，清算参与者据此支付双向盯市损益结算资金。盯市计算方式如下：（1）计算 T+i 日起息的远期、掉期交易的一端或期权行权后产生的即期交易或现金流的盯市价值。$\mathrm{P}_{\mathrm{T+i}} = (\mathrm{T+i}$日本币净额$+\mathrm{T+i}$日外币净额$*\mathrm{F}_{\mathrm{T+i}}) \times \mathrm{DF}_{\mathrm{i,T}}$，会员应收，净额为正；会员应付，净额为负。i 表示期权期权费起息日距

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离当天日期的自然日天数，i 大于 1；$DF_{i,T}$为贴现率，根据当日日终上海清算所内部构造的人民币即期利率曲线进行计算；F_{T+i}为当日日终所得的即期汇率及外汇掉期曲线计算得到的远期汇率。（2）计算未到期期权的盯市价值。首先使用 Garman-Kohlhagen 模型计算 T+i 日交割的未到期期权内在价值：$P_{T+i} = a \times M \times DF_{i,T} \times \omega \times [F_{T+i}N(\omega d_1) - KN(\omega d_2)]$，

$d_1 = \frac{Ln\left(\frac{F_{T+i}}{K}\right) + \frac{\sigma^2_{T_ep-T,K} \times (T_ep-T)}{730}}{\sigma_{T_ep-T,K} \times \sqrt{\frac{T_ep-T}{365}}}$，

$d_2 = \frac{Ln\left(\frac{F_{T+i}}{K}\right) - \frac{\sigma^2_{T_ep-T,K} \times (T_ep-T)}{730}}{\sigma_{T_ep-T,K} \times \sqrt{\frac{T_ep-T}{365}}}$。i 表示期权交割日距离当天日期的自然日天数，i 大于 1；$T_{_ep}$为期权到期日；M 为名义本金；K 为期权执行价；a：买方为+1，买方为-1；ω：CALL 为+1，PUT 为-1；$\sigma_{T_{_ep}-T,K}$为当日日终上海清算所内部构造的波动率曲面上到期日为$T_{_ep}$及执行价为 K 所对应的隐含波动率。（3）计算期权费调整值。当且仅当期权费起息日大于下一个工作日时需根据期权费调整盯市价值，调整值ΔP_{T+i}的计算方法为：$\Delta P_{T+i} = -a \times M \times DF_{i,T} \times Pre$。i 表示期权期权费

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起息日距离当天日期的自然日天数，i 大于 1；Pre 指期权费金额。(4)计算未到期头寸的盯市价值。$V_T = \sum_{i=1} (P_{T+i} + \Delta P_{T+i})$。（1）（2）（3）项结果相加得到当日该清算参与者未到期头寸的盯市价值。（5）计算双向盯市损益结算金额。

T 日双向盯市损益结算金额 $= V_T -$（$1 + \frac{SHIBOR_O/N * day}{360}$）$* V_{T-1}$。day 等于当天到下一个工作日的自然天数；$V_{T-1}$表示上一计算日计算的盯市价值。双向盯市损益结算金额在计算当日的下一个工作日进行收付。

上海清算所制定的《违约处置指引》及相关内容

2.9 2016 年 2 月 22 日，上海清算所通过与多家中资银行、外资银行及其境外母行进行沟通、召开专题研讨会等形式听取意见后，在官网发布《人民币利率互换集中清算业务违约处置指引（征求意见稿）》，征集各方意见，截止期限为 2016 年 5 月 1 日。期间共收到 27 条建议和咨询，上海清算所采纳 14 条。2016 年 9 月，上海清算所在官网发布《人民币利率互换集中清算业务违约处置指引》（以下简称《利率互换违约处置指引》，现已废止），第二章至第十一章分别就清算会员违约认定与分类、自营/代理业务违约、运营性违约处置、永久性违约处置、违约处置专家组、强行平仓处置、非清算会员违约处置、

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头寸转移与资金清算、移仓、信息沟通进行了规定。

2.10 2017 年 6 月 26 日，上海清算所将起草的《银行间市场清算所股份有限公司人民币外汇询价交易中央对手清算业务违约处置指引（征求意见稿）》及《人民币外汇询价交易中央对手清算业务违约处置可行性调研问卷》通过电子邮件发送给全体人民币外汇业务清算会员征求意见，截止期限为 2017 年 7 月 14 日。期间共收到建议和咨询 8 条，上海清算所拟采纳 4 条。该处置指引最终未公布，上海清算所在 2017 年、2018 年外汇业务违约处置演练中以该指引作为演练流程的制度参考。

2.11 2019 年，上海清算所以《利率互换违约处置指引》规定的违约处置流程为基础，结合各业务特点，着手制定涵盖利率、汇率、债券、标准债券远期、大宗商品等各类集中清算业务的《银行间市场清算所股份有限公司集中清算业务违约处置指引（征求意见稿）》，并提交风险管理委员会征求意见。2019 年 8 月 6 日，上海清算所在官网发布征求意见稿，截止期限为 2019 年 9 月 13 日。期间共收到建议和咨询 20 条，上海清算所采纳 6 条。2020 年 1 月 21 日至 22 日，上海清算所就指引内容对全体清算会员进行宣讲。2020 年 3 月 2 日，上海清算所在官网发布第一版《银行间市场清算所股份有限公司集中清算业务违约处置指引》（以下简称《违约处置指引（第一版）》）。

2.12 2021 年 11 月 17 日，上海清算所针对违约处置过程中可

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能出现的法律风险召开座谈会，违约处置专家组及受托交易方代表出席。2022 年 6 月 27 日，上海清算所制定《违约处置指引（第一版）修订意见稿》，并通过电子邮件发送给全体人民币利率互换和人民币外汇业务清算会员征求意见，意见提交期为 5 个工作日。期间收到 3 条建议和 6 条询问，上海清算所采纳 1 条。2022 年 9 月 1 日，上海清算所在官网发布《违约处置指引》。较之《违约处置指引（第一版）》，《违约处置指引》主要进行了以下两处修订：（1）修改第二十二条“违约处置专家组职能”。将第（二）项“以获取最佳市场价格与减少对冲损失为目标，拟定违约清算会员未平仓合约的对冲交易方案，拟定对冲交易的要素、策略；”修改为“以减少对冲损失为目标，拟定违约清算会员未平仓合约的对冲交易方案，拟定对冲交易的要素、策略；”。将第（四）项“经风险管理委员会批准后协助实施上述（一）（二）（三）方案；”修改为：“经上海清算所审核通过的以上款项为合理方案，违约处置专家组应协助实施相关方案；”。（2）将原四十四条“平仓拍卖流程”第（三）项“风险对冲”中“违约处置专家组应以获取最佳市场价格与减少对冲损失为目标，提供对冲交易的方案。”修改为“违约处置专家组应以减少对冲损失为目标，提供对冲交易的方案。”并新增“依据违约处置专家组提供并经上海清算所同意后的对冲交易方案实施所达成的对冲交易价格合理有效，上海清算所不保证该成交价格

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的即时最优”的规定。

2.13 《违约处置指引》中与本案相关的主要条款列明如下：

(1) 第五条“违约认定流程”：清算会员在规定时点前保证金、清算基金、结算资产（包括不限于资金、债券和实物资产）或违约金未足额到账的，为运营性违约。清算会员未能及时消除该运营性违约情形的，需提供书面承诺，承诺该运营性违约的次一工作日能在违约处置关键时点之前完成相关履约义务，否则，上海清算所有权对该清算会员进行永久性违约认定。各业务违约处置关键时点为《银行间市场集中清算业务指南》规定的违约资金种类对应的正常结算时点。清算会员在该运营性违约的次一工作日未及时消除运营性违约情形，或再次发生运营性违约的，上海清算所将对该清算会员进行永久性违约认定……。

(2) 第七条“永久性违约处置措施”：清算会员被认定为永久性违约的，除上述运营性违约处置中所涉及措施外，上海清算所还可采取以下一项或多项措施：（一）终止该违约清算会员参与相应集中清算业务的资质。（二）将该违约清算会员相应集中清算业务的头寸、抵押品转移至上海清算所违约处置专用账户。（三）启动非现金类抵押品（若有）的快速处置流程。上海清算所有权将非现金类抵押品部分或全部变现，用于弥补违约

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处置损失。此处所指非现金类抵押品包括清算会员自营业务以及未成功移仓代理业务对应提交的非现金类抵押品。（四）按需处置违约清算会员应收资产（包括资金、债券和实物资产）和保证金，以完成违约处置期间相关支付义务或偿还银行授信及借贷的债券。（五）涉及实物交割的，根据实物交割失败情况，启动现金差额补偿机制、违约交割分配机制等相应处置流程。（六）根据实际违约情形，召集违约处置专家组，协助上海清算所进行违约处置。（七）如违约清算会员为综合清算会员，上海清算所根据第三章移仓相关规定，对其未违约且符合条件的被代理非清算会员进行移仓。（八）对违约清算会员头寸（包括自营业务头寸和未移仓代理业务头寸）执行强行平仓，强行平仓操作流程参照各业务相关章节。（九）根据强行平仓情况，上海清算所依据各业务违约处置操作指引中强制结算相关规定执行强制结算。（十）依据强行平仓处置结果执行现金和非现金抵押品、头寸的转移。（十一）依据损失分摊流程，依次使用风险准备资源弥补对违约清算会员头寸强行平仓或强制结算（若有）造成的损失。（十二）关闭违约清算会员在上海清算所的相关账户，终止其清算会员资质。（十三）向监管机构报告违约清算会员的违约及处置情况。

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（十四）及时向市场披露违约清算会员的违约及处置情况，涉及风险准备金使用的，向相关会员披露风险准备金使用情况。

(3) 第八条“违约认定生效”：永久性违约认定结果自上海清算所作出违约认定并发出通知之时起立即生效。

(4) 第九条“违约处置配合”：一旦发生违约事件（包括运营性违约和永久性违约），上海清算所将立即展开针对性调查……违约清算会员对违约处置相关保密信息负有保密义务。清算会员有义务配合上海清算所进行违约处置，并对其提供材料的准确性、真实性、完整性承担法律责任。

(5) 第二十二条“违约处置专家组职能”：违约处置专家组的主要职能是提供违约处置意见并协助上海清算所进行违约处置。具体包括：（一）以便于完成风险对冲和减少平仓拍卖损失为目标，拟定违约清算会员头寸分割方案；（二）以减少对冲损失为目标，拟定违约清算会员未平仓合约的对冲交易方案，拟定对冲交易的要素、策略；（三）按需制定平仓拍卖的时间表和执行方案，监督平仓拍卖流程的公平公正；（四）经上海清算所审核通过的以上款项为合理方案，违约处置专家组应协助实施相关方案；（五）参加上海清算所组织的违约处置专家组会议，评估最新违约处置流

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程的合理性，并参与违约处置模拟演练；（六）需要违约处置专家组处置的其他事项。

(6) 第二十三条“违约处置专家组的组成”：违约处置专家组由上海清算所审核确定，其成员包括：(一)上海清算所风险管理委员会主席或其授权人担任违约处置专家组组长；(二)违约处置专家组合作机构，由其指派的市场成员代表履行违约处置专家组的具体职能；(三)上海清算所风险管理委员会委员；(四)其他上海清算所认为合适的人选。

(7) 第二十四条“违约处置专家组合作机构”：上海清算所邀请相应清算业务中符合相关标准要求的清算会员作为违约处置专家组合作机构，违约处置专家组合作机构应向上海清算所推荐具有丰富市场经验的市场成员代表。

(8) 第二十五条“违约处置专家组工作章程”：上海清算所制定《银行间市场清算所股份有限公司违约处置专家组工作章程》对违约处置专家组的成员组成、职能、工作流程、信息保密义务等进行具体规定。

(9) 第二十六条“信息保密”：违约处置专家组成员应依据相关规定遵守相应保密要求，相关规定包括但不限于上海清算所相关业务规则、本《指引》、《银行间市场清算所股份有限公司违约处置专家

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组工作章程》、其他相关协议与承诺书等，如有违反，上海清算所将追究相应法律责任。

(10) 第二十七条“利益冲突”：违约处置专家组成员应严格遵守《银行间市场清算所股份有限公司违约处置专家组工作章程》的规定，上海清算所做出违约处置相关决策以及违约处置专家组履行专家组职责应最大程度保护上海清算所风险资源，并以维护金融市场和中央对手方稳定为优先。

(11) 第三十条“信息公开”：违约处置过程中，上海清算所将及时对外公布必要的违约处置相关信息，以便于市场了解违约处置状态，维护市场稳定。公开信息包括：违约清算会员名称、违约日期、待拍卖头寸合约明细（可隐匿机构名称）、待拍卖头寸组合风险敞口和盯市价值等。

(12) 第三十一条“信息保密”：清算会员有义务对违约处置过程中所获得的所有未公开信息进行保密，在未得到上海清算所许可前，不得向市场公开。上海清算所有权就保密事宜要求清算会员进行书面确认。获得违约处置保密信息的清算会员和个人不得非法买卖、提供或公开相关信息，不得利用所掌握的保密信息从事交易活动，或利用该信息建议其他人从事交易活动。清算会员应建立有效的保密信息识别和保护制度，确定保密信息的知悉范围，设置保护保密信息限制，规范传递保

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密信息的渠道和方式。

(13) 第四十二条“强行平仓方式”：强行平仓分为平仓拍卖和合约多边净额终止两种方式。优先采用平仓拍卖方式，若平仓拍卖失败，可采用合约多边净额终止。

(14) 第四十三条“平仓拍卖”：上海清算所将邀请未违约清算会员参与待平仓头寸的拍卖，并以拍卖成交价将待平仓头寸转移到竞标成功的清算会员头寸账户。

(15) 第四十四条“平仓拍卖义务”：上海清算所人民币外汇交易中央对手清算业务的所有未违约清算会员有义务参与平仓拍卖。

(16) 第四十五条“平仓拍卖流程”：上海清算所按照以下流程执行平仓拍卖：头寸分割、结售汇交易、风险对冲、拍卖激励池、头寸拍卖。（一）头寸分割：上海清算所将根据违约清算会员待平仓头寸的交易类型和风险敞口等因素决定是否进行头寸分割以及头寸分割方式。违约处置专家组应以便于完成风险对冲和减少平仓拍卖风险为目标，提供方案。……（三）风险对冲：上海清算所将针对待平仓头寸在银行间市场达成对冲交易，将违约清算会员的待拍卖头寸组合的风险敞口降低到可容忍的范围内，具体可容忍范围由上海清算所根据实际情况确定。违约处置专家组应以减少

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对冲损失为目标，提供对冲交易的方案。风险对冲过程中的交易由上海清算所委托清算会员在银行间外汇市场与市场参与机构达成。依据违约处置专家组提供并经上海清算所同意后的对冲交易方案实施所达成的对冲交易价格合理有效，上海清算所不保证该成交价格的即时最优。上海清算所有权对待拍卖头寸组合执行多次对冲或不进行对冲。对冲交易达成后，上海清算所将委托中国外汇交易中心以应急录入方式录入反向交易，将受托交易转移至上海清算所。……（五）头寸拍卖：上海清算所完成头寸分割、风险对冲及拍卖激励池分配后，将执行多轮头寸拍卖。在每一轮头寸拍卖前，上海清算所向参与拍卖的所有未违约清算会员公布每个头寸组合的交易类型、交易币种、交易金额和盯市价值等信息。未违约清算会员应在上海清算所公布待拍卖头寸组合信息起一个工作日以内向上海清算所报价，上海清算所有权根据实际情况要求未违约清算会员在更短的时间内报价。清算会员可多次报价，报价截止时点前的最后报价为该清算会员该轮拍卖的有效报价。上海清算所将参考待拍卖头寸风险溢价、现有风险资源与最优报价价差等因素评估待拍卖头寸组合报价有效性，并根据评估结果决定是否接受最优报价。若上海清算所认为待拍卖头寸组合

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报价有效，该头寸组合拍卖成功。上海清算所应通过违约处置网站专区通知所有参与拍卖的清算会员该头寸组合的拍卖已经成功，并通知拍卖成功的清算会员其报价已经被接受。若待拍卖头寸组合无市场报价或报价未被上海清算所接受，该头寸组合拍卖失败。上海清算所应通过违约处置网站专区通知所有参与拍卖的清算会员该头寸组合拍卖已经失败，以及下一轮拍卖的安排。原则上拍卖不应超过 3 轮，若出现多轮拍卖失败的情况，上海清算所有权决定是否采用合约多边净额终止的强行平仓方式。

上海清算所制定的《专家组工作章程》及相关内容

2.14 上海清算所对于人民币利率互换业务、外汇业务、债券业务适用违约处置专家组机制。2015 年 7 月 27 日、2017 年 8 月 17 日，上海清算所两次通过电子邮件，就《违约处置专家组工作章程（征求意见稿）》向人民币利率互换业务的主要清算会员征求意见，反馈截止期分别为 2015 年 8 月 10 日、2017 年 9 月 1 日。2020 年 8 月，上海清算所为落实《违约处置指引》中关于违约处置专家组的制度安排，启动违约处置专家组配套协议签署工作，期间部分签约清算会员提出反馈意见。通过上述途径，上海清算所共收到建议 29 条，采纳 23 条，据此制定《违约处置专家组工作章程（2020 年版）》，并通过电子邮件向相关专家组及对冲交易合作方发送。2021 年 11 月

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17 日，上海清算所针对违约处置过程中可能出现的法律风险召开座谈会，违约处置专家组及受托交易方代表出席。2022 年 6 月 27 日，上海清算所通过电子邮件，将《<违约处置专家组工作章程>修订意见稿》发送给全体人民币利率互换和人民币外汇业务清算会员征求意见，意见提交期为 5 个工作日。期间收到建议 9 条，上海清算所采纳 6 条。2022 年 9 月 1 日，上海清算所将修订后的《违约处置专家组工作章程（2022 年版）》通过电子邮件向相关专家组及对冲交易合作方进行发送。

2.15 《专家组工作章程》与本案相关的主要规定列明如下：

(1) 第三条：违约处置专家组合作机构（简称“合作机构”）是指应上海清算所邀请，与上海清算所签订有效违约处置专家组合作协议的清算会员机构。合作机构有义务指派具有丰富市场经验的市场成员代表（简称“市场成员代表”）履行违约处置专家组的主要职能。

(2) 第四条：上海清算所从违约处置专家组合作机构中选择若干机构作为对冲交易受托方（简称“对冲交易受托方”）。对冲交易受托方应与上海清算所签订有效违约处置对冲交易合作协议，指派具有丰富市场经验的对冲交易员（简称“交易员”）履行达成对冲交易相关职能。

(3) 第七条：对冲交易受托方的主要职能是根据上海清算所提供的交易策略，完成对冲交易。

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(4) 第九条：上海清算所邀请符合相关标准要求的清算会员作为合作机构，合作机构应向上海清算所推荐具有丰富市场经验的市场成员代表，包括一名正式代表与一名候补代表。

(5) 第十一条：市场成员代表需具备该业务四年以上的交易经验，并熟悉上海清算所违约处置相关制度。

(6) 第十二条：合作机构需与上海清算所签署《银行间市场清算所股份有限公司违约处置专家组合作协议》。市场成员代表需签署《违约处置专家组市场成员代表承诺书》。

(7) 第十七条规定：违约处置/演练时，上海清算所将从所有签署协议的合作机构中进行筛选，组成违约处置专家组和对冲交易受托方。

(8) 第十八条：上海清算所将通知违约处置专家组市场成员代表参加违约处置会议，违约处置专家组（代表）总人数应为单数。上海清算所将通知交易员前往违约处置对冲交易指定场所。

(9) 第十九条：市场成员代表/交易员自接到通知后在规定时间内到达上海清算所指定地点……。

(10) 第二十条：上海清算所向市场成员代表/交易员披露违约机构名称，当市场成员代表/交易员发现任何具有潜在利益冲突的行为时，应及时向违约处置专家组组长报告，由上海清算所根据实际情况

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决定采取以下措施：（一）暂停该市场成员代表/交易员履职；（二）调整参与本次违约处置的合作机构名单。

(11) 第二十一条：市场成员代表/交易员分别签署《违约处置专家组市场成员代表签字书》和《违约处置对冲交易员签字书》。

(12) 第二十二条规定：出于保密需要，上海清算所有权要求市场成员代表/交易员不得离开指定办公区域，全程关闭其通讯设备，不得以电话或邮件等形式擅自与外界联系或披露相关保密信息。

(13) 第二十三条规定：违约处置专家组应以便于完成风险对冲和减少平仓拍卖风险为目标，根据违约头寸信息拟定头寸分割和风险对冲方案，专家组内部存在不同意见的，可通过投票的方式决定，不可投弃权票。赞成票数超过反对票数视为方案通过，若有多个对冲方案，则进行两轮投票，首轮支持率最高的两个方案进入下一轮甄选，票数超过半数的方案通过。

(14) 第二十四条：违约处置专家组将头寸分割和风险对冲方案提交上海清算所，上海清算所审核通过后执行，审核内容包括风险对冲后待拍卖头寸组合的风险敞口是否在上海清算所可容忍的范围内等。如上海清算所审核不通过，违约处置专家组应重新制定方案，重新提交上海清算所审核。

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(15) 第二十五条：上海清算所审核通过头寸分割和风险对冲方案后，应向对冲交易受托方传达交易策略。

(16) 第二十六条：交易策略包括基础信息和非基础信息，基础信息是指交易品种、交易期限、交易方向和交易总量等必要提供的交易信息，非基础信息是指单笔交易询价次数、单笔交易询价金额、目标成交价格区间、交易达成时间限制等建议提供但非必要提供的交易信息，是否提供非基础信息由违约处置专家组根据市场情况拟定。

(17) 第二十七条：对冲交易受托方应根据上海清算所提供的交易策略完成对冲交易，如对冲交易要素完全符合交易策略基础信息和非基础信息相关要求，对冲交易可直接达成；如因市场价格波动、风控指标限制等原因无法完全按照交易策略中的基础信息和非基础信息完成对冲交易，交易员应及时与违约处置专家组沟通，由违约处置专家组决定是否调整交易策略。整个交易达成过程将被记录。

(18) 第二十八条：对冲交易受托方应整理最终达成交易信息，信息包括：交易品种、交易对手方、成交金额、成交价格、成交日期、合约期限等标准化交易要素，并提交上海清算所。

(19) 第二十九条：违约处置专家组应对第二十八条中

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所涉交易信息进行审核确认。

(20) 第三十条：对冲交易达成后，交易员应督促所在机构后台部门尽快进行交易确认，并督促交易对手方尽快进行交易确认，原则上双方应于交易后1个工作日内完成交易确认。

(21) 第三十一条：对冲交易纳入集中清算后，上海清算所应按照违约处置专家组审核通过的对冲交易信息对交易要素逐一进行核对，核实一致后，将对冲交易转移至上海清算所指定头寸账户或由上海清算所与其达成反向交易。对冲交易受托方所在机构无需承担该交易所产生的清算费用、保证金、清算基金等一切费用。

上海清算所人民币外汇中央对手方清算业务违约处置演练情况

2.16 自2016年起，上海清算所就人民币外汇中央对手清算业务，每年组织开展违约处置演练。演练环节包括专家组成员召集、对冲交易达成、违约头寸拍卖、损失分摊等。演练前，上海清算所向全体参与人民币外汇中央对手清算业务的会员发送清算所违约处置情况《违约处置演练邀请函》及《违约演练计划》。会员报名参加后，上海清算所按照专家组成员、对冲交易受托机构、对冲交易报价参与方和头寸拍卖参与方四类角色，对清算会员进行角色分配，并告知各自分工、职责及参与流程等。2016年至2019年及2021年违约处置演练中，违约处置专家

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组市场机构代表至上海清算所指定地点参会，受托机构交易员在上海清算所指定地点完成对冲交易，对冲交易报价参与方和头寸拍卖参与方交易员均在本机构交易台完成相关交易。2020 年，上海清算所针对新冠疫情防控等特殊场景，开展线上违约处置演练，违约处置专家组市场成员代表采用线上参会模式，受托机构交易员远程完成对冲交易，对冲交易报价参与方和头寸拍卖参与方交易员均在本机构交易台完成相关交易。机构 A 作为 C 类普通清算会员，于 2021 年参与演练。

机构 A 违约情形

2.17 上海清算所于每个工作日日终 19 时通过综合业务系统向机构 A 发送《上海清算所日终保证金清单》。2022 年 9 月 16 日（周五）保证金清单显示：机构 A 在人民币外汇交易中央对手清算业务中应补缴超限保证金人民币（以下如无特别标注，则币种均为人民币）5,000,000 元、盯市保证金 3,000,000 元，共计 8,000,000 元，支付截止时间为 2022 年 9 月 19 日 15 时 00 分。2022 年 9 月 19 日，机构 A 未能按时补缴，同日，机构 A 新增应补缴超限保证金 2,000,000 元、盯市保证金 4,000,000 元，累计欠缴保证金 14,000,000 元。当日，机构 A 向上海清算所出具《清算会员运营性违约承诺书》，表示：本机构因短期流动性不足而导致暂时无法履约，现郑重承诺在下一个工作日 15 时前完成相关履约义务。2022 年 9 月 20 日，机构 A 仍未能补缴欠付保证金。9 月 20 日 9 时至 15 时，

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上海清算所持续向机构 A 了解资金筹措情况，同时通过新闻舆情、公告等渠道进一步了解机构 A 的信用情况。机构 A 于当日口头回复，表示资金尚在筹集过程中。

2.18 截至 2022 年 9 月 19 日，机构 A 在上海清算所人民币外汇交易中央对手清算业务中，共持有五份合约，包括一笔掉期交易（名义本金 4.5 亿美元，远端方向为卖美元，远端起息日为 2022 年 12 月 23 日）及四笔远期交易（含 3 笔名义本金分别为 1 亿美元、4 亿美元、2.8 亿美元的远期，方向均为卖美元，起息日依次为 2022 年 10 月 28 日、2022 年 11 月 18 日、2023 年 8 月 24 日；以及 1 笔名义本金为 1.5 亿美元的远期，远端方向买美元，起息日 2023 年 6 月 22 日），之后再无新增头寸。截至 2022 年 9 月 20 日终，机构 A 的美元净头寸为-10.8 亿美元，盯市价值为 262,749,550.75 元，风险敞口为 17,230,300 美元。

2.19 2022 年 9 月 21 日 9 时 05 分、9 时 10 分，上海清算所分别通过系统客户端及电子邮件，向机构 A 发送《永久性违约通知》：“截至 2022 年 9 月 21 日 9 时 00 分，贵机构未能完成 2022 年 9 月 19 日、9 月 20 日的保证金支付义务。根据《清算协议》第十四条、《业务规则》第四十七条和第四十八条、《违约处置指引》第五条、《业务指南》3.3，上海清算所认定机构 A 在人民币外汇交易中央对手清算业务永久性违约。上海清算所有权根据《清算协议》、《业务规则》、《违约处置指引》采取违约处置措施。贵机构应予以配合，并承担相应法律后果”。

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上海清算所拟定违约处置方案过程

2.20 2022 年 9 月 21 日，上海清算所从已签署《违约处置专家组合作协议》的清算会员中确定机构 1、机构 2、机构 3、机构 4 和机构 5 作为违约处置专家组成员；从已签署《违约处置对冲交易合作协议》的机构中确定机构 6、机构 7 作为对冲交易受托方。违约处置专家组成员分别委派员工 a、b、c、d、e 作为市场成员代表参加违约处置，对冲交易受托方分别委派员工 f、g 作为对冲交易员参加违约处置；同时，上海清算所任命上海清算所风险管理委员会主席 x、风险管理委员会委员 y 参加违约处置，x 担任违约处置专家组组长。

2.21 2022 年 9 月 21 日 10 时 30 分，违约处置专家组市场成员 5 名代表和 2 名对冲交易员到达上海清算所指定地点。上海清算所在该地点开启信号屏蔽器，并要求七人将手机等通讯设备交由上海清算所保管，不得随意离开指定办公区域，并对违约处置过程录音录像。七人分别签署《违约处置专家组市场成员代表签字书》《违约处置专家组成员代表承诺书》《违约处置对冲交易员签字书》《违约处置对冲交易员承诺书》，承诺将最大程度保护上海清算所风险资源，以维护金融市场和中央对手方稳定为优先履行各自职责，并对所接触到的本业务违约处置活动的保密信息在保密期限内承担保密义务。

2.22 2022 年 9 月 21 日 11 时，上海清算所向违约处置专家组披露待处置的机构 A 头寸信息、盯市价值及风险敞口，

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并告知机构 A 的自有保证金资源约为 1.23 亿元，已产生亏损 700 万元，剩余自有保证金资源约为 1.16 亿元。同时，上海清算所设定本次对冲的目标为：1.敞口压缩比例至少达到 90%；2.价差损失不超过违约机构的剩余保证金资源。

2.23 2022 年 9 月 21 日 13 时，专家组以一人一票的计票原则，全票通过了头寸分割及风险对冲方案，建议：1.执行两笔名义本金分别为 5 亿美元和 5.8 亿美元的外汇即期交易，方向为买美元，询价次数均为 1 对 3（即询价 3 家机构），17 时前完成；2.执行 5 笔掉期交易：（1）名义本金 1 亿美元，远端期限 1 个月，近端卖出美元，远端买入；（2）名义本金 4 亿美元，远端期限 2 个月，近端卖出美元，远端买入；（3）名义本金 4.5 亿美元，远端期限 3 个月，近端卖出美元，远端买入；（4）名义本金 1.5 亿美元，远端期限 9 个月，近端买入美元，远端卖出；（5）名义本金 2.6 亿美元，远端期限 1 年，近端卖出美元，远端买入。该 5 笔交易的询价次数均为 1 对 3，17 时前完成。方案形成后，专家组立即将其提交上海清算所。

上海清算所执行对冲交易情况

2.24 2022 年 9 月 21 日 13 时至 14 时，人民币外汇即期撮合交易平台（以下简称 ODM 平台）的美元即期市场的报卖价格波动幅度为 25pips。当日 14 时，上海清算所审核通过专家组提交的方案，并向交易员 f、g 传达对冲交易方案。两名交易员分别以机构 6、机构 7 的名义，在综合考

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虑了持仓规模、做市能力、既往是否曾有同类的大额交易以及与本机构是否存在利益冲突等因素后，确定了被询价的做市商，并在询价后进行了以下对冲交易。

2.25 对冲交易员 f：（1）于 14 时 02 分选择 3 家做市商进行 5.8 亿美元即期交易的询价。做市商 1-1 报价 6.4606，做市商 1-2、1-3 未回复询价。f 于 14 时 02 分 49 秒选择做市商 1-1 成交，成交价格为 6.4606。（2）于 14 时 04 分选择向 3 家做市商进行 5 亿美元即期交易询价，做市商 2-1 报价 6.4626，做市商 2-2 报价 6.4636，做市商 2-3 未回复询价。f 于 14 时 04 分 40 秒选择做市商 2-1 成交，成交价格为 6.4626。审理中，双方一致确认，在大额美元交易询价中，无法获得全数回价的情况时有发生。

2.26 上述即期交易成交时，CFETS2017 外汇交易系统的 ODM 平台美元即期交易情况如下：（1）14 时 02 分，总报卖量为 1.2 亿美元，其中金额为 500 万美元的美元最优报卖价为 6.4546，与本案 5.8 亿美元即期买入价的偏离值为 60pips；金额为 1.2 亿美元的美元报卖价格深度[3]为 6.4566，偏离值为 40pips。（2）14 时 04 分，总报卖量为 1.2 亿美元，其中金额为 500 万美元的美元最优报卖价为 6.4560，与本案 5 亿美元即期买入价的偏离值为 66pips；金额为 1.2 亿美元的美元报卖价格深度为 6.4581，偏离值为 45pips。

2.27 对冲交易员 g：（1）于 14 时 15 分选择向 3 家做市商进行 2.6 亿美元掉期交易的询价。做市商 3-1 报价为：近端

[3] 该价格深度指：1.2 亿美元对应的预计最高一笔成交价格为 6.4566，报价均价区间为 6.4546 至 6.4566。

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6.4566，远端 6.6069，掉期点 1695。做市商 3-2 报价为：近端 6.4566，远端 6.618777，掉期点 1621.77。做市商 3-3 报价为：近端 6.4566，远端 6.6260，掉期点 1680。g 于 14 时 15 分 50 秒选择做市商 3-2 成交。（2）于 14 时 17 分选择向 3 家做市商进行 4.5 亿美元掉期交易的询价。做市商 4-1 报价为：近端 6.4566，远端 6.5046，掉期点 480。做市商 4-2 报价为：近端 6.4566，远端 6.5006，掉期点 440。做市商 4-3 报价为：近端 6.4566，远端 6.5026，掉期点 460。g 于 14 时 17 分 50 秒选择做市商 4-2 成交。（3）于 14 时 21 分选择向 3 家做市商进行 1.5 亿美元掉期交易的询价。做市商 5-1 报价为：近端 6.4566，远端 6.5766，掉期点 1200。做市商 5-2 报价为：近端 6.4566，远端 6.577247，掉期点 1206.47。做市商 5-3 报价为：近端 6.4566，远端 6.566600，掉期点 1100。g 于 14 时 21 分 30 秒选择做市商 5-2 成交。（4）于 14 时 25 分选择向 3 家做市商进行 4 亿美元掉期交易的询价。做市商 6-1 报价为：近端 6.4566，远端 6.4871，掉期点 305。做市商 6-2 报价为：近端 6.4566，远端 6.4865，掉期点 299。做市商 6-3 报价为：近端 6.4566，远端 6.4876，掉期点 310。g 于 14 时 25 分 30 秒选择做市商 6-2 成交。（5）于 14 时 27 分选择向 3 家做市商进行 1 亿美元掉期交易的询价。做市商 7-1 报价为：近端 6.4566，远端 6.4711，掉期点 145。做市商 7-2 报价为：近端 6.4566，远端 6.4701，掉期点 135。做市商 7-3 报价为：近端 6.4566，远端 6.4716，

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掉期点 150.g 于 14 时 27 分 55 秒选择做市商 7-2 成交。

2.28 上述七笔对冲交易完成后，上海清算所委托中国外汇交易中心以应急录入方式，将受托交易转移至上海清算所。至 2022 年 9 月 21 日日终，违约处置头寸组合（含机构 A 的原有头寸及对冲交易新增头寸）的盯市价值共计 177,370,542.13 元，风险敞口为 892,259.49 美元（较对冲前下降 94.8%）。

上海清算所执行头寸拍卖情况

2.29 2022 年 9 月 21 日 20 时，上海清算所在官网的违约处理业务系统发布《拍卖头寸报价说明》（以下简称《报价说明》）、拍卖组合现金流汇总表（以下简称《现金流汇总表》）、人民币外汇交易中央对手清算业务头寸拍卖组合明细表（以下简称《明细表》）。《报价说明》载明：（1）报价机构以头寸组合盯市价值为基准进行报价，报价金额单位为人民币；（2）报价机构对此头寸拍卖报价是基于违约方的头寸方向，具体理解为，若该机构拍卖成功后，组合的远期、掉期明细中违约方将替换成该拍卖成功机构；（3）报价时间截止时间点为 2022 年 9 月 23 日 12 时前。《明细表》载明：本次拍卖头寸组合为机构 A 的原有 5 笔头寸及新增的 5 笔掉期对冲交易（剔除掉期交易的近端交易）。《现金流汇总表》载明了所有待拍卖头寸的现金流情况。

2.30 2022 年 9 月 21 日 20 时 30 分，上海清算所将手机等通讯设备交还违约处置专家组市场成员代表及对冲交易员，

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后者离开上海清算所指定地点。

2.31 截至 2022 年 9 月 23 日 12 时，共有 35 家未违约清算会员进行了有效报价，上海清算所选择报价最高的机构 8 成交，成交价格为 175,000,000 元。2022 年 9 月 23 日 14 时 30 分，上海清算所在其官网的违约处理业务系统发布《上海清算所人民币外汇交易中央对手清算业务违约处置拍卖结果》，公布本次拍卖的中标价格为 175,000,000 元。

上海清算所通知机构 A 违约处置结果

2.32 2022 年 9 月 23 日 20 时 30 分，上海清算所通过电子邮件，向机构 A 发送《人民币外汇交易中央对手清算业务违约处置结果通知》：“机构 A：本次人民币外汇交易中央对手清算业务违约处置整体损失金额为 101,631,116.91 元人民币。具体损失构成：风险对冲阶段损失 85,379,008.62 元人民币（其中原始交易损失 51,104,394.52 元人民币，对冲交易损失 34,274,614.10 元人民币）；拍卖阶段损失 9,252,108.29 元人民币；违约处置前两个工作日应缴未缴盯市损失 7,000,000.00 元人民币。拍卖报价说明：上海清算所共收到 35 家清算会员有效报价，中标价格为 175,000,000 元人民币。机构 A 已缴纳保证金和清算基金情况：初始保证金为 122,685,899.76 元人民币，清算基金为 18,402,884.96 元人民币。截止 2022 年 9 月 23 日，本次违约处置整体损失已从贵机构已缴纳的保证金中予以扣除。”从初始保证金中扣除损失后，机构 A 剩余保

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证金为 21,054,782.85 元。上海清算所已将上述剩余保证金及清算基金共计 39,457,667.81 元发还机构 A。

2.33 上述损失的具体构成为：1.违约处置前两个工作日应缴未缴盯市保证金：机构 A 原有头寸于 2022 年 9 月 19 日应缴未缴盯市保证金 3,000,000 元，于 2022 年 9 月 20 日应缴未缴盯市保证金 4,000,000 元，合计 7,000,000 元。2.风险对冲阶段损失：2022 年 9 月 21 日，机构 A 原有头寸发生盯市亏损 51,104,394.52 元，新增对冲交易发生盯市亏损 34,274,614.10 元，共计 85,379,008.62 元。3.拍卖阶段损失：（1）2022 年 9 月 22 日，待拍卖头寸（含机构 A 原有头寸及新增对冲交易剔除即期交易和掉期交易近端交易）发生盯市亏损 600,000 元，上海清算所持有头寸（即新增对冲交易的即期交易和掉期交易近端交易部分）发生盯市亏损 2,400,000 元，共计 3,000,000 元。（2）9 月 23 日，拍卖头寸至当日日终的盯市价值为 181,563,404.90 元，较之拍卖最终成交价 175,000,000 元，亏损 6,563,404.90 元；当日待拍卖头寸另产生盯市收益 311,296.61 元；总计亏损金额为 6,252,108.29 元。9 月 22 日、9 月 23 日合计亏损金额为 9,252,108.29 元。

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3. 诉辩意见

申请人的请求事项及理由

3.1 机构 A 的请求事项：上海清算所向机构 A 赔偿损失 43,526,722.39 元（含风险对冲阶段的对冲交易损失 34,274,614.10 元、拍卖阶段损失 9,252,108.29 元）及利息损失（以 43,526,722.39 元为基数，按上海清算所当前保证金年利率 0.27%，自 2022 年 9 月 21 日计算至实际清偿之日止）。

3.2 申请人认为，第一，《违约处置细则三文件》对机构 A 无拘束力。

3.3 首先，《违约处置细则三文件》不当然构成《清算协议》的组成部分。《清算协议》第二条第（二）款第 2 项虽约定上海清算所有权将新发布和修改的规则纳入《清算协议》范围，但该项权利应受到必要的限制。只有符合下列条件，在形式和内容上均具有合法性和合理性的规则，方可纳入《清算协议》范围：（1）上海清算所发布规则的内容相较于已经过审批的规则或已有规则不应产生实质性变更或新设的法律效果，否则应重新获得监管机构审批；（2）鉴于相关规则均为格式条款，上海清算所应当履行提示和说明义务并且应公平设置权利义务。

3.4 其次，《违约处置细则三文件》对《业务规则》进行了重大实质性变更或新设，且未经中国人民银行批准，应属无效。《银行间市场清算所股份有限公司业务监督管理规则》（银发〔2011〕73 号，以下简称《监督管理规

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则》）第四条及银市场〔2020〕1号《批复》中均规定：上海清算所制定制度或进行重大制度修改，应当报中国人民银行同意后实施。参照《全国法院民商事审判工作会议纪要》第30条第二款的司法意见，央行的上述规定、涉及金融安全及市场秩序，应属效力性强制性规范，违反该规定而制定的《违约处置细则三文件》应为无效。

3.5 根据国际操作惯例，清算所修改规则的权限应受到严格限制。（1）新加坡《证券期货法》（Securities and Futures Act 2001）第23条（2）规定："核准清算所不得对其业务规则作出任何修订，除非其符合有权机关所制定的要求"。同时，《新加坡交易所衍生品清算规则》第1.05.1条的规定："除非清算所符合有权机关、新加坡《证券期货法》或任何适用法律规定的要求，否则不得对本规则进行任何修订"，也即，清算所不得自行修改规则。（2）香港《证券及期货条例》（Securities and Futures Ordinance）第41（1）规定："除第（7）款另有规定外，认可结算所的规章（不论是否根据第40条订立）或对该等规章的修订须获证监会书面批准，否则不具效力"。该条第（7）款规定："证监会可藉宪报公告宣布认可结算所的某类别的规章（违责处理规则除外）无须根据第（1）款获批准，而任何属于该类别的该结算所规章（包括对该等规章的修订）即使没有根据第（1）款获批准，仍属有效"。因此，在我国香港地区，与违约相关的规则必须经过审批。

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3.6 《违约处置细则三文件》相较于《业务规则》，存在多处重大修改，未经中国人民银行批准：（1）变更了违约情形认定的相关规定。根据《业务规则》第四十八条之规定，能够被认定为永久性违约的情形为：如清算会员出现未按规定交纳保证金以外的违约事件，发生运营性违约但清算会员未在违约处置关键时点前履行承诺的，上海清算所可将该违约事件认定为永久性违约。换言之，清算会员未按规定交纳保证金的，不能构成永久性违约。但《违约处置指引》第五条却规定：清算会员未交纳保证金，且在次一工作日的违约处置关键时点之前未完成履约义务，上海清算所可认定其构成永久性违约。后者实质性变更了《业务规则》的规定。（2）缩短了机构 A 构成运营性违约后的补正期限，使上海清算所可以更早认定永久性违约。《业务规则》第四十八条并未明确规定认定永久性违约的时间节点，但《违约处置指引》第五条及《业务指南》第 3.3.2.3 条却将补正期限限制为“运营性违约的次一工作日”，该规定使得超期清算会员再无补正机会，将直接被认定为永久性违约。（3）增设违约处置的平仓拍卖流程必须有专家组参与决策的规定。《业务规则》第五十二条“强行平仓”中并未规定平仓拍卖必须由违约处置专家组参与实施。但《违约处置指引》第四十五条“平仓拍卖流程”中却突破性地规定头寸分割及风险对冲必须由专家组参与决策。这会损害违约处置过程的灵活性，使得部分情况下违约处置流程变

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得冗长，信息容易发生泄露，还会不当削减本应由上海清算所承担的违约处置压力。此外，《违约处置指引》《专家组工作章程》还详细规定了违约处置专家组的职能、决策流程及组成方式。这些规定均未见于《业务规则》，应构成规则创制。

3.7 国家外汇管理局不能代替中国人民银行审批《违约处置细则三文件》。国家外汇管理局汇综复〔2020〕1号批复仅是对外汇交易渠道及业务的批准，不能替代中国人民银行对新增和重大修改规则的批准流程。

3.8 再次，上海清算所未尽到提示说明义务、条款设置有违公平，《违约处置细则三文件》不构成《清算协议》内容或无效。

3.9 签订《清算协议》时，上海清算所未对《违约处置细则三文件》中的违约处置条款进行合理的提示与说明，依法不构成《清算协议》内容。（1）《违约处置细则三文件》由上海清算所单方拟定、未经协商、反复使用，构成格式条款。《民法典》第四百九十六条第二款规定："提供格式条款的一方未履行提示或者说明义务，致使对方没有注意或者理解与其有重大利害关系的条款的，对方可以主张该条款不成为合同的内容。"《违约处置细则三文件》规定了对机构A进行违约处置的具体程序和方法，与机构A有重大利害关系，但上海清算所在签署《清算协议》时，未解释《违约处置细则三文件》相应文件。后续更新仅在官网发布更新版本，未标示或指

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明其中有关违约处置的重大利害关系条款，未通过合理方式进行解释或说明，《专家组工作章程》则未进行披露。因此，《违约处置细则三文件》不构成《清算协议》的内容，对机构 A 无拘束力。（2）上海清算所作为规则的制定者和实施者，相较于机构 A 处于优势地位。案涉违约处置规则并非通用交易规则，其所包括的保证金计算、违约认定、处置流程、结算规则等内容均具有独特性，核心信息亦由上海清算所单方面掌握，机构 A 无法基于自身专业知识完全理解和掌握相关规则及其内在运行逻辑，也因此更需要上海清算所依法履行法定解释说明义务，甚至还应履行定期披露信息等义务。

3.10 《业务指南》第 3.3.2.3 条和 3.3.4 条、《违约处置指引》第五、八、九、四十五条不合理地免除上海清算所责任、加重机构 A 责任、限制和排除机构 A 主要权利，根据《民法典》第四百九十七条的规定，上述条款应被认定无效。（1）根据《业务指南》第 3.3.2.3 条及《违约处置指引》第五条、第八条（以下简称永久性违约认定条款），清算会员若在运营性违约发生后一个工作日内未能消除违约情形或再次发生运营性违约的，上海清算所有权单方对该清算会员进行永久性违约认定，认定作出即生效。上述关于违约处置关键时间点及运营性违约补正期限的规定有失公平合理。此外，《违约处置细则三文件》只规定了清算会员违约时上海清算所可以采取的措施，却未对等规定上海清算所自身违约时的处置方式，亦有失

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公平。（2）上海清算所免除了其在违约处置中应以“获取最佳市场价格为目标”的义务。现行的《违约处置指引》第二十二条删除了第一版中“违约处置专家组应当以获取最佳市场价格为目标”的规定，并新增了专家组决策达成的对冲交易当然合理有效的规定，免除了自身主要义务（以下简称违约处置专家组目标条款）。（3）《违约处置指引》第九条规定了违约机构的保密和配合义务，但第九章规定的平仓拍卖流程却未赋予机构 A 任何参与、异议和申诉权(以下简称违约机构参与度条款)。机构 A 不能对永久性违约认定提出异议，不能参与风险对冲的决策过程，不能自行平仓，却要无条件地承担违约处置的全部损失，权利义务设置明显不公，应属无效。相较而言，域外中央对手方清算所如伦敦清算所（LCH Limited,以下简称 LCH Ltd.）、以及我国香港地区的香港场外结算有限公司（OTC Clearing Hong Kong Limited,以下简称 OTC Clear）等，均允许违约方参与违约处置过程。

3.11 第二，上海清算所的违约处置行为不合理。

3.12 首先，头寸分割不合理，导致对冲交易未能按照当日带量行情图的最优价格成交。（1）上海清算所将案涉名义本金头寸拆分为 5.8 亿美元及 5 亿美元两笔大额即期交易，导致实际成交价格偏离同时段市场最优报价 60pips 和 66pips，偏离值过高，足以证明头寸分割决策不合理。（2）上海清算所以 5.8 亿美元及 5 亿美元分别向三家交易对手方进行询价，最终仅分别获得了 1 个和 2 个回价。这说

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明大额交易的市场流动性和交易对手方回价意愿均较差。如上海清算所将案涉头寸拆分为更小的金额，则可获得更好的流动性及回价意愿。（3）美元/人民币外汇即期市场交易量大、流动性较好，完全可以获得更好的成交价。根据中国货币网公布的2022年9月人民币外汇即期月报，违约处置当月，USD/CNY的成交金额为57,894.71亿元，折合约8,229亿美元，平均每日成交金额为274亿美元。本案名义本金仅10.8亿美元，远小于当日市场实际成交额度。因此，本案交易对市场冲击有限，不会造成成交价格明显偏离市场最优价。

3.13 其次，询价次数不合理，上海清算所仅进行三次询价，不符合行业惯例操作，未能获得充分的市场报价。《NAFMII主协议》第二十五条规定："终止净额计算方（或其代理人）须尽可能地寻求至少四名参考做市商于基准日提供其报价，并且在合理可行的范围内，要求各参考做市商均在同一日期和时间（不考虑时区）提供其报价"。可见，在中国市场金融衍生品交易下，类似交易的询价次数规定为四次或多次，而非三次，上海清算所的询价次数不符合交易习惯。

3.14 再次，对冲交易中掉期交易与待平仓头寸的远端清算日期及头寸金额匹配不合理，未能充分匹配，降低风险敞口。对冲交易中的掉期交易与待平仓头寸的具体信息如下：

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序号	掉期交易的远端清算日	待平仓头寸的远端清算日
1	2022 年 10 月 24 日（买入 1 亿美元）	2022 年 10 月 28 日（卖出 1 亿美元）
2	2022 年 11 月 23 日（买入 4 亿美元）	2022 年 11 月 18 日（卖出 4 亿美元）
3	2022 年 12 月 23 日（买入 4.5 亿美元）	2022 年 12 月 23 日（卖出 4.5 亿美元）
4	2023 年 6 月 26 日（卖出 1.5 亿美元）	2023 年 6 月 22 日（买入 1.5 亿美元）
5	2023 年 9 月 25 日（买入 2.6 亿美元）	2023 年 8 月 24 日（卖出 2.8 亿美元）

3.15 上述交易中，除 3 号两笔交易的远端清算日及头寸能够完全匹配外，其余交易的远端清算日均有较大偏离。其中，5 号两笔交易的远端清算日偏离近一个月，头寸金额相差 0.2 亿美元。上海清算所在本案项下达成的对冲交易未能完全与待平仓头寸相匹配，使得机构 A 不得不面临头寸差以及时间差带来的损失。

3.16 最后，交易方案从作出到实施的间隔时间长，导致方案实施时的市场行情发生变化，交易方案已丧失时效性，并非最佳方案。由于外汇交易市场每时波动极为复杂，在正常的交易之中，当交易员形成交易策略后，将立即予以实施，以保证交易策略的即时有效性。但在本案违约处置过程中，专家组在 2022 年 9 月 21 日 13:00 已形成头寸分割和风险对冲方案，却直至当时 14:00 后才由上海清算所审批通过并交由对冲交易员实施。此时，专家组所形成的交易策略已丧失时效性，与操作时的市场情况不符。根据《专家组工作章程》第 8 条规定，上海清算

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所风险管理委员会主席或其授权人担任违约处置专家组组长，全程作为专家组成员参与交易策略的形成。策略上报后，根据《专家组工作章程》第24条规定，上海清算所仅应就对冲后风险敞口是否在可容忍范围内等问题进行形式审核，不应再作实质审。上海清算所的审批时间过长，存在明显过错。

被申请人的答辩意见

3.17 第一，上海清算所制定的《业务规则》《违约处置细则三文件》构成《清算协议》组成部分，对机构A具有约束力。

3.18 首先，《业务规则》《违约处置细则三文件》具有合法性。

3.19 其一，上海清算所制定的《业务规则》依法经有权机构审批同意，具有合法性。中国人民银行对被申请人制度或规则的报批范围有明确要求。根据《监督管理规则》及《批复》，需报批的范围为制度或规则的“制定”或“重大修改”。2020年1月6日，上海清算所制定的《业务规则》经中国人民银行审批同意。2020年1月9日，关于外汇集中清算业务违约处置方案经国家外汇管理局批复同意。

3.20 其二，中国人民银行已授权上海清算所制定相关业务操作细则，《违约处置细则三文件》是对《业务规则》既定制度在实施操作层面的细化，无需报批。《监督管理规则》第六条规定：上海清算所应当采取下列措施保证

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业务的正常开展……（四）根据中国人民银行的管理要求，制定相关业务规则和操作细则，并切实执行……。该规定表明，上海清算所有权根据金融市场情况和实际需求制定相关业务的操作细则，明确各业务环节中的具体操作方式及流程，以保证业务的正常有序开展。本案系争的《违约处置细则三文件》即属此类，因此无需再经中国人民银行审批。

3.21 《违约处置细则三文件》的规定不构成规则的重大“创制”或修改。《业务规则》对永久性违约的认定、引入违约处置专家组、平仓拍卖流程等问题作了原则性规定。上海清算所在此基础上，结合各类业务的特点，通过《违约处置细则三文件》，对具体的永久性违约关键时点、专家组的召集及如何协助违约处置、如何具体开展平仓拍卖等进行了细化明确，上述细则经上海清算所发布后实施，具有合法性。至于申请人所称，《违约处置细则三文件》变更了《业务规则》对违约情形的规定，此系申请人对《业务规则》第四十七条、第四十八条的误读所致。第四十七条规定的清算会员违约行为实则分为两类，一类是第（一）项规定的“未按照规定履行保证金交纳或结算义务”，另一类是第（二）至（九）项规定的经营状况、财务状况持续恶化等其他严重违约行为。根据第四十八条的规定，第二类违约行为，可直接被认定为永久性违约；第一类违约行为则可给予一定的补正期限。

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3.22 其三，《违约处置细则三文件》的相关规定公平合理，不存在无效事由。（1）关于《业务指南》第 3.3.2.3 条及《违约处置指引》第 5 条、第 8 条规定的永久性违约认定，上述条款文义清晰，就关键时点及补正期限的规定已经充分考虑了市场各方的诉求和意见，不存在免除或减轻上海清算所责任的情况。（2）关于第二版《违约处置指引》第 22 条对专家组制定对冲策略目标的修改，中央对手方清算所进行违约处置的根本目的在于防范系统性风险，而处置时效性是防范风险的重要方面。以“减少对冲损失”为目标，本身就已包含在当时的市场条件下，去寻找一个合理、更优价格的含义，故并未免除或减轻上海清算所的责任。（3）关于机构 A 是否应享有参与违约处置的权利。上海清算所对于违约处置享有相对灵活的决策权。在违约处置过程中，如果允许清算会员有申诉、异议的权利，则必然需要对申诉、异议进行处置的程序，这会使得上海清算所的处置遇到严重阻碍，从而丧失必要的灵活性和时效性。这一点在各大国际清算机构的处置规则及惯例中亦有体现，如香港场外结算有限公司的违约会员参与就仅限于观摩违约处置过程。此外，根据《业务规则》和《违约处置细则三文件》，上海清算所也并未否定机构 A 作为违约方的适当参与。因此，机构 A 的该项主张不能成立。

3.23 其次，《清算协议》并非单纯的双方法律行为，而是包括机构 A 在内的所有清算会员和清算参与者为了满足清

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算需求实施的共同法律行为，不应适用《民法典》对于格式条款的审查标准。上海清算所实行会员准入制，《清算协议》的签订，不仅是确定机构 A 与上海清算所双方之间的权利义务关系，更重要的是确定机构 A 在中央对手方机制下，作为市场参与者对整个市场、系统正常稳定运转所需遵循的规则。上海清算所作为中央对手方，具有特殊的合同地位，其有权制定规则、进行违约处置，这正是中央对手方机制的必然要求。因此，双方签订的《清算协议》有别于一般的民商事合同，不应适用格式条款的规定。

3.24 机构 A 作为成熟的金融市场参与方，具有风险判断能力及充分法律服务支持，具备对于协议条款的理解能力及风险判断能力，其在参与清算交易前已明确知晓上海清算所作为中央对手方的主体地位及特点，知晓在某一清算会员发生违约的情况下，中央对手方须及时进行违约处置，并在该等违约处置中享有决策及执行权，该等权利系维护所有清算参与方利益及金融市场稳定性的重要保障。因此，机构 A 选择成为清算会员即应明确知晓并理解其与上海清算所之间的清算关系与一般双边交易之性质不同。本案所涉《业务规则》《违约处置细则三文件》对于违约认定具有客观、清晰的判断标准及流程，对违约处置有明确的集体专业决策机制，体现了对全体市场参与方的公平性，该等规则不应仅依据某一交易的结果而对该等规则整体的合理性及适用性作出评判。

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3.25 再次，上海清算所在规则制定和实施过程中进行了相应的意见征询，且已通过多种方式使清算会员知悉相应规则流程。上海清算所在制定《违约处置指引》《专家组工作章程》的过程中，在规则制定前、草案出台后，均通过官网发布、电子邮件发送、召开专题研讨会、座谈会、向市场主体个别调研、模拟演练等方式，广泛征求利益相关方意见。此外，上海清算所还以开展宣讲会、组织违约处置演练等途径，帮助清算会员知悉、理解《业务规则》《违约处置细则三文件》。机构 A 应对违约处置的流程和规则有充分的了解。

3.26 复次，上海清算所作为中央对手方，制定并实施《业务规则》《违约处置细则三文件》符合我国对于金融市场基础设施安全稳定、防范金融风险的政策要求。上海清算所从事的清算业务涉及金融安全及市场秩序，其规则的稳定性、确定性及中央对手方交收义务的履行将影响全体清算会员的利益及金融市场稳定，关乎公共利益。目前，国内外经济金融环境发生深刻变化，不确定因素明显增多，金融风险诱因和形态更加复杂。在此背景下，更应确保上海清算所的细则制定和实施权，以守住不发生系统性风险的底线。

3.27 最后，上海清算所制定《业务规则》《违约处置细则三文件》时，参考了国际各大清算机构违约处置流程，上述规则亦与相关国际协会意见相符，符合国际惯例。境外多家清算机构的规则中明确规定，清算机构在违约处

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置过程中享有决策权。如 LCH Ltd.违约处置规则中规定“但本规则的任何内容都不妨碍清算所以其合理确定的必要方式采取行动，以管理其风险或以其他方式履行其持续的监管义务，包括适用于其作为公认的清算机构和衍生品结算组织的义务”。欧洲期货交易所清算公司（Eurex Clearing AG，以下简称 Eurex Clearing）违约处置规则中规定“清算所在任何时候都将对是否以及在何种条款和条件下实施违约处置委员会的建议保持最终决定权”。芝加哥商品交易所（Chicago Mercantile Exchange Incorporation，以下简称 CME）规则中规定“清算所可进行任何商业上合理的交易，以消除或减少违约造成的风险，由此产生的所有义务、成本和费用应是违约场外结算会员对清算所的义务”。此外，支付结算体系委员会（Committee on Payment and Settlement and Settlement Systems, CPSS，现已改名为支付与市场基础设施委员会，即 Committee on Payments and Market Infrastructures，CPMI）、国际证监会组织（International Organization of Securities Commission，IOSCO）、期货行业协会（Futures Industry Association，FIA）及国际掉期和衍生品协会（International Swaps and Derivatives Association，ISDA）等国际协会的相关研究报告等文件，也均认可清算机构等金融市场基础设施在违约处置过程中应具备一定的自由裁量权及最终决策权。美国纽约州的 *New Hampshire Ins. Co. v. MF Glob., Inc.*[4]案中，芝加哥商业交易所和期货

[4] 108 A.D.3d 463, 970 N.Y.S.2d 16 (2013).

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行业协会作为法庭之友（*amici curiae*）向法庭提交的专业意见中提到："为了确保这些关键市场的正常运作，防止金融系统的系统性风险，清算过程，以及管理该过程的规则必须得到尊重。"英国上诉法院在 *United Company Rusal Plc, R(on the application of) v. The London Metal Exchange*[5]案件中认为："本案是一个相对不寻常的商业司法审查案件，即对一个具有管理商业市场或交易所的公共职能的机构的决定寻求司法审查。……法院必须谨慎行事，以免市场的完整性因不可持续的法律挑战而受到损害。"可见，域外司法实践对于涉及交易所等金融市场基础设施之决定的审查也非常谨慎。

3.28 第二，上海清算所实施的违约处置行为具备合理性。

3.29 首先，上海清算所作为中央对手方，在其清算会员的违约处置过程中应具有一定的决策权。基于上海清算所中央对手方的主体地位及业务特点，其自身风险必须得到有效控制。因此，当清算会员发生违约、上海清算所根据其规则进行违约处置时，在遵循违约处置损失最小化、及时完成违约处置及维护市场稳定原则的前提下，对于该等处置应当拥有相应决策权。该等决策权有利于维护上海清算所作为中央对手方的稳定性及未违约清算会员利益，进而维护金融市场的稳定性。

3.30 其次，处置方案的合理性不应受到事后复盘的质疑。在判断违约处置方案是否合理时，不应将事后的复盘及相关金融数据作为唯一标准，而应对当时市场条件及被申

[5] [2014] EWCA Civ 1271.

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请人作为中央对手方所承担的维护公共利益的职责进行整体考虑。在 *Euroption Strategic Fund Ltd. v. Skandinaviska Enskilda Banken AB*[6]案件中，英国法院的判决认为，“对交易进行复盘时，总有某些事宜可能会让交易员回顾并表示可采取不同的策略。但交易决策必须在客户违约和困难市场条件下迅速作出。法院面临的问题不是另一种策略与实际采取的策略相比的相对优势和劣势，而是实际作出的决定是否在经纪商所有的合理和灵活性范围内”。

3.31 再次，不应以同时段 ODM 最优价作为本案所涉平仓交易的合理价格。（1）中国外汇交易中心撮合平台 ODM 最优价具有数量限制。结合询价发生时的市场流动性，以 14：02 时为例，ODM 市场深度行情显示可见的单次买入 1.2 亿美元对应的市场深度为 6.4566，较该时刻的 ODM 市场最优价 6.4546 偏离 20pips，而当时的 ODM 市场最优价 6.4546 仅可买入 500 万美元。考虑到实际询价金额为 5 亿美元，远远大于 1.2 亿美元，实际价格与 ODM 最优报价偏离 60pips 属于合理范围，不应仅凭实际成交价格与最优价偏离过高即认为该笔交易成交价格不合理。（2）价格与 ODM 最优价偏离值是一个随着市场条件变化的动态变量，在同一市场条件下，报价与 ODM 最优价偏离值会根据单笔交易的金额大小而波动，同时 ODM 市场最优报价也会因为市场单向连续询价需求而快速变化。如交易员选择在 ODM 平台成交 1.2 亿美元的交易，

[6] [2012] EWHC 584 (Comm).

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单向连续询价需求极大，可能迅速、大幅改变后续 ODM 平台最优价，则未执行的 9.6 亿美元的待成交交易面临的市场环境将完全改变，可能导致更差的处置价格。

3.32 第四，本案违约处置策略具有合理性。（1）根据《违约处置指引》第四十五条第（三）款及《专家组工作章程》第二条的规定：违约处置专家组应以最大程度保护上海清算所风险资源、维护金融市场及中央对手方稳定为优先履行其职务；违约处置专家组在形成交易策略方案时将综合考虑当时市场的情况、违约处置所需时间和保密需要等因素，来决定头寸如何拆分、拆分金额、询价次数等；上海清算所亦不保证在风险对冲阶段的交易成交价格的即时最优。案涉违约处置过程中，上海清算所在违约处置专家组的遴选、交易策略（包括头寸分割、询价次数等）的形成、交易策略的实际执行中，均遵循了上述原则。该等决策系在当时特定市场环境下，由具有丰富市场经验的专家组共同作出的最优决策，不应根据事后的复盘结果判断其合理性，否则将与市场基本运行规律相悖。（2）本案对冲交易策略经违约处置专家组充分论证，综合考虑了待成交金额、市场流动性、潜在市场冲击、交易习惯等多重因素，具备合理性。违约处置专家组基于以下考虑将案涉名义本金头寸拆分为 5.8 亿美元及 5 亿美元两笔大额交易，并要求每笔交易分别询价 3 次：其一，将 10.8 亿美元即期分为两笔买入，不容易引起市场的注意。但若将交易拆分成数笔小金额在市

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场上持续买入，则平盘完成时间和最终成交价格均面临较大的不确定性，不利于上海清算所对违约处置头寸进行后续处理，且持续单方向的市场买入操作容易造成信息泄露，不利于保护违约处置头寸敞口信息，可能导致更差的最终处置价格。此外，如上海清算所的证人所言，由于银行间外汇市场的参与主体数量有限，如果为了保密而邀请众多受托交易机构实施对冲交易，这些机构就无法作为对冲交易的相对方，这会大大减少整个市场的流动性，不利于违约处置的进行。其二，如向过多的交易对手方询价，可能引起市场的大幅波动，同时市场参与者会通过价格交易行为存在一致性判断，因信息盲区和从众心理行为产生指数效应，从而进一步放大价格波动，甚至造成头寸不能正常出清。因此每笔交易均向三家做市商进行询价，分别获取一个和两个回价，并以最优价成交，具有合理性。实践中，大额交易无法获得全数回价实属正常，因此，虽然两笔大额即期未获得全数回价，但交易员在回价中接受报价较高者成交，具有合理性。其三，根据机构 A 引述市场日均交易量为 274 亿美元，而 10.8 亿美元的买盘已经占到全天市场交易量的 4%左右，足以对市场价格产生较大影响，而且 274 亿美元为全天交易量，而 10.8 亿美元的买盘需要在一定时间内完成，造成的市场冲击会更大。此外，若根据机构 A 所述，将 10.8 亿美元买盘拆成多笔小单在市场上持续买入极大可能衍生跟风买盘，根据交易经验，实际产生的

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买盘将远大于 10.8 亿美元，会对市场价格产生更大冲击。其四，CPMI 与 IOSCO 联合发布的《中央对手方违约处置拍卖报告—需考虑的问题》提及，在对违约参与方投资组合进行对冲交易时，中央对手方可向多个来源进行询价。然而，如果市场发现中央对手方正在寻求交易多种对冲式工具，市场或产生猜测这些产品类别的违约事件已经发生，进而导致市场价格波动的风险增加。中央对手方在决定最合适的执行方法时，应平衡信息泄露的风险和获得竞争性价格的目的。因此，本案所涉对冲交易方案确定的头寸分割和询价次数具有合理性。

3.33 此外，专家组制定的对冲策略中，已对原持仓的风险敞口进行了最优匹配。标准期限的掉期交易流动性要好于非标准期限的掉期交易。因此，在制定对冲策略时，上海清算所选择了与原持仓到期日最为接近的标准期限。5 笔对冲掉期交易中，有 4 笔的期限基本匹配，故名义本金金额无需调整。但有 1 笔，远端期限为标准期限 12 个月，但对应的原持仓头寸却将于约 11 个月后到期。由于掉期产品期限越长、利率风险就越大，为对冲期限错配期间的利率风险，违约处置专家组以 2.8 亿美元×11 个月÷12 个月，计算出对应的名义本金金额约为 2.6 亿美元，据此执行了对冲交易。因此，对冲交易与原持仓头寸不完全匹配，并未侵害机构 A 的利益。

3.34 最后，交易方案的实施时间具有合理性。根据《专家组工作章程》第 24 条的规定，违约处置专家组形成对冲交

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易方案后，需经上海清算所审核通过后执行，该等审核亦是上海清算所履行中央对手方职责，控制风险的必要环节。具体审核过程如下：（1）上海清算所对对冲交易的预期对冲效果进行内部试算，将交易方案手稿整理形成电子文件，并将相关交易要素导入内部试算系统进行计算，整理交易和计算耗时 20 分钟；（2）违约处置专家组组长向上海清算所风险管理委员会汇报对冲交易方案，包括待处理违约头寸对冲前的风险情况，对冲后的预期风险情况，对冲方案的主要考量因素等关键信息，风险管理委员会委员就当时市场情况，对冲方案的主要风险点，可能的潜在市场影响等问题询问违约处置专家组，违约处置专家组予以一一答复。后风险管理委员会表示同意，并审批通过对冲交易方案，该会议耗时 40 分钟。以上审核过程并未超出合理范围，具备合理性。

3.35 综上，在本案违约处置的过程中，各处置环节均符合上海清算所《业务规则》《违约处置细则三文件》的规定，虽然对冲阶段的交易成交价格与机构 A 事后复盘查询所得的最优价格存在一定偏差，但该处置方案系综合考虑当时市场条件及防范市场波动、维护金融市场稳定情况下的最优方案，具备合理性。

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4. 审理庭意见

处理本案争议时应遵循的原则

4.1 本案为上海清算所中央对手方违约处置场景下发生的纠纷，涉及金融市场基础设施法律地位、中央对手方集中清算业务相关规则效力、具体违约处置行为合理性等司法认定问题。审理庭围绕测试案例的具体案情，认为：在依法处理本案的具体争议时，应遵循优先适用金融法具体规则，充分尊重国内外金融市场惯例，全面考量金融监管与金融审判的规则协同三大原则。

优先适用金融法具体规则

4.2 金融纠纷作为一种特定类型的民商事纠纷，适用法律时应系统准确把握民事法律一般规则与金融法特别规则的关系，在符合《民法典》等民事法律基本原则的前提下，优先适用金融法具体规则。这首先是“特别法优于一般法”基本原则的要求。在我国的法律体系中，《立法法》和《民法典》都确立了“特别法优于一般法”的法律适用原则。[7]考虑到我国民商合一的立法例，《民法典》第十一条更是明确规定，“其他法律对民事关系有特别规定的，依照其规定。”金融法作为调整特定金融法律关系的规则体系，相较于民法属于特别法，应予优先适用。事实上，这也是最高人民法院在金融审判中所强调的司法立场。如 2023 年 1 月 10 日召开的全国法院金融审判

[7] 《中华人民共和国立法法》（以下简称《立法法》）第九十二条规定，“同一机关制定的法律、行政法规、地方性法规、自治条例和单行条例、规章，特别规定与一般规定不一致的，适用特别规定；新的规定与旧的规定不一致的，适用新的规定。”

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工作会议中指出，“在用好民法典一般性制度工具的同时，要根据金融监管的规则，还原具体的法律适用场景，作出更精准的判断”[8]，以及“在民法典、金融行政法律、行政法规没有规定的情况下，人民法院审理金融民商事案件，原则上可以适用或参考金融监管规章的规定”[9]。本案涉及金融市场中央对手方违约处置这一专门性的特定场景，相关金融法律规则体系也针对这一交易场景和模式作出了具体规定，应予以优先适用。其次是统筹考虑民法与金融法的价值取向。普通民商法以鼓励交易、契约自由为主要价值取向，而金融法更侧重于对市场准入和金融交易的监管、对系统性金融风险的防控、对金融消费者和投资者合法权益的保护，以维护金融市场的秩序和稳定。因此，审理金融纠纷，应优先适用金融法的具体规则。

充分尊重国内外金融市场惯例

4.3 金融是一个专业性强并不断发展变化的行业，往往是鼓励创新、实践先行。在规则供给上，立法通常存在滞后性，金融市场惯例发挥着稳定预期、规范交易的不可替代的重要作用。不仅如此，全球金融市场日益互联互通，为防止金融风险的外溢和传导，国际社会也不断加强金融规则协调，将国际层面的最佳实践形成体系化的规则表达，以原则、标准、共识、倡议等形式供各成员国采

[8] 刘贵祥：《关于金融民商事审判工作中的理念、机制和法律适用问题》，载《法律适用》2023 年第 1 期，第 13 页。
[9] 同上注，刘贵祥文，第 15 页。

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纳。在我国金融市场进一步制度型开放的背景下，金融市场的规则体系尤其需结合我国金融市场开放的现实需求，充分尊重国内外金融市场惯例，实现金融市场规则供给的有效性、及时性和先进性。

4.4 作为反思 2008 年全球金融危机的一项重要经验，国际社会对于构建高效、透明、规范、完整的金融市场基础设施达成广泛共识。在总结金融市场基础设施既有各类国际标准的执行经验并充分汲取金融危机教训的基础上，CPSS 与 IOSCO 两国际组织联合发布《金融市场基础设施原则》，以确保各金融市场基础设施和各国的金融风险管理具有共同基准。《金融市场基础设施原则》出台以来，CPSS 及 IOSCO 各主要成员国广泛将该原则作为国内立法指引和监管标准，各国际主要金融市场基础设施亦普遍将该原则作为规则制定和业务开展的重要指引。可以认为，在金融市场基础设施运行的规范基础方面，《金融市场基础设施原则》在国际上已经构成该行业的金融市场惯例，受到普遍的遵循。

4.5 我国是 CPSS 和 IOSCO 的成员国，承诺在管辖范围内最大限度地采纳《金融市场基础设施原则》。2013 年，中国人民银行办公厅、中国证券监督管理委员会办公厅分别就实施《金融市场基础设施原则》有关事项发文通知[10]，要求金融市场基础设施的运营机构和参与者遵守《金融市场基础设施原则》并落实到位。此后，我国国内各主

[10] 参见《中国人民银行办公厅关于实施<金融市场基础设施原则>有关事项的通知》（银办发〔2013〕187 号），以及中国证券监督管理委员会办公厅《关于实施<金融市场基础设施原则>有关事项的通知》（证监办发〔2013〕42 号）。

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要金融市场基础设施的运营机构对照《金融市场基础设施原则》的要求，推进金融市场基础设施的规范运作，在长期以来的业务实践中为参与基础设施的金融机构所广泛接受。因此，对于金融市场国际惯例，通过我国金融监管机关在监管规则中的明确援用，并经国内相关金融机构的实践，业已转化成为国内金融市场惯例，属于《民法典》第十条规定的“习惯”，可在本案中予以适用。

全面考量金融监管与金融审判的规则协同

4.6 对金融市场而言，统一和确定的规则，是准确量化和有效治理风险的前提。因此，在审理金融纠纷时，应坚持“统一法秩序”的理念，全面考量金融监管和金融审判的规则协同：即尊重金融监管，秉持司法审慎之立场，在依法裁量范围内尽可能作不相冲突之解释，以实现金融市场法秩序的共同目的。

4.7 在实现统一法秩序上，金融司法与金融监管的价值取向、核心目标高度一致，两者之间理应保持基本精神、基本要求的一致性，统一裁判和监管尺度，为金融市场主体提供明确的规则预期。

4.8 实践中，广义的金融监管既包括金融行政监管，也包括金融自律管理。相较于司法裁判的纠纷事后解决，金融监管能更迅捷地识别和处置金融风险，回应金融市场需求，更好地实现金融风险治理。本质上，司法尊重金融监管，根本原因就在于金融监管防范化解金融风险的专

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业性和及时性。我国司法实践中也一直秉持金融司法尊重金融监管的原则，如2017年《最高人民法院关于进一步加强金融审判工作的若干意见》明确要求各地法院金融审判应当充分考虑金融监管的规定，积极与金融监管部门沟通。[11]2023年1月10日召开的全国法院金融审判工作会议强调："司法解释、指导案例、地方法院制定的指导意见，要充分体现中央金融监管政策、金融监管规章的基本精神、基本要求，及时统一裁判尺度，规范法官裁量权。"[12]"在民法典、金融行政法律、行政法规没有规定的情况下，人民法院审理金融民商事案件，原则上可以适用或参考金融监管规章的规定。"[13]就本案而言，审理庭将全面考量违约处置问题的金融行政监管和上海清算所的自律管理，妥为处理。

4.9 基于上述原则，具体到本案的利益衡量，双方争议的违约处置行为涉及机构A、上海清算所、其他清算会员等多方主体利益：其中，机构A被认定为永久性违约，持有的全部合约被强行平仓，清算会员资格被终止。上海清算所作为中央对手方，当机构A违约导致风险敞口出现时，本应由机构A向未违约清算会员履行的支付义务会由上海清算所承担，因此上海清算所需要进行违约处置以保持风险中性。其他未违约清算会员虽然自身并未

[11] 参见《最高人民法院关于进一步加强金融审判工作的若干意见》（法发〔2013〕22号）第二十五条规定，"加强与金融监管机构的协调配合，推动完善金融法治体系。探索建立人民法院与金融监管机构之间的沟通机制，定期通报涉及金融风险防范与金融安全的重要案件情况，强化金融监管和金融审判的衔接配合，推动形成统一完善的金融法治体系。"

[12] 同注8，刘贵祥文，第11页。

[13] 同上注。

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违约，但在违约会员的自有保证金及清算基金不足以弥补平仓损失的情况下，未违约清算会员已交纳的清算基金按照违约瀑布序列[14]的安排，可能会被用于填补损失，且上海清算所有权要求其补充交纳清算基金继续进行分摊损失。此外，由于中央对手方需尽快恢复头寸平衡，原则上需尽速完成强行平仓。但如待平仓头寸过大，短时间内大量强平可能会给市场造成较大影响，形成“多米诺骨牌效应”，在此意义上，违约处置亦关涉到场外衍生品市场的运行。

4.10 因此，司法在审理本案两大争议焦点，即违约处置规则是否有效、违约处置行为是否合理时，应审慎平衡以下三种利益：第一，确保上海清算所发挥中央对手方的作用，在清算会员违约后能继续履行结算义务，维护金融市场稳定，防范系统性风险。第二，确保场外衍生品市场公平、透明、高效地运行，不因违约处置而受到过度扰动。第三，妥善保护清算会员的合法权益。除违约清算会员外，其他未违约清算会员的整体利益也应受到充分关注。基于前述法益保护的前提，以下分别对两个争议焦点进行讨论。

争点一：《业务规则》《违约处置细则三文件》是否对机构 A 发生法律效力

4.11 对此，需分三步考察。第一，我国场外衍生品中央对手

[14] 违约瀑布序列（Default Waterfall）指中央对手方清算所动用违约会员、未违约会员及清算所自身财务资源处理违约损失的偿付顺序。根据《违约处置指引》附件 5，上海清算所的违约瀑布序列依次为：违约会员的自有保证金及交纳的清算基金、上海清算所部分风险准备金、未违约清算会员清算基金、未违约会员补充交纳的清算基金、上海清算所剩余风险准备金。

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方清算机制如何运行，有何特点。第二，基于上述特点，上海清算所制定的规则是否适用《民法典》第四百九十六条、第四百九十七条的格式条款规则。第三，如否，则相关规则应适用何种法律进行规制，又需具备哪些条件方能对清算会员发生法律拘束力。以下分而详述。

我国场外衍生品中央对手方清算机制的运行方式及特点

4.12 《期货和衍生品法》第三十七条第一款规定："衍生品交易，由国务院授权的部门或者国务院期货监督管理机构批准的结算机构作为中央对手方进行集中结算的，可以依法进行终止净额结算，结算财产应当优先用于结算和交割，不得被查封、冻结、扣押或者强制执行……"。上海清算所的业务范围即包括作为中央对手方（Central Counterparty，CCP）进行的集中清算[15]。2016 年 1 月 13 日，上海清算所获中国人民银行批准，成为合格中央对手方，对直接或间接的本外币及其衍生产品交易提供集中清算服务，清算品种包括债券、利率衍生品、外汇及汇率衍生品、航运及大宗商品金融衍生品、信用衍生品等。其中，除部分人民币利率互换场外衍生品交易按照银发〔2014〕29 号文[16]，执行强制集中清算外，其他均为自愿集中清算。

4.13 以本案所涉的《业务规则》《违约处置细则三文件》及上海清算所制定的其他相关规则为基础，在清算所与清

[15] 如作细分，上海清算所提供的服务，既包括对每日保证金收付进行的清算，也包括交割阶段的结算。为简便起见，以下统以"清算"称之。

[16] 参见《中国人民银行关于建立场外金融衍生产品集中清算机制及开展人民币利率互换集中清算业务有关事宜的通知》第三条。

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算会员间的法律关系层面，我国场外衍生品中央对手方清算机制主要通过如下方式运行：（一）为清算会员提供集中清算服务。清算会员间在银行间市场达成场外衍生品双边交易协议后，将协议提交上海清算所，后者作为中央对手方，为双方提供下列服务：（1）通过合约替代[17]，介入已成交的该笔交易中，与买方和卖方建立两个新合约，据此成为该笔交易中买方的卖方和卖方的买方，并在新合约项下承担买卖双方之间的初始权利义务。由此，上海清算所成为交易的履约保障方，原始交易双方无需再承担因对方违约产生的信用风险，该种风险由上海清算所承担。（2）进行多边集中净额清算[18]。合约替代后，上海清算所根据既定规则，对全市场多个清算参与人之间的债权债务关系进行合并清算，通过净额轧差的方式，得出清算参与人与中央对手方之间的多边净额，据此进行交收。多边净额清算使得中央对手方可以对某一清算会员与不同交易对手方达成的全部交易进行轧差，可有效降低清算会员的风险敞口和资金占用。（二）对清算会员进行有效的风险控制和管理。合约替代和净额结算虽可使清算会员免于承担对手方的信用风险，总体头寸暴露也有所减少，但风险本身并未消灭，而是转移给了中央对手方清算所。后者集合了整个集中清算场外衍生品市场的信用风险，因而具有系统重要性。一旦中央对手方自身无法完成结算，将会引发连锁反应，触发

[17] 参见《业务规则》第四条“合约替代”、第三十五条“生成新合约”。《业务指南》第1.1.8条“合约替代”等。
[18] 参见《业务规则》第三十八条“净额计算”、《业务指南》第1.1.5条“多边净额清算”等。

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更多清算参与方违约，最终产生市场系统性风险。因此，清算所需要在全体清算会员中建立并执行有效的风险控制制度。本案中，上海清算所的风险控制和管理措施主要包括：（1）设置准入标准。上海清算所对申请加入的机构设有会员准入要求，以控制参与方的信用风险。申请人的净资产、资信评分、业务经营状况应达到上海清算所规定的相应标准，同时，还需具备开展集中清算业务所必须的业务管理制度、风险管理制度、技术系统，制定人员配置计划、集中清算业务政策落实及发展计划等[19]。上海清算所审核通过申请后，申请人方可成为正式的清算会员参与集中结算。（2）对清算会员的资质进行持续监测[20]。会员应接受上海清算所对其进行的业务评估、资信评估、年度评估；接受上海清算所为其设定的清算业务额度（基于业务规模、资信状况等因素确定）；按照要求向上海清算所提交交易数据，由后者对其所持头寸净额、风险敞口、保证金缺口等指标的风控合规性进行审查。上海清算所可根据清算会员参与业务、风险管理、年度评估结果等情形，对清算会员的资质及参与集中清算业务的范围进行调整。（3）建立保证金、清算基金及风险准备金制度[21]，控制信用及流动性风险。清算会员应当按照规则交纳各类保证金，以覆盖所持头寸带来的潜在风险。清算会员应根据清算限额缴纳最低保证金；

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[19] 参见《业务规则》第八条、《业务指南》第2.1条“普通清算会员业务参与申请”、2.2条“综合清算会员业务参与申请”等。

[20] 参见《业务规则》第十二条“清算会员资质变更与终止”、第十七条“资信评估”。《业务指南》第2.5条“清算会员持续评估”、第2.8条“上海清算所变更或终止清算会员资质”等。

[21] 参见《业务规则》第四章“风险管理”、《业务指南》第 1.2 条“风险管理”等。

在所持头寸净额或风险敞口超出清算限额时交纳超限保证金；根据日终或日间盯市盈亏交纳盯市保证金；在异常情况下，还应根据上海清算所的要求交纳特殊保证金。此外，清算会员还应根据规定交纳清算基金和补充清算基金，用于弥补相关集中清算业务出现违约损失后，违约会员保证金不足以覆盖部分的损失。上海清算所亦需按照主营业务收入的一定比例计提风险准备金，用于弥补清算会员重大违约损失。（4）建立违约处置制度。为防止清算会员违约对上海清算所、其他参与方以及更广泛的金融市场可能造成的严重影响，上海清算所建立违约处置制度，以确保在发生会员违约时，清算所仍然能够继续履行对其他非违约方的义务。具体包括[22]：规定可判定为违约的事由；将违约区分为运营性违约和永久性违约；规定发生运营性违约时，上海清算所可采取限制或暂停业务参与、冻结应收资产、保证金账户、清算基金账户、征收违约金等措施，发生永久性违约时，可采取的措施种类还包括强行平仓、移仓、终止清算会员资格等；规定风险准备资源使用顺序[23]；规定违约处置的具体程序等。

4.14 上述机制的运行具有以下特点：其一，在场外衍生品市场中，集中清算中央对手方设立的主要目的在于：处理交易对手方违约带来的风险。甚至可以说，如果不存在

[22] 参见《业务规则》第七章。
[23] 即前述的违约瀑布序列。

交易方的违约可能，就没有中央对手方存在的必要[24]。中央对手方通过转移存在于原交易双方的信用风险，将该风险集中于自身，然后再通过风险管理及互助，将风险标准化地传递并再分配至市场中。在此意义上，中央对手方作为金融市场基础设施，其存在可有效降低所服务金融市场的系统性风险，对增强金融稳定性至关重要[25]。其二，前述各项机制并非上海清算所独有，而系实现中央对手方清算的制度目的、维持集中清算机制正常运行所必须。因此，在国际范围内，尽管存在细节差异，但中央对手方清算所与清算会员的法律关系均大体如是。其三，为将这些机制付诸实施，中央对手方清算所首先需要制定包括业务规则、实施细则等在内的一系列规则，将集中清算、清算会员管理、风险管理等机制纳入规则。然后，通过与清算会员签订清算协议，由后者同意遵守现有规则、并将规则未来的修订和新设权利让渡给清算所，据此使规则内容能及时反映市场变化并始终保持对清算会员的效力。而且，为实现规制效能，规则需对所有清算会员一体适用。其四，上海清算所系公司制法人，各清算会员并非上海清算所的股东。因此，不同于实行会员制的中央对手方，清算会员无法通过会员大会等机制行使规则制定权。本案所涉各项规则均由上海清算所作为金融市场基础设施的运营者负责制定。清算会员作为金融市场基础设施的参与方，只能被动遵守规则，其

[24] *See* David Murphy & Jo Braithwaite, *Central Counterparties (CCPs) and the Law of Default Management,* 17 Journal of Corporate Law Studies 291 (2017).
[25] *See* CPSS-IOSCO, *supra* note 1, Introduction, para. 1.1, para. 1.13.

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虽可对规则的制定和实施提出意见，但所提意见是否采纳仍需由上海清算所根据具体情况最终决定。其五，上海清算所虽采公司制，但其与纯粹的营利性商业企业有所不同。由前述设立目的所决定，上海清算所兼具私益性和公益性，除为参与者有偿提供集中清算服务外，也提供市场规则、自律管理等准公共产品[26]。但由于现行法律、行政法规尚未就上海清算所制定规则的法律地位作出特别规定，故清算会员与清算所间基于规则效力争议而产生的损害赔偿案件，当作为合同纠纷予以审理。

4.15 此外，需要指出的是，由以上特点所决定，上海清算所认为《清算协议》及相关规则为共同法律行为的主张难以成立。共同法律行为在传统民法上也称协同行为、协定行为，通常指因同方向平行的两个以上意思表示一致而成立的法律行为[27]。典型的共同法律行为包括社团法人的设立、合伙的设立等。设立公司、合伙等团体的共同法律行为人，作为公司的股东、合伙人等，同时也是团体的成员，因此享有共同参与制定团体治理规则，如章程、公约、合伙协议、团体规章制度等的权利。该种情况下，团体规则的效力本质上来源于共同法律行为人的合意。法律对团体规则效力的审查通常限于：形成规则的合意是否真实有效、规则内容是否违反法律、行政法规的强制性规定等。

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[26] *See* Caroline Bradley, *Demutualization of Financial Exchanges: Business as Usual?*, 21 Northwestern Journal of International Law & Business 657, 674-675 (2001).

[27] 参见史尚宽：《民法总论》，中国政法大学出版社 2000 年版，第 310-311 页；韩世远：《合同法总论（第四版）》，法律出版社 2018 年版，第 10 页；朱庆育：《民法总论（第二版）》，北京大学出版社 2016 年版，第 136-138 页。

4.16 在本案中，虽然上海清算所与各清算会员之间的法律关系与因共同法律行为形成的团体法律关系存在一定相似之处，例如双方运营及参与中央对手方清算业务的目的，均为借助中央对手方机制集中场外衍生品交易对手方的信用风险并进行再分配。但正如前述特点四中所言，清算会员并非上海清算所这一社团法人的社员，不享有包括社团规则制定权在内的社员权，因此与团体法律关系存在本质差异。此外，由于上海清算所负有的前述准公共职能，其设立和运营均受到金融监管部门的严格监管，与普通的社团法人不同，因此，不宜简单套用共同法律行为理论对各项规则的效力进行评判。

《业务规则》《违约处置细则三文件》的效力判断应适用金融法具体规则

4.17 《业务规则》《违约处置细则三文件》经由《清算协议》引致适用，属于双方合同的组成部分。又因上述规则系上海清算所单方制定，客观上存在不当侵害清算会员利益的可能。故对于上述规则应如何订入合同、又该如何确保规则内容的公平合理，确需通过法律加以控制。

4.18 本案中，机构 A 主张，应适用《民法典》中的格式条款规则进行订入及内容控制。对此，审理庭认为，基于前述场外衍生品中央对手方清算机制的运行特点，上述法律规定不宜适用，主要理由如下。第一，《民法典》第四百九十六条规定，格式条款提供方对与相对人有重大利害关系的条款，负有提示及说明义务。正因如此，机

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构 A 主张，上海清算所在签订《清算协议》时，应对有关违约处置的具体程序和方法予以指明，并加以解释。对此，审理庭认为，提示和说明的目的之一在于使相对方知悉并理解规则的内容。但在衍生品中央对手方清算机制下，参与清算的会员均为在银行间市场从事衍生品交易的专业金融机构，包括银行、券商、财务公司等，本身即有严格的监管和风险内控要求。金融业作为一个经营风险的行业，如果连专业金融机构对自身所参与的金融交易风险都没有准确认知和有效防范，又何谈为其客户提供金融服务？监管部门之所以对金融机构及其从事的金融业务实行牌照等准入管理，重要的一个原因就在于建立符合法律要求的金融服务专业水准，以保护投资者和金融消费者。本案中，上海清算所出于自律管理之要求，也设有会员准入控制，获准参与集中清算的机构均具有相当的规模，且具备良好的业务管理和风险管理制度。对于该类专业金融机构，完全有能力也有义务应在申请加入上海清算所前，自行查阅并了解相关规则，对于不明事宜，还可进一步向上海清算所询问。本案中，机构 A 作为从事银行间外汇市场业务的交易者，同样有能力、也有义务依此行事。上海清算所的《业务规则》《业务指南》《违约处置指引》等规则均在其官方网站公示，机构 A 能够非常方便地查阅，也应在知悉并了解上述规则的前提下，再审慎决定是否向上海清算所提出加入申请，而非苛以上海清算所在签订《清算协议》时

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履行提示说明义务。

4.19 第二，法律对格式条款设定提示和说明的另一目的在于：在订立合同时，保障相对方的磋商缔约权，防止规则提供方利用优势地位，使用单方制定的条款，以契约自由为名，在实质上排除弱势相对方对条款内容的协商权。正因如此，格式文本并不完全排除个别协商和修改。例如，《民法典》第四百九十八条即规定："格式条款与非格式条款不一致的，应当采用非格式条款"。然而，本案所涉的《业务规则》《违约处置细则三文件》在本质上不可通过个别协商进行修改。上述规则及其他相关规则所共同承载的，是包括集中清算的组织和运行方式、风险管理措施、清算所及清算会员间的具体权利义务等在内的整个中央对手方清算业务机制。因此在规则适用上，必须保持一体性和无差别性。无论是对已加入的清算会员，还是拟加入的潜在会员，均应不加歧视地统一适用。如果允许某位加入者通过个别磋商，个性化地变更或排除某项规则对其适用，就会改变集中清算这一机制的整体结构，并将由此增加的成本转嫁给其他清算会员和清算所，最终破坏整个机制的完整性和有效性。所以，上海清算所规则的修改和变更，不可通过与清算会员的个别协商达成，而只能依法或依其治理机制规定的方式进行，且在变更后继续对全体清算会员统一发生效力。从这一角度而言，以提示说明为基础以便进行后续磋商，与金融市场实践方枘圆凿，于本案中殊不可行。

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4.20 第三，如果采用提示说明的方式对上海清算所规则订入合同进行控制，则在上海清算所未作提示说明的情况下，会产生部分清算会员主张因未注意或未理解相关规则，故而规则对其不适用；而另一部分清算会员虽未经提示说明，但已了解知悉相应规则，因而规则对其适用的不统一情形。但如前所述，为实现中央对手方的运营目的，上海清算所的规则必须对全体会员统一适用。而通过格式条款进行规制，难以避免上述问题。

4.21 第四，《业务规则》《业务指南》《违约处置指引》等，是中央对手方清算机制的规则载体。其中包含的违约处置规则，更是核心制度之一，国际主要中央对手方清算机构规则中均有规定。相较而言，本案双方争议的上海清算所违约处置规定与国际各主要清算机构的相应规定在主要方面不存在重大差异，也未明显悖离《金融市场基础设施原则》等指引性国际标准。因此，机构 A 作为专业的金融机构，在自愿申请加入上海清算所之前，应当且有义务关注这一中央对手方清算机制的核心制度，并在权衡后作出是否同意遵守的决定。如果因自身主观原因，未经阅看即作出同意遵守的意思表示，由此造成的不利后果原则上应属于自己责任的范畴。

4.22 第五，根据《民法典》第四百九十七条，针对格式条款专门设定的内容控制，主要体现于第（二）项及第（三）项，即提供格式条款一方不合理地免除或减轻其责任、加重对方责任、限制或排除对方主要权利的，该格式条

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款无效。上述规定关注的主要是缔约双方的权利义务均衡。但如前所述，中央对手方清算所的规则，除需公平保护参与方权利之外，还需防范金融市场系统性风险，故对于内容控制的考量还应扩及整个相关市场的公共利益保护。综上，《民法典》的格式条款规则主要以民事个体法中的交易型合同为模板设计，在本案涉及对中央对手方规则的法律效力进行判断时，存在天然的局限。

4.23 基于上述理由，审理庭认为，中央对手方清算机制的法律规制属于金融法领域，《民法典》第十一条规定：其他法律对民事关系有特别规定的，依照其规定。本案争议应当适用金融法具体规则。

4.24 第一，关于《业务规则》《违约处置细则三文件》的订入控制。我国法上，对于金融市场基础设施中的证券结算机构和期货结算结构的业务规则，应通过何种方式使参与方得以遵守，均有明确规定。根据《期货和衍生品法》第九十五条、《中华人民共和国证券法》第一百四十九条，上述结算机构制定或修改的章程和业务规则，经国务院证券期货监督管理机构批准后，参与证券或期货结算的会员即应遵守。实践中，上海期货交易所、中国金融期货交易所等的业务规则和实施细则，均通过在官网公布的方式向会员进行披露。但对于场外衍生品结算机构，法律尚未设置相关规定。

4.25 对此，审理庭认为，在法律欠缺相关规定时，《金融市场基础设施原则》之原则 23“规则、关键程序和市场数

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据的披露”中关于中央对手方规则披露的规定可作为商事习惯法，予以适用。理由在于：（1）由 CPSS 和 IOSCO 共同制定的《金融市场基础设施原则》作为被广泛接受的国际标准，是对金融市场基础设施风险管理经验的全面总结，适用其成员认定的各类金融市场基础设施。（2）我国是 CPSS 和 IOSCO 的正式成员，并承诺在管辖范围内最大限度地采纳《金融市场基础设施原则》。上海清算所是受中国人民银行监管的金融市场基础设施。2013 年，中国人民银行发布《中国人民银行办公厅关于实施<金融市场基础设施原则>有关事项的通知》（银办发〔2013〕187 号），要求包括上海清算所在内的被监管机构遵守该原则，并采取适当行动将《金融市场基础设施原则》落实到位。据此，《金融市场基础设施原则》已转化为我国的国内监管标准。（3）《金融市场基础设施原则》原则 23 规定：“FMI（即金融市场基础设施）应该具有清晰、全面的规则和程序，提供充分的信息，使参与者能够准确了解参与 FMI 承担的风险、费用和其他实质性成本。所有相关的规则和关键程序应公开披露”。[28]该原则的注释部分，第 3.23.2 条规定：“FMI 的规则和程序通常是 FMI 的根本，为参与者认识参与 FMI 所承担的风险奠定了基础。FMI 应清晰地披露系统的设计和运行，以及 FMI 和参与者的权利和义务，以便让参与者可以评估

[28] “Pinciple 23: Disclosure of rules, key procedures, and market data *An FMI should have clear and comprehensive rules and procedures and should provide sufficient information to enable participants to have an accurate understanding of the risks, fees, and other materials costs they incur by participating in the FMI. All relevant rules and key procedures should be publicly disclosed.*” *See* CPSS-IOSCO, *supra* note 1.

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参与 FMI 所承担的风险……”。[29]第 3.23.4 条规定：“在了解规则和程序、参与 FMI 的风险以及 FMI 与其他 FMI 连接时可能产生的风险方面，参与者负有首要责任……”。[30]根据上述规定，对于已作适当披露的规则，清算会员负有自行了解的义务。（4）多年来，上海清算所制定、修改的《业务规则》及实施细则等均公布于官网。清算会员普遍认可：规则公布后，对于现有的清算会员即应视为订入合同，应当遵守；对于拟加入的清算会员，则应自行了解上述规则的内容，并在此基础上决定是否申请加入上海清算所。上述做法已形成确定的商业习惯，被中央对手方清算的参与主体长时间、普遍地遵守。此外，由于前述监管部门的明确要求，清算会员们对于遵守该种商业习惯，已形成法律效力之确信。上述商业习惯，不仅能避免格式条款规制的不足，更符合金融领域的中央对手方机制运行特点，亦无悖于公序良俗，已构成《民法典》第十条规定的习惯，可成为处理规则订入争议的法源。

4.26 当然，需要指出的是，《金融市场基础设施原则》中存在大量原则性表述，有些是中央对手方必须遵守的最低要求，有些则是指引性规定。对于采纳《金融市场基础设施原则》的成员国而言，存在因地制宜细化落实的自主裁量空间。因此，对于原则性的国际金融市场惯例，其中哪些规定可被认为已转化为国内的商业习惯法，尚

[29] *Id*., Pinciple 23, Explanatory note 3.23.2.
[30] *Id*., Pinciple 23, Explanatory note 3.23.4.

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应结合个案情况而定。

4.27 第二，关于《业务规则》《违约处置细则三文件》的内容控制。《期货和衍生品法》第三十条规定：组织开展衍生品交易的场所制定的交易规则，应当公平保护交易参与各方合法权益和防范市场风险。审理庭认为，上海清算所虽非衍生品的交易场所，但其作为中央对手方清算机构，为交易主体提供合约替代及集中清算服务，所制定的相关规则也应参照第三十条规定，公平保护清算参与各方的合法权益，防范市场风险。该种内容控制方式更加贴合中央对手方清算规则的规制目的，应予适用。

《业务规则》《违约处置细则三文件》对机构 A 产生法律拘束力需具备的条件

4.28 根据前文所述，审理庭认为，案涉规则欲对包括机构 A 在内的清算会员产生法律拘束力，需具备以下四项条件：（1）向清算会员进行合理告知。（2）清算会员同意遵守规则。（3）对于需经监管批准方能生效的规则，应当获得监管部门的批准。（4）规则内容公平合理。其中第一、二项为规则订入的要件；第三、四项为规则内容的生效要件。以下分别阐述。

向清算会员进行合理告知

4.29 根据《监督管理规则》第六条之规定，上海清算所有权

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制定相关业务规则和操作细则[31]。同时，依据《金融市场基础设施原则》的前述规定，上述规则应向清算会员进行披露，也即通过合理方式予以告知。合理告知的目的在于使清算会员了解规则的具体内容，告知的具体方式则应视规则的具体性质而定。按照《金融市场基础设施原则》的要求，涉及中央对手方系统的设计和运行，以及 FMI 和参与者权利义务的规则及关键程序应当公布。本案中，《业务规则》《业务指南》《违约处置指引》即属于该类规则，无论是新制定、还是修改后的文本，均应进行公开发布。根据本案已查明的事实，上海清算所已将上述规则发布于其官方网站，应认为已适当履行了告知义务。根据《清算协议》的约定，对于机构 A 申请加入时已存在且已公布的规则，签订协议即表明上述规则被订入合同；对于加入后新增或修改的规则，则自发布公告中指定的日期起，对机构 A 发生效力，协议中同时约定了公告规则的具体网址。对于机构 A 这样的专业金融机构，上述方式足以使其方便地了解规则内容，该种做法亦符合中央对手方机制下的商业习惯，因此，应认定《清算协议》的上述约定合法有效。对于新增或修改的规则，如机构 A 对相应内容持有异议，并不影响上述规则被订入合同，机构 A 可通过提出规则内容合理性异议、促请修改规则、或是退出清算机构等方式维护自身利益。

[31] 参见《监督管理规则》第六条："上海清算所应当采取下列措施保证业务的正常开展：……（四）根据中国人民银行的管理要求，制定相关业务规则和操作细则，并切实执行；……"。

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4.30 除上述三项规则之外，对于《专家组工作章程》，因其主要规定的是与上海清算所签订合作协议的会员机构在具体履行专家组工作职责时应遵循的流程，本案中，上海清算所已通过电子邮件将《专家组工作章程》发送给了与其签订违约处置专家组合作协议及违约处置对冲交易合作协议的清算会员，故可认为已履行了告知义务。

清算会员同意遵守规则

4.31 《业务规则》《违约处置细则三文件》经由《清算协议》引致适用，根据《民法典》第四百六十五条之规定，机构 A 需在《清算协议》中同意遵守上海清算所制定的各项规则，双方就此达成的合同方可成立。包括机构 A 在内，清算会员同意遵守规则的意思表示，均产生于签订《清算协议》时。上述同意分为两部分：一是同意接受上海清算所已制定并公布的相关规则；二是同意上海清算所有权在未来对现有规则进行修改、补充，或制定新的规则，在此情况下，机构 A 仍然受这些规则约束。后一部分的同意，在性质上实为机构 A 对上海清算所的预先概括授权。在中央对手方清算机制下，该种预先概括授权具有存在的必要性。为了使集中清算中央对手方机制正常运行，清算所需要根据具体情况不时调整或增订规则。而金融交易本身具有规模大、时效性强等特点，对效率和系统性稳健具有较高要求，因此，上述规则的变动客观上不可能通过双边磋商的形式一一进行，有必要由包括机构 A 在内的清算会员通过预先让渡权利的方

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式，使自己服从于上海清算所将来可能制定的各项规则。。如此，才能实现集中清算的目的，会员也才能获得由此带来的收益。该种预先授权合于意思自治原则，应属有效。在国际实践中，主要中央对手方清算机构均有类似做法。当然，这种预先授权并非毫无限制。首先，被预先授权行使之事项不可违法悖俗。其次，虽然预先让渡了权利，但并不意味着让渡者必须无条件遵从上海清算所作出的所有决定。在符合一定条件的情况下，让渡者仍可对决定的合法性提出质疑，并要求监管或司法予以审查。

4.32 本案中，机构 A 的预先同意不存在违法悖俗情形。但值得讨论的是，机构 A 可以在多大范围内对规则的合法性提出异议，请求司法介入。审理庭注意到，2021 年 10 月 15 日《清算协议》签订时，上海清算所已制定并公布的与本案相关的规则包括：《业务规则》《违约处置指引（第一版）》及《业务指南（第七版）》。机构 A 提出异议的大部分条款，均已在上述规则中作出规定。对于在加入时已存在的规则，如机构 A 已在《清算协议》中表示同意遵守，事后是否还能就其效力提出异议，值得探讨。对此，审理庭认为，应分情况而定。若机构 A 参与的是监管要求进行强制集中清算的场外衍生品业务，如人民币利率互换业务，应当赋予其对加入时已存在之规则提出异议的权利。但如机构 A 参与的是类似本案的自愿集中清算业务，除非会员举证证明相关规则影响的

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是全体或某类清算会员的整体利益，否则原则上不能对加入时的已有规则提出异议。至于在加入后新增或修改的规则，则应当允许其提出异议。本案中，机构 A 提出的异议条款涉及永久性违约的认定标准、违约处置专家组的工作目标、违约机构对违约处置过程是否有权参与等，上述问题对于已违约或将来潜在的不特定违约清算机构均有影响，故应纳入审理范围。

需经监管批准方能生效的规则，应当获得监管部门的批准

4.33 中央对手方清算所由于汇集了所有交易方信用风险，一旦机制失效风险外溢，就会产生巨大的传导性和破坏性。清算所制定的规则能否有效防范系统性风险、信用风险、流动性风险、业务风险及运营风险等，事关场外衍生品市场的稳定运行，因此不同于普通商事主体的内部规则，必须接受监管部门的监管。《监督管理规则》第四条规定：“下列事项，上海清算所应当报中国人民银行批准：……（三）内部控制制度、风险管理制度、业务规则以及应急预案的制定和重大修改；……”。根据上述规定，上海清算所虽然有权制定业务规则和实施细则，但上述规则中，包括业务规则在内的部分规则必须报请监管审批。被规定为需经批准的均为关涉到清算所安全、稳健运营的重要规则，批准的目的在于通过对规则内容的直接监管，维护场外衍生品市场基本秩序，防控系统性金融风险。因此，如果上海清算所制定的某项规则违

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反了上述规定，未能按照要求获得监管部门的批准，则可以作为司法判断规则效力的重要参考因素。

4.34 本案所涉规则中，《业务规则》因涉及上海清算所业务运行的基本架构，需经中国人民银行批准方能生效，双方对此并无分歧。争议之处在于：《违约处置细则三文件》是否属于第四条第（三）项规定的“风险管理制度”，是否构成对《业务规则》的实质变更和重大修改，并因此需要中国人民银行的审批。

4.35 上海清算所由中国人民银行监管。2020 年 1 月 6 日，中国人民银行金融市场司作出批复，同意上海清算所发布《业务规则》。金融市场司的主要职责包括：监督管理银行间债券市场、货币市场、外汇市场、票据市场、黄金市场及上述市场有关场外衍生产品，承担上海清算所等重要金融市场基础设施建设规划并统筹实施监管的具体工作等。从中国人民银行对下辖各金融市场基础设施的既往监管实践看，可认为《业务规则》已获得其批准。

4.36 对于《违约处置细则三文件》是否需经中国人民银行审批这一问题，首先，在我国金融市场实践中，集中清算机构的清算规范体系多由“基本业务规则+实施细则”的形式构成。其中，第一层级的基本业务规则旨在对清算业务模式、运营流程、参与方权利义务等制度要素进行原则性的界定。第二层级的实施细则对如何具体落实原则性要素作出细化规定[32]。此外，还存在第三层级的通知、

[32] 参见刘燕等：《第三方意见书》，载上海金融法院官方网站 2022 年 12 月 6 日，http://www.shjrfy.gov.cn/jrweb/upload/dsfyj_ly.pdf，第 3-5 页。

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公告等，由清算机构于日常经营中予以发布[33]。依照我国法律规定及监管实践，三层规范体系中只有第一层级的基本业务规则需报监管部门进行审批[34]，第二、第三层级的规范则由清算机构按照各自内部治理的要求自行制定。上述法律、监管规章对需审批规则的层级限定具有充分的合理性。实施细则等次级规范的目的在于有效落实基本业务规范。多变的市场环境对专业性和灵活度的要求较高，尤其在场外衍生品市场，交易往往以双边磋商方式达成，产品标准化程度相对较低。中央对手方清算所对市场情况更为熟悉，对风险控制更有优势，将实施细则的制定权授予清算机构，可避免行政审批流程可能产生的相对缓慢和滞后，合理配置监管资源，降低监管成本的同时提高监管质效。

4.37 就本案涉及的《违约处置细则三文件》而言，一项普遍的共识是，中央对手方在违约处置方面必须具有必要的灵活度，其应当有能力迅速采取行动以处理清算会员的违约事件，并在最大程度上维护金融市场的整体稳定。由于我国场外衍生品的集中清算业务尚处于发展阶段，相关违约处置规则更多地是由清算机构以实践先行的方式，逐步探索并加以完善。在此背景下，监管部门将制定违约处置细则的权力赋予集中清算机构，有利于增强

[33] 如上海清算所发布的调整清算基金的通知等。

[34] 如《证券法》第一百四十九条规定："证券登记结算机构应当依法制定章程和业务规则，并经国务院证券监督管理机构批准。……"。《期货和衍生品法》第九十五条规定："期货结算机构应当按照国务院期货监督管理机构的规定，在其业务规则中规定结算参与人制度、风险控制制度、信息安全管理制度、违规违约处理制度、应急处理及临时处置措施等事项。期货结算机构制定和修改章程、业务规则，应当经国务院期货监督管理机构批准。"

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其有效化解风险的能力。

4.38 其次，关于《监督管理规则》第四条第（三）项中规定的“风险管理制度”的含义。审理庭认为，《监督管理规则》的该项规定，旨在对应当报监管部门审批的规则范围进行界定。因此，该项所涉的应报中国人民银行批准的“风险管理制度”仅指基本业务规则层面的相应风险管理制度，而不含实施细则一级的规范在内。《监督管理规则》制定于2011年，当时，上海清算所尚未制定统一适用于全部业务种类的基本业务规则，只是针对各类业务和流程分别制定了具体规则，如《清算会员管理办法》《保证金管理办法》《清算基金和风险准备金管理办法》《银行间外汇市场人民币外汇交易中央对手清算规则》《人民币利率互换集中清算业务规则》《银行间市场人民币外汇询价交易净额清算风险管理规则》等等。因此，《监督管理规则》第四条规定的“风险管理规则”应指《清算会员管理办法》《保证金管理办法》《清算基金和风险准备金管理办法》等分项出台、属于第一层级基本业务规则的相关规则。此后，上海清算所制定了《业务规则》，将分项风险管理规则统一纳入第四章“风险管理”（第十六至第三十三条）及第七章“违约处理”（第四十七至第五十六条）中。经监管部门审批同意的《业务规则》中，本身就包含了风险管理规则。因此，机构A主张本案所涉《违约处置细则三文件》属于《监督管理规则》第四条规定的“风险管理规则”的

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主张，缺乏依据，审理庭不予采纳。

4.39 再次，关于《违约处置细则三文件》是否构成对《业务规则》的重大修改。审理庭认为，判断机构 A 主张的相关条款是否构成“重大修改”，首先须对“重大修改”的认定标准进行明确。如前所述，监管部门之所以要对《业务规则》进行审批，是为了确保该第一层级基本规则所规定的清算参与方权利义务、风险管理、账户分类管理、清算流程、违约处理等内容有助于中央对手方安全、有效地运营，从而实现维护场外衍生品市场基本秩序、防控系统性金融风险的监管目的。《监督管理规则》第一条规定：“为维护金融市场秩序，促进金融市场健康规范发展，……制定本规则”，可为印证。因此，对已获审批的《业务规则》所进行的重大修改，应达到实质性地变更《业务规则》原有内容，影响监管目的实现之程度。下列情形不应被认定为“重大修改”：（1）对《业务规则》的规定进行措辞调整，不改变规则实体内容的；（2）为落实《业务规则》，对其中的原则性规定予以具体化，使其具有可操作性的细则规定；（3）虽对《业务规则》的内容作了变更，但该种变更不构成对原规则的根本性改变和偏离的；（4）规则内容的变更或细化并未增加风险，而是更好地控制了风险，因此并未偏离监管目标。总体而言，在对是否构成“重大修改”进行审查时，应以确保在先审批内容的确定性和稳定性为目标，防止出现相关主体借由制定实施细则，变相规避

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强制性审批要求，损害社会公共利益的情况。本诸上列标准，以下逐一对机构 A 提出的三部分重大修改异议[35]进行分析。

4.40 机构 A 主张的第一部分重大修改，涉及《业务规则》第四十八条第（二）项之解释。按照文本解释原则，该项规定不能单独视之，而应结合第四十七条、第四十八条第（一）项的规定作整体理解[36]。《业务规则》第四十八条第（一）项明确规定了运营性违约的定义：若清算会员因操作失误、系统故障、短期流动性不足等而导致暂时无法履约的为运营性违约。根据该定义，无论是因技术问题、还是因财务流动性问题导致的运营性违约，其共同的特点都在于暂时性，也即，违约方可在短期内进行纠正，因此具有给予一定补正期限之必要。

4.41 以此标准对照第四十七条规定的各项违约情形，可以发现，仅第（一）项可能构成运营性违约。如果清算会员未按规定交纳或结算保证金系因操作失误、系统故障、或短期流动性不足所致，则其违约状态是暂时、可纠正的，故可被认定为运营性违约。至于第（二）至第（九）项，因违约会员此时已出现丧失偿债能力、解散、停业整顿、破产、清算、被接管、对全部或大部分资产丧失处分权、在金融市场基础设施之间构成交叉违约等对其债务清偿能力构成重大影响的事件，客观上已不可能仅构成暂时性违约，也因此不属于运营性违约的范畴。在

[35] 参见本意见书第 3.6 段。
[36] 参见《业务规则》第四十七条、四十八条，内容可见本意见书“基本事实”部分。

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此意义上，上海清算所对第四十八条第（二）项的解释具有合理性，“若清算会员出现除第四十七条第（一）项所列情形以外的违约事件”与“发生运营性违约但清算会员未在违约处置关键时点前履行承诺”之间，系择一而非并存关系。也即，当清算会员发生第四十七条第（一）项规定的运营性违约时，上海清算所需给予一定的补正期限，当期限届满、违约情形仍未纠正时，方可作出永久性违约认定。

4.42 因此，《违约处置指引》第五条规定的：“清算会员在规定时点前保证金……未足额到账的，为运营性违约。清算会员在该运营性违约的次一工作日未及时消除运营性违约情形……，上海清算所将对该清算会员进行永久性违约认定……”，是对《业务规则》第四十七条第（一）项应构成运营性违约的进一步明确，而非变更，机构 A 的该项主张不能成立。

4.43 机构 A 主张的第二部分重大修改条款涉及《业务规则》第四十八条第（二）项规定的“违约处置关键时点”如何界定。《违约处置指引》第五条及《业务指南》第 6.4.1 条[37]对《业务规则》的上述规定作了两点细化：一是分别规定了保证金等资金种类的不同结算时点，对何为“违约处置关键时点”进行了明确。二是将运营性违约的补正期限设定为一个工作日。审理庭认为，上述细化不应被认定为是对《业务规则》的重大修改，理由有二。第一，业务规则对于永久性违约认定标准仅有原则性规定，

[37] 具体规定依次参见本意见书第 2.13 段及第 2.8 段。

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必须通过实施细则的进一步细化，方能具体落实。第二，各类资金的具体结算时点需根据不同清算业务的特性及实际需要，分别加以确定，且可能随着支付方式等具体情况的变化而调整；运营性违约的补正期限则需结合机构交纳的保证金等风险资源对潜在风险的覆盖程度、违约处置流程耗时长短、是否存在跨境清算等具体因素综合确定，也可能随着实际情况的变化进行调整。出于专业度和灵活性的考虑，由第二层级的实施细则对上述问题进行规定，符合不同层级规范的调整目的。

4.44 机构 A 主张的第三部分重大修改涉及到违约处置是否必须由违约处置专家组参与实施。《业务规则》第五十条“永久性违约处理”规定：清算会员被判定为永久性违约后，……上海清算所还可根据各集中清算业务具体情况，采取以下一项或多项措施：……（三）召集违约处置专家组，协助上海清算所进行违约处置……。《违约处置指引》在人民币利率互换集中清算业务、人民币外汇交易中央对手清算业务、债券集中清算业务的违约处置中规定了违约处置专家组参与的相关内容。其中第九章“人民币外汇交易中央对手清算业务”第四十五条规定：平仓拍卖的流程分为头寸分割、结售汇交易、风险对冲、拍卖激励池和头寸拍卖。其中，“头寸分割”中规定：“上海清算所将根据违约清算会员待平仓头寸的交易类型和风险敞口等因素决定是否进行头寸分割以及头寸分割方式。违约处置专家组以便于完成风险对冲和

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减少平仓拍卖风险为目标，提供方案”。“风险对冲”中规定：“上海清算所将针对待平仓头寸在银行间市场达成对冲交易，将违约清算会员的待拍卖头寸组合的风险敞口降低到可容忍的范围内，具体可容忍范围由上海清算所根据实际情况确定。违约处置专家组应以减少对冲损失为目标，提供对冲交易的方案”。审理庭认为，上述规定不能割裂视之，而应作整体解释。从上述规定可见，《业务规则》仅将召集违约处置专家组作为可以采取、而非必须存在的违约处置步骤。相应的，《违约处置指引》也并未在所有类别业务的违约处置中无差别地设置违约处置专家组的规定，而是根据业务特点，在包括本案所涉人民币外汇交易在内的三类业务中引入了违约处置专家组的相关规定。在规定了专家组的条款中，依文义也无法得出专家组必须参与头寸分割、风险对冲等违约处置程序的结论。以《违约处置指引》第四十五条为例，“头寸分割”中规定：是否进行头寸分割由上海清算所根据风险敞口、交易类型等具体情况决定。据此，如果上海清算所认为无需进行头寸分割，违约处置专家组自然也就不需参与分割方案的制定。“风险对冲”中虽未明确规定上海清算所可自行决定是否执行风险对冲，但该款规定：风险对冲的目的是降低风险敞口。故循理而论，如果违约机构原有持仓的风险敞口较小，本就在上海清算所的可容忍范围之内，就很可能无需进行风险对冲便可直接拍卖。鉴此，审理庭认为，《业务规

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则》对违约处置专家组作了原则性规定，需由实施细则根据各类业务的不同特点，对于违约处置专家组机制应否适用，以及应如何适用等具体内容作出规定。这并非是对违约处置专家组规则的创制，而是细化落实，并无不妥之处。

4.45 综上，因《违约处置细则三文件》不属于《监督管理规则》第四条规定的“风险管理制度”，也不构成对《业务规则》的重大修改，故无需报请中国人民银行批准。根据《监督管理规则》第六条第（四）项之规定，《违约处置细则三文件》属于中国人民银行授权上海清算所制定的“操作细则”范畴，且相关法律法规及规章并未对操作细则设置报批或报备要求。因此，上海清算所自行制定上述规则，在行政监管层面不存在无效事由，符合条件三的要求。

规则的内容应当公平合理

4.46 《期货和衍生品法》第三十条规定：“组织开展衍生品交易的场所制定的交易规则，应当公平保护交易参与各方合法权益和防范市场风险”，如前所述，该条规定在本案中应当参照适用。据此，上海清算所虽然有权制定相应规则，特别是可以自行制定操作细则，但规则内容的合理性仍不得违反法律的原则和规定。

4.47 以法律视角观之，之所以需要对清算规则的内容进行控制，存在以下原因。首先，在中央对手方集中清算机制的运行过程中，不可避免地会出现利益冲突。本案中，

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上海清算所实行公司制，该种组织形式本身就内嵌着运营者可能将自身利益或股东利益置于参与者利益之上、或是将一部分参与者的利益置于另一部分参与者利益之上的风险，因此在内部会产生清算机构自身、清算机构股东与清算会员之间的利益冲突。此外，在外部，还可能存在清算机构的营利性动机与市场公共利益之间的冲突。上述利益冲突均可能导致规则内容有失公平或有违公益。其次，由清算机构制定的实施细则，虽然具有专业性、灵活性的优点，能够基于市场的具体情况进行快速地修改和更新，但同时也可能产生未充分咨询、听取、吸收相关利益方的合理意见，导致制定的规则未能充分保护相关方利益的情况。因此，司法有必要对相关条款的合理性进行判断，具体可从以下两方面着手，进行综合考量：第一，中央对手方在制定和修改规则时，利益相关方是否有渠道表达自己的意见；第二，规则内容是否公平保护了清算参与各方的合法权益，并有利于防范市场风险。

4.48 第一，中央对手方在制定和修改规则时，利益相关方是否有渠道表达自己的意见，是判断规则内容是否公平合理的一项重要参考因素。《金融市场基础设施原则》原则 2 注释 3.2.18 要求：“金融市场基础设施的董事会在作出重大决定（包括与系统的设计、规则以及总体业务战略相关的决定）时，应考虑所有利益相关者（包括直接和间接参与者）的利益。……在董事会的决策流程中

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引入利益相关方的机制可以包括：在董事会成员中加入利益相关方代表、设立用户委员会、以及公开征求意见的流程。……”[38]。上述规定对于中央对手方应以何种方式考虑利益相关方的意见提供了有益参考。中央对手方是否依照该倡导性原则制定与修改规则，可作为判断规则是否公平合理的参考因素之一。但同时也需要注意的是，中央对手方制定的规则层级多样，内容和目的各不相同，因此，并无统一适用于所有规则的征求意见标准。相关规则否必须征求意见、应通过何种途径征求、征求意见时所披露规则草案及相应理由的详实程度、收集意见的时间长短等，均需结合个案具体情况加以判断，需考虑的因素包括但不限于规则制定或修改的具体内容、受到影响的利益相关方范围、是否存在极端市场情况等。

4.49 具体到本案，上海清算所在争议规则的制定过程中，通过在董事会中加入利益相关方代表，以及公开或定向征求意见的方式，吸纳了利益相关方的意见。首先，上海清算所董事会下设风险管理委员会、业务管理委员会，前者的职责范围包括对上海清算所的重要风险管理制度进行审议，后者负责对上海清算所的业务发展规划及业务发展中的重大事项提出意见等，两个委员会的委员中均包含有多名清算会员机构的代表。本案《业务规则》制定时，曾提交业务管理委员会进行审议。《违约处置

[38] “An FMI’s board should consider all relevant stakeholders’ interests, including those of its direct and indirect participants, in making major decisions, including those relating to the system’s design, rules, and overall business strategy. …… Mechanisms for involving stakeholders in the board’s decision-making process may include stakeholder representation on the board (including direct and indirect participants), user committees, and public consultation processes.” *See* CPSS-IOSCO, *supra* note 1, Principle 2, Explanatory note 3.2.18.

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指引》也曾提交风险管理委员会征求意见。应认为上述规则在公司内部治理层面，已征求了利益相关方的意见。其次，关于公开或定向征求意见。审理庭认为，合理且富有成效的意见征求流程应符合下列条件：意见征求应在规则酝酿形成阶段就着手实施；征求意见的对象应包括规则涉及的利益相关方，征求方式应视受影响利益相关方的不同范围，以公开或定向方式为之；应当给予被征求意见方合理时间，以提交反馈意见；对于提交的反馈意见，应当进行审慎的评估，以决定是否采纳。本案中，双方对于规则条款合理性的争议主要集中于《违约处置指引》及《专家组工作章程》。对于《违约处置指引》，第一版《违约处置指引》系以《利率互换违约处置指引》为基础，结合其他各类业务的特点统合而成。上海清算所在《利率互换违约处置指引》制定阶段即曾通过与清算会员个别沟通、召开研讨会、在官网公开发布征求意见稿等多种形式，征求了利益相关方的意见。第一版《违约处置指引》制定时，上海清算所亦在其官网就草案公开征求意见，设定了一个多月的反馈期限，且在收到提交的建议后，逐条评估并采纳了其中的部分意见，应认为已适当合理地征求了利益相关方的意见。第二版《违约处置指引》征求意见稿并未在官网公布，只通过电子邮箱向全体人民币利率互换业务和人民币外汇交易业务的清算会员发送，且将征求意见期设定为 5 个工作日。考虑到第二版主要的修订仅有两处，均为考

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虑到法律风险而对对冲目标及结果的措辞增删，影响的清算业务种类也仅限于人民币利率互换业务和人民币外汇交易业务，因此，上海清算所采取的上述意见征求方式虽不尽完善，但尚无明显不合理之处，审理庭予以确认。至于《专家组工作章程》，2020 年第一版《专家组工作章程》制定前，上海清算所曾于 2015 年 7 月、2017 年 8 月，为落实当时的《利率互换违约处置指引》中的违约处置专家组机制，向从事人民币利率互换业务的主要清算会员征求意见；2020 年 8 月，又通过向与上海清算所签订违约处置专家组配套协议的签约会员征求意见的方式，收集相关建议，据此制定了第一版章程。第二版《专家组工作章程》征求意见的方式则与第二版《违约处置指引》相同。考虑到《专家组工作章程》中涉及的专家组职能、组成以及目标等内容均已在《违约处置指引》中作出规定，章程的主体内容主要集中于专家组的任期、替换、违约处置中应具体执行的工作流程等，上述内容主要约束参与专家组的机构成员。因此，上海清算所征求意见的方式尚属合理，审理庭予以确认。综上，应认为上海清算所在制定和修改《业务规则》《违约处置细则三文件》时，已对利益相关方的意见进行了较为充分的考虑。

4.50 第二，规则内容应当公平保护清算参与各方的合法权益，并有利于防范市场风险。本案中，机构 A 认为，《违约处置细则三文件》中规定的永久性违约认定条款、违约

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处置专家组目标条款、以及违约机构参与度条款[39]，未能公平保护参与方的合法权益，不合理地免除了上海清算所主要责任，应被认定无效。

4.51 对此，首先需要确定的是，应以何种标准判断条款内容是否公平合理。审理庭认为，《金融市场基础设施原则》原则 13 对违约规则目标的指引性规定可资参考。该条规定："FMI（即金融市场基础设施）应具有有效的、定义清晰的规则和程序管理参与者违约。设计的这些规则和程序应该确保 FMI 能够采取及时的措施控制损失和流动性压力并继续履行义务"[40]。其后的注释 3.13.1 进一步规定，违约规则及程序的主要目标应当包括："（1）即使在极端但可能的市场条件下也要确保及时完成结算；（2）最小化 FMI 和非违约参与者的损失；（3）限制对市场的破坏；（4）为需要时获取 FMI 的流动性便利提供清晰的框架；（5）以审慎和有序的方式管理和轧平违约参与者的头寸以及变卖可用的担保品。在某些情况下，对参与者违约的管理可能会涉及对敞口头寸进行对冲、质押融资，或二者，以便抛售头寸。……此外，某一产品的违约处置流程，还应该充分考虑清算产品的风险特性，例如场内及场外交易市场的差异，以及产品流动性、市场深度、市场参与者等方面的风险概况"[41]。上述指引在利益衡量上体现出下列特点：（1）在违约处置过程中，相

[39] 相关条款参见本意见书第 3.10 段。

[40] " Principle 13: Participant-default rules and procedures *An FMI should have effective and clearly defined rules and procedures to manage a participant default. These rules and procedures should be designed to ensure that the FMI can take timely action to contain losses and liquidity pressures and continue to meet its obligations.*" *See* CPSS-IOSCO, *supra* note 1.

[41] *See* CPSS-IOSCO, *supra* note 1, Principle 13, Explanatory note 3.13.1.

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较于违约会员利益，更需要优先考虑的是非违约会员和中央对手方的利益，以及市场的稳定。因此，违约处置的目标并非是实现违约方利益的最大化，而是尽可能减少非违约方及中央对手方的损失。（2）为了实现这一目标，中央对手方需要借助违约处置规则，及时、迅速、灵活地对违约会员的头寸和担保品进行处理，以控制损失，保证中央对手方职能的正常履行。因此，需要赋予中央对手方对违约处置过程的掌控权。参考上述原则，审理庭对机构 A 提出的三部分异议条款逐一评判如下。

4.52 首先，关于永久性违约认定条款，根据《违约处置指引》第五条及《业务指南》第 3.3.2.3 条的规定：清算会员在规定时点前保证金、清算基金、结算资产或违约金未足额到账的，为运营性违约。运营性违约的次一工作日未及时消除运营性违约情况，或再次发生运营性违约的，上海清算所将对该清算会员进行永久性违约认定。审理庭认为，上述规定并未不当减损清算会员的权利。（1）不同于场内衍生品市场中散户与机构并存的参与者结构，银行间市场的场外衍生品交易参与者均为专业的金融机构，本身即有严格的监管要求和合规要求，也因此具备较高的资信等级。出于稳定经营的需要，金融机构即便在流动性趋紧的情况下，也会倾向于按期足额履行到期债务，尤其是对于金融市场基础设施的债务，以免触发交叉违约，引起信用危机。因此，如果清算会员发生运营性违约之后，在 1 个工作日的补正期限内仍然无法筹

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措资金进行补缴，亦无法向中央对手方提供证据证明存在任何特殊情况，则此时，中央对手方面临的就不再是会员短暂流动性不足的问题，而是对方的信用恶化可能。此时，清算会员将被认定为无法履行对清算所的现有及未来债务。在此情况下，对违约会员的持仓头寸进行部分强平、补足目前欠付保证金的做法已无法达到风险控制的目的，因为其很有可能仍然无法履行后续债务。而继续等待，将会使得停留在中央对手方账簿中的风险敞口越来越大。因此，为防止清算会员的后续违约给清算机构带来更大损失，有必要允许清算机构迅速采取行动，终止违约会员的交易资格，并对其持仓头寸进行强平[42]。

（2）如前所述，清算会员一旦违约，清算机构作为中央对手方就需要承担违约方无法支付而引发的责任。违约机构的持仓头寸在中央对手方的账簿中敞口的时间越长，由于市场价格或其他因素变化而产生的中央对手方的可能损失就越大。因此，需要尽快启动违约处置程序，以轧平账面。任何迟延或不确定，都会使得中央对手方遭受更大的损失，甚至影响到整个市场的稳定[43]。此外，较之场内衍生品，场外衍生品具有非标准化、期限长、流动性较差的特点，这使得中央对手方在进行违约集中处置时，面临平仓难度大，耗时长等问题，因此更需尽早启动违约处置进程。为覆盖清算会员一旦违约可能给中央对手方造成的损失，上海清算所根据《金融市场基础

[42] 刘燕教授等提供的第三方意见亦持该种观点。同注 32，刘燕等文，第 1.3.4 节。
[43] *See* Jiabin Huang, *The Law and Regulation of Central Counterparties*, Hart Publishing, 2010, p.118-119.

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设施原则》原则 6 要点 3 的要求，向全体清算会员收取初始保证金。保证金模型按照假设的违约处置平仓天数、市场波动、风险头寸等条件设计。根据该模型计算得出的保证金，理论上应足以覆盖自上次收取保证金起至参与者违约后头寸被抛售时止，清算所对参与者潜在的风险暴露。根据人民币外汇交易业务的特点，上海清算所将模型中的平仓天数设为 5 天。也即机构 A 交纳的初始保证金，可在 99%以上的置信水平下覆盖自其上次交纳保证金之时起算，在 5 天内产生的损失。此外，对于标准债券远期债券、大宗商品衍生品、利率互换、信用违约互换等业务，上海清算所也分别根据违约处置难易度的不同，设定了自 2 日至 10 日不等的平仓期限[44]。为确保上海清算所能在预设的违约处置期限（平仓期限）内完成风险处置，防止因违约机构自有保证金不足导致的风险外溢，《违约处置细则三文件》将运营性违约的补正期限限定为 1 个工作日，具有合理性。此外，该补正期限，亦为上海清算所公开征求利益相关方意见后，经综合评估确定，可认定为合理[45]。（3）《违约处置细则三文件》虽然设置了 1 个工作日的补正期限，但该期限并非绝对不可变更。《违约处置指引》第五条第三款规

[44] 参见上海清算所：《上海清算所中央对手方清算业务金融市场基础设施原则信息披露（2022）》，载上海清算所官方网站 2022 年 3 月 1 日，https://www.shclearing.com.cn/cpyyw/pfmi/detail_38.html?productDocClient/detail/402852817f321050017f44e2020872d3，第 36 页。

[45] 参见被申请人补充答辩意见书附件一表格二《2016 年<人民币利率互换集中清算业务违约处置指引>征求意见及采纳情况表》，载上海金融法院官方网站 2022 年 12 月 5 日，http://www.shjrfy.gov.cn/jrweb/upload/bsqrbcdbsyj.pdf。意见征集中，有机构认为，运营性违约补正期限只有一天，太短，建议改为 3 个工作日，也有机构建议将补足资金的期限改为几小时。上海清算所综合考虑后，将补正期限设定为 1 天，理由为，如果时间太长，保证金缺口过大，不利于控制违约损失。

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定：特殊情况下，清算会员可以提出宽限申请，宽限期最长为 1 个工作日，经上海清算所审核通过后可以暂缓执行永久性违约处置。上述规定为永久性违约的认定预留了一定的制度弹性，可以应对实践中产生的例外情况，对于未能按时补交保证金、以及重复运营性违约两种应被认定为永久性违约的情形均有适用余地。本案中，机构 A 并未依据该条规定，向上海清算所申请宽限期，故上海清算所直接对机构 A 作出永久性违约认定，并无不当。（4）从国际实践看，对于场外衍生品，永久性违约的认定时机均由中央对手方清算机构自由裁量决定。“永久性违约”系上海清算所采用的概念，对应的法律后果为：对违约会员的全部持仓进行强平，并终止其会员资格。其他境外及我国香港地区的中央对手方清算机构通常使用“违约事件”（Event of Default）、终止事件（Termination Event）[46]指称同等概念。其中，LCH Ltd.《违约处置规则》（*LCH Limited Default Rules*）第 3 条规定：如清算所认为清算会员无法履行或可能无法履行一项或多项合约义务，或发生了自动提前终止事件，则清算所可以采取第 6 条规定的相关措施[47]。Eurex Clearing《清算条件》（*Clearing Conditions of Eurex Clearing AG*）

[46] 此处所指的“违约事件”“终止事件”，含义等同于上海清算所《业务规则》所指的运营性违约及永久性违约，而与 1992 年 ISDA 主协议、2002 年 ISDA 主协议以及 NAFMII 主协议中所指的“违约事件”“终止事件”有别，需注意区分。以 NAFMII 主协议为例，该协议第六条规定了违约事件，当违约事件发生时，为避免守约方的风险敞口继续扩大，主协议赋予守约方提前终止交易并计算终止净额的权利；第七条则规定了终止事件，发生终止事件时，任何一方均无主观上的过错，但由于该事件，双方之间存续的交易已无任何意义，故主协议赋予一方提前终止受影响交易的权利。两份 ISDA 主协议中也有类似的规定。

[47] *See* LCH Limited (LCH Ltd), *LCH Limited Default Rules*, LCH website (Sept. 2017), https://www.lch.com/system/files/media_root/Default Rules.pdf, § 3, §5-6. 其中，第 5 条列举了可认定会员无法履行或将要无法履行义务的若干情形，第 f 款即为：“会员未能向清算所支付任何到期应付的款项”。第 6 条规定了伦敦清算所可采取的违约处置措施，包括终止业务（closing out）、处置担保品、移仓等。

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第 7.2.1 条规定：以下事件构成终止事件：（1）未履行支付义务，未能交纳保证金……。如清算会员发生终止事件，且该事件处于持续状态，清算所可以：(i)向该清算会员发出书面通知……并指定一个合理的宽限期（grace period）来补救相关的终止事件，该宽限期可由清算所不时延长。（ii）……如果在宽限期结束前，终止事件的补救仍未达到清算所的满意程度，清算所可以向清算会员……发出书面终止通知……[48]。OTC Clear《利率及外汇衍生品清算规则》（*OTC Clear Rates and FX Derivatives Clearing Rules*）第 1301 条规定：违约事件指导致清算所认定清算会员无法履行或将要无法履行其在清算文件或合约项下义务的事件，……：（1）清算会员未能根据清算文件支付任意到期金额……[49]。可以发现，上列规则均未明确规定应在何时作出违约认定，而将该权利交由清算所，由后者根据具体情况自行裁度。一旦清算所认为某清算会员已经无法履行或将要无法履行对清算所的债务，即可根据需要，相机作出违约认定决定，继而启动违约处置程序。可见，在具备合理理由的情形下，清算所对永久性违约认定的时机具有决定权。综合上述四点，上海清算所基于保证金对风险的覆盖度以及快速处置违约头寸等原因，将运营性违约的补正期限设

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[48] *See* Eurex Clearing AG, *Chapter I of the Clearing Conditions of Eurex Clearing AG,* Eurex website (Oct.24, 2022), https://www.eurex.com/resource/blob/280396/b13cad6ef3090a78e61385e46afc8ee5/data/k01-chapter01_ab_2022_10_24.pdf, §7.2.1.

[49] *See* OTC Clearing Hong Kong Limited (OTC Clear), *OTC Clear Rates and FX Derivatives Clearing Rules,* Hong Kong Exchanges and Clearing Limited (HKEX) website (Sept. 2017), https://www.hkex.com.hk/-/media/HKEX-Market/Services/Rules-and-Forms-and-Fees/Rules/OTC-Clear/Rules/OTCR_15_CH13.pdf, §1301.

定为 1 个工作日，并无明显不当，审理庭予以尊重。

4.53 其次，关于违约处置专家组目标条款。第一版《违约处置指引》第二十二条规定：违约处置专家组应以获取最佳市场价格与减少对冲损失为目标，拟定违约清算会员未平仓合约的对冲交易方案……。修订后的《违约处置指引》第二十二条则规定：违约处置专家组以减少对冲损失为目标，拟定违约清算会员未平仓合约的对冲交易方案。《违约处置指引》另于第四十五条第（三）项增加以下规定：依据违约处置专家组提供并经上海清算所同意后的对冲交易方案实施所达成的对冲交易价格合理有效，上海清算所不保证该成交价格的即时最优。审理庭认为，上述修改并未不当减损清算会员的权利。（1）从违约处置专家组的设立目的看。在场外衍生品清算中央对手方开展的违约处置中，常会引入违约处置小组机制，由中央对手方从非违约会员机构或其客户中抽调专业人员，与中央对手方的内部工作人员一起，共同组成违约处置小组[50]。这是由于场外衍生品的标准化程度低，处置中常会涉及头寸分割、对冲、拍卖等复杂流程，引入上述机制，可以协助中央对手方形成最优的违约处置方案。《金融市场基础设施原则》原则 13 注释部分的 3.13.4 亦规定：“在某些情况下，CCP 可以从非违约参

[50] *See* The Global Association of Central Counterparties, European Association of CCP Clearing Houses (CCP12-EACH), *CCP Default Auctions Best Practices-Category 2 Issues: CCP Governance and Default Management Groups*, CCP12 website (Sept. 27, 2022), https://ccp12.org/wp-content/uploads/2022/12/CCP_Default_Auction_Category_2_CCP-Governance-DMGs_CCP-Paper_Final_a.pdf, p.6-9. CCP12 即全球中央对手方协会，成员包括 Eurex Clear、上海清算所、日本证券清算公司等 38 家清算机构。EACH（The European Association of CCP Clearing Houses）即欧洲中央对手方清算所协会，其成员包括 19 家位于欧洲的中央对手方清算所。

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与者临时调派人员协助进行抛售或者对冲。CCP 的规则和程序应明确说明调派人员的职责范围和服务期限[51]”。具体而言，违约处置专家组存在的意义和价值主要体现在：第一，在对冲策略制定过程中，专家组成员中的非违约市场机构代表可以从特定风险管理、产品交易以及市场判断等方面，为中央对手方提供来自外部的专业意见支持，这种外部支持有助于中央对手方的内部专家更好地判断并形成最终的违约处置方案。第二，非违约机构作为一个整体，向上海清算所交纳了绝大部分的清算基金。根据违约损失瀑布序列，如果违约会员的自有保证金不足以弥补违约损失，这些清算基金即存在被动用的可能。在此意义上，非违约清算会员与中央对手方在违约处置中存在潜在的利益冲突可能。因此，有必要通过违约处置专家组的形式，使非违约清算会员参与到违约处置过程中，表达他们作为独立的利益相关方，对违约处置方案的具体意见，并对中央对手方的违约处置过程进行监督[52]。然而，需要注意的是，违约处置专家组的存在，只是为了协助中央对手方形成更好的处置方案，违约处置的最终决定权仍然在中央对手方自身。公认的原则是，中央对手方必须在违约处置中保有相当的灵活度，其有权自行决定是否成立专家组。如果违约方的头寸构成简单、处置便捷，且预计损失不会超过其交纳的

[51] *See* CPSS-IOSCO, *supra* note 1, Principle13, Explanatory note 3.13.4.
[52] *See* Futures Industry Association, International Swaps and Derivatives Association (FIA-ISDA), *Governance of CCP Default Management Processes and the Role of Default Management Groups*, ISDA website (Dec.1, 2022), https://www.isda.org/a/TNcgE/FIA-ISDA-Paper-DMG-for-PSG-220906.pdf, p. 2-3.

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初始保证金；或者违约方的头寸虽然复杂，但根据当时的市场状况，组成专家组所需耗费的时间可能导致处置损失的进一步扩大，中央对手方均可依自由裁量，决定不成立专家组而自行处置[53]。国际实践中，多家场外衍生品中央对手方清算所均在违约规则中对违约处置专家组进行了规定。例如，LCH Ltd.《违约处置规则》附录 3“外汇交易清算”第 2.1 条、2.2 条规定：清算所可在外汇交易清算违约处置小组的咨询及协助下，对违约会员的头寸进行分割，并进行风险对冲[54]。Eurex Clear《违约规则》（*FCM Default Rules of Eurex Clearing AG*）4.1.2 条规定：“清算所可就下列事项召集违约处置委员会：（1）设定违约处置对冲交易，包括选择相关交易方、对冲条款及策略，以及协助执行违约处置对冲交易……”[55]等。（2）从违约处置专家组的立场和履职目标看。违约处置专家组由中央对手方召集，协助中央对手方制定并执行风险对冲等处置方案。由其设立目的所决定，专家组对中央对手方负责，同时也代表着非违约会员的整体利益。因此，其立场与违约处置目标与前述《金融市场基础设施原则》原则 13 注释 3.13.1 条的规定一致，即最小化中央对手方和非违约参与者的损失，同时限制对市场的破坏。这就意味着，第一，违约清算会员的利益保护不在优先考虑之列。这点很容易理解，因为如果要在

[53] *Id*., at p.3.
[54] *See* LCH Ltd., *supra* note 47, Schedule 3, § 2.1-2.2.
[55] *See* Eurex Clearing AG, *FCM Default Rules of Eurex Clearing AG*, Eurex website(Aug.1, 2022), https://www.eurex.com/resource/blob/1394234/e66b3c51c3fc7155ece911348c7b8bcd/data/2022_08_01-fcm-regulation-default-rules.pdf, §4.1.2.

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违约处置过程中最大程度保护违约方的利益，中央对手方就必须勤勉尽责地寻找对违约方最有利的处置方案，并根据市场情况，等待最有利于违约方的时机执行强平。这势必会造成违约处置的拖宕和迟延，扩大中央对手方的风险敞口，最终可能危及中央对手方的正常结算。第二，中央对手方和违约处置专家组之所以无需优先考虑违约会员的利益，是因为，违约处置并非是中央对手方向清算会员提供的某项服务，而是中央对手方按照运营规则对其执行的风险管理措施。因此，在违约处置中，中央对手方对违约会员不负有合同法上服务提供方应尽的注意义务，其有权以最有利于自身及未违约会员的方式，快速完成处置，哪怕会因此给违约会员造成损失。第三，中央对手方虽无需优先考虑违约会员的利益，但仍应遵循诚实信用原则，以商业上合理的方式（Commercial Reasonableness）进行处置。1992 年 ISDA 主协议及 2002 年 ISDA 主协议中均有关于“商业上合理”的要求[56]。对于由中央对手方清算所主导的违约处置，同样可资参照。至于上述原则在本案中的具体适用，审理庭将于争点二中详细讨论。（3）从第一版《违约处置指引》第二十二条的文义看，该条规定的是专家组应以何种目标为指引，制定对冲策略。对冲交易的目的在于减少违约机构原有持仓的风险敞口，将其控制在中央对手方可以容忍的范围内。对冲交易的成交价格则关系着违

[56] *See* ISDA, *1992 ISDA Master Agreement (Multicurrency - Cross Border)*, ISDA website, https://www.isda.org/book/1992-isda-master-agreement-multi-currency/, § 14. 2002 年 ISDA 主协议则在两处提到了商业合理性：终止协议的一方应采用具有商业合理性的终止程序，进而得出具有商业合理性的结果。

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约所致损失的大小。因此，第一，该条所谓的“获取最佳市场价格”，并非指对于违约会员而言最有利的对冲交易价格，而是指中央对手方依照本着诚实信用原则而制定的对冲方案，在当时的具体市场环境下所能获得的对中央对手方及未违约清算会员而言的最佳对冲交易价格。在文义上，与修订后的《违约处置指引》第四十五条规定的“上海清算所不保证对冲交易价格的即时最优”不存在根本冲突。第二，“减少对冲损失”本身即蕴含着“获取最佳市场价格”的含义[57]。尽可能获得对中央对手方有利的对冲交易价格，本身就有助于减少对冲损失。同样的，要减少对冲损失，也必须以获得有利的对冲交易价格为前提。综上，修订后的《违约处置指引》删去了容易引起歧义的“获取最佳市场价格”这一表述，并明确规定上海清算所不保证对冲交易价格的即时最优，这一修改并未背离原二十二条的本意，符合《金融市场基础设施原则》对违约处置规则目标的设定，也并未免除上海清算所的法定责任。上海清算所仍应本着诚实信用原则制定并执行对冲策略，如有违反，则应承担相应赔偿责任。

4.54 再次，关于违约机构参与度条款。《违约处置指引》第九条“违约处置配合”规定：“一旦发生违约事件（包括运营性违约和永久性违约），上海清算所将立即展开针对性调查。……上海清算所向违约清算会员调查违约情况时，相关人员应根据上海清算所的要求，及时、完

[57] 同注 32，刘燕等文，第 11 页。

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整地提供相关材料。违约清算会员对违约处置相关保密信息负有保密义务。清算会员有义务配合上海清算所进行违约处置，并对其提供材料的准确性、真实性、完整性承担法律责任”。至于违约清算会员是否可参与违约处置程序，《违约处置细则三文件》未作明确规定。

4.55 审理庭认为，违约机构是否必须参与违约处置过程，《金融市场基础设施原则》等国际标准未对该问题作出规定。从境外及我国香港地区的实践看，是否允许违约机构参与违约处置，以及通过何种方式参与，可由中央对手方自主衡量决定，法律或交易规则对此并无强制要求。例如，LCH Ltd.和 OTC Clear 在各自的规则中设置了违约会员参与违约处置的相关途径；Eurex clearing、新加坡交易所衍生品结算有限公司（Singapore Exchange Derivatives Clearing,以下简称 SGX-DC）和 CME 的规则中，则对该问题未作明确规定。在允许违约会员参与的清算所中，LCH Ltd.《违约处置规则》附录 3 第 9.4 条规定：“为了召开违约处置小组会议以处理某特定外汇类会员的违约事宜，清算所可以在与违约处置小组协商后，邀请违约清算会员提名一名或多名代表加入违约处置小组，协助其在违约管理过程中履行职能……。”[58]。OTC Clear《利率及外汇衍生品清算规则》第 1607 条规定：“根据清算机构要求，违约会员可以指派一名代表参加违约处置小组”[59]，实践中，OTC Clear 的违约会员指派的代

[58] *See* LCH Ltd., *supra* note 47, Schedule 3, § 9.4.
[59] *See* OTC Clear, *supra* note 49, §1607.

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表可以列席违约处置小组会议，观察违约处置过程，但对形成的处置方案没有投票权，也不能参与对冲、拍卖等违约处置行动。从上述规定及落实可见，第一，违约会员的参与并非违约处置的必要步骤，清算所可根据违约事件的具体情况，决定是否要求违约会员派员参与。第二，从目前已知的 OTC Clear 的实践看，违约会员的参与方式仅为间接参与，目的在于通过全程在场，督促中央对手方依诚信原则行事。其所指派的人员并无制定对冲策略，协助执行对冲交易等实质性的职责。

4.56 本案中，机构 A 认为其应在永久性违约认定、违约处置方案拟定、违约处置方案实施过程中享有实质性的参与权——包括对永久性违约认定提出异议并进行申辩、参与对冲方案的决策、享有对持仓头寸自行平仓的权利等。机构 A 诉称上海清算所的规则未赋予违约会员上述参与权利，有失公平，故应归于无效。审理庭认为，机构 A 的主张能否成立，需首先对其主张的“实质参与权”之利弊作一分析。有利之处显而易见，通过吸纳违约会员的意见，中央对手方能够更好地在违约处置中兼顾包括违约会员利益在内的各方利益，降低违约处置纠纷的发生概率。但与此同时，也会带来一系列弊端。如前文多次强调的，迅速完成违约处置，确保中央对手方能够继续正常展业是违约处置程序的首要目标。这一目标可能会因为违约会员的实质性介入而受到影响：（1）如果规定违约会员有权对永久性违约的认定提出异议和申辩，

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中央对手方就必须设定一系列包括异议提出、听证、异议审核、审核结果告知等在内的复杂程序，这会大大延长违约判定的耗费时长，导致无法及时启动后续的处置步骤。（2）如果规定违约会员在违约处置小组中享有实质表决权，基于违约方与清算所、其他非违约方之间存在天然的利益冲突和立场差异，违约会员很可能会反对或阻止专家组制定的快速处置策略，而要求寻找一个更好的处置时点或机会。此时，专家组需要耗费额外的时间处理异议，这会进一步拖延处置进程。而原本，违约会员的利益并不在优先考虑之列。（3）场外衍生品交易具有非标准化的特点，通过个别磋商的形式成交，缺乏场内衍生品交易的公允定价机制。因此，如果规定违约会员在处置过程中有权自行平仓，就很难避免潜在的道德风险。另一方面，违约会员较差的资信状况，亦可能会令其自行处置头寸的价格不够理想，进一步扩大损失。而由清算所委托交易员代为执行平仓操作，就能较好地避免上述问题。基于前述利弊衡量，审理庭认为，强制赋予违约会员实质性的参与权并不可取。更妥当的做法是，由清算所作为违约处置的主导方和决策方，根据违约事件的具体情况，自行裁量决定是否邀请违约方参与违约处置，以及以何种方式参与处置。基于上述分析，《违约处置细则三文件》制定程序正当、相关规则的内容公平合理，不存在无效事由。

4.57　综上，关于本案争点一，审理庭认为，《业务规则》《违

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约处置细则三文件》已向机构 A 进行合理告知，机构 A 同意遵守上述规则，且相关规则已经过监管部门审批，内容公平合理，不存在无效事由，故应对机构 A 发生法律拘束力。

争点二：上海清算所的违约处置行为是否合理

4.58 本案中，机构 A 未能于 2022 年 9 月 19 日 15 时前按时支付保证金，按照《业务规则》第四十七条、《违约处置指引》第五条的规定，构成运营性违约。机构 A 虽于当日向上海清算所出具《清算会员运营性违约承诺书》，承诺在下一个工作日 15 时前支付，但至 2022 年 9 月 20 日 15 时仍未能补交，亦未向上海清算所提出宽限申请。故上海清算所根据上述规定，于 2022 年 9 月 21 日认定机构 A 构成永久性违约，并无不当，本院予以确认。

4.59 双方争议之处在于，上海清算所的违约处置行为是否合理。对此，审理庭认为，可分为程序和实体两方面进行考察。第一，程序方面，违约处置流程是否符合《业务规则》和《违约处置细则三文件》的相关规定。第二，实体方面，具体的违约处置行为是否合理。

程序上，违约处置行为是否符合《业务规则》《违约处置细则三文件》的规定

4.60 违约处置流程合规是处置行为具有合法性的必要前提，在此基础上，方有进一步判断合理性之必要，故需先就此进行审查。以下分阶段述之。第一阶段：认定永久性违约。该阶段中，上海清算所于 2022 年 9 月 16 日终通

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过综合业务系统向机构 A 发送了《日终保证金清单》，明确告知了应补交的超限保证金及盯市保证金的金额，以及支付的截止时间。从机构 A 向上海清算所提交的《清算会员运营性违约承诺书》可见，其已收到保证金清单、认可己方已构成运营性违约、知悉《违约处置细则三文件》规定的补正期限为 1 个工作日，并承诺在宽限期内完成补交。此后，当机构 A 未能按照承诺期限在 2022 年 9 月 20 日 15 时补交保证金时，上海清算所及时于次日即 9 月 21 日 9:05、9:10 分别通过综合业务系统的客户端、电子邮件两种渠道，向机构 A 发出了《永久性违约通知》，通知中列明了机构 A 的违约行为、认定永久性违约的规则依据、永久性违约的法律后果（即上海清算所将依照相关规则采取违约处置措施，机构 A 需承担相应后果），并告知机构 A 在违约处置中应履行配合义务。上述通知已向机构 A 有效送达，应认为上海清算所已经适当履行了通知义务。

4.61 第二阶段：风险对冲。永久性违约认定作出后，上海清算所快速确定了 5 家违约处置专家组机构成员、2 家对冲交易受托机构。最终，专家组的人数为 7 人（含上海清算所的两名成员），符合《专家组工作章程》第十八条“违约处置专家组（代表）总人数应为单数”的规定。5 名外部专家组成员代表和 2 名对冲交易员于 9 月 21 日 10 时 30 分到达上海清算所指定地点后，上海清算所立即采取了相关保密措施，包括要求专家组市场成员代表及对

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冲交易员签订承诺书，承诺对接触到的保密信息承担保密义务；将手机等通讯设备交给上海清算所保管，并开启信号屏蔽器；不得离开指定区域，并对违约处置过程全程录音录像，直至对冲交易完成、拍卖信息在官网公布后半小时方允许离开。上述保密措施有助于建立清算会员机构代表与其所属机构之间的防火墙，防止违约处置信息不当泄露，影响违约处置的顺利进行，符合《违约处置指引》第三十一条及《专家组工作章程》第三十二条、第三十三条、第三十七条的规定。违约处置专家组拟定对冲交易方案后，以一人一票多数决的方式表决通过，并立即将对冲策略提交上海清算所进行审核，获得通过。该流程体现了专家组协助提供对冲建议、由上海清算所作出最终决策的违约处置基本原则，符合《专家组工作章程》第二十三和第二十四条的规定。对冲策略审核通过后，上海清算所向受托交易员传达对冲交易方案，后者以所属机构的名义按照方案要求完成了对冲交易，上海清算所再通过应急录入方式将受托交易转入上海清算所名下。该做法符合《违约处置指引》第四十五条、《专家组工作章程》第二十五条至第三十一条的规定。

4.62 第三阶段：头寸拍卖。上海清算所于 2022 年 9 月 21 日 20 时，在官网公布了拍卖信息，告知了待拍卖头寸的组合明细、现金流、报价截止时间及竞拍成功后的头寸转移方式等，所有从事相关清算业务的会员均可参与竞拍。

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报价于 2022 年 9 月 23 日 12 时截止后，上海清算所从 35 个有效报价中选择了报价最高的机构成交，并于当日 14 时 30 分在官网公布了拍卖结果及中标价格。（1）从上述拍卖的形式看，上海清算所将新增的对冲交易与机构 A 原持仓头寸打包整体拍卖，不作切割，由出价最高的单个竞拍者获得整个资产包。该种拍卖方式被称为“单一单位竞价”(Single Unit Pay Your Price)[60]，是利率互换、外汇掉期业务违约拍卖中的常用方式，常适用于已通过对冲交易降低了大部分的风险敞口的情况，符合国际清算银行 CPMI 与 IOSCO 于 2020 年共同发布的《中央对手方违约处置拍卖—考虑因素》第 4.2.2 条的相关指引性要求。（2）从拍卖的参与者看，基于本次拍卖的具体情况，上海清算所将竞价权开放给所有从事相关业务的清算会员，这一方式较为公平透明，有助于获得更优的竞拍价格。（3）从拍卖的时间设置看，上海清算所给予了竞拍者 40 个小时报价时间。结合拍卖标的的资产构成，上述报价期间较为充足，各竞拍机构可有充分的时间对拍卖标的的价值进行评估，并在此基础上形成报价。故上述时间设置应认为符合《中央对手方违约处置拍卖—考虑因素》第 4.2.4 条的相关指引[61]。（4）从拍卖结果的告知看。拍卖成交后，上海清算所已于当日及时向所有竞拍参与者告知了拍卖结果，应认为已尽到适当的告知义务。因此，上海清算所的头寸拍卖程序符合《业务规

[60] *See* CPMI-IOSCO, *Central Counterparty Default Management Auctions—Issues for Consideration*, IOSCO website (Jun.25, 2020), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD657.pdf, p.10.
[61] *Id*., at p.12.

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则》第五十二条、《违约处置指引》第四十五条的规定，并无不当。

4.63 第四阶段：违约处置结果告知。9 月 23 日当日晚 20 时 30 分，上海清算所通过电子邮件向机构 A 发送了《人民币外汇交易中央对手清算业务违约处置结果通知》，将拍卖情况、损失构成及保证金扣除事宜告知了机构 A，机构 A 收到通知。由于机构 A 在永久性违约后，已被终止清算会员资质，无法再使用综合业务系统的客户端，因此，上海清算所通过电子邮件送达处置结果通知，并无不当，通知内容亦较为明确，故应认为上海清算所已尽到了通知义务。

4.64 综上，上海清算所的违约处置符合《业务规则》及《违约处置细则三文件》的相关规定，程序合法。

实体上，违约处置行为是否合理

4.65 上海清算所作为中央对手方，有权依据相应规则采取及时的违约处置措施以控制损失和流动性压力，为此，其对于违约处置方案的制定和实施具有毫无争议的最终决定权，可以根据单个违约处置的具体情形灵活行使自由裁量权。但权利皆有边界，中央对手方违约处置中的自由裁量并不意味着恣意而为。《民法典》第七条规定：民事主体从事民事活动，应当遵循诚信原则，秉持诚实，恪守承诺。上海清算所同样亦需遵循诚信原则，以审慎和有序的方式管理和轧平违约参与者的头寸，包括对敞

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口头寸进行对冲和拍卖[62]。“审慎、有序”要求上海清算所在行使裁量权时，应当根据当时的具体市场情况，以诚信和合理的方式行事，在违约处置中实现中央对手方机制的最大利益。审理庭对处置行为合理性的审查将限于：在当时情境下，上海清算所的违约处置行为是否存在有违诚信的明显不合理之处，而非根据最终处置结果，重新设想违约处置本可以通过哪种更合理的方式进行。关于上述审查方式，亦有他国司法实践持相似意见[63]。

4.66 本案中，机构 A 提出的不合理处置包括四处：（1）即期交易的头寸分割不合理；（2）对冲交易的询价次数不合理；（3）对冲交易中掉期交易的远端清算日期及金额与机构 A 原持仓头寸不匹配；（4）上海清算所对专家组作出的对冲策略审核时间过长。机构 A 认为，所有四处不合理处置均不当扩大了机构 A 的损失。对此，审理庭认为，《违约处置指引》第四十五条第（三）项“风险对冲”规定：风险对冲的目的在于，将违约会员的待拍卖头寸组合的风险敞口降低到上海清算所可容忍的范围内，据此制定的对冲方案应以减少对冲损失为目标。根据上述规定，就机构 A 提出的异议逐一分析如下。

关于两笔即期交易的头寸分割

4.67 机构 A 认为，美元/人民币外汇即期交易市场交易量大，流动性较好，根据中国货币网公布的月报，2022 年 9 月平均每日成交额约为 247 亿美元，本案两笔即期交易的

[62] *See* CPSS-IOSCO, *supra* note 1, Principle 13, Explanatory note 3.13.1, “(e) managing and closing out the defaulting participant’s positions and liquidating any applicable collateral in a prudent and orderly manner.”
[63] *See Euroption Strategic Fund Ltd. v. Skandinaviska Enskilda Banken AB* [2012] EWHC 584 (Comm).

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名义本金仅有 10.8 亿美元，对市场冲击有限。上海清算所本应将 10.8 亿美元拆分为更小的金额，召集多家受托交易机构的交易员完成交易，以获得更好的交易价格。其不当分割使得成交价格低于同时段市场最优报价 60pips 和 66pips。

4.68 上海清算所认为，银行间外汇市场的参与主体数量有限，如果邀请众多受托交易机构，这些机构就无法作为对冲交易的向对方，这会大大减少整个市场的流动性，不利于违约处置的进行。机构 A 所称的最优价来自于 CFETS2017 外汇交易系统中 ODM 平台，该系统是即期撮合交易平台，挂单金额较小，2022 年 9 月 21 日 14 时 02 分的最优价 6.4540、14 时 04 分的最优价 6.4550 对应的成交量仅为 500 万美元。本案的两笔大额即期系通过询价交易完成，成交价格与 ODM 平台的小额成交最优价不具有可比性。

4.69 审理庭认为，本案中，机构 A 的原持仓包括一笔掉期（名义本金 4.5 亿美元，远端方向为卖美元，远端起息日为 2022 年 12 月 23 日）以及四笔远期（含 3 笔名义本金分别为 1 亿美元、4 亿美元、2.8 亿美元的远期，方向均为卖美元，起息日依次为 2022 年 10 月 28 日、2022 年 11 月 18 日、2023 年 8 月 24 日；以及 1 笔名义本金为 1.5 亿美元的远期，远端方向买美元，起息日 2023 年 6 月 22 日），美元净头寸为-10.8 亿美元。违约处置专家组在制定对冲策略时，并未选择直接通过远期交易对冲平仓头

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寸，而是先使用两笔即期（买入 5.8 亿美元、5 亿美元）对冲了机构 A 的原持仓净头寸的远期汇率风险；然后再通过五笔掉期（包含 4 笔名义本金分别为 1 亿美元、4 亿美元、4.5 亿美元、2.6 亿美元的掉期交易，远端交易方向均为买美元，远端起息日依次为 2022 年 10 月 24 日、2022 年 11 月 23 日、2022 年 12 月 23 日、2023 年 9 月 25 日；以及 1 笔名义本金为 1.5 亿美元的掉期交易，远端交易方向为卖美元，远端起息日为 2023 年 6 月 26 日）对冲了两笔即期交易与机构 A 原持仓远端交易日之间因期限错配而产生的利率风险。之所以通过这种途径进行对冲，是因为在银行间交易市场人民币外汇交易中，掉期的交易量远大于远期的交易量[64]，后者流动性较差，如果直接采用远期交易进行平仓，会导致更大的价格损失。因此，审理庭认为，上海清算所采用的上述对冲方式具有合理性。

4.70 机构 A 提出的第一点处置异议，针对的是前述对冲中的即期交易部分。机构 A 认为，专家组确定的单笔即期交易金额过大，因此不合理。对此，审理庭认为，单笔对冲的金额切分是否合理，不应以该切分方案是否取得了绝对最优交易价格为标准，而应当结合当时的市场状况，判断上海清算所的分割方案是否旨在于当时条件下，追求相对更好的对冲交易价格而定。如果上海清算所已尽到一家中央对手方清算所通常所能尽到的审慎义务，来

[64] 参见汇丰银行（中国）有限公司金融衍生品法律团队：《第三方意见书》，载上海金融法院官方网站 2022 年 12 月 7 日，http://www.shjrfy.gov.cn/jrweb/upload/dsfyj_hfyhjryspfltd.pdf，第 1.1 节。

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决定单笔对冲金额，即应认定其切分行为合理。故审理庭认为，原则上，如申请人没有充分证据证明专家组的违约处置方案存在明显不当，司法机关应充分尊重违约处置中的专家组决策。事实上，即便从本案的实际结果上考量，上海清算所对即期单笔金额的分割及选择通过询价方式完成对冲，亦无明显不当。

4.71 首先，从对冲交易模式的选择看。银行间人民币外汇市场的主要交易模式包括询价交易和撮合交易两种。本案询价交易采用的是请求报价模式[65]，即由上海清算所委托的对冲交易员向做市商请求报价，做市商回价后，对冲交易员选择接受回价并达成交易。至于撮合交易，则指符合条件的会员之间按照“价格优先、时间优先”的原则，通过订单匹配或点击成交等方式达成交易的交易模式。机构 A 提到的 ODM 平台就是中国外汇交易中心设立的人民币外汇即期撮合交易平台。本案中，从执行对冲交易时的市场流动性看，询价交易的市场深度并无可供查询的公开数据。但从 2022 年 9 月 21 日撮合交易平台 ODM 的市场深度看，14 时 02 分、14 时 04 分的平台总报卖量均为 1.2 亿美元。也即，该撮合平台在上述时点报卖的美元总量均各仅有 1.2 亿美元。由于上海清算所需要对冲的总头寸金额为 10.8 亿美元，远大于平台报买量，如果选择通过 ODM 平台完成即期交易，势必需要在短时间内进行单向的大量买入挂单，这种操作会迅速改变

[65] 参见《银行间人民币外汇市场交易规则》第三十九条第（一）项，“请求报价是指做市机构或会员发出交易请求，请求被发送至一个或多个做市机构或会员，由做市机构或会员进行回价，发起请求报价的做市机构或会员接受回价并达成交易。”

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市场的走向，导致美元价格上涨，且后续交易能否成交不确定性较大。因此，上海清算所未选择撮合交易，而是以询价交易的方式进行对冲，符合当时的市场情况。

4.72 其次，从询价交易的对冲金额分割看。如果将大额对冲单拆成小额订单连续成交，可能会产生以下不利情况：第一，我国境内银行间人民币外汇即期交易单笔成交量多集中在 100 万至 1,000 万美元之间[66]。如短时间内有某一交易方抛出多笔、总额巨大的同向买单，很可能会引发市场猜测，认为有违约处置正在进行，进而对交易价格造成不利影响。即便委托多个对冲交易员完成交易，一则会产生上海清算所述的信息泄露及流动性被抽干的问题，二则，大量来自于不同买方的买单也同样会推高成交价格，其传导性虽不如 ODM 平台迅速，但产生的影响同样无法忽略。第二，小额拆分的另一个不利影响在于，由于交易笔数多，成交跨度时间长，对于时间在后的订单能否成交，平仓何时能全部完成，均有很大的不确定性，这会影响违约处置流程的进度，进而可能对整个市场产生不利影响[67]。因此，上海清算所将即期交易的头寸金额分割为 5 亿美元和 5.8 亿美元，并无明显不当之处。

4.73 再次，从最终达成的对冲交易价格看。5.8 亿美元即期的最终成交价格为 6.4606，5 亿美元即期的最终成交价格为 6.4626。对比同时间段 ODM 平台的小额美元报卖价格，

[66] 同注 64，汇丰银行（中国）有限公司金融衍生品法律团队文，第 2.1 节。
[67] 参见赵英敏：《第三方意见书》，载上海金融法院官方网站 2022 年 11 月 29 日，http://www.shjrfy.gov.cn/jrweb/upload/dsfyjszym.pdf，第 1.2.1 节。

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5.8 亿美元即期成交时，ODM 平台金额为 500 万美元的美元最优报买价为 6.4546，与前者成交价的偏离度为 60pips[68]；但随着交易金额的增加，最优报卖价格深度也渐次升高，至金额为 1.2 亿美元时，报卖价格深度为 6.456，与前者成交价的偏离度收窄至 40pips。5 亿美元即期的情况也是类似。从上述事实可见，第一，ODM 平台小额成交的最优报买价，与本案大额询价的成交价格之间，并无对比价值，机构 A 所谓即期交易成交价大幅偏离最优价的主张不能成立。第二，从 ODM 平台显示的即期美元买入交易中，交易量与成交价的正向关联关系，以及当日该平台的价格走势[69]看，本案的两笔大额即期的成交价格高于该平台 1.2 亿美元报卖价格深度尚属正常，并未明显偏离正常情况下的合理流动性溢价。

4.74 综上，机构 A 认为对冲交易单笔金额切割不合理的主张，不能成立。

关于对冲交易的询价次数

4.75 机构 A 认为，对冲方案要求每笔交易询价三次，不符合《NAFMII 主协议》第二十五条关于“市场报价”的规定。根据后者，终止净额计算方须尽可能寻求至少四名参考做市商于基准日提供其报价，并且在合理可行的范围内，要求各参考做市商均在同一日期和时间（不考虑时区）提供其报价。因此，作为行业惯例的询价次数应

[68] 1pip=0.0001。

[69] 参见被申请人证据 34，载上海金融法院官方网站 2022 年 11 月 1 日，http://www.shjrfy.gov.cn/jrweb/upload/bsqrzjyzl.pdf。

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为四次及以上。

4.76 上海清算所认为，CPMI 和 IOSCO 共同发布的《中央对手方违约处置拍卖—考虑因素》中提到，中央对手方在执行对冲交易时，可以向多方询价，但并未限定询价的次数。专家组基于本案具体情况，决定进行 1 对 3 询价并无不当。询价中，交易员综合考虑了持仓规模、做市能力、既往是否曾有同类的大额交易、以及与本机构是否存在利益冲突等因素，确定了被询价的做市商。实践中，大额交易无法获得全数回价实属正常，因此，虽然两笔大额即期未获得全数回价，但交易员在回价中接受报价较高者成交，具有合理性。

4.77 审理庭认为，首先，机构 A 援引的《NAFMII 主协议》第二十五条于本案并无参照价值。《NAFMII 主协议》适用于银行间市场的双边衍生品交易。对于因一方违约而引起的交易提前终止，《NAFMII 主协议》为终止净额计算方提供了两种计算“被终止交易的公允市场价值”的方法，第一种即为机构 A 提到的“市场报价法”，另一种为“替代交易法”[70]。“市场报价法”指由终止净额计算方（或其代理人）尽可能寻求至少四名参考做市商进行报价，后者提供的报价为：如果自己与终止净额计算方达成替换交易，应当支付给终止净额计算方、或者终止净额计算方应当支付给自己的金额。如果终止净额计算方收集到的报价不少于 3 个，需要去掉最高及最低

[70] 参见《NAFMII 主协议》第九条第（二）款第 3 项，载中国银行间市场交易商协会官方网站 2021 年 10 月 29 日，https://www.nafmii.org.cn/zlgl/bzxy/bzxywb/jrys/202208/P020220814471434758828.pdf。

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的报价，取剩余报价的算术平均值作为被终止交易的公允市场价值；如少于 3 个报价，就视为无法适用“市场报价法”。由此可见，“市场报价法”是在合约终止的前提下，用来计算该合约公允价值的一种方法。《NAFMII 主协议》的上述规定来源于 1992 年版 ISDA 主协议，该协议第十四条要求，确定市场报价的一方应在相关市场上真诚地选择四个具有最高信用等级的主要交易商作为“参考做市商”来提供报价[71]。但由于市场报价法运用的内在局限性，2002 年版的 ISDA 主协议未再采用市场报价法，而是改为“终止净额法”，允许守约方参照一个或多个第三方提供的相关市场数据或基于内部信息或估值模式来确定终止结算额[72]。

4.78 但在本案争议的对冲中，机构 A 的原有合约并不终止，而是继续存续。本案的询价方式与普通衍生品双边交易的询价方式并无不同，用于实际成交，这与 NAFMII 市场报价法中用于计算公允价值的报价有所不同。因此，机构 A 主张本案 1 对 3 的对冲询价方式违反市场惯例的主张不能成立。

4.79 其次，在人民币外汇市场的询价中，并不存在关于询价次数的市场惯例[73]。《中央对手方违约处置拍卖—考虑因素》在“对冲交易执行方式”项下提到：“CCP 在寻求执行对冲以管理违约参与者投资组合的风险时，可能会参考多个价格来源。然而，一旦市场发现 CCP 正在寻求

[71] *See* ISDA, *supra* note 56.
[72] 同注 32，刘燕等文，第 22 页。
[73] 同注 67，赵英敏文，第 1.2.4 节；同注 64，汇丰银行（中国）有限公司金融衍生品法律团队文，第 3 页。

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交易多种对冲型产品，则可能会猜测这些产品类别已经发生违约事件，进而导致市场价格变动的风险增加。CCP在决定最合适的对冲策略执行方式时，应权衡信息泄露的风险和获得有竞争力的价格的目的”[74]。因此，询价次数应由中央对手方根据对冲交易的种类、金额、流动性，结合当时的市场情况、处置时点等因素进行综合判断。

4.80 具体到本案，如果询价次数过少，就无法对询价结果进行比较，确定回价的合理性。但询价次数过多也未必一定对成交结果更有利。有大额订单在询价的消息一旦在市场上传播，可能导致市场价格或交易对手报价向不利于平仓价格的方向发展。因此，违约处置专家组决定就即期和掉期的对冲交易均进行 1 对 3 的询价，并无明显不当之处。两笔即期交易中，对冲交易员在审慎尽责地选择了询价做市商的情况下，各进行了 3 次询价，但只分别获得 1 个及 2 个回价。由于专家组制定的对冲策略并未对回价次数进行限制，交易员遂选择回价中较高者成交。鉴于实践中，大额外汇交易分别询价未获全数回复的情况时有所见，故专家组基于迅速完成对冲交易、减少风险敞口的考虑，未设置回价次数，并无明显不合理之处。交易员根据既定对冲策略完成交易，并无不当。因此，机构 A 认为询价次数不合理的主张，不能成立，本院不予采信。

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[74] *See* CPMI-IOSCO, *supra* note 60，§4.1.(iv). 译文参见注 32，刘燕等文，第 2.4.1 节。

关于掉期对冲交易的金额及远端清算日与机构 A 原持仓头寸的匹配度

4.81 机构 A 认为，5 笔掉期对冲交易中，仅有 1 笔的远端清算日及金额能与机构 A 的原有持仓相匹配，其余各笔均有较大差异，这种不匹配，使得风险未能完全对冲，机构 A 的损失扩大。

4.82 上海清算所认为，标准期限的掉期交易流动性要好于非标准期限的掉期交易。因此，在制定对冲策略时，上海清算所选择了与原持仓到期日最为接近的标准期限。5 笔对冲掉期交易中，有 4 笔的期限基本匹配，故名义本金金额无需调整。但有 1 笔 1.5 亿美元对冲交易的远端期限为标准期限 12 个月，但对应的原持仓头寸却将于约 11 个月后到期。由于掉期产品期限越长、利率风险就越大，为对冲期限错配期间的利率风险，违约处置专家组遂以 2.8 亿美元×11 个月÷12 个月，计算出对应的名义本金金额约为 2.6 亿美元，据此执行了对冲交易。因此，对冲交易与原持仓头寸不完全匹配实属正常，并未侵害机构 A 的利益。

4.83 审理庭认为，根据《违约处置指引》第三十六条第（二）项的规定，对冲交易的目的在于将违约会员的持仓头寸风险敞口降低到可容忍的范围内，具体可容忍范围由上海清算所根据实际情况确定。换言之，风险敞口不必降为零，只需降低到上海清算所可承受、亦有利于后续拍卖顺利进行的小敞口即可。该条规定赋予了上海清算所

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必要的灵活度，使其能够根据不同的具体情况制定最适合的对冲策略，符合《中央对手方违约处置拍卖—考虑因素》4.1“对冲策略”的相应要求：“在规则中保留灵活性十分重要，这有助于CCP根据违约会员的头寸持有情况或现有的市场条件要求，来制定对冲策略”[75]。本案中，根据本意见书第4.69段载明的交易数据，机构A所列的头寸及清算日对比表[76]中，左列5笔对冲交易的交易日期均为2022年9月21日，以该日为基准，最接近原持仓到期日的标准期限依次为1个月、2个月、3个月、9个月和1年，违约处置专家组遂决定进行上述标准期限的对冲交易，各笔交易的远端起息日即为左列所示。对比可见，表中的第1至第4笔对冲与原交易的期限匹配度较好。第5笔交易，由于执行了1年的标准期限，导致与原持仓头寸到期日有约1个月的期限错配。审理庭认为，上述对冲交易的期限和金额设定并无明显不当之处。虽然理论上，对冲交易的远端清算日如能与原始交易的远端清算日完全匹配，就能达到最好的风险对冲效果。但考虑到非标准期限交易的流动性不及标准期限交易[77]，若坚持以完全对应的非标准期限交易进行对冲，很可能会影响对冲交易的价格，扩大对冲损失，因此，用日期接近的标准期限交易进行平仓是较为合理有效的做法[78]。本案中，上海清算所正是采用该种做法，将机构A

[75] *Id.*, at p.7.
[76] 参见本意见书第3.14段。
[77] 在人民币外汇衍生品交易中，标准期限为：1周、2周、3周、1个月、2个月、3个月、4个月、5个月、9个月、1年、18个月、2年和3年。
[78] 同注64，汇丰银行（中国）有限公司金融衍生品法律团队文，第1.2节。

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原持仓头寸的风险敞口降低了 90%以上，已达到了显著降低风险敞口的目的，符合《违约处置指引》第三十六条第（二）项的规定。至于第 5 笔交易的名义本金差额问题，系为解决期限错配导致的利率风险问题所致，上海清算所的解释较为合理，审理庭予以采纳。因此，上海清算所对掉期交易期限及金额的设定，并无明显不合理之处，机构 A 就此提出的异议不能成立。

关于上海清算所对专家组对冲策略的审核时间

4.84 机构 A 认为，上海清算所的审核时间过长。违约处置专家组中，本就包括了风险管理委员会主席及一名委员。因此，在报请审核阶段，上海清算所仅应就对冲后风险敞口是否在可容忍范围内等问题进行形式审核，而不应再作实质审。但本案中，上海清算所花费了整整 1 个小时才完成审核。由于外汇市场尤其是即期市场价格波动大，1 个小时足以使得原对冲策略失去时效性，因此该方案已非最佳方案。

4.85 上海清算所认为，1 小时的审核时间合理。前 20 分钟，上海清算所将交易方案手稿整理为电子文件并对预期对冲效果进行内部试算。后 40 分钟，专家组向上海清算所的风险管理委员会汇报对冲交易方案，后者就当时的市场情况、对冲方案主要风险点、可能的潜在市场影响等问题询问专家组，确认方案合理后通过审批。审批违约处置方案是上海清算所作为中央对手方的必要风控环节，上述审批过程并未超出合理范围。

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4.86 审理庭认为，《违约处置指引》第二十四条规定：“违约处置专家组将头寸分割和风险对冲方案提交上海清算所，上海清算所审核通过后执行，审核内容包括风险对冲后待拍卖头寸组合的风险敞口是否在上海清算所可容忍的范围内等。如上海清算所审核不通过，违约处置专家组应重新制定方案，重新提交上海清算所审核”。结合前述对违约处置专家组职能和设置目的的分析，以下几点值得注意：首先，上海清算所的审核不应仅限于形式审查。如前所述，上海清算所的违约处置专家组主要由未违约清算会员派出的市场成员代表组成，实行一人一票的表决机制，旨在为中央对手方拟定违约处置方案提供外部专家意见支持，并代表整体未违约清算会员的利益参与违约处置。专家组中虽有上海清算所的成员，但上述成员作出的表决代表的系其作为内部专家的个人立场，并无证据表明其在投票前已征求上海清算所的意见并获得后者批准。正如 FIA 与 ISDA 共同发布的《中央对手方违约处置程序管理及违约处置小组的角色》所述，虽然违约处置小组担当着前述职责，但并不因此成为中央对手方的正式治理者，违约处置小组完全认同，只有中央对手方才是违约处置的最终决定者[79]。因此，对于专家组作出的对冲策略，应由中央对手方结合对冲方案的复杂程度、方案是否存在较大分歧、当时的市场具体情况、立即实施处置方案是否会对市场造成重大影响、应否等待更佳时机执行处置等多重因素，自主决定应作何种程度的审查。其既可以只作数据上的简单复核，也

[79] *See* FIA-ISDA, *supra* note 52, p.3.

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可以基于需要进行实质审核。只要该种决定系本着诚信原则，以合理的理由作出，即应获得司法的支持。

4.87 具体到本案，一方面，机构 A 的持仓构成较为简单，据此制定的对冲策略也并不复杂。专家组经表决，全票通过对冲策略，显示专家组成员就对冲策略并无明显的分歧和冲突。2022 年 9 月 21 日当日，外汇即期交易市场的波动较大，从 ODM 平台当日的美元即期交易数据看，至 13 时，美元最优报卖价较之当日的开盘价上涨了 721pips。上列事实一般意味着，中央对手方应当尽快完成就对冲交易策略的审核。但另一方面，本案需要立即平仓的头寸总额较大，达到 10.8 亿美元，很可能对市场造成一定程度的冲击，从这个角度而言，中央对手方对于对冲策略的审核又应当较为慎重。本案中，上海清算所耗费的审核时间虽然较长，但结合其审核的内容和步骤看，尚不能认为其存在以不诚信之态度、故意为不合理拖延的情形。

4.88 综上，关于本案的第二个争议焦点，审理庭认为上海清算所采取的违约处置措施不存在明显不合理之处。

4.89 最后，机构 A 主张的对冲交易阶段损失 34,274,614.10 元、以及拍卖阶段损失 9,252,108.29 元中，除拍卖头寸在拍卖日的日终盯市价值[80]与拍卖最终成交价之间的差额损失 6,563,404.90 元之外，其余各项均为相应头寸因市场波动，导致盯市价值的变化而产生的损失。双方就盯市价值的计算方式并无异议，而拍卖最终成交价与拍卖头寸估值间存在的差价，系竞拍者对风险判断不同，亦属正常。

[80] 即上海清算所对拍卖头寸的日终估价。

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机构 A 要求上海清算所赔偿对冲交易损失及拍卖阶段损失的请求，缺乏相应依据。

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5. 审理庭最终结论

5.1 综合前述关于两大争点的论述，审理庭依据《中华人民共和国民法典》第七条、第十条以及《中华人民共和国期货和衍生品法》第三十七条之规定，结合国内外金融市场惯例，形成以下司法意见。

5.2 审理庭对机构 A 的损害赔偿请求不予支持。

5.3 针对金融市场基础设施的法律地位、中央对手方清算业务相关规则的效力以及具体违约处置行为合理性等问题，在法律适用上应当遵循以下三项原则：（1）在符合《民法典》等民事法律基本原则的前提下，优先适用金融法具体规则；（2）充分尊重国内外金融市场惯例；（3）全面考量金融监管与金融审判的规则协同。

5.4 机构 A 作为专业金融机构，在申请加入上海清算所前，应自行查阅了解上海清算所公布于官网的相关规则。签订《清算协议》时，上海清算所无需就《业务规则》《违约处置细则三文件》的内容，对清算会员进行提示及说明。

5.5 上海清算所制定的规则，在同时符合下列条件的情况下，对清算会员产生法律拘束力：（1）规则已向清算会员进行合理告知；（2）清算会员同意遵守规则；（3）对于需经监管批准方能生效的规则，应当获得监管部门的批准；（4）规则内容公平合理。

5.6 上海清算所对已获审批《业务规则》的重大修改，是指对原有《业务规则》内容进行实质性变更，以致影响监

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管目的的实现。下列情形不应被认定为“重大修改”：（1）对《业务规则》的规定进行措辞调整，不改变规则实体内容的；（2）根据《业务规则》中的原则规定所制定的具有可操作性的细则规定；（3）虽对《业务规则》的内容作了变更，但不构成对原规则的根本性改变和偏离的；（4）规则内容变更或细化没有增加风险或偏离监管目标，而是更好地控制了风险。

5.7 上海清算所实施的违约处置行为，应符合下列要求：（1）程序方面，违约处置流程应符合违约处置规则的相关规定；（2）实体方面，违约处置以保护上海清算所及未违约清算会员的利益为优先，上海清算所在制定和执行违约处置方案时，应遵循诚信原则，以审慎、合理的方式行事。

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二〇二三年二月二十二日

审理庭助理　　刘　蒙
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审理庭助理　　赵丹阳

致 谢

本案是上海金融法院金融市场案例测试机制试行后，审结的首例案件。自案件受理以来，得到了启动申请人上海清算所、交通银行股份有限公司、上海浦东发展银行股份有限公司、兴业银行股份有限公司、法国兴业银行（中国）有限公司的大力配合和支持。代理申请人的上海虹桥正瀚律师事务所及其临港新片区律师事务所的王正律师、钱前律师及其团队，代理被申请人的北京国枫（上海）律师事务所朱黎庭律师、袁晓东律师及其团队，为本案的顺利推进付出了大量公益的辛勤劳动，并展示了令人印象深刻的专业素养。审理庭对上述参与方及代理人表示衷心感谢。

案件受理后，审理庭收到了多份由独立第三方提供的《第三方意见书》，提供者包括（按第三方意见的提交时间排序）：供职于星展银行（中国）有限公司的赵英敏先生；供职于中国金融期货交易所的程红星先生；北京市金杜律师事务所金融衍生品团队；北京大学法学院刘燕教授及刘月、杨骐玮博士；汇丰银行（中国）有限公司金融衍生品法律团队；供职于德国商业银行股份有限公司的顾红女士，以及上海市方达律师事务所金融争议团队。上述意见书为本案相关法律及实务争议的厘清提供了宝贵的参考意见，审理庭对上述各方对本案的关心和支持致以诚挚的谢意。

审理中，为深入研判本案所涉各项法律争议，审理庭进行了

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多次研讨，业内诸多专家不吝赐教，他们是中国人民大学法学院叶林教授、华东政法大学经济法学院吴弘教授、浙江大学光华法学院张谷教授、华东政法大学法律学院金可可教授、上海市高级人民法院金融审判庭单素华庭长、华东政法大学国际金融法律学院郑彧教授、复旦大学法学院班天可副教授、中国金融期货交易所期货市场巡回审理协作部负责人程红星先生（以上排名不分先后）。在此，审理庭对各位专家教授对本案的关心和支持表示由衷感谢。

最后也要特别强调的是，在上海金融法院积极探索金融市场案例测试机制的过程中，最高人民法院和上海市高级人民法院有关领导始终给予了大力支持和有力指导，金融业界、法律实务、学术界以及金融监管部门给予了积极反馈和支持，审理庭专此一并深表谢忱。

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附件：司法建议书（略）

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Frequently Asked Questions on DLT and blockchain in bond markets

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Introduction

Distributed ledger technology (DLT) and blockchain represent an exciting new frontier in the evolution of fixed income securities issuance and trading. Several institutions including the World Bank, European Investment Bank, as well as financial and corporate issuers around the world have issued DLT-based debt instruments.[1]

These instruments, involving the use of DLT or blockchain in one form or another, promise to bring about significant efficiencies in the automation of post-trade and asset-servicing processes, with operational efficiencies such as streamlining issuance flows, identifier creation, settlement cycle compression, and payments automation.

However, there appears to be limited knowledge and understanding amongst market stakeholders of the nature of DLT-based bonds, the implications for issuance and settlement processes, market infrastructures and intermediaries, and underlying technologies.

This set of Frequently Asked Questions ("**FAQs**") developed by ICMA, seeks to raise market awareness by clarifying some of the fundamental questions related to DLT and blockchain in bond markets, in a manner that is easy to understand. Where feasible, the FAQs rely on existing definitions and terminology used by central banks, multilateral financial institutions or regulatory bodies to ensure consistency and avoid any ambiguity that may arise from the introduction of new concepts or terms.

Given the variety of DLT bonds and the various issuance structures, this set of FAQs does not attempt to be a comprehensive reference or prescribe specific approaches. Instead, it seeks to serve as an entry point for non-experts to gain a basic understanding of DLT bonds and their impact on capital markets.

The FAQs are intended to be a living document and will be updated and revised regularly to ensure they remain relevant to developments in the fast-evolving DLT bonds space.

1. What is distributed ledger technology? What is blockchain?

Distributed ledger: a collection of data that is spread across multiple nodes [ie computers] and whose consistency is enforced by means of a distributed ledger technology (see next).

[1] See ICMA's FinTech tracker of DLT-based bond issuance, trading, settlement, distribution as well as repo and securities lending transactions.

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(FSB: Decentralised financial technologies: Report on financial stability, regulatory and governance implications, 2019)

Distributed ledger technology (DLT): a means of recording information through a distributed ledger. These technologies enable nodes [ie computers] in a network to propose, validate, and record state changes (or updates) consistently across the network's nodes – without the need to rely on a central trusted party to obtain reliable data. (FSB: Decentralised financial technologies: Report on financial stability, regulatory and governance implications, 2019)

Blockchain: a form of distributed ledger in which details of transactions are held in the ledger in the form of blocks of information. A block of new information is attached into the chain of pre-existing blocks via a computerised process by which transactions are validated. (FSB: Crypto-asset markets: Potential channels for future financial stability implications, 2018)

2. What are virtual assets, crypto assets and (native) digital assets?

The following definitions are based on official sector publications or recommendations, notably by the Financial Action Task Force (FATF), the Financial Stability Board (FSB) and the European Central Bank (ECB). Some of the below terms are sometimes used interchangeably and definitions may vary depending on the jurisdiction and perspective, for a example, whether from a regulated, financial markets angle, a crypto-market perspective or through a broader anti money laundering (AML) lens.

Virtual asset: a digital representation of value that can be digitally traded, or transferred, and can be used for payment or investment purposes. Virtual assets do not include digital representations of fiat currencies, securities and other financial assets that are already covered elsewhere in the FATF Recommendations. (FATF recommendations, Updated March 2022)

Crypto-asset: a type of private asset that depends primarily on cryptography and distributed ledger or similar technology as part of their perceived or inherent value. These are also referred to as cryptocurrencies. (FSB: Crypto-asset markets: Potential channels for future financial stability implications, 2018). The EU's proposed Markets in Crypto-Assets (MiCa) regulation defines a crytpo-asset more broadly as "a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology" (Art. 3-1 (2)). Examples include Bitcoin, Ether, Tether, Algorand and Stellar, amongst others.

Digital asset: a digital instrument that is issued or represented through the use of distributed ledger or similar technology. This does not include digital representations of fiat currencies. (FSB: Assessment of Risks to Financial Stability from Crypto-assets, 2022)

Native digital asset: a security that is originally issued, recorded and kept in a DLT-based system. (ECB: The use of DTL in post-trade processes, 2021)

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3. What is a Central Bank Digital Currency (CBDC)?

A Central Bank Digital Currency (CBDC) is a digital form of central bank money eg a digital banknote which would be a direct liability of a central bank. CBDC designed for use by individuals and businesses is also referred to as "retail CBDC" (rCBDC) or "general purpose CBDC". A CBDC for financial institutions is referred to as "wholesale CBDC" (wCBDC) and could be used to settle financial transactions.

Source:
Federal Reserve, FAQs, Currency and Coin
BIS Innovation Hub work on central bank digital currency

ICMA members note that regulators and central banks globally have adopted different definitions of central bank digital currency. For example, the use of DLT being a criterion for some but not for others.

Further reading:
Wholesale central bank digital currency experiments with the Banque de France, November 2021.
BIS Innovation Hub, the Swiss National Bank (SNB), SIX: Project Helvetia: A multi-phase investigation on the settlement of tokenised assets in central bank money.

4. What are so-called stablecoins?

A stablecoin can be described as "a crypto-asset that aims to maintain a stable value relative to a specified asset, or a pool or basket of assets". The underlying mechanics of so-called stablecoins may vary and include:

- "Asset-linked stablecoins" which "purport to maintain a stable value by referencing physical or financial assets or other crypto-assets". Examples include Tether, USD Coin, or Euro Coin.
- "Algorithm-based stablecoins" which "purport to maintain a stable value via protocols that provide for the increase or decrease of the supply of the stablecoins in response to changes in demand. Examples include DAI, and TerraUSD (which collapsed in May 2022[2]).

However, the FSB notes that "stablecoin issuers are not subject to a consistent set of standards regarding the composition of reserve assets backing the stablecoin, and there is a lack of consistency in disclosure practices among stablecoin issuers"[3], amongst other risks and vulnerabilities. (FSB: Regulation, Supervision and Oversight of "Global Stablecoin" Arrangements, Final report and High-Level Recommendations, 2020)

[2] Terra crisis fans regulatory concerns over $180bn stablecoin market, Financial Times, 11 May 2022, available at: https://www.ft.com/content/48d82c7a-495f-4d5e-a87a-a56bea58e760
[3] FSB: Assessment of Risks to Financial Stability from Crypto-assets, 16 February 2022, p. 11

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Further reading:
ECB: The expanding functions and uses of stablecoins, published as part of the Financial Stability Review, 2021
G7 Working Group on Stablecoins, IMF, BIS-CPMI: Investigating the impact of global stablecoins, 2019

5. What are DLT bonds?

Whilst there is no single, widely accepted definition, the term "DLT bonds" is understood to be an instrument whose register of ownership is stored using DLT (see Q&A 1).[4]

While the nature of DLT bonds continues to evolve, two different models can be distinguished:

a) Bonds issued natively onto a distributed ledger or blockchain. Such securities are held and traded through the DLT or blockchain environment, ie outside the traditional market infrastructure. The creation and existence of such bonds will be specific to each transaction and will likely differ across transactions. This type of instrument could also be referred to as a "native digital asset", "security token" or "bond token" depending on the deal structure.

   Examples include:
   - SIX Group (CH1142754337, 0.125%, 27/11/2026). See press release.
   - EIB (FR0014003521, 0%, 28/04/2023). See press release.
   - World Bank "BOND-I" (AU0000020612, 2.20%, 28/08/2020). See press release.

   See further examples on ICMA's tracker of new FinTech applications.

b) Traditional bonds which are immobilised from an operational perspective ie held by an (I)CSD or custodian and represented through a token on a blockchain or DLT network (see also Q&A 6). Whether a token holds legal value or not depends on the specific jurisdiction and the underlying operational configuration. This type of instrument could be referred to as a "tokenised bond", or "non-native security token".

   Examples include:
   - Deutsche Börse/HQLAx platform for collateral swaps in the securities lending market, where securities are not physically moved between the collateral agents but change in ownership is recorded on a DLT-based register. See further information here.

In both cases, bonds can be referred to as tokenised assets. Critical bond information including, but not limited to, DLT bond identifiers, issuance amount and maturity, coupon,

[4] From an IT perspective, a DLT or blockchain system will need to satisfy a number of technical requirements, such as consensus mechanisms to validate transactions, level of distribution, and data structure, amongst others, to be classed as such. ICMA's DLT Bonds Working Group may consider elaborating on such criteria at a later stage.

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features and corporate actions, identification of approved operators, transfer conditions and other reference data can be embedded into its code-based representation.

DLT bonds are sometimes also referred to as blockchain or digital bonds. While DLT and blockchain are used interchangeably, there is no market consensus on the use of the term "digital bond", which can be used loosely to refer to any debt security issued in dematerialised, ie electronic form (see also Q&A 6) irrespective of the use of DLT or blockchain.

Further reading:
ECB: The use of DLT in post-trade processes, 2021
OECD: The Tokenisation of Assets and Potential Implications for Financial Markets, 2020

6. What is the difference between between DLT bonds and traditional bonds, and how they are held?

Traditional bonds are typically held in either physical or dematerialised (account-entry only) form, through a series of intermediaries linking the issuer and the ultimate noteholder. They may also be held by noteholders directly in physical form, although this is now rare[5]. By way of summary:

- *Physical*: The entitlement to bonds issued in paper-based form, also referred to as "definitive", "materialised" or "certificated", is represented by possession of a physical instrument, such as a bearer bond. Historically, Eurobonds issued under English law and held for the two ICSDs (Euroclear Bank and Clearstream) were in "definitive form".
- *Dematerialised:* The entitlement to dematerialised bonds such as registered bonds is represented in account-entry records and transfers made by book entries but there is generally no physical instrument, also referred to as "uncertificated bonds" in some jurisdictions. Dematerialised instruments are prevalent in most European jurisdictions. The examples referred to in Q&A 5 (a) fall in this category. Physical certificates can be issued to evidence title in dematerialised bonds, but it does not represent legal title itself.
- *Immobilised*: Physical bonds are now generally immobilised and issued in the form of a single physical instrument, referred to as a "global" instrument. They are held by a depository or nominee, and the ultimate entitlement to which is represented by the account-entry records and transferred by book entries in those records. This is typically now the case for most Eurobonds which are issued in physical form.

DLT instruments use DLT or blockchain to perform the role of the keeping of records and book entries. As noted above in Q&A 5, DLT or blockchain could be used to perform a similar role to the records in bearer or dematerialised bonds (and regardless of immobilisation), depending on the legal structure adopted. Note the term "immobilised" in Q&A 5 relates to

[5] It is commonplace however for bond documentation to be drafted in a manner that assumes the bonds are held in definitive form, even if this isn't the case in practice. A mechanism for exchanging interests in a global instrument for definitive instruments is often also included, designed to operate as a fallback in the event the clearing systems fail.

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an operational, rather than a legal feature, and refers to a traditional instrument in its different forms described above, which is held or immobilised and represented through a token on a DLT network, where for example, change of ownership can be recorded.

Critically, a DLT bond is still a "bond", being ordinarily understood as a bundle of legal rights as between an issuer and holder, having enforceable existence and with the capacity to be traded. Whether DLT or blockchain can be used to perform some or all of the roles described above (including if the DLT or blockchain can ever be the "source" of the legal rights and obligations between issuers and holders) will be dependent on a mix of law and contract and each jurisdiction is likely to be different. This will have an impact on the future utility and functionality of DLT bonds. See further information on how law and regulation are adapted in key jurisdictions in ICMA's DLT Regulatory Directory

See annex 1 and 2 for a visual representation of how a traditional bond in immobilised form may be held compared to a DLT bond.

Some of the implications and benefits of a new blockchain- or DLT-based systems are outlined in Q&As 10 and 11.

7. How does DLT bond documentation generally differ from traditional legal bond documentation?[6]

In principle, the note itself as well as regulatory documentation such as a prospectus, are expected to be similar to that used in traditional bonds. However, provisions in the documentation for a DLT bond are expected to differ from traditional bonds in a few key respects, stemming from the differences in the legal structure of the bond and any related obligations of the issuer and its potential agent(s). Generally, the documentation of a DLT bond is expected to:

- Accurately reflect how the DLT bond is held from a legal perspective, as described in Q&A 6. This may necesstitate adapting or removing many of the provisions typically seen in traditional bond documentation as regards the legal form of the bonds – for example, the provisions regarding the bearer or registered form of the bonds.
- Accurately reflect the different issuance and lifecycle processes applicable to DLT bonds, as described in Q&A 11. This may necessitate adapting, removing or supplementing the provisions concerning how the DLT bond is safekept, as well as the way record keeping, payments and corporate actions functions are delivered. The roster of transaction parties (eg agents, registrars etc) acting in relation to a DLT bond may differ from a traditional bond, too. The documentation appointing those transaction parties may therefore need revision.
- Ensure that the terms and conditions of the DLT bond are compatible with the relevant DLT or blockchain-based system on which the bonds are recorded, ie ensure the terms and conditions can be converted into computational logic where needed. This is particularly true of DLT bonds that are digital native assets, where the terms

[6] The term "documentation" refers to all documents needed in relation to a bond issuance, including prospectus or offering circular, contractual agreements between parties involved and others subject to local law and regulatory requirements.

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and conditions may be coded onto a DLT or blockchain-based system in the form of a smart contract.

However, it should be expected that core functions of legal documentation, such as disclosure of the terms of the bonds, apply irrespective of the format of a security (whether DLT-based, physical, dematerialised or immobilised) and be performed subject to legal and regulatory requirements of the respective jurisdiction, as also noted above in Q&A 6.

8. What is a (digital) token?

There is no single definition of "token". The FSB defines a digital token as "any digital representation of an interest, which may be of value, a right to receive a benefit or perform specified functions, or may not have a specified purpose or use" (FSB: Crypto-assets: Work underway, regulatory approaches and potential gaps, 2019).

Figuratively speaking, a token can be considered a "digital envelope" that contains a set of information in codified form. In the case of a security, this may include the economic terms (eg issuance amount, coupon rate, redemption date, pre-approval and transfer conditions). In the context of crypto markets and financial markets, tokens or "digital envelopes" always exist in a blockchain or DLT network.

Further reading:
ISO 24165-1:2021(en): Digital token identifier (DTI) — Registration, assignment and structure — Part 1: Method for registration and assignment

9. Are DLT bonds always on a DLT network or blockchain? Are there access restrictions?

Yes, DLT bonds described above (Q&A 5) utilise DLT or blockchain. A DLT or blockchain network can either be permissioned (ie restricted access through a centralised operator) or permissionless (ie no restrictions on accessing the network).

10. Can DLT bonds reduce settlement risk?

DLT bonds in and of themselves do not reduce settlement risk but can be paired with digital or rather, programmed cash solutions. This allows for a DLT bond and digital cash such as a CBDC or tokenised cash to be exchanged simultaneously on the same DLT network, also known as "atomic settlement", or at least intraday. This DLT-based process is designed to minimise settlement risk through programming the transfers of digital cash and digital bonds only to occur together. In practice, there may be multiple DLT networks involved in this process. See also Q&A 11.

11. How might DLT bonds change the issuance and lifecycle process?

The issuance and lifecycle processes for DLT bonds are expected to be different to traditional bonds. This is because:

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- For DLT bonds that are native digital assets (also referred to as "bond tokens" or "security tokens") the use of DLT or blockchain is expected to fundamentally change how the execution, clearing, safekeeping, record keeping, payments and corporate actions functions in respect of the bonds are delivered. This could have wide-ranging implications for the market participants that manage those functions in conventional systems, such as trading venues, clearing systems, depositories, custodians, agents, brokers and other intermediaries in the bond issuance and lifecycle processes.
- For tokenised bonds (also referred to as "non-native security tokens"), the use of DLT or blockchain to record the transfer of bonds can make existing processes more efficient by eliminating paperwork depending on the local law requirements, and facilitating more direct communication between issuers and investors.

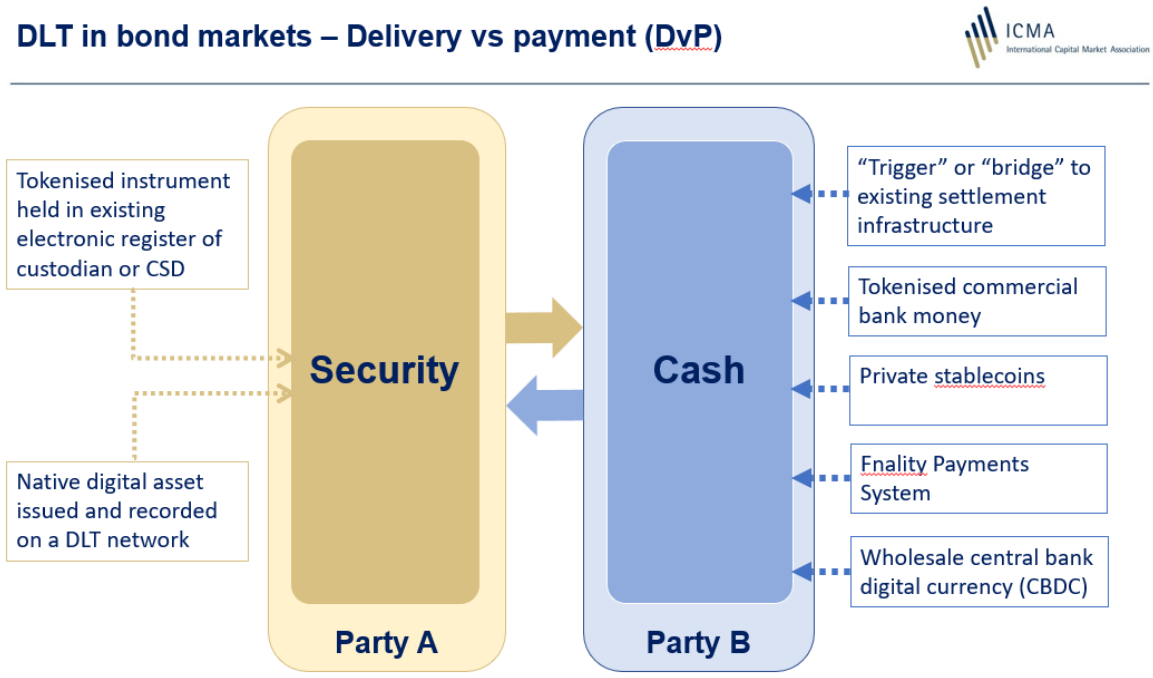
In general terms, DLT or blockchain-based systems are expected to replace incumbent systems with 'on-chain' solutions, delivering efficiency improvements and cost savings, and potentially enhancing compliance with financial crime and data protection regulations. Atomic settlement or shortened settlement cycles (as outlined in Q&A 10) could eliminate trade fails associated to incorrect settlement instructions, increase transparency to ensure available inventory, enable real-time netting for positions held on the DLT or blockchain network, and reduce or eliminate counterparty risk.

12. How are payments made in relation to DLT bonds?

Payments for settlement, coupon payments or redemption payments of DLT bonds which are tokenised bonds can take place in the same way as traditional bonds. Payments related to DLT bonds that are native digital assets can, from a technical standpoint, take place in the same way as traditional bonds, or use any payment mechanism which is also in code-based or distributed ledger form, commercial bank money in tokenised form, so-called stablecoins representing value denominated in fiat currencies (see also Q&A 4), or central bank digital currency (CBDC, see also Q&A 3). However, in practice, access to central bank money is generally restricted to wholesale commercial banks and to enable DvP with a CBDC, investors would also require direct access to a CBDC, which is a policy choice rather than a technological question.

The below diagram illustrates the forms of payment that have been used in a Delivery-versus-payment (DvP) scenario in bond markets, based on ICMA's tracker of new FinTech applications:

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Examples include:

- JPM Coin, "a permissioned system that serves as a payment rail and deposit account ledger, that allows participating J.P.Morgan clients to transfer US Dollars held on deposit with J.P.Morgan within the system, facilitating the movement of liquidity funding and payments in right time"[7].
- Tokenisation of CHF held within an account with SIX Interbank Clearing (SIC) for settlement of DLT instruments on SIX Digital Exchange.[8]
- Fnality Payment Systems, formely known as "Utility Settlement Coin" (USC), which is backed by a consortium of banks and market infrastructures and seeks to provide a "a peer-to-peer digital cash asset to settle tokenised transactions with finality"[9].

13. What is the Common Domain Model (CDM) for repo and bonds, and how does this fit in with DLT bonds?

The CDM essentially enables IT systems to 'speak the same language'. It is a standardised, machine-readable and machine-executable blueprint for how financial products are traded and managed across the transaction lifecycle, initially developed by ISDA for derivatives.

As such, the CDM lends itself to DLT or blockchain applications where market particpants and their computer nodes in a DLT network can use the CDM to exchange and validate transaction

[7] https://www.jpmorgan.com/onyx/coin-system.htm
[8] General Terms and Conditions, SIX Digital Exchange AG (GTC SDX) - Version 1 July 2022
[9] https://www.fnality.org/about-fnality

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data when processing a repo transaction and related lifecycle events such as clearing or settlement processes, or changes of a repo rate.

See also CDM video explainer. Further information is available on ICMA's CDM webpage.

14. What is ICMA's Common Data Dictionary initiative for primary bond markets, and how does it support DLT bonds?

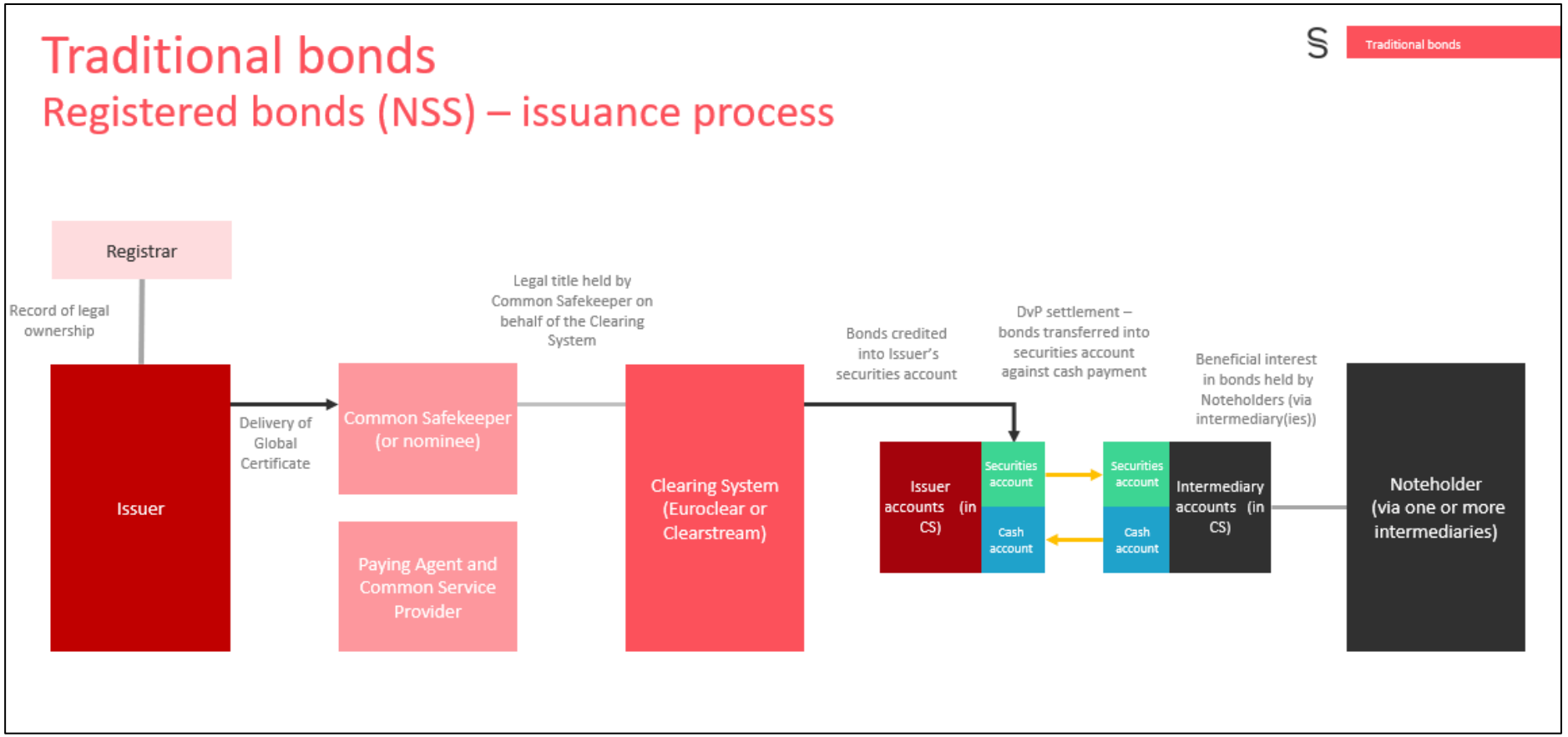
ICMA's Common Data Dictionary initiative is bringing together market stakeholders across the spectrum of debt capital markets (DCM) to build consensus on bond data exchanged during the issuance process and deliver a data dictionary in machine-readable format. The aim is to support automation from issuance to settlement and trading.

The initial focus is notably on economic terms of a bond (eg nominal amount, currency, interest type, maturity date), and other information typically included within a vanilla bond term sheet (eg whether bearer or registered form, selling restrictions). The Common Data Dictionary aims to provide not only a foundation for the automation of existing processes in bond issuance, but also for DLT bonds based on industry consensus on the fundamental characteristics and terminology to serve as a key reference for the digital representation of bonds.

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Appendix 1:

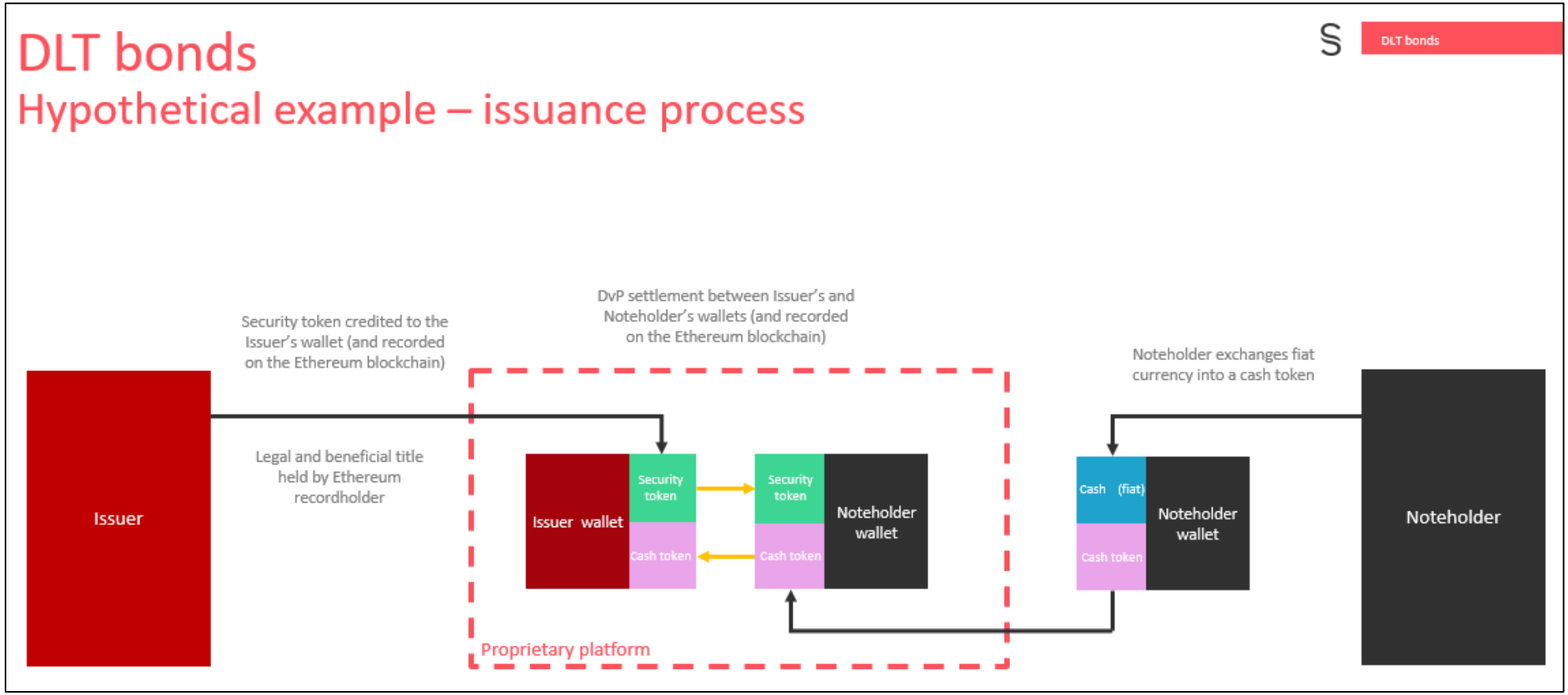


Source: Simmons & Simmons LLP

[DLT & blockchain in bond markets FAQ]

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Appendix 2:



Source: Simmons & Simmons LLP

[DLT & blockchain in bond markets FAQ]

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HONG KONG MONETARY AUTHORITY
香港金融管理局

香港債券市場代幣化



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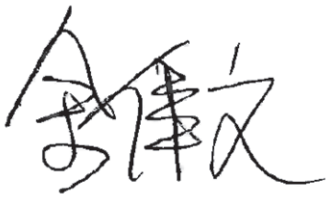
前言

2021年，香港金融管理局（**金管局**）與國際結算銀行創新樞紐轄下香港中心合作開展了代幣化綠色債券發行的概念測試，自此開啟了我們的代幣化之旅。今年初，我們在該概念測試的基礎上更進一步，協助中華人民共和國香港特別行政區政府（**特區政府**）成功發行首批代幣化綠色債券（**Evergreen項目**）。這次發行證明了在香港現有法律框架下在真實資本市場交易中使用分布式分類帳技術（**DLT**）的可行性，同時展現了DLT提高債券市場效率、流動性和透明度的潛力。

本報告詳細介紹了此次首創發行項目的經驗，報告的發布標誌着我們在探索和推廣債券代幣化道路上的又一重要里程碑。報告中介紹的設計和政策考慮因素反映了香港金融市場的獨有特點以及國際市場的最新發展動態。我們歡迎市場參與者在考慮於香港進行代幣化發行時參考我們的經驗。

儘管近年來全球代幣化債券發行數量持續增長，債券代幣化依然處於起步階段；其普及化仍需克服不少挑戰。隨着愈來愈多的金融機構推出各自的代幣化解決方案，不同解決方案之間及其與傳統系統之間如何連接和互動以避免市場零碎化將成為關鍵。現有法律和監管制度也可能需要作一定調整，以適應以至促進相關技術的應用。本報告討論了在這些方面未來可能的發展方向以及可以採取的措施。金管局將繼續與特區政府和其他持份者合作，共同解決尚存的問題，力求進一步完善我們的市場生態系統，以支持代幣化的普及應用。

本報告的編寫獲得了Evergreen項目各方的支持和協助。金管局特此感謝安理國際律師事務所（在Evergreen項目中擔任特區政府的法律顧問）以及Evergreen項目各方（包括（按英文字母序）中國銀行（香港）、東方匯理銀行、Digital Asset、高盛、滙豐）。



余偉文
總裁
香港金融管理局

I EVERGREEN 項目概況

背景

1. 近年來，代幣化債券的發行數量持續增長。截至2023年3月底，全球代幣化債券發行總金額達到39億美元，其中九成是在2021年至2023年期間發行。[1] 為探索此項技術的機會和潛力，金管局和國際結算銀行創新樞紐轄下香港中心在2021年合作完成Genesis項目，對在香港發行代幣化綠色債券進行了概念測試。

2. 在Genesis項目的基礎之上，金管局於2022年啟動了Evergreen項目。此項目是特區政府在《有關香港虛擬資產發展的政策宣言》中公佈的試驗項目之一，使用分布式分類帳技術（**DLT**）以貨銀兩訖（**DvP**）的方式交收代表特區政府發行的綠色債券實益權益的證券代幣[2]和代表對金管局港元法定貨幣債權的現金代幣。Evergreen項目的主要目標之一是測試在香港金融基建和法律及監管環境下，DLT在整個債券流程中（涵蓋一級發行及交收、息票派付、二級市場交易交收和到期日贖回）的使用情況，並為市場參與者未來進行同類發行提供藍本。此項目中的代幣化綠色債券是在香港特區政府"政府綠色債券計劃"下發行，募集資金將用於可帶來環境效益項目的融資和／或再融資，並支持香港可持續發展。

3. 本報告旨在總結Evergreen項目的經驗，包括介紹代幣化綠色債券的詳情，並解釋該項目考慮的相關因素，包括技術和平台設計、交易結構和法律及監管事宜。

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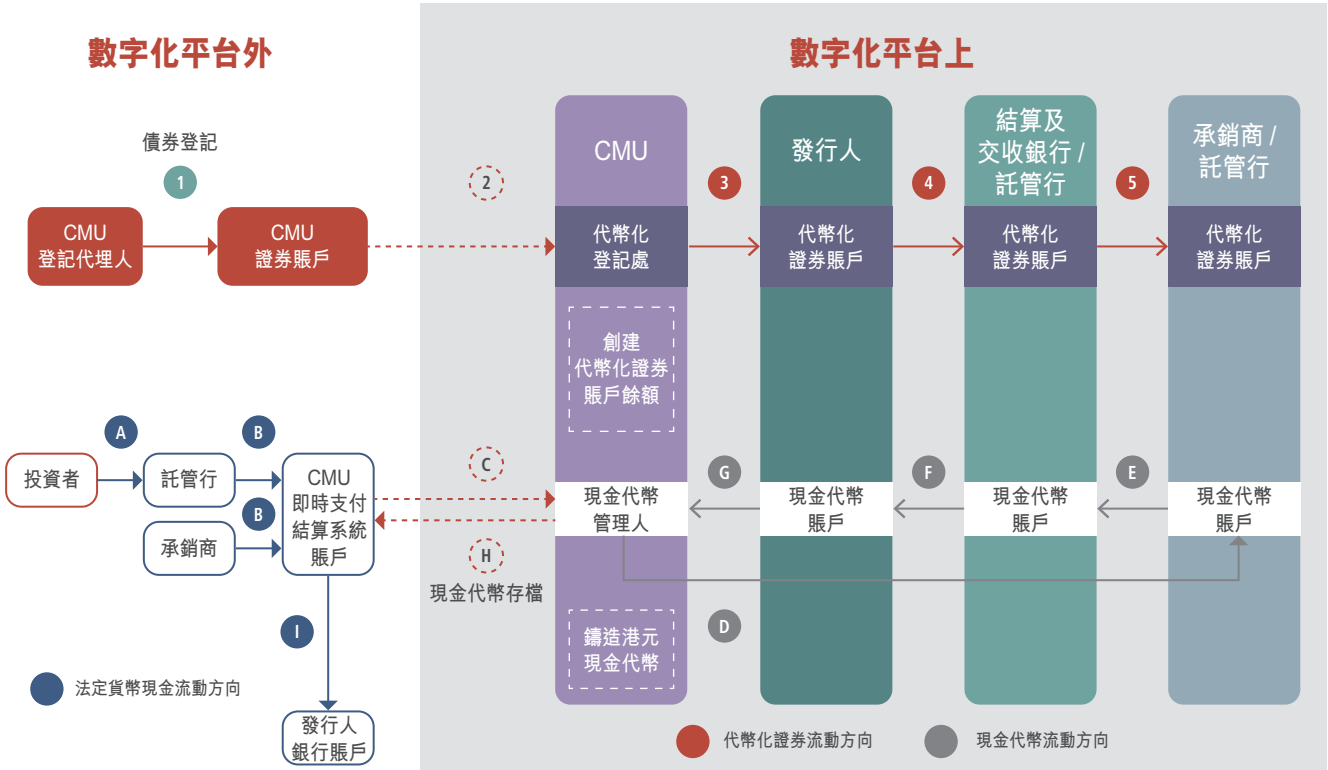
[1] *來源：彭博社、湯森路透Eikon和金管局職員的估算。*

[2] *記錄為數字化平台上代幣化證券賬戶中的餘額。*

代幣化綠色債券的發行和其後工作流程

4. Evergreen項目中，代幣化綠色債券的發行和認購在操作時分為不同階段，其中部分階段是在第三方DLT平台（**數字化平台**），即高盛的數字化資產平台（GS DAP™）上進行。下圖描述了Evergreen項目中以DvP方式交收的代幣化綠色債券的一級發行過程：

圖1總結了以DvP方式交收的Evergreen項目一級發行的工作流程程



發行準備：債券代幣化和創建

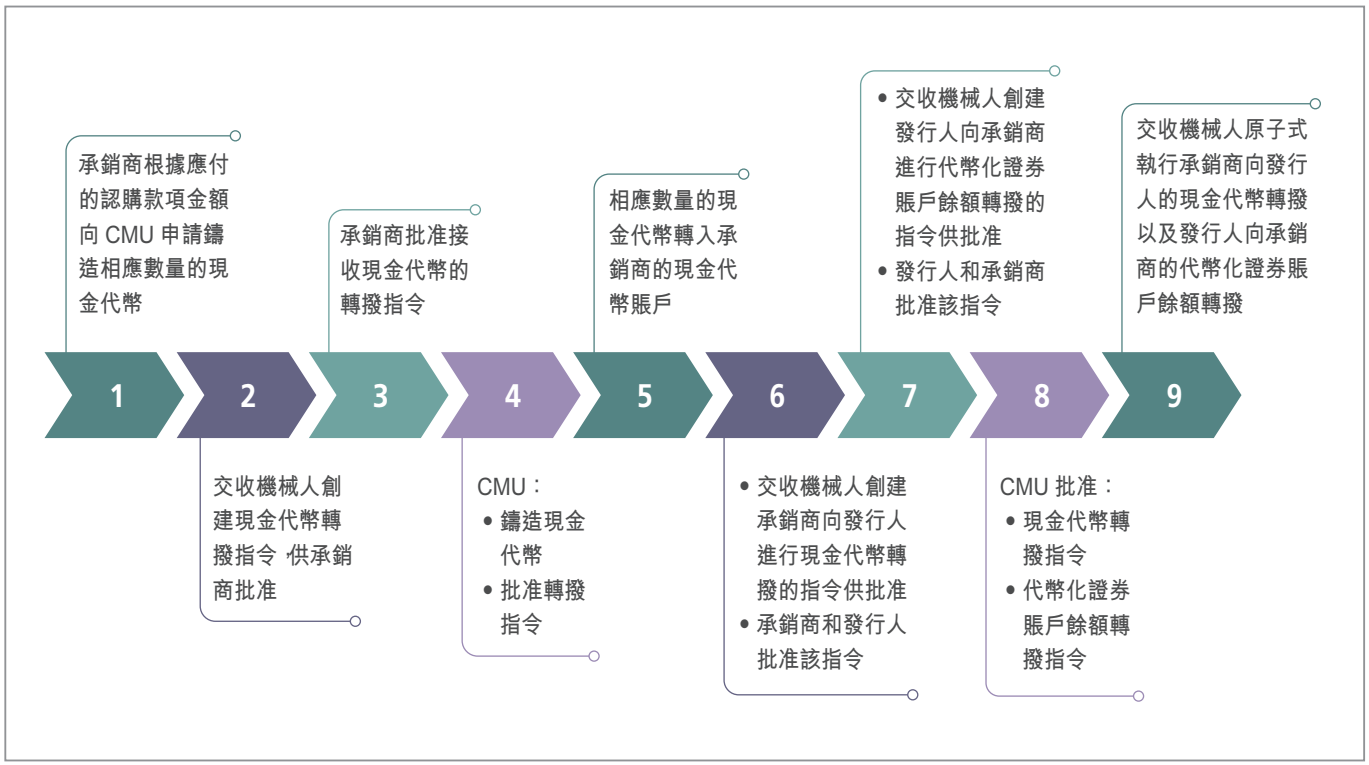
5. 參與方進駐平台：數字化平台僅向平台參與方開放，這其中包括代幣化綠色債券的發行人（即特區政府）、香港的中央證券託管機構（即香港債務工具中央結算系統（**CMU**））、發行人支付代理人、發行人代理人（如下文定義）、分銷商、託管行和二級市場交易商。每名參與方在數字化平台中都被分派了相應角色與職責功能。一套共同商定的條款和條件適用於所有平台參與方對數字化平台的訪問和使用。聯席牽頭行（作為分銷商和二級市場交易商）和託管行均為CMU成員，它們加入平台已經獲得CMU批准。**非參與方投資者**（即未以平台參與方的身份加入數字化平台的代幣化綠色債券最終受益人）通過託管行（作為數字化平台的參與方）持有其權益。

6. 發行和認購：代幣化綠色債券發行在操作中分為非在區塊鏈網絡上進行的（**鏈下**）流程和在區塊鏈網絡上進行的（**鏈上**）流程，並保留了傳統債券發行的部分元素。在代幣化流程前，簿記建檔在鏈下進行，代幣化綠色債券在定價日（**T**）進行定價，並於次日（即**發行日**，**T+1**）向CMU進行登記並在CMU系統的證券數據庫中創建。在簿記建檔和定價日（T），CMU以數字化平台的代幣化登記處身份，在鏈上創建代表代幣化債券的實益權益的智能合約。CMU另以現金代幣管理方的身份在鏈上創建代表港元現金代幣的智能合約。已進駐數字化平台的分銷商可以通過批准轉換代幣化證券賬戶餘額及現金代幣的指令，參與數字化平台上的認購流程。

分配、交割和交收

7. 在發行日（T+1），每家承銷商安排向CMU即時支付結算系統（**RTGS**）[3]賬戶轉入與其認購金額相等的鏈下法定貨幣現金。下列主要工作流程步驟展示了如何使用單一數字化平台彙聚所有不同各方，為分配、交割和交收活動提供便利，實現端到端自動化，提高效率並降低交收延遲和交收風險：

圖2總結了分配、交割和交收活動的工作流程



[3] *港元RTGS系統為港元銀行同業支付交易的交收提供便利。銀行同業支付交易在金管局所設的帳冊上以持續方式逐筆交收，而不是淨額處理。*

效率提升

8. Evergreen項目展現了DLT提高機構債券發行各方面效率的潛力，詳見下文表1總結：

表1列舉了Evergreen項目展現的關鍵效率提升

無紙化創建	省去傳統債券創建流程所需的實物總額憑證及其人工標注，從而節省人力並消除人工處理錯誤的風險。
共同DLT平台為不同各方之間的互動提供便利	典型債券發行通常涉及多個組織及其內部的多個團隊，這些組織和團隊通過不同的系統進行互動，以管理和開展發行、交收、支付和贖回流程。共同DLT平台集合所有不同各方於一個作為單一不可篡改的可信數據源共同平台上，支持多方工作流程並提供特定參與方授權、實時驗證和簽字功能，從而提高處理效率。
DvP原子式交收	債券過戶和現金支付在共同DLT平台完成，而非分別通過不同渠道完成，從而實現以DvP方式即時且同時完成交收，降低交收延遲和交收風險。
整個債券生命週期端到端採用DLT	從一級發行、二級市場交易交收、息票派付和到期日贖回均採用DLT，可以顯著減少多重人工處理，降低服務時間和成本，同時也不再需要對不同渠道進行同步，從而顯著優化運行效率。DLT分類帳為數字化平台參與方提供涵蓋一級和二級市場流程以及交易後服務的不可變、單一的可信數據源。
增強透明度	DLT能夠實現不同各方之間的實時數據同步，從而實現交易透明化並確保一致性，同時又能在面對其他平台參與方時提供更高的私隱保護。

9. 這些效率提升具備更廣泛地應用於市場的潛力，具體取決於每筆數字化債券的特點、鏈上和鏈下工作流程的設計以及傳統市場慣例、系統和基建需要為使用DLT而作出的調整程度。與傳統債券一樣，數字化債券的特點也因交易而異，當中取決於技術可行性、不同司法管轄區的法律和監管要求、商業考慮等多項因素。

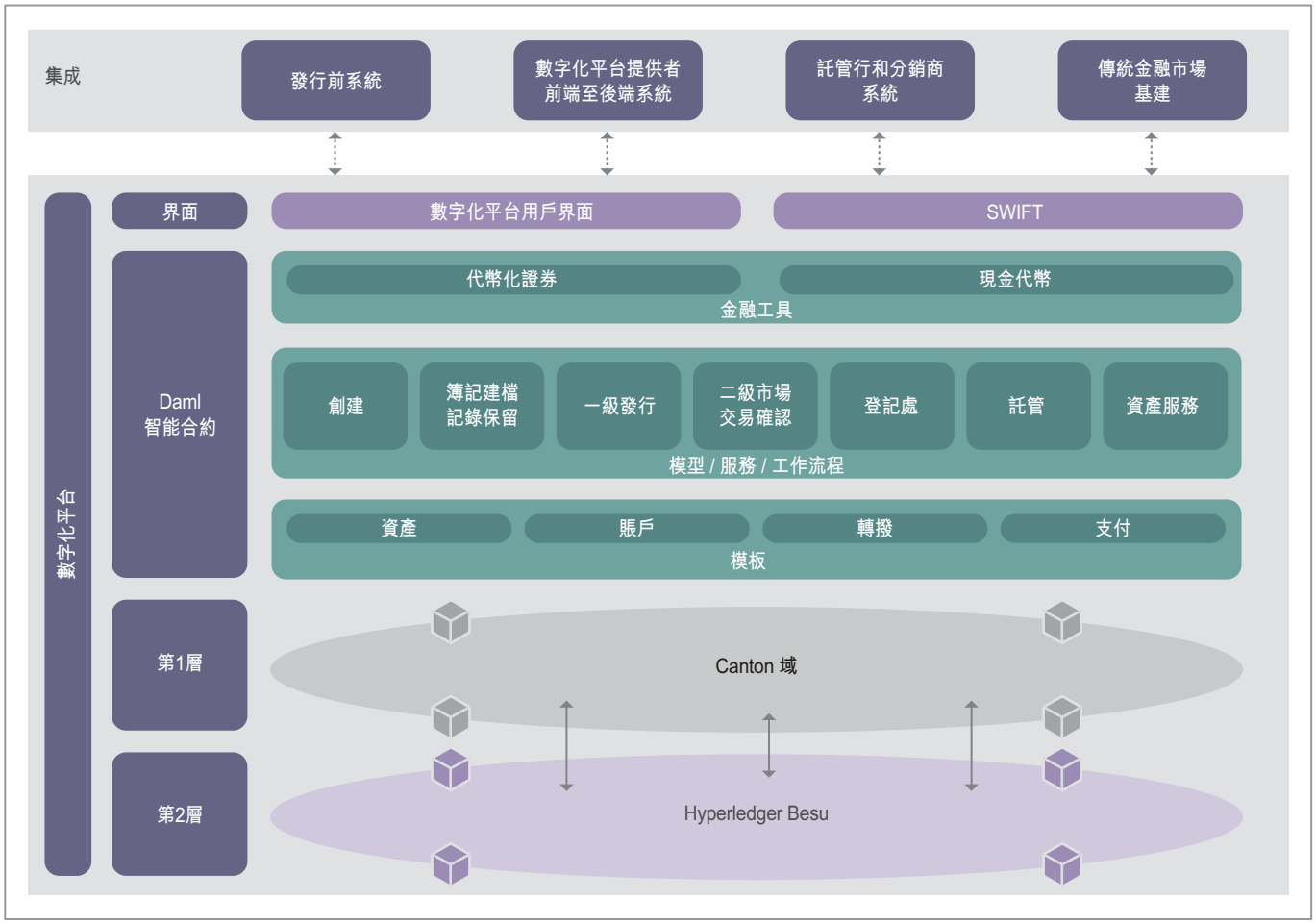
10. 下文的討論將介紹Evergreen項目的技術/平台設計詳情以及數字化債券交易在不同方面的其他可用選項。本章節旨在分享Evergreen項目的經驗，為有興趣的發行人提供指引和參考。

網絡類型

11. 在數字化債券交易中，各方需要考慮使用公共區塊鏈還是私有區塊鏈。公共區塊鏈一般對所有人開放，因此更加透明。由於公共區塊鏈對訪問人身份沒有限制，因此可能引起數據和信息私隱方面的擔憂。另一方面，私有區塊鏈僅允許獲授權用戶訪問，可以提供更高的數據保密性。本報告後續章節將進一步討論數據可見性和透明性。

12. 在Evergreen項目中，數字化平台由通過Canton區塊鏈和Hyperledger Besu實施的智能合約組成，由Canton區塊鏈和Hyperledger Besu提供對等式網絡和指令共識機制。上述兩種區塊鏈均為許可制私有區塊鏈，能夠提供更高的安全性和私隱性，並能避免公共區塊鏈本質上存在眾多未知行為人與相關活動的潛在問題。下方圖3描繪了Evergreen項目使用的數字化平台的總體架構。

圖3描繪了Evergreen項目使用的數字化平台的總體架構



13. 數字化平台的第一層區塊鏈使用Hyperledger Besu[4]，該區塊鏈是在以太坊上運行的許可制私有區塊鏈，作為節點間通訊和共識賬本；平台的第二層區塊鏈使用 Canton，該區塊鏈是提供私隱性和可擴展的DLT，負責智能合約的解讀和執行，維持參與方節點之間的統一執行。數字化平台選用數字資產建模語言（**Daml**）[5]作為智能合約解決方案，Daml 是一種企業級，提供私隱性的開源智能合約語言，其包含的運行時環境負責定義 Canton DLT 網絡的不同參與方之間的交易工作流程、模式、語義和執行。

參與模式

14. 數字化平台生態圈的參與模式可以採用節點託管、應用程式界面（**API**）或用戶界面（**UI**）的形式。

15. 節點託管模式是指在DLT平台上運行含有分類帳副本的節點。節點託管可以實現直接接入網絡，並減少對中介或第三方提供者的依賴。但是，節點託管在硬件、軟件、帶寬、維護和安全基建等方面可能產生更高的前置成本和持續成本，並且可能存在更高的運作和網絡風險。能夠平衡在使用便利性和嚴格執行數據私隱這二項因素的一種可能替代解決方案是專屬節點託管，即每家承銷商分別設有各自的虛擬機，從而對進入共享池的數據進行隔離（即一家銀行對應一台虛擬機）。虛擬機隔離（即便是由平台營運方管理）可以實現專屬數據權限配置的後續解耦，並增強數據私隱性。

16. API或UI模式是指使用標準化界面與DLT平台進行交流和互動，這種模式無須運行節點或儲存分類帳副本。在Evergreen項目中，參與方通過圖象化UI訪問數字化平台。這種方式可以最大程度地減少參與方需要開展的技術學習和整合工作，提供更快投入市場的解決方案，從而使參與方能夠關注資產代幣化、智能合約和工作流程數字化帶來的業務和功能優勢以及DLT解決方案的潛力。

17. 根據不同參與模式和DLT平台設置，數字化債券交易的各方應該留意相關數據私隱法規，特別是可能較為複雜的有關跨境數據傳輸和數據本地化的法規。數據保護制度因司法管轄區而異，不同法規要求之間的衝突可能給平台提供者、潛在發行人和其他中介帶來挑戰。

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[4] *Hyperledger Besu支持企業安全、加密、私隱和許可制式，定期接受安全審計，並實施權威證明共識算法，能夠高效地支持所需的交易處理量。Hyperledger Besu是金融市場廣泛使用的私有企業區塊鏈之一，是基於以太坊虛擬機（EVM）的開源區塊鏈，提供了更好地與龐大的EVM生態圈進行互操作或加入該EVM生態圈的途徑。*

[5] *Daml提供金融函數庫以及有用的資產和生命周期模板，原語和基本 置語言函數，跨獨立工作流的網絡互操作性和橫向擴展，以及確保數據安全性和完整性的 置安全和端到端加密。*

數據可見性

18. 在數字化債券發行中，DLT平台設計的另一重要考慮因素是交易和持有量數據的可見性。如上所述，數據可見性取決於DLT平台是基於公共區塊鏈還是私有區塊鏈。傳統債券交易一般通過傳統的場外交易以雙邊方式進行。因此，交易相關信息（如交易價格、數量和頻率）均不公開。傳統債券的持有量記錄在結算系統參與者的結算系統賬戶中，而投資者通過託管行持有的數量則記錄在託管行的帳簿和記錄中，後者通常是私人信息。

19. 以公共區塊鏈為基礎的平台可利用DLT提高交易和持有量數據的可見性。在2023年2月歐洲投資銀行發行的50,000,000英鎊隔夜指數平均值浮動利率債券中，該數字化債券先在能夠確保私隱和效率的私有區塊鏈中進行註冊，再以匿名方式在公共區塊鏈作出鏡像記錄從而增加透明度。[6]

20. 在Evergreen項目中，數字化平台使用Daml和Canton私隱模型進行交易處理。在Daml私隱模型中，不同參與者的可見性取決於其是否為相關智能合約的持份者（即簽署者或觀察者），參與者相應取得某些智能合約的可見性，同時確保其他參與者的私隱。在交易層面，Canton提供交易私隱性，每個Canton參與節點僅掌握部分"虛擬總體賬本"狀態且僅接收、處理和儲存其有權知道的子交易。

DLT網絡的性能和可擴展性

21. 數字化債券發行還應考慮DLT網絡的性能和可擴展性。Evergreen項目的數字化平台設計考慮了Hyperledger Besu和Canton區塊鏈兩個DLT層的性能和可擴展性。

22. 為對所需的處理配置性能和可擴展性提供支持，Hyperledger Besu區塊鏈採用權威證明共識協議（IBFT 2.0）。[7] 就Canton區塊鏈而言，各Canton參與節點接收及持久儲存其有權存取的數據並將數據保留在各自的賬本（即Canton賬本），共同構成"虛擬總體本"。[8] Canton技術設計亦允許Canton網絡以多種相互依存的方式橫向擴展。[9] 這種網絡設計的其中一個目標就是最終可擴展到Evergreen項目範圍之外。

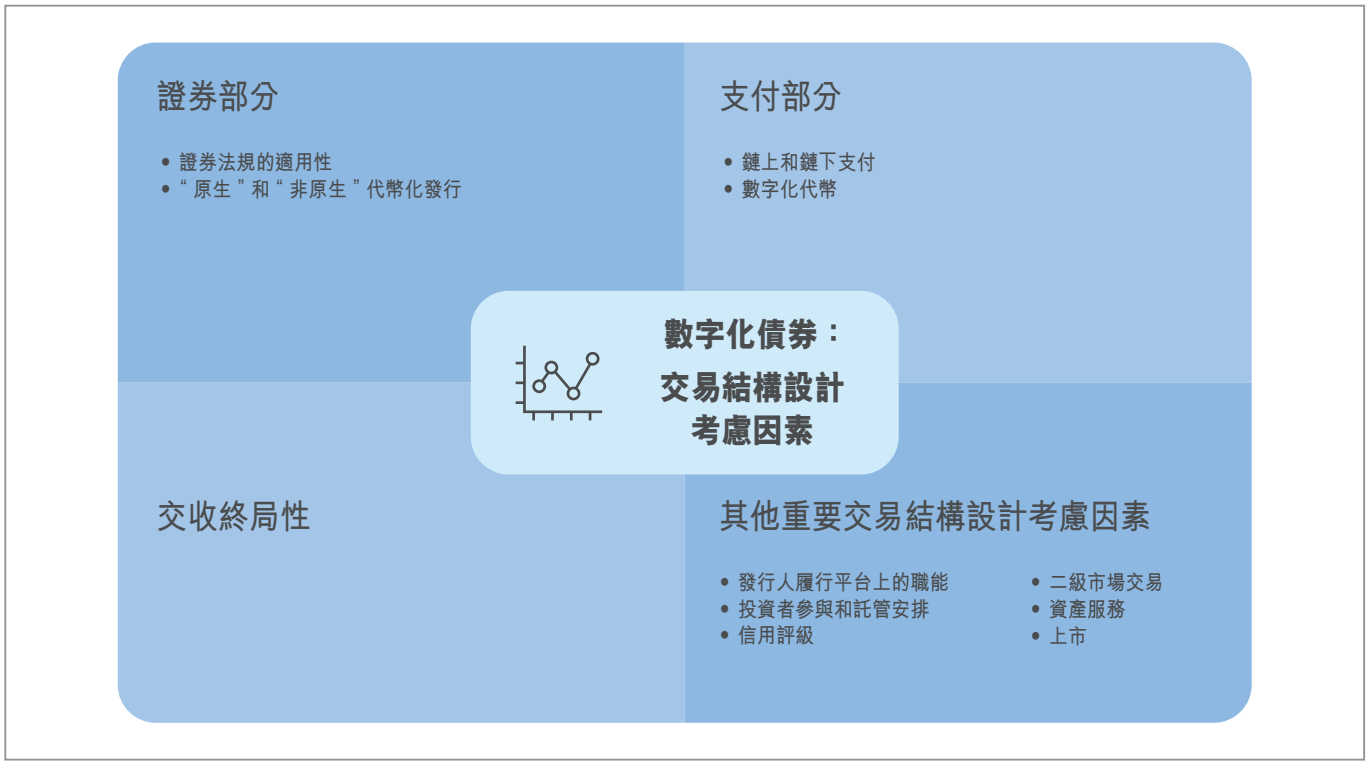
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[6] *https://www.eib.org/en/press/all/2023-030-eib-issues-its-first-ever-digital-bond-in-british-pounds*

[7] *只允許驗證者節點驗證加密的 Canton 交易並將其提交到Hyperledger Besu 區塊鏈分類帳上的區塊，這比工作量證明區塊鏈（須硬件密集型計算能力）有更好的性能和可擴展性。非驗證者節點不影響性能。*

[8] *除此之外，Canton 使用 Canton 協議（類似於權威證明）來實現其交易驗證共識，只需所涉參與節點按每筆交易驗證 Daml 交易。*

[9] *擴展策略取決於瓶頸所在。如果瓶頸是因參與節點必須執行太多多邊（參與者）交易，則可以通過擴展額外參與節點的方式改進性能。在域（如域管理器、調解器）達到容量極限的大型活動網絡中，可以擴展其他域來提高整體網絡性能。*



證券部分

證券法規的適用性

23. 香港《證券及期貨條例》(第571章)(**《證券及期貨條例》**)沒有明確規定債務證券(包括債券或票據)是否需採用紙質形式或非實物化形式。因此，《證券及期貨條例》下的現有受規管活動(例如證券交易、就證券提供意見和提供自動化交易服務)的許可制度和證券發行制度也適用於數字化債券的發行或分銷。對於公司發行人而言，《公司(清盤及雜項條文)條例》(第32章)(**《公司(清盤及雜項條文)條例》**)的招股章程規定也適用於其發行的數字化債券。

24. 在Evergreen項目中，代幣化綠色債券的分銷根據有關證券發行的法律和監管要求及《證券及期貨條例》下的許可要求(包括相關的豁免規定)進行。具體而言，代幣化綠色債券僅分銷給《證券及期貨條例》(及按《證券及期貨條例》制定的規則)所定義的“專業投資者”。

“原生”和“非原生”代幣化發行

25. 在數字化債券發行中，債券可直接在DLT平台上發行(即“原生”發行)，或先在平台外發行，然後在DLT平台上代幣化(即“非原生”發行)。

26. Evergreen項目採用“非原生”發行方式。代幣化綠色債券採用記名形式[10]，最初於發行日在平台外的CMU系統的證券數據庫中以電腦化帳簿條目形式記錄。代幣化綠色債券的實益權益之後於發行日記錄在數字化平台的代幣化證券賬戶中。一些發行人可能較為傾向“非原生”的代幣化發行，由中央證券託管機構(**CSD**)的傳統系統按照其現行操作規則進行債券的代幣化，因為這種發行方式可能更加貼近現有市場慣例。

27. 在“原生”發行中，債券直接在DLT平台上發行，不涉及CSD的傳統系統。“原生”發行增加了與DLT平台的融合程度，並可減少對傳統的中央證券託管機構、託管行和登記處等中介機構的需求，從而降低交易成本和運作風險。結合智能合約技術和自動化功能，它還可加快結算和債券流程的執行。

28. 在香港法例下，《證券及期貨條例》、《公司條例》(第622章)(**《公司條例》**)及《支付系統及儲值支付工具條例》(第584章)(**《支付系統及儲值支付工具條例》**)均沒有規定債務證券發行時必須採取的形式。但是，根據發行人類型，可能需要考慮下列因素：

    (a) 特區政府根據《借款條例》(第61章)(**《借款條例》**)有權發行債券。關於發行的債券的形式，明確規定可以用非可閱的形式記錄(不論是以電腦或其他方式記錄)，但能夠以可閱形式複製出示的資料或數據。分布式賬本(實質是電腦化帳簿條目，能夠以可閱形式複製)屬於這個範圍。因此，特區政府根據《借款條例》發行的債券無需採用實物紙質形式。在Evergreen項目中，為增加發行的數字化元素及簡化鏈下流程，發行人免除了實物總額憑證。

    (b) 與《證券及期貨條例》類似，《公司條例》沒有明確規定債權證(根據《公司條例》的定義，包括債券)可以(或必須)採用哪種形式，因此數字化債券可被視為《公司條例》下的“債權證”。根據《公司條例》或《舊有公司條例》在香港成立的公司，在符相關法例要求及其組織章程細則的前提下，可發行數字化債券。《公司條例》下可能需數字化債券發行人特別注意的主要要求包括：

[10] *平台外註冊人保留一份註冊記錄，記錄金管局(作為CMU的營運機構)是代幣化綠色債券的註冊持有人。*

(i) 根據《公司條例》第308條，如果公司發行不可籍交付而轉讓的債權證，公司必須備存一份債權證持有人登記冊（**債權證持有人登記冊**）。[11] 潛在香港公司發行人有意選用的DLT平台需能以印本形式複製登記冊；[12]

(ii) 如適用於該次發行，《公司條例》第318、319、320、323及324條要求公司交付或向公司交付（視情況而定）債權證及轉讓文書；及

(iii) 根據《公司條例》第656條，如債權證持有人登記冊的備存方式，並非藉着在經釘裝的簿冊內作出記項，公司需採取足夠預防措施以防止捏改，並須採取足夠步驟，以利便發現任何捏改。潛在發行人需確保平台提供者的系統設置允許發行人（或發行人指定的人）在必要時保留或控制DLT平台上的記錄。

29. 視乎債券的類型，可能還需要考慮其他因素。例如，不記名債券是否能夠以及如何進行數字化"管有"和"交付"（從而可以進行上文第27段所述的"原生"發行）可能需要進一步研究。[13]

支付部分

30. 數字化債券的本金和利息，可在DLT平台上支付，或在平台外以法定現金支付。數字化債券本金和利息的鏈上支付可以採用央行數碼貨幣形式，或採用原生於發行及/或記錄數字化債券的DLT平台的數字化代幣或與該平台兼容的數字化代幣形式，以提供更快也更簡單的支付流程等優勢。對於鏈上支付，交易各方還應考慮是在債券發行同一DLT平台上支付，還是採用跨鏈機制在不同DLT平台支付。後者可通過跨鏈橋等技術實現，在此情況下，支付流程還可使用跨鏈智能合約實現自動化。這可提高數字化債券進入不同市場的靈活性和流動性，並可利用不同區塊鏈的獨特優勢實現多個功能或特性。但其中也有挑戰，包括相關複雜性、成本、跨鏈通信和協調不匹配或失敗的風險，以及橋接機制的可靠性和可信度。

31. 在一些數字化債券的發行中，本金和利息是在平台外使用法定貨幣支付的，與傳統債券發行的支付相同。這具有穩定及貼近現有流程等優勢。但是，各方需要注意DLT平台和支付系統之間可能存在的相互協調和互操作性問題。

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11 登記冊須以英文或中文保存，應包括姓名、地址、持有款額、持有人記入登記冊的日期、持有人不再是持有人的日期。登記冊應保存在公司註冊辦事處（或通知公司註冊處處長的香港地點），供公司成員、公司債權證登記冊的債權證持有人及其他有權查閱債權證持有人登記冊者查閱。債權證配發後，公司需在切實可行範圍內盡快（無論如何於配發日期後的2個月內）在其債權證持有人登記冊中登記債權證的配發。除非債權證條款和條件另有規定，否則公司必須在配發後 的2 個月內製成債權證並備妥以供交付。根據《公司條例》第320條，只有在妥善的轉讓文書已向公司交付情況下，公司方可將債權證的轉讓進行登記。

12 根據《公司條例》，"公司紀錄"的定義包括《公司條例》規定公司須備存的登記冊。《公司條例》第 655 條規定，公司紀錄可採用印本形式或電子形式備存，如紀錄採用電子形式備存，公司須確保能夠以印本形式重現。如公司藉着以電子形式記錄相關資料，備存《公司條例》規定公司須備存的公司紀錄，則任何根據《公司條例》施加於該公司的、容許查閱該紀錄的責任，須視為 (a) 容許查閱該紀錄或其有關部分的印本形式複製本的責任；或 (b) 按查閱該紀錄的人的要求，容許以電子方式查閱該紀錄或其有關部分的責任。

13 根據普通法，不記名債券作為不記名票據的其中一種，賦予票據持有人（即持票人）對相關資產的所有權（即相關債務）。該權利源於對票據本身的管有，而不記名票據的所有權是通過簡單的交付和轉移所有權的必要意圖而轉移。

32. 在Evergreen項目中，代幣化證券賬戶的餘額和現金代幣均在同一DLT平台處理和記錄。

數字化代幣

33. 平台支付可通過數字化代幣進行。在Evergreen項目中，向平台參與者支付的本金和利息採用金管局CMU在數字化平台上鑄造的港元現金代幣（**現金代幣**）形式。現金代幣代表對金管局的法定貨幣債權，一現金代幣等於一法定港幣。本金支付環節中，在現金代幣轉移的同時，代幣化證券賬戶中的餘額在數字化平台上進行原子式扣賬（即交易只會完全成功或完全失敗，不會存在中間或不一致的部分執行狀態）。通過現金代幣進行支付即解除特區政府在代幣化綠色債券條款和條件下的支付義務。

34. 在其他數字化債券交易中，支付可使用非由金管局（或任何央行）鑄造的數字化代幣進行，這些代幣可以是為數字化債券發行交收而專門設計的代幣，具有靈活性並可量身定制。但是，這些數字化代幣在交易對手、信用、運作、波動性和流動性方面可能有更大風險。

交收終局性

35. 一般而言，“交收終局性”是指“通過已變得不可撤銷且無附帶條件的資金轉撥和證券轉撥解除義務”。[14] 具體而言，“終局性”是指廢棄法律上本來存在，允許推翻通過結算及交收系統達成的轉移指令或在結算及交收系統內的處事程序的全部權利。在香港，交收終局性可以（如為指定結算及交收系統）透過履行《支付系統及儲值支付工具條例》下的相關法定要求，或合同協議來實現。

36. 在Evergreen項目中，代幣化綠色債券通過CMU進行結算和交收，通過CMU進行的交易交收在《支付系統及儲值支付工具條例》下具有法定交收終局性。根據《支付系統及儲值支付工具條例》第55條，CMU為當作已獲指定的結算及交收系統。終局性證明書也被當作已就CMU發出。根據《支付系統及儲值支付工具條例》，交收終局性制度就通過符合條件的指定結算及交收系統交收的轉撥指令的完整性提供法定保護，免受香港的破產法和清盤法或（如國際私法適用）香港以外地方的同等法律的影響。這是為了確保通過指定結算及交收系統交收的轉撥指令不可撤銷，也不會因這些系統的參與者破產而被逆轉，這些轉撥指令的基礎交易所產生的權利將予保留。

[14] *https://www.bis.org/dcms/glossary/glossary.pdf?scope=CPMI&base=term*

37. 為使DLT平台具有《支付系統及儲值支付工具條例》下的法定交收終局性，DLT平台必須首先被金管局按照《支付系統及儲值支付工具條例》下的法定程序指定為指定結算及交收系統。另請參閱下文題為"結算和交收模式"的章節。

38. 若DLT平台不是《支付系統及儲值支付工具條例》下的指定結算及交收系統，數字化債券交易的相關方可通過合約商定方式為該DLT平台上的轉撥指令賦予確定性，從而實現交收終局性。

其他重要交易結構設計考慮因素

發行人履行平台上的職能

39. 就數字化債券交易而言，發行人可能需要在DLT平台上履行某些職能，例如數字化債券的發行、轉讓、贖回和付息。其中部分職能可以根據具體情況委託給代理人。一般而言，代理人可以就DLT平台的技術、運作和管理方面以及在發行人職能方面向發行人提供協助，進而減少可能出現的潛在運作風險。

40. 在Evergreen項目中，特區政府委任了發行人代理人（"**發行人代理人**"），作為特區政府在數字化平台上的特定代理人履行職能，包括提交和批准與代幣化證券賬戶和現金代幣餘額的扣賬和入賬相關指令。由於代幣化綠色債券牽涉根據現金代幣鑄造或贖回的需要而向平台外CMU賬戶進行法定貨幣的支付或轉帳，因此CMU支付代理人也參與了此次交易，這與特區政府全球中期票據發行計劃項下的其他傳統債券發行類似。換言之，在Evergreen項目特定背景下，發行人代理人的角色可被視為 CMU登記和支付代理人的延伸。如果其他發行人有意使用與Evergreen項目類似的支付機制，可能需要考慮是否委任同一個機構擔任CMU登記和支付代理人以及DLT平台上的發行人代理人（正如Evergreen項目的情況），以提高效率、降低運作風險。

投資者參與和託管安排

41. 參與數字化債券發行的投資者既可以通過發行或記錄數字化債券的DLT平台直接持有其數字化債券（即自我託管），或通過託管關係持有債券。如通過託管關係持有債券，投資者還可選擇加入DLT平台直接獲取資訊，或無需進駐平台。

42. 投資者以自我託管方式持有數字化債券是指投資者以安全數字化錢包持有和管理其資產賬戶（及相關的私密金鑰，如適用）的，從而擁有DLT平台上的數字化債券或代幣的使用權利。在該等情況下，投資者需要進駐DLT平台。自我託管為投資者提供了對其數字化債券和代幣更為直接的控制權、自主權和私隱。但同時，投資者也可能需要承擔丟失債券和代幣或出現安全性漏洞的風險，因此投資者需要具備相關的技術知識並對保護其鏈上賬戶和／或私密金鑰的安全負責。

43. 此外，投資者也可以通過託管行持有數字化債券。鑒於託管服務與結算系統中以帳簿條目形式發行的其他傳統債券的安排相類似，因此託管服務可以為投資者提供更多便利並且更為投資者所熟悉。託管關係還可以減輕投資者的行政和運作負擔。即使投資者通過託管行持有其數字化債券，他們仍可以進駐 DLT 平台以直接獲取相關資訊。

44. 投資者進駐DLT平台可能會對DLT平台營運者和交易相關方帶來監管和法律要求，例如DLT平台將需要實施適當的進駐審查程序，以驗證投資者的身份和資格。DLT平台營運者（及託管行，如適用）將首先需要對投資者進行相關了解客戶（**KYC**）程序及採取措施以確保遵守適用於不同投資者的反洗錢、反恐怖主義融資以及其他適用法規。根據可在DLT平台上開展的活動，平台營運者需要考慮《證券及期貨條例》發牌制度對平台營運者和／或DLT平台可能的影響，以及與數字化債券分銷相關的監管要求的適用情況。而在投資者通過託管行持有數字化債券且不進駐DLT平台的情況下，與投資者相關的KYC流程將由託管行負責。

45. 在Evergreen項目中，

(a) 只有進駐數字化平台並且是CMU參與者的託管行能夠在數字化平台上開立代幣化證券賬戶和現金代幣賬戶。代幣化綠色債券的實益權益在發行日作為代幣化證券賬戶餘額記錄在數字化平台上的代幣化證券賬戶中。代幣化證券賬戶持有人之間轉讓代幣化綠色債券的實益權益通過在相應的代幣化證券賬戶記錄代幣化綠色債券餘額的扣賬和入賬方式達成。

(b) 非參與方投資者通過與作為數字化平台參與者的託管行之間的託管關係持有其代幣化綠色債券實益權益，這需要在平台外與託管行訂立託管協定，從而使相關託管行能夠使用數字化平台代表它們持有和交收代幣化綠色債券實益權益。非參與方投資者持有的實益權益由託管行在平台外根據託管安排記錄在其帳簿和記錄中。

(c) 在數字化平台上持有代幣化證券賬戶的託管行與相關非參與方投資者之間的託管關係類似於以總額憑證代表債券的傳統債券發行所使用的結算系統（例如CMU、Euroclear和Clearstream等）中的直接參與者和間接參與者的關係，在這些結算系統中，債券實際持有人作為結算系統間接參與者，其債券實益所有權通過金融機構持有。

信用評級

46. 發行人可以考慮為數字化債券獲取信用評級。在Evergreen項目中，代幣化綠色債券的評級與特區政府的傳統機構綠色債券評級一致。[15]

47. 在對數字化債券進行評級時需要考慮的一項重要因素是數字化發行相較於傳統發行形式可能存在的額外風險。數字化債券發行涉及DLT平台，而DLT平台使用的區塊鏈技術處於快速發展變化中，其所具有的創新功能尚未在使用中得到充分證明，並且未在金融市場上得到充分測試。部署清晰的業務持續性計劃（**業務持續性計劃**），明確規定平台營運者和相關方在DLT平台中斷或故障時應採取的步驟，有助於解決潛在風險。在制定業務持續性計劃之前，各方可以對可能擾亂DLT平台正常運行的潛在威脅、漏洞和影響（例如網路攻擊、自然災害、停電、網路故障等）等進行全面的風險評估和分析。業務持續性計劃中可以包括資料庫恢復和定期備份程序。對於無法補救的中斷或故障事件等問題，各方還可以考慮於鏈下定期保留資料庫的鏡像記錄，並制定將資料庫遷移到替代平台的措施。

二級市場交易

48. 如上所述，與其他傳統債券類似，Evergreen項目中代幣化綠色債券的實益權益在二級市場的交易完全通過數字化平台之外的傳統場外交易進行，僅在數字化平台上進行交收和轉撥。場外交易對於參與交易的各相關方而言更加熟悉，各方之間可以像交易傳統債券一樣直接協商交易條款和條件。

49. 理想情況下，DLT平台如果具有證券型代幣交易等交易功能，將提高二級市場的流動性和透明度，提供標準化和自動化流程和協定，並且可以憑藉其使用的區塊鏈技術和智能合約來實現更安全、更高效的交易驗證和交收，進而降低交易對手方和交收風險。然而，提供上述交易功能涉及一些複雜的技術和法律要求。從技術角度來說，將該等功能納入DLT平台會產生額外的成本和時間，包括但不限於基建設置、測試和協助參與者熟悉流程。此外，平台提供者還需要考慮開展交易平台業務的法律影響，例如就香港而言，《證券及期貨條例》下第1類（證券交易）受規管活動和第7類（提供自動化交易服務）受規管活動[16]的牌照要求。

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[15] *如同特區政府發行的傳統機構綠色債券（期限超過一年）的評級與特區政府的長期信用評級一致，代幣化綠色債券（期限為365天）的評級與特區政府的短期信用評級一致。*

[16] *提供自動化交易服務的法團應根據《證券及期貨條例》第III部分獲認可供相關服務，或根據《證券及期貨條例》第V部分獲發牌或進行注冊。詳情請參閱香港證監會《監管自動化交易服務的指引》及《適用於虛擬資產交易平台營運者的指引》（已實施）。*

資產服務

50. 在數字化債券交易中，相關方應考慮是以全自動化方式還是以需要人工核查的半自動化方式提供資產服務。DLT平台可依賴智能合約和區塊鏈技術來實現包括利息和本金支付在內的整個資產服務流程的自動化，從而降低運作成本、風險和錯誤，並提高效率。在典型的傳統債券發行中，支付流程通常涉及支付代理人等中介機構；全自動化的數字化債券則可能不需要委任類似中介機構。

51. 除了將資產服務完全自動化，相關方還可以考慮實行半自動化流程，並保留人工驗證程序。例如，對於數字化浮動利率債券，各方可以考慮自動計算利息支付金額，但要求相關方在付息前對該金額進行驗證和批准。這種方法可以平衡自動化的利弊和相關運作風險，同時提供更大的靈活性。在Evergreen項目中，數字化平台利用智能合約技術對部分資產服務流程進行自動化。例如，就支付本金而言，代幣化證券賬戶的餘額將在現金代幣轉撥的同時在數字化平台上原子式進行扣賬。對於利息支付，數字化平台將自動計算利息金額，但在數字化平台上執行支付指令之前，由支付代理人對該金額進行驗證和批准。

上市

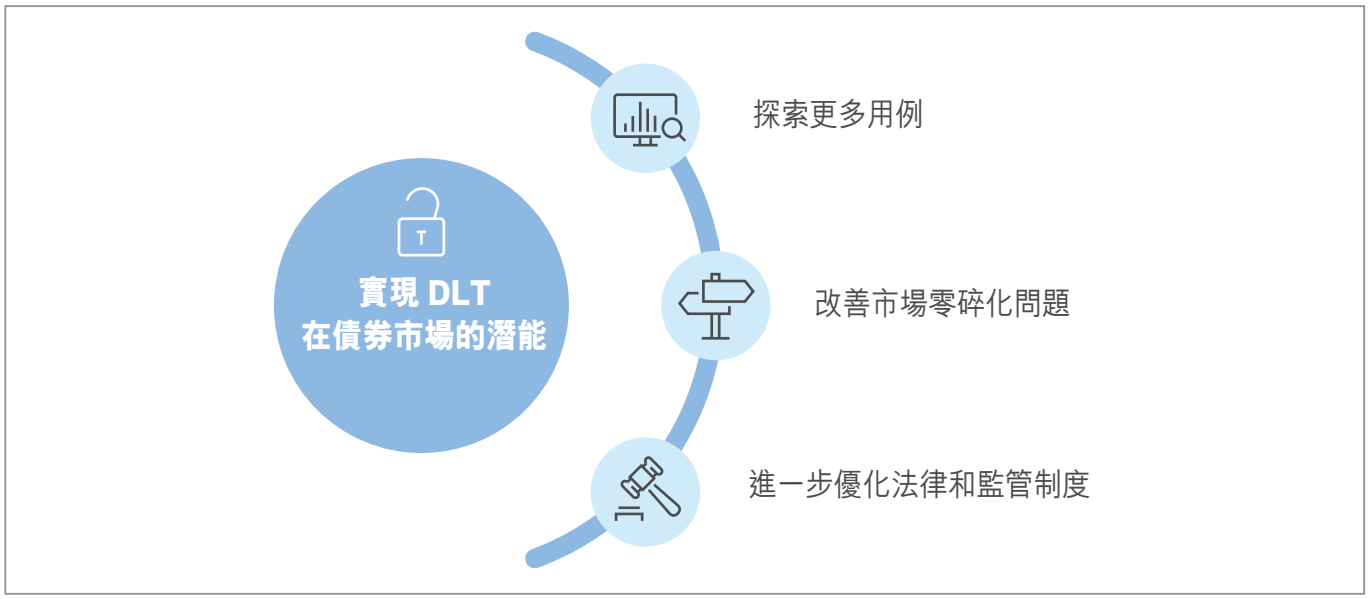
52. 在Evergreen項目中，代幣化綠色債券沒有在傳統交易所上市。

53. 縱觀全球，並非所有數字化債券都會在傳統交易所上市。其中一個原因可能是傳統交易所與DLT 平台之間缺乏連接，特別是在交易及／或交收方面的連接，這可能對確保上市的數字化債券在不同平台上交易資料的一致性構成挑戰。

54. 針對數字化交易的一些獨有特徵（包括在交收和資產服務中使用DLT平台），部分境外交易所為數字化資產上市開闢了專屬市場。香港目前尚未建立數字化債券上市的專屬市場，而香港的二級市場債券交易通常以傳統的場外交易方式進行。

IV 實現DLT在債券市場的潛能

55. 代幣化有提高債券市場的效率、流動性和透明度的潛力。Evergreen項目成功證明了在香港現行法律框架下在資本市場交易中使用DLT的可行性。為了充分實現代幣化的潛能，可從在探索更多用例、改善市場零碎化問題以及優化法律及監管框架方面著手。



探索更多用例

56. 在Evergreen項目的基礎上，可以在技術和功能層面進行進一步測試，包括（但不限於）：

(a) 平台：近年來出現了多個商業代幣化平台，每個平台可能具備不同的功能。為評估不同技術設置所具備的優勢並探索跨平台互操作性的可行性和潛能（見下文第58-60段討論），可以使用不同的DLT平台進行更多的發行。

(b) 貨幣：為滿足不同發行人和投資者的需求，債券發行也可以使用除港元以外的其他貨幣。在Evergreen項目中，金管局CMU在數字化平台上鑄造港元現金代幣。視乎債券發行人、投資者和DLT平台提供方的偏好和營運就緒程度，以及相關法律及監管框架，現金部分理論上可以採用各種形式，例如商業銀行鑄造的現金代幣、穩定幣或使用法定貨幣現金進行鏈下支付。

(c) 文件標準化：如果市場廣泛採用標準化流程，某些常規業務流程可能可以被簡化，促進直通式處理，為DLT普及化鋪路。例子之一是國際資本市場協會（**ICMA**）近期推出的“債券數據分類術語”[17]。

[17] *債券數據分類術語（Bond Data Taxonomy）是對普通債券的條款書中通常包含的主要商業條款（例如票面金額、面額、貨幣、價格、淨收益、利息和利息支付相關信息）、重要日期（例如定價日、交收日、發行日）及其他信息（例如記名或不記名，債券地位，相關方，評級）進行標準化規範的“通用”語言。*

(d) 實時影響跟蹤和報告：可以進一步探討增加實時跟蹤和報告功能的可行性（例如針對環境、社會和治理（ESG）發行），由DLT平台整理並傳送直接從募集資金所支持的資產收集的數據，讓最終投資者可以獲取該等數據。

(e) 回購交易代幣化：Evergreen項目展現了債券代幣化的益處。鑒於回購協議在債券市場流動性方面發揮的作用，回購交易的代幣化亦可以使金融市場參與者受益。通過使用DLT，回購交易中的資產可被代幣化，從而實現原子式DvP自動交收。傳統回購交易所涉及的文件繁瑣但需要在特定時間內完成，代幣化可以提高效率、縮短結算時間、降低結算風險。

(f) 零售用例：長遠而言，在識別並解決潛在的法律、監管、技術和營運問題的前提下，零售投資層面實現代幣化有望簡化傳統零售債券發行／認購程序；降低債券面額，從而讓更多的投資者參與；實現一級發行和二級市場交易程序自動化，從而提高效率及有望提高流動性。

改善市場零碎化問題

57. Evergreen項目與許多其他數字化債券類似，運用了一個使用自身的DLT網絡獨立運行的數字化平台，與其他DLT網絡沒有互通。各DLT平台之間、DLT平台和傳統系統之間以及DLT平台和CSD之間互相建立連接，或者創建一個共同平台（如下文所述），或可幫作改善市場零碎化問題。

建立跨平台互操作性／連接性

58. 跨平台可操作性／連接性可以從多方面實現。具體包括相同技術架構（即相同的智能合約語言、基礎技術基建等）但不同應用程序之間的互操作性／連接性，或者不同應用程序和不同技術架構之間的完全互操作性／連接性。

59. 如上文所述，通過建立各DLT平台之間的跨鏈橋，可以提升數字化債券的靈活性和流動性，使其能夠進入不同市場，以及利用不同區塊鏈的自身獨特優勢來實現不同的功能或特點。

60. 隨着市場逐步成熟，DLT平台供應者需有足夠靈活性以滿足互操作性／連接性和商業需求。我們鼓勵平台供應者為未來交易提供各種選擇，以實現跨平台的互操作性/連接性。

建立DLT平台和傳統系統之間的連接

61. 與現有託管系統和支付系統等其他傳統系統之間實現互操作性，在技術操作層面上很複雜，但克服這種技術障礙將有助於將債券交易的每個環節納入鏈上運作。鏈上／鏈下整合的一個方面是無縫直通式處理模式（**STP**），該模式不需要在現有行業標準流程中作手動重新輸入。

62. Evergreen項目探討了如何在現有訊息系統之外擴大DLT平台與傳統系統之間的互操作性，這可能有助於在市場參與者之間的運作流程中實現更順暢和簡化的STP。以與託管行現有系統的連接來舉例說明，在數字化平台與現有託管系統沒有連接的情況下（Evergreen項目就是這種情況），與傳統債券發行採用的STP相比，託管行的職責將明顯加重。

表2對Evergreen項目中託管行在數字化平台上開展的主要活動與傳統債券發行進行對比

主要活動	Evergreen項目託管行	傳統債券發行下的託管行
保管 — 開戶	託管行是CMU參與者，在數字化平台上擁有一個存有代幣化證券餘額的代幣化證券賬戶、以及一個存有代表託管行客戶持有的現金代幣的現金代幣賬戶。	假設託管行已是CMU參與者，不需要額外開戶。
記錄保存	鏈下託管系統也記錄了數字化平台賬戶的持有量。這是因為託管行的客戶仍然依靠傳統的信息傳遞方式來指示託管行進行交易交收，目前現有託管系統和數字化平台之間沒有連接。 數字化平台記錄和託管系統記錄之間的對賬由人工完成。	投資者和託管行與現有系統進行下連接，因此過程是STP。
結算	託管行根據客戶的指示，在數字化平台上進行交易確認並授權交易。這些活動通過手動完成，因為現有託管系統和數字化平台之間沒有建立連接。	STP

63. 如果DLT平台和現有託管系統之間可以建立連接，相關流程就會簡化，從而提高運作效率。

64. 雖然我們留意到DLT正被應用於不同的活動領域，但它目前仍然是一項新興技術，傳統金融系統在金融市場交易中仍然發揮着重要作用。為改善市場零碎化問題，或需對DLT系統和傳統系統進行整合。

DLT平台和CSD之間建立連接

65. 在私營機構營運DLT平台的情況下，在各DLT平台之間優化互操作性之前，CSD可以在其中發揮關鍵作用。例如，CSD和各DLT平台之間建立連接，可以通過CSD的現有成員網絡，讓更多的投資者參與DLT平台。CSD的現有成員可能不需要再次完成KYC程序，亦可能不必在每個DLT平台上開設賬戶。

66. 當DLT平台是所有參與者直接共同運作的共享資訊系統時，CSD的角色將縮窄為提供增值服務，例如流動性來源。在這種去中心化的基建中，記錄保存和交收的角色可以透過智能合約自動化。

建立一個共同平台

67. 另一種可能性是由成熟的CSD開發用於數字化債券發行的DLT系統，以減少出現不同發行人為不同交易使用各不相通的DLT平台的情況。與零碎化的各DLT平台相比，一個標準化中央系統可能會吸引更高的流動性，實現更低的交易成本。然而，要達到中央系統所能帶來的規模效益，需要形成群聚效應。

進一步優化法律和監管制度

債券發行流程的進一步數字化

68. 數字化債券發行目前仍保留了部分紙本流程。將這些流程全面數字化有望提升效率，但行業要改變已經沿用數十年的市場慣例和傳統可能需要一定時間。法律及監管框架也可能需要作一定調整以配合相關流程全面數字化[18]。

上市

69. 一些海外交易所已經為數字化債券發行人提供了上市方案。此類替代性上市方案的兩個例子如下：

    (a) 第一種模式是僅在交易所上市，但不開展交易所上交易（因為交易採用與傳統債券一樣的場外交易方式）。盧森堡證券交易所採用了這種模式，允許發行人在其“證券官方清單”上注冊數字化債券但不可交易。

    (b) 第二種模式允許在交易所同時上市和交易。目前與數字化交易場所連接的證券交易所並不多，但已建立該等連接的交易所的一個例子是瑞士SIX數字化交易所，該交易所提供數字化證券的發行、上市、交易、交收和託管服務。2022年，一批數字化債券在SIX數字化交易所通過使用DLT的CSD發行，並且同時在SIX數字化交易所和SIX瑞士交易所上市和交易，證明了數字化平台與傳統金融市場基建可以建立連接。

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[18] *例如，為使不記名債券可以“原生”發行，需通過修訂法例引入類似其他司法管轄區法律中的管有“電子可轉讓記錄”的概念，同時亦須考慮這些修訂對可流轉票據相關法律可能產生的潛在連鎖影響。*

70. 其他交易所的發展情況為香港提供有用的參考實例探索相關上市制度的發展，以滿足潛在數字化債券發行人的需求。

結算和交收模式

71. 在香港，參與數字化債券發行的DLT平台可能需要考慮，根據《支付系統及儲值支付工具條例》，被指定的結算及交收系統須遵守金管局的監察制度。[19]《支付系統及儲值支付工具條例》第4條規定，如果一個結算及交收系統在香港運作或接納以港元計值的轉撥指令，以作結算或交收，金管局有權出於金融穩定或公眾利益考慮指定該系統接受金管局的監察。[20] 結算及交收系統在被指定後需要遵守《支付系統及儲值支付工具條例》規定的部分某些要求[21]，並且遵循《金融市場基建的原則》等金融市場基建的國際監管標準。

72. 金管局已在其網站上發佈了闡釋備註[22]，對金管局在指定結算及交收系統和發出終局性證明書時擬遵循的相關政策作出了解釋，並且概述了指定結算及交收系統的主要義務、金管局在這方面的權力、關於指定和撤銷指定結算及交收系統的上訴機制以及指定結算及交收系統終局性證明書的發出、暫時吊銷或撤銷。

73. 一些外國司法管轄區採用其他模式為市場參與者開展數字化債券交易創造機會，包括：

    (a) 指定和豁免*DLT*平台：透過指定[23]或豁免[24]結算及交收系統，可吸引數字化和金融中介機構參與，促進數字化債券發行。

    (b) 引入專門制度：目前針對數字化債券的海外監管制度並不多，其中許多仍處於早期階段。[25] 專門制度的引入是否有必要，以及在有必要情況下如何制定具體制度，還有待進一步研究。

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19 根據《支付系統及儲值支付工具條例》，結算及交收系統被定義為包括為轉讓記帳證券的義務的結算或交收，或該等證券的轉讓而設立的系統。

20 即，如果金管局認為該系統是或相當可能成為一個其正常運作對香港的貨幣穩定或金融穩定事關重要、或對香港發揮作為國際金融中心的功能事關重要的結算及交收系統、或在顧及涉及重大公眾利益的事宜。《支付系統及儲值支付工具條例》第4(3)條至第4(4A)條進一步詳述了金管局在作出指定時會考慮的因素。

21 該等要求包括系統的運作是以安全和有效的方式進行，以期盡量減低對該系統發揮功能的干擾的可能性；備有運作規則、設有足夠安排以監察及強制執行以使該系統的運作規則；具備為妥善執行該系統的特定功能而屬適當的可供該系統運用的財政資源。金管局也可要求指定結算及交收系統的營運者交出必要的資料或文件，以確定其是否遵守《支付系統及儲值支付工具條例》；在給予或不給予事先通知或不通知的情況下，在任何時間審查系統營運者的任何簿冊、帳目或交易；在諮詢指定結算及交收系統營運者後，藉書面通知要求系統營運者提交核數師報告；向系統營運者發出遵守《支付系統及儲值支付工具條例》的指示，以及對該等指定結算及交收系統施加運作規則。

22 關於《支付系統及儲值支付工具條例》的《指定及發出終局性證明書闡釋備註》(https://www.hkma.gov.hk/media/eng/doc/key-functions/banking-stability/oversight/explanatory_note.pdf)

23 如上文第71段所釋。

24 根據《支付系統及儲值支付工具條例》，如果金管局信納在香港以外地方的主管當局就任何指定系統所作出的監管的範圍及性質足以達到《支付系統及儲值支付工具條例》規定而訂立的任何或所有目標，金管局有權豁免香港以外的指定結算及交收系統。

25 例如盧森堡的中央賬戶管理人制度。

IV 結論

74. DLT具有徹底改變金融市場的潛力。Evergreen項目在推廣應用和充分發揮DLT在債券市場的潛能上邁出了重要一步。我們希望本報告可以就香港代幣化債券發行的技術和平台設計、交易結構設計、法律及監管考慮因素等方面提供有用的資訊。

75. 在Evergreen項目基礎上，金管局和特區政府將與行業合作開展更多代幣化發行，繼續推進代幣化債券的發展。我們正在與主要市場參與者商討未來代幣化發行事宜，在解決方案就緒的前提下，有望引入新特點，以進一步增強效率提升，擴大投資者覆蓋面，並為代幣化發行在資本市場的更廣泛應用鋪路。

附件三

香港法相关事宜
参考资料

Re Leading Holdings Group Ltd
(領地控股集團有限公司)

[2023] HKCFI 1770

(Court of First Instance)

(Companies (Winding-up) Proceedings No 343 of 2022)

Deputy Judge Jenkin Suen SC

13 April, 18 July 2023

Company law — compulsory winding-up — petition — locus to present petition — petitioner as indirect owner of sub-interest of global note issued by company with "no action clause" — global note operated on "no look through" principle whereby each bondholder had rights only against immediate counterparty — holder only party with right to sue issuer — petitioner not contingent creditor — petitioner lacked locus

Civil procedure — parties — locus standi — winding-up petition — locus of petitioner

公司法 — 強制清盤 — 呈請書 — 提交呈請書的資格 — 呈請人作為公司發行的帶有「無訴訟權條款」的全球性票據的子權益的間接所有人 — 全球性票據按照「不看透」法律原則運作，因而每個債券持有人都擁有僅針對即時對手方的權利 — 持有人只屬有權起訴發行人的一方 — 呈請人並非或有債權人 — 呈請人缺乏訴訟資格

民事訴訟程序 — 訴訟方 — 訴訟資格 — 清盤呈請 — 呈請人的資格

This application concerned whether the petitioner (P), who was an investor of a global note, had the standing to present a winding-up petition against the issuing company (C) and whether P was a contingent creditor for that purpose. C was a limited company incorporated in the Cayman Islands and listed in Hong Kong. C issued certain notes (the Notes), which were constituted by a foreign law-governed indenture (the Indenture) between C, a bank (the Trustee) and various guarantors. C's books only showed one registered global note (the Global Note). The Global Note was executed by C and registered in the name of the Trustee (who also served as the common depositary) for the accounts of Euroclear and Clearstream. The Trustee was the sole holder of the Global Note. P was the indirect owner of a sub-interest in US$1.3 million of the Notes via DBS Bank. The Indenture provided that investors (such as P) purchased a portion of the indirect beneficial interest in the

Global Note via their intermediaries such as banks and brokers (such as DBS Bank) who had accounts with Euroclear and Clearstream. Pursuant to the "No Action Clause" and the "Right to Payment Clause" of the Indenture, only the holder of the Global Note (but not "holders" of book-entry interests) had the right to institute proceedings with respect to the Indenture or the Notes or to bring suit for enforcement of payment. As a result, indirect participants such as P did not have any directly enforceable rights against C under the terms of the Indenture.

In its petition to wind up C, P claimed that it was the beneficial holder or owner of the Notes in the sum of US$1.3 million; that C failed to make payment of the principal sum and interest of the Notes on the due date; that C was insolvent and unable to pay its debts; and that P was alternatively entitled to present the petition as a contingent and prospective creditor of C. P argued that it was a contingent creditor since it might be entitled to request for the issuance of definitive notes in certain specified circumstances whereupon it could directly enforce its claims against C. C applied to strike out the petition on the ground that P had no standing to present the petition.

Held, allowing C's application, that:

(1) It was incumbent on P to demonstrate that it had standing to present the petition as it was a burden which the petitioner had to discharge up to the substantive hearing of the petition. It was not right to say that the petition should not be struck out unless it was plain and obvious that P had no *locus* (*Tallington Lakes Ltd v Ancasta International Boat Sales Ltd* [2014] BCC 327, *Re Lam Kwok Hung Guy* [2022] 4 HKLRD 793 applied). (See paras.29–31.)

(2) In a typical structure of a global note with a "No Action Clause", the trustee represented and protected the bondholders who were treated as forming a class. In consenting to the "No Action Clause" by purchasing bonds, the bondholders waived their rights to bring claims that were common to all bondholders and thus could be prosecuted by the trustee. The purpose of the regime was to ensure that the class of bondholders all acted through the trustee, such that there was neither competition between the bondholders, nor the potential for multiplicity of actions or for duplication of actions brought by the trustee on the one hand and individual bondholders on the other (*Re Jinro (HK) International Ltd (No 2)* [2003] 4 HKC 637, *Elektrim SA v Vivendi Holdings 1 Corp* [2009] 2 All ER (Comm) 213, *Re China Oceanwide Group Ltd* [2023] HKCFI 455 applied). (See paras.53–58.)

(3) Before an account holder became entitled to a direct interest in the notes, the only party with a right to sue the issuer was the holder of the notes. The system operated on the basis of a "no look through" principle, whereby each party had rights only against their own immediate counterparty. Account holders must look solely to Clearstream or Euroclear (as the case may be) for their share of each payment and in relation to all other rights arising under the global note. Investors with "book-entry interests" only held the notes indirectly or had "sub-interests" in the notes. It would be contrary to commercial common sense to suggest that such ultimate account holder could somehow petition for winding-up and thereby bypass the limitations otherwise imposed under the design of the global note structure. Accordingly, P only had rights against DBS Bank; DBS Bank only had rights against Euroclear; etc (*Secure Capital SA v Credit Suisse AG* [2018] 1 BCLC 325, *Deutsche Trustee Co Ltd v Bangkok Land (Cayman Islands) Ltd* [2019] EWHC 657 (Comm), *Winterbrook Global Opportunities Fund v NB Finance Ltd* [2019] EWHC 737 (Ch), *Madison Pacific Trust Ltd v Shakoor Capital Ltd* [2020] EWHC 610 (Ch), *Galapagos Bidco SARL v Kebekus* [2021] EWHC 68 (Ch) applied). (See paras.59–65, 118.)

(4) The position of a beneficiary of a trust property was different from that of an equitable assignee of property. The former generally had no personal right to sue, was not a creditor and did not have standing to petition for winding-up (*Re Uruguay Central and Hygueritas Railway Company of Monte Video* (1879) 11 Ch D 372, *Re Dunderland Iron Ore Co Ltd* [1909] 1 Ch 446, *Roberts v Gill & Co* [2011] 1 AC 240, *McEneaney v Stevens* [2017] EWHC 993 (Ch), *Re Canberra Babington Pty Ltd* [2021] NSWSC 552 applied; *Re China Cultural City Ltd* [2020] 4 HKLRD 1 doubted). (See paras.67–79.)

(5) A contingent creditor denoted a person towards whom, under an existing obligation, the company may become subject to a present liability upon the happening of some future event. The existing obligation provided a legal nexus between a person and a company, such that any liability which would or may arise in a future event under such legal nexus could be taken into account as prospective or contingent liability. Without the requirement of a legal nexus, the matter would be at large. P would not qualify as a contingent creditor because there was no existing contractual relationship and obligation as between P and C. It followed that P did not have standing to commence the petition against C (*Re William Hockley Ltd* [1962] 1 WLR 555, *Re Sutherland, deceased*

[1963] AC 235, *Re SBA Properties Ltd* [1967] 1 WLR 799, *Community Development Pty Ltd v Engwirda Construction* (1969) 120 CLR 455, *Stonegate Securities Ltd v Gregory* [1980] Ch 576, *Re Universal Dockyard Ltd* [2004] 1 HKLRD 935, *Re Nortel GmbH* [2014] AC 209, *Re Shinsun Holdings (Group) Co Ltd* (FSD 192/2022 (DDJ), Grand Court of the Cayman Islands, 21 April 2023) applied; *Re Jackin Total Fulfilment Services Ltd* [2008] 3 HKLRD 475 distinguished). (See paras.94–109, 116.)

(6) The expression "contingent creditor" could have different interpretations in different contexts. What was at stake in cases on schemes of arrangement concerned voting rights on schemes which may affect economic interests, as distinct from *locus* to present winding-up petition which was a more draconian right than a mere voting right for schemes. It was therefore inappropriate to attach any undue weight to such authorities (*Re T & N Ltd* [2006] 1 WLR 1728, *R (Steele) v Birmingham City Council* [2006] 1 WLR 2380, *Re Shinsun Holdings (Group) Co Ltd* (FSD 192/2022 (DDJ), Grand Court of the Cayman Islands, 21 April 2023) considered; *Re GW Pharmaceuticals Plc* [2021] BCC 696, *Re Haya HoldCo 2 Plc* [2022] EWHC 1079 (Ch) distinguished). (See paras.131–136.)

Application

This was an application by the subject company to strike out a winding-up petition.

[*Editor's note*: This judgment is of interest because it was the first occasion where a Hong Kong Court made a ruling on the *locus* of a global note investor to present a winding-up petition against the issuer of the note as a "contingent creditor".]

Mr Vincent Chen, instructed by Stevenson, Wong & Co, for the petitioner.

Mr Look Chan Ho, instructed by Sidley Austin, for the company.

Legislation mentioned in the judgment

Companies Act 1907 [United Kingdom] s.28
Companies Act 1929 [United Kingdom] s.170
Companies Ordinance (Cap.622) s.179, 179(1), Pt.16
Insolvency Rules 1986 [United Kingdom] r.13.12(1)(b)
Life Assurance Companies Act 1870 [United Kingdom] s.21

Cases cited in the judgment

Bio-Treat Technology Ltd v Highbridge Asia Opportunities Master Fund LP [2009] SC (Bda) 26 Civ

Canberra Babington Pty Ltd, Re [2021] NSWSC 552 (20 May 2021)
Castle Holdco 4 Ltd, Re [2009] EWHC 3919 (Ch)
China Cultural City Ltd, Re [2020] 4 HKLRD 1, [2020] HKCLC 945, [2020] HKCFI 1598
China Oceanwide Group Ltd, Re [2023] HKCFI 455, [2023] HKEC 556
Community Development Pty Ltd v Engwirda Construction [1969] HCA 47, (1969) 120 CLR 455
Deutsche Trustee Co Ltd v Bangkok Land (Cayman Islands) Ltd [2019] EWHC 657 (Comm)
Dunderland Iron Ore Co Ltd, Re [1909] 1 Ch 446
Elektrim SA v Vivendi Holdings 1 Corp [2008] EWCA Civ 1178, [2009] 2 All ER (Comm) 213, [2008] 2 CLC 564
Enice Holding Co Ltd [2018] 4 HKLRD 736, [2018] HKCLC 305, [2018] HKCFI 1736
GW Pharmaceuticals Plc, Re [2021] EWHC 716 (Ch), [2021] BCC 696
Galapagos Bidco SARL v Kebekus [2021] EWHC 68 (Ch)
Haya HoldCo 2 Plc, Re [2022] EWHC 1079 (Ch), [2023] 2 BCLC 82
Jackin Total Fulfilment Services Ltd, Re [2008] 3 HKLRD 475, [2008] 3 HKC 566, [2008] HKCLC 137
Jinro (HK) International Ltd (No 2), Re [2003] 4 HKC 637
KCA Deutag UK Finance Plc, Re [2020] EWHC 2779 (Ch)
Kapoor v National Westminster Bank Plc [2011] EWCA Civ 1083, [2012] 1 All ER 1201, [2012] Bus LR D25
Lam Kwok Hung Guy, ex p Tor Asia Credit Master Fund LP, Re [2022] 4 HKLRD 793, [2022] HKCA 1297
Madison Pacific Trust Ltd v Shakoor Capital Ltd [2020] EWHC 610 (Ch)
Magyar Telecom BV, Re [2013] EWHC 3800 (Ch), [2014] BCC 448
McEneaney v Stevens [2017] EWHC 993 (Ch), [2017] 5 WLUK 10 (2 May 2017)
Mitchell McFarlane & Partners Ltd, Re [2002] EWHC 3203 (Ch), [2002] 12 WLUK 529 (18 December 2002)
Mongolian Mining Corp, Re [2018] 5 HKLRD 48, [2018] HKCLC 349, [2018] HKCFI 2035
Nortel GmbH (In Administration), Re [2013] UKSC 52, [2014] AC 209, [2013] 3 WLR 504, [2013] 4 All ER 887, [2013] Bus LR 1056
Olathe Silver Mining Co, Re (1884) 27 Ch D 278
Parmalat Capital Finance Ltd v Food Holding Ltd [2008] UKPC 23, [2008] BCC 371
R (Steele) v Birmingham City Council [2005] EWCA Civ 1824, [2006] 1 WLR 2380, [2007] 1 All ER 73, [2006] ICR 869

Roberts v Gill & Co [2010] UKSC 22, [2011] 1 AC 240, [2010] 2 WLR 1227, [2010] 4 All ER 367, [2010] PNLR 30
SBA Properties Ltd, Re [1967] 1 WLR 799, [1967] 2 All ER 615
Secure Capital SA v Credit Suisse AG [2017] EWCA Civ 1486, [2017] 2 CLC 428
Shinsun Holdings (Group) Co, Ltd, Re (FSD 192/2022 (DDJ), Grand Court of the Cayman Islands, 21 April 2023)
Southwest Pacific Bauxite (HK) Ltd, Re [2018] 2 HKLRD 449, [2018] HKCFI 426
Steel Wing Co Ltd, Re [1921] 1 Ch 349
Stonegate Securities Ltd v Gregory [1980] Ch 576, [1980] 3 WLR 168, [1980] 1 All ER 241
Sutherland, deceased, Re [1963] AC 235, [1961] 3 WLR 1062, [1961] 3 All ER 855
T & N Ltd, Re [2005] EWHC 2870 (Ch), [2006] 1 WLR 1728, [2006] 3 All ER 697, [2006] 2 BCLC 374
Tallington Lakes Ltd v Ancasta International Boat Sales Ltd [2012] EWCA Civ 1712, [2014] BCC 327
Universal Dockyard Ltd, Re [2004] 1 HKLRD 935
Uruguay Central and Hygueritas Railway Co of Monte Video, Re (1879) 11 Ch D 372
William Hockley Ltd, Re [1962] 1 WLR 555, [1962] 2 All ER 111
Winterbrook Global Opportunities Fund v NB Finance Ltd [2019] EWHC 737 (Ch)
Wong Chun Kit v Cheng Kwong Fat [2020] 2 HKLRD 307, [2020] HKCFI 486
Wong Yee Chuk v Harsen (China) Ltd [2022] HKCFI 3806, [2022] HKEC 5288

Other material mentioned in the judgment

Report of the Company Law Amendment Committee (1906) (Cd 3052), para.43

JUDGMENT

Deputy Judge Jenkin Suen SC

A. Introduction

1. This is the hearing of the Summons issued by the company (**Summons**) seeking an order to strike out the winding-up petition (**Petition**) presented by the petitioner (**P**) together with the substantive hearing of the Petition.

2. By the Petition dated 27 September 2022, P asks that the company be wound up on the ground that it is indebted to P in the sum of US$1.3 million plus interest at the rate of 12% per annum

totalling US$1,397,500 (**Debt**), which arises out of the 12% Senior Notes Due 2022 (**Notes**) issued by the company on 28 June 2021.

3. According to the Petition: P is the beneficial/equitable holder/owner of the Notes in the sum of US$1.3 million; the company acted in breach of the Indenture governing the Notes (**Indenture**) by failing to make payment of the principal sum and interest of the Notes on 22 June 2022; the company is insolvent as it is unable to pay its debts; and further or alternatively, P is entitled to present the Petition as a contingent and prospective creditor of the company.

4. By the Summons dated 19 October 2022, the company has applied for an order that the Petition be struck out or dismissed for abuse of process as P had no standing to present the Petition. In particular, it is denied that P is a contingent or prospective creditor of the company.

5. By an order dated 6 January 2023 made by Peter Ng J, the substantive hearing of the Petition was adjourned for substantive argument to be heard together with the Summons.

6. The central issue in this hearing therefore hinges on P's *locus* to present the Petition against the company, particularly the question whether P is a contingent or prospective creditor of the company. In this regard, it is perhaps unfortunate that the Petition contains little particulars of the facts relied upon in support of the contention that P is a contingent and prospective creditor. Instead, these are set out in the legal submissions lodged on behalf of P. This would appear objectionable, and the Court may take the view that it is not open to P to rely on any fact or grounds not fairly stated in the Petition: see *Re China Oceanwide Group Ltd* [2023] HKCFI 455, Linda Chan J, [20]–[32]. Nevertheless, since the company has not taken any pleadings point, I proceed to deal with such contention by P. As it transpires, ultimately I do not find favour with P's contention and in light of such findings, the deficiency in the pleadings in the Petition is thus immaterial, but I fully endorse Linda Chan J's remark in *Re China Oceanwide* at [32] that the Court expects practitioners and parties to abide by the principles on pleading the material facts in a petition in future.

B. Background

B1. The company

7. The company is a company with limited liability incorporated in Cayman Islands on 15 July 2019 and was registered in Hong Kong on 23 October 2019 under Pt.16 of the Companies Ordinance (Cap.622) as a registered non-Hong Kong company. The registered office of the company is in Cayman Islands and the principal place

of business of the company is in Hong Kong. The shares of the company are listed on the Hong Kong Stock Exchange under stock code 6999.

B2. The Notes

8. On 28 June 2021, the company issued the Notes. As submitted by Mr Ho on behalf of the company (which is not seriously disputed by P), the pertinent legal structure and features of the Notes may be summarised as follows:

(1) The Notes were constituted by the Indenture between the company, The Bank of New York Mellon, London Branch (**BNYM** or **Trustee**), and various guarantors.
(2) The Indenture is governed by New York law. It governs all contractual rights and obligations under the Notes.
(3) The company, as the Notes issuer, has no direct contractual relationship with the ultimate beneficial investors in the Notes. Instead, the company's books show only one registered global note (**Global Note**), and only one registered holder of the Global Note (**Holder**).
(4) The Global Note was executed by the company and delivered to the Trustee which also served as the common depositary (**Common Depositary**) (Section 2.04(c) and (d) of the Indenture).
(5) The Global Note was registered in the name of the Common Depositary for the accounts of Euroclear and Clearstream (Section 2.04(c) of the Indenture).
(6) The Holder of the Global Note is the Person in whose name the Global Note is registered in the Note register maintained by the company (Sections 1.01 and 2.04(c) of the Indenture). The Holder is the owner of the Global Note for all purposes (Section 2.05(c) of the Indenture).
(7) On the facts, BNYM is the sole Holder (as well as the Trustee and the Common Depositary) of the Global Note. In contrast, P is neither a party to the Debenture nor the Holder of the Global Note.
(8) Investors (such as P) do not acquire the Global Note. Instead, each investor purchases a portion of the indirect beneficial interest in the Global Note *via* their intermediaries, such as banks and brokers who have accounts with Euroclear or Clearstream (Section 2.06 of the Indenture). Transfers of beneficial interests in the Global Note may be effected only through a book-entry system maintained by Euroclear and Clearstream (or their respective agents) (Sections 2.05(g) and 2.06 of the Indenture).

9. Further, the following provisions of the Indenture are of particular relevance (and hence quoted here for ease of reference):

Section 2.06. *Book-entry Provisions for Global Notes.*
… *So long as the Notes are held in global form, the Common Depositary (or its nominee) will be considered the sole holder of the Global Notes for all purposes under this Indenture and 'holders' of book-entry interests will not be considered the owners or 'Holders' of Notes for any purpose.* As such, participants must rely on the procedures of Euroclear and Clearstream and *indirect participants must rely on the procedures of the participants through which they own book-entry interests in order to transfer their interests in the Notes or to exercise any rights of Holders under this Indenture* …

Section 6.06. *Limitation on Suits.*

A Holder of Notes may not institute any proceeding, judicial or otherwise, with respect to this Indenture or the Notes, or for the appointment of a receiver or trustee, or for any other remedy under this Indenture or the Notes, *unless*:

(a) the Holder has previously given the Trustee written notice of a continuing Event of Default;
(b) the Holders of at least 25% in aggregate principal amount of outstanding Notes make a written request to the Trustee to pursue the remedy;
(c) such Holder or Holders offer the Trustee indemnity and/or security and/or prefunding satisfactory to the Trustee against any costs, liability or expense to be incurred in compliance with such written request;
(d) the Trustee does not comply with the request within (i) 60 days after receipt of the written request pursuant to clause (b) above or (ii) 60 days after the receipt of the offer of indemnity and/or security and/or prefunding satisfactory to it pursuant to clause (c) above, whichever occurs later; and
(e) during such 60-day period, the Holders of a majority in aggregate principal amount of the outstanding Notes do not give the Trustee a written direction that is inconsistent with the written request.

Section 6.07. *Rights of Holders to Receive Payment.*

Notwithstanding anything to the contrary, the right of any Holder to receive payment of the principal of, premium, if any, or interest on, such Note, or to bring suit for the enforcement of any such payment, on or after the due date expressed in the Notes, which

right shall not be impaired or affected without the consent of the Holder. [Emphasis added.]

10. Section 2.06 is of fundamental importance because it reflects the common features of the global note structure (which I will explain further below) under which only the holder (and the trustee) of the global note is recognised and can exercise any rights under the global note, whereas "holders" of book-entry interests will not be considered the owners or holders of the global note for any purpose. As such, participants (such as DBS Bank in the present case) must rely on the procedures of Euroclear and Clearstream and indirect participants (such as P in the present case) must rely on the procedures of the participants through which they own book-entry interests in order to transfer their interests in the global note or to exercise any rights of the holder under the same.

11. Echoing the above, the Indenture also contains provisions in Sections 6.06 and 6.07 which are commonly referred to as the "No Action Clause" and the "Right to Payment Clause" respectively. These provisions reinforce the position that only the holder of the global note (but not "holders" of book-entry interests) may institute any judicial proceedings, subject however to express limitations (although such limitations do not apply to an action to enforce payment). As a result, indirect participants such as P simply do not have any directly enforceable rights against the company under the terms of the Indenture.

B3. P's beneficial interest in loan

12. On its pleaded case, P is the beneficial/equitable holder/owner of the Notes in the sum of US$1.3 Million. In particular, as pleaded by P:

(1) According to a Statement of Account for the Purpose of Liquidation/Bankruptcy Claim dated 17 February 2023 (**Statement of Account**) issued by Euroclear Bank SA/NV (**Euroclear**) to DBS Bank Ltd (**DBS Bank**), it was certified that (a) as of 15 February 2023, DBS Bank had a holding of US$1.3 Million of the Notes in a Euroclear account and (b) such holding is allocated in the books of DBS Bank to P. P therefore avers that its beneficial interest is held through DBS Bank Ltd *via* Euroclear.
(2) P's beneficial interest is also evidenced by a securities holding report issued by the DBS Bank, showing that P held and holds US$1.3 Million of the Notes.
(3) The Notes are held by DBS Bank on behalf of P pursuant to the Custody Agreement dated 15 June 2021 between P (as client) and the DBS Bank (as custodian) (**Custody**

Agreement). Pursuant to cl.2.3.1 of the Custody Agreement, the custody account is established in the name of P to reflect the fact that securities do not belong to DBS Bank and to segregate the securities from the assets of DBS Bank and from the assets of the other clients of DBS Bank. Accordingly, P's holding of the Notes is entered in P's securities account and the Notes held therein do not belong to DBS Bank but to P.

(4) All rights attaching to the Notes, including rights of enforcement, have been transferred to P, albeit held *indirectly* through DBS Bank and by book-entry. P, being the person to whose account the Notes have been credited, is the beneficial/equitable holder/owner of the Notes.

(5) Under the Indenture, the company promised to (1) repay the principal sum of the Notes on 27 June 2022 and (2) pay interest on the interest payment dates on 28 December 2021 and 27 June 2022. Yet, no repayment of the principal sum and no payment of interest were made by the company on 27 June 2022. It is thus P's case that the company is unable to pay its debt.

(6) Further or alternatively, P is entitled to present the Petition as a contingent and prospective creditor of the company.

(7) In the further alternative, P relies on the statutory demand served by P on the company on 11 August 2022 demanding the company to pay or secure or compound for the Debt to P's satisfaction, but the company has failed or neglected to pay or secure or compound for the Debt or any part thereof despite the lapse of over 3 weeks.

13. In my view, there should be little dispute on the evidence that P is the *indirect* owner of sub-interest in US$1.3 Million of the Notes *via* the DBS Bank and, in turn, Euroclear and ultimately BNYM as the Holder of the Notes. On the other hand, it is also beyond dispute that P cannot directly enforce and sue the company on the Debt, and hence the statutory demand does not really assist P. Rather, the real issue is whether P, as the *indirect* owner of such sub-interest, has *locus* to present the Petition as contingent creditor of the company.

C. Issues and parties' position

C1. Key issue

14. The key issue is whether P has *locus* to present the Petition against the company, and in particular: (i) whether P as owner of beneficial interest in the loan in question has standing to present the Petition; and (ii) whether P is a contingent creditor of the

company in that P would have a direct claim against the company in the event of issuance of definitive notes.

15. Depending on the Court's decision on standing, it may be necessary to consider further issues such as whether the company is insolvent.

C2. Petitioner's case

16. P does not dispute that it has no directly enforceable right against the company under the Indenture of the Note. Nevertheless, P argues that it has standing to present the Petition mainly on two grounds.

17. First, P contends that, as equitable/beneficial owner of the debt under the Note, P is entitled to present the Petition. P relies on cases on equitable assignees and in particular Harris J's decision in *Re China Cultural City Ltd* [2020] 4 HKLRD 1 for the proposition that a beneficiary of a trust of a debt is entitled to present a winding-up petition.

18. Second, P contends that it is a contingent creditor because under certain specified events, P may be entitled to request for the issuance of definitive notes whereupon P could directly enforce its claims against the company. In this regard, P relies on a number of authorities in the context of schemes of arrangement where the Courts treat the beneficial owners of interests in loans of similar notes as contingent creditors.

C3. Company's case

19. The company contends that P is not a creditor.

20. First, whilst the company accepts that an equitable assignee of a debt may petition for winding-up, it contends that the position of a beneficial owner of a trust of debt is different. The company relies on a number of authorities in support. Further, the company contends that *Re China Cultural City* should not be followed as Harris J only relied on cases concerning equitable assignees, and it appears that cases on beneficiaries of a trust were not cited to him.

21. Second, the company contends that P is not a contingent or prospective creditor. In particular: (a) the Notes have already matured and the company already owes money to the Holder of the Notes, and therefore any liability could not be said to be contingent or prospective; and (b) the cases relied upon by P are distinguishable as they were decided for the specific purpose and context of schemes of arrangement only. During oral submissions, Mr Ho further argues on behalf of the company that P could not be a contingent or prospective creditor of the company because no debtor-creditor relationship exists between them at present, and there is no existing obligation which may give rise to contingent

liability. Indeed, this argument has been heavily relied upon by the Grand Court of the Cayman Islands in a decision which was handed down after the hearing.

D. Supplemental submissions

22. After the hearing, the company has lodged supplemental submissions on 2 May 2023 (**Company's Supp Skel**) to bring to the attention of this Court a decision on point handed down by the Grand Court of the Cayman Islands, namely *Re Shinsun Holdings (Group) Co, Ltd* (FSD 192/2022 (DDJ), Grand Court of the Cayman Islands, 21 April 2023). At para.3 of the Company's Supp Skel, the company seeks this Court's permission in doing so.

23. As the company has not sought leave from the Court before lodging the Company's Supp Skel, I gave directions on 3 May 2023 for P to lodge supplemental submissions, to deal with the question whether leave should be given for the filing of the Company's Supp Skel and also to set out substantive response to the same.

24. On 17 May 2023, P has lodged supplemental submissions. P criticises the company for failing to seek any prior leave from the Court or consent from P, contrary to the recommended practice in *Wong Chun Kit v Cheng Kwong Fat* [2020] 2 HKLRD 307, [38]–[44]. P further submits that no leave should be granted to the company as *Re Shinsun* arose in a factual setting which is markedly different from the present case.

25. Having considered the decision of *Re Shinsun*, I take the view that it is relevant to the key dispute in the present case, and I therefore grant retrospective leave to the company to lodge the Company's Supp Skel. In particular, David Doyle J sitting in the Grant Court of the Cayman Islands has conducted a helpful examination of the authorities on the meaning of contingent and prospective creditors as well as authorities explaining the context of similar global notes, and provided a well-reasoned analysis as to why a holder of an ultimate beneficial interest of such notes (as distinct from the holder of the notes), having no direct contractual relationship with the issuer of the notes, is not a creditor of the issuer (whether contingent or prospective) and hence has no standing to present a winding-up petition. I would have more to say on this in the analysis below.

26. Nevertheless, I agree with P that, before lodging the Company's Supp Skel, the company should, as a matter of courtesy and proper practice, approach P first to see whether P agrees to the lodging of further submissions; and even if there is a consensus between the parties, they should apply for leave from the Court *before* such further submissions are lodged. For such reason and to mark the Court's disapproval of the company's conduct (but giving

credit to the fact that the decision of *Re Shinsun* is relevant), I order on a *nisi* basis that the company do pay 50% of the costs of the supplemental submissions to P, to be taxed if not agreed.

E. Applicable test for striking out on *locus*

27. P submits that, in a striking out application, it is assumed that the particulars and allegations in the petition and the supporting affidavits would be established and the conflicts resolved in favour of the petitioner, and the burden is on the applicant to show that it is plain and obvious that the winding-up petition would fail: *Re Harsen (China) Ltd* [2022] HKCFI 3806, [16].

28. On the other hand, the company submits that since the striking out application hinges on P's *locus* or standing, the applicable test is whether such standing is *bona fide* disputed on substantial grounds. By analogy, the company relies on *Re Jackin Total Fulfilment Services Ltd* [2008] 3 HKLRD 475, [4], for the proposition that, if an alleged debt is *bona fide* disputed on substantial grounds by a company, the creditor does not have *locus* to present a winding-up petition — this should be *a fortiori* the case where the petitioner's standing is disputed on substantial grounds.

29. In my view, it is incumbent on P to demonstrate that it has standing to present the winding-up petition. This is a burden which P has to discharge up to the substantive hearing of the Petition. In *Re Lam Kwok Hung Guy* [2022] 4 HKLRD 793, G Lam JA said at [77]:

> … although a principal question on a winding-up petition is the solvency of the company since a company may be wound up if it is unable to pay its debts, *there is a separate question whether the petitioner is a creditor because 'until the creditor is established as a creditor he is not entitled to present the petition and has no locus standi in the Companies Court'* … [Emphasis added.]

30. Echoing the above, in *Tallington Lakes Ltd v Ancasta International Boat Sales Ltd* [2012] EWCA Civ 1712, [2014] BCC 327, the English Court of Appeal confirmed (at [4]–[5]) that the Court would strike out a winding-up petition if there was a *bona fide* dispute about the petitioner's standing. One way of demonstrating such *bona fide* substantial dispute is to show that there is a *bona fide* substantial dispute about the petition debt. In principle, there is no reason why the same approach should not apply to the present case where there is a direct challenge of the petitioner's standing as creditor.

31. In the premises, I do not consider it right to say that the Petition should not be struck out unless it is plain and obvious that

P has no *locus*, because this would be sidestepping the issue of *locus* which is an essential element of P's case.

F. Overview

32. This Judgment is of considerable length, as this is the first occasion where the Hong Kong Court has to decide the issue of the *locus* of an investor of a global note to present a winding-up petition as a contingent creditor. In view of the length of the Judgment, I consider it helpful to give an overview of my reasoning.

33. As mentioned above, the company's arguments are that: (1) beneficiaries of a trust or sub-trust has no standing to sue or petition for winding up; and (2) the debt has matured and hence cannot be contingent.

34. On the first argument, Mr Ho seeks to draw a distinction between the position of a beneficiary of a trust and that of an equitable assignee of part of the debt. There are well-established authorities that the former cannot sue in general, whereas the latter may sue on the debt, albeit subject to the procedural requirement to join the equitable assignor when suing. More fundamentally, there are authorities that an equitable assignee of a debt may petition for winding-up without joining the equitable assignor, having regard to the nature of winding-up process as a collective remedy. As explained later, such authorities do not apply to the scenario of a beneficiary of a trust.

35. As to the second argument, as I have pointed out to Mr Ho during the hearing, it does not really assist because (1) it begs the rhetorical question whether, had the debt not matured, P could then be a contingent creditor (hence having *locus* to petition for winding up) — if so it seems absurd to suggest that somehow because the debt has matured, P is in worse-off position by losing the *locus* to petition for winding up; and (2) it fails to engage directly with P's central argument that P can sue the company *contingent* on the issuance of definitive notes in P's favour.

36. During oral submissions, Mr Ho seeks to overcome the above by saying that there is no existing debtor-creditor relationship between the company and P, even though he has not developed the argument fully. Subsequently, with the benefit of the Cayman decision in *Re Shinsun*, Mr Ho has adopted the reasoning there to pursue a more structured argument as to why P does not qualify as a contingent creditor. This is ultimately the analysis which I find favour with, as explained further below.

37. Significantly, my conclusion is borne out by the context of the global note structure. There are numerous authorities which examine the features of such structure, including in particular that under such structure, only the trustee is entitled to take enforcement

action against the issuer of the note, the purpose of the regime was to ensure that the class of bondholders all act through the trustee as the exclusive channel of enforcement, bondholders cannot proceed directly against the issuer unless the trustee fails to take action in accordance with the bond documentation, and should it be otherwise there was potential for multiplicity of actions.

38. On the other hand, P's main arguments are that: (1) beneficiaries of a debt can petition for winding up; and (2) P is a contingent director as it can acquire direct right to sue the company in the event definitive notes are issued to P. P also relies on cases on schemes of arrangement in support. Further, P argues that New York law (being the governing law of the Indenture) is irrelevant to the question of P's *locus* under Hong Kong insolvency law.

39. Since I accept the company's first argument, I also reject P's first argument as explained further below. In gist, I am of the view that P's position is different from that of an equitable assignee of debt.

40. On the other hand, there is some superficial attraction in P's second argument because (1) on the face of it one can say that P is a person who is owed a liability that will become due in future only on the happening of some future event which may or may not occur, namely the issuance of the definitive notes in P's favour; and (2) there is some force in Mr Chen's argument that P's economic interest would be affected in a winding-up even though P cannot immediately enforce the debt.

41. Upon closer analysis (as detailed further below), however, I am unable to accept such argument of P.

42. First of all, there are authorities on the need for an existing obligation to qualify as a contingent creditor. This is the key reasoning in the Cayman decision of *Re Shinsun*. In the present case, and as a matter of construction of the Notes and the Indenture (whether under Hong Kong law or New York law), P has neither existing contractual relationship with, nor directly enforceable rights against, the company. This is admitted by P. As such, not until definitive notes are issued, P is not yet a creditor of the company (whether contingent or otherwise).

43. Second, this is consistent with the framework of the global note structure which is premised on class action to be pursued by the trustee exclusively. Individual bondholders such as P cannot act on their own. If P cannot sue the company to enforce the debt, it would appear anomalous if P can sidestep such constraint by petitioning for winding up instead.

44. Third, should the position be otherwise, it would lead to duplicity of actions, in that both the Trustee/Holder and individual bondholders (such as P) could pursue winding up relief against the company at the same time. In contrast, under my decision, there is

no duplicity in actions. Prior to the issuance of the definitive notes, only the Trustee/Holder can sue and petition for winding up against the company. Upon the issuance of the definitive notes in place of the global note, individual bondholders would have acquired direct rights to sue and petition for winding up against the company. This is a seamless regime.

45. Fourth, the policy objectives of including contingent and prospective creditors in the meaning of a creditor is to enable the Court to take into account a company's contingent or prospective liabilities in future. Such policy objectives would not be frustrated if P is not recognised as a contingent creditor, because the same amount of debt would have been recognised as liability owed by P to the Holder/Trustee anyway.

46. Fifth, there could be potential of abuse on P's case. Applying P's logic, even before the Notes have matured, every individual bondholder (including P) is already a contingent creditor and can petition for winding up, despite (i) the fact that the debt under the Notes are not yet due and (ii) the lack of directly enforceable rights against the company. It might lead to floodgates and defeat the purpose of the global note structure.

47. Sixth, insofar as P says this renders the concept of contingent creditor meaningless, this is not the case. Before maturity of the Notes, the Holder can petition as contingent creditor. After maturity, the Holder can petition as actual creditor or, upon issuance of definitive notes, individual account holders can petition as actual creditor.

48. Seventh, before P acquires directly enforceable rights, its economic interest is taken care of by the Holder, whether as actual creditor (if the debt is due) or contingent creditor (if the Notes have not matured).

49. Last but not least, cases on schemes of arrangement are different. In any event they concern voting rights on schemes which may affect economic interests, as distinct from *locus* to present petition which is a more draconian right than a mere voting right for schemes.

50. Having set out an overview of my reasoning, I would now go into the analysis in more detail.

G. Analysis

G1. Context of intermediated, dematerialised securities in the international capital markets

51. Before addressing the relevant arguments, I consider it helpful to refer to authorities which examine the salient features of intermediated, dematerialised securities in the international capital

markets. As elucidated by these authorities (mostly relied upon by the company), international bond issuances often use the global note structure, coupled with intermediation and dematerialised securities. Under such structure, the investors have only an indirect beneficial interest in the bonds. This provides a crucial context in considering the status of P in the present case.

52. On behalf of the company, Mr Ho has cited a number of English authorities to illustrate the features of the global note structure. I would, however, start with some relevant Hong Kong authorities which have considered such features.

53. In *Re Jinro (HK) International Ltd (No 2)* [2003] 4 HKC 637, the Court was concerned with a challenge of the *locus* of the petitioners who claimed to be holder of rights acquired through the Euroclear trading system of a global note called "Guaranteed Floating Rate Notes". The facts are materially different because in that case, the definitive notes were due to be issued and there were contractual provisions providing that, if the definitive notes were not issued within 45 days as contractually required, the global note will become void such that individual account holders would acquire direct rights. There is little dispute that such individual account holders have standing to petition for winding-up as creditors, and the issue in *Re Jinro* concerned whether the petitioners were successors and assigns of account holders, or otherwise equitable assignees of the direct rights, such that they have *locus* to petition for winding-up. Such issue was answered in the affirmative by Kwan J (as she then was). Whilst the issue is not directly relevant to this case, Kwan J (as she then was) has provided a helpful summary of the global note structure at [31]–[40]:

> *The Euroclear system*
>
> …
>
> [31] The Euroclear system is the world's largest clearance and settlement system for internationally traded securities. It also provides a custodian service for securities and is an international central securities depositary (ICSD). The majority of participants in the system are banks, brokers, dealers, custodians, and other institutions professionally engaged in managing new issues of securities, market making, trading or holding the wide variety of securities accepted in the system. The participants trade in the system as principals, notwithstanding that they may trade on their own behalf or on behalf of an underlying investor. GSI was, at all relevant times, a participant in Euroclear and had operated three Euroclear securities

clearance accounts. GSAF had its own Euroclear securities account since October 1999.

[32] Prior to the acceptance of a new issue of securities for trading in the system, various criteria would have to be met. The important ones for present purpose, as set out in the 'Guide to acceptance of securities in the Euroclear system' (the User Guide), are as follows.

(1) *Immobilization of securities*

[33] To be accepted for trading in the system, securities must be deposited with one of the Euroclear depositaries and a depositary is appointed by the Euroclear Operations Centre (EOC) for each issue accepted in the system. Securities designed for the ICSD are generally issued in the form of a temporary global note which is subsequently exchanged for a permanent global note. Where securities are represented by a global note, these are lodged with a common depositary authorised by Euroclear. Where securities are represented by definitive notes or other certificates, these are lodged with a specialised depositary, generally located in the country in whose currency the notes or certificates are denominated, or where the issuer is located. In this way, *the physical documents which represent the securities traded in the system are 'immobilized' in the Euroclear depositary network. The immobilization of securities enables a high volume settlement to take place without the movement of the underlying physical certificates. The settlement of transfers is done electronically, sales and purchases of such securities are recorded by book entries in the accounts of participants who are recognised as accountholders in respect of the securities*. Payments due in respect of the securities are made by the issuer *via* the paying agents to the common depositary and thence into the Euroclear system. *There is no registry maintained by or under the control of the issuer which records the legal ownership of the securities.*

…

(2) *Fungibility*

[35] *For securities to be accepted in the system, it must be possible to hold them on a fungible basis. Amongst other things, this means that all securities of a same issue must be treated as equivalent.* It is provided in cl 4(a) of the 'Terms and conditions governing use of Euroclear' (the Euroclear Terms) that *no accountholder has entitlement to any specific securities but each will be entitled to transfer (by book entry)*, to deliver or to repossess from Euroclear an amount of securities of any issue equivalent to the amount credited to any securities clearance account in its name. It is further

provided in the Euroclear Terms that a security 'shall be deemed to be held in the Euroclear System' if it is standing to the credit of a securities clearance account (cl 4(d)(i)(v)) and that a security held in the Euroclear system 'shall be deemed to be held by the holder of the Securities Clearance Account' to which it is standing to the credit (cl 4(d)(ii)(v)). Hence, *accountholders have a co-ownership right in the notional pool of securities of each category held on their behalf by Euroclear and this intangible right is represented solely by a book-entry record in the securities clearance account of the participant*, see 'Operating procedures of the Euroclear System' (the Euroclear Operating Procedures) cl 3.2.

(3) *Transferability*

[36] *Securities deposited in the system must be freely transferable between participants, without further reference to or communication with the issuer.* Transfer restrictions are acceptable only if they require the standard certification procedures described in the User Guide. As a general rule, EOC handles certifications only in relation to the exchange of temporary global securities, the payment of income or redemption proceeds, or the exercise of certain custodian operations. Other restrictions on the transfer of beneficial ownership or registered title can only be enforced *outside* the Euroclear system and participants are *solely* responsible for complying with such restrictions. It is also provided in cl 10.3.1(c)(ii) of the Euroclear Operating Procedures that each participant is solely responsible 'for informing itself of the characteristics of the securities it holds, or it intends to hold, or to be recorded on any Account through the Euroclear System including without limitation … holding or transfer restrictions …'.

(4) *Disclosure*

[37] EOC does not accept securities of which the terms and conditions require EOC to disclose information about the participants' holdings of the issue. EOC is generally prevented, without a participant's authorization, from disclosing ownership of securities held in the system by applicable law. Moreover, *EOC has no knowledge of the beneficial ownership of securities held by participants, which often hold securities of their own clients in the system*.

…

(5) *Enforcement of holders' rights*

[39] Neither EOC nor its depositaries will enforce the terms of securities against an issuer or guarantor on behalf of

> persons holding such securities through the Euroclear system. The beneficial owners of the securities must be able to enforce their rights under the terms of the securities against the issuer and/or the guarantor and specific arrangements may be necessary to achieve this when the securities are represented by permanent global certificates. *If there is no trustee for the issue (who will be responsible for enforcing beneficial owners' rights against the issuer in the case of default) and the issue is evidenced by a global certificate, there should be a 'clearly documented procedure' in place whereby either*:
>
> > * *Euroclear participants or the beneficial owners can appoint a trustee*; or
> > * *the issuer exchanges the global certificate into individual certificates* that can be delivered out of the Euroclear system; or
> > * if the issuer cannot issue definitive certificates, a Deed of Covenant or similar provision included in the terms and conditions should state that *the issuer will recognise statements of account, issued by EOC to participants, as evidence of beneficial ownership*.
>
> [40] A full description of an event of default should also be included in the terms and conditions of the securities, for example a declaration of default on the request of a beneficial owner to a fiscal agent or other agent, or as to an automatic default. Euroclear requires that in a default situation the issuer must recognise the beneficial owner's rights in the securities. It is expressly provided in the User Guide at p 27 that 'securities in default' can be held in the Euroclear system.

54. The above is a helpful summary of the global note structure, although it has not addressed specifically the position of an ultimate account holder (commonly referred to as the "UAH") where there is a holder/trustee appointed under the note who will be enforcing beneficial owners' rights on their behalf.

55. More recently, in *Re China Oceanwide*, Linda Chan J held that even if the petitioner has book-entry interests in the specified amount of a global note, the petitioner is not a holder of the note and has no direct right against the bond issuer or guarantor (at [38]–[42]):

> [38] The combined effect of Sections 2.04, 2.05 and 2.06 is that:

> (1) Only the following persons are Holders of the Notes: (a) Citivic Nominees Limited as nominee of the Common Depositary for Euroclear and Clearstream (Section 2.04(c)); and (b) the Holder whose name and address have been recorded in the Register (Section 2.05(a)); and
> (2) Until final acceptance and registration of the transfer by the Registrar in the Register, a transferee of the Note will not become and does not have the rights of a Holder (Section 2.05(c)).
>
> [39] *There is no evidence whatsoever to show that the Petitioner's name and address have been recorded in the Register. It follows that the Petitioner is not a Holder of the Notes.*
>
> [40] *No reliance can be placed by the Petitioner on Section 6.06 or Section 6.07 of the Indenture as both sections expressly provide that only a Holder has the right to institute proceedings* with respect to the Indenture or the Notes or to bring suit for enforcement of payment …
>
> [42] For the above reasons, *I hold that the Petitioner is not a Holder of the Notes and, therefore, does not have the right to commence proceedings with respect to the Indenture or the Notes or to bring suit for enforcement of payment under the Notes. The Petition must be dismissed for this reason alone.* [Emphasis added.]

56. Based on the construction of terms of the global note, Linda Chan J concluded that the petitioner in *Re China Oceanwide* is not a holder of the global note and does not have the right to commence proceedings with respect to the indenture or the notes. It may be noted that the indenture in that case also contains the "No Action Clause" and the "Right to Payment Clause" (also under Sections 6.06 and 6.07), but the Court pointed out that such provisions do not assist the petitioner as they expressly provide that only a holder has the right to institute proceedings with respect to the indenture or the notes or to bring suit for enforcement of payment. Moreover, whilst the petitioner in that case seeks to rely on the "Downstream Purchaser point" in *Re Jinro*, Linda Chan J explained (among others) at [50](5) that *Re Jinro* concerned situation where neither Euroclear nor its depositaries will enforce the terms of the securities whereas *Re China Oceanwide* concerned an indenture with provisions stipulating who have the right to enforce the indenture and the notes and how it should be done. Such analysis should apply equally to the position of P under the Notes and the Indenture (which similarly make provision that only the Holder has the right to enforce the Indenture and the Notes), although Linda Chan J did not go

further to consider whether the petitioner may be regarded as a contingent or prospective creditor.

57. Turning to the English authorities relied on by the company, I would start with *Elektrim SA v Vivendi Holdings 1 Corp* [2008] EWCA Civ 1178, [2009] 2 All ER (Comm) 213, where the English Court of Appeal explained in a similar vein that only the holder of a note has the right to take enforcement action against the issuer, with particular reference to the "No Action Clause", at [1]–[3] and [91]:

> [1] The principal question on this appeal relates to the construction of a 'no-action' clause in a bond issue, whereby *only the trustee of the issue is entitled to take enforcement action against the issuer*, and *bondholders cannot proceed directly against the issuer unless the trustee fails to take action in accordance with the bond documentation*. Such clauses have been common in bond issues governed by English law since the nineteenth century, and in bond issues in other common law countries.
>
> [2] The use of a trustee is an effective way of centralising the administration and enforcement of bonds. *Bondholders act through the trustee, and share pari passu in the fortunes of the investment, and do not compete with each other. The trustee represents and protects the bondholders, who are treated as forming a class*, and who give instructions to the trustee through a specified percentage of bondholders. Such a scheme promotes liquidity. *Individual bondholders rely on the trustee as the exclusive channel of enforcement* and can be confident that on enforcement principal and interest will be distributed pari passu.
>
> [3] No-action clauses are the subject of many decisions in the United States and Canada. They include the recent decision of the Ontario Court of Appeal in *Casurina Ltd Partnership v Rio Algom Ltd* (2004) 40 BLR (3d) 112, in which it upheld the lower court's approval of the approach in the United States (citing *Feldbaum v McCrory Corp* 1992 Del Ch LEXIS 113) that *in consenting to no-action clauses by purchasing bonds, bondholders waive their rights to bring claims that are common to all bondholders, and thus can be prosecuted by the trustee*, unless they first comply with the procedures in the instrument constituting the bonds. As I said in *Highberry Ltd v Colt Telecom Group plc* [2002] EWHC 2503 (Ch) at [12], [2003] 1 BCLC 290 at [12], no-action clauses have even been the subject of discussion in the International Court of Justice (although not the subject of decision) in relation to insolvency

> proceedings brought directly by bondholders: see *Re Barcelona Traction, Light and Power Co Ltd* (*Belgium v Spain*) (*second phase*) [1970] ICJ Rep 3 at 104–105 *per* Judge Sir Gerald Fitzmaurice QC.
>
> [91] *The purpose of the regime was to ensure that the class of bondholders all acted through the Trustee*. That ensured that they all shared equally in the fortunes of the investment and that there was no competition between the bondholders. *If an individual bondholder were free to pursue a claim based on a loss caused to the bondholders as a class, then either there was the potential for multiplicity of actions or for duplication of actions brought by the Trustee on the one hand and individual bondholders on the other.* [Emphasis added.]

58. As explained in the above passages, in a typical structure of a global note with a "No Action Clause", the trustee represents and protects the bondholders, who are treated as forming a class, and the bondholders rely on the trustee as the exclusive channel of enforcement because, in consenting to the "No Action Clause" by purchasing bonds, bondholders waive their rights to bring claims that are common to all bondholders, and thus can be prosecuted by the trustee. The purpose of the regime was to ensure that the class of bondholders all acted through the trustee, such that there was neither competition between the bondholders, nor the potential for multiplicity of actions or for duplication of actions brought by the trustee on the one hand and individual bondholders on the other.

59. That the bondholders have the right to sue only their own direct intermediaries (but not the issuer) has been confirmed by the English Court of Appeal in *Secure Capital SA v Credit Suisse AG* [2017] EWCA Civ 1486, [2018] 1 BCLC 325 (at [9]–[11], [46]–[50], [52]):

> [9] *Typically, as in this case, the securities are represented by a bearer note that is physically held on a permanent basis by a custodian. In this way, the note is said to be 'immobilised'. It is not the bearer note, but interests in the note, that are traded through the Clearstream system. This is achieved through a descending succession of interests. The custodian holds the note for the Clearstream system. Clearstream maintains accounts for members (banks and others) which hold and deal in interests in securities as account holders*. Each account holder's interests in securities at any time are recorded by Clearstream. The interests are fungible and are traded between account holders through electronic book entries. *Account holders*

may hold interests for themselves as principal or to the order of their customers (account owners).

[10] *The system operates on the basis of a 'no look through' principle, whereby each party has rights only against their own counterparty*. Payments of sums due on the securities are made by the issuer or other payer to Clearstream which then makes payment to the account holders in respect of their recorded interests. The account holders pass on the appropriate sums to their account owners.

[11] *Typically, as in the present case, account holders will become entitled to a direct interest in notes only if there has been default in the payment of principal due on the notes* or if Clearstream were closed permanently or for a continuous period of 14 days.

[46] The rights of parties to sue Credit Suisse on the contract constituted by the Notes and the relevant documents are clearly set out in those documents.

[47] *The only party entitled to sue is the holder of the Notes represented by the PGS, ie BNYM, unless one of a limited number of specified events has occurred*. The obligations of Credit Suisse are owed to the bearer for the time being of the PGS. The Programme Memorandum provides that the holder would 'be deemed to be and may be treated as its absolute owner *for all purposes*' (my emphasis). *The persons shown in the records of Clearstream (ie the account holders, not account owners) must look solely to Clearstream 'for his share of each payment made by the Bank and in relation to all other rights arising under the Global Securities'* (my emphasis). This is, as Secure Capital accepts, the 'no look through' provision which is fundamental to the workings of the settlement systems in interests in immobilised securities. Secure Capital's submission that it is limited in its effect to payment obligations is incompatible with the emphasised words. This provision is concerned with the rights of an account holder, which in the present case was RBSL. It would be eccentric to suggest that account holders, who may hold interests on their own account, must look only to Clearstream or other settlement system but account owners, who are even more removed from the underlying Notes, are not so constrained.

[48] The general position, that only the holder of the Notes enjoys enforceable rights against Credit Suisse, is further made clear by the provisions that, in limited circumstances, enable parties to proceed directly against Credit Suisse.

> [49] If principal in respect of any Notes was not paid when due, the PGS could be exchanged for definitive securities which could then be distributed among those with interests in the Notes, creating a direct relationship with Credit Suisse and enabling the holders to sue Credit Suisse directly.
>
> [50] Additionally, cl 2.1 of the Deed of Covenant provided that, on the giving of notice in the event of default in the payment of principal, each account holder with interests in the Notes would 'acquire against the Bank all rights (Direct Rights) that it would have had if, immediately before each such Acquisition Time, it had been the holder of the Original Securities'. This is expressed to include 'without limitation' the right to receive all payments due at any time on the Notes. The effect is again to create rights in favour of account holders (but not account owners) that are directly enforceable against Credit Suisse. This latter point is made expressly clear by cl 4.2 of the Deed which provides that each relevant account holder 'is entitled to receive payment of the amount due in respect of each of its Entries and of all other sums referable to its Direct Rights to the exclusion of any other person'.
>
> [52] The overall effect of these express provisions is clear. *The only party with a right to sue Credit Suisse is BNYM as holder of the Notes, unless there is default in the payment of principal on the Notes, in which event account holders may acquire directly enforceable rights against Credit Suisse.* [Emphasis added.]

60. The above makes it clear that, before an account holder becomes entitled to a direct interest in the notes, the only party with a right to sue the issuer is the holder of the notes. The system operates on the basis of a "no look through" principle, whereby each party has rights only against their own counterparty. As such, account holders must look solely to Clearstream or Euroclear (as the case may be) for their share of each payment and in relation to all other rights arising under the global note.

61. Against such backdrop, investors with "book-entry interests" have often been said to be holding the notes indirectly, or that they have only "sub-interests in the notes. For instance, in *Deutsche Trustee Co Ltd v Bangkok Land (Cayman Islands) Ltd* [2019] EWHC 657 (Comm), Knowles J explained that the investors of such bond issuance have only "sub-interests" in the bonds (at [8], [22], [44]):

> [8] The Bonds were issued in global form. *Tradeable interests in the Bonds are held by underlying investors ('Persons with*

> *Sub-Interests') through holders of accounts at clearing systems ('Accountholders')*. A global certificate (the 'Global Certificate') is registered in the name of The Bank of New York Depositary (Nominees) Limited ('BNY Nominees'), as a nominee for a common depositary for the clearing systems …
>
> [22] The Court finds as follows:
>
> (1) The Bonds were issued in global form with the Global Certificate … The Bonds are held in the name of BNY Nominees, as a nominee for a common depositary for the Clearing Systems.
> (2) The Bonds were listed on the London Stock Exchange and were traded through the Clearing Systems, which provide electronic book entry trading systems for interests in securities and act as clearing houses for trades in those interests.
> (3) *The Clearing Systems maintain accounts for Accountholders, who hold interests in securities such as the Bonds on behalf of themselves or Persons with Sub-Interests* …
>
> [44] The Trustee argues, in the Court's view correctly, that *Persons with Sub-Interests have been trading not in the Bonds but in interests in the Bonds, which are held through Accountholders and the Clearing Systems* … [Emphasis added.]

62. In *Winterbrook Global Opportunities Fund v NB Finance Ltd* [2019] EWHC 737 (Ch), Marcus Smith J explained that the claimant, being an investor of such bond issuance, had only an indirect beneficial interest in the bonds (at [8]):

> [8] The Claimant … is the beneficial owner of some of the Notes. As is common in note issues such as these, the Notes were issued in global note form, and held by a common depositary on behalf of the relevant clearing systems, Euroclear and Clearstream. *Under this structure, the securities are issued in global form and held by the depositary for the clearing system.* Investors hold their interests through accounts at the clearing systems or indirectly through custodians who have accounts at the clearing systems. *[The Claimant] holds its Notes indirectly.* [Emphasis added.]

63. In *Madison Pacific Trust Ltd v Shakoor Capital Ltd* [2020] EWHC 610 (Ch), Zacaroli J explained that the underlying investors

of such bond issuance are only beneficiaries under sub-trusts (at [14]–[17]):

> [14] In relation to the 2010 Notes only one Note has been issued, a permanent global note which is deposited with a common depositary who holds it on behalf of Euroclear and Clearstream (the 'Clearing Systems'). The Clearing Systems facilitate trading in the Notes by crediting interests in the global note to account holders, or 'participants' in the Clearing Systems.
>
> [15] *The participants hold such interests on behalf of persons in the market who wish to acquire beneficial interests in the global note, the ultimate account holders ('UAHs'). The UAHs may hold their interest directly with a participant in the Clearing System or through one or more intermediaries.* All dealings in interests in the notes take place by way of book entries, in the books either of the Clearing Systems, the participants or intermediaries.
>
> [16] *As a matter of English law, there is a chain of contractual and proprietary relationships between the Issuer and each UAH*, as follows (see, for example, Gullifer and Payne, *Corporate Finance Law* (2nd ed) at 389-390). The common depositary has contractual rights (set out in the global note, which incorporates the terms of the Trust Deed). The Clearing System has contractual rights against the common depositary; the participants have contractual rights against the Clearing Systems; and *where there are no further intermediaries the UAH has contractual rights against the participant. If there are further intermediaries between the participant and the UAH, then each intermediary has contractual rights against the entity next above it (i.e. closer to the Issuer) in the chain.*
>
> [17] In addition, *the contractual rights of each entity against the entity next above it in the chain are typically held on trust for the entity next below it in the chain*. For example, a participant's contractual rights against the Clearing System are held by it for the benefit of the intermediary next below it in the chain. *The common depositary's contractual rights under the global note against the Issuer are thus held via a trust and series of sub-trusts for each UAH.* [Emphasis added.]

64. **In *Galapagos Bidco SARL v Kebekus* [2021] EWHC 68 (Ch), Zacaroli J explained that under the global note structure the underlying investors have only indirect beneficial interests in the note (at [68]–[70]):**

> [68] … the [high-yield notes ('HYN')] were held in global form, so that the only Holder was the Common Depository. Beneficial interests in the HYN were held through a series of sub-participations: the Holder held its interest for the benefit of the clearing systems, who held for the benefit of account holders, who in turn held for the benefit of the ultimate beneficial holders, either directly or through one or more intermediaries … *Under English law, this is analysed as a series of sub-trusts* …
>
> [69] The HYN Trustee is appointed under the Indenture as trustee for the benefit of the Holders of the HYN …
>
> [70] *Since … the only direct beneficiary of the trust constituted by the Indenture was the Common Depository (as the only 'Holder' of HYN …), all those who held beneficial interests in the HYN were indirect beneficiaries as a result of the sub-participation arrangement described above.* [Emphasis added.]

65. In the premises, I accept Mr Ho's submissions that, whilst the global note structure and intermediation increase liquidity and make investing and trading simpler for investors, they do not confer any direct right on them to sue the bond issuer for payment. I further accept that the enforcement mechanism under a global note is designed to achieve the collectivity of proceedings, so that bondholders as a class would all act through the trustee as the exclusive channel of enforcement. It seems plain to me that, having regard to the purpose and context of a global note (as reflected in the terms of the Notes and the Indenture set out in Section B2 above), it would be anomalous and contrary to commercial common sense to suggest that, whilst an ultimate account holder cannot exercise any direct rights under the Notes against the company, such ultimate account holder can somehow petition for winding-up and thereby bypass the limitations otherwise imposed under the design of the global note structure.

G2. Beneficial owner of a debt

66. The first argument relied upon by Mr Chen on behalf of P is that, as a beneficial owner of part of the underlying debt of the Note, P has standing to petition for winding up of the company.

67. On behalf of the company, Mr Ho contends that a bond investor such as P who is a mere trust beneficiary, *qua* beneficiary alone, has no standing to present a winding-up petition against the bond issuer. I agree.

68. Mr Ho has cited a few authorities in support.

69. In *Re Uruguay Central and Hygueritas Railway Co of Monte Video* (1879) 11 Ch D 372, Jessel MR held at 380–383 as follows:

> There can be no question that upon that deed the holders of the bonds are not creditors: *they are merely cestuis que trust of a charge, having a right, no doubt, to put their trustees in motion to compel payment under the covenant, but not having any independent right to sue the company either at law or in equity.*
>
> … *it was not intended to be a bond enforceable by any one for his own benefit*; because, if one of the bondholders could sue, he could only get judgment on behalf of all. *They are pari passu bonds*. Of course, it never could have been meant that one should be able to get judgment for himself. Even in cases where it has been held that debts are created by these instruments, *one bondholder cannot, by getting a judgment, get paid in priority to the other bondholders*.
>
> … When you look at the provisions of the deed, *the mode of payment is, for the company to pay to the trustees who are to pay to the bearers of the coupons. So that it is not a covenant to pay to the bearers direct, but to pay through the trustees under the provisions of the deed.* Now, *I cannot imagine that this document can give either the bearer of the coupons as regards interest, or the bearer of the bond as regards principal, an immediate right of action for money lent or for money due.* It is not the meaning of the transaction. The whole transaction means this, that both the share and the bond are issued as a mode of securing to the person advancing the money for making the line certain benefits, and he takes the benefits as they are given to him. That does not appear to me, as I said before, to create any direct debt from the company. In fact it is hardly possible it can be so, because *the company is liable to pay the trustees under the deed, and they cannot be sued twice over. Are they to have two actions brought, one by the trustees, and the other by the holder of the coupon; and are they to be liable to every person who cuts a coupon off a bond to an action, simply because he is the holder of a coupon? It does not appear to me that was the intention of the parties, which, after all, is the governing rule in deciding questions of equitable debt, to create a debt for which the holder of the coupon could sue directly. I think, therefore, that the holder of the coupon, who claims now for interest unpaid, is not a creditor either at law or in equity* within the meaning of the Companies Acts. [Emphasis added.]

70. Significantly, the bond structure in *Re Uruguay* resembled that of a global note in international capital markets practice, under which a bondholder typically could not sue the issuer of the bond directly and can only act through the trustee. In finding that a bondholder is not a creditor either at law or in equity, Jessel MR

noted that bondholders do not have any independent right to sue the issuer, the bondholder cannot get a judgment in priority to other bondholders, and there should not be duplicity of actions by the trustee and bondholders. Such considerations resonate with the design of the global note structure examined above. The lack of a direct debt owed by the issuer to the bondholder is thus critical.

71. In this regard, Mr Chen for P seeks to rely on Harris J's decision in *Re China Cultural* which I will address below. Mr Chen also argues that *Re Uruguay* was decided at a time when English law did not confer any standing on a contingent creditor to petition for winding-up. Nevertheless, this is beside the point because, for the purpose of P's first argument, the focus is whether a beneficial owner of a debt under a trust (or sub-trust) has standing to present a winding-up petition as creditor. In any case, the reasoning of *Re Uruguay* would militate against P's second argument on contingent creditor because it emphasises the need for a direct debt (or direct debtor-creditor relationship) in order to qualify as a creditor. This is logically speaking a *prior* question to be decided *before* moving on to consider, if there is indeed a direct debt and hence the status of creditor is established, whether the debt is (i) immediately payable (ie actual liability); (ii) payable in future upon certain event (ie contingent liability); or (iii) definitely payable at certain time in future (ie prospective liability). As I will explain later, such approach is amply supported by authorities. For present purposes, it suffices to say that *Re Uruguay* is an authority in support of the proposition that a trust beneficiary is not a creditor and does not have standing to petition for winding-up.

72. In *Re Dunderland Iron Ore Co Ltd* [1909] 1 Ch 446, a conclusion similar to *Re Uruguay* was reached by Swinfen Eady J at pp.452-453 as follows:

> *In these circumstances are the petitioners, the debenture stockholders, creditors? There is no covenant by the company with them. The covenant in the trust deed is between the company and the trustees.* There is no covenant in the stock certificate, and there is no statement therein beyond a copy of the conditions contained in schedule 1 of the trust deed. In my opinion *the true legal position is that the debenture stockholders, although cestuis que trust, are not creditors of the company. They have not any direct contract with the company. The contract is between the company and the trustees, and in these circumstances I am of opinion that the petitioners are not creditors entitled to present a winding-up petition.* It is not a case in which there is any negotiable security or any coupons issued. The petitioners are merely the registered holders of debenture stock, and the only covenant to pay the principal and interest to the stockholders is a covenant made between the company and the trustees.

> On that state of facts, the stockholders as such are not creditors of the company. *The fact that there is a covenant between the company and the trustees that the company will pay the principal and interest to the stockholders does not entitle them to sue the company as direct creditors and does not make them creditors entitled to present a winding-up petition* … I therefore determine that the petitioners are not in respect of their holdings of stock creditors of the company. [Emphasis added.]

73. The emphasis of the Court is, again, on the lack of any direct contract or covenant between the debenture holder and the company, as a result of which the debenture holder is not entitled to (i) sue the company as direct creditor and (ii) present a winding-up petition as creditor.

74. More recently, in *Roberts v Gill & Co* [2010] UKSC 22, [2011] 1 AC 240, Lord Collins held at [62]–[68] as follows:

> [62] Consequently it has been the consistent practice … for almost 300 years that, where a beneficiary brings an action in his own name to recover trust property, the trustees should be joined as defendants. … The purpose of joinder has been said to ensure that they are bound by any judgment and to avoid the risk of multiplicity of actions: *Lewin on Trusts*, 18th ed (2008), para 43-05. *But joinder also has a substantive basis, since the beneficiary has no personal right to sue, and is suing on behalf of the estate, or more accurately, the trustee.*
>
> [63] The conclusion that in a beneficiary's derivative action the trustee must be a party is not undermined by those cases in which it has been held, or assumed, that an action by an equitable assignee of property (such as a debt, or intellectual property) can proceed, or is properly constituted, without the joinder of the assignor at the outset of proceedings.
>
> [64] The starting point is that if an equitable assignee sues a third party, the assignor must be joined as a defendant …
>
> [65] But it is not an invariable rule …
>
> [67] In more modern times it has been held that, although the practice was to join the assignor, the requirement is a procedural one, the absence of which can be cured. The assignor must be joined before a final judgment can be obtained by the assignee, but the action is validly constituted without joinder, so that if the assignee sues without joining the assignor, the action is in time for the purposes of limitation: …

> [68] *What distinguishes these cases from the present one is that in the case of an equitable assignment the assignee is the true owner and the assignor is a bare trustee.* I agree with Lord Walker of Gestingthorpe JSC that there is no real analogy between an equitable assignee and a beneficiary interested in an unadministered estate. [Emphasis added.]

75. The general position, therefore, is that the beneficiary of a trust property has no personal right to sue. This is echoed by cases like *Re Canberra Babington Pty Ltd* [2021] NSWSC 552, where Emmett AJA stated at [27] that, "Save in special or exceptional circumstances, a beneficiary under a trust has no cause of action against a third party in relation to injury to trust property"; and *McEneaney v Stevens* [2017] EWHC 993 (Ch), where Deputy Judge Edward Murray held at [17] that "The general rule is that since trustees administer the trust fund as principals and not as agent for the beneficiaries, the trustees are normally the proper claimants in proceedings against third parties in actions based on breach of contract or tort and other causes of action arising in the course of administration of the trust". Of course, these cases are to be distinguished from cases where the bond documentation expressly confers a direct right of enforcement on the trust beneficiaries, such that the beneficiaries would have standing to present a winding-up petition: see eg *Re Olathe Silver Mining Co* (1884) 27 Ch D 278, *per* Pearson J at p.283.

76. Significantly, as noted in *Roberts v Gill & Co*, the position of a beneficiary of a trust property is different from that of an equitable assignee of property. As explained by Emmett AJA, an equitable assignee is the true owner of the property and the assignor is a bare trustee, and hence the practice or requirement to join the assignor is a procedural one. Indeed, it is well-established that, unlike the position of a trust beneficiary, an equitable assignee of a debt is a creditor and has standing to present a winding-up petition: see eg *Re Steel Wing Co Ltd* [1921] 1 Ch 349, *per* P O Lawrence J at p.357; *Re Mitchell McFarlane & Partners Ltd* [2002] EWHC 3203 (Ch), *per* N Strauss QC at [10]; *Kapoor v National Westminster Bank Plc* [2011] EWCA Civ 1083, [2012] 1 All ER 1201, *per* Etherton LJ at [30]. Such distinction is pertinent when it comes to the analysis of *Re China Cultural*.

77. As mentioned above, Mr Chen relies heavily on *Re China Cultural* because, on the facts of that case, the petitioner's interests in the debt arose by way of *both* equitable assignment and a declaration of trust: see the third issue set out at [8] of the decision (referring to both equitable assignment and a declaration of trust), and also [20] of the decision where Harris J said the issue is whether it is necessary for a beneficiary under a trust to join the trustee as

a party to a petition to wind up a company (without differentiating between the position of a trust beneficiary and an equitable assignee). With due respect, it would appear that Harris J has conflated the position of a beneficiary of trust with an equitable assignee of debt, probably because his attention was not drawn to authorities on the position of a trust beneficiary. Instead, Harris J relied on authorities on equitable assignment of debts such as *Re Steel Wing* to arrive at his conclusion at [24]–[28].

78. Specifically, in [25]–[26] of *Re China Cultural*, Harris J relied on the reasoning in *Re Steel Wing* and the Privy Council's decision approving the same in *Parmalat Capital Finance Ltd v Food Holding Ltd* [2008] BCC 371, [2009] 1 BCLC 274, [6]–[8]. In gist, as held by those decisions, an assignee of part of a debt is required to join all parties interested in the debt in an action to recover the part assigned to him because the Court cannot adjudicate completely and finally without having such persons before it; but this does not apply to a winding-up petition which only puts into effect a process of collective execution for the benefit of all creditors and in the course of that process, the rights of creditors may have to be determined but such determination is not necessary at the stage of making winding-up order, and thus an equitable assignor (or assignee) has a sufficient interest to present a winding-up petition without joining the other. In my view, such reasoning does not apply equally to a trust beneficiary because (i) whilst a trust beneficiary cannot petition for winding-up, a trustee (who can represent all beneficiaries) can petition for winding-up alone; and (ii) unlike the case of equitable assignee, the joinder of the trustee is a substantive as opposed to mere procedural requirement.

79. Therefore, I do not accept Mr Chen's argument that one could rely on *Re China Cultural* and thereby ignore well-established authorities that, unlike an equitable assignee, a trust beneficiary is not entitled to present a winding-up petition. It follows that I reject P's first argument.

G3. "Contingent" and "prospective" creditor

G3.1 Introduction

80. On behalf of P, Mr Chen argues in the alternative that P is a contingent or prospective creditor of the company under s.179(1) of the Ordinance. In short, Mr Chen argues that, since P may be entitled to request for issuance of definitive notes in certain specified circumstances whereupon P can directly enforce its rights against the company, P is a contingent creditor as the company's liability is contingent on the event of the issuance of definitive notes.

81. In response, Mr Ho on behalf of the company initially argues that because the Notes have already matured and the

underlying debt is already due, the same debt cannot at the same time be owing and contingent. During oral submissions and in the Company's Supp Skel in reliance of the Cayman decision of *Re Shinsun*, Mr Ho's further argument is that, since there is no existing obligation or debtor-creditor relationship between P and the company, P does not qualify as a contingent creditor.

82. As mentioned above, Mr Ho's initial argument on contingent debt does not address the point because (1) it begs the rhetorical question whether, had the debt not matured (and hence could at best be contingent), P could then be a contingent creditor (hence having *locus* to petition for winding up) — if so it seems absurd to suggest that somehow because the debt has matured, P is in worse-off position; and (2) it fails to engage directly with the argument of P that it can sue the company *contingent* on the event of issuance of definitive notes in its favour. Moreover, it may be conceptually open to P to argue that the debt is not contingent for the Holder but it may still be contingent for P who has no immediate right to payment. Hence, one still has to go back to the question whether the event of issuance of definitive notes renders P a contingent creditor. That said, Mr Ho's initial argument does highlight a problem of P's case, namely that there will be more than one creditor of the same debt which results in duplicity and is one of the reasons relied on by the Cayman Court in rejecting the petitioner's argument (see *Re Shinsun* at [155]).

G3.2 Meaning of "contingent creditor" and "prospective creditor"

83. Before dealing with the parties' arguments, I accept Mr Ho's submissions that, as s.179(1) of the Ordinance is derived from English insolvency legislation, the meaning of "contingent creditor" and "prospective creditor" in equivalent English legislation is also pertinent.

84. In Mr Ho's written submissions, he has included a helpful Appendix which traces the evolution of English insolvency legislation concerning "contingent creditor" and "prospective creditor". For present purposes, I do not think it is necessary to go into such evolution in detail, although it would be illuminating to highlight some key developments and relevant case law.

85. The winding-up regime under the Companies Act 1862 did not have the concept of "contingent creditor" and "prospective creditor".

86. In 1870, the winding-up regime in respect of insurance companies introduced the concept of "contingent creditor" and "prospective creditor". Section 21 of the Life Assurance Companies Act 1870 provided as follows:

> The Court may order the winding up of any company, in accordance with The Companies Act, 1862, on the application of one or more policy holders or shareholders, upon its being proved to the satisfaction of the Court that the company is insolvent, and *in determining whether or not the company is insolvent the Court shall take into account its contingent or prospective liability under policies and annuity and other existing contracts*; but the Court shall not give a hearing to the petition until security for costs for such amount as the judge shall think reasonable shall be given, and until a prima facie case shall also be established to the satisfaction of the judge … [Emphasis added.]

87. It is noteworthy that at this stage, the English legislation only made an extension to cover contingent or prospective liability under policies and annuity and other existing contracts with insurance companies, and there should be no question that there was existing contract or legal relationship between the policy holders and the insurance companies. As can be seen, this in fact tallies with the meaning of contingent creditor under English case law which requires an "existing obligation".

88. In 1907, the 1870 winding-up regime in respect of insurance companies was extended to all companies. As provided in s.28 of the Companies Act 1907:

> In determining whether a company is unable to pay its debts within the meaning of section eighty of the Companies Act, 1862, *the court shall take into account the contingent and prospective liabilities of the company, and any contingent or prospective creditor shall be a creditor entitled to present a petition for winding up the company* under section eighty-two of that Act:
>
> Provided that the court shall not give a hearing to a petition for winding up the company by such a creditor, until such security for costs has been given as, the court thinks reasonable, and until a prima facie case for winding up has been established to the satisfaction of the court. [Emphasis added.]

89. As submitted by Mr Ho, the rationale for extending the regime for insurance companies to all companies and thus allowing contingent and prospective creditors to petition for a winding-up is explained in the *Report of the Company Law Amendment Committee* (1906) (Cd 3052) at para.43:

> Greater facilities are also wanted, we think, for winding up insolvent companies at the instance of creditors whose debts are not immediately payable. As things stand, a creditor must, in order to obtain a winding-up order, be in a position to prove that there is a debt presently payable to him from the company. *If his debt is*

> *due on a current bill, bond or debenture, the time for the payment of which has not yet arrived, he has no remedy by a winding-up petition, and this although the company may be notoriously insolvent. In the meanwhile the company may be disposing of its assets to his prejudice or contracting new liabilities, and when at last his debt matures and he obtains a winding-up order, he may find that the interim transactions, having been completed three months before the winding-up, cannot be impeached.* In the case of life assurance companies the Life Assurance Companies Act, 1870, enables the Court to order a winding-up on the application of any one or more policy holders, upon giving proof to the satisfaction of the Court that the company is insolvent; and, in determining whether or not the company is insolvent the Court is to take into account the company's contingent or prospective liability under policies and annuity and other existing contracts. *We think that the principle of this section should be extended to the case of other companies, and that a creditor, whose debt is not yet payable, should be at liberty to present a petition for winding-up*, and the Court be empowered to make an order, where insolvency is proved, taking into account the debts due and to become due … *These amendments if adopted would, we think; make it possible to put an end by winding-up proceedings to many objectionable companies.* [Emphasis added.]

90. **The mischief sought to be redressed by the legislative amendment is the potential lacuna and abuse whereby a company may be able to dispose of its assets or contract new liabilities even though the company is plainly insolvent upon taking into account not only its current but also contingent or prospective liabilities, and on such basis a contingent or prospective creditor should be afforded standing to present a winding-up petition to protect such creditor's interests. This is particularly the case where, without such standing, *no person* would be in a position to present a winding-up petition on account of such contingent or prospective liability.**

91. **Pausing here, whilst there is some superficial attraction in Mr Chen's argument that the economic interests of ultimate account holders of the Notes (such as P) would be affected in a winding-up and hence they should similarly be afforded standing to present winding-up petition, their position is in fact different. It must be borne in mind that the purpose of the regime of the global note structure is to ensure that the class of bondholders would all act through the trustee as an exclusive channel. Therefore, it does not accord with such design to allow individual bondholders to be at liberty to petition for winding-up when it is accepted that they could not bring any action to directly enforce their debt. More importantly, the position of such bondholders is already safeguarded under the global note structure. Indeed, even in the event where the Notes have not yet matured, their position would be safeguarded by the holder/trustee who may present a winding up petition (whether as**

actual or contingent creditor) on their behalf. Thus it does not follow from the rationale of the aforesaid Report that bondholders such as P must be afforded standing to present a winding-up petition.

92. After 1907, there were further amendments to the English insolvency legislation in 1908, 1929, 1948, 1985 and 1986, but the position on contingent and prospective creditors has remained more or less the same for all practical purposes.

93. Insofar as the position in Hong Kong is concerned, the Ordinance was enacted in 1933 and modelled on the Companies Act 1929. Specifically, s.179 of the Ordinance is taken from s.170 of the Companies Act 1929. It is common ground that the English and Hong Kong statutes do not provide a definition of "contingent creditor" and "prospective creditors". It is therefore necessary to consider English and Hong Kong case law as to the meaning of the same.

94. In *Re William Hockley Ltd* [1962] 1 WLR 555, Pennycuick J held at p.558 as follows:

> Section 224 (1) of the Act of 1948, provides, that a winding-up petition may be presented either by the company or by any creditor, including any contingent or prospective creditor or contributory. The list of persons who may present a petition appears to be exhaustive … Indeed, it is difficult to imagine circumstances in which a stranger to the company could have any locus standi to present a petition in any capacity other than that of a creditor, nor does Mr. Bickford Smith suggest the contrary. His contention is that on February 7, 1962, the petitioning creditor was a contingent creditor of the company.
>
> *The expression 'contingent creditor'* is not defined in the Companies Act, but *must*, I think, *denote a person towards whom under an existing obligation, the company may or will become subject to a present liability upon the happening of some future event or at some future date*. … It is necessary, therefore, to consider the nature of the petitioning creditor's rights as they stood at February 7, 1962 [i.e. the date on which the petitioner presented the petition] [Emphasis added.]

95. What is important is that, under such formulation, a contingent creditor denotes a person towards whom ***under an existing obligation***, the company may become subject to a present liability upon the happening of some future event. Such formulation requires an existing obligation, even though the liability to pay may only be triggered upon the happening of some future event.

96. In *Stonegate Securities Ltd v Gregory* [1980] Ch 576, Buckley LJ held at p.579 as follows:

> In that context [of section 224(1) of the Companies Act 1948] … the expression 'contingent creditor' means a creditor in respect of a debt which will only become due in an event which may or may not occur; and a 'prospective creditor' is a creditor in respect of a debt which will certainly become due in the future, either on some date which has been already determined or on some date determinable by reference to future events.

97. Therefore, the key difference between a contingent creditor and a prospective creditor is that the debt of the former will only become due in an event which may or may not occur, whereas the debt of the latter will certainly become due in future. It is true though that Buckley LJ did not focus on the need for an existing obligation, although arguably this may be implied as he was considering a debt owed by the company (presumably under existing obligation) which has not yet become due.

98. Turning to the authorities in Hong Kong, in *Re Universal Dockyard Ltd* [2004] 1 HKLRD 935, Kwan J (as she then was) held at [25] that:

> … As for a contingent claim, a 'contingent creditor' in s.124(1) of the Insolvency Act 1986 (equivalent to s.179(1) of Cap.32 and provides that a contingent or prospective creditor may petition to wind up a company) has been held to denote 'a person towards whom, under an existing obligation, the company may or will become subject to a present liability on the happening of some future event or at some future date' (*Re Williams Hockley Ltd* [1962] 1 WLR 555 at p.558). So the expression of a contingent claim is of equally wide import.

99. It is significant that Kwan J (as she then was) adopted the formulation of Pennycuick J in *Re Williams Hockley* which requires an existing obligation in order for a person to qualify as a contingent creditor (even though she regarded the expression as being of wide import).

100. In *Re Jackin Total Fulfilment Services Ltd* [2008] 3 HKLRD 475, DHCJ Harris SC (as he then was) held at [22] as follows:

> It is clear that a person to whom a company has a liability to pay a debt contingent on the occurrence of a future event has *locus* to issue a winding-up petition: section 179(1). This is because although he is not entitled to immediate payment he will still be affected if the company is insolvent. He cannot, however, serve a statutory demand. …

101. The formulation in *Re Jackin Total* is wider, as it is not predicated upon an existing obligation, and on the face of it P's

argument can fit into such formulation. Further, Mr Chen also emphasises that although P is not entitled to immediate payment, P will still be affected if the company is insolvent. Whilst there is attraction in such argument, it appears to me that the matter ultimately turns on whether, as a matter of law, P does qualify as a contingent creditor. In this regard, it would appear that in *Re Jackin Total*, the point concerning the need for an existing obligation was not argued and, on the facts, there was plainly an existing contractual relationship and obligation between JSM and the company in question, even though the precise amount which will be payable would only be known upon the event of completion of taxation.

102. Based on the relevant authorities including in particular *Re Williams Hockley* and *Re Universal Dockyard Ltd*, I am of the view that, on balance, there has to be an existing legal relationship or obligation between a person and a company before such person may qualify as a creditor of the company. In the case where a liability may become due in future under such existing relationship or obligation, then the person would be a contingent creditor of the company. Under such formulation, P would not qualify as a contingent creditor because there is, at present, no existing contractual relationship and obligation as between P and the company.

G3.3 Cayman decision of *Re Shinsun*

103. My analysis is borne out by the recent Cayman decision of *Re Shinsun*. In that case, issues as to standing and authority have arisen, and the petitioner says that it is a contingent creditor with standing and is otherwise authorised to proceed with winding-up (at [2]). David Doyle J, sitting in the Grand Court of the Cayman Islands, found against the petitioner on both issues (at [3]). The position of the petitioner is analogous to P, in that the petitioner (i) was not a party to the indenture; (ii) was not the holder of the note; and (iii) was an indirect investor through the Hong Kong Monetary Authority as a participant with Euroclear (at [4]). The indenture in that case also contains various provisions similar to those of the Indenture here (at [5]).

104. Although the facts in that case are different, the issue on standing is plainly on point and relevant to the present case. Like the present case, the petitioner there has no direct rights against the company in question and, at best, it has a contingent right to receive Certificated Notes if a Holder makes a demand on the company pursuant to section 2.04(e) of the indenture therein. This is analogous to P's position here.

105. Like English and Hong Kong statutes, the Cayman insolvency legislation does not provide a definition of a "contingent

creditor" and therefore it is necessary to resort to relevant case law (at [62]). At [64], David Boyle J cited the *dicta* of Pennycuick J in *Re William Hockley* at p.555. He went on to consider that it remains good law, at [65]–[68]:

> [65] *Re William Hockley Ltd,* a first instance English decision, was applied by the High Court of Australia (Barwick CJ, Kitto, Taylor, Windeyer and Owen JJ with Taylor J dying before the delivery of the judgment) in *Community Development Pty Ltd v Engwirda Construction* (1969) 120 CLR 455. Kitto J quoted the well-known extract above, noted that it was perhaps a definition of 'a contingent or prospective creditor' and stressed:
>
> > "The importance of these words for present purposes lie in their assistance that there must be an existing obligation and that out of that obligation a liability on the part of the company to pay a sum of money will arise in a future event, whether it be an event that must happen or only an event that may happen." (My underlining.)
>
> [66] Owen J reviewed various cases and concluded:
>
> > "In the present case the appellant was, at all material times, under a contractual obligation to pay to the respondent the amount, if any, which might be found by an arbitrator to be due to it under the building contract. Whether or not that obligation would ultimately result in a debt becoming payable by the appellant to the respondent was dependent on a contingency, namely the making of an award in the respondent's favour by an arbitrator acting under cl 26 of the building contract. In these circumstances I am of the opinion that the respondent was, at the date of the presentation of the petition, a contingent creditor for the appellant." (My underlining.)
>
> [67] I accept Mr Lowe's submission that *Re William Hockley* remains good law. I give just two recent examples. First, it was referred to by Norris J in *Green v SCL Group Ltd* [2019] 2 BCLC 664 at paragraph [89]:

> "A contingent creditor is a person towards whom, under an existing obligation, a company may or will become subject to a present liability upon the happening of some future event." (My underlining.)

[68] Second, Segal J in *Perry v Lopag Trust* (FSD; unreported judgment 23 February 2023) referred to *Re William Hockley Ltd* and the reference to the need for 'an existing obligation'.

106. At [70]–[76], David Boyle J went on to consider a number of other English authorities which support the above analysis. In particular:

(1) In *Re SBA Properties Ltd* [1967] 1 WLR 799, on the hearing of a winding-up petition, a bank claimed to be entitled to be heard as a contingent creditor in respect of the costs of an action brought by the Board of Trade in the name of the company if that action was adopted by the liquidator. It was held by Pennycuick J that the question whether a person was a contingent creditor depended on the circumstances existing at the date of the hearing, and as at that date nothing had been done by the company in the action so as to raise any contingent liability for costs, then notwithstanding the future possibility of ratification by the liquidator, the bank was not a contingent creditor and had no standing in the matter. This reinforces the analysis above that there must be an existing obligation as at the date of the hearing.

(2) In *Re Sutherland, deceased* [1963] AC 235, Lord Reid said at pp.247-248 as follows:

> It is said that *where there is a contract there is an existing obligation even if you must await events to see if anything ever becomes payable*, but that there is no comparable obligation in a case like the present. But there appears to me to be a close similarity. To take the first stage, *if I see a watch in a shop window and think of buying it, I am not under a contingent liability to pay the price*: similarly, *if an Act says I must pay tax if I trade and make a profit, I am not before I begin trading under a contingent liability to pay tax in the event of my starting trading. In neither case have I committed myself to anything.* But if I agree by contract to accept allowances on the footing that I will pay a sum if I later sell something above a certain price I have committed myself and I come under a contingent liability to pay in that event. [Emphasis added.]

Pausing here, whilst it may be said that P has committed to certain obligations, those are obligations existing as between P and DBS Bank, not the company, unless and until definitive notes are issued.

(3) In *Re Nortel GmbH* [2014] AC 209, the critical question was what constituted an "obligation incurred" for the purposes of r.13.12(1)(b) of the Insolvency Rules 1986 (at [130]). Lord Neuberger adopted the reasoning of Lord Reid in *Re Sutherland* and held that there has to be an obligation from which a contingent liability may arise (at [81]):

> [81] … It was suggested that the reasoning of Lord Reid should not, therefore, be relied on here. I do not agree. Lord Reid gave a characteristically illuminating and authoritative analysis of an issue of principle. It appears to me that *the issue of (i) what is a contingent liability and (ii) what is an obligation by reason of which a contingent liability arises, are closely related. In In re Sutherland the House had to decide whether what a company had done was sufficient, in Lord Reid's words, to have 'committed [it]self' to a contingent liability. As I see it, that is much the same thing as having incurred an obligation from which a contingent liability may arise,* for the purposes of rule 13.12 (1) (b). [Emphasis added.]

(4) In a similar vein, Lord Sumption emphasised the need for an existing legal relationship, and said at [131] as follows:

> [131] The paradigm case of an 'obligation' within the sub-paragraph is a contract which was already in existence before the company went into liquidation. … Yet when one asks what it is about a contract that qualifies it as a relevant source of obligation, the answer must be that *where a subsisting contract gives rise to a contingent debt or liability, a legal relationship between the company and the creditor exists from the moment that the contract is made and before the contingency occurs*. The judgment of Lord Reid in *In re Sutherland, decd* [1963] AC 235 was concerned with a very different statutory scheme, but his analysis is nevertheless illuminating because it makes precisely this point at pp. 247-248 … [Emphasis added.]

(5) David Boyle J also considered *Re Dunderland* which are among the authorities examined above on the lack of standing by a trust beneficiary to commence winding-up proceedings.

107. At [78]–[82], David Boyle J further referred to the decision of Puisne Judge Geoffrey R Bell (as he then was) in ***Bio-Treat Technology Ltd v Highbridge Asia Opportunities Master Fund LP*** [2009] SC (Bda) 26 Civ (28 May 2009). In that case, Bell J similarly rejected the argument of the petitioner that it has status as a contingent or prospective creditor from the premise that, consequent upon the company's default, the petitioner is entitled to require the Holder to exchange the global bond for definitive bonds and to transfer such number of definitive bonds as representing its beneficial interest. Bell J's reasoning is that the petitioner cannot establish itself as a contingent creditor in the absence of an existing obligation. As he had explained at [47]–[50], after referring to the English case of *Re William Hockley* and the Australian case of *Community Development Pty Ltd v Engwirda Construction* (1969) 120 CLR 455:

> [47] The critical words are of course 'under an existing obligation.' I indicated when dealing with the primary issue that in relation to those other rights which Highbridge might have against the Company, those were not issues for me to decide. However, *in relation to the argument that Highbridge is a contingent or prospective creditor, the starting point is whether there is an existing obligation, with particular reference to its entitlement to definitive bonds.* …
>
> [48] I have referred to the pertinent provisions of the exchange provisions. … there is nothing in the relevant wording which suggest that an end investor such as Highbridge would have a direct right as against the Company in relation to the issue of definitive bonds. So the position does seem to me to be that *until definitive bonds are issued in favour of Highbridge, there is no existing obligation owed by the Company to Highbridge*. …
>
> [50] I do therefore accept that Mr Hargun's contentions on behalf of the Company, and find that, *prior to the issue of definitive bonds, Highbridge cannot be said to have the requisite contractual relationship with the Company, as is necessary to found the status of contingent or prospective creditor*. I therefore find that pending the issue of the definitive bonds to Highbridge, it is neither a contingent nor a prospective creditor of the Company, and hence does not have *locus* on this ground to present a winding-up petition. [Emphasis added.]

108. I agree with the above analysis, which is amply supported by case law. In particular, as explained by the High Court of Australia in ***Community Development***, there must be an existing

obligation and that out of that obligation a liability on the part of the company to pay a sum of money will arise in a future event, whether it be an event that must happen (ie prospective liability) or only an event that may happen (ie contingent liability). In my view, this makes perfect legal sense because the existing obligation would provide a legal nexus between a person and a company, such that any liability which will or may arise in a future event under such legal nexus could be taken into account as prospective or contingent liability. Without the requirement of a legal nexus, the matter would be at large. The test would become unduly wide and far-fetched. For instance, if a company is negotiating a loan with a bank and if there is no need for an existing obligation, it would be open to the bank to claim that it is a contingent creditor in the event of the bank agreeing to advance a loan and the company failing to repay, even though there is at present no legal nexus between the two. That simply cannot be right.

109. Moreover, I agree with the analysis by David Boyle J, after surveying the relevant authorities, that the petitioning bondholder is not a contingent creditor. As held by him in [90]–[91], [143]–[144], [151]–[155]:

> [90] The Petitioner says it is a contingent creditor because it has a present right due to the operation of the Clearing Systems to instruct the Participant to request delivery of Certificated Notes, which, if exercised, would make it a 'Holder' of the Notes.
>
> [91] *The Company says that it is the Petitioner's standing which is contingent, in the first place, upon it succeeding in bringing itself into a direct contractual relationship with the Company*; and that is regardless of whether the debt is also properly to be treated as contingent. The Company adds that, in other words, the Petitioner presently has no standing at all, and will not unless or until the 'contingency' which would give it standing actually happens.
>
> [143] I set out below my brief reasons for determining that the Petitioner does not have standing as a contingent creditor. Applying the agreed principles in respect of the construction of the Indenture, there is no contractual relationship between the Petitioner and the Company. The Petitioner is not a party to the Indenture. The principle of privity of contract and what English judges, lawyers and academics would describe as the 'no look through' principle are in play. *The evidence before me establishes no obligation, whether existing or otherwise, upon the Company to the Petitioner whether in contract, tort, equity or otherwise. In such circumstances and put simply the Petitioner*

is not a contingent creditor of the Company. The Petitioner appears to have fundamentally misunderstood the legal position in respect of its investment and the terms of the Indenture.

[144] In my judgment the Petitioner is not a creditor or a contingent creditor of the Company and consequently it has no legal standing to progress the winding up petition.

[151] … *The highwater mark of the Petitioner's submissions on legal standing was that it was a contingent creditor because it had a present right, under the terms of the Indenture, to require the delivery of Certificated Notes*, *via* an instruction to HKMA and then HKMA could instruct Euroclear, which would eventually (provided all parts of the chain proceeded smoothly) make the Petitioner a Holder of the Notes under the terms of the Indenture. In my judgment, however, *this submission confuses and conflates the concept of contingent creditor with contingent standing. The Petitioner has to prove actual standing as a contingent creditor at least at the date of the hearing. It has been unable to do that. Its standing is not actual but contingent.* Contingent standing is insufficient. A legal entity either has standing or it does not. Moreover, the Petitioner has no relevant existing legal relationship with the Company. There is no existing obligation owed by the Company to the Petitioner. Put simply, *the Petitioner does not have the necessary existing relationship with the Company to found the status of contingent creditor* and hence it does not have the requisite legal standing to progress the winding up petition.

[152] … *It is not sufficient for the Petitioner to establish, on a balance of probabilities, that it has 'contingent standing'. The Petitioner must prove, on a balance of probabilities, that it is a 'contingent creditor'. To do that it must show that there is an existing obligation owed by the Company to the Petitioner which may or will result in a liability. The Petitioner has failed to do that.* I agree with the Company that it is wholly inadequate for a party to plead, in effect, that its standing is itself contingent upon the happening of some future event at some future date.

[153] … The Petitioner has not received the Certificated Notes and does not appear to have taken any proper steps to obtain them and to obtain legal standing. I agree with the Company that *unless or until the Petitioner obtains Certificated Notes in its name it cannot establish that it is a creditor, either actual or contingent. It is its standing which is contingent, in the first place, upon it succeeding in bringing itself into a direct contractual relationship with the Company and this is regardless*

> *of whether the debt is also properly to be treated as contingent*. It is insufficient in law to have 'contingent standing' in respect of winding up petitions in this context.
>
> [154] To have legal standing to progress a winding up petition *a petitioner must have actual standing on the date of the determination of the petition. You cannot 'back date' standing.* The requisite legal standing has to exist as at the date of the hearing of the petition. Standing cannot be dependent on a contingency.
>
> [155] *Moreover it would be difficult conceptually to have two creditors in respect of the same debt*. In the case presently before the court, the right to sue the Company under the relevant documentation is not vested in the Petitioner. [Emphasis added.]

110. On behalf of P, Mr Chen seeks to distinguish *Re Shinsun* on the facts. However, whilst the facts are different, the reasoning on standing applies equally to the present case as analysed above. Further, it is not entirely correct or accurate for Mr Chen to suggest that the Cayman Court recognised in *Re Shinsun* at [151] that the situation would be different if there was an event of default. Rather, the situation referred to there is where there was an event of default and Certificated Notes were delivered or transferred to the petitioner such that the petition had an enforceable debt against the company. This could not assist P in the present case because, as admitted by P, no definitive notes have been issued to P and there is, at present, no direct contractual relationship and enforceable rights by P against the company.

111. Mr Chen also seeks to attack the rationale of *Re Shinsun*. However, he has not dealt with the authorities relied on by David Boyle J in arriving at his conclusion. As I have sought to demonstrate above, the conclusion of David Boyle J is amply supported by case law.

112. Instead, Mr Chen merely argues that, if the Cayman Court was right, it would render the "definition" of contingent creditor or prospective creditor superfluous because, if the Certificated Notes had been obtained, the petitioner could petition as a "creditor" rather than a "contingent creditor". With respect, this is misconceived. In the event that the Certificated Notes are issued, whether the debt is immediately payable would turn on the terms of the Certificated Notes. If those terms provide that the debt is payable at a future date or future event, then the debt would be a contingent one. If the terms provide that the debt is immediately payable, then the petitioner would be an actual creditor. It does not follow that simply because the terms in a particular case provide for

immediate payment that the concept of contingent creditor is rendered superfluous.

113. Mr Chen further argues that the extension of the statute to cover not only actual creditors but also contingent or prospective creditors represents the legislature's intention to cast the net wide to cover a petitioner who does not (at the time of the petition) have a direct contractual relationship with the company, but still had an economic interest in the solvency of the company. With respect, Mr Chen has provided no authority on point in support of such proposition. It would also appear from the history of the legislative amendments in England that the law was first amended in 1870 to cover contingent or prospective liabilities of insurance companies to policy holders, for which there were existing contractual obligations and relationships.

114. Moreover, whilst Mr Chen prays in aid the *dicta* of DHCJ Harris SC (as he then was) in *Re Jackin Total* and emphasises that beneficial owners of the debt will be affected if the company is insolvent, I do not think that this can override the case law examined above. It would also be too far-fetched to confer on any person who does not have any existing legal relationship with the company a standing to present a winding-up petition, on the premise of a mere contingency that a legal relationship may exist between such person and the company in future. In any event, the rationale of *Re Jackin Total* is very much watered down here because, even if individual account holders may be affected, they can (and should) act through the trustee, all the more so if the debt has not matured (bearing in mind that on P's case, P could petition as contingent creditor even if the debt has not matured). Equally, even where the debt has matured (which is the case here), there are defined contractual circumstances for issuance of definitive notes and there is no reason why P should not resort to that to be able to sue individually.

115. Mr Chen further relies on cases concerning schemes of arrangement. In my view and as explained further below, they are decided in different context and do not assist P.

116. For all these reasons, *Re Shinsun* is directly on point and its reasoning is sound. In the present case, and as a matter of construction of the Notes and the Indenture (whether under Hong Kong law or New York law), P plainly has no existing contractual relationship with the company, and it has no directly enforceable rights against the same. Unless or until P obtains definitive notes in its name, it cannot establish that it is a creditor, either actual or contingent, because there is no existing contractual relationship and obligation between P and the company. It follows that P does not have standing to commence the Petition against the company.

G3.4 Further considerations

117. My conclusion above is supported by further considerations.

118. *First and foremost*, my view is borne out by the context of the global note structure, which I have examined in detail under Section G1 above. It is plain from both Hong Kong and English jurisprudence examined above that the very design of the global note structure is to ensure that the class of bondholders all act through the holder or the trustee of the note as the exclusive channel of enforcement. The regime operates on the basis of a "no look through" principle, whereby each party has rights only against their own *immediate* counterparty. For instance, in the present case, P only has rights against DBS Bank; DBS Bank only has rights against Euroclear; so on and so forth. In line with the practice and purpose of such regime, typical notes and indentures would contain terms (including the "No Action Clause") to the effect that only the holder/trustee can take enforcement action against the issuer of the notes, and that bondholders cannot proceed directly against the issuer unless the trustee fails to take action in accordance with the bond documentation. In other words, the framework of the global note structure is premised on class action to be pursued by the trustee exclusively. As such, given that ultimate account holders cannot sue the company to enforce the debt, it would appear anomalous (if not repugnant to the design of the global note structure) to allow them to bypass such constraint by petitioning for winding up instead.

119. *Second*, it is of paramount importance under the global note structure that ultimate account holders such as P could not enforce its rights against the company directly. Should the position be otherwise, it would lead to competition with other account holders, and also duplicity of actions in that both the Trustee/Holder and individual account holders (such as P) could pursue winding up relief against the company at the same time. Apart from duplicity of actions, as observed by David Boyle J in *Re Shinsun* at [155], it would be difficult conceptually to have two creditors in respect of the same debt. That would happen in the present case if the Debt owed to P is recognised as contingent liability owed by the company, because the company would at the same time be owing such debt to the Trustee/Holder. This is not to mention the potential of double counting if both the Debt owed to P and the same amount of debt owed to the Holder/Trustee are to be taken into account in considering the solvency or otherwise of the company.

120. In contrast, if P is not a contingent creditor, there will be no duplicity in actions. Prior to the issuance of the definitive notes, only the Trustee/Holder can sue and petition for winding up against the company. Depending on whether the Notes have matured, the

Trustee/Holder would be actual or contingent creditor. On the other hand, upon the issuance of the definitive notes in place of global notes, individual bondholders (such as P) would have acquired direct rights to sue and petition for winding up against the company and insofar as the definitive notes provide for immediate payment, they would be actual creditors.

121. Of course, if the definitive notes only provide for payment after certain timeframe, then after acquiring definitive notes P will become a true contingent creditor in that sense. There will also be no duplicity of debts or actions given that definitive notes are issued in place of the global note. Either way, this is a seamless regime without any lacuna or gap.

122. *Third*, the policy objectives of including contingent and prospective creditors in the meaning of a creditor is to enable the Court to take into account a company's contingent or prospective liabilities in future in deciding whether the company is insolvent and liable to be wound up. However, even if the debt owed to an ultimate account holder of a global note is not taken into account as contingent liability, this would not frustrate the policy objectives or result in any unfairness or lacuna because the debt in the same amount owed by the issuer to the holder/trustee could still be taken into account. Moreover, in this way, there would not be two creditors for the same debt; nor would there be duplicity of debts.

123. It should be noted that this is not only relevant to the issue of standing. In winding-up petitions presented by other creditors, the Court has to consider whether a company is insolvent by taking into account the company's contingent or prospective liabilities, and the liability owed to P would have already been taken into account by reference to the same amount of debt owed by the company to the Holder of the Notes. In contrast, on P's argument, there is a risk of double counting because one has to take into account the debt owed by the company to the Holder as actual creditor, as well as the "contingent" debt owed by the company to P, which duplicate with each other. This reinforces my decision that P is not a contingent creditor, and P could only become a creditor when definitive notes are issued in its favour.

124. *Fourth*, there could be potential of abuse on P's case. Applying P's logic, even before the Notes have matured, every individual bondholder (including P) is already a contingent creditor and can petition for winding up, despite the fact that (1) the debt under the Notes are not yet due and (2) individual bondholders (such as P) do not have any directly enforceable rights against the company. On P's argument, this could lead to floodgates because, in theory, every individual account holder may petition for winding-up against the company. Such outcome would defeat the rationale and design of the global note structure, under which an

individual account holder is not supposed to act and take enforcement action on his own. Instead, any action has to be pursued through the collective decision of the holder or the trustee of the global note.

125. If, as contended by P, a beneficial owner of a book-entry debt can petition for winding-up, such beneficial owner can in effect bypass the collective enforcement regime. Indeed, the threat of winding-up petition may pressurise the issuer to pay off an individual beneficial owner of the debt, thereby defeating the very purpose of the structure of such debentures. In this regard, whilst it is true that winding-up petitions are different from ordinary actions in that they seek a class remedy, and winding-up petitions are not proceedings to enforce a debt *per se*, in most cases they are nevertheless proceedings by which a petitioner seeks to recover his debt because the petitioner regards it to be the most efficacious method of obtaining payment: *Re Southwest Pacific Bauxite (HK) Ltd* [2018] 2 HKLRD 449, [12], [25]; *Re Lam Kwok Hung Guy* at [75]–[76]. As such, it would be anomalous if P were unable to bring an ordinary action in Hong Kong (or indeed any other jurisdiction) against the company for the recovery of the Debt, but able to resort to the more draconian measure of presenting a winding-up petition in Hong Kong on the basis of the Debt and expecting the Hong Kong Court to treat it as a contingent creditor of the company such that P can, in effect, seek to recover its debt. Similar consideration was relied upon by G Lam JA in *Re Lam Kwok Hung Guy* at [84] in support of his view that the approach in ordinary actions in granting a stay where there is an exclusive jurisdiction clause in favour of foreign Court should be applied to insolvency petitions.

126. *Fifth*, insofar as P says that my conclusion renders the concept of contingent creditor meaningless or superfluous, this is not the case. Before maturity of the Notes, the Holder can petition as contingent creditor. After maturity, the Holder can petition as actual creditor or, upon issuance of definitive notes, individual accounts holders can petition as actual creditor. Of course, if the terms of the definitive notes are such that account holders can only be entitled to payment upon a future date or future event, then the account holders would become true contingent creditors upon being issued such definitive notes.

127. *Sixth*, before P acquires directly enforceable rights, its economic interest is taken care of by the Holder or the Trustee, whether as actual creditor (if the debt is due) or contingent creditor (if the Notes have not matured). This is again in line with the design of the global note structure, under which the trustee represents and protects the bondholders, who are treated as forming a class, and who give instructions to the trustee through a specified percentage of bondholders.

128. At the end of the day, one may say that P knowingly traded in interests, not in the underlying securities, and hence should be taken to know and accept the consequence of the global bond structure as a result. As David Richards LJ put it in *Secure Capital* at [55] and [57]:

> [55] I have struggled, unsuccessfully, to understand the principle that could justify this approach. In the case of immobilised securities, Clearstream and other settlement systems exist to facilitate efficient trading in interests in securities, not in the securities themselves. *The fact that security issues are organised in this way so as to facilitate such trading is nothing to the point. Participants in the market know that they are trading in interests, not in the underlying securities.* They are interests in contractual arrangements constituted by the Notes and ancillary documents. *The documents expressly provide for English law to be the proper law and expressly identify the parties who may either generally or in limited circumstances sue for breach of the terms of the Notes. Those provisions are as much part of the package of rights as the payment terms and any other terms of the Notes. Market participants trade in interests in that total package of rights.*
>
> [57] *A lacuna cannot in any relevant sense be said to exist if it is precisely the consequence of the express terms of the Notes and ancillary documents.* There is no reason to suppose that this was an unintended consequence and, indeed, the clear and detailed provisions make clear that this consequence was intended. If it had been intended that account holders or account owners or others with even more remote interests should be entitled to sue Credit Suisse in contract for breach of the misleading statements term, the documents could and would surely have so provided. It was a matter for Secure Capital whether it traded in interests in securities having these features. [Emphasis added]

G3.5 Schemes of arrangement cases

129. On behalf of P, Mr Chen has relied on various authorities which recognise a bondholder of a global note as "contingent creditor" for the purpose of voting in schemes of arrangement, such as *Re Mongolian Mining Corp* [2018] 5 HKLRD 48, *Enice Holding Co* [2018] 4 HKLRD 736, *Re Castle Holdco 4 Ltd* [2009] EWHC 3919 (Ch) and *Re Haya HoldCo 2 Plc* [2022] EWHC 1079 (Ch).

130. In my view, these cases are decided in different context and cannot assist P. In particular, I agree with the observations made by Mr Ho in response.

131. *First and foremost*, the Courts in those cases recognise that the matter is context-specific, and they emphasise that their decisions are made in the context of the meaning of "creditor" in the scheme legislation, rather than "contingent creditor" in the winding-up legislation. For instance, in *Re Haya Holdco* at [30], Marcus Smith J noted that "[i]t has been held in numerous cases that a beneficial owner who may obtain definitive notes is a contingent creditor *for the purposes of the CA 2006*" (see similarly *Re Magyar Telecom BV* [2013] EWHC 3800 (Ch), [2015] 1 BCLC 418, [5]; *Re KCA Deutag UK Finance Plc* [2020] EWHC 2779 (Ch), [53]).

132. Indeed, there are authorities suggesting that the word "creditor" in the scheme legislation has a wider meaning than in the winding-up legislation: see *Re T & N Ltd* [2005] EWHC 2870 (Ch), [2006] 1 WLR 1728, [40].

133. In this regard, I accept Mr Ho's submissions that the expression "contingent creditor" can have different interpretations in different contexts, as alluded to by Arden LJ (as she then was) in *R (Steele) v Birmingham City Council* [2005] EWCA Civ 1824, [2006] 1 WLR 2380, [21].

134. *Second*, in *Re Castle Holdco* at [23], Norris J took the view that, when the Scheme of arrangement comes to be considered, it ought obviously to be considered by those who have an economic interest in the debt, that is to say, by the ultimate beneficial owner or principal (see also *Re GW Pharmaceuticals Plc* [2021] EWHC 716 (Ch), [2021] BCC 696, [24]–[26]). As Mr Ho put it, the above authorities reflect a mischief targeted by the English Court to enfranchise *economic* owners of intermediated securities to vote at scheme meetings. In contrast, there is no authority to the effect that a person with economic interest in a debt is thereby entitled to present a winding-up petition.

135. At the end of the day, it has often been said that context is everything in the exercise of legal interpretation. In this regard, I note that a similar view was taken by David Boyle J in *Re Shinsun*. Upon examining various authorities in the context of schemes of arrangement at [92]–[97], he registered a word of caution at [98] as follows:

> [98] These commercially pragmatic judicial decisions at first instance on voting rights and schemes need, I would respectfully suggest, to be treated with caution and confined to their context. As Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26 at paragraph 28 and many others have stressed *in law*

> *context is everything. In these schemes of arrangement cases all parties wished the beneficial owners to be counted and their standing was not contested. I do not think it safe to apply them in the present context before the court.* [Emphasis added.]

136. At the end of the day, cases on schemes of arrangement are a far cry from the present case. In those cases, what is at stake concerns voting rights on schemes which may affect economic interests, as distinct from *locus* to present winding-up petition which is a more draconian right than a mere voting right for schemes. It is therefore, in my view, inappropriate to attach any undue weight to such authorities decided in a rather different context.

H. Other matters

137. Given my view on P's lack of *locus standi* to present the winding-up Petition herein, I do not consider it necessary to consider other issues such as the solvency of the company and the need for an adjournment (had I found in favour of P on the issue of *locus standi*).

I. Disposition

138. In the premises, I accede to the company's application for striking out of the Petition against P.

139. I further order on a *nisi* basis that, subject to [26] above, the costs of the Petition including the Summons be paid by P to the company, to be taxed if not agreed.

140. It remains for this Court to thank Mr Chen for P and Mr Ho for the company for their helpful submissions and assistance rendered to the Court.

Reported by Ken TC Lee

Elektrim SA v Vivendi Holdings 1 Corp.
Law Debenture Trust Corp plc v Vivendi Holdings 1 Corp.

[2008] EWCA Civ 1178

Court of Appeal (Civil Division).
Sir Anthony May P, Hallett and Lawrence Collins L JJ.
Judgment delivered 24 October 2008.

Anti-suit injunction – Banking – Bond issue – Conflict of laws – No-action clause – Dispute between French and German media companies over ownership of stake in Polish mobile phone service provider – Claimant Polish company which held stake became insolvent and defaulted on bonds – Defendant acquired bonds and brought proceedings in Florida alleging fraud against claimant and breach of fiduciary duty against trustee of bond issue – Trust deed and bond conditions contained no-action clause providing that only trustee could enforce bonds and bondholders could not proceed directly against issuer – Florida claims within no-action clause – Claims mirror image of contractual claims for breach of trust deed – Claimant entitled to anti-suit injunction – Florida proceedings also vexatious and oppressive because hopeless.

This was an appeal against the making of an anti-suit injunction based on a 'no-action' clause in a bond issue.

The bonds had been issued by a special purpose vehicle and guaranteed by Elektrim, a Polish conglomerate (formerly state-owned) which had become bankrupt. A French media company (Vivendi), which had a joint venture with Elektrim, had been in dispute since 1999 with Elektrim and with a German media company (DT) about Elektrim's stake in a Polish mobile telephone service provider (PTC). Vivendi claimed that the Vivendi/Elektrim joint venture company (Telco) was formed to acquire Elektrim's 48% shareholding in PTC; that ultimately it acquired a controlling interest in Telco; that it had invested over €2 billion under various agreements and was entitled, through Telco, to the PTC stake. DT challenged the transfer by Elektrim of the PTC shares to Telco, and claimed that it had an option over the PTC shares under a 1995 shareholder agreement, which it claimed to have exercised following Elektrim's entry into the joint venture with Vivendi.

The battle for control of the PTC stake had been fought in numerous proceedings, including arbitrations in Vienna, Switzerland and London, and bankruptcy proceedings in Poland. There had also been related litigation in France, Germany, Switzerland, and in Seattle, Washington.

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A **In 2007 a Delaware subsidiary of Vivendi (VH1) acquired a substantial holding in the bonds. VH1 then commenced proceedings in Florida claiming fraud against Elektrim and breach of fiduciary duty against the trustee of the bond issue. Anti-suit injunctions were granted in favour of Elektrim and the trustee, and VH1 appealed. The injunction granted in favour of Elektrim was to enforce the no-action clause in the trust deed and bond conditions, whereby only**
B **the trustee of the issue was entitled to take enforcement action against the issuer, and bondholders could not proceed directly against the issuer unless the trustee failed to take action in accordance with the bond documentation. On appeal VH1 argued that its claim against Elektrim was a claim purely in fraud, a Florida law tort, and no claim in contract was made against Elektrim, either to enforce the**
C **trust deed or to claim damages for its breach.**

The judge indicated that he would have also granted an anti-suit injunction on the general discretionary ground of vexation/oppression in favour of Elektrim had he not been persuaded that the no-action clause applied. He granted an injunction in favour of the trustee on that ground.
D

Held, **dismissing the appeal:**

1. The judge approached the question of construction of the no-action clause in the right way and came to the correct conclusion. In particular the commercial
E **purpose of the no-action clause led to the conclusion that the no-action clause applied to claims which were in substance claims to enforce the trust deed or the bonds, as well as to claims which were in terms claims to enforce them. The no-action clause should be construed, to the extent reasonably possible, as an effective bar to individual bondholders pursuing, for their own account, what**
F **were in substance class claims. That could apply to tortious claims as well as to contractual claims. VH1 made its claim in the Florida proceedings as assignee of the bonds. The claims were all class claims. The object of the claim was to compensate it for the loss of a contractual right or entitlement under the bond conditions which it had by virtue of being a bondholder. The allegations made in the Florida proceedings would be clear breaches by Elektrim of the trust deed.**
G

2. VH1 had not identified any basis for a conclusion that the judge erred in principle in finding that the claims in the Florida proceedings against Elektrim were hopeless. Consequently, the judge was right that an injunction would have been appropriate on the ground of vexation/oppression even if the no-action
H **clause had not applied.**

3. Permission to appeal was refused against the decision to grant an injunction in favour of the trustee on the basis that the Florida claims against the trustee were hopeless and accordingly vexatious and oppressive.

The following cases were referred to in the judgment of Lawrence Collins LJ: A

Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace) [1995] 1 Ll Rep 87.
Airbus Industrie GIE v Patel [1998] CLC 702; [1999] 1 AC 119.
Belgium v Spain (Barcelona Traction case) 1970 ICJ Rep 3. B
British Airways Board v Laker Airways Ltd [1985] AC 58.
Casurina Ltd Partnership v Rio Algom Ltd (2004) 40 BLR (3d) 112.
Donohue v Armco Inc [2002] CLC 440.
Dura Automotive Systems Inc, Re 379 BR 257 (SDNY 2007).
Feldbaum v McCrory Corp 1992 Del Ch LEXIS 113.
Highberry Ltd v Colt Telecom Group plc [2002] EWHC 2503 (Ch). C
McMahan & Co v Wherehouse Entertainment Inc 859 F Supp 743 (SDNY 1994).
Masri v Consolidated Contractors International Co SAL [2008] EWCA Civ 625; [2008] 1 CLC 887.
Midland Bank plc v Laker Airways Ltd [1986] QB 689.
Shell International Petroleum Co Ltd v Coral Oil Co Ltd [1999] 2 Ll Rep 606.
Societe Nationale Industrielle Aerospatiale (SNIA) v Lee Kui Jak [1987] AC 871 (PC). D
US Bank National Assn v US Timberlands Klamath Falls LLC 864 A 2d 930 (Del Ch 2004).

Richard Millett QC and Julian Kenny (instructed by Barlow Lyde & Gilbert) for Elektrim SA. E

Robert Miles QC and Andrew Clutterbuck (instructed by Simmons & Simmons) for Law Debenture Trust Corporation plc.

Ali Malek QC and David Quest (instructed by Orrick, Herrington & Sutcliffe) for Vivendi Holdings 1 Corp. F

JUDGMENT

G

Lawrence Collins LJ: I Introduction

No-action clauses

1. The principal question on this appeal relates to the construction of a 'no-action' clause in a bond issue, whereby only the trustee of the issue is entitled to take enforcement action against the issuer, and bondholders cannot proceed directly against the issuer unless the trustee fails to take action in accordance with the bond documentation. Such clauses have been common in bond issues governed by English law since the nineteenth century, and in bond issues in other common law countries. H

A 2. The use of a trustee is an effective way of centralising the administration and enforcement of bonds. Bondholders act through the trustee, and share *pari passu* in the fortunes of the investment, and do not compete with each other. The trustee represents and protects the bondholders, who are treated as forming a class, and who give instructions to the trustee through a specified percentage of bondholders. Such a scheme promotes liquidity. Individual bondholders rely on the trustee as the B exclusive channel of enforcement and can be confident that on enforcement principal and interest will be distributed *pari passu*.

3. No-action clauses are the subject of many decisions in the United States and Canada. They include the recent decision of the Ontario Court of Appeal in *Casurina* C *Ltd Partnership v Rio Algom Ltd* (2004) 40 BLR (3d) 112, in which it upheld the lower court's approval of the approach in the United States (citing *Feldbaum v McCrory Corp* 1992 Del Ch LEXIS 113) that in consenting to no-action clauses by purchasing bonds, bondholders waive their rights to bring claims that are common to all bondholders, and thus can be prosecuted by the trustee, unless they first comply with the procedures in the instrument constituting the bonds. As I said in *Colt Telecom* D *Group plc* [2002] EWHC 2503 (Ch), at [12], no-action clauses have even been the subject of discussion in the International Court of Justice (although not the subject of decision) in relation to insolvency proceedings brought directly by bondholders: *Belgium v Spain (Barcelona Traction case)* 1970 ICJ Rep 3, 104–5, per Judge Sir Gerald Fitzmaurice QC.

E 4. In the United States it has been said that a primary purpose of a no-action clause is to protect issuers from the expense involved in defending lawsuits which are either frivolous or otherwise not in the economic interest of the issuer and its creditors, causing expense to the issuer and diminishing the assets available to bondholders. In protecting the issuer such clauses protect bondholders. They can F extend to non-contractual claims (other than fraudulent inducement of a purchase) because interpreting the no-action clause to exclude non-contractual claims would lead to inefficient claim-splitting. If the no-action clause required a noteholder to demand that the trustee should bring all contractual claims, but the noteholder had to bring the non-contractual claims, that would lead to a situation where contractual and G non-contractual claims would have to be brought by different plaintiffs, possibly in different fora: see e.g. *Feldbaum v McCrory Corp* ante; *US Bank National Assn v US Timberlands Klamath Falls LLC* 864 A 2d 930 (Del Ch 2004); cf. *McMahan & Co v Wherehouse Entertainment Inc* 859 F Supp 743 (SDNY 1994); *Re Dura Automotive Systems Inc* 379 BR 257 (SDNY 2007).

H *Parties*

5. Elektrim SA ('Elektrim') is a Polish conglomerate (formerly state-owned) and now in bankruptcy, which has had substantial telecommunications interests. The Law Debenture Trust Corporation plc ('the Trustee') is the Trustee of €510,000,000 2% Bonds ('the bonds') originally issued in 1999 by Elektrim Finance BV (a special

purpose vehicle), and guaranteed by Elektrim. The bonds were restructured in 2002: the maturity date was extended to 15 December 2005 and the interest rate was reduced, in return for which Elektrim agreed to make a contingent payment in 2006 (or earlier in certain circumstances), which represented 25% of the fair market value of Elektrim's assets in excess of €160m. This is referred to in this case as the 'contingent payment' or the 'equity kicker'.

6. Elektrim had a 48% interest in Polska Telefonia Cyfrowa ('PTC') a leading mobile telephone service provider in Poland. Deutsche Telecom AG ('DT'), a major German media company, also had a substantial holding in PTC.

The dispute

7. A major French media company called Vivendi Universal SA ('Vivendi'), which had a joint venture with Elektrim, has been in dispute since 1999 with Elektrim and with DT about Elektrim's PTC stake. The Vivendi/Elektrim joint venture company is called Elektrim Telecommunikacja known as ET or Telco (and to which I shall refer as 'Telco'), owned 51% by Vivendi and 49% by Elektrim. Vivendi says that Telco was formed to acquire Elektrim's 48% shareholding in PTC; that ultimately it acquired a controlling interest in Telco; that it has invested over €2 billion under various agreements and is entitled, through ET/Telco, to the PTC stake. Vivendi says that the shares in PTC had a market value of about US$3 billion.

8. DT challenged the transfer by Elektrim of the PTC shares to Telco, and claimed that it had an option over the PTC shares under a 1995 shareholder agreement, which it claimed to have exercised following Elektrim's entry into the joint venture with Vivendi. Elektrim says that it was originally entitled to the PTC stake and that, by virtue of various awards of an arbitral tribunal sitting in Vienna, Elektrim was obliged to transfer the stake to DT.

9. Vivendi claims that the transfer of the PTC shares to DT is invalid and at a substantial undervalue, and is part of a long-running fraudulent scheme by Elektrim and Mr Zygmunt Solorz-Zak (a Polish businessman who was the principal shareholder of Elektrim) to strip the assets out of Elektrim for his own benefit, and that DT has colluded in the fraud (and that the Vienna arbitration was a collusive device).

10. The battle for control of the PTC stake has been fought in numerous proceedings, including arbitrations in Vienna, Switzerland and London, and bankruptcy proceedings in Poland. There has also been related litigation (including claims brought by Vivendi against Mr Solorz-Zak) in France, Germany, and Switzerland, and in Seattle, Washington. Many millions of dollars in legal fees have been expended on this dispute.

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Vivendi's acquisition of bonds

11. In 2007 Vivendi Holdings 1 Corp ('VH1'), a Delaware corporation with its principal place of business in New York and a subsidiary of Vivendi, acquired a substantial holding in the bonds, allegedly for commercial reasons. In fact it is apparent that VH1's acquisition of the bonds was for the purpose of pursuing Vivendi's battle with Elektrim by indirect means.

12. VH1 commenced proceedings in Florida against Elektrim and the Trustee alleging (inter alia) fraud against them, and also breach of fiduciary duty and negligence against the Trustee, although the fraud claims against the Trustee were later dropped. Lewison J granted anti-suit injunctions in favour of Elektrim and the Trustee, and this is an appeal by VH1 against the injunction in favour of Elektrim (permission to appeal having been given by Rix LJ) and a renewed application by VH1 for permission to appeal from the injunction in favour of the Trustee.

II The bonds and the 2002 Restructuring

13. As I have said, the restructuring of the bonds which took place in 2002 involved an extension of the maturity date to 15 December 2005 and a reduction of the interest rate, in return for which Elektrim agreed to make a contingent payment, which represented 25% of the fair market value of Elektrim's assets in excess of €160m. The Trust Deed was amended and restated on 15 November 2002 to reflect this restructuring. The Trust Deed, the bonds and the Bond Conditions were governed by and to be construed in accordance with English law (Trust Deed, clause 29.1).

14. The effect of clause 2.3 of the Trust Deed and Condition 6(k) of the Bond Conditions was that Elektrim was required to pay the contingent payment/equity kicker on the Contingent Payment Date (which was to be 180 days after the earlier of the date of publication of Elektrim Finance's accounts for the year ending 31 December 2005, or the year ending on 31 December immediately following disposal of interests in certain defined assets, including its interest in Telco). As I have already indicated, in broad terms the amount of the contingent payment is a specified proportion of the difference between: (a) the fair market value of Elektrim's net assets (i.e. its assets after deduction of debt apart from contingent liabilities) as determined on the Contingent Payment Date and (b) €160 million.

Default and the bondholders' committee

15. In 2005, Elektrim and Elektrim Finance defaulted on the bonds.

16. Since early 2001 the bondholders had been represented by a bondholders' committee. The bondholders included Acciona (a substantial Spanish company) and Trafalgar (an asset management company) who together held almost 40% of the bonds.

17. Everest Capital Ltd ('Everest'), a Bermuda company, purchased Elektrim bonds, on its own behalf and on behalf of various clients, including General Motors, between February 2005 and June 2006. The investment was managed by Everest Capital Inc in Florida.

18. Everest held about 8% of the bonds. Everest became a member of the bondholders' committee. The evidence was that thereafter Everest was able to participate in all advice from Bingham McCutchen or Clifford Chance, the legal advisers to the bondholders' committee; and that all information and documents made available to the Trustee or its legal advisers in the course of the prosecution of the bankruptcy petition which would have been of relevance to decisions to be made by the committee, other than that relating to the Trustee's own legal position, were sent to Bingham McCutchen or Clifford Chance.

III Arbitration, court proceedings and bankruptcy

19. The history of the proceedings is complicated, and there was no agreed chronology available to the court. I will endeavour in this section to limit the account to the matters most relevant to the issues before the court.

A Vienna arbitrations between Elektrim and DT and the Polish bankruptcy proceedings

20. It is not possible to understand the course of the bankruptcy proceedings in Poland independently of the Vienna arbitrations and the judicial proceedings in Austria. That is because the petition debt was discharged from the proceeds of the transfer of the PTC shares by Elektrim to DT following an agreement in the course of the arbitration.

2004 arbitral award

21. DT commenced arbitration proceedings in Vienna against Elektrim and Telco challenging the transfer of Elektrim's shares in PTC to Telco. The arbitral tribunal, sitting under the auspices of the Vienna Court of Arbitration, rendered an award on 26 November 2004 declaring that the transfer of PTC shares to Telco was ineffective. But the tribunal also stated that it had no jurisdiction over Telco. On 20 December 2005 the Vienna Commercial Court set aside that part of the Vienna Award which had declared the transfer of PTC to be ineffective, because the arbitral tribunal did not have jurisdiction over Telco. A decision of the Court of Appeal in Vienna of 10 October 2006 set aside the annulment decision, but confirmed that the arbitral tribunal did not have jurisdiction over Telco.

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Polish bankruptcy proceedings: March 2005

22. On 3 March 2005 the Trustee, on the instructions of more than 30% of the bondholders, issued a bankruptcy petition against Elektrim in Poland in the sum of €434,541,700. The contingent payment was not part of the petition debt. The petition was at first dismissed, but re-instated on appeal.

June 2006 arbitral award

23. After exercising its call option over the PTC shares then owned by Elektrim, DT commenced a further arbitration in Vienna against Elektrim claiming title to the PTC shares. Vivendi alleges that this arbitration was a sham in that Elektrim had separately agreed to transfer the PTC shares to DT at book value.

24. On 6 June 2006, the Vienna tribunal issued a First Partial Award ('the June 2006 Award'). For present purposes the significance of this Award is that the tribunal decided that DT had validly exercised an option over Elektrim's shareholding in PTC, and directed that the price of the shares would be established in a further award.

25. The tribunal said that it was not then in a position to determine the price. The tribunal considered that the right claimed by DT to acquire the shares at book price constituted a contractual penalty which, under Polish law, was liable to be reduced at the demand of the party liable for it. It said (para. 68):

> '… the Arbitral Tribunal has to recognize that the penalty is glaringly exorbitant. The difference of price between the book value of the shares, which is said to be inferior to 400 million Euros, and a fair market value which would revolve around 2.4 billion Euros or even 3 billion Euros manifestly leads to the conclusion that the penalty included in [the call option] is glaringly exorbitant.'

The tribunal directed that the price of the shares would be established in a further award after a reduction of the penalty, the payment terms and conditions to be determined after further submissions.

26. The operative part of the Award was as follows:

> '1. DT validly exercised the call option provided by Article 16 of the Shareholders Agreement over the shares that Elektrim owned in PTC;
>
> 2. As a result of its exercise of the call option provided by Article 16 of the Shareholders Agreement and subject to payment within 30 days of the price (as determined pursuant to no. 3 below), DT will acquire the shares that Elektrim owned in PTC and will be their owner;

3. The price payable for Elektrim's shares is the price to be established by the Arbitral Tribunal taking into account that Article 16(3) of the Shareholders Agreement includes a penalty as compared to a fair market value and this price shall be determined after reduction of the penalty in a further award, the payment terms and conditions to be specified by the Arbitral Tribunal in the light of further developments and submissions;

4. Elektrim is in material default pursuant to Article 16(1) of the Shareholders Agreement;

5. The issue of the costs of arbitration in respect of the Interim Orders, the present Award as well as this entire proceeding is reserved for a subsequent Award.'

September 2006 Warsaw court order

27. On 21 September 2006, on the Trustee's application in the course of the bankruptcy proceedings, the district court of Warsaw enjoined Elektrim from disposing of its assets.

October 2006 arbitral award

28. On 2 October 2006 the Vienna arbitral tribunal in the arbitration between Elektrim and DT issued a Second Partial Award ('the October 2006 Award'). The order made by the tribunal was that DT would acquire full legal title to the shares on payment of an amount in cash not less than the current book value of the shares and the provision of an undertaking to pay any subsequent adjustment of the price. Consequently, by contrast with the June 2006 Award, the October 2006 Award authorised the transfer of the shares to DT.

29. The Award recited the operative parts of the June 2006 Award, in which the tribunal had held that DT had validly exercised an option over Elektrim's shareholding in PTC. It further declared that on payment of the price to be determined, DT would acquire that shareholding. The tribunal said (in a somewhat imperfect translation):

'32. In the present case, [DT] itself admits that a great uncertainty shrouds both the thing to be sold and the price for which it should be deemed to have been sold on 15 February 2005.

33. First, as regards the Option Shares, [DT] has appropriately declared that the present title to the Shares is uncertain, and was uncertain at the time of the exercise of the call option. It points out that "it remains unclear whether DT has acquired 226,080 PTC shares (i.e. over 48 per cent of the PTC shares), on the one hand, or only a single PTC share, on the other" [referring to DT's submissions]. It is known that at least one parallel arbitration between different parties bears on the title on those shares. The Arbitral Tribunal is not informed about those

A proceedings nor concerning any finding of the other Arbitral Tribunal, so that the above mentioned uncertainty [endures] to the fullest extent conceivable. Therefore the validity of the so-called "share purchase agreement" that would have been concluded on 15 February 2005 is put to doubt by reason of the indetermination of its very subject matter, an indetermination which the present proceeding at the present stage cannot lift in any meaningful way …

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34. Second, as concerns the price of the shares whichever they are, this price is neither determined nor determinable at the present time.'

30. The tribunal concluded that the exercise by DT of its option fulfilled the C requirement to bring about the transfer of the shares once the determination of the precise number and price had been determined. The order made by the tribunal was that DT would acquire full legal title to the shares on payment of an amount in cash not less than the current book value of the shares and the provision of an undertaking to pay any subsequent adjustment of the price. It also ordered Elektrim to transfer 'full factual control over the Option Shares' to DT.

D

31. The operative part of the October 2006 Award was as follows:

'1. Claimant will acquire legal title to the Option Shares owned by Respondent with effect as of 15 February 2005 upon payment by Claimant of

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(a) an amount in cash not less that the current book value price for the Option Shares, based on the most recent financial statements of PTC available at the date of payment, and

F (b) provision to Respondent of DT AG's irrevocable undertaking to pay the subsequent adjustment of the current book value price for the PTC shares owned by Elektrim within 30 days from the Arbitral Tribunal's award in this regard.

2. Respondent is ordered to transfer full factual control over the Option Shares to Claimant by enabling Claimant, to the extent Respondent may exert a controlling G influence on these points, fully to exercise all ownership rights and power attaching to these shares, including by insuring that

(a) Claimant will be listed as the owner of the shares in the National Court Register.

H

(b) Claimant's nominees to PTC's Supervisory and Management Boards will be listed in the National Court Register.'

32. On 5 October 2006 the Trustee sent a notice to the bondholders' committee notifying them of the award.

Adjournment of Polish bankruptcy petition from 4 October 2006 to 27 October 2006

33. On 4 October 2006 (when the Polish bankruptcy petition against Elektrim was due for hearing), Bingham McCutchen sent an e-mail to the Trustee's lawyers to say that certain named bondholders, who included not only Concord, Acciona and Trafalgar, but also Everest, confirmed that they approved of:

> '(1) the Trustee making an application to the Polish court to request an adjournment of the Polish bankruptcy hearing for up to four weeks on the basis that the Bondholders require further time to consider Elektrim's composition application and the implications of the Vienna award; and/or
>
> (2) accepting a court endorsed payment of no less than Euro 525,000,000 out of the funds paid by DT on terms that the bankruptcy petition is withdrawn; and/or
>
> (3) applying for ET's application for bankruptcy petition to be dismissed.'

34. The petition was adjourned to 27 October 2006.

Polish bankruptcy court rejects Telco application: 12 October 2006

35. On 12 October 2006 an application by Telco for an attachment over Elektrim's receivables from DT was rejected by the Polish bankruptcy court. The court said that the Trustee represented essentially all Elektrim's creditors and to prevent Elektrim from paying what it owed to the Trustee would in effect decide the bankruptcy proceedings against Elektrim.

Compromise with DT and payment of petition debt: 20-27 October 2006

36. On about 20 October 2006 it was agreed between Elektrim and DT that DT would pay the book value of the PTC shares (€643 million) to Elektrim, and that Elektrim would pay €525 million to the Trustee for distribution to the bondholders.

37. On 23 October 2006, Bingham McCutchen were asked for the Trustee's bank account details, so that Elektrim could pay the petition debt. Elektrim paid €525m to the Trustee on 26 October 2006.

38. On 27 October 2006 Bingham McCutchen sent an e-mail to the Trustee's lawyers. It confirmed instructions from Acciona and Trafalgar (bondholders who, as I have said, held almost 40 per cent in value of the bonds and who together with Everest were members of the bondholders' committee). The e-mail said that the bondholders approved of the Trustee applying to the bankruptcy court for a direction that the payment by Elektrim was lawful; and if that direction was obtained, to permit the petition to be dismissed or to withdraw it.

A 39. In circumstances where the petition was dismissed the Trustee was to reserve its rights in relation to the quantum of the payment and any additional amounts which might be outstanding under the Trust Deed. Mr Torres, a senior analyst at Everest Capital Inc, confirmed in a declaration attached to the Everest Assignment to VH1 that Everest had supported the decision to withdraw the petition, although he described it as the Trustee's decision.

B

40. At the hearing on that day the Polish bankruptcy court ruled that the payment was lawful, and that the order of the District Court of Warsaw dated 21 September 2006 (to which I have referred, and which enjoined Elektrim from disposing of its assets) did not prevent the repayment. Among the points made by the bankruptcy C court in its written ruling were the following: (a) although Telco opposed withdrawal of the petition it advanced no substantial grounds for its opposition; (b) transfer of the shares was not a voluntary act of Elektrim because DT was exercising a pre-existing right, and hence was not in breach of any court order; (c) the Trustee represented all the creditors of Elektrim, and Telco was not a creditor because it had not filed for Elektrim's bankruptcy; (d) a petitioner which decided that it no longer had an interest D in pursuing the bankruptcy was entitled to withdraw the petition.

41. In the light of the court's ruling, the petition was withdrawn by the Trustee on instructions of more than 30% of the bondholders, and the Trustee retained the money. The Trustee did not immediately distribute the money to the bondholders because of E its concern that Telco might appeal against the dismissal of bankruptcy proceedings, resulting in Elektrim's liquidation and a possible claim by a liquidator for the return of the €525 million under 'claw-back' provisions in Polish bankruptcy legislation. Telco did attempt to appeal, but its attempts failed.

Elektrim bankruptcy: August 2007

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42. On 9 August 2007, Elektrim petitioned the Polish court for its own bankruptcy and was adjudicated bankrupt on 21 August 2007.

B LCIA arbitration

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43. In 2005 Vivendi commenced arbitration proceedings in the London Court of International Arbitration ('LCIA') against Elektrim under their joint venture agreement claiming that Telco, the joint venture company, still owned or was entitled to the PTC shares.

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44. On 2 August 2006 the arbitral tribunal (Mr Wolfgang Peter, Chairman; Mr Alan Redfern and Mr Jerzy Raski), made an order ('LCIA Order No 6') for interim measures, which enjoined Elektrim from voluntarily selling or agreeing to sell the PTC Shares. On 25 August 2006 Vivendi wrote to Bingham McCutchen and the Trustee giving notice of the order.

45. On 23 October 2006 the LCIA tribunal made a seventh interim measures order in the arbitration between Vivendi and Elektrim ('LCIA Order No 7'). By that order the tribunal declared that LCIA Order No 6 did not prevent Elektrim from applying the sum of €600 million (the book value of the PTC shares) paid or payable by DT in discharge of Elektrim's liability to the bondholders which had presented the bankruptcy petition.

46. On 19 March 2008 the tribunal by a majority ruled in favour of Vivendi. It decided (inter alia) that Elektrim was in breach of the joint venture agreement by taking actions which purported to dispose of the PTC shares, and by failing to hold them in trust for Vivendi or take such measures as would protect Vivendi's interests in the shares to the extent Elektrim had or might recover the shares. But the tribunal emphasised (at para. 122) that it was not making a decision on the question of who had title to the PTC shares, which was a question for the Polish courts. This court was told that Elektrim is challenging the award in the Commercial Court.

C Trustee's first English proceedings (the contingent payment proceedings): December 2005

47. The bonds were due for redemption on 15 December 2005. On the following day, the Trustee commenced a claim in England against Elektrim seeking damages for the loss of the contingent payment/equity kicker. The basis of the action was alleged asset-stripping by Elektrim in breach of the Trust Deed resulting in the loss of the full value of the contingent payment obligation under the Bond Conditions. In February 2006 the Trustee obtained judgment in default. Subsequently the judgment was set aside and a stay of the proceedings was agreed. This court was told that these proceedings are now continuing.

D The DT press releases

48. In September and October 2006 DT issued two press releases about its interest in PTC. According to VH1, these press releases were issued by DT in conjunction with Elektrim and were materially misleading, because they gave Everest the impression that the PTC shares owned by Elektrim had been legally transferred and that DT had good title to the shares pursuant to and consistently with the June 2006 Award and the October 2006 Award. VH1's case is that Everest relied on these press statements as a basis for agreeing to the Trustee's withdrawal of the bankruptcy petition: Mr Davis' witness statement, 20 July 2007, para. 44.

September 2006

49. On 5 September 2006 DT issued a press release stating that a DT group employee had been appointed chief executive of PTC and went on:

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> 'The new management appointment at PTC is a direct consequence of Deutsche Telekom's acquisition of the 48 per cent stake of PTC formerly held by the Polish company Elektrim. The acquisition is based on a call option awarded to Deutsche Telekom by a Court of Arbitration.'

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October 2006

50. On 4 October 2006, DT issued a press release stating:

> 'In yet another award of 2 October 2006, the Arbitral Tribunal in Vienna conferred the ownership title to the disputable 48% of the shares in PTC to [DT] (with effect as of 15 February 2005), which remains in concord with the joint stand of [Elektrim] and [DT] presented to date. For this reason [DT] has paid an amount of more than Euro 600m, which surely covers the current book value of the shares in PTC.'

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E Vivendi's claims and Part 8 proceedings by the Trustee

51. On 23 October 2006 Vivendi wrote to the Trustee, and to Mr Roome, of Bingham McCutchen, as counsel to the bondholders' committee, and to Citibank NA as the agent, to notify them that the intended acquisition by DT of the PTC shares was unlawful; even if Elektrim and DT did successfully manage to place the money in the Polish court, it constituted the proceeds of an unlawful acquisition of PTC shares; and that any acceptance by the bondholders would constitute an unlawful attempt by Elektrim to defraud its creditors, and would constitute a preferential payment by Elektrim to one of its creditors and would be subject to challenge. The letter put the addressees on notice of the existing orders, injunctions and court decisions and of the serious implications of the acceptance of any payments, and warned that pursuant to Article 302 of the Polish Criminal Code acceptance of such monies would constitute a criminal offence. On 1 February 2007 Vivendi alleged that the €525 million were the 'proceeds of [an] illegal agreement'.

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52. In the light of these claims, on 26 March 2007 the Trustee began Part 8 proceedings in England seeking directions, to determine whether any of the claims that had been intimated against the Trustee arising from the circumstances in which it had received the funds were a bar to distribution to bondholders.

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53. On 2 April 2007, Lewison J made a representation order appointing two of the bondholders, Concord and Acciona, to represent all the bondholders pursuant to CPR, r. 19.7(2).

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54. On 1 May 2007 Lewison J gave judgment in the Part 8 proceedings, holding that the claims intimated by Vivendi to the effect that the monies received by the Trustee were tainted lacked any merit; and made an order that the claims threatened by Vivendi and/or Telco had no reasonable foundation. The basis of the decision

was that the effect of the LCIA Order No 7 in the arbitration between Vivendi and Elektrim was that Elektrim was authorised to make a payment in discharge of its liabilities to the bondholders and the discharge of those liabilities could not be achieved if the money belonged to someone else. Accordingly the plain intention of the LCIA tribunal was that Vivendi would have no proprietary rights over the money. The tribunal had considered that Vivendi did not even have a prima facie proprietary right. Elektrim and Vivendi were bound not only by issue estoppel in the arbitration but also by contract since the arbitration arose out of a contractual arbitration clause. If Vivendi were to bring a claim against the Trustee in an attempt to outflank the order that would be a fraud on Elektrim and an abuse of process. In addition the Trustee had no notice of a proprietary claim at the date when it received the money and since the money was used in discharge of the Elektrim debt it followed that the Trustee was a purchaser for value.

55. Lewison J also ordered that notice of his judgment and order of 1 May 2007 be served on Vivendi and Telco pursuant to CPR, r. 19.8A, which gave Vivendi the right to apply within 28 days of service to set aside the order of 1 May 2007, failing which the order would be binding on it: CPR, r. 19.8A(8). The notice was served on Vivendi and it was informed that a further hearing of the Part 8 claim was fixed for the week of 5 June 2007.

56. What happened next is described in the following sections, but to put the events in context I mention them here. First, on 29 May 2007 VH1 acquired a substantial holding of bonds from Everest. Second, on 1 June 2007 VH1 as assignee of the bonds commenced an action in a federal court in Florida against Elektrim and the Trustee, and on Sunday 3 June before the Complaint in those proceedings was served, Vivendi issued a press release to announce the proceedings. The Trustee says, with some justification, that the intention was to seek maximum publicity for the claim, and to frustrate the Part 8 hearing before Lewison J.

57. On 4 June 2007, Vivendi's solicitors wrote to the Trustee stating that Vivendi did not intend to acknowledge service in the Part 8 proceedings. They said that notwithstanding the right under CPR, r. 19.8A to apply to set aside Lewison J's judgment of 1 May 2007, to the extent that the judgment purported to bind them, what had occurred was contrary to Article 6 of the European Convention on Human Rights.

58. A further hearing of the Part 8 claim took place on 5–8 June 2007. Vivendi did not appear. On 8 June 2007 VH1 was joined as a necessary and proper party.

59. Lewison J delivered a further judgment in the Part 8 proceedings on 15 June 2007, and declared that the bonds had not been redeemed by the payment of the €525 million and that the security granted pursuant to the Trust Deed was still in place. Subsequently the Trustee made distributions to the bondholders, and after further payments by Elektrim the bonds were redeemed in April 2008.

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A 60. The Trustee submitted an amended proof in the Polish bankruptcy relating to the contingent payment.

F May 2007 assignment agreement

B 61. On 29 May 2007 Everest entered into an Assignment Agreement (in which it was described as a 'sophisticated investor') which assigned its bonds (having a face value of €38.3 million) to VH1, together with 'all current and potential causes of action and claims in law and equity, known or unknown, including … past, pending and future claims' against (among others) Elektrim and the Trustee.

C 62. Normally, as was submitted on behalf of Elektrim, such bonds are traded by electronic entries and an Assignment Agreement is unnecessary. It is plain on the face of the document that the purpose of the assignment was to enable Vivendi to pursue, through VH1, its claim against Elektrim in yet another forum. Although Vivendi suggested that it claimed to have a purely commercial purpose in causing VH1 to purchase the bonds, its own evidence shows that the motive was to pursue D the Elektrim claim.

63. Mr Davis, Vivendi's lawyer, stated in his witness statement in these proceedings dated 20 July 2007 that VH1 and Vivendi had sound business reasons for acquiring the bonds and saw the potential to realise a significant return on their investment E from the related claims concerning the contingent payment. The acquisition was a significant investment and was a reaction to Lewison J's judgment of 1 May 2007. Vivendi had considered acquiring Elektrim bonds at various stages in the past and there had been negotiations with other bondholders. Discussions with Everest began in October 2006, when Everest contacted Vivendi. The acquisition of the bonds and their claims also formed a legitimate part of Vivendi's strategy in the major dispute F with DT and Elektrim concerning control of PTC. Subsequently (witness statement of 7 September 2007) Mr Davis said that VH1 had never asserted that the acquisition of the bonds and their related claims had nothing to do with the Elektrim dispute, and that his previous statement never suggested that VH1's motivation in acquiring the bonds was purely commercial.

G

G Florida proceedings: 1 June 2007

64. On 1 June 2007 VH1 (suing as the assignee of claims held by General Motors Corp) filed a Complaint in the United States District Court, Southern District of Florida (Miami), against the Trustee and Elektrim. The original Complaint recited H Lewison J's Order of 1 May 2007, and said that it had been procured by non-disclosure, and sought a freeze on the assets in the Trustee's hands.

65. VH1 filed an Amended Complaint in the Florida proceedings on 7 June 2007. The Amended Complaint against the Trustee was (1) for breach of fiduciary duty to General Motors; (2) for breach of the Trust Deed (clause 18) by failing to exercise

due care when withdrawing the bankruptcy petition in Poland; and (3) for fraudulent conspiracy to reduce the total recovery under the bonds in a manner designed to defraud other creditors of Elektrim. The claim against Elektrim was for fraud, consisting of (a) fraudulently inducing Everest, on behalf of General Motors, to purchase bonds based on false statements regarding Elektrim's assets; (b) fraudulently inducing Everest on behalf of General Motors to purchase the bonds by representing that it would make the contingent payment when in fact it was allowing assets to be stripped which were material to the calculation of the contingent payment; (c) making false statements regarding the legality of its transfer of PTC shares to DT; and (d) failing to disclose its complicity in the illegal stripping of its assets by Mr Solorz-Zak and DT.

Claim against the Trustee

66. VH1 now accepts that all the allegations of fraud against the Trustee are to be withdrawn. Following the conclusion of the hearing, the judge was provided (at his request) with a further version of the Amended Complaint with the allegations of fraud against the Trustee deleted.

67. In a lengthy section headed 'Facts' (paras 7 to 47) the allegations against the Trustee which were maintained included the following:

(i) The Trustee was aware of an injunction issued on 23 November 2005 by the Warsaw court in the bankruptcy proceedings to secure all PTC shares held by Elektrim and was aware that it precluded any sale of the PTC shares to DT (para 18), and was aware of Polish court orders in June and July 2006 attaching Elektrim's rights in the PTC shares, but ignored them (para. 20 and 21).

(ii) The Trustee was aware of the joint venture agreement between Elektrim and Vivendi prior to the withdrawal of the bankruptcy petition (para. 22).

(iii) The Trustee collaborated with Elektrim and DT on a plan whereby the Trustee would withdraw the bankruptcy petition in exchange for receiving the consideration owed by DT to Elektrim for the PTC shares which had been unlawfully transferred from Elektrim to DT and the Trustee did not disclose to Everest or General Motors material facts relating to this plan, including the fact that the transfer of PTC shares from Elektrim to DT had been in violation not only of outstanding injunctions, but also of the June 2006 Award (paras 33 and 34).

(iv) Although the Trustee had access to the October 2006 Award, it failed to disclose it to Everest or General Motors at any time prior to the withdrawal of the bankruptcy petition on 26 October 2006 (para. 37).

(v) The Trustee supported the adjournment of the 4 October 2006 bankruptcy hearing even though the adjournment was against the interest of the bondholders (para. 38).

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A (vi) When DT made a payment of €525 million to the Trustee on 26 October 2006, the Trustee did not inform either Everest or General Motors that it was acting in a manner inconsistent with the orders of the Vienna arbitral tribunal (para. 40).

(vii) On 26 October 2006 the Trustee, without disclosing to Everest or General Motors that DT and Elektrim had engaged in a transaction which was contrary to
B the direction of the Vienna tribunal, withdrew the bankruptcy petition, irreparably damaging VH1 (para. 41).

(viii) The Trustee did not distribute the funds but, seeking to insulate itself from liability, filed an action in the High Court in England seeking permission to distribute
C the funds, without disclosing that at the time it received the funds the underlying transfer of PTC shares had violated the June 2006 Award (para. 42).

(ix) The Trustee blocked VH1 from attending and voting at a meeting of the bondholders on 4 June 2007 (para. 47).

D 68. The claim against the Trustee is for breach of fiduciary duty in the following respects (para. 50):

(i) Failing to disclose to Everest and General Motors the full contents of the October 2006 Award prior to the withdrawal of the bankruptcy petition and the effect of such
E withdrawal on the value of the bonds.

(ii) Failing to obtain from Elektrim and disclose to VH1 the full content of the June 2006 Award before agreeing to withdraw the bankruptcy petition.

F (iii) Failing to disclose to Everest and General Motors that DT and Elektrim had engaged in a transaction which was contrary to the direction of the Vienna tribunal.

(iv) Accepting tainted funds from Elektrim without consulting Everest or General Motors and without obtaining prior approval of the bondholders.

G (v) Failing to disclose to Everest and General Motors the risks of accepting tainted money.

(vi) Failing to exercise adequate due diligence prior to withdrawing the bankruptcy petition by failing to conduct a full investigation of the legality of the transaction.

H (vii) Acquiescing in delays of the bankruptcy proceedings.

(viii) Withdrawing the bankruptcy petition and thereby giving up the right to recapture fraudulently transferred assets and thus to maximise the value of the contingent payment/equity kicker.

69. It is alleged (para. 51) that if Everest had known the contents of the June 2006 Award and the October 2006 Award, namely that the first award did not permit Elektrim to transfer the PTC shares in August 2006 and that the second award did not sanction that transfer, Everest would have opposed the withdrawal of the bankruptcy petition. While Everest and General Motors wanted to be paid they did not want to receive tainted money and the possible liability which would come with it.

70. It is claimed (para. 53) that the Trustee had an obligation not only to warn Everest that the conduct was unlawful but also to avoid entering into unlawful transactions. Had Everest opposed a withdrawal, it would not have occurred, because the bondholders typically required unanimity before making important decisions and the other bondholders would not have wanted to participate in an unlawful transaction and incur the risks that the funds would have to be disgorged: para. 54. If Everest had disclosed to the bankruptcy court that the underlying transaction had taken place in violation of both the LCIA Order No. 6 and the June 2006 Award, the bankruptcy court would not have permitted the withdrawal of the petition: para. 55. General Motors would have been able to use the bankruptcy proceeding to recapture fraudulently transferred assets which would have given significant value to the equity kicker; and it would have been able to recover the principal and interest owed on the bonds without having to accept tainted money: para. 56.

71. In addition (paras 60 and 62), as a result of those matters, 'including actual and constructive knowledge of material information that it did not disclose to Everest or [General Motors]' the Trustee failed to exercise the degree of care and diligence required by the Trust Deed (clause 18), and its conduct constituted a material breach of its obligations.

Claim against Elektrim

72. In the section dealing with the facts, the allegations against Elektrim are as follows:

(i) Elektrim represented to Everest that it owned substantial assets including the shares of PTC (claimed by VH1 to be worth more than $3 billion) (para. 8).

(ii) The Vienna arbitration was 'in part a set-up' since DT and Elektrim had secretly agreed to transfer the PTC shares to DT in return for at least the book value of the shares, which was only a fraction of their true value, and Elektrim was willing to transfer the PTC shares at less than fair value because it had previously been paid the full market value by Vivendi for the same shares (para. 15). DT and Elektrim ignored the injunctions of the LCIA and the Warsaw court and proceeded with their scheme to illegally transfer the PTC shares to DT and conspired to defraud other creditors of Elektrim and to withdraw the bankruptcy petition without informing either Everest, General Motors or the bankruptcy court of the full circumstances and consequences of the transfer (para. 19).

A (iii) Elektrim transferred the PTC shares to DT in violation of outstanding injunctions in the order of the LCIA (para. 23).

(iv) On 5 September 2006 and 4 October 2006 DT, acting in collusion with Elektrim, issued materially misleading press releases upon which Everest relied (paras 26–27 and 35–36).

B

(v) Prior to the October 2006 Award Elektrim had collaborated on a plan with the Trustee and DT whereby the Trustee would withdraw the bankruptcy petition in exchange for receiving the consideration for the PTC shares (para. 33).

C (vi) Elektrim asked for an adjournment of the 4 October 2006 bankruptcy hearing so that it could continue to implement the illegal plan, and its lawyers failed to disclose to the court that the PTC shares had already been transferred.

73. The claim against Elektrim (para. 65) is that it engaged in a pattern of fraud which included fraudulently inducing Everest on behalf of General Motors to purchase the bonds based on a false statement regarding its assets, and fraudulently inducing Everest on behalf of General Motors to purchase the bonds by representing that it would pay an equity kicker when in fact it was allowing assets to be stripped from Elektrim which were material to the calculation of the equity kicker, making false statements regarding the legality of its transfer of PTC shares to DT, and failing to disclose its complicity in the illegal stripping of its assets.

D

E

74. In particular the following allegations were made:

(i) The agreement with DT was a fraud, and, supporting the agreement to withdraw the bankruptcy petition, Everest reasonably relied upon statements of DT made in conspiracy with Elektrim that the sale of the shares of PTC to DT was lawful and had been authorised and permitted by the Vienna Tribunal, and Everest relied upon DT's press releases which falsely stated that the transfer was made pursuant to orders of the Vienna tribunal: paras 68 and 69.

F

G (ii) All the false statements were made pursuant to a conspiracy to facilitate the unlawful transfer of PTC shares from Elektrim to DT. It is said (para. 70) that 'as long as the bankruptcy proceedings remained pending, the PTC shares that Elektrim had illegally transferred to DT could have been recaptured as fraudulent conveyances to the benefit' of VH1.

H

75. The Amended Complaint went on to assert that Elektrim did not disclose to Everest that the transfer which had occurred in August was not authorised by the Vienna tribunal: para. 71. Everest would have opposed the withdrawal of the bankruptcy petition, and if it had opposed the withdrawal, it would not have occurred because the bondholders followed a course of conduct in which important decisions were made by consensus: paras 72 and 73.

76. If the bondholders had not withdrawn their petition for bankruptcy, VH1 would have been in a substantially better position because it would have been able to use the bankruptcy proceeding to recapture fraudulently transferred assets, including the PTC shares which had been transferred to DT, the value of which was much greater than the amount which had been paid by DT to the trustee: para. 74.

77. Elektrim defrauded General Motors and the other bondholders by aiding and abetting the illegal stripping and fraudulent transfers of Elektrim assets, and as a result the bondholders, including General Motors, were deprived of assets which could have been used to pay the full value which Elektrim owed to the bondholders, including the full value of the contingent payment/equity kicker: paras 75 to 77.

IV Anti-suit injunctions and applicable principles

78. On 7 June 2008 Elektrim issued Part 8 proceedings against VH1 for a declaration that VH1 was in breach of the no-action clause by commencing the Florida proceedings and for an injunction enjoining VH1 from continuing the Florida proceedings, and on 8 June 2007 Lewison J made a without notice interim order.

79. As I have said, on 8 June 2007, on the Trustee's without notice application, VH1 was joined as an additional defendant to the Trustee's Part 8 proceedings, and service on VH1 was authorised on the basis that it was a necessary and proper party. By the same order an interim anti-suit injunction against VH1 was granted in favour of the Trustee to restrain the Florida proceedings.

80. On 12 October 2007, Lewison J granted final anti-suit injunctions restraining VH1 from continuing the Florida proceedings. Notice of voluntary dismissal of those proceedings was filed on 23 October 2007.

81. The injunction granted in favour of Elektrim was to enforce the no-action clause. The judge referred to cases involving jurisdiction clauses (*Donohue v Armco Inc* [2002] CLC 440) and arbitration clauses (*The Angelic Grace* [1995] 1 Ll Rep 87) in this context, but in fact on this aspect the case involves not a question of the appropriate or chosen forum, but the question whether a party may sue at all. VH1 accepted that if the no-action clause was applicable an injunction was the appropriate remedy, because the court would ordinarily enforce a negative covenant by injunction.

82. Nor was there any substantial dispute on the principles to be applied on the alternative ground for an injunction in favour of Elektrim, or on the ground for an injunction in favour of the Trustee. An injunction could be granted if the applicant could show that the pursuit of foreign proceedings was vexatious or oppressive. This presupposed that, as a general rule, the English court must conclude that it provided the natural forum for the trial of the action; and since the court was concerned with

A the ends of justice, account must be taken not only of injustice to the defendant in the foreign proceedings if the plaintiff was allowed to pursue the foreign proceedings, but also of injustice to the plaintiff in the foreign proceedings if he was not allowed to do so. So the court would not grant an injunction if, by doing so, it would deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him: *Soc Nat Ind Aerospatiale v Lee Kui Jak* [1987] AC 871, 896 (PC).

B

83. The categories of factors which indicate vexation or oppression are not closed, but they include the institution of proceedings which are bound to fail, or bringing proceedings which interfere with or undermine the control of the English court of its own process, or proceedings which could and should have formed part of an English C action brought earlier: see Dicey, Morris and Collins, *Conflict of Laws* (14th edn, 2006), para. 12-073.

84. But an application for an anti-suit injunction should not be used as a means of obtaining a summary determination of the foreign claims in an English court, particularly where (as in the United States) material may turn up on discovery which D may support a case which otherwise appears unlikely to succeed: *British Airways Board v Laker Airways Ltd* [1985] AC 58, 86; *Midland Bank plc v Laker Airways Ltd* [1986] QB 689, 700. But if there are other factors which indicate oppression or vexation, the weakness of the case on the merits may be a further compelling factor.

E 85. In particular, an injunction may be granted to protect the process of the English court, and in particular to prevent the re-litigation abroad of issues which have been (or should have been) the subject of decision in England: *Masri v Consolidated Contractors International Co SAL* [2008] EWCA Civ 625; [2008] 1 CLC 887, at [83]–[88].

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V No-action clause

Clause 10 of the Trust Deed and condition 13 of the Bond Conditions

G 86. By clause 10 of the Trust Deed:

> '10.1 The Trustee shall not be bound to take any proceedings mentioned in Clause 9 or any other action in relation to these presents unless respectively directed or requested to do so (i) by an Extraordinary Resolution of the holders of the Bonds or (ii) in writing by the holders of at least thirty percent in principal H amount outstanding of the Bonds and in either (i) or (ii) then only if it shall be indemnified to its satisfaction against all Liabilities to which it may thereby render itself liable or which it may incur by so doing.
>
> 10.2 Only the Trustee may enforce (i) [against the security provided by Elektrim] or (ii) the provisions of these presents. No Bondholder shall be entitled to proceed

directly against [Elektrim Finance] or [Elektrim] to enforce the performance of any of the provisions of these presents unless the Trustee having become bound as aforesaid to take proceedings fails to do so within a reasonable time and such failure is continuing.'

87. By condition 13 of the Bond Conditions:

'13. *Enforcement of Rights*

At any time after the Bonds become due and repayable, the Bond Trustee may, at its discretion and without further notice, institute such proceedings against [Elektrim Finance] or [Elektrim] as it may think fit to enforce the Bonds and the provisions of the [Trust Deed], but it need not take any such proceedings unless (i) it shall have been so directed by an Extraordinary Resolution of the Bondholders or so requested in writing by holders of at least thirty percent in principal amount outstanding of the Bonds and (ii) it shall have been indemnified to its satisfaction. No Bondholder may proceed directly against [Elektrim Finance] or [Elektrim] unless the Bond Trustee, having become bound to proceed, fails to do so within a reasonable time and such failure is continuing.'

88. The Bond Conditions and the Trust Deed were to be construed as one document (Trust Deed, clause 5.1). The Bond Conditions were subject to the detailed provisions of the Trust Deed and the bondholders were entitled to the benefit of, are bound by, and are deemed to have notice of, all the provisions of the Trust Deed (Bond Conditions, recitals). Nothing turns on the different formulations in clause 10 of the Trust Deed and condition 13, and therefore the question of the effect of a difference does not arise for decision in this case.

The judge's decision

89. The judge's approach was to consider the application of the no-action clause against the commercial context within which the words were used, and the purpose which it could be inferred that the provisions were designed to achieve.

90. The overall structure of the Trust Deed and the Bond Conditions considered in the light of the evidence led the judge to the conclusion that the bondholders could not be free to pursue their own claims to enforce performance of the bonds individually against Elektrim because otherwise the Trustee scheme did not work. Instead they must trust the Trustee to do it. Only if the Trustee failed to act could bondholders pursue their own course.

91. The purpose of the regime was to ensure that the class of bondholders all acted through the Trustee. That ensured that they all shared equally in the fortunes of the investment and that there was no competition between the bondholders. If an individual bondholder were free to pursue a claim based on a loss caused to the

A bondholders as a class, then either there was the potential for multiplicity of actions or for duplication of actions brought by the Trustee on the one hand and individual bondholders on the other.

92. The phrase 'enforce performance of' the Bond Conditions in clause 10.2 of the Trust Deed was not confined to claims for specific performance. It must extend B at least to a claim for damages for compensation for non-performance of the Bond Conditions. The phrase was apt to include any claim designed to vindicate the rights of a bondholder in his capacity as such.

93. The test of what claims were caught by the phrase should be purposive and C substantive, and not procedural or dependent on the ingenuity of the draftsman. A claim designed to compensate a bondholder for the loss of something that would have belonged to him in his capacity as a bondholder was caught by the prohibition, whether the cause of action was pleaded in contract or tort.

D 94. A claim such as that advanced in the Florida proceedings, which was designed to secure to the plaintiff the lost value of the contingent payment/equity kicker which would have become payable under the Bond Conditions was within the prohibition because (a) the claimed loss was one which was suffered by Everest in its capacity as bondholder, and the claim was therefore one which was designed to vindicate its rights as bondholder; and (b) the allegedly fraudulent statements were not made to E Everest individually but, to the extent that they were directed at the bondholders (rather than to the world generally) they were directed to the bondholders as a class. The claimed loss was one which (if established) was suffered by all the bondholders as a class, rather than by Everest individually; and (c) the claimed loss was predicated on Elektrim having been declared bankrupt. If that had happened, the only way of F recovering the value attributable to the equity kicker would have been by proving in Elektrim's bankruptcy. Proving in bankruptcy was one of the species of proceedings whose conduct in accordance with the Trust Deed and the Bond Conditions was exclusively within the control of the Trustee.

95. Consequently, the Florida proceedings were proceedings which, in substance, G were proceedings to enforce the provisions of the Trust Deed and the Bond Conditions; and were therefore within the contractual prohibition.

VH1's appeal

H 96. The main points made by VH1 are these. VH1's claim against Elektrim was a claim purely in fraud, a Florida law tort. No claim in contract was made against Elektrim, either to enforce the Trust Deed or to claim damages for its breach. There would be nothing to prevent a bondholder from suing for misrepresentation which induced him to buy bonds.

97. That would be a personal claim, unrelated to the contract. Consequently, VH1 was not seeking to enforce the Trust Deed or Bond Conditions. The Florida claim was not a class claim which could be made on behalf of all bondholders. The claim was made to recover its own (or Everest's) losses, and not the losses of other parties. That was not a claim which the Trustee could bring. The claim was not open to all bondholders, since not all bondholders would be able to prove reliance, to prove that they saw the press releases and acted on them.

98. Where the ordinary natural meaning gave a commercially sensible result, there was no need to look any further. There was no reason to give the no-action clause a wide or purposive meaning when it could sensibly be given its literal meaning. On a literal reading, it was confined to contractual claims under or for breach of the Trust Deed. To the extent that the no-action clause is said to provide a defence to Elektrim against claims by bondholders in tort, including claims for fraud, it ought to be construed *contra proferentem* against Elektrim.

99. The judge put excessive weight on what he described as the overall structure of the Trust Deed which required the bondholders to give up their individual rights of suit against the issuer. That begged the question of what the Trust Deed provided. The bondholders did not give up any rights against the issuer but, rather, the contractual obligations of the issuer (in particular the obligation to pay) were assumed only to the Trustee and therefore could only be enforced by the Trustee. The parties did not make any provision in the Trust Deed for the possibility that bondholders might wish to bring claims in tort against the issuer or guarantor for fraud.

Conclusion on the no-action clause

100. I am satisfied that the judge approached the question of construction in the right way and came to the correct conclusion. In particular the commercial purpose of the no-action clause leads me to conclude that the no-action clause applies to claims which are in substance claims to enforce the Trust Deed or the bonds, as well as to claims which are in terms claims to enforce them.

101. In particular, as I said in the introductory section, the purpose of the normal bond issue Trust Deed is that bondholders should act through the Trustee, and share equally in the fortunes of the investment, and not compete with each other. The bondholders are treated as forming a class, and give instructions to the trustee through a specified percentage of bondholders. Such a scheme promotes liquidity. The no-action clause should be construed, to the extent reasonably possible, as an effective bar to individual bondholders pursuing, for their own account, what are in substance class claims. That can apply to tortious claims as well as to contractual claims.

102. VH1 made its claim in the Florida proceedings as assignee of the bonds. The only loss VH1 claimed in the Florida proceedings was the loss of the contingent payment/equity kicker. The loss was said to arise from the fact that if Elektrim had

A been made bankrupt, the bondholders would have used the bankruptcy to recover assets of which Elektrim had stripped itself: Complaint, para. 74.

103. The claims are all class claims: if Elektrim defrauded or deceived anybody by the DT press release, then it was the entire class of bondholders. The statements in the press release were not made to Everest or VH1 alone in some private capacity.

B

104. I accept Elektrim's argument that although framed as a claim in the tort of 'fraud', the loss that VH1 claims is the loss of a contractual benefit, the contingent payment/equity kicker. Although the Complaint includes a claim that Elektrim fraudulently induced Everest to purchase the bonds, there is no suggestion in Mr
C Torres' declaration or in the Complaint that any representation was made to Everest before its purchase of the bonds.

105. Although the cause of action is not for breach of contract but in tort, the object of the claim is to compensate it for the loss of a contractual right or entitlement under the Bond Conditions which it had by virtue of being a Bondholder. The claim
D is, in effect, enforcing Everest's right as a bondholder to a share of the contingent payment. The loss of the contingent payment would be a loss which was suffered by all bondholders alike. It was a class loss, and not a loss which would be in any way peculiar to Everest. It is the same loss which the Trustee is currently seeking to recover from Elektrim in proceedings in the Chancery Division.

E

106. I also accept that the allegations made in the Florida proceedings would be clear breaches by Elektrim of the Trust Deed: (1) under clause 15.1(A) of the Trust Deed, Elektrim undertakes that it will 'at all times carry on and conduct its affairs and procure that its Subsidiaries carry on and conduct their respective affairs in a proper
F and efficient manner'; (2) stripping itself of assets would clearly be a breach of that obligation; (3) engaging in a fraudulent conspiracy with third parties for the purposes of deceiving the bondholders and facilitating asset stripping must also be a breach of the same obligation. The misconduct relied upon is a breach of a duty owed to all the bondholders.

G 107. I accept, therefore, that VH1's claims are the mirror image of contractual claims for breach of the Trust Deed: both the alleged wrongful acts and the alleged losses are identical. In summary, the claim is one which is designed to vindicate Everest's rights as a bondholder. I am satisfied, therefore, that the judge's approach to the construction of the no-action clause was correct and I agree with his conclusion.

H

VI Vexation/oppression

108. The judge indicated that he would have also granted an anti-suit injunction on the general discretionary ground of vexation/oppression in favour of Elektrim had he not been persuaded that the no-action clause applied. He granted an injunction in favour of the Trustee on that ground.

109. In view of the fact that I would dismiss the appeal in relation to the no-action clause, it is not necessary for me to say much about the injunction on that ground in favour of Elektrim. Permission to appeal has not been granted to VH1 in relation to the injunction in favour of the Trustee and what is before the court on this appeal is its renewed application for permission to appeal on notice, with the appeal to follow if permission is granted. VH1 accepts that it has a heavy burden to discharge in seeking to upset the judge's exercise of discretion.

110. The points of principle in relation to which VH1 says that the judge erred are these. It says, first, that it is important not to take too narrow or restrictive an approach to the drafting of the Complaint since, in Florida as in England, pleadings can be amended. Moreover, the anti-suit injunction granted by the judge restrains not only the proceedings as pleaded in the Complaint but any proceedings based on the allegations contained in the Complaint, an order which could only be justified if the Florida proceedings not only were unconscionable as pleaded but also could not be rectified by amendment.

111. Secondly, it says that it is not ordinarily the role of the English court to assess the merits of proceedings before a foreign court, particularly in respect of claims made under foreign law. A claim may be so unmeritorious as to be vexatious or oppressive but the test is a high one: the claim must be so bad as to be 'utterly absurd' (*SIPC v Coral Oil Co Ltd* [1999] 2 Ll Rep 606, in which such cases were described as 'an extremely rare category'). The court should not act as if it were hearing an application for summary judgment by the defendant to the foreign proceedings (*Midland Bank plc v Laker Airways Ltd* [1986] QB 689, at 700), since that is a matter for the foreign court, especially where the assessment of the merits involves a consideration of the evidence which is likely to be before the foreign court and the likely findings of fact in the light of discovery procedures which have not yet taken place: *British Airways Board v Laker Airways Ltd* [1985] AC 58, 86.

A Injunction in favour of Elektrim

The judge's conclusion

112. The judge's decision was that the essence of VH1's Amended Complaint in Florida was that Elektrim made fraudulent misrepresentations and non-disclosures, in particular about the circumstances and legality of the transfer of the PTC shares to DT, in the two press releases issued in the name of DT which VH1 alleged (a) were part of a conspiracy between DT and Elektrim to defraud Elektrim's creditors; and (b) were intended to, and did, induce Everest and the other bondholders to believe that DT had lawfully acquired title to 48 per cent of the PTC shares pursuant to the determination of an arbitration tribunal. It was alleged that in reliance on these press releases Everest supported the decision to withdraw the bankruptcy petition, and but for the misrepresentations by Elektrim, Everest would have taken steps to prevent a withdrawal of the petition.

A 113. The judge considered that the claim was unsustainable because it was now conceded (contrary to Mr Torres' declaration) that Everest in fact saw the full contents of the October 2006 Award at exactly the same time, and that it was in the hands of Bingham McCutchen. It could not therefore be plausibly argued that it relied on and was deceived by the press release. In addition, for the same reasons as he gave in relation to the injunction in favour of the Trustee, the causal link between the B allegedly fraudulent statements and the claimed loss was fanciful, and the claim as framed against Elektrim was also bound to fail. Nor was there any juridical advantage in suing Elektrim in Florida of which VH1 would be unjustly deprived if the anti-suit injunction is continued.

C *VH1's appeal*

114. VH1 takes two jurisdictional points which it did not take before the judge. Neither of these points were in its notice of appeal, although the first point was taken in its skeleton argument in support of its application for permission to appeal. The first point is as follows. VH1 accepts the judge had jurisdiction to determine whether D the Florida proceedings were in breach of the no-action clause because the Trust Deed and the Bond Conditions were governed by English law contract. But it says that the judge did not have jurisdiction to grant an anti-suit injunction because the English court did not have a sufficient interest in, or connection with, the matter in question to justify such interference: *Airbus Industrie v Patel* [1998] CLC 702, 712-3; [1999] E 1 AC 119, 138.

115. The dispute between VH1 and Elektrim is a dispute between companies neither of which is domiciled in England and which is based on events taking place in the United States and Poland. VH1 could pursue its claim against Elektrim either in the United States or in Poland. England is not only not the natural forum, but it is F a not a possible forum at all in that (in the absence of agreement or submission) it has no jurisdiction over VH1's claim or over any claim by Elektrim based on the matters in the Florida Complaint.

116. The second jurisdictional point (taken for the first time on the hearing of this G appeal) is that Elektrim obtained permission to serve VH1 out of the jurisdiction on the basis that its claim for an injunction to enforce the no-action clause was a claim within CPR, r. 6.20(5)(c) to enforce a contract governed by English law, and it was not permissible to join a claim for an injunction on the vexation/oppression ground, since it is elementary that it is not possible to join a claim which is not within CPR, H r. 6.20 to proceedings in respect of which permission has been granted under CPR, r. 6.20.

117. There is nothing in either of these points. On the first point, it cannot be said that there is no connection with England, or that it could be a breach of international comity for the English court to exercise jurisdiction. Elektrim is being sued by the Trustee for the loss of the equity kicker, which is the same loss which VH1

claims in Florida, under the terms of a bond issue governed by English law, relying on substantially the same facts as the Florida claims, namely asset-stripping by Elektrim. The connection with Florida is only that Everest is said to have received the misrepresentations there.

118. As regards the second point, it is true that the application was made on the basis of CPR, r. 6.20(5)(c) (contract governed by English law), and no separate basis of jurisdiction was identified for the alternative basis of vexation/oppression and collateral attack on the judgment of 1 May 2007. But it is now far too late for VH1 to take the point. It never objected to the English court's exercise of jurisdiction over the claim on the alternative basis, and there has therefore been a clear submission to the jurisdiction by VH1 in respect of this claim.

119. Nor do I see any error of principle in what the judge said would have been his exercise of discretion to grant an injunction on the alternative basis.

120. I accept that, in considering whether a cause of action in a foreign country is vexatious or oppressive on the ground that it is bound to fail, the English judge should not conduct a summary determination under English law principles without regard to the fact that the foreign system of pleadings may be more liberal, or that the foreign system of discovery may yield sufficient material to support allegations which in England should not be made without existing evidence. I also accept that an error or omission in a foreign pleading should not be considered fatal, if it can be cured by amendment.

121. But the inherent weakness of a claim, taken together with other matters, may be an important factor in the consideration of whether foreign proceedings are vexatious or oppressive. The English court is not exercising a summary jurisdiction. It is entitled to take a view in the round, and it is entitled to be sceptical about attempts to cure by potential amendment claims which on their face are hopeless (and, in this case, in some respects bogus). In my judgment, the judge was entitled to take the view that reliance on the press releases was plainly a cynical device to establish an independent cause of action in Florida, and that it was inherently incredible that Everest could have relied on a press release rather than on the Awards themselves or on the advice of the bondholders' lawyers, Bingham McCutchen. The judge was fully entitled to take into account the weakness, and inherent implausibility, of the claim in the exercise of the discretion.

122. I accept Elektrim's submission that VH1 has not identified any basis for a conclusion that the judge erred in principle in finding that the claims in the Florida proceedings against Elektrim were hopeless. Consequently, I agree with the judge that an injunction would have been appropriate on this ground even if the no-action clause had not applied.

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A *B Injunction in favour of the Trustee*

Judge's decision

123. The judge noted that the recitation of the facts in the Amended Complaint was peppered with allegations of fraud against the Trustee. But all those allegations had been withdrawn, and it had not been explained why, and on what material, they had been made.

124. The claims were against an English trustee, concerning the Trustee's duties under an English law Trust Deed, expressly governed by English law and containing a non-exclusive English jurisdiction clause, with the Trustee being in England and the relevant acts having occurred in England. VH1 accepted that England was the natural forum for this claim, and did not suggest that there was any advantage in proceeding in Florida of which VH1 would be deprived if an injunction were granted. The sole substantive question was whether the claim against the Trustee was vexatious or oppressive.

125. The judge considered that the claims were hopeless. The main points he made were as follows.

126. The allegations based on failure to disclose the full contents of the June 2006 Award and the October 2006 Award before withdrawal of the bankruptcy petition were based on factual allegations which were simply wrong.

127. As for the allegations that the Trustee failed to disclose to Everest its knowledge that DT and Elektrim had engaged in a transaction that was contrary to the direction of the Vienna arbitral tribunal, and that the Trustee had failed to exercise adequate due diligence prior to withdrawing the bankruptcy petition by failing to conduct a full investigation of the legality of the transaction, the fact was that the Trustee expressly applied to the Polish bankruptcy court for a determination whether it was entitled to accept the money offered by Elektrim, and the Polish bankruptcy court ruled that it was. The Trustee was both entitled and obliged to act on the instructions of bondholders holding more than 30 per cent in value of the bonds.

128. The allegations based on receipt of 'tainted money' from Elektrim were hopeless because they were predicated on Elektrim not being made bankrupt, and in any event the judge had held in a judgment binding on VH1 that they were not tainted.

129. In addition, the allegations of causation of loss flowing from the alleged breaches were themselves fanciful. The Amended Complaint said that had Everest 'opposed withdrawal and explained its reasons for doing so, the withdrawal would not have occurred' or that the bankruptcy court 'would not have permitted the withdrawal'. The Trustee's evidence was that its instructions to withdraw the petition

came from holders of more than 30 per cent in value of the bonds and that there was no realistic prospect of showing that bondholders other than Everest would have acted differently had they known about the June 2006 Award. It adduced evidence from the bondholders supporting that position.

130. The possibility that Everest's protests could have dissuaded the Trustee from accepting the money and withdrawing the petition was fanciful. It ignored the Trustee's obligation to act on the instructions of bondholders holding more than 30 per cent in value of the bonds. The suggestion that Everest could have whipped up support from 30 per cent of the bondholders was equally fanciful. The fact was that the bondholders were being offered repayment of the bonds after many years of waiting. If Elektrim were declared bankrupt, it would have been because its liabilities exceeded its assets, which would in itself have prejudiced its ability to repay the bonds.

131. The possibility that Everest might have prevented the withdrawal of the bankruptcy was also fanciful. It had no *locus standi* before the Polish bankruptcy court, because it was not a creditor of Elektrim and had not filed a petition for Elektrim's bankruptcy; the Polish court had made it clear in its ruling of 27 October 2006 that a petitioner was entitled to withdraw his petition if he wanted to. It also ruled that a bankruptcy petition could not be founded on an allegation that a contingent claim, if established, would not be met. So the possibility of the equity kicker becoming payable would not have figured in any decision of the Polish court. The idea that the Polish court would have compelled the Trustee to proceed with its petition when it did not want to was fanciful.

132. Consequently, the Amended Complaint disclosed no arguable cause of action against the Trustee, and no arguable claim for recoverable loss arising out of the alleged breaches. It was a claim that is bound to fail and was vexatious.

133. In addition the claim in Florida against the Trustee should not be allowed to proceed because it was an attempt to mount a collateral attack on the judge's judgment in the Part 8 proceedings. One of the principal purposes of the Part 8 proceedings was to determine whether there were any meritorious claims against the Trustee concerning the receipt from Elektrim of the €525m and the events of October 2006. In the course of the proceedings the judge made a representation order under which the bondholders (including Everest) were represented by two bondholders. The representative bondholders, through leading counsel instructed on their behalf, argued that the receipt of the monies by the Trustee was lawful and that there was no impediment to distribution. The judge accepted that argument and gave judgment to that effect. VH1 as assignee of the bonds from Everest was bound by that judgment. Its claim against the Trustee in Florida argued precisely the opposite. Its claim in Florida was therefore a collateral attack on that judgment. In addition the claim that VH1 sought to advance in Florida was a claim that could and should have been raised in the course of the Part 8 proceedings in this court. If necessary, Everest could have applied to have been separately represented in those proceedings on the ground that

A there was a conflict of interest between it and the remaining bondholders. It did not do so, and should not be allowed to do so now.

VH1's application for permission to appeal

B 134. Mr Malek QC accepted before this court that England was the natural forum, but that was not a sufficient basis for an anti-suit injunction. The motive for the assignment and the withdrawal of the fraud claims did not affect the question whether the remaining claims against the Trustee were viable. Mr Malek QC frankly accepted that if the question was which side had the better case, the answer would be against his clients. But the judge was not entitled, in effect, to decide summarily that the C claims were hopeless.

135. The principal points made by VH1 on this application are these. First, VH1 (as distinct from Vivendi) was not bound by Lewison J's judgment in the Part 8 proceedings, and was therefore not making a collateral attack on a judgment by which it was bound. The judge attributed too wide a scope to the Part 8 proceedings. D In those proceedings, the judge gave directions for distribution of the money and for that purpose determined the issues which were raised by the Trustee and the other parties. VH1 was bound by the result of the Part 8 proceedings because of the representation order, but it was not a party to them and there was no reason why it should be compelled to bring its claims against Elektrim and the Trustee within those E proceedings.

136. The Part 8 judgment was only concerned with whether the Trustee could distribute, and did not relate to the question whether there were any personal claims against the Trustee. VH1's case related not to the possibility that Vivendi or any other third party might assert a proprietary interest but to the possibility that, the original F petition having been withdrawn against payment, the money could be clawed back (either from the Trustee or the bondholders) in *subsequent* bankruptcy proceedings.

137. The extent of the duty of the Trustee to ensure that bondholders were sufficiently informed was fact-sensitive, and the Trustee should have informed G bondholders that the transfer to DT of the PTC shares at book value was considerably less than their real value. If Everest had appreciated this, it would have persuaded bondholders to press for bankruptcy, or instruct the Trustee not to withdraw the petition. If the sale had been set aside in the bankruptcy, $3 billion would have been recovered for the bondholders.

H 138. The judge was wrong to hold that the allegation that the Trustee was in breach of duty by failing to disclose the risks of accepting tainted money was hopeless. Even if a duty to give legal or commercial advice to the bondholders was not expressly pleaded, it was clear that VH1's case was that the Trustee owed a fiduciary duty of care to disclose the risks to Everest. The other points relied on by the judge (viz. it was Bingham McCutchen, and not the Trustee, who had a duty to give advice; Everest

was a sophisticated investor, which did not ask the Trustee for advice; and the Trustee had no means of knowing the identities of all of the bondholders, and so could not have assumed a duty to them) were all important factors which would need to be weighed by a court seised of the substantive dispute in deciding the existence and extent of the duty owed. But none of them was in itself decisive. VH1 did not allege that the Trustee undertook to provide general legal or commercial advice about the transaction, but only alleged that it undertook a narrow obligation to disclose what it knew (or should have known) about the transfer of the PTC shares to DT. That was simply an aspect of the Trustee's general fiduciary duty of reasonable care and skill, which was expressly preserved by clause 18 of the Trust Deed.

Conclusion

139. It is plain, and virtually admitted, that the purpose of the assignment was to enable Vivendi to pursue its claim in yet another forum.

140. A fundamental part of the claim against the Trustee was that it was in breach of fiduciary duty in failing to disclose to Everest and General Motors the full contents of the October 2006 Award prior to the withdrawal of the bankruptcy petition and the effect of such withdrawal on the value of the bonds, and in failing to obtain from Elektrim and disclose to VH1 the full content of the June 2006 Award before agreeing to withdraw the bankruptcy petition (Florida Complaint, para. 50). The Complaint also specifically pleaded that although the Trustee had access to the October 2006 Award, it failed to disclose it to Everest or General Motors at any time prior to the withdrawal of the bankruptcy petition on October 26, 2006 (para. 37);

141. Clause 8(c) of the Assignment Agreement between Everest and VH1 contained a representation by Everest that it was unaware of any evidence which contradicted the statements in the attached declaration of Mr Richard Torres, who described himself (as I have said) as a senior analyst with Everest Capital Inc.

142. In that declaration (made under penalty of perjury) he said: 'At no time prior to the decision to withdraw the bankruptcy petition did Everest have access to either the First or Second Partial Awards of the Vienna Arbitration Panel which I understand were not publicly available and which neither DT, Elektrim Finance BV, or Elektrim SA disclosed to Everest.' (para. 12). Clause 8(c) also contained a representation that: 'In particular [Everest] further represents that it has not seen a copy of either the 6 June 2006 Partial Award or the 2 October 2006 Partial Award. …'

143. The Amended Complaint in Florida alleged (para. 51) that if Everest had known the contents of the June 2006 Award and the October 2006 Award, namely that the first award did not permit Elektrim to transfer the PTC shares in August 2006 and that the October 2006 Award did not sanction that transfer, Everest would have opposed the withdrawal of the bankruptcy petition.

144. In his witness statement of 20 July 2007 Mr Davis, of Orrick Herrington & Sutcliffe, in Washington DC, repeated (para. 43) the allegation that the Trustee had failed to disclose to Everest and GM the full contents of the October 2006 Award, and failed to obtain and disclose the full content of the June 2006 Award.

145. The claim was bogus.

146. The evidence which emerged was that the Trustee's Polish lawyers obtained a copy of the October 2006 Award at the 4 October 2006 bankruptcy hearing. They arranged for an English translation to be produced and supplied the Award in the original and in translation to Clifford Chance (the lawyers for the bondholders' committee) in Poland. As I have said, on 4 October 2006 Bingham McCutchen sent an e-mail on behalf of (among others) Everest itself authorising the Trustee to seek an adjournment of the bankruptcy hearing because the bondholders 'require further time to consider … the implications of the Vienna award.'

147. On 5 October 2006 the Trustee sent a notice to all bondholders notifying them of the October 2006 Award and its contents and of the adjournment of the bankruptcy proceedings on 4 October, and stating that further information would be available to bondholders on a confidential basis on request. No bondholder made such a request.

148. In his witness statement of 6 September 2007 Mr Torres said merely: 'While I accept that the October award was made available to the bondholders, no one drew my attention to the fact that neither of these awards were consistent with the claims made in the press release.' (para. 7). There was no explanation for the false statement in his earlier declaration. In reply for VH1 Mr Davis also had no explanation for the misleading way in which the case had been put.

149. Consequently it is now common ground that the bondholders had a copy and that Mr Torres himself had a copy shortly after it was made, and the October 2006 Award recited in full the operative part of the June 2006 Award.

150. I have not been persuaded that there is any prospect of a successful appeal from the exercise of the discretion. There is no suggestion that the judge applied the wrong principles. The main point made by VH1 on this application is that, whatever the weaknesses in VH1's claims in the Florida proceedings, it was wrong in principle for the judge in effect to decide summarily that they were hopeless. I have already dealt with the approach to this aspect in my consideration of the alternative basis for an injunction in favour of Elektrim.

151. It is accepted that England is the appropriate forum for the claims made in the Florida proceedings. The claims are against an English trustee, concerning the Trustee's duties under an English law trust deed, expressly governed by English law, with a non-exclusive English jurisdiction clause, and the relevant acts occurred in England. The alleged victim was the assignor of the bonds, Everest, a Bermuda

company. The only Florida connection relied on is that Mr Torres, who managed the investment of the bonds for General Motors, and his employer Everest Capital Inc, are based there. Neither Everest nor Everest Capital Inc was the owner of the bonds. General Motors is a Delaware corporation with its principal place of business in Detroit, Michigan. I accept the submission for the Trustee that there is no real connection with Florida.

152. Once the bogus claims about non-disclosure of the Awards are stripped out, the remaining claims are for breach of fiduciary duty in accepting 'tainted funds' from Elektrim without consulting Everest or General Motors, and failing to disclose to Everest and General Motors the risks of accepting tainted money; failing to exercise adequate due diligence prior to withdrawing the bankruptcy petition by failing to conduct a full investigation of the legality of the transaction; acquiescing in delays of the bankruptcy proceedings; and withdrawing the bankruptcy petition and thereby giving up the right to recapture fraudulently transferred assets and thus to maximise the value of the contingent payment/equity kicker. In addition (paras 60 and 62), as a result of those matters, 'including actual and constructive knowledge of material information that it did not disclose to Everest or [General Motors]' the Trustee failed to exercise the degree of care and diligence required by the Trust Deed (clause 18), and its conduct constituted a material breach of its obligations.

153. It is surprising to find an allegation that the Trustee of a bond issue (whose main function is administrative and ministerial) has the duties which are pleaded in the Amended Complaint, and I am satisfied that for the reasons given by the judge, there are no such duties in the circumstances of this case under English law, the only possible applicable law.

154. The Trustee issued the bankruptcy petition under direction from the bondholders. On 4 October 2006 the bondholders directed the Trustee to adjourn the petition to allow time to consider the consequences of the October 2006 Award. Everest was party to that instruction. On 27 October 2006 the Trustee was directed by more than 30% of the bondholders regarding the conditional withdrawal of the petition and Everest later approved that instruction. Consequently, acceptance of the funds and the withdrawal were actions which were undertaken on the instructions of the bondholders' committee. By clause 10.1 of the Trust Deed the Trustee is not required to take any actions unless it is directed or requested to do so either by an extraordinary resolution of bondholders or in writing by 30% in value of the bondholders, and in each case only if indemnified to its satisfaction. If it receives such instructions it has to act (subject to getting satisfactory indemnities). I accept the Trustee's argument that bondholders are expert investors who look after their own interests, and that market practice is that when things go wrong bondholders may organise bondholders' committees.

155. Everest was a member at the material times of the bondholders' committee which pursued the commercial interests of the bondholders assiduously. The

A bondholders' committee had experienced lawyers, Clifford Chance in Poland, and Bingham McCutchen in London. All of the correspondence with Vivendi, in which Vivendi set out why it considered any receipt of repayment of the bonds from Elektrim would be 'tainted', was addressed to the bondholders' committee as well as to the Trustee. Bingham McCutchen took the lead in responding to Vivendi's letters.

B

156. I also accept the argument for the Trustee that the case was hopeless because, even if it could be argued there was a duty to disclose information to bondholders, it is impossible to argue that the Trustee failed to discharge the duty. The Trustee provided the October 2006 Award to the bondholders' lawyers. Bondholders representing more than 30%, including Everest, then instructed the Trustee to seek an adjournment on C the basis that the bondholders required further time to consider the implications of the Vienna award. Consequently the Trustee was being told that the bondholders were being advised on this very point. It is fanciful to suggest that the Trustee should have gone further and second-guessed the advice of the bondholders' own lawyers.

D

157. It is alleged that (a) if Everest had known the contents of the June 2006 Award and the October 2006 Award, or (b) if the Trustee had warned Everest that the conduct was unlawful, then Everest would have opposed the withdrawal of the bankruptcy petition. While Everest and General Motors wanted to be paid they did not want to receive tainted money and the possible liability which would come with it. Had Everest opposed a withdrawal, it would not have occurred, because the bondholders typically E required unanimity before making important decisions and the other bondholders would not have wanted to participate in an unlawful transaction and incur the risk that the funds would have to be disgorged. If Everest had disclosed to the bankruptcy court that the underlying transaction had taken place in violation of both the LCIA and the June 2006 Award, the bankruptcy court would not have permitted the withdrawal of the petition. General Motors would have been able to use the bankruptcy proceeding F to recapture fraudulently transferred assets which would have given significant value to the equity kicker; and it would have been able to recover the principal and interest owed on the bonds without having to accept tainted money.

158. I consider the judge's conclusions on causation are unassailable. As at 27 G October 2006, Elektrim, the debtor, had tendered in available funds the full petition debt and the Polish Court had approved the payment. There is no realistic prospect of showing that the Trustee could have gone on with the petition even had it wished to. The bondholders who gave instructions to withdraw the petition have given evidence that they would have given those instructions in any event.

H

159. I also consider that there is no arguable basis for an appeal from the judge's conclusion that the injunction was justified on the ground of protection of the jurisdiction of the English court. Vivendi chose not to apply to the English court to challenge the Order of 1 May 2007 or seek to restrain distribution of the €525m. Vivendi was served with notice of the 1 May 2007 order and was given the opportunity to apply to set it aside. The Part 8 proceedings were between the Trustee,

Elektrim, and all of the bondholders and concerned the circumstances of receipt of the €525m and whether the monies should be distributed, and in particular whether the Trustee might be liable in respect of the events of October 2006. England was plainly the natural forum for any disputes concerning the bonds. Instead Vivendi attacked the decision collaterally by having VH1 acquire bonds and issue the Florida proceedings, a jurisdiction having no substantial connection with the dispute, with the object of preventing the distribution.

160. The allegation that the funds were vulnerable to legal challenge is a necessary element of the Florida claim about the 'tainted funds.' Vivendi's claims could and should have been brought in the Part 8 proceedings. The court ruled, on 1 May 2007, on the question whether Vivendi's arguments had merit, and decided that there was no proprietary claim and, also, that the Trustee was a bona fide purchaser for value without notice of any claim.

161. VH1 now says that the term 'tainted' means something other than being subject to adverse claims, and means sums which may be clawed back in the Polish bankruptcy. I am also wholly unconvinced by the suggestion now made on behalf of VH1 that the reference in the Amended Complaint to 'tainted' money is a reference to the possibility of a later clawback in the bankruptcy. It is absolutely plain that when the Complaint speaks of 'tainted' monies it is referring to the claims of third parties in respect of the monies.

VII Disposition

162. I would dismiss VH1's appeal against the injunction in favour of Elektrim, and dismiss VH1's application for permission to appeal against the order in favour of the Trustee. Vivendi may have some genuine grievance about the loss of its investment in PTC (about which I say no more), but the Florida action was a misconceived method of pursuing that grievance.

Hallett LJ:

163. I am indebted to Lawrence Collins LJ for the thoroughness and clarity of his analysis. I respectfully agree with his reasoning and in the result.

Sir Anthony May P:

164. I also agree.

(*Appeal and application dismissed*)

HCCW 100/2022
[2023] HKCFI 455

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
COMPANIES (WINDING-UP) PROCEEDINGS NO 100 OF 2022

IN THE MATTER of CHINA OCEANWIDE GROUP LIMITED

and

IN THE MATTER of the Companies (Winding Up and Miscellaneous Provisions) Ordinance, Chapter 32 of the Laws of Hong Kong

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Before: Hon Linda Chan J in Court

Date of Hearing: 31 January 2023

Date of Judgment: 17 February 2023

J U D G M E N T

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1. There is before the court a winding up petition presented by New Merit Group Limited ("**Petitioner**") against China Oceanwide Group Ltd (中泛集團有限公司) ("**Company**") on 13 April 2022 (as amended on 27 July 2022) on the ground that the Company is insolvent and unable to pay its debts ("**Petition**").

2. In the Petition, the Petitioner pleaded 2 factual matters in support of its contention that the Company is insolvent:

(1) The Company is indebted to the Petitioner in the sum of US$32,471,522.19 ("**Debt**"), "being the amount of payment under 'Oceanwide Holdings International Development III Co. Ltd US$280,000,000 14.5% Guarantee Senior Notes Due 2021 inclusive of interest up to 23rd March 2022"[1] ("**Notes**"); and

(2) On 1 March 2022, a statutory demand ("**SD**") was served on the Company at its principal place of business, but the Company failed to pay the debt within the 3-week period for compliance with the SD[2]. There is no averment on whether the "debt" referred to in the SD was the Debt stated in the Petition[3].

3. The Company opposes the Petition on the following grounds:

(1) The Petitioner is not a "Holder" of the Notes (as defined in the Indenture dated 23 May 2019 ("**Indenture**") and, therefore, is not entitled to seek payment from the Company directly;

(2) Even if the Petitioner is a "Holder" of the Notes, it failed to satisfy the conditions precedent stipulated in the Indenture for presenting a winding up petition against the Company; and

(3) In any event, in light of the undertaking given by its sole shareholder, Oceanwide Holdings Co., Ltd (泛海控股股份有限

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1 Petition §5
2 Petition §§6-7
3 In the SD, the Company was demanded to pay US$32,188,330.44 of which US$1,194,330.44 was interest accrued up to 28 February 2022

公司) ("**Holdings**"), to provide financial support to the Company, the Company is solvent and should not be wound up.

4. As stated above, other than stating that the Debt is the amount due under the Notes, there is *no* particulars on the grounds for contending that the Debt is owed to the Petitioner or the facts relied upon by the Petitioner in support of such contention.

5. Even after the parties filed extensive evidence to deal with the grounds raised by the Company, the Petitioner still does not apply for leave to amend the Petition to state any additional or alternative grounds for asking the court to make a winding up order against the Company or the facts it relies upon. In particular, there is *no plea* in the Petition on:

(1) whether it is alleged that the Petitioner is a "Holder" of the Notes and, if so, the provisions in the Indenture relied upon, the particulars of the Notes it holds and the facts in support of the allegation;

(2) whether it is alleged that the Petitioner has any other interest in the Notes, the nature and particulars of the interest, the provisions in the Indenture relied upon, and the facts in support of the allegation;

(3) whether it is alleged that the Petitioner has *locus* to present the Petition as contingent or prospective creditor, and the facts relied upon in support of the allegation; and

(4) whether the Petitioner relies on any other facts in support of its allegation that the Company is insolvent.

6. Nevertheless, in his written submissions, Mr Taylor LK Li[4], counsel for the Petitioner, argues that the Company should be wound up for the following reasons[5]:

(1) The court held in *Re Jinro (H.K.) International Limited* [2003] 4 HKC 637 that "downstream debenture purchasers (i.e. P), who purchased notes held in common depository, are creditors under s178(1)(a) of [CWUO] and have *locus* to petition for winding up" (Downstream Purchaser point);

(2) Further or alternatively, the Petitioner is an "equitable assignee and have [sic] *locus* to petition for winding up as creditors [sic] in equity pursuant to *Re Jinro* and sections 178(1)(c) and 179(1) of [CWUO]" (Equitable Assignee point);

(3) Further or alternatively, the Petitioner is a "contingent and/or prospective creditors and have [sic] *locus* to petition for winding up as creditors [sic] in equity pursuant to section 179(1) of [CWUO]" (Contingent Creditor point);

(4) Notwithstanding Section 6.06 of the Indenture, Section 6.07 provides that the Petitioner may bring suit for enforcement of the Indenture after 23 May 2021 (Section 6.07 point);

(5) The Company fails to demonstrate that there is a genuine dispute on the Debt (No *bona fide* Dispute point); and

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4 Appearing with Mr Fergus Chan
5 Petitioner's skeleton submissions §11

(6) In any event, the Company is unable to pay its debts, taking into account its contingent and prospective liabilities (Prospective Liabilities point).

Background

7. The Company is incorporated in Hong Kong and is an investment holding company. It is wholly owned by Holdings, a company established in the Mainland.

8. The Company is at the apex of a group of companies known as "Oceanwide Group", which engages in real estate, financial service and energy business. According to the corporate structure chart prepared by the Company (reproduced at the end of this Judgment):

(1) The Company owns a number of wholly owned subsidiaries incorporated in the BVI and Hong Kong. The subsidiaries in turn hold equity interests in companies incorporated in Bermuda, the United States and Hungary.

(2) Oceanwide Holdings International Development III Co., Ltd (泛海控股國際發展第三有限公司) ("**Issuer**") is a wholly owned subsidiary of the Company. It is incorporated in the BVI. Apart from issuing the Notes, the Issuer does not have any other business or asset.

(3) Amongst the sub-sub subsidiaries, there are 2 companies whose shares are listed on The Stock Exchange of Hong Kong Limited. They are China Oceanwide Holdings Limited (中泛控股有限公司) (stock code 715) ("**COH**") and China Tonghai International

Financial Limited (中國通海國際金融有限公司) (stock code 952) in which the Company (through its subsidiaries) holds 70.28% and 72.51% shareholding respectively.

9. The Notes were issued by the Issuer pursuant to the Indenture. The Indenture was executed by the Issuer (as Issuer of the Notes), Holdings (as PRC Parent Guarantor), the Company (as Hong Kong Parent Guarantor), Oceanwide Real Estate International Company Ltd (泛海建設國際有限公司) (as Subsidiary Guarantor) and Citicorp International Limited (as Trustee).

10. The Notes fell due on 23 May 2021. Neither the principal nor the interest accrued on the Notes were paid to the Petitioner.

11. In the "Announcement on Inside Information" made by COH on 28 May 2021 ("**1st Announcement**"), it was stated that on 24 May 2021, the Issuer repurchased part of the Notes in the aggregate principal amount of US$146,045,000 through the issuance of privately placed US$146,045,000 notes due 2024. The aggregate principal amount of the Notes which remained outstanding was US$133,955,000.

12. On 1 March 2022, the Petitioner served the SD on the Company. The Company did not comply with the SD or pay any part of the amount demanded by the Petitioner.

13. On 13 April 2022, the Petitioner presented the Petition.

14. On 29 April 2022, COH made an announcement disclosing the SD and the Petition presented by the Petitioner against the Company ("**2nd Announcement**"). In the 2nd Announcement, it was stated that the Company

"intends to oppose the Petition vigorously", and will continue to explore an amicable settlement with the Petitioner.

15. The Notes are secured by the "Parent Guarantee" executed by each of Holdings and the Company.

Applicable principles

16. A creditor seeking to wind up a company is required to present a petition in compliance with the requirements of the Companies (Winding up and Miscellaneous Provisions) Ordinance (Cap. 32) ("**CWUO**"), the Companies (Winding-Up) Rules (Cap. 32H) ("**CWUR**") and the Forms contained in the Appendix to the CWUR where applicable.

17. In so far as the CWUO is concerned, s.177 provides that the court may make a winding up order against the company on the grounds set out in sub-section (1)(a)-(f). Section 179(1) stipulates the persons who have *locus* to apply for a winding up order in this way:

> "An application to the court for the winding up of a company shall be by petition, presented subject to the provisions of this section either by the company, or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories or the trustee in bankruptcy or the personal representative of a contributory, or by all or any of those parties, together or separately…"

18. Where a creditor seeks to wind up a company on the ground that it is insolvent, it bears the burden of proving that the company is unable to pay its debts (s.177(1)(d)). For this purpose, s.178(1)(a), (b) and (c) of the CWUO set out 3 different bases for a creditor to prove that the company is "unable to pay debts" as follows:

> "A company shall be deemed to be unable to pay its debts –

(a) if –

(i) a creditor, by assignment or otherwise, to whom the company is indebted in a sum then due that equals or exceeds the specified amount, has served on the company a written demand –

(A) in the prescribed form requiring the company to pay the sum so due; and

(B) by leaving it at the registered office of the company; and

(ii) The company has, for 3 weeks after the service of the demand, neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor,

(b) if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) if it is proved to the satisfaction of the court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company." (underlined added)

19. The form and contents of a petition are governed by the CWUR. The following Rules and Forms apply to a petition presented by a creditor on insolvency ground:

(1) Rule 1(1) provides that the CWUR "shall apply to the proceedings in every winding up under the [CWUO] of a company".

(2) Rule 3(1) provides that "the forms in the Appendix, where applicable, and where they are not applicable forms of the like character, with such variations as circumstances may require, shall be used…".

(3) Rule 3B sets out the requirements of the form and the content of statutory demand in this way:

"(1) A statutory demand –

(a) must be in Form 1A;

(b) must state –

(i) the amount of the debt; and

(ii) the consideration for the debt, or if there is no such consideration, the way in which the debt arises;

(c) must be dated; and

(d) …

(2) …

(3) Subject to paragraph (4), if the amount of the debt claimed in a statutory demand includes –

(a) any charge by way of interest not previously notified to the company as a liability of the company; or

(b) any other charge accruing from time to time,

the charge (whether expressed in an amount or by reference to a rate) must be separately identified, and the grounds on which the charge is claimed must be stated, in the demand.

(4) The amount of the debt claimed must be limited to that which has accrued due as at the date of the demand." (underlined added)

(4) Rule 3C prescribes the other information to be given in the statutory demand.

(5) Rule 22 provides that "Every petition shall be in the Form 2 or 3 with such variations as circumstances may require".

(6) Form 1A is the prescribed form of statutory demand. It requires, *inter alia*, the creditor to state:

(a) when was the debt incurred. Note 1 thereof states that "[i]f the creditor is entitled to the debt by way of assignment, then, in addition to the date of incurrence of the debt, details of the original creditor and any intermediary assignees

should be given in Part B, including the date of each assignment to each of the assignees";

(b) the description of the debt. Note 2, 3 and 5 thereof mirror the requirements stipulated in Rule 3B(1)(b)(i)-(ii), Rule 3B(3)(a) and Rule 3B(3)(b) respectively; and

(c) the amount due as at the date of the statutory demand. Note 4 thereof requires the amount of interest to be shown separately.

(7) Form 2 is the prescribed form of petition. Amongst others, it requires the petitioner to "set out in paragraphs the facts on which the petitioner relies".

(8) Form 7 and Form 8 are affidavits verifying petition. Each requires the petitioner to verify the truthfulness of "the statements in the petition" as relate to the acts and deeds of the affirmant or of any other persons to be true.

20. As is clear from the above Rules and Forms, which apply to every petition presented against a company, a petitioner is required to state not just the debt remains unpaid, but also "*the facts on which the petitioner relies*". Consistent with this, Form 7 and Form 8 only require the petitioner to verify the truthfulness of "the statements in the petition" as relate to the acts and deeds of the affirmant or of any other persons to be true. Such verification is generally sufficient given that the facts on which the petitioner relies have already been stated in the petition.

21. In my view, it is not open to a petitioner to rely on any facts or grounds not fairly stated in the petition and asks the court to make a winding up order against the company on the bases of any unpleaded facts or grounds.

22. First, winding up petition is the originating process for a petitioner to set out its case and the relief sought against the company. It is the document which sets in motion the jurisdiction of the court to wind up a company under s.177(1) of the CWUO[6]. If a petitioner wishes to expand or change its case against the company, it must first amend the petition.

23. Second, the jurisdiction to make a winding up order against a company is derived from the CWUO. The court would be concerned to see that the requirements prescribed by the CWUO and the CWUR for invoking the statutory remedy are complied with. It would be inconsistent with the requirements of the CWUO and the CWUR to allow a petitioner to rely on any facts or grounds not fairly stated in the petition.

24. Where a creditor relies on the company's failure to comply with a statutory demand as the basis for contending that the company is insolvent, the court would consider whether the demand is made in conformity with the requirements of Rule 3B and 3C and Form 1A. This includes whether the creditor has stated, correctly, (1) the amount of the debt; (2) the way in which the debt arises; (3) the amount of interest not previously notified to the company as a liability of the company (if any); (4) any other charge accruing from time to time and the grounds on which the charge is claimed (if any); and (5) the amount accrued due as at the date of the demand.

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[6] In the case of a petition against a Hong Kong company, or s.327(3) of the CWUO in the case of a petition against an "unregistered company"

25. If there is any error or omission in the information stated in the statutory demand, the court would expect the creditor to issue a fresh demand (if a petition has *not* been presented) or apply for leave to amend the petition to rectify the error or omission in the statutory demand, and state the correct amount and particulars of the debt upon which it relies (if a petition has already been presented). This requirement accords with the importance of a statutory demand, which is the means created by the CWUO and the CWUR to allow a creditor to prove insolvency of the company, as non-compliance with a statutory demand *per se* is sufficient for the court to conclude that the company is insolvent.

26. Third, it is *no* answer for a petitioner to say that the relevant facts and grounds upon which it relies have been stated in the affirmations filed in the proceedings, or that there is no unfairness for a petitioner to rely on such unpleaded facts and grounds. There is no provision under the CWUO or the CWUR which allows a petitioner to change or supplement its case against a company by way of affirmations.

27. Nor is it the practice of the Companies court to allow a petitioner to expand its case by way of affirmations. There is a long line of authorities, where the court emphasised the requirement that a petition must set out the facts and matters relied upon by a petitioner in justifying a winding up order, and any defects or omissions cannot be cured by supporting affidavits (see, in the context of "just and equitable" petition: *In re Fildes Bros. Ltd* [1970] 1 WLR 592, at 597G-598C; *Re Tourmaline Ltd* [2000] 4 HKC 348, at 354B-D; and the cases cited in *Butterworths Hong Kong, Company Law (Winding Up and Miscellaneous Provisions) Handbook*, 5th ed., p.191). The same approach has been adopted by the Companies court when dealing with a petition

presented by a creditor (see for eg., *Re Pioneer Iron and Steel Group Co Ltd*, HCCW 322/2010, 6 March 2013, §31, per Harris J).

28. It seems to me that the requirement discussed in *In re Fildes Bros. Ltd* apply equally, if not with greater force, to a petition presented by a creditor on insolvency ground. Unlike a "just and equitable" petition which is determined after a trial with the benefit of pleadings, list of documents and witness statements filed by the parties, a petition presented by a creditor is almost invariably determined by the court summarily, without any pleadings, discovery or witness statements. It is all the more important for the court to insist that a petitioner must set out its case and the facts relied upon in the petition so that the company would know what case it has to meet at the hearing. Indeed, it is necessary for the court to insist on such requirement as otherwise the company and the court would have to trawl through the affirmations and the exhibits filed by the parties, which are often voluminous as the affirmants (and those advising the parties) seems to think that they can raise any facts and exhibit any documents in support even though such facts have not been pleaded in the petition.

29. I note that in the UK, the same approach has been adopted by the Companies court when dealing with a petition presented by a creditor seeking to wind up a company on insolvency ground.

(1) This includes (a) the requirement that a petitioner's case, including details of the basis on which it is contended that the company is insolvent and sufficient particulars of the debt, must be stated in the petition; (b) at the hearing, the petitioner will be limited to the grounds stated in the petition; and (c) the court will

not travel outside the allegations in the petition (*French, Applications to Wind Up Companies*, 4th ed., §§2.218-2.220; 5.53).

(2) Where there are mistakes, misstatements or omissions in the petition, the petition will have to be amended with the leave of the court, unless the court can be persuaded that the mistake is trivial and that the defect in the petition ought to be waived. Errors in the description of the debt and that that debt arose are more fundamental mistakes which require amendment (*Boyle & Marshall*, *Practice and Procedure of the Companies Court*, §9.26).

30. The above principles are well-established and should be familiar with practitioners. However, it has become increasingly common for a petitioner to present a winding up petition against a company which only contains an averment that the company failed to satisfy the statutory demand served upon it as the basis for contending that the company is insolvent and unable to pay its debts. The present case is a paradigm example. The Petition is a 3-page document but the hearing bundles contain over 1,626 pages. It is of course unobjectionable for the petitioner to take this course if at the time it presented the petition, it was not aware of any *bona fide* dispute on substantial grounds in respect of the debt and the company had not challenged the statutory demand.

31. The position would be very different if the company is able to demonstrate that the statutory demand is defective (by reason of errors or omissions in describing the debt or how the debt arose) and the petitioner has *not* rectified the defect by issuing a fresh demand or amending the petition (as the case may be). In such scenario, it may be said that the statutory

requirements for triggering the deemed insolvency provision (s.178(1)(a) of the CWUO) have not been met, and there is no proper basis for the court to conclude that the company is insolvent.

32. In future, the court expect the practitioners and the parties to comply with the requirements of the CWUO and the CWUR and abide by the principles discussed above. Save in exceptional circumstances or where it is impracticable for the petitioner to apply for leave to amend the petition, the court would *not* allow a petitioner to rely on any grounds or factual matters not fairly covered in the petition even if such grounds or matters have been stated in the affirmations filed in the proceedings.

Discussion

33. At the highest, the Downstream Purchaser point (§6(1) above), the Clause 6.07 point (§6(4) above) and the No *bona fide* dispute point (§6(5) above) may be said to be arguments in response to the grounds raised by the Company in opposition to the Petition, such that they do no need to be pleaded in the Petition.

34. However, the same cannot be said of the Equitable Assignee point (§6(2) above), the Contingent Creditor point (§6(3) above) and the Prospective Liabilities point (§6(6) above). They are new grounds which ought to but have not been pleaded in the Petition. When the question of lack of pleading is raised by this court, Mr Li submits that the court may give leave to the Petitioner to amend the Petition. However, no such application is made at the hearing, presumably because the Petitioner does not want to pay the costs occasioned by the adjournment of the Petition. I am unable to see why the court should consider these unpleaded points in circumstances where the Petitioner

decided not to raise them in the Petition and not to apply for leave to amend the Petition to include the points.

35. I turn to the points which I consider may be relied upon by the Petitioner.

Whether the Petitioner is a "Holder" of the Notes

36. As stated above, it is *not* the Petitioner's pleaded case that it is the Holder of the Notes. This is reinforced by §11 of Mr Li's submissions where he summarises the Petitioner's position on *locus standi*. Nevertheless, Mr Li advances the Section 6.07 point in response to the Company's argument that the procedure for commencing legal proceedings stipulated in Section 6.06 has not been complied with.

37. As the Petitioner has not made clear whether the Notes it relies on are in the form of Global Notes, I will consider all the relevant Sections in the Indenture which govern the registration of the Notes. These include:

(1) Article 1 contains definitions: "Holder" is defined as "means the Person[7] in whose name a Note is registered in the Register[8]". "Global Notes" is defined as "has the meaning assigned to such term in Section 2.04".

(2) Article 2 Section 2.04 deals with "Form, Denomination and Date of Notes: Payments". Sub-section (c) provides that:

> "On the Original Issue Date, an Authorized Officer of the Issuer will execute and deliver to the Trustee one global note representing the Notes (together with any other global notes issued after the Original

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7 Defined as "means any individual, corporation, partnership, limited liability company, joint venture, trust, unincorporated organization or government or any agency or political subdivision thereof"

8 Defined as "has the meaning assigned to such term in Section 2.05"

Issue Date, the "**Global Notes**"), with the Guarantees and the JV Subsidiary Guarantees (if any) endorsed thereon … which shall be deposited with, and registered in name of the nominee of the common depositary for Euroclear and Clearstream (the "**Common Depositary**"), which shall initially be Citivic Nominees Limited …" (underlined added)

(3) Section 2.05 deals with "Registration, Transfer and Exchange" of the Notes and provides as follows:

"(a) The Notes are issuable only in registered form. The Issuer will keep at the office or agency to be maintained for the purpose as provided in Section 4.02 (the "**Registrar**"), a register (the "**Register**") in which, subject to such reasonable regulations as it may prescribe, it will register, and will register the transfer of, the Notes as provided in this Article. The name and address of the Holder of each Note and the amount of each Note, and all transfers and exchanges related thereto, will be recorded in the Register. Such Register shall be in written form in the English language or in any other form capable of being converted into such form within a reasonable time. Such Register shall be open for inspection by or on behalf of the Trustee during normal business hours upon prior written request.

(b) Upon due presentation for registration of transfer of any Note, the Issuer shall execute and the Trustee shall authenticate and deliver in the name of the transferee or transferees a new Note or Notes in the authorized denominations for a like aggregate principal amount.

(c) A Holder may register the transfer of a Note only by written application to the Registrar stating the name of the proposed transferee and otherwise complying with the terms of the Indenture. No such registration of transfer shall be effected until, and such transferee shall succeed to the rights of a Holder only upon, final acceptance and registration of the transfer by the Registrar in the Register. Prior to the registration of any transfer by a Holder as provided herein, the Issuer, the Trustee and any agent of them shall treat the Person in whose name the Note is registered as the owner thereof for all purposes whether or not the Note shall be overdue, and neither the Issuer, the Trustee, nor any such agent shall be affected by any notice to the contrary. Furthermore, any Holder of a Global Note shall, by acceptance of such Global Note, agree that the transfers of beneficial interests in such Global Note may be effected only through a book-entry system maintained by Euroclear and

Clearstream (or their respective agents) and that ownership of a beneficial interest in the Note shall be required to be reflected in a book entry. At the option of the Holder, Notes may be exchanged for other Notes of any authorized denomination and of a like aggregate principal amount, upon surrender of the Notes to be exchanged to the Registrar. When Notes are presented to the Registrar with a request to register the transfer or to exchange them for an equal principal amount of Notes of other authorized denominations for such transactions set forth herein are met. To permit such registrations of transfers and exchanges, the Issuer and the Guarantors and each JV Subsidiary Guarantor (if any) shall execute and the Trustee shall authenticate Notes at the Registrar's request.

…

(g) So long as the Global Notes remain outstanding and are held by or on behalf of the Common Depositary, transfers of beneficial interests in the Global Notes may be made only in accordance with the rules of Euroclear or Clearstream.

…

(k) …" (underlined added)

(4) Section 2.06 "Book-Entry Provisions for Global Notes" provides as follows:

"Ownership of beneficial interests in the Global Notes (the "**book-entry interests**") will be limited to persons that have accounts with Euroclear and/or Clearstream or persons that may hold interests through such participants. Book-entry interests will be shown on, and transfers thereof will be effected only through, records maintained in book-entry form by Euroclear and Clearstream and their participants.

…

So long as the Notes are in global form, the Common Depositary (or its nominee) will be considered the sole holder of the Global Notes for all purposes under this Indenture and "holders" of book-entry interests will not be considered the owners or "holders" of Notes for any purpose. As such, participants must rely on the procedures of Euroclear and Clearstream and indirect participants must rely on the procedures of the participants through which they own book-entry interests in order to transfer their interests in the Notes or to exercise any rights of Holders under this Indenture.

None of the Issuer, the Guarantors, the JV Subsidiary Guarantors (if any), the Trustee or any of the Agents will have any responsibility

> or be liable for any aspect of the records relating to the book-entry interests. The Notes are not issuable in bearer form." (underlined added)

38. The combined effect of Sections 2.04, 2.05 and 2.06 is that:

(1) Only the following persons are Holders of the Notes: (a) Citivic Nominees Limited as nominee of the Common Depositary for Euroclear and Clearstream (Section 2.04(c)); and (b) the Holder whose name and address have been recorded in the Register (Section 2.05(a)); and

(2) Until final acceptance and registration of the transfer by the Registrar in the Register, a transferee of the Note will not become and does not have the rights of a Holder (Section 2.05(c)).

39. There is no evidence whatsoever to show that the Petitioner's name and address have been recorded in the Register. It follows that the Petitioner is not a Holder of the Notes.

Section 6.07 point

40. No reliance can be placed by the Petitioner on Section 6.06 or Section 6.07 of the Indenture as both sections expressly provide that *only* a Holder has the right to institute proceedings with respect to the Indenture or the Notes or to bring suit for enforcement of payment:

(1) Section 6.06 Limitation on Suits

> "A Holder of Notes may not institute any proceeding, judicial or otherwise, with respect to this Indenture or the Notes, or for the appointment of a receiver or trustee or for any other remedy under this Indenture of the Notes, unless [the requirements stipulated in (a), (b), (c) and (d)]" (underlined added)

(2) Section 6.07 Rights of Holders to Receive Payment

> "Notwithstanding anything to the contrary, the right of any Holder to receive payment of the principal of, premium, if any, or interest on, such Note, or to bring suit for the enforcement of any such payment, on or after the due date expressed in the Notes, shall not be impaired or affected without the consent of the Holder." (underlined added)

41. Mr Li argues that "the very fact that the Company and its solicitors have considered that [Section 6.06] applies to [the Petitioner]" somehow can be taken as the Company's acceptance that the Petitioner is a Holder of the Notes. The argument must be rejected. The question as to whether the Petitioner is a Holder of the Notes is a question of fact and must be established by evidence.

42. For the above reasons, I hold that the Petitioner is not a Holder of the Notes and, therefore, does not have the right to commence proceedings with respect to the Indenture or the Notes or to bring suit for enforcement of payment under the Notes. The Petition must be dismissed for this reason alone.

Parent Guarantee

43. Although counsel have in their written submissions referred the court to the terms of the Parent Guarantee, neither Mr Li nor Mr Danny Chan[9] has referred to the terms of the Parent Guarantee.

44. It seems to me that if one construe the terms of the Parent Guarantee and Section 11.01 of the Indenture, it is clear that the Company is only liable to the Holder of the Notes and the Trustee.

45. The Parent Guarantee provides *inter alia* as follows:

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[9] Appearing with Mr Ronald Pang and Ms Linda Cho, counsel for the Company

> "Each of the "Parent Guarantors" … hereby jointly and severally guarantees as principal obligor to each Holder of a Note authenticated by the Trustee and to the Trustee and its successors and assigns the due and punctual payment of the principal of, premium, if any, and interest on, and all other amounts payable under, the Notes and the Indenture …
>
> The obligations of the Parent Guarantors to the Holder of this Note and to the Trustee pursuant to this Parent Guarantee and the Indenture are expressly set forth in Article 11 of the Indenture, and reference is hereby made to such Article and Indenture for the precise terms of the Parent Guarantee". (underlined added)

46. Article 11, Section 11.01 Parent Guarantees provides that:

> "Subject to the provisions of this Article 10, each of the Parent Guarantors hereby jointly and severally Guarantees as principal obligor to each Holder of a Note authenticated by the Trustee and to the Trustee and its successors and assigns the due and punctual payment of the principal of, premium, if any, and interest on, and all other amounts payable under, the Notes and this Indenture." (underlined added)

47. Even if, contrary to my view, the Petitioner (not being a Holder of the Notes) has the right to commence these proceedings with respect to the Notes or to enforce payment thereunder, there is no basis to suggest that the Company is liable to the Petitioner.

Downstream Purchaser point

48. In light of my view on the Parent Guarantee, it is unnecessary to consider the Downstream Purchaser point. In case this matter goes further, I will explain why I do not consider that there is merit in the point.

49. Again, in the absence of any pleading, one can only ascertain the Petitioner's case by reference to Mr Li's submissions. His arguments may be summarised as follows:

(1) In *Jinro*, the court held that a person who purchased a note from an accountholder with Euroclear is a "creditor". The structure of the notes in *Jinro* mirrors the structure of the Notes in this case[10]. The court should follow the approach in *Jinro* and consider the provisions and effect of the Indenture "in the context of the practice and procedure of Euroclear system and in the context of the understanding of those who participate in the system".[11]

(2) The Petitioner "at very least, holds the book-entry interest and the beneficial interest of the Notes" through its account at Haitong International Securities Company Limited ("**Haitong**"). Section 2.06 of the Indenture "envisages that retail investors, such as [the Petitioner], could hold interests through participants with Euroclear such as Haitong".[12]

(3) There is "ample amount of evidence establishing [the Petitioner's] beneficial interests" which includes:[13]

(a) a statement from Haitong, an accountholder or participant in the common depository at Euroclear;

(b) according to the Company, Haitong was one of the "Initial Purchasers" of the Additional Notes, and "the Notes that the Petitioner 'owns' should have been purchased through Haitong"[14];

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10 Petitioner's submissions §§17-19
11 Petitioner's submissions §§31-33
12 Petitioner's submissions §§24-27
13 Petitioner's submissions §28
14 2nd affirmation of Liu Hongwei §§24-25

(c) in the 2nd Announcement, COH "acknowledges [the Petitioner] as 'holder' of the debenture and creditor of the Company";

(d) the Trustee sent a "NOTICE TO HOLDERS" dated 13 May 2022 which contains "important information that is of interest to the beneficial owners of the subject securities" to the Petitioner. The Notice referred to the 2nd Announcement and extracts of the Indenture; and

(e) Haitong sent a "NOTICE TO HOLDER" issued by Euroclear which described the balance of security "XS1995111736 Oceanwide Holding Regs 14.5 23/05/21" as at 13 May 2022.

(4) Relying on the documents set forth in sub-paragraph (3), Mr Li contends that "the Trustee/Common Depository Citibank Euro Plc, the Clearing System Euroclear, the Accountholder Haitong and even [COH] (and its legal advisor) all acknowledged [the Petitioner's] ownership of the debenture. This is a reflection of the context of the understanding of the participants in relation to the Notes".

50. In my view, *Jinro* is a very different case and does not assist the Petitioner for the following reasons:

(1) In *Jinro*, the company was the issuer of the "2001 Notes" and was liable to pay the amount due upon their maturity (§9). Here, the Company is not the issuer of the Notes and its liability has to be

determined by construing the terms of the Parent Guarantee and the Indenture (to which the Company is a party).

(2) The petitioners in *Jinro* had amended the petition and specifically alleged that "as a result of the petitioners' purchase of the 2001 Notes, they are 'successors and/or assigns [of the Accountholders] and/or equitable assignees of the rights under the Deed of Covenant'" (§19). As stated above, there is no plea in the Petition to the effect that the Petitioner is a downstream purchaser of the Notes or that it has acquired any beneficial interest in the Notes or that it is a successor or assignee of Haitong.

(3) In *Jinro*, the court had to consider the issue as to what "rights" in the 2001 Notes, if any, were acquired by the petitioners when they purchased the 2001 Notes by way of trading in the Euroclear system. This was because the acquisition was made by the petitioners after (a) events of default under the 2001 Notes had taken place, and (b) the PGN[15] had become void (§§13-18). No such complication arose in this case.

(4) In *Jinro*, the 2001 Notes acquired by the petitioners were shown by an entry in their respective securities clearance account of the petitioners at Euroclear. Euroclear provided a certification by letter dated 5 March 2022 that the petitioners were holding the 2001 Notes in their respective accounts at Euroclear in the

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[15] "The 2001 Notes were initially represented by a 'temporary global note' in bearer form, which was then exchanged for the PGN in bearer form issued on 24 June 1996. The PGN was duly deposited with Deutsche Bank, Hong Kong Branch, for Morgan Guaranty Trust Company of New York, Brussels Office, as operator of the Euroclear system. Under the terms of the PGN, the PGN would be exchangeable for notes in definitive form (Definitive Notes) against surrender of the PGN if, inter alia, an event of default under the terms and conditions of the 2001 Notes should occur" (*Jinro*, §13).

amounts stated in the statutory demand (§34). No such evidence is present in this case.

(5) In *Jinro*, neither EOC[16] nor its depositaries will enforce the terms of the securities against an issuer or guarantor on behalf of persons holding such securities through the Euroclear system. It is against this fact that the court held that "The beneficial owners of the securities must be able to enforce their rights under the terms of the securities against the issuer and/or the guarantor and specific arrangements may be necessary to achieve this when the securities are represented by permanent global certificates" (§39). In the present case, the Indenture contains provisions stipulating who have the right to enforce the Indenture and the Notes and how it should be done.

51. As regards the Petitioner's reliance on Section 2.06, Mr Chan takes issue with Mr Li's contentions that (1) Haitong is a participant of Euroclear system; (2) the statement issued by Haitong may be regarded as a book-entry by a participant for the purpose of Section 2.06 of the Indenture.

52. It is unnecessary to decide the point. This is because even *if* the Petitioner has book-entry interests in the specified amount of the Notes (as described in Haitong's statement), it is still incumbent upon the Petitioner to satisfy the court that it has the right to commence proceedings in respect of the Indenture or to enforce payment under the Notes *and* the Company is liable to the Petitioner under the Parent Guarantee.

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[16] Euroclear Operations Centre (see §33)

53. As the Petitioner is not a creditor of the Company, it has no *locus* to present the Petition.

54. Where, as here, the petitioner does not have *locus* to present a winding up petition, it cannot ask the court to consider the evidence filed and decide whether or not the company is insolvent (*Re Hyundai Engineering & Construction Co Ltd (No 2)* [2002] 2 HKLRD 354 §29; *Re H12 (HK) Ltd* [2021] HKCFI 1836 at §§19-20). It is therefore unnecessary to consider whether or not the Company is insolvent.

Conclusion

55. For the reasons set out above, the Petition is liable to be struck out.

56. In §9 of his submissions, Mr Li refer to a notice of intention to appear on petition filed on 9 August 2022 by Mr Cheung Shun Ching as supporting creditor. It is not clear whether the supporting creditor intends to apply for substitution as petitioner and, if so, whether the Company disputes the amount claimed by him.

57. I therefore adjourn the Petition to be heard on 27 February 2023 at 9:30am. If any party wishes to make any application in these proceedings, it must file a summons together with supporting affirmation by 22 February 2023 so that the application can be dealt with at the hearing on 27 February 2023.

58. If no application for substitution is made within the above time limit, this Court will make an order striking out the Petition and dismissing the proceedings at the hearing on 27 February 2023. For this purpose, the attendance of the legal representatives be excused.

59. As for costs, I make a costs order *nisi* that:

(1) the costs of and occasioned by the Petition be paid by the Petitioner to the Company, to be taxed if not agreed and with certificate for one counsel; and

(2) the costs of the Official Receiver be paid by the Petitioner and be deducted out of the deposit. The amount to be assessed by way of gross sum assessment if not agreed.

(Linda Chan)
Judge of the Court of First Instance
High Court

Mr Taylor L.K. Li and Mr Fergus K.F. Chan, instructed by Au Yeung, Chan & Ho, for the Petitioner

Mr Danny Chan, Mr Ronald Pang and Ms Linda Cho, instructed by Deacons, for the Company

White & Case, for the supporting creditor (Cheung Shun Ching), is absent

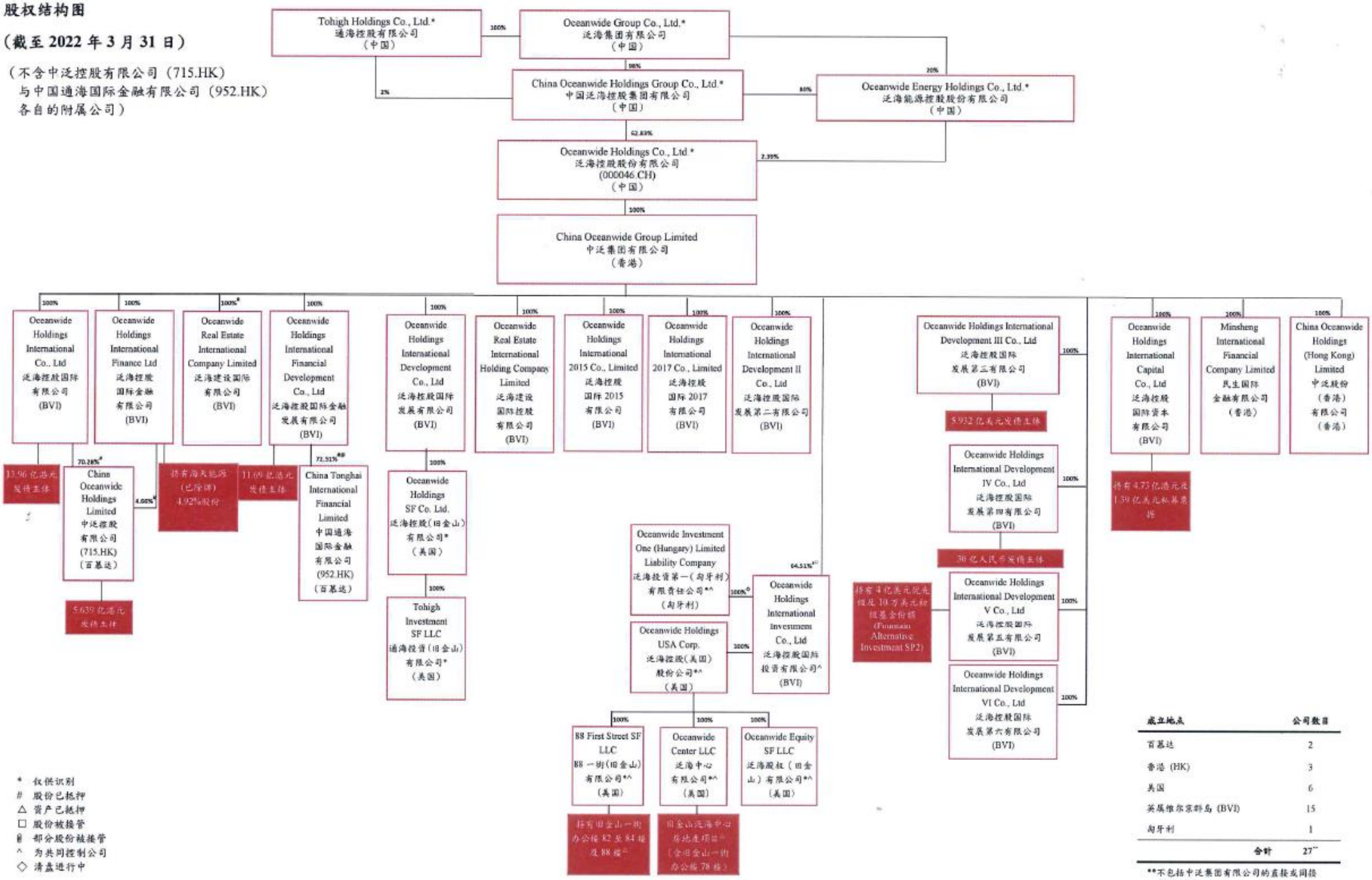
The Official Receiver is excused

中泛集团有限公司

股权结构图

（截至 2022 年 3 月 31 日）

（不含中泛控股有限公司（715.HK）
与中国通海国际金融有限公司（952.HK）
各自的附属公司）



* 仅供识别
\# 股份已抵押
△ 资产已抵押
□ 股份被接管
▮ 部分股份被接管
^ 为共同控制公司
◇ 清盘进行中

成立地点	公司数目
百慕达	2
香港 (HK)	3
美国	6
英属维尔京群岛 (BVI)	15
匈牙利	1
合计	27**

**不包括中泛集团有限公司的直接或间接控股公司

Secure Capital SA v Credit Suisse AG.

[2017] EWCA Civ 1486

Court of Appeal (Civil Division).
Beatson, David Richards and Irwin L JJ.
Judgment delivered 6 October 2017.

Contract – Loan notes – Bearer notes – Notes held in Luxembourg clearing system – Notes represented by single bearer share held by custodian and 'immobilised' – Notes governed by English law – Investor holding interest in notes as account owner – Investor alleging that information provided in issue documentation misleading – Whether investor could bring breach of contract claim against issuer – Whether issuer's contractual obligations owed only to custodian of single note – Whether Luxembourg law allowing direct claim applied as law of settlement system or by incorporation.

This was an appeal raising the question whether an investor with an interest in notes issued in bearer form and held through the Clearstream system in Luxembourg had a direct claim for breach of contract against the issuer of the notes.

The claimant, Secure Capital, held an interest in 'longevity' notes issued by Credit Suisse and linked to life insurance policies.

The notes were held through the Clearstream electronic trading system based in Luxembourg. The notes were represented by a bearer note held on a permanent basis by a custodian and governed by English law. Such a note was said to be 'immobilised'.

Clearstream maintained accounts for members (banks and others) which held and dealt in interests in the notes as account holders. Account holders held interests for themselves or to the order of their customers as account owners. The system operated on a 'no look through' basis, whereby each party had rights only against their own counterparty.

Secure Capital claimed that the information provided in the issuance documentation was misleading, and brought a claim based on one of the contractual documents governing the notes. Its claim was based on Luxembourg securities law, which it said gave it the right of the bearer to bring an action for breach of a term of the notes.

Credit Suisse argued that the contract constituted by the notes was governed by English law and Luxembourg law was irrelevant; since Secure Capital was not the bearer of the notes, it was not in a contractual relationship with Credit Suisse and therefore was unable to maintain a claim for breach of contract.

Hamblen J granted summary judgment to Credit Suisse ([2015] EWHC 388 (Comm)) holding that English law applied to the contractual obligations of the issuer which were owed only to the custodian as the bearer of the single permanent note; Luxembourg law was irrelevant and could not found Secure Capital's claim against Credit Suisse for breach of contract.

On appeal Secure Capital argued that the issue of who was entitled to sue on a bearer note held in an immobilised settlement system was sui generis and should be answered by reference to Luxembourg law as the law of the settlement system. Alternatively, the right of a security interest holder to bring a claim against Credit Suisse under the Luxembourg law had been incorporated into the contract constituted by the notes and related documents as part of the 'rules and procedures of Clearstream'.

Held, **dismissing the appeal:**

1. The only party entitled to sue as a matter of English law, which expressly governed the notes, was the holder or custodian of the single bearer note, unless one of a limited number of specified events had occurred. The obligations of Credit Suisse were owed to the bearer for the time being. The Programme Memorandum provided that the holder would 'be deemed to be and may be treated as its absolute owner for all purposes'. The account holders had to look solely to Clearstream for their payments and all other rights under the securities. The 'no look through' provision was fundamental to the workings of the settlement systems in interests in immobilised securities. The general position, that only the holder of the notes enjoyed enforceable rights against Credit Suisse, was further made clear by the provisions that, in limited circumstances, enabled parties to proceed directly against Credit Suisse. The express provisions governing the notes left no room for account owners such as Secure Capital to have directly enforceable contractual rights against Credit Suisse, unless there was a default in the payment of principal on the notes, which had not occurred.

2. In the case of immobilised securities, Clearstream and other settlement systems existed to facilitate efficient trading in interests in securities, not in the securities themselves. Participants in the market knew that they were trading in interests, not in the underlying securities. They were interests in contractual arrangements constituted by the notes and ancillary documents. The documents expressly provided for English law to be the proper law and expressly identified the parties who might either generally or in limited circumstances sue for breach of the terms of the notes. It was not necessary for the law of the settlement system to be identified as the proper law, in order to fill a gap. If it had been intended that account holders or account owners should be entitled to sue Credit Suisse in contract for breach of the contract terms, the documents could and would have so provided. A rule which identified the law of the settlement system as the applicable law could produce an incoherent, if not chaotic, result.

3. The Luxembourg law had not been incorporated into the terms governing the notes as part of the 'rules and procedures of Clearstream'. A natural reading of those words did not include Luxembourg law. The context overwhelmingly suggested that they did not, particularly if the effect would be to create direct claims by holders of security interests against Credit Suisse. Their effect would be to nullify all the other provisions in the governing documents which emphasised that only the bearer could claim against Credit Suisse, subject to well-defined exceptions, and would run counter to well-established market practice. It would also be inconsistent with the exclusion of the Contracts (Rights of Third Parties) Act 1999. In any event, the provision was concerned with the rights of account holders, not account owners such as Secure Capital.

The following cases were referred to in the judgment:

Picker v London and County Banking Co Ltd (1887) 18 QBD 515.
Raiffeisen Zentralbank Osterreich AG v Five Star General Trading LLC [2001] CLC 843; [2001] QB 825.

Raymond Cox QC and Liisa Lahti (instructed by Collyer Bristow LLP) for the appellant.

Adrian Beltrami QC and Christopher Burdin (instructed by Allen & Overy LLP) for the respondent.

JUDGMENT

David Richards LJ: Introduction

1. The issue on this appeal is whether an investor with an interest in Notes issued in bearer form and held through the Clearstream system has a direct claim for breach of contract against the issuer of the Notes, in respect of an alleged breach of the misleading statements term to which I refer below.

2. The appellant, Secure Capital SA (Secure Capital), holds an interest in Notes issued by the respondent, Credit Suisse SA (Credit Suisse). The Notes, described as longevity notes, were linked to life insurance policies and payment on the Notes was contingent on mortality rates amongst a set of 'reference lives' to which the relevant life insurance policies related.

3. One of the contractual documents governing the Notes, the Pricing Supplement, contained a term (the misleading statements term) as follows:

> 'Except as stated below, the Bank has taken all reasonable care to ensure that the information contained in this Pricing Supplement when taken together with the other Issue Documentation is true and accurate in all material respects and

A that, in the context of the issue of Notes, there are no other material facts the omission of which makes misleading any statement herein, whether of fact or opinion. The Bank accepts responsibility accordingly. The information relating to the life expectancies of the Reference Individuals has been provided by the Life Expectancy Provider and does not reflect the view of the Bank or its affiliates.'

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4. Secure Capital claimed that the information provided in the issuance documentation was misleading in that the mortality tables used to generate the estimated life expectancies were shortly to be updated in a way that would significantly increase the life expectancies, rendering the Notes effectively worthless. C It alleged that Credit Suisse knew or ought to have known this but failed to disclose it in breach of the misleading statements term.

5. Secure Capital's claim is based on article 8 of Luxembourg law dated August 2001 on the circulation of securities (the 2001 Law). Secure Capital argued that, by reason of the 2001 Law, it was entitled to exercise the right of the bearer to bring an D action for a breach of a term of the Notes, although it was not the bearer.

6. Credit Suisse contends that, as Secure Capital is not the bearer of the Notes, it is not in a contractual relationship with Credit Suisse and thus unable to maintain a claim in contract for breach of the misleading statements term. The contract constituted by E the Notes is governed by English law and the 2001 Law is accordingly irrelevant.

7. On 11 April 2014, Secure Capital issued a claim form, claiming damages for breach of contract against Credit Suisse, and served particulars of claim. Credit Suisse applied to strike out the particulars of claim as disclosing no reasonable grounds for bringing the claim or for summary judgment on the claim as disclosing no real F prospect of success. By an order dated 24 February 2015, Hamblen J (as he then was) granted Credit Suisse summary judgment on the claim ([2015] EWHC 388 (Comm)). This appeal is brought with permission granted by Underhill LJ on a renewed oral application for permission to appeal, the judge and Tomlinson LJ having refused permission.

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The Clearstream system

8. Clearstream, like Euroclear based in Belgium, operates an electronic trading system for interests in securities. It is established in Luxembourg and operates under Luxembourg law.

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9. Typically, as in this case, the securities are represented by a bearer note that is physically held on a permanent basis by a custodian. In this way, the note is said to be 'immobilised'. It is not the bearer note, but interests in the note, that are traded through the Clearstream system. This is achieved through a descending succession of interests. The custodian holds the note for the Clearstream system. Clearstream

maintains accounts for members (banks and others) which hold and deal in interests in securities as Account Holders. Each Account Holder's interests in securities at any time are recorded by Clearstream. The interests are fungible and are traded between Account Holders through electronic book entries. Account Holders may hold interests for themselves as principal or to the order of their customers (Account Owners).

10. The system operates on the basis of a 'no look through' principle, whereby each party has rights only against their own counterparty. Payments of sums due on the securities are made by the issuer or other payer to Clearstream which then makes payment to the Account Holders in respect of their recorded interests. The Account Holders pass on the appropriate sums to their Account Owners.

11. Typically, as in the present case, Account Holders will become entitled to a direct interest in notes only if there has been default in the payment of principal due on the notes or if Clearstream were closed permanently or for a continuous period of 14 days.

The Notes

12. The claim brought by Secure Capital relates to eight Notes issued by Credit Suisse (the Notes). They were issued in July and August 2008 and for the purposes of the application heard by Hamblen J and the appeal, they have been treated as in materially identical terms so far as relevant to the issues in dispute. Prior to issue, Prometeo Investment Services SA agreed to acquire, through Clearstream, the entire interest in the Notes. It is Secure Capital's case that RBS Global Banking (Luxembourg) SA (RBSL) acquired Prometeo's interest and that RBSL holds its interest in the Clearstream system as Account Holder for Secure Capital.

13. Each Note is represented by a single Permanent Global Security (PGS) which states that it is 'a bearer document and negotiable accordingly'. It is stated to be transferable by delivery 'and such transfer shall operate to confer upon the transferee all rights and benefits appertaining hereto …'. The PGS is governed by English law.

14. The PGS is deposited with Bank of New York Mellon ('BNYM') as common depositary. It is common ground that BNYM is the bearer of the Notes which it holds on behalf of Clearstream.

15. Secure Capital's interest in the Notes is held by it as an Account Owner with RBSL as the Account Holder.

16. The Notes are subject to the Conditions, defined to comprise the Programme Memorandum, the Product Supplement and the Pricing Schedule.

17. The Programme Memorandum is a set of standard terms for securities to be issued by Credit Suisse, which was issued about two years before the Notes. It

A stated, so far as relevant, that each security or series of securities to be issued in bearer form would be represented by a PGS to be held by a common depositary for Clearstream, Euroclear or another agreed clearing system. Title would pass by delivery of the PGS. The holder would 'be deemed to be and may be treated as its absolute owner for all purposes'. Each person shown in the records of Clearstream must look solely to Clearstream 'for his share of each payment made by the Bank B and in relation to all other rights arising under the Global Securities, subject to and in accordance with the respective rules and procedures of … Clearstream'. The Programme Memorandum expressly provided that no person would have any right to enforce any term or condition of the securities under the *Contracts (Rights of Third Parties) Act* 1999 except and to the extent (if any) that the securities expressly C provide otherwise. Securities were to be governed by English law and Credit Suisse agreed to the jurisdiction of the English courts for the exclusive benefit of the holders of securities.

18. The Notes are supported by an agency agreement between Credit Suisse and JPMorgan entities dated 2 August 2006, and a Deed of Covenant by Credit Suisse on D the same date. The Deed of Covenant provides that in the event of non-payment of principal, an Account Holder with interests in the Notes acquires direct rights against Credit Suisse as if it had been the bearer of the Notes, including but not limited to the right to receive all payments due on the Notes.

E **The 2001 Law**

19. The 2001 Law applies to settlements under the Clearstream system. The unchallenged expert evidence on Luxembourg law adduced by Secure Capital was that the purpose of the 2001 Law was to provide that, in the case of immobilised securities, the security interest holder should not be in a worse position because it F holds an interest in the securities rather than holding the securities themselves.

20. Article 3 provides for an Account Owner (Secure Capital in this case) to have an intangible right in rem, up to the number of securities registered in his custody account, to the securities of that type held by the Account Holder and to the rights G attached to those securities but 'subject to any legal provisions to the contrary, he may only assert his rights with the relevant account holder', which in this case is RBSL. This preserves the fundamental no look through principle.

21. Secure Capital seeks to rely on article 8(1) of the 2001 law which provides:

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> 'the investor may exercise or arrange to exercise corporate rights attached to the securities and the rights attaching to the holding of the securities linked to the possession of the securities by producing a certificate drawn up by the relevant account holder attesting to the number of securities registered in its custody account'.

22. Secure Capital contends that, while article 8 did not apply to the issuer's obligations for the payment of principal and interest on securities and so did not in that respect contradict the 'no look through' principle, it does entitle account owners to exercise other rights (for example, voting rights) attached to notes and to bring legal proceedings against the issuer for breach of any terms governing the Notes, other than payment terms.

23. The judge recorded that Credit Suisse questioned whether article 8 had this effect but it did not adduce any expert evidence on Luxembourg Law. The judge therefore proceeded on the basis that it had the effect for which Secure Capital contended 'and that it does seek to confer "rights attaching to the holding of the securities linked to the possession of the securities" which may be enforced by the investor against the issuer'. The judge therefore assumed that under Luxembourg law Secure Capital could sue Credit Suisse for damages for breach of the misleading statement term.

Secure Capital's claim

24. The only claim made in the claim form issued by Secure Capital is for damages 'for breach of contract'. No claim is made in tort or under statute. The particulars of claim assert that 'in breach of the express terms of the Notes, Credit Suisse failed to ensure that it had disclosed material facts. As a result, Secure Capital is entitled to damages.' By reason of article 8, it was entitled 'to exercise the right of the bearer to bring an action for a breach of a term of the Coupon Notes.' But for the breach, Secure Capital would not have purchased its interests in the Notes and it claims damages accordingly.

25. Credit Suisse applied to strike out the particulars of claim or for summary judgment on the basis, shortly stated, that Secure Capital was claiming for breach of a contract to which it was not a party. The contract was governed by English law, not Luxembourg law, and whatever the effect of article 8 as a matter of Luxembourg law, it could not confer on a non-party a right to sue on the contract.

The Judgment

26. The judge identified the applicable law, and in particular whether Secure Capital was entitled to rely on Luxembourg law, as the fundamental issue that arose.

27. He cited the following passage from the judgment of Mance LJ in *Raiffeisen Zentralbank Osterreich v Five Star Trading* [2001] CLC 843; [2001] QB 825, as setting out the applicable principles to be followed when determining the applicable law:

> '26. … at common law, the identification of the appropriate law may be viewed as involving a three-stage process: (1) characterisation of the relevant issue; (2) selection of the rule of conflict of laws which lays down a connecting factor

A for that issue; and (3) identification of the system of law which is tied by that connecting factor to that issue: see *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387, 391–392 per Staughton LJ. The process falls to be undertaken in a broad internationalist spirit in accordance with the principles of conflict of laws of the forum, here England.

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27. While it is convenient to identify this three-stage process, it does not follow that courts, at the first stage, can or should ignore the effect at the second stage of characterising an issue in a particular way. The overall aim is to identify the most appropriate law to govern a particular issue. The classes or categories of issue which the law recognises at the first stage are man-made, C not natural. They have no inherent value, beyond their purpose in assisting to select the most appropriate law. A mechanistic application, without regard to the consequences, would conflict with the purpose for which they were conceived. They may require redefinition or modification, or new categories may have to be recognised accompanied by new rules at stage 2, if this is necessary to achieve the overall aim of identifying the most appropriate law D (cf also Dicey & Morris, *The Conflict of Laws* (13th edn, 2000), vol 1, para 2-005) …

28. The three-stage process identified by Staughton LJ cannot therefore be pursued by taking each step in turn and in isolation. …

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29. There is in effect an element of interplay or even circularity in the three-stage process identified by Staughton LJ. But the conflict of laws does not depend (like a game or even an election) upon the application of rigid rules, but upon a search for appropriate principles to meet particular situations.'

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28. Secure Capital's claim was pleaded exclusively as a claim for breach of contract. The judge considered that the true issue was whether Secure Capital could claim damages for breach of the misleading statements term, which was a contractual term. The claim involved the assertion of contractual rights and the breach of a contractual term, said to be enforceable by Secure Capital. The existence G of contractual duties and the right of a party to sue on a contract are contractual questions. In the judge's view, the issue in the case was clearly to be characterised as contractual and Secure Capital's arguments to the contrary were 'inconsistent and to a significant extent legally incoherent'.

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29. The judge noted the development of the claim advanced by Secure Capital. In proceedings issued in 2013, it asserted that it was the bearer of the Notes. This was not pursued after it was asked to produce the Notes, which were of course held by BNYM. In the particulars of claim in the present proceedings, it asserts the right of the bearer to bring a claim for breach of the terms of the Notes. This was a type of derivative claim on behalf of BNYM but the claim was for damages suffered by Secure Capital, not BNYM. At the hearing before Hamblen J, Secure Capital argued

that it was entitled to exercise the rights of a bearer of the Notes. As explained in oral argument, BNYM retained its rights of action but the 2001 law created 'a new, parallel but independent right of action as bearer in favour of the investors (however many there may be) against the issuer in respect of any breaches of the terms of the Notes'.

30. Earlier assertions made in correspondence that Secure Capital was advancing a proprietary claim were abandoned. At the hearing before the judge, its entitlement to be treated as a bearer was neither contractual nor proprietary but was 'a novel situation which did not fit existing characterisations and was *sui generis*'. Its entitlement to enforce rights under the Notes was to be distinguished from the content of the rights and should be governed by the *lex situs*, being the law applicable to whether or not a person is entitled to be treated as a bearer of a note.

31. The judge took the view that 'none of these arguments satisfactorily explain why the "true issue" is not one of contract or, if it is not, what it is and why'. Seeking to re-describe the issue in non-contractual terms did not alter the true nature of the issue. The question was not the identity of the holder of the Notes – this was unquestionably BNYM – but whether Secure Capital was entitled to be treated as an additional holder so as to be able to sue on the Notes for its own loss.

32. He cited from Dicey, Morris & Collins: *The Conflicts of Laws* (15th edn) at 33-388, 33-389:

> '… the question whether a "bearer bond" is capable of carrying with it the right to claim payments of principal and interest from the issuer should ultimately be determined, not by the law of place where the bearer instrument was situated at the time of its negotiation, but by reference to the law governing those rights and the issuer's corresponding obligations. … a choice of law expressed in the instrument itself should be determinative'.

> '… a person's (proprietary) entitlement to be treated as a "holder" as against other claimants, will normally be determined in accordance with the lex situs, but the question whether the instrument carries with it rights against the issuer (and questions concerning the exercise of those rights) will, ultimately, be matters for the law governing the instrument.'

33. Having determined that the issue was correctly characterised as contractual, the judge held that it was to be decided according to English law as the proper law of the contract. Further, however the issue was characterised, 'given that it involves the enforcement of rights against Credit Suisse under Notes governed by English law it is difficult to see how the appropriate law can be other than English law'.

34. Under English law, the obligations of the issuer were owed to, and only to, the bearer, in this case BNYM. At [56] the judge said that there was no scope in this contractual analysis for the introduction of foreign law:

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> 'I agree with Credit Suisse that there is no scope in this contractual analysis for the introduction of foreign law. The fact that a foreign law might or might not purport to grant a third party a right to sue on an English law contract is irrelevant. A foreign law cannot (even if it purported to do so) create new contractual obligations in an English law contract'.

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35. It followed that the 2001 Law was irrelevant and could not found Secure Capital's claim against Credit Suisse.

36. The judge considered the works of notable academic and industry commentators which were unanimous in their view that, in the case of immobilised C securities, the ultimate investor does not have a cause of action directly against the issuer, unless otherwise provided by the terms of the Notes and ancillary documents. While Secure Capital did not dispute these general statements, it submitted that they were confined to the performance of payment obligations. However, the judge pointed out that a failure to pay was itself a breach of contract, just as much as any other breach, and the general importance of separating interests applies equally to D all claims for breach of contract.

Secure Capital's written case

37. In its skeleton argument for this appeal, Secure Capital submitted that the E judge was wrong to characterise the issue as contractual. It contended that the issue is 'who is entitled to sue on a bearer note which is held in an immobilised settlement system'. It submitted that this issue is *sui generis* and should be answered by reference to a new conflicts rule, which identifies the law of the settlement system (in this case, Luxembourg law) as the applicable law. This was the most appropriate law. F

38. Secure Capital pointed out that Credit Suisse, as the issuer, chose to use Clearstream as the settlement system and account holders and account owners invest in the Notes through that system. It is logical that the law applicable to that system should apply to the rights and obligations between investors and G Credit Suisse, particularly where the law makes specific provision in that respect, as in the 2001 Law. At the same time, Secure Capital accepted that, by reason of the overriding 'no look through' principle, only the bearer of the Notes could sue for the payment of principal and interest (save where the terms of the Notes made contrary provision), but that principle was confined to those monetary obligations. It did not affect a claim for breach of other terms, such as the H misleading statements term.

39. Secure Capital argued that the judge's decision resulted in a lacuna. The effect was that the only person who could sue for breach of the misleading statements term was BNYM as custodian and holder of the Notes, which had suffered no loss from the breach, while the persons which had suffered loss could not sue for breach. It

followed that Credit Suisse was immune from a claim for breach of the term. These were 'grave consequences' that pointed to the law of the settlement system as the appropriate law.

40. Secure Capital did not deny the importance of English law as the governing law of the Notes, but its relevance was to determine the meaning and effect of the terms of the Notes, while Luxembourg law as the law of the settlement system would determine who could sue for breach of those terms. As it was put in the skeleton argument, the law applicable to the contract governs the content of the right to sue but 'the integrity of the system requires that the right to sue exists or does not exist where the system demands'.

41. Secure Capital submitted that its approach 'reflects the commercial realities, and how the security interests function in practice'. The settlement system was not intended to make security interest holders worse off than if they were bearers of the Notes. Their rights were created under and governed entirely by the settlement system. Further, choice of the law of the settlements system would meet the needs of certainty.

Secure Capital's oral case

42. Without abandoning the case as formulated in the skeleton argument, counsel for Secure Capital developed a further submission, not previously put forward, that the right of a security interest holder to bring a claim against Credit Suisse under the 2001 Law was incorporated into the contract constituted by the Notes and related documents. It was submitted that this arose by virtue of the following provision in the Programme Memorandum:

> 'Each of the persons shown in the records of Euroclear, Clearstream, Luxembourg, DTC or any other clearing system as the holder of a Security represented by a Global Security must look solely to Euroclear, Clearstream, Luxembourg, DTC or such clearing system (as the case may be) for his share of each payment made by the Bank, acting through the Relevant Branch, to the bearer of such Global Security or the holder of the underlying Registered Securities as the case may be, and in relation to all other rights arising under the Global Securities, *subject to and in accordance with the respective rules and procedures of Euroclear, Clearstream, Luxembourg, DTC or such clearing system (as the case may be)*. Such persons shall have no claim directly against the Bank or the relevant Branch in respect of payments due on the Securities for so long as the Securities are represented by such Global Security and such obligations of the Bank and the relevant Branch will be discharged by payment to the bearer of such Global security or the holder of the underlying Registered Securities, as the case may be, in respect of each amount so paid.' (emphasis added)

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A 43. It was submitted that the emphasised words had the effect of incorporating substantive rules of Luxembourg law, including article 8(1) of the 2001 Law.

Discussion

B 44. I will start with the submissions made by Secure Capital in its skeleton argument. Insofar as these repeat the case argued before Hamblen J, they were in my judgment rightly rejected by the judge for the reasons he gave.

45. Under English conflicts of law principles, the identification of the parties entitled to sue on a contract is governed by the proper law of the contract. In this case, C the proper law is, by the express terms governing the Notes, English law. Hamblen J cited the statement of Bowen LJ in *Picker v London and County Banking Co* (1887) 18 QBD 515 at 519 that '[a]mong the rights which are ordinarily created by such instruments is the right of suing upon the contract therein contained'.

D 46. The rights of parties to sue Credit Suisse on the contract constituted by the Notes and the relevant documents are clearly set out in those documents.

47. The only party entitled to sue is the holder of the Notes represented by the PGS, i.e. BNYM, unless one of a limited number of specified events has occurred. The obligations of Credit Suisse are owed to the bearer for the time being of the E PGS. The Programme Memorandum provides that the holder would 'be deemed to be and may be treated as its absolute owner for *all purposes*' (emphasis added). The persons shown in the records of Clearstream (i.e. the Account Holders, not Account Owners) must look solely to Clearstream 'for his share of each payment made by the Bank and *in relation to all other rights arising under the Global Securities*' (emphasis added). This is, as Secure Capital accepts, the no look through provision F which is fundamental to the workings of the settlement systems in interests in immobilised securities. Secure Capital's submission that it is limited in its effect to payment obligations is incompatible with the emphasised words. This provision is concerned with the rights of an Account Holder, which in the present case was RBSL. It would be eccentric to suggest that Account Holders, who may hold G interests on their own account, must look only to Clearstream or other settlement system but Account Owners, who are even more removed from the underlying Notes, are not so constrained.

48. The general position, that only the holder of the Notes enjoys enforceable rights against Credit Suisse, is further made clear by the provisions that, in limited H circumstances, enable parties to proceed directly against Credit Suisse.

49. If principal in respect of any Notes was not paid when due, the PGS could be exchanged for definitive securities which could then be distributed among those with interests in the Notes, creating a direct relationship with Credit Suisse and enabling the holders to sue Credit Suisse directly.

50. Additionally, clause 2.1 of the Deed of Covenant provided that, on the giving of notice in the event of default in the payment of principal, each Account Holder with interests in the Notes would 'acquire against the Bank all rights ("Direct Rights") that it would have had if, immediately before each such Acquisition Time, it had been the holder of the Original Securities'. This is expressed to include 'without limitation' the right to receive all payments due at any time on the Notes. The effect is again to create rights in favour of Account Holders (but not Account Owners) that are directly enforceable against Credit Suisse. This latter point is made expressly clear by clause 4.2 of the Deed which provides that each relevant Account Holder 'is entitled to receive payment of the amount due in respect of each of its Entries and of all other sums referable to its Direct Rights to the exclusion of any other person'.

51. For good measure, paragraph 16 of the General Terms and Conditions excluded the effect of the *Contracts (Rights of Third Parties) Act* 1999.

52. The overall effect of these express provisions is clear. The only party with a right to sue Credit Suisse is BNYM as holder of the Notes, unless there is default in the payment of principal on the Notes, in which event Account Holders may acquire directly enforceable rights against Credit Suisse.

53. If the issue in the case is correctly characterised as contractual, both general principles of English law and the express provisions governing the Notes leave no room for anyone other than BNYM to have directly enforceable contractual rights against Credit Suisse, unless there is default in the payment of principal (which has not in this case occurred).

54. It was to avoid this insuperable obstacle that Secure Capital submitted that exceptionally in the case of immobilised securities a new and different characterisation was needed, fixing the law of the settlement system as the appropriate law to determine the parties entitled to sue on the Notes, although leaving the content of the rights under the Notes to be determined in accordance with English law as their express governing law. Because this was a novel situation, there was no authority on which Secure Capital could rely for this bifurcation of proper laws.

55. I have struggled, unsuccessfully, to understand the principle that could justify this approach. In the case of immobilised securities, Clearstream and other settlement systems exist to facilitate efficient trading in interests in securities, not in the securities themselves. The fact that security issues are organised in this way so as to facilitate such trading is nothing to the point. Participants in the market know that they are trading in interests, not in the underlying securities. They are interests in contractual arrangements constituted by the Notes and ancillary documents. The documents expressly provide for English law to be the proper law and expressly identify the parties who may either generally or in limited circumstances sue for

breach of the terms of the Notes. Those provisions are as much part of the package of rights as the payment terms and any other terms of the Notes. Market participants trade in interests in that total package of rights.

56. The only justification advanced by Secure Capital is that, unless the law of the settlement system is identified as the proper law, there will be no-one able to recover substantial damages in contract for breach of the misleading statements term, thus creating a lacuna and conferring immunity on Credit Suisse as the issuer. I emphasise 'in contract' because it is not suggested that a claim in tort, if sustainable, would be similarly barred.

57. A lacuna cannot in any relevant sense be said to exist if it is precisely the consequence of the express terms of the Notes and ancillary documents. There is no reason to suppose that this was an unintended consequence and, indeed, the clear and detailed provisions make clear that this consequence was intended. If it had been intended that Account Holders or Account Owners or others with even more remote interests should be entitled to sue Credit Suisse in contract for breach of the misleading statements term, the documents could and would surely have so provided. It was a matter for Secure Capital whether it traded in interests in securities having these features.

58. Secure Capital proposes its novel conflicts rule for immobilised securities because Luxembourg law happens to contain, in article 8 of the 2001 Law, a provision which (it is assumed only for the purposes of the present application and appeal) would confer a direct right of action on Secure Capital as an Account Owner. But if its proposed conflicts rule were accepted, it would necessarily make the laws of another country apply where the interests were held through a settlement system located in and governed by the laws of that country; for example, Belgian law in the case of Euroclear or New York law in the case of the Depositary Trust Company. Interests in the Notes are or were themselves traded on Euroclear as well as Clearstream and could be traded across the two systems. There is no evidence on whether Belgian or New York law contain provisions similar to the 2001 Law, but it is entirely feasible that they do not. Secure Capital's case could therefore produce an incoherent, if not chaotic, result. Whether Credit Suisse and other issuers would be exposed to direct claims would depend on the system in which the claimant's interests were held. This would damage both certainty and consistency for a reason that might be little more than happenstance.

59. Secure Capital submitted that its approach accorded with commercial realities and expectations and with the nature of an immobilised bearer security and the manner in which it is intended to function in practice. This assertion is unsupported by evidence or academic or other literature. It is contradicted by the extensive literature to which the judge referred in his judgment at [58], which emphasises that the purpose of immobilised securities is to prevent a direct link between investors and the issuer. It is apparent from the literature that market participants operate on this basis. It

is noteworthy that the International Capital Market Association recommended that market contracts governed by English law should adopt as standard the exclusion of the *Contracts (Rights of Third Parties) Act* 1999 'on the basis that the legal structure of the rights arising from the transaction documentation … is effective, certain and generally accepted in the market'.

60. For all these reasons, I consider that the principal case advanced by Secure Capital, based on the adoption of a new conflicts rule, is unsustainable. The alternative formulation contained in its skeleton argument, that the issue should be characterised as 'who is entitled to sue as a bearer under a note in an immobilised note system', is little more than a re-formulation of the same case. It was not separately developed in written or oral submissions and it fails for many of the same reasons.

61. The submission that article 8 of the 2001 Law was incorporated into the terms governing the Notes was, as I mentioned earlier, made for the first time in oral argument on the appeal. It had not been considered by the judge and Secure Capital did not have permission to appeal on that ground. However, it is a submission that Mr Beltrami QC was able to respond to and that can be dealt with by this court. In the interests of certainty, I think this court should deal with it.

62. It would be possible for a contract governed by English law to incorporate a provision of a foreign law conferring on a non-party a right of action for breach of the contract against one of the contracting parties. The provision on which Mr Cox QC relied for this purpose was that set out in paragraph [42] above. He relied on the words italicised in the quotation, incorporating the 'rules and procedures of … Clearstream'. These words, he submitted, extended to include substantive provisions of Luxembourg law.

63. I reject this submission. First, the 'rules and procedures of … Clearstream' do not on a natural reading include Luxembourg law. Second, the context overwhelmingly suggests that they do not do so, particularly if the effect would be to create direct claims by holders of security interests against Credit Suisse. Their effect would be to nullify all the other provisions in the governing documents referred to above, which emphasise that only the bearer can claim against Credit Suisse, subject to well-defined exceptions, and would run counter to well-established market practice. It would be inconsistent with the exclusion of the *Contracts (Rights of Third Parties) Act* 1999. Third, against this background, if the intention had nonetheless been to incorporate a right of action conferred by article 8, clear words to this effect would have been used. Fourth, in any event, the provision in question is concerned with the rights of Account Holders such as RBSL, and not with Account Owners such as Secure Capital.

64. For these reasons, I would dismiss the appeal.

Irwin LJ:

65. I agree.

Beatson LJ:

66. I also agree.

(*Appeal dismissed*)

A **AVC PROPERTY DEVELOPMENT CO LTD v JOYFUL GRACE TRADING LTD & ANOR**

COURT OF APPEAL
CIVIL APPEAL NO 208 OF 2016
LAM VP, CHEUNG AND KWAN JJA
B 27 APRIL, 16 JUNE 2017

Civil Procedure – Service of process – Notice of appeal – Unrepresented registered non-Hong Kong company – Whether there was valid service – Whether relief be granted to cure irregularity in service – Omission to serve on authorised representative – Service at place of business established in Hong Kong – Companies Ordinance (Cap 622) s 803 – Rules of the High Court (Cap 4A) O 2 r 1

Guarantees and Indemnities – Guarantee – Discharge – Tenancy – Whether guarantor consented to amendment of terms of tenancy – Whether amendment prejudiced guarantor – Whether default interest provision penalty

民事訴訟程序 — 送達法律程序文件 — 上訴通知 — 沒有代表的註冊非本港公司 — 是否屬於有效的送達 — 是否因送達程序不合規定而批出濟助 — 遺漏送達給獲授權的代表 — 送達至建立在香港的營業地址 — 《公司條例》(第622章)第803條 — 《高等法院規則》(第4A章)第2令第1 條

擔保與賠償 — 保證 — 解除 — 租約 — 擔保人是否同意修改租約條款 — 修改是否對擔保人構成不利 — 默認利息條文是否屬於懲罰

The plaintiff landlord leased shop premises in Wanchai to the 1st defendant. The 1st defendant's due performance of the tenancy agreement was guaranteed by the 2nd defendant, a registered non-Hong Kong company. The 1st defendant defaulted in payment of rent and management fees. The plaintiff commenced proceedings to forfeit the tenancy and recover vacant possession of the premises from the 1st defendant. The plaintiff also sued the 2nd defendant based on the guarantee. The 2nd defendant filed by solicitors a defence disputing liability. Shortly before the trial, the 2nd defendant's former solicitors ceased to act. At trial, the 2nd defendant did not attend. The trial proceeded and having heard the evidence and submissions, the trial judge dismissed the claim against the 2nd defendant. The plaintiff appealed against the judgment and served the notice of appeal to the 2nd defendant by leaving it at (a) the 2nd defendant's principal place of business registered in the Companies Registry (the Queen's Road Address) and (b) another address of the 2nd defendant obtained from the website of the Hong Kong Trade Development Council (the IFC Address). It was found that the 2nd defendant was not located at the Queen's Road Address or the IFC Address. The plaintiff's solicitors had also attempted to serve papers in the appeal on a Wong

Ying (Wong), the 2nd defendant's director from April 2003 to September 2004, but without success. A

Held, unanimously allowing the appeal and giving judgment to the plaintiff against the 2nd defendant:

Service of the Notice of Appeal B

(1)) There was an irregularity in the service of the notice of appeal but the Court of Appeal granted relief under the Rules of the High Court (Cap 4A) O 2 r 1 to cure the irregularity in service. The plaintiff's solicitors omitted to serve through Wong pursuant to s 803(1) of the Companies Ordinance (Cap 622) before resorting to service pursuant to s 803(3). Assuming and without deciding that s 803 of the Companies Ordinance was a complete code, there was sufficient C grounds for the court to exercise its discretion to grant relief under O 2 r 1. The evidence clearly showed that any attempt to serve the 2nd defendant through Wong would be a futile exercise. Justice demanded that relief be granted to the plaintiff to cure the immaterial irregularity. *Boocock v Hilton International Co* [1993] 4 All ER 19, *LG Electronics v Bank of Taiwan* [2001] 4 HKC 421, *Deutsche Bank AG, Hong Kong Branch v Zhang Hong Li* [2015] HKCU 2905; D (HCCL 19/2014, Chan J, 27 November 2015, unreported) (CFI) and *Deutsche Bank AG, Hong Kong Branch v Zhang Hong Li* [2016] 4 HKC 266, [2016] 3 HKLRD 303 (CA) followed (paras 29-30).

(2) Service at the Queen's Road Address, which could be regarded as the place of business established by the 2nd defendant, was valid notwithstanding that the E 2nd defendant had moved out at the time of service, since the 2nd defendant did not notify the Companies Registry as regard the change of its address in accordance with the law. *Ho Kwok Wah v Group Jewellery Arts Ltd* [2000] 3 HKC 595 and *Best Joint Investments Ltd v Kagani Ltd* [2011] HKCU 1640; (CACV 417/2007, Kwan JA and Suffiad J, 23 August 2011, unreported) referred to (para F 31).

Substantive Merits of the Appeal

(3) The trial judge's conclusion on liability should be reversed. The 2nd defendant could not rely on the amendment of the tenancy agreement as discharging it from the obligation under the guarantee. Although a guarantee was discharged when the amendment of the principal contract could potentially cause G prejudice or increase the risk borne by the guarantor, the context and the factual matrix of the present case showed that the 2nd defendant could not possibly suffer any prejudice arising from the amendment since the corresponding postponement of the rent free period had been provided for. There was no other defence available to the 2nd defendant (paras 36-37, 41-46). H

Obiter

(4) The onus rested on the party being sued upon to show that default interest provision was a penalty. It would not be right for the court to raise the issue on penalty on its own motion. Had the issue been raised on the pleadings, the plaintiff I would have to consider adducing evidence on the course of negotiations and other evidence to support its case that it was a genuine pre-estimate of the loss suffered by the plaintiff on account of its being kept out of the money. *Ip Ming Kin v Wong Siu Lan* [2013] HKCU 1216; (CACV 201/2012, Cheung, Kwan and Lam JJA, 28 May 2013, unreported) followed (paras 55-56).

Cases referred to

Best Joint Investments Ltd v Kagani Ltd [2011] HKCU 1640; (CACV 417/2007, Kwan JA and Suffiad J, 23 August 2011, unreported) (CA)

Boocock v Hilton International Co [1993] 4 All ER 19, [1993] 1 WLR 1065, [1993] BCLC 1363 (CA, Eng)

Deutsche Bank AG, Hong Kong Branch v Zhang Hong Li [2015] HKCU 2905; (HCCL 19/2014, Chan J, 27 November 2015, unreported) (CFI)

Deutsche Bank AG, Hong Kong Branch v Zhang Hong Li [2016] 4 HKC 266, [2016] 3 HKLRD 303 (CA)

Guangdong International Trust & Investment Corp v Yuet Wah (HK) Wah Fat Ltd [1997] 2 HKC 696, [1997] 1 HKLRD 489 (HC)

Ho Kwok Wah v Group Jewellery Arts Ltd [2000] 3 HKC 595 (CA)

Holme v Brunskill (1878) LR 3 QBD 495, (1878) 38 LT 838 (QBD)

Ip Ming Kin v Wong Siu Lan [2013] HKCU 1216; (CACV 201/2012, Cheung, Kwan and Lam JJA, 28 May 2013, unreported) (CA)

Law Bing Kee v Persons in occupation of RP [2013] HKCU 634; (HCMP 672/2013, Recorder A Ho SC, 9 May 2013, unreported) (CFI)

LG Electronics v Bank of Taiwan [2001] 4 HKC 421 (CFI)

Saab v Saudi American Bank [1999] 4 All ER 321, [1999] 1 WLR 1861, [1999] 2 BCLC 462 (CA, Eng)

Stevenson Wong & Co v Goldsense Technology Ltd [2007] 1 HKLRD 217, [2006] HKCU 1974 (CFI)

Treasure Land Property Consultants v United Smart Development Ltd [1995] 3 HKC 30, [1995] 2 HKLR 176 (CA)

Waddington Ltd v Chan Chun Hoo Thomas [2016] HKCU 1192; (CACV 10/2014, Lam VP, Kwan and Barma JJA, 20 May 2016, unreported (CA)

Legislation referred to

Companies Ordinance (Cap 622) ss 791, 794, 803
Rules of the High Court (Cap 4A) O 2 r 1; O 10 r 1; O 59 rr 3(5), 4

Other sources referred to

Chitty on Contracts (32nd Ed) Vol 1 para 26-239
Courtney & Phillips The Modern Contract of Guarantee (3rd Ed) para 7-002
Hong Kong Civil Procedure 2006

[*Editorial note*: for service on a non-Hong Kong company, see *Halsbury's Laws of Hong Kong*, Title 90, Civil Procedure: High Court, [90.0192].]

Appeal

This was an appeal by the plaintiff against the judgment of Deputy High Court Judge Kwok SC dismissing the plaintiff's claim against the 2nd defendant in enforcement of a guarantee. The facts appear sufficiently in the following judgment.

Benny Lo (FitzGerald Lawyers) for the plaintiff.
The 2nd defendant, absent.

Lam VP (giving the Judgment of the Court):

1. In this appeal, the plaintiff asks this Court to overturn the judgment of Deputy High Court Judge Kenneth Kwok SC on 30 September 2016 (see [2016] HKCU 2346). By that judgment, the learned judge dismissed the plaintiff's claim against the 2nd defendant and ordered the plaintiff to pay costs to the 2nd defendant.

2. The plaintiff was the landlord of shop premises at Shops A-D, Ground Floor, Paul Yee Mansion in Wanchai ['the Shop']. By a tenancy agreement of 12 September 2012, the plaintiff leased the Shop to the 1st defendant. By a Guarantee dated 20 August 2012, the 2nd defendant guaranteed the due performance of the obligations of the 1st defendant under the tenancy agreement including the due payment of rent. The Guarantee was executed by one Surasak Lelalertsuphakun ['Lela'], who was the sole director and shareholder of the 2nd defendant.

3. Though it was originally envisaged that the tenancy could commence on 20 August 2012, there was some delay due to repair works at the Shop not being completed. The tenancy eventually commenced on 11 September 2012. The 1st defendant defaulted in the payment of rent in November 2012. Upon demand by solicitors for the plaintiff, such rent was paid on 9 January 2013. In February 2013, the 1st defendant again failed to pay rent and management fees. No payment was made despite demand by the solicitors.

4. The plaintiff issued the writ on 2 April 2013, seeking to forfeit the tenancy and the recovery of possession. The plaintiff also sought payment of outstanding rent and management fees with overdue interests as well as mense profits until possession.

5. Based on the Guarantee, the plaintiff also sued the 2nd defendant in the action.

6. After the issue of the writ, the 1st defendant handed the keys of the Shop back to the plaintiff on 29 May 2013. The plaintiff obtained summary judgment against the 1st defendant on 3 September 2013. The 1st defendant's appeal against the summary judgment was dismissed on 21 February 2014.

7. In the 2nd defendant's Amended Defence of 30 April 2015, it disputed liabilities on the following basis:

(a) There was a signed Guarantee which was only a draft which had never come into effect. The Guarantee relied upon by the plaintiff is a forged document;

(b) The amendment in terms of adding a Clause 7 to Part II of the 5th Schedule to the tenancy agreement was a material variation and the guarantee was discharged accordingly.

8. Clause 7 provided:

A ‘ The Tenant is fully aware that the Landlord is presently carrying out repair works in the Premises. If for whatever reason the Landlord fails to deliver up vacant possession of the Premises on or before 1st September 2012 (‘the Lease Commencement Date’), the Landlord shall be entitled to postpone the delivery of possession to a later date to be designated by the Landlord in a 7 days’ prior written notice to the Tenant provided that such later date shall not be later than 30th September 2012. Upon such postponement, the Lease Commencement Date and all relevant dates of the Term shall automatically be postponed accordingly.’

C 9. In respect of the duration of the tenancy, the Third Schedule of the tenancy agreement provided:

‘ Term: For the term of TWO (2) YEARS fixed lease commencing on the 1st day of September 2012 and terminating on the 31st day of August 2014 (both days inclusive).

D Rent:. . .

Rent Free Period: The Tenant will be granted a rent-free of One (1) month starting from 1st September 2012 to 30th September 2012 (both days inclusive).

E During the rent free period, the Tenant shall nevertheless be responsible for payment of Management Fee, Government Rates and other outgoing utilities payable in advance on the 1st day of each calendar month.’

10. In the Reply, the plaintiff pleaded the following in respect of the amendment of the tenancy agreement:

F (a) The 2nd defendant consented to the amendment;

(b) The amendment was in any event manifestly immaterial and incapable of prejudicing the 2nd defendant as guarantor.

11. The 2nd defendant was legally represented until its former solicitors ceased to act for it on 8 September 2016, shortly before the trial. The 2nd defendant did not appear at the trial, which took place before the judge from 12 to 14 September 2016. The plaintiff called its witnesses at the trial. After hearing the evidence and submissions, the judge handed down the judgment of 30 September 2016 dismissing the claim against the 2nd defendant.

G

12. In the judgment, the judge held that the amendment was material alteration and rejected the plaintiff’s case that the 2nd defendant had consented to the same. The judge also made some adverse comments on the quantum of the claim.

H

Service of the Notice of Appeal and the summons of 20 April 2017

I 13. The plaintiff appealed against the judgment. Since the former solicitors for the 2nd defendant have gone off the record, the plaintiff served the Notice of Appeal on the 2nd defendant by leaving the same at two addresses of the 2nd defendant on 27 October 2016: 19th Floor Two IFC, Central and Unit 2205A, 22nd Floor, 9 Queen’s Road Central.

14. Service of a notice of appeal is important because O 59 rr 3(5) and 4 prescribe the service as the commencement of the appeal process. For the purpose of reckoning if an appeal is brought within time, such time only stop to run upon service of the notice of appeal. In this connection, Fok JA (as he then was) said in *Law Bing Kee v Persons in occupation of RP* [2013] HKCU 634, HCMP 672 of 2013, 9 May 2013 at [11]:

> ' The proper way to commence an appeal is therefore by service of the notice of appeal on the intended respondent. There is no need for issue or prior authentication of the notice of appeal by the Appeals Registry.'

15. Thus, apart from *ex parte* appeals, until a notice of appeal has been validly served (or, perhaps, the court granting an order for service to be dispensed with in cases of an intended respondent evading service, a subject which has not been argued before us) the court cannot entertain an appeal.

16. In the present case, the 2nd defendant is a Cayman Island company. It has been registered in Hong Kong as a non-Hong Kong company. On 19 July 2012, its secretary gave notice to the Companies Registry that the new address of its principal place of business was Unit 2205A, 22nd Floor, 9 Queen's Road Central, Hong Kong. That was one of the addresses at which the Notice of Appeal was served by the plaintiff.

17. There is no further up-dating in the records of the Companies Registry regarding the address of the principal place of business of the 2nd defendant. There is also no notification of the 2nd defendant's cessation of having a place of business in Hong Kong (as prescribed by s 794 of the Companies Ordinance (Cap 622)).

18. Under s 791 of the Companies Ordinance (Cap 622), when there is a change of the address of the company's principal place of business in Hong Kong, a registered non-Hong Kong company must deliver to the Registrar of Companies within one month after the date of the change.

19. Apparently, those responsible for the operation of the 2nd defendant had failed to comply with these statutory requirements. When a para-legal of the solicitors for the plaintiff attended Unit 2205A, 22nd Floor, 9 Queen's Road Central, Hong Kong (which is the address of a firm of Hong Kong solicitors) for service of documents in relation to this appeal on 13 March 2017, he was told by the reception staff that the 2nd defendant was not located there. Documents sent there by registered post were returned.

20. The other address at which the notice of appeal was served at 19th Floor Two IFC, Central was an address obtained by solicitors for the plaintiff from the website of The Hong Kong Trade Development Council. There is no further information as to how that address came to be posted on that website. When the para-legal went there, it was found out that it is the office of a company which provides serviced and 'virtual' office facilities or services and the 2nd defendant was not located there. Again documents sent there were returned.

21. Section 803 of the Companies Ordinance (Cap 622) governs the

service of process or notice on a registered non-Hong Kong company. For present purposes, ss 803(1) to (3) are relevant. They read:

> ' 803. Service of process or notice
>
> (1) Subject to sub-ss (3) and (4), any process or notice required to be served on a registered non-Hong Kong company is sufficiently served if—
>
> (a) it is addressed to an authorised representative of the company whose required details are shown in the Companies Register; and
>
> (b) it is left at, or sent by post to, the representative's last known address.
>
> (2) sub-sections (3) and (4) apply if—
>
> (a) no required details of authorised representatives of a registered non-Hong Kong company are shown in the Companies Register; or
>
> (b) every one of the company's authorised representatives refuses to accept service on behalf of the company or the process or notice cannot be served on any of them.
>
> (3) Any process or notice required to be served on the registered non-Hong Kong company is sufficiently served if it is left at, or sent by post to, any place of business established by the company in Hong Kong.'

22. The 2nd defendant had appointed an authorised representative in the past. That authorised representative, Wong Ying, had been its director from April 2003 to September 2004. She resigned as a director on 13 September 2004 and another person was appointed in her place. That person later resigned in 2007 when Lela became the sole director. There has not been any notification of change of authorised representative. Those acting for the plaintiff had attempted to serve papers in this appeal on Wong Ying but without success. Apparently she had moved out of the address stated in the return naming her as authorised representative.

23. In our judgment, on the evidence before us, this is a clear case coming within s 803(2)(b) and therefore the plaintiff should be permitted to rely on the provision for service under s 803(3). The only obstacle to that is solicitors for plaintiff had not attempted to serve the Notice of Appeal on the 2nd defendant through Wong Ying before resorting to service at Unit 2205A, 22nd Floor, 9 Queen's Road Central, Hong Kong.

24. Mr Lo, counsel for the plaintiff, tried to make good his case on service by two alternative arguments:

(a) Section 803 is not the exclusive provision governing service and the plaintiff can still rely on Order 65 Rule 5 of the Rules of the High Court;

(b) Alternatively, the court should grant relief under Order 2 Rule 1(2) to cure the irregularity in respect of the omission to serve through Wong

Ying pursuant to s 803(1) before resorting to service pursuant to s 803(3). For that purpose, the plaintiff issued a summons of 20 April 2017 asking for such relief.

25. In respect of the submission that s 803 is not the exclusive code, Mr Lo relied on the dicta of Saunders J in *Stevenson, Wong & Co v Goldsense Technology Ltd* [2007] 1 HKLRD 217 at [8]. That was not a case on service on registered non-Hong Kong company. Rather, it was a case on service on Hong Kong company and the judge in that case held that a plaintiff can rely on O 10 r 1 to effect service apart from the provision in s 356 of the old Companies Ordinance (Cap 32). There was however not much discussion on that issue in the judgment save a reference to a paragraph in the *Hong Kong Civil Procedure 2006*.

26. There are indeed other cases on the same topic (in respect of service on a Hong Kong company) and they did not speak with one voice: *Treasure Land Property Consultants v United Smart Development Ltd* [1995] 3 HKC 30; *Guangdong International Trust & Investment Corp v Yuet Wah (HK) Wah Fat Ltd* [1997] 2 HKC 696, [1997] 1 HKLRD 489. *Treasure Land* is an authority of the Court of Appeal whilst the latter, like the decision of Saunders J, is a first instance decision. Mr Lo have not addressed us on the same.

27. In respect of registered non-Hong Kong company, there are English Court of Appeal authorities on similar legislation as s 803 which held that the section was the complete code for effecting service on such company: *Boocock v Hilton International Co* [1993] 4 All ER 19; applied in *Saab v Saudi American Bank* [1999] 2 BCLC 462. Mr Lo attempted to distinguish *Boocock* by submitting that it was dealing with the service of originating process, for which personal service is required and O 10 r 1(7) explicitly provides for the rules to be applied subject to any other enactment.

28. Though there was reference to O 10 r 1(7) in the judgment of Neill LJ in *Boocock*, we do not think His Lordship solely rested his decision on the provision in that rule. Further, s 803 itself does not draw any distinction between service of originating process and service of other documents.

29. We prefer to rest our decision on the alternative route. Assuming (without deciding) that s 803 is a complete code, on the facts of the present case there is sufficient ground for this Court to grant the relief under O 2 r 1 to cure the irregularity. Such discretion to cure irregularity in service is well established: see *Boocock*, p 29; *LG Electronics v Bank of Taiwan* [2001] 4 HKC 421; *Deutsche Bank v Zhang Hong Li* [2015] HKCU 2905, HCCL 19 of 2014, 27 November 2015, upheld on appeal [2016] 4 HKC 266, [2016] 3 HKLRD 303.

30. The irregularity in question is the omission to serve through Wong Ying before resorting to s 803(3). The evidence clearly shows that any attempt to serve the 2nd defendant through Wong Ying would be a futile exercise. Though remaining on record as the authorised representative of the 2nd defendant, she had probably ceased to have any connection with the

2nd defendant a long time ago. Further, she herself cannot be located and she had moved out of the address recorded in the return filed with the Companies Registry. As Neill LJ held in *Boocock* at p 29j, 'the surest guideline for the exercise of any general discretion is to consider what the justice of the case demands'. In the present circumstances, we have no hesitation in holding that justice demands that relief be granted to the plaintiff to cure the immaterial irregularity.

31. We are satisfied that the address at Unit 2205A, 22nd Floor, 9 Queen's Road Central, Hong Kong can be regarded as the place of business established by the 2nd defendant. Service at that address is valid notwithstanding that the 2nd defendant had moved out at the time of service since the 2nd defendant did not notify the Companies Registry as regard the change of its address in accordance with the law, see *Ho Kwok Wah v Group Jewellery Arts Ltd* [2000] 3 HKC 595 at 598I to 599B and *Best Joint Investments Ltd v Kagani Ltd* [2011] HKCU 1640, CACV 417 of 2007, 23 August 2011, at [49].

32. Thus, the notice of appeal had been validly served on the 2nd defendant. Likewise, we are satisfied that the Amended Notice of Appeal, notice of hearing and other documents deployed in this appeal have been validly served on the 2nd defendant.

Liability of the 2nd defendant

33. Mr Lo relied on three grounds to support his argument that the judge erred in holding that the 2nd defendant was not liable:

(a) Consent of the 2nd defendant to the amendment of the tenancy agreement;

(b) The amendment was manifestly immaterial and incapable of prejudicing the 2nd defendant;

(c) Estoppel.

34. Estoppel was not pleaded nor run before the judge and we are not persuaded that we should entertain this fresh point in this appeal. The judge's conclusion on consent is a finding of fact. In our view, Mr Lo is on firmer ground in terms of the submission on the amendment being manifestly immaterial and incapable of occasioning any prejudice to the 2nd defendant.

35. The law can be taken from *Holme v Brunskill* (1878) LR 3 QBD 495. At pp 505-6, Cotton LJ said:

> ' The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is insubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial,

> or one which cannot be prejudicial to the surety, the Court, will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged.'

36. In Courtney & Phillips, *The Modern Contract of Guarantee* (3rd Ed), para 7-002, the learned editors opined:

> ' The principle is an equitable one and is applied strictly. If the variation of the principal contract could prejudice the guarantor, the guarantor will be absolutely discharged whether or not the variation has in fact resulted in prejudice and whether or not it is likely to do so. The guarantor will remain liable only where the alteration to the principal contract is obviously 'unsubstantial', with no possible prejudice to the guarantor resulting, or whether the alteration is inevitably for the benefit of the guarantor.'

37. The threshold is very high. The guarantee is discharged when the amendment can potentially cause prejudice or increase the risk borne by the guarantor.

38. In the present case, the judge found that the amendment caused prejudice to the 2nd defendant because the rent free period had been reduced. That was based on the judge's construction of Clause 7, see [26] to [28] of the judgment.

39. It all turns on a very narrow point. The relevant part is the last sentence in Clause 7:

> ' Upon such postponement, the Lease Commencement Date and all relevant dates of the Term shall automatically be postponed accordingly.'

40. The judge construed 'all relevant dates of the Term' as only referring to the commencement and end dates of the tenancy, but not the rent free period. The construction advocated on behalf of the plaintiff is that 'all relevant dates of the Term' include the dates of the rent free period.

41. The judge referred to the *contra proferentem* rule in coming to his conclusion. With respect, the judge apparently overlooked that the tenancy agreement was made between the plaintiff and the 1st defendant. If one were to apply the *contra proferentem* rule (assuming that rule has any place for present purposes), one should adopt a construction more favourable to the 1st defendant. Adopting a construction of this phrase to encompass a corresponding postponement of the rent free period would be more favourable to the 1st defendant.

42. In any event, one must have regard to the context and the factual matrix in construing a clause. The postponement of the commencement date was to accommodate the landlord in not having the Shop ready for

possession to be delivered, it is highly unlikely that the tenant would accept that it should suffer in terms of the reduction of the rent free period as a result of the postponement. We accept that it would be clearer if the expression is 'all relevant dates in the Term'. However, if one pays proper regard to the context, the meaning is tolerably clear.

43. We hold that on proper construction, Clause 7 provides for the corresponding postponement of the rent free period as well. On that construction, the 2nd defendant could not possibly suffer any prejudice arising from the amendment.

44. Though the threshold is high, we are satisfied that this is a case where self-evidently the amendment could not possibly cause any prejudice to the 2nd defendant. Hence, the 2nd defendant could not rely on the amendment as discharging it from the obligation under the Guarantee.

45. Without any evidence to support its case of forgery and the Guarantee not intended to take effect, there is no other defence available to the 2nd defendant.

46. We therefore reverse the judge's conclusion on liability.

Quantum

47. In his submissions, Mr Lo particularised the plaintiff's claim as follows:

> ' For **1.2.13 to 28.2.13**, unpaid rent and management fees of **HK$152,860**, plus contractual interest at 3% per month from 14.2.13 to judgment and thereafter at judgment rate;
>
> For **1.3.13 to 31.3.13**, unpaid rent and management fees of **HK$152,860**, plus contractual interest at 3% per month thereon per month from 14.3.13 to judgment and thereafter at judgment rate;
>
> For **1.4.13 to 2.4.13**, unpaid rent and management fees of **HK$10,190**, plus contractual interest at 3% per month thereon from 14.4.13 to judgment and thereafter at judgment rate; and
>
> For **3.4.13 to 29.5.13**, mesne profits in the sum of **HK$280,322**, plus interest thereon at prime+1% p.a. from 1.5.13 (the middle of the hold-over period) to judgment and thereafter at judgment rate. Mesne profits are recoverable under Clause (2) of the Guarantee.'

48. Counsel also prepared a schedule setting out the quantum of interests in the plaintiff's claims. They are as follows:

Item	Calculation
Unpaid rent and management fees of HK$152,860 for 1.2.13 to 28.2.13	Daily Interest = HK$152,860 x 3% per month / 30 days =HK$152.86 Interest from 14.2.13 up to date of hearing = HK$152.86 x 1,534 days = HK$234,487.24

Unpaid rent and management fees of HK$152,860 for 1.3.13 to 31.3.13	Daily Interest = HK$152,860 x 3% per month / 30 days = HK$152.86 Interest from 14.3.13 up to date of hearing = HK$152.86 x 1,506 days = HK$230,207.16
Unpaid rent and management fees of HK$10,190 for 1.4.13 to 2.4.13	Daily Interest = HK$10,190 x 3% per month / 30 days = HK$10.19 Interest from 14.4.13 up to date of hearing = HK$10.19 x 1,475 days = HK$15,030.25
Mense profits of HK$280,322 for 3.4.13 to 29.5.13	Daily Interest = HK$280,322 x 6% per annum / 365 days = HK$46.08 Interest from 1.5.13 up to date of hearing = HK$46.08 x 1,458 days = HK$67,184.64

49. The judge raised several points on quantum:

(a) The claim for default interest is a penalty;

(b) There is no basis for the claims for mesne profit, management fees from 1 May 2013;

(c) The claim for damages for breach of tenancy agreement is triple counting.

50. The judge also had some observations on the pleadings.

51. We are satisfied that there is no problem with the principal sums claimed by the plaintiff as particularised by Mr Lo. The position regarding interest is more complicated.

52. The claim for default interest is based on Clause 2 in Section VIII of the tenancy agreement:

> ' Notwithstanding anything herein contained in the event of default in payment of Rent or rates or management fees or any monies payable by the Tenant for a period of 14 days from the date when payment is due (whether formally demanded or not) the Tenant shall pay to the Landlord on demand daily interest on all such sums outstanding at the monthly rate of $3% calculated from the date on which the same shall be due for payment (in accordance with the provisions contained in that behalf herein) until the date of payment as liquidated damages and not as penalty provided that the demand and/or receipt by the Landlord of interest pursuant to this Clause shall be without prejudice to and shall not affect the right of the Landlord to exercise any other right or remedy hereof (including but without prejudice to the generality of the foregoing the right of re-entry) exercisable under the terms of this Agreement.'

53. In light of that provision, subject to arguments on its validity and applicability, the court should enforce this contractual obligation to pay interest, see *Chitty on Contracts* (32nd Ed), Vol 1 para 26-239.

54. The judge questioned the validity of the clause and held that it was a penalty. However, as Mr Lo submitted, there was no allegation in the pleadings that the provision is a penalty. The plaintiff pleaded the provision for default interest in paragraph 6 of the Amended Statement of Claim. In the Amended Defence of the 2nd defendant, it was admitted, see paragraph

5 of it. There was no further averment that the provision was invalid as it constituted a penalty. There was also no suggestion in the witness statements filed on behalf of the 2nd defendant to such effect.

55. As held in *Ip Ming Kin v Wong Siu Lan* [2013] HKCU 1216, CACV 201 of 2012, 28 May 2013, at [38], the onus rested on the party being sued upon to show that the provision is a penalty. Hence, it is the duty of the 2nd defendant to raise the issue by pleadings if it wished to rely on such attack on the default interest provision.

56. In such circumstances, with respect to the judge, it would not be right for the court to raise the issue on penalty on its own motion. Had the issue been raised on the pleadings, the plaintiff would have to consider adducing evidence on the course of negotiations and other evidence to support its case that it was a genuine pre-estimate of the loss suffered by the plaintiff on account of its being kept out of the money. At the trial, the judge only raised the issue after the plaintiff had closed its evidence.

57. For these reasons, we cannot uphold the judge's conclusion that the clause constituted a penalty.

58. The judge was also not satisfied that the plaintiff had shown that the conditions for imposing default interest had been fulfilled. At [36] to [38] of the judgment, he said:

> ' 36. To claim interest under Clause 2 in section VIII:
>
> (1) the tenant has to be in default in payment for a period of 14 days; and
>
> (2) demand (for interest) is necessary.
>
> 37. The plaintiff forfeited the Tenancy Agreement by the issue of the Writ on 2 April 2013, see §16 of the Amended Statement of Claim.
>
> 38. There is an unparticularised allegation of demand in §15 of the Amended Statement of Claim. Mr Patrick Chong accepted that the latest demand was made on 14 March 2013. As rent was due on the first day of each month, rent for March 2013 had not been in default for 14 days at the time of demand by letter dated 14 March 2013. Only the rent for February 2013 had been in default for 14 days or more at the time of demand.'

59. We agree with the judge as to his analysis of the pre-conditions for triggering default interest. Unlike a challenge on its validity (for which the burden is on the defence), the plaintiff bears the burden of showing that these pre-conditions had been fulfilled. The judge was also correct in highlighting the lack of pleadings in the Amended Statement of Claim to aver that these pre-conditions had been fulfilled before the issue of the writ.

60. The only evidence of demand is the letter of 14 March 2013 from the then solicitors for the plaintiff to the 2nd defendant. As the judge quite rightly observed, that could only serve as a valid demand for the default interest regarding the arrears for February 2013.

61. Mr Lo did not advance any submissions in these respects.

62. In the circumstances, we are only prepared to award contractual interest in respect of the arrears for February 2013. In respect of the arrears accruing after February 2013 (including mesne profit), we would award usual pre-judgment interest at 1% above prime, see *Waddington Ltd v Chan Chun Hoo Thomas* [2016] HKCU 1192, CACV 10 of 2014, 20 May 2016, at [185].

Disposition

63. For the above reasons, we allow the appeal and give judgment to the plaintiff against the 2nd defendant in the sums as indicated above. Solicitors for the plaintiff should produce a set of revised figures in accordance with this judgment for the approval of the court within 14 days.

64. We also set aside the judge's order as to costs. Instead we order the 2nd defendant to pay the costs of the plaintiff here and below, such costs are to be taxed if not agreed.

Reported by Leung Sze Lum Cylum

A **Chao Keh Lung** Plaintiff

and

Don Xia Defendant

B

(Court of Appeal)
(Civil Appeal Nos 425 and 427 of 2002)

C Cheung and Ma JJA and Waung J
30 April and 13 June 2003

Sale of goods — remedies of buyer — sufficient if seller had right to sell goods when property was to pass — if before that time seller had no title, buyer unable
D *to repudiate unless he proved impossible for seller to pass title*

Contract law — repudiation — renunciation — whether reasonable man would have said that defendant did not intend to perform contract or that impossible to perform

E *Contract law — repudiation — acceptance of repudiation — acceptance must be unequivocal — party could not rely on subsequent events to show that acceptance unequivocal*

售　貨品──買　的補救──假　賣方於貨品所有權轉移時有權售賣貨
F *品　便已足夠──假　於該時間前賣方不擁有貨品的所有權，則除非買方證　賣方無可能將所有權轉移，否則買方不得不履行合約*

合　法──不　行合約──放　履約──明　的人是否會認為被告人無意履行　約或不可能履行　約

G *合　法──不　行合約──接　悔約──接　悔約的行為必需清楚明確──有　一方不能倚據隨後發生的事情以證明接受悔約的行為清楚明確*

In October 1998, D agreed to sell his "30,000 Teleway" shares to P. There were a total of 700,000 Teleway shares. The agreement was
H not to sell a specific lot of Teleway shares but simply Teleway shares. P was to make payment by five instalments with the fourth instalment due on 4 July 1999 and the last on 13 December 1999. The shares would be transferred once all the payments had been made. On 3 June 1999, D sold his entire Teleway shareholding to TP. At the time of
I the disposal, P had paid the first three instalments but did not make the remaining instalments. Although P had heard of the disposal in June 1999, it was not until August 1999 that he received confirmation of this and began to hint in correspondence that the agreement was at an end. Subsequently P brought proceedings. P claimed that:
J (a) by selling the shares to TP, D had renounced or repudiated the agreement; and (b) that the act of not making the fourth instalment in July 1999 was an acceptance of that repudiation. As to (b), P sought

to rely on events subsequent to July 1999 to show that the non-payment was an unequivocal acceptance of the repudiation. At first instance, the Judge found in favour of P. D appealed.

Held, allowing the appeal, that:

(*Per* Cheung JA, Ma JA and Waung J agreeing)

(1) D had not renounced the agreement. It was still possible for him to buy shares from other shareholders to complete the sale bearing in mind that the sale quantity was only 5% of the total shares in Teleway. Hence, P failed to show that by disposing of the shares a reasonable man would have said that D did not intend to perform his contract or that it was impossible to perform. (See pp.19B–20F.)

(2) In a contract to sell, it was sufficient if the seller had a right to sell the goods at the time when the property was to pass; if it emerged before then that the seller had no title, the buyer would be unable to treat the contract as repudiated unless he proved that it would be impossible for the seller to pass good title. (See p.18A–C.)

(3) Even if there had been a repudiation, it had not been accepted. The non-payment of the fourth instalment was not an unequivocal act of repudiation; it was at best an equivocal act. First, in not making the fourth instalment, P did not inform D that this was due to D's repudiation. Second, the non-payment could well have been an attempt, pursuant to discussions, to use dividends to make partial payment of the fourth instalment. Third, at this stage P could not possibly have known what D intended to do with the agreement. (See pp.21I–22G.)

(4) P could not rely on subsequent events. First, the act relied upon as acceptance must be unequivocal at the time it was performed. An equivocal act could not be turned into an unequivocal act by subsequent events. In any event, the subsequent events did not assist P *(Fercometal Sarl v MSC Mediterranean Shipping Co SA (The Simona)* [1989] AC 788, *Vitol SA v Norelf Ltd (The Santa Clara)* [1996] AC 800, *Kar Ho Development Co Ltd v Axis Investment Ltd* [2001] 1 HKC 86 applied). (See pp.21B–H, 22I–23G.)

(*Per* Ma JA, Waung J agreeing)

(5) This case starkly demonstrated that when a repudiatory breach took place, in order to terminate the contract, the so-called innocent party, P, in this case, had to clearly and unequivocally accept the repudiation. If he did not do so, he ran the risk of being in breach himself were he not to perform his side of the bargain and thereby allowing the original wrongdoer to turn the tables on him. The rationale behind this conclusion (often ignored in the business world) was that unless the contract was terminated it continued to remain in existence for the benefit of D as well as P. There was no halfway situation whereby P would be able

to keep the contract alive and not perform his obligations (*Avery v Bowden* (1855) 5 E & B 714, *Frost v Knight* (1872) LR 7 Exch 111, *Fercometal Sarl v MSC Mediterranean Shipping Co SA (The Simona)* [1989] AC 788 applied). (See p.27A–G.)

[*Editor's note*: The Court of Appeal dismissed P's application for leave to appeal to the Court of Final Appeal. See [2004] HKEC 402.]

Appeal

This was the defendant's appeal to the Court of Appeal against a judgment found in favour of the plaintiff where the plaintiff claimed that: (a) by selling the shares to a third party, the defendant had renounced or repudiated an agreement; and (b) that the act of not making an instalment was an acceptance of that repudiation. The facts are set out in the judgment.

Mr Paul Carolan, instructed by Robertsons, for the plaintiff.
Mr Warren Chan SC and Mr Liu Kin Man, instructed by F Zimmern & Co, for the defendant.

Cases cited in the judgment

Avery v Bowden (1855) 5 E & B 714, (1856) 6 E & B 953
Braithwaite v Foreign Hardwood Co [1905] 2 KB 543
Fercometal Sarl v MSC Mediterranean Shipping Co SA (Simona, The) [1989] AC 788, [1988] 3 WLR 200, [1988] 2 All ER 742, [1988] 2 Lloyd's Rep 199
Frost v Knight (1872) LR 7 Exch 111
Kar Ho Development Co Ltd v Axis Investment Ltd [2001] 1 HKC 86
Lombard North Central Plc v Butterworth [1987] QB 527, [1987] 2 WLR 7, [1987] 1 All ER 267
Universal Cargo Carrier Corp v Citati (No 1) [1957] 2 QB 401, [1957] 2 WLR 713, [1957] 2 All ER 70, [1957] 1 Lloyd's Rep 174
Vitol SA v Norelf Ltd (Santa Clara, The) [1996] AC 800, [1996] 3 WLR 105, [1996] 3 All ER 193, [1996] 2 Lloyd's Rep 225

Other materials mentioned in the judgment

Benjamin's Sale of Goods (5th ed., 1997) p.169 para.4-005
Chitty on Contracts (28th ed., 1999) Vol.1, paras.25-017, 25-020, 25-027–25-029

Cheung JA

Teleway

1. The defendant was the founder of a private company called Teleway Communications Ltd (Teleway). He was a director and majority shareholder of Teleway until June 1999.

2. In 1996, Teleway and a mainland company formed a joint venture through a company called Unicom Media Ltd (Unicom).

3. In 1998, the plaintiff was appointed as the Chief Financial Officer and Vice-President of Unicom. Under his terms of employment, the plaintiff was allotted some Teleway shares.

4. Disputes arose between the defendant and Mr Wellington Yu (Mr Yu) who was another board member of Teleway. In order to maintain his control of Teleway, the defendant secured the support of the plaintiff. In return, the defendant agreed to transfer additional shares in Teleway to the plaintiff.

The agreement

5. In August 1998, the plaintiff and the defendant signed an agreement in which the defendant agreed to transfer 30,000 of his shares in Teleway to the plaintiff. This agreement was subsequently replaced by an agreement entitled Teleway Common Shares Transfer Agreement (the Agreement) signed by the parties in October 1998.

6. By the Agreement, the parties agreed that the defendant would sell and the plaintiff would buy 30,000 Teleway common shares (the shares) at the fixed price of US$10 per share. The payment schedule was as follows:

(1) US$15,000 (5% of US$300,000) by 5 August 1998;
(2) US$15,000 (5%) by 30 August 1998;
(3) US$30,000 (10%) by 31 October 1998;
(4) US$150,000 (50%) within 20 days after the "second closing"; and
(5) US$90,000 (30%) within 180 days after the "second closing".

7. The Agreement was signed by the defendant on 11 October 1998 and by the plaintiff on 12 October 1998.

8. Clause 3 of the Agreement further provided that the shares would be transferred to the plaintiff "once all the payments being made, but all economic rights of the 30,000 shares will be with (the plaintiff) upon the first closing".

9. It is common ground between the parties that the "first closing" and the "second closing" were 5 November 1998 and 16 June 1999 respectively. Accordingly, the fourth payment was due on or before 6 July 1999 and the fifth payment was due on or before 13 December 1999.

10. According to the plaintiff, the term "economic rights" in the Agreement included the immediate right to the dividends of the shares.

11. The Agreement specified that the first two payments had already been paid by the plaintiff. The plaintiff had also paid the third instalment of US$30,000. Hence, the plaintiff had paid a total of US$60,000.

The disposal of Teleway shares

12. Teleway and the mainland company each held shares in Unicom.

13. Mr Yu and his faction on the board in Teleway had started an action in the High Court against the defendant and Teleway seeking, among other things, injunctions which would have prevented the transfer of Teleway shares. The action was eventually settled in February 1999. However, there were still some outstanding matters that needed to be resolved under this settlement.

14. In August 1998, a US company called RH Donnelly Inc (Donnelly) had agreed to invest in Unicom. In order to ensure that Donnelly would complete the investment, the outstanding issues between the defendant and Mr Yu had to be resolved first. To that end, the defendant agreed to give up his entire shareholding in Teleway to Mr Yu.

15. On 3 June 1999, the defendant and Mr Wellington Yu agreed that the defendant would transfer his shares in Teleway and received about 41.7% of the shares owned by Teleway in Unicom. These shares were to be held by the defendant through a company called Optimum Pacific Ltd (Optimum). Unicom was subsequently renamed ChinaBig.com Ltd. The actual transfer of the defendant's shares in Teleway took place on 16 June 1999.

16. The disposal by the defendant of his shares represented the disposal of his entire holding in Teleway.

The plaintiff's claim

17. The plaintiff alleged that the defendant by disposing of his entire shareholding in Teleway had repudiated the Agreement because he would no longer be able to sell the 30,000 shares to him. He accepted the repudiation and the Agreement was brought to an end. He claimed damages against the defendant.

18. The defendant denied that he had repudiated the Agreement or the plaintiff had accepted the repudiation.

The judgment

19. Deputy High Court Judge Carlson found for the plaintiff and gave judgment to the plaintiff in the sum of US$555,750 which was the market price of the shares at the contractual time for delivery less the contract price.

The appeals

20. The defendant now appeals against the judgment. The plaintiff also appeals on the ground that the Judge had not awarded him the dividends of the shares which had been distributed but retained by the defendant.

The defendant's appeal

21. On the defendant's appeal, the three issues are:

(1) Did the defendant repudiate the Agreement by disposing of his entire shareholding in Teleway in June 1999?
(2) Did the plaintiff accept the repudiation?
(3) Was there evidence on the market price of the 30,000 shares?

Liability

22. It is apparent from the case that the issue of liability must be determined first. Unless liability is resolved in the plaintiff's favour, the question of damages will not arise. On this basis, we invited Counsel for the parties to address us on the question of liability first.

The basis of the liability

23. The renunciation or repudiation relied upon by the plaintiff was alleged to have taken place in June 1999 when the defendant disposed of the whole of his shareholdings in Teleway. The plaintiff also relied in the pleadings on the impossibility of performance by the defendant of the Agreement, although Mr Carolan, Counsel for the plaintiff, informed the Court that he did not or did not need to rely on this.

24. The Judge found that the defendant, by disposing of his entire shareholding in Teleway, had renounced the Agreement. He further found that the plaintiff accepted this alleged renunciation or repudiation by not paying the fourth instalment of HK$150,000 which was due on 6 July 1999.

25. Although the plaintiff had also, in the amended statement of claim, relied on other matters as the basis of his acceptance of the renunciation, he did not seek to argue these other points on appeal, there being no respondent's notice to this effect.

The principles

26. It is sufficient for the purpose of this appeal to state the following principles on renunciation, impossibility of performance and anticipatory breach.

(1) A renunciation of a contract occurs when one party by words or conduct evinces an intention not to perform, or expressly declares that he is or will be unable to perform his obligations under the contract in some essential respect.
(2) The renunciation may occur before (an anticipatory breach) or at the time fixed for performance (actual breach). An absolute refusal by one party to perform his side of the contract will entitle the other party to treat himself as discharged, as will also

a clear and unambiguous assertion by one party that he will be unable to perform when the time for performance should arrive.

(3) Short of such an express refusal or declaration, however, the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions. *Chitty on Contracts* (28th ed., 1999) Vol.1, para.25-017.

(4) If, before the time arrives at which a party is bound to perform a contract, he expresses an intention to break it, or acts in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfill his part, this constitutes an "anticipatory breach" of the contract: *Chitty on Contracts* (28th ed., 1999) Vol.1, para.25-020.

(5) Where one party has, by his own act or default, disabled himself from performing his contractual obligations in some essential respect, the other party will be entitled to treat himself as discharged. The inability to perform his contractual obligations must be established on the balance of probabilities and the fact that a party has "entered into inconsistent obligations does not in itself necessarily establish such inability, unless these obligations are of such a nature or have such an effect that it can truly be said that the party in question has put it out of his power to perform his obligations": *Chitty on Contracts* (28th ed., 1999) Vol.1, para.25-027.

(6) In most cases where the impossibility created by one party has manifested itself by conduct, the innocent party will rely upon renunciation by conduct rather than impossibility, because renunciation is so much easier to establish. Renunciation is to be preferred because the innocent party need only show that the conduct of the party in default was such as to lead a reasonable man to believe that he did not intend, or was not able, to perform his promise; whereas if the innocent party relies upon impossibility he must show that the contract was in fact impossible of performance due to the other party's default: *Chitty on Contracts* (28th ed., 1999) Vol.1, para.25-028.

(7) The burden of proof of repudiation is on the party who alleges it. As Nicholls LJ said in *Lombard North Central Plc v Butterworth* [1987] QB 527:

> … it is for the plaintiffs, as the party asserting that the hirer's conduct amounted to repudiation, to plead and to prove this.

(8) Anticipatory breach of contract may be constituted by impossibility as well as by renunciation, and similar principles apply to both: *Chitty on Contracts* (28th ed., 1999) Vol.1, para.25-029.

(9) What is important is that an anticipatory breach must be proved in fact and not in supposition: *per* Devlin J in *Universal Cargo Carrier Corp v Citati (No 1)* [1957] 2 QB 401 at p.450.

(10) "Where the contract of sale purports to effect a present transfer of the property in the goods from the seller to the buyer, the seller must have a right to sell the goods at the time of the contract. But where the contract is merely an agreement to sell, it is sufficient if the seller has a right to sell the goods at the time when the property is to pass. ... If, therefore, before that time it emerges that the seller has no title to the goods agreed to be sold, the buyer will be unable to treat the contract as repudiated and recover the instalments paid unless he proves that it will be impossible for the sellers to pass a good title when the payments are completed or that the situation is such as to lead a reasonable person to conclude that the seller does not intend, or will not then be able, to do so." *Benjamin's Sale of Goods* (5th ed., 1997) at p.169 para.4-005.

Anticipatory breach

27. Under the Agreement, the defendant would only be required to transfer the shares to the plaintiff in mid-December 1999 which was six months away from the alleged repudiation. The alleged breach by the defendant was therefore in the nature of an anticipatory breach.

28. In order to succeed on liability, the plaintiff must establish that the disposal by the defendant of his Teleway shares would cause a reasonable man to conclude that he no longer intended to be bound by the Agreement.

Reason for the disposal

29. The Judge found that when the defendant disposed of his entire Teleway shareholding in June 1999, he did not do so in order to sabotage or undermine the Agreement. He did this in order to ensure that Donnelly would complete the purchase of Unicom. There is no cross-appeal on this point.

The finding

30. The Judge found that the defendant had renounced or repudiated the Agreement because after the agreement with Mr Yu on 3 June 1999, he put it beyond his ability to perform the Agreement. He no longer had Teleway shares, he only had Unicom shares. He could not provide what he had contracted to sell. As Mr Yu and his supporters wished to remove the defendant from Teleway, they would not be interested to sell their shares to him. The Judge held that the defendant had not demonstrated or called evidence that he would be able to buy the shares from these shareholders. It was in the region of speculation. Following the fallout with Mr Yu, the other shareholders were unlikely to sell their shares to the defendant. Further there would be

additional problems regarding the valuation of the Teleway shares and whether the defendant would be able to afford to purchase the Teleway shares. The Judge referred to the e-mail of 23 November 1999 of the defendant in which he said that he did not have a lot of cash at hand or other assets.

Renunciation and impossibility of performance

31. It would appear from the above that although the Judge said the defendant had renounced the Agreement, this conclusion was not so much based on the reasonable man test but rather on impossibility of performance. This by itself would not necessarily affect the finding, because the matters relied upon by the Judge may equally constitute the evidence upon which a reasonable man may form a view as to whether the defendant had intended no longer to be bound by the Agreement or not.

32. However, even on this basis, I do not consider that either the reasonable man test or impossibility of performance has been satisfied in this case.

33. In order to deal with this question it is important to bear in mind the period of time in which the defendant had disposed of his shares on 3 June 1999 and the plaintiff's acceptance of the repudiation on 6 July 1999 when the Agreement was terminated. This is a very short period of time. Within this short period the focus can only have been on the event of 3 June 1999 when the defendant was said to have renounced the Agreement. By then the defendant still had six months to complete the Agreement. When he disposed of the shares, he did not tell the plaintiff that he would not perform the Agreement in December 1999.

34. What the defendant had contracted to sell, however, was not a specific lot of 30,000 Teleway shares. They were simply 30,000 Teleway shares. According to the annual return of Teleway for the period ending 25 July 1999, Teleway had 25 shareholders excluding the defendant. The plaintiff was already one of them. The total number of shares of Teleway was 707,047. The 30,000 shares under the Agreement therefore constituted less than 5% of the share structure of the Teleway. These facts clearly reveal that it was not a foregone conclusion that on 3 June 1999, it would be impossible for the defendant to perform the Agreement (which it will be recalled was only required to be completed on 13 December 1999). It was possible for him to get the shares from the other shareholders to complete the sale bearing in mind that the quantity was only 5% of the total share structure of Teleway.

35. The burden was on the plaintiff to show repudiation or impossibility of performance. Apart from the disposal by the defendant of his shares in June 1999, all that the plaintiff could do to prove his case was to produce a letter of inquiry dated 31 May 2001 (by the

solicitors) to Lim Seng Gee who was one of the shareholders of Teleway and who only held 23,586 shares, as to whether he wished to sell the shares to the defendant on or before 13 December 1999. The reply was in the negative. In my view, this did not show any indication that the defendant would not be able to obtain the shares from the other shareholders.

36. As to whether the defendant could ever acquire the shares to complete the Agreement, it is important to bear in mind the evidence of the defendant that in the subsequent negotiations with the plaintiff, the plaintiff had not indicated that he still wanted the Teleway shares. Rather, the plaintiff seemed more keen to have an interest in Unicom. In these communications, the defendant said that if the plaintiff had insisted on the Teleway shares, it was possible that he could buy them from the other shareholders. This stance was never challenged by the plaintiff.

37. As to the financial position of the defendant, it is clear that his statement in one e-mail that he had no cash must be considered in the context of what he had said. A fair reading of the e-mail is that he was simply saying that he was not as rich as the plaintiff. This is a long way away from saying that he would be unable to buy the shares to fulfill the Agreement.

38. In my view, the plaintiff had failed to discharge the burden that, by disposing of his Teleway shares in June 1999, the defendant had, as a matter of fact, rendered the Agreement to be impossible to perform.

39. Likewise on these facts a reasonable man could not possibly have said that on 3 June 1999, the defendant did not intend or was not able to perform his promises. The plaintiff had failed to show that the Agreement was repudiated by the defendant.

Acceptance

40. Further even if it could be said that the defendant had repudiated the Agreement, I do not agree that the plaintiff had accepted the repudiation by not paying the fourth instalment.

The principles

41. Lord Steyn in *Vitol SA v Norelf Ltd (The Santa Clara)* [1996] AC 800 stated the following principles on acceptance:

(1) Where a party has repudiated a contract the aggrieved party has an election to accept the repudiation or to affirm the contract: *Fercometal Sarl v MSC Mediterranean Shipping Co SA (The Simona)* [1989] AC 788.

(2) An act of acceptance of a repudiation requires no particular form: a communication does not have to be couched in the

> language of acceptance. It is sufficient that the communication or conduct *clearly and unequivocally* conveys to the repudiating party that that aggrieved party is treating the contract as at an end. (Emphasis added.)

42. In *Vitol SA v Norelf Ltd (The Santa Clara)* [1996] AC 800, Lord Steyn was concerned with the question of whether a failure to perform a contractual obligation by the aggrieved party could, as a matter of law, be ever capable of constituting an unequivocal acceptance by him of the repudiating party's repudiatory breach of the contract. He stated that, as a matter of law, it could be the case. He stated that:

> … in the … field of repudiation, a failure to perform may sometimes be given a colour by special circumstances and may only be explicable to a reasonable person in the position of the repudiating party as an election to accept the repudiation.

The special circumstances obviously had to be determined by the particular contractual relationship and the particular facts of the case.

43. The principles in *Vitol SA v Norelf Ltd (The Santa Clara)* [1996] AC 800 were accepted by this Court in *Kar Ho Development Co Ltd v Axis Investment Ltd* [2001] 1 HKC 86 where it was held that the conduct relied on as constituting the acceptance of the repudiation must not merely unequivocally convey to the repudiating party that the aggrieved party is treating the contract as at an end, but must also unequivocally convey to the repudiating party that the aggrieved party is treating the contract as at an end because of the repudiating party's repudiatory breach of the contract.

44. This Court held in that case, which was a striking-out application, that the purchaser's failure to pay for the purchase price of the contract when called upon do so could not be regarded as an unequivocal acceptance of the seller's repudiatory breach to complete the building on time for a number of reasons: The purchaser might not have been able to raise the balance of the purchase price. Or it might have wanted to pull out of the purchase because of a decline in the property market, and the flat was no longer worth what it had agreed to pay for it. Without being told what the reason for the failure to complete was, there was no way that the vendor would inevitably have realised that the purchaser was pulling out of the purchase because of the vendor's failure to complete the buildings.

Non-payment equivocal

45. Under the Agreement, the plaintiff had to pay the fourth instalment on 6 July 1999. He did not do so. The only basis in which acceptance was said to have occurred here was by the non-payment of the fourth instalment. This again puts the case into a very narrow

focus. Although the pleading had relied on other matters as evidence of acceptance (which were denied by the defendant), as I have said, there was no respondent's notice by the plaintiff. This is not as surprising as one may initially think because the plaintiff has to show that the repudiation was accepted on 6 July 1999 in order to explain his subsequent conduct after the alleged repudiation by the defendant.

46. When the plaintiff did not pay the fourth instalment, he did not inform the defendant that the reason was due to the defendant's repudiation. At that stage, the defendant had not informed him that he would no longer perform the Agreement. The non-payment was at best an equivocal act.

47. Further, there are two other matters which further strengthened the argument that the non-payment could not be an unequivocal act of acceptance.

48. First, there were earlier discussions between the parties for the plaintiff to apply the dividends paid in respect of the 51,000 shares (ie the 30,000 shares under the Agreement and his own 21,000 shares) as partial payment for the fourth instalment. Hence the non-payment on 6 July 1999 could well be an attempt by the plaintiff to implement this discussion. In other words, he had chosen to continue with the Agreement but only set off the payment with the dividends.

49. Second, the evidence of the plaintiff was that he had not received the letter of 14 June 1999 from the defendant's solicitors informing him of the disposal of the Teleway shares. Although he had heard of this matter in June 1999, it was only on 23 August 1999 that he received confirmation from Mr Yu of the disposal by the defendant. The plaintiff was unable to contact the defendant in July and August 1999. The plaintiff agreed that he did not make the payment despite not having clarified the matter with the defendant. At that stage, the plaintiff could not possibly have known what the defendant intended to do with the Agreement. He further stated that he was then still considering using the dividends as partial payment. This being the state of the evidence, it can hardly be said that the non-payment on 6 July 1999 was an unequivocal acceptance of the defendant's repudiation.

Subsequent events

50. Rather ingeniously, the plaintiff seeks to rely on events subsequent to July 1999 to show that the non-payment was an unequivocal acceptance. This may be an attempt to rely on what Lord Steyn said that a failure to perform may sometimes be given meaning by special circumstances. If I understand the plaintiff's case, the argument runs thus: the subsequent discussions were settlement negotiations rather than discussions on the basis that the Agreement was still alive. They were explicable on the basis that the Agreement had already been

terminated. Thus, this showed that the non-payment was an acceptance of the repudiation.

51. In my view, it is incorrect. First, the act relied upon as acceptance must be unequivocal at the time it was performed. An equivocal act cannot be turned into unequivocal act by subsequent events. Lord Steyn's reference to special circumstances must be those already present at the time of the non-performance of contract by the aggrieved party so that the repudiating party would understand it as an acceptance of his repudiation.

52. Second, the subsequent discussions contained in the contemporaneous correspondence by e-mail do not assist the plaintiff at all. They do not reveal any indication on the plaintiff's part that he had ever regarded that the defendant had repudiated the Agreement or that he had accepted the repudiation.

53. On the contrary, any objective reading of this correspondence must show that the plaintiff had chosen to keep the Agreement alive with the hope of getting a share in the Unicom venture. In fact, the Judge had commented that the correspondence created "a sense of unreality" about what was said by the plaintiff of his acceptance of the repudiation in July 1999. This unreality is further highlighted by the letter dated 23 September 2000 from the plaintiff's solicitors to the defendant stating, among other things, that,

> We are instructed to and we hereby accept your repudiation of the said Agreement and the same is hereby terminated.

When the plaintiff commenced the action in September 2000, this letter was pleaded as the basis of the acceptance. Although, the plaintiff no longer relied on this letter as the acceptance, this really casts doubt on his case that he had accepted the repudiation in July 1999.

The correspondence

54. In the e-mail of 1 November 1999, the defendant referred to the discussion on how to resolve the Agreement. This e-mail assumed that it was still alive. He stated that:

> I offered you to complete the transaction even you have missed the payment schedule which we agreed. You have indicated that instead of completing the transaction, you would like to seek some other alternative solution if I can agree.

55. On 23 November 1999, the defendant further wrote:

> As to the intended transaction for the old Teleway shares between you and me, even you have missed the payment schedule for such a long time, for the good will for my part, I will give you until the

> end of November, 1999 to complete the transaction as contemplated in the agreement we signed last year. I am afraid that this is the last time I can extend the completion date … .
>
> If you decide to give up this date this time, I am still open to consider other possibilities … .

Again, the assumption was that the Agreement was still alive.

56. The written response of the plaintiff came on 15 December 1999. There was not the slightest indication that the Agreement had already come to an end. He stated that:

> As far as my Teleway shares, the simplest way to resolve may be: keep in your Optimum account. You figure it out what is a fair equity portion for me (what I paid. Teleway loan payment and others). Then, we can agree with a note from you. I'll ride with you. Whenever you dispose the shares I'll take whatever I own. If you agree with the concept, please think about a formula so we can get it behind us. Thanks for the trouble.

57. The matter then seemed to be left at bay until August 2000, when the plaintiff wrote on 12 August 2000:

> Regarding the Old Teleway shares, we need to get it resolved. You suggested that there are three options: (1) Return the money invested. (2) Allow me to complete the origin deal. (3) Somewhere in between (1) and (2) above. Since the splitting of old Teleway complicating the matter somewhat, the option 3 seems more realistic. What I may be interested is to get a note from you to receive a % of your Optimum holding to exchange the old note.

It is clear from this that as far as the plaintiff was concerned, one of the options open to the parties was the performance of the Agreement.

58. The defendant's response on 15 August 2000 was:

> As to your proposal, I too think that we should reach a reasonable settlement so that we can all concentrate on what we have to now and in the future. I will let you know soon after I give it a bit of thinking and perhaps consultation with other concerned people.

59. There was further correspondence and then on 22 August 2000, the defendant wrote:

> Since you have missed and stopped paying the balance for the old Teleway shares, and the old Teleway is not longer existence (sic) … .
>
> I think that easiest way is to return your money as the deal was not complete due to your deciding not to pay according to the agreement with my consent at that time. I think this is a fair to all.
>
> I hope that you can see my logic.

60. The plaintiff's response on 25 August 2000 was:

> … Since the split of Teleway right after the second closing, and you don't have the Teleway shares anymore, the contract could not be continued.
>
> Now base on these, we want to find an amicable way to resolve it. The simplest way is for you to give me a note to transfer my holdings to your Optimum on a % basis. I am also willing to take a cash settlement if it is reasonable.

I accept that the plaintiff was here saying that as the defendant no longer had the shares, the Agreement could not be continued, but the question still remains: did the plaintiff accept the repudiation in July 1999? The tone and content of the letter as well as the other correspondence I have referred to, point to the contrary. The matter then turned sour and the plaintiff's solicitors issued the letter dated 23 September 2000.

Intention of the plaintiff

61. The correspondence plainly shows that it was not until 25 August 2000 that the plaintiff began to hint that the Agreement was at an end. His position was only unequivocally stated by his solicitors on 23 September 2000 that he had accepted the defendant's repudiation and the Agreement had come to an end. This, however, was not the way the plaintiff ran his case. His primary position was that the Agreement had been terminated in July 1999. Even if the plaintiff could show he had tried to terminate the Agreement in August or September 2000, it was already too late. By that time, he himself was in breach by failing to make payment of the fourth and fifth instalments.

62. The plaintiff also alleged that in October and November 1999 when the defendant was still asking the plaintiff to pay the instalments in order to complete the Agreement, he had verbally told the defendant that he could not pay him because the defendant did not have the Teleway shares.

63. The Judge did not make a finding on this conversation. In any event even if the plaintiff had said this, this is still a long way away from his own case that he had in June 1999 treated the defendant's disposal of the shares as repudiation and had in July 1999 accepted the repudiation. At the very least, this is inconsistent with the stand of the plaintiff as revealed in the solicitors' letter of 23 September 2000. There is no indication that the solicitors had misunderstood the plaintiff's position.

64. The Judge held that the plaintiff was adopting a tactical approach of trying to obtain a settlement from the defendant for his breach of the Agreement.

65. That may well be the intention of the plaintiff but the ultimate test is whether a reasonable man in the position of the repudiating party would consider the plaintiff's failure to pay as an acceptance of the repudiation. The answer must be no.

Defendant's appeal allowed

66. Accordingly, the plaintiff fails in his claim against the defendant both on the ground of repudiation and acceptance. This being the case, it is not necessary to consider the question of damages. Further as the defendant has only adopted a defensive position and did not raise any counterclaim based on any breach on the plaintiff's part, there is no need to consider any further matter regarding the Agreement. The appeal is allowed and the judgment is set aside.

Plaintiff's cross-appeal dismissed

67. The plaintiff claims that he is entitled to the dividend on a pro-rata proportion of the 30,000 shares which he had already paid.

68. He claims that he is entitled to this dividend as a separate and distinct claim from his claim for damages against the defendant for repudiation of the Agreement.

69. I will refrain from deciding on whether the plaintiff is entitled to dividends despite the fact that he had not paid for the balance of the purchase price. The Judge had not made a finding on the matter. Mr Warren Chan SC, Counsel for the defendant, had not addressed us on this issue. The difficulty now faced by the plaintiff is that while the claim for dividend was pleaded as part of his claim for damages by reason of the defendant's repudiation, he had never pleaded it as a separate and distinct claim independent from his claim based on repudiation. Further, the Judge was never asked to consider this claim on that basis. That being the position, I will decline to consider it now.

70. The plaintiff's cross-appeal is accordingly dismissed.

Costs

71. There will be an order *nisi* that the defendant is entitled to the costs of the appeal (both in respect of his appeal and the plaintiff's cross-appeal) and the costs below.

Ma JA

72. I agree with the Order proposed by Cheung JA.

73. I also agree with the reasons contained in his judgment for allowing the defendant's appeal. All I would add in relation to the aspect of acceptance of breach is that the facts of the present case starkly demonstrate the application of the principle that where a repudiatory breach takes place, in order to terminate the contract, the

so-called innocent party must clearly and unequivocally accept the repudiation. If he does not do so, he will run the risk of being in breach himself were he not to perform his side of the bargain and thereby allow the original wrongdoer to "turn the tables" on him: see *Frost v Knight* (1872) LR 7 Exch 111; *Avery v Bowden* (1855) 5 E&B 714, (1856) 6 E&B 953. The basis for this conclusion (often ignored in the business world) is that unless a contract is terminated, it remains in existence for the benefit of the wrongdoer as well as the innocent party.

74. I would also take the opportunity again to reiterate the point that there is no halfway situation whereby the innocent party is able to keep the contract alive and yet not perform his obligations arising thereunder. Any misconceptions in this regard arising from the case of *Braithwaite v Foreign Hardwood Co* [1905] 2 KB 543 (and the numerous cases that followed this decision) have now been swept away by the decision of the House of Lords in *Fercometal Sarl v MSC Mediterranean Shipping Co SA (The Simona)* [1989] AC 788.

75. As for the plaintiff's cross-appeal, I would dismiss it for the following additional reason. Mr Carolan relies on cl.3 of the Agreement (see para.8 above) to argue that in any event, even if his client did not succeed on establishing liability on the defendant's part, the plaintiff should be entitled to dividends anyway. He submits, quite simply, that cl.3 says that all economic rights in the shares would pass to the plaintiff upon the "first closing" and this was therefore irrespective of whether or not the Agreement was ultimately completed. I am unable to agree with this. In my view, cl.3, properly construed, was a conditional clause whereby the passing of economic rights to the plaintiff was made on the assumption that completion of the whole Agreement would take place. It was a device which was intended to allow the plaintiff to make use of the shares at a relatively early stage before completion, but completion there had to be. Otherwise, even if the sale of the shares did not go through (and particularly as in the present case, where the defendant was not at fault), the plaintiff would still have the benefit of the economic rights to the shares. This would be quite absurd.

Waung J

76. I agree with the judgment of Cheung JA and the judgment of Ma JA.

HCA 706/2020
[2025] HKCFI 753

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO 706 OF 2020

BETWEEN

NOBLESEED PARTNERS LIMITED Plaintiff

and

ZHANG QIAN QIAN (張倩倩) Defendant

Before: Mr Recorder Richard Khaw SC in Court
Dates of Hearing: 5, 6 June, 15 July 2024
Date of Judgment: 20 February 2025

J U D G M E N T

A. BACKGROUND

1. This dispute arises out of a service agreement made between Nobleseed Financial Group Limited ("**NFG**") and Ms Zhang Qian Qian i.e. the Defendant herein ("**Zhang**") on 4 November 2019 ("**Service Agreement**").

2. NFG, now known as Yuan Tong Global Financial Group Limited, is a Hong Kong company with subsidiaries holding licenses for providing securities services and asset management services. One of NFG's directors was Mr Kwok Wai Tak ("**Kwok**"), who is also the sole director of Nobleseed Partners Limited ("**Plaintiff")**.

3. In around October 2019, according to Kwok's evidence, he was introduced to Zhang through one of Kwok's acquaintances, Mr Thomas Shie ("**Shie**"), and he was given to understand that Zhang was Shie's girlfriend. As stated by Kwok in his evidence, he gathered from Shie that Zhang was experienced in liaising with relevant professional parties to provide public relations ("**PR**") services for Kwok's business. However, Zhang in her evidence admits she "*had little experience ... with public relations matters*" but she had several contacts, particularly in Mainland China, who might be able to assist in this respect.

4. According to the Service Agreement, Zhang agreed to assist NFG in seeking professional parties to provide PR services. The Service Agreement is a short document which provides:

> "[Zhang] will assist NFG on a best-effort basis in seeking of professional parties to provide the following public relations service to the related projects of NFG (referred below as the "Service") The period for performance of this Agreement shall commence on the date of signing this Agreement for a ten-months terms.
>
> 1. Address media, and public perception issues through the strategic professional and formulation of appropriate core messages to reinforce preferred corporate profile and positioning
> 2. Raise its profile to the level that it is regularly and favorable covered by the media

> 3. Raise the profile of its senior management, including initiatives to establish a leadership profile for relevant industrial branding;
>
> 4. Provide substantive media monitoring on trends and development related to the related projects on regular basis so as to identity angles and media opportunities; and
>
> 5. As the media office to all media queries both locally and internationally.
>
> NFG shall pay a total service fee of HK$4,000,000 or equivalent to approx. 2,800,000 shares within one month from the date of this Agreement."

5. As alleged by Kwok, one of the "related projects" referred to in the Service Agreement would involve "enhancing the public profile" of Shinelong Automative Lightweight Application Limited ("**Shinelong**") listed on the Hong Kong Stock Exchange. In fact, on 26 November 2019, NFG duly transferred 2,800,000 shares in Shinelong ("**Shares**") valued at HK$1.43 each and worth HK$4,004,000 in total to Zhang as the service fee stipulated under the Service Agreement.

6. NFG's case is that Zhang failed to provide any service as required under the Service Agreement. By letter from its solicitors dated 4 February 2020 ("**Demand Letter**"), NFG (i) purported to accept Zhang's repudiation of the Service Agreement (ii) demanded the return of the Shares or the payment of HK$4,004,000 within 14 days from the date of the Demand Letter.

7. By letter from her solicitors dated 26 February 2020, Zhang responded that she had duly performed the Service Agreement (*albeit* without any further particulars) and that she should not be liable to NFG as claimed or at all. It is common ground that Zhang has never returned either the Shares or the sum of HK$4,004,000 to NFG.

8. By a deed of assignment dated 30 March 2020, the chose in action of NFG was assigned to the Plaintiff. On 23 April 2020, the Plaintiff through its solicitors gave Zhang notice of the assignment.

B. PARTIES' RESPECTIVE CASES

9. The parties' pleaded cases are straightforward, and the issues in dispute are confined.

10. The Plaintiff's case runs as follows:

(1) Zhang was in repudiatory breach of the Service Agreement because she failed to carry out any of her obligations to assist NFG in seeking professional parties to provide PR services. As a result, the Plaintiff claims HK$4,004,000 in loss.

(2) Further and/or alternatively, Zhang is unjustly enriched at the expense of NFG for total failure of consideration and is liable to make restitution in the sum of HK$4,004,000 or the equivalent value of the Shares to NFG.

11. In response, Zhang's pleaded case is that:

(1) She was not in breach of the Service Agreement because NFG had never instructed or requested Zhang to seek any professional parties to provide public relations services to NFG pursuant to the Service Agreement. Absent such instruction or request, there was no obligation on the part of Zhang to perform.

(2) The Plaintiff is not entitled to any restitution where the enrichment received by Zhang was received pursuant to a contract between the parties.

C. EVIDENCE

12. I have heard the evidence from Kwok and his secretary, Ms Yan Siu Fung ("**Yan**"), both of whom testified on the Plaintiff's behalf. Zhang is the only witness for her case.

C1. Kwok

13. As the Plaintiff's sole director, Kwok spoke to the circumstances surrounding the entry into the Service Agreement and Zhang's performance. His account is that:

(1) In around July 2019, Kwok became acquainted with Shie, with whom Kwok was eager to explore business opportunities given Shie's credentials, financial capability, and social connections.

(2) In around October 2019, NFG required PR service for its projects, including a project to enhance the public profile of Shinelong. Shie recommended his girlfriend, Zhang, as someone experienced in liaising with the relevant professional parties to provide PR services. Kwok agreed as he would like to strengthen his business ties with Shie in any event.

(3) After the Service Agreement was entered into, Zhang never proposed any names of the relevant professional parties and

could not be reached when Kwok tried to follow up with her in around early February 2020.

14. Mr So,[1] counsel for Zhang, characterises Kwok as a dishonest and evasive witness who gave inconsistent accounts of his role in the Service Agreement. For instance, Mr So highlights the different versions propounded by Kwok: (1) he said in his witness statement that he had attempted to contact Shie about Zhang's performance; (2) he said under cross-examination that it was the "*company's team*" (namely, Yan) who would remain in close contact with Zhang; (3) later, he said that there should have been a specifically designated "*director*" for this purpose because Yan was busy. Further, it is contended on behalf of Zhang that Kwok's explanations as to why he did not ask for personal particulars from Zhang and also why he did not contact her despite his knowledge of her residential address (as stated in the Service Agreement) are not acceptable. Kwok's evidence will be further addressed below.

C2. Yan

15. Yan's evidence is brief. In essence, Yan testified that:

(1) She was not the person responsible for liaising with Zhang about NFG's business matters, including the Service Agreement. The only time she met Zhang was in around late October 2019, when she was accompanying Kwok to meet Shie at Shie's office on a social occasion.

---

[1] With Mr Herman Ho.

(2) It is untrue that Zhang received no work requests from NFG regarding the Service Agreement. Instead, Kwok had numerous follow-up meetings with Shie regarding the performance of the Service Agreement. As she was required to handle Kwok's diary, she confirmed that according to the records of her WeChat conversations with Shie, Kwok and Shie had met or contacted each other on various occasions from December 2019 to January 2020.

16. Under cross-examination, Yan reiterated that it was Kwok who liaised with Zhang or Shie. In response to the Court's questions, Yan added that she discussed with Kwok about the scope of work under the Service Agreement; and as far as she could recall, she did not provide Zhang with any information in relation to the Service Agreement and the steps required for performance of the same.

17. I find Yan to be an honest witness who endeavoured to assist the Court and answered questions in a forthright manner. In particular, while Kwok during cross-examination tried to suggest that Yan was in direct contact (in answer to the question on who actually followed up the matter with Yan) with Zhang, Yan made no attempt to tailor her evidence to suit Kwok's evidence and, as mentioned above, she maintained it was Kwok who tried to contact Zhang or Shie.

C3. Zhang

18. The key aspects of Zhang's evidence can be summarised as follows:

(1) Prior to entering into the Service Agreement, she discussed with Yan about certain projects NFG was then engaged in. They then agreed that it would only be upon NFG's request to be linked up with a PR professional to provide services in relation to a particular project that she would have to try to locate for NFG.

(2) However, throughout the 10 months following the execution of the Service Agreement, she received no work requests from NFG. Instead, during her meeting with several executives from NFG, she was told that NFG was facing internal issues which prevented it from exploring new projects. No one from NFG had ever complained about the fact that no work was done by her.

(3) Under cross-examination, Zhang also said that at the time of signing the Service Agreement, she knew that the PR services envisaged under the Service Agreement relate to Shinelong. She knew that Shinelong was a listed company, although she had not been given instructions as to the precise projects she was expected to assist with.

(4) She also denied that Kwok and Yan were unable to contact her and that they did not have her contact details.

19. Mr Wong for the Plaintiff has attacked the quality of Zhang's evidence on various fronts. In particular, Mr Wong criticises Zhang for signing statements of truth when she was not proficient in English and only understood the gist of her pleadings and witness statements. While it may

be the case that Zhang's previous solicitors did not handle the statements of truth with the necessary care and attention, I do not consider this to have a material bearing on her credibility. I find that she generally intended to assist the Court and tried her best to answer questions raised in cross-examination. That said, there are new factual matters she raised under cross-examination which had not been canvassed in her witness statements. I shall return to this aspect below.

D. ANALYSIS ON THE ISSUE OF BREACH OF CONTRACT

20. The key question for the Court's determination is whether Zhang has repudiated or renounced the Service Agreement such that the Plaintiff became entitled to elect to accept the repudiation or renunciation. Alternatively, there is an issue of unjust enrichment.

D1. Parties' contentions

21. The Plaintiff submits that Zhang failed to perform *any part* of her obligation to assist NFG on a best-effort basis in seeking professional parties to provide PR service:

(1) The parties' intention was clear in that the Service Agreement took effect immediately for Zhang to seek professional parties to enhance the image of *inter alia* Shinelong. Nowhere in the Service Agreement provided that NFG was required to make any request or demand to Zhang. Instead, Zhang did not perform anything. She was out of reach.

(2) Zhang was also unfamiliar with the business of Shinelong. She accepted at trial that she had done nothing throughout the material period as she was awaiting work requests.

22. In response, Mr So submits that NFG elected to terminate the Service Agreement prematurely:

(1) First, the Service Agreement does not state any stages or milestone events stating what should be done at each juncture.

(2) Second, the Plaintiff did not adduce any evidence as to the commercial standard which a PR advisor is expected to meet within three months.

(3) Third, there was no evidence as to what NFG did to ascertain with Zhang her intention relating to the performance of the Service Agreement.

(4) Fourth, even assuming Zhang chose to do nothing in the first three months, the Plaintiff is still required to prove Zhang would not have been able to discharge the Service Agreement during the remainder of the term.

D2. Analysis

D2(1). Legal principles

23. The principles governing the construction of best endeavour clauses were set out by DHCJ Bernard Man SC in *The Pui Ying Middle School of Hong Kong v So Shing Yit Eric* [2021] HKCFI 692 §102 (citing *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] SGCA 16 at §93):

(1) Such clauses require the obligor "to go on using endeavours until the point is reached when all reasonable endeavours have been exhausted"; or "to do all that it reasonably could".

(2) The obligor need only do that which has a significant or real prospect of success in procuring the contractually-stipulated outcome.

(3) If there is an insuperable obstacle to procuring the contractually-stipulated outcome, the obligor is not required to do anything more to overcome other problems which also stood in the way of procuring that outcome but which might have been resolved.

(4) The obligor is not always required to sacrifice its own commercial interests in satisfaction of its obligations, but it may be required to do so where the nature and terms of the contract indicate that it is in the parties' contemplation that the obligor should make such sacrifice.

(5) An obligor cannot just sit back and say that it could not reasonably have done more to procure the contractually stipulated outcome in cases where, if it had asked the obligee, it might have discovered that there were other steps which could reasonably have been taken.

(6) Once the obligee points to certain steps which the obligor could have taken to procure the contractually stipulated outcome, the burden ordinarily shifts to the obligor to show that it took those

steps, or that those steps were not reasonably required, or that those steps would have been bound to fail.

24. The principles on renunciation are likewise well-established:

(1) An innocent party is entitled to accept an anticipatory breach of a defaulting party prior to the conclusion of a contract. The defaulting party's "act" could be termed as "renunciation", which could be communicated by words, conduct, or a party's inaction: *The Nanfri* [1979] AC 757 at 778-779 (Lord Wilberforce).

(2) Whether renunciation by conduct or inaction can be inferred is to be assessed objectively. It must not be taken out of context and must be assessed against the whole backcloth of dealings: *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277 at 287-288, 299.

(3) The acceptable test for renunciation is whether the threatened or insisted unauthorised mode of performance is a commercially significant deviation from the agreed mode of performance: *Ross T Smyth & Co v TD Bailey Son & Co* [1940] 3 All ER 60 at 72 (Lord Wright).

D2(2). Discussion

25. Having considered the entirety of the evidence, I am not satisfied that the Plaintiff has shown any anticipatory breach of the Service Agreement on the part of Zhang.

26. To begin with, the Plaintiff's pleaded case in its Re-Amended Statement of Claim ("**RASOC**") on Zhang's breach is as follows:

> "4. Up to the date hereof, in breach of the Service Agreement, Zhang has failed to carry out any of her obligations to assist NFG in seeking of professional parties to provide public relations services.
>
> 5. By reason of this breach, Zhang was in repudiation of the Service Agreement."

27. The Plaintiff's RASOC is silent on what conduct of Zhang constituted her anticipatory breach.

28. In relation to the terms of the Service Agreement, it is noteworthy that it does not spell out any information regarding any of the projects for which Zhang was supposed to seek professional parties to provide PR services; nor does it stipulate any milestone dates or events stating what should be done by when.

29. As such, in the actual implementation of the Service Agreement, one would have expected some indication of the relevant businesses or projects on the part of NFG which required PR services, so that Zhang would be in a position to ascertain NFG's PR needs and gauge what would need to be done. At the very least, Zhang would reasonably expect that there would be an idea of some essential elements of the tasks expected of her.

30. The Plaintiff's primary answer is that Zhang ought to have come forward to ask NFG for instructions. I am unable to accept that submission:

(1) It is not part of the Plaintiff's pleaded case, whether as a matter of construction of the Service Agreement or by way of a potential implied term, that it was Zhang's duty to ask NFG for instructions. Effectively, the Plaintiff's position in this respect is that Zhang would need to take the initiative of asking NFG what she would have to do and her failure to do so would amount to a repudiatory breach. This does not make commercial sense and is not consistent with the purposes and objectives of the Service Agreement.

(2) Under cross-examination, Kwok repeatedly said that the Service Agreement was a "*standard*" agreement, and it is the "*trade practice*" that PR personnel would take the initiative to gather information. But Kwok was not in a position to comment on the so-called "trade practice" because it transpired that he had in fact never previously instructed PR professionals before entering into the Service Agreement. The Service Agreement was the first one of this kind that Kwok was involved in. Apart from Kwok's own assertions, there is no evidence as to the commercial standard of which a PR advisor in Zhang's position would be expected to fulfil in order to kickstart the performance of the Service Agreement or the like.

(3) Clause 1 of the Service Agreement refers to "media and public perception issues" and "formulation of appropriate core messages to reinforce preferred corporate profile and positioning. Clause 3 mentions "the profile of its senior management" and Clause 4 concerns "substantive media monitoring on trends and development related to the related

projects". It is simply inconceivable that any PR expert or consultant, without any information regarding these elements, could have been in a position to embark upon any work with a view to performing the Service Agreement.

31. Next, the Plaintiff argues that since Zhang knew that the PR services would be for Shinelong (which was admitted in her oral testimony at trial), she ought to have taken steps to acquire some understanding of how she could assist in procuring PR services for Shinelong. However, this appears to be merely a repetition of the above argument that Zhang ought to have come up with some ideas on her own as to how the Service Agreement should be performed. This is untenable for the reasons stated above. To say the least, even if Zhang was aware of the fact that the PR services were intended to be for Shinelong and also Shinelong's line of business, she would still reasonably require further inputs on matters such as Shinelong's business plans, any events which Shinelong intended to organise, and the corporate positioning that Shinelong was planning to take in order to map out the appropriate PR strategies for the company. Such information would have to come from NFG.

32. Insofar as the Plaintiff contends that more could probably have been done on Zhang's part or other PR service providers could have done more, Zhang's best-effort obligations are not breached merely because somebody else might have done more: *Pui Ying Middle School* at §§98-102. Each case obviously turns on its own facts. In any event, this issue would not arise in the first place given my conclusion that NFG did not provide any instructions at all as to Zhang's performance.

33. Further, I have also taken into account the following matters which lend further support to my finding that the Plaintiff has failed to establish Zhang's breach:

(1) NFG sought to terminate the Service Agreement just 3 months after the commencement of the Service Agreement, which was 7 months before the expiry of its term.

(2) It is Kwok's own evidence that the Service Agreement was entered into at least in part due to his desire to strengthen business ties with Shie; and the alleged termination came at a time when the relationship between Kwok and Shie had turned sour.

(3) I do not accept Kwok's evidence that Zhang was not reachable since around December 2019. Kwok failed to explain why he could not have at least contacted Zhang despite his knowledge of her residential address as stated in the Service Agreement. Moreover, Kwok's explanation that he did not ask for any other personal details of Zhang because she was then Shie's girlfriend does not make sense.

(4) Finally, the Demand Letter dated 4 February 2020 (issued on behalf of the Plaintiff) did not identify what Zhang ought to have done (as now contended) under the Service Agreement but failed to do. Neither did it mention at all that Zhang was not reachable at any stage.

34. For these reasons, I conclude that the Plaintiff has not shown that Zhang was in breach of the Service Agreement, or that any breach was such as to amount to a renunciation of the Service Agreement.

35. The Plaintiff's claim in breach of contract is therefore dismissed.

E. UNJUST ENRICHMENT

36. In respect of the Plaintiff's claim for unjust enrichment, the following questions are set out in *Shanghai Tongji Science & Technology Industrial Co Ltd v Casil Clearing Ltd* (2004) 7 HKCFAR 79 at §67: (1) Was the defendant enriched? (2) Was the enrichment at the plaintiff's expense? (3) Was the enrichment unjust? (4) Are any of the defences applicable?

37. The principles on the unjust factor of total failure of consideration are summarised in *Zief Incorporated v Tekchandani Ajai Mohan* [2021] 3 HKC 69 at §§25-27 (Recorder Eugene Fung SC):

(1) "Consideration" in the context of a claim in unjust enrichment is different from that in the law of contract. It does not mean the quid pro quo for there to be a binding contract as it is used in the law of contract. It refers to the condition which formed the basis of the plaintiff's transfer to the defendant of the benefit in question.

(2) It is crucial to correctly identify and characterise the transaction providing the basis for the defendant's enrichment, and it is

only then can one identify the relevant anticipated performance and ascertain whether it has totally failed.

(3) The usual consideration that fails which gives rise to restitution is the promised counter-performance. If money was paid to secure performance and if performance fails, the inducement which brought about the payment is not fulfilled.

38. Zhang contends that the claim in unjust enrichment fails because:

(1) Whilst a contract continues to subsist between the parties, one party who makes a payment to the other party in accordance with his obligations under the contract cannot be allowed to mount a claim in restitution for the return of that sum since such a claim would be inconsistent with what the parties had agreed: citing *Shanghai Tongji* at §§90-92; *The Evia Luck (No 2)* [1992] 2 AC 152 at 165D-E; *Barton v Morris* [2023] AC 684. As Ribeiro PJ said in *Shanghai Tongji* at §92:

> "While a contract continues to subsist between the parties, one party who makes a payment to the other party in accordance with his obligations under that contract cannot be allowed to mount a claim in restitution for the return of that sum since such a claim would be inconsistent with what the parties had agreed. It is in this sense that the contract would be "undermined" or, as Professor Birks puts it, that the restitutionary claim would "subvert bargains" ([Birks, An Introduction to the Law of Restitution (1989 Rev ed.)], p.47)."

(2) A party relying on total failure of consideration must establish that he has no contractual obligation to confer the relevant benefit on the defendant. If the contract is still in subsistence,

a restitutionary claim based on total failure of consideration fails: citing *The Evia Luck (No 2)*.

(3) The test of total failure consideration lies on whether the promisor has performed any part of the contractual duties, not whether the promisee has received any contractual benefits: citing *Au Chi Chiu & Ho Sau May v Ho Chi Hung* [2020] HKCFI 2089 at §21.

39. During oral closing submissions, Zhang's counsel confirmed that Zhang treated the Plaintiff's premature termination as itself amounting to a repudiatory breach, and that at the latest, by filing and serving the Defence, Zhang has accepted the Plaintiff's repudiation. In the premises, on each party's case, there is no longer any subsisting contract. Indeed, the Service Agreement had a ten-month term, which had long lapsed by the time of the trial.

40. Zhang submits that since the Shares were transferred at the time when the Service Agreement was subsisting, the restitution claim could not be established. I do not think that proposition is supported by the authorities. Instead:

(1) Where a contract has been terminated for breach, its provisions do not necessarily exclude a claim in unjust enrichment. This holds true even where the claimant has committed a repudiatory breach: *Goff & Jones on Unjust Enrichment* (10th edn) §§3-15, 3-40.

(2) The Australian decision of *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 is cited in *Goff & Jones on Unjust Enrichment* (above) 3-15 in support of the proposition that it is essential to distinguish between benefits in respect of which no unconditional right to payment under the contract has accrued, and those in respect of which such a right has accrued. For example, in *Mann*, there was a building contract which provided for work to be paid for in stages and the work for some of those stages had been completed when the contract was terminated following the innocent party's acceptance of repudiation. It was held that no claim in unjust enrichment could be allowed in respect of work within the completed stages (where an unconditional right to those payments has accrued). In this scenario, the innocent party's action will be limited to one for the agreed sum and damages for breach.[2] However, in respect of benefits where there is no unconditional accrued right, the claimant can choose between claiming in unjust enrichment or for breach of contract (with the amount of recoverable in restitution limited by the price of the contract).[3]

(3) In other words, the Court did not propound a rule to the effect that whenever a transfer is made pursuant to a subsisting contract, restitution for unjust enrichment is somehow automatically precluded. Instead, the key enquiry is to

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[2] At §19 (Kiefel CJ, Bell and Keane JJ); §§62-64 (Gageler J); §§110, 172 (Nettle, Gordon and Edelman JJ).

[3] At §101 (Gageler J); §§110, 215-216 (Nettle, Gordon and Edelman JJ).

ascertain whether the counterparty has acquired an unconditional right to earn those payments.

41. Zhang does not seem to have any substantive response to the above propositions. In any event, I do not think Zhang had any accrued right of payment during the time in which the contract was subsisting, given that under the Service Agreement, such a right would need to be earned by Zhang's corresponding performance of the contract.

42. Zhang's remaining argument is that there was no "total" failure of consideration in the present case. Mr So for Zhang contends that the evidence at trial shows that Zhang had at least (1) held a conference with the NFG executives; (2) engaged entrepreneurs in Mainland China; and (3) set aside time for the completion of the Service Agreement. However, according to her pleaded case and witness statements, the Zhang's position has been that she was under no obligation to perform the Service Agreement at all in the absence of any requests or instructions from the Plaintiff without making reference to any of the work she has allegedly carried out. During his oral closing submissions, Mr So accepted that he could not advance any argument beyond his pleaded case. Obviously, had it been Zhang's defence that she had performed some part of the Service Agreement such that there was no total failure of consideration, this ought to have been pleaded so that the Plaintiff would have had the opportunity to address this allegation. I therefore rule that it is not open to Zhang to seek to run the argument that the failure of consideration was not total simply by relying on what Zhang alluded to at trial.

43. In any event, for the sake of completeness, I am not convinced that there is sufficiently cogent evidence that Zhang has performed any part of the contractual obligations:

(1) First, in her witness statement, Zhang said that "*no work had been done by [her]*" under the Service Agreement. It is only under cross-examination that she alluded in general terms – for the first time – to having contacted several tycoons in Mainland China. Yet, it is difficult to see how this amounts to seeking professional PR personnel to provide PR services. Nor is there any documentary record evidencing the same.

(2) Second, Zhang relies on Kwok's evidence that there was a meeting with Zhang in November 2019. However, there was no details as to what transpired at that meeting and how such a meeting related to the work required under the Service Agreement.

(3) Third, the fact that Zhang had allegedly freed up her time in preparation for serving NFG is neither here nor there. This does not in any way evidence performance of any contractual duties.

44. Accordingly, there was no counter-performance emanating from Zhang which provided consideration for the Plaintiff's transfer of the Shares: *Zief* at §§25-27. I find that there was a total failure of consideration.

45. Apart from the above, Zhang has not pleaded any defences to the restitution claim such as change of position.

46. As regards relief, it is common ground that the Shares are valued at HK$4,004,000. Although the Plaintiff pleaded alternatively for the transfer of the Shares to it, I do not see any basis to order the transfer of the Shares *in species*.

F. DISPOSITION AND COSTS

47. Accordingly, I make an order that Zhang do pay the Plaintiff the sum of HK$4,004,000.

48. I also make a costs order *nisi* that Zhang do pay 40% of the Plaintiff's costs, to be taxed if not agreed. This deduction in costs reflects the fact that the Plaintiff has not been successful in its claim in breach of contract which constituted a major part of the Plaintiff's action and incurred more than half of the time spent at trial.

49. The above order *nisi* shall become absolute unless an application to vary the same is made within the next 14 days.

(Richard Khaw SC)
Recorder of High Court

Mr Wong Hok Yan, instructed by Patrick Mak & Tse, for the Plaintiff

Mr Simon So and Mr Herman Ho, instructed by Francis Kong & Co, for the Defendant

上 海 金 融 法 院
金 融 市 场 案 例 测 试 机 制

第 三 方 意 见 书

上海金融法院：

贵院正在审理的申请人投资者I、信托管理人C与被申请人A公司、B1公司关于区块链簿记发行的自贸区离岸债券违约处置的测试案例（案号（2024）沪74测试1号，下称“**测试案例**”或“**本案**”），**香港特区天博大律师事务所（Temple Chambers）杜淦堃资深大律师（Victor Dawes SC）、黄汇烺大律师（William Wong）、上海虹桥正瀚律师事务所卢晓成、王正、许诚及上海虹桥正瀚（临港新片区）律师事务所郭勒洋、钱前**[1]阅看了相关材料，经共同研究讨论，就本案涉及的争议焦点，依据《上海金融法院关于金融市场案例测试机制的规定》（试行）第十五条之规定，特此提出第三方意见，供贵院在审理过程中予以参考，并授权贵院在互联网平台公布本意见。

其中上海虹桥正瀚律师事务所、上海虹桥正瀚（临港新片区）律师事务所针对区块链簿记发行债券等中国法相关事项[2]发表意见，杜

[1] 南京大学在读硕士研究生龙耀镕、厦门大学在读硕士研究生樊佳颖、复旦大学在读硕士研究生洪天旭亦有贡献。

[2] 本第三方意见书所称中国法，均因出具本第三方意见书之目的，考虑到香港特别行政区司法体系的差异，仅指中国内地的司法管辖区内的法律。

淦堃资深大律师（Victor Dawes SC）、黄汇烺大律师（William Wong）针对本案中原告适格性、债券违约触发等香港法[3]相关事项发表意见。

[3] 本第三方意见书所称的香港法，系指中国香港特别行政区在其司法管辖区内所适用的法律。

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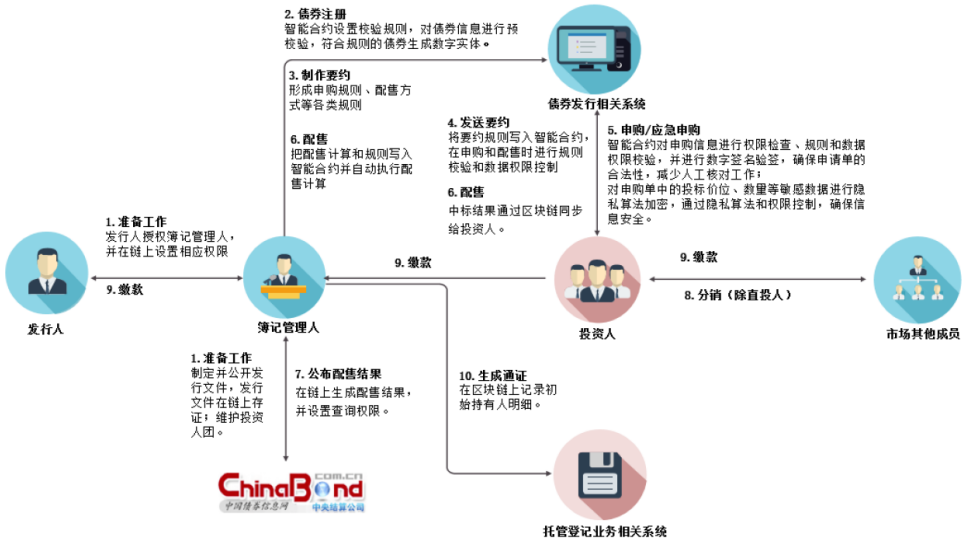
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第一部分：中国法相关事项

1. 从操作流程来看，案涉区块链簿记发行未涉确权登记环节，不会因采取区块链簿记发行而对确认登记产生影响

1.1. 根据中央国债登记结算有限责任公司（下称“**中债登**”）上海分公司所提交的《第三人意见书》，案涉债券系适用《中债区块链数字债券发行平台规范》，借助中债登推出的区块链数字债券公用平台进行的簿记发行，该平台的主要核心功能包括：发行前信息披露存证、债券注册、申购要约制作、债券申购、配售、公布结果、生成通证等。

1.2. 《中债区块链数字债券发行平台规范》中进一步对区块链数字债券发行业务流程以图示发行予以说明。



1.3. 由前述可见，案涉债券确如其名称“区块链簿记发行数字债券”，区块链贯穿于簿记发行阶段，至于后续的债券托管登记等，并不上链。因此，从上述业务描述，我们理解，目前中债登区块链数字债券没有涉及任何法律上的确权，确权仍有赖于中债登

以传统模式进行登记。

1.4. 同时，在中债登于2024年10月发布的《区块链数字债券白皮书》中，亦指明：

> ***在区块链数字债券确权法律法规尚未明确的情况下，区块链系统发行的债券仍需在传统系统登记托管，****这就要求区块链系统和传统系统必须进行数据交互。且在区块链数字债券发展初期，区块链数字债券规模较小，投资人有限，区块链系统只有和传统系统联通，才能打通“小池”和“大海”，拓展投资人和应用范围，提高市场流动性，形成持续发展的活力。*

进一步印证，区块链技术集中运用于簿记发行阶段，债券确权并未运用区块链技术，也不属案涉债券所使用块链数字债券公用平台所能提供的业务范畴。

1.5. 因此，基于案涉债券（区块链簿记发行数字债券）前述的业务模式及流程，我们认为，既然区块链技术并未应用于案涉债券的确权，且相关确权托管仍使用传统系统，故案涉债券的持有人应当是明确的，且不会因区块链簿记发行而产生法律上的不明确性。

1.6. 当然，任何技术或者金融创新都不可能完美，若因区块链技术不足引发簿记发行的执行结果发生错误或区块链系统与传统系统交互时发生错误，导致中债登确权登记产生错误，对此，我们认为严格意义上并非法律问题，而是技术层面的瑕疵，不

应以此可能全面否定区块链簿记发行，或根本性质疑后续债券确权登记的效力。

2. 区块链数字债券的法律效力应当适用与传统债券相同的监管规则进行审查，不能仅因使用了区块链技术而认为簿记发行效力存在瑕疵

2.1. 根据《中华人民共和国民法典》第469条规定，我国法律允许以数据电文形式订立合同。债券簿记发行本质上属于以要约、承诺方式达成债券合同，而采取的区块链技术可属于数据电文方式。因此，《民法典》为区块链簿记发行债券提供了基础的有效性依据。但由于债券发行还受到金融监管，区块链簿记发行债券的效力还需要考虑债券领域的特别法律法规。

2.2. 鉴于我国对区块链数字债券之明确法律规制尚处空白，而全球主要司法辖区已就该类债券已逐步形成具有参考价值的实践经验，因此，有必要以“对标全球最优、嵌入中国场景”之范式，参考境外最佳市场实践，分析案涉债券的法律效力。

2.3. 在我国香港特区，香港证券及期货事务监察委员会（Security and Future Commission，SFC）于2023年11月2日发布《Circular on intermediaries engaging in tokenised securities-related activities》，明确：

第7条：At the outset, given that the nature of Tokenised Securities are fundamentally traditional securities with a

tokenisation wrapper, the existing legal and regulatory requirements governing the traditional securities markets continue to apply to Tokenised Securities.

第8条：The overarching principle of the SFC's regulatory approach is "same business, same risks, same rules."

即通过发布通函，明确代币化产品的法律属性不变，需遵循传统投资产品的监管标准，监管方针的总体原则是"相同业务、相同风险、相同规则"。

2.4. 在新加坡，新加坡金融管理局（Monetary Authority of Singapore，MAS）于2025年5月26日发布《A Guide To Digital Token Offerings》，其中：

第2.4条：Offers of digital tokens which constitute securities, securities-based derivatives contracts or units in a CIS are subject to the same regulatory regime under Part XIII of the SFA, as offers of securities, or securities-based derivatives contracts or units in a CIS respectively made through traditional means.

即通过发布指南，明确构成证券的数字代币的发售，受到证券法对传统产品相同监管制度的约束。

2.5. 在美国，美国证券交易委员会（United States Securities and Exchange Commission，SEC）创新与金融科技战略中心（Strategic Hub for Innovation and Financial Technology）发布

《Framework for "Investment Contract" Analysis of Digital Assets》，其中提出：

> *The so-called 'Howey test' applies to any contract, scheme, or transaction, regardless of whether it has any of the characteristics of typical securities...Therefore, issuers and other persons and entities engaged in the marketing, offer, sale, resale, or distribution of any digital asset will need to analyze the relevant transactions to determine if the federal securities laws apply.*

虽该份文件不构成美国证券交易委员会（United States Securities and Exchange Commission，SEC）的任何正式监管文件或意见，但仍可发现，美国监管部门或倾向于采取与香港特区、新加坡一致的监管模式，即应统一适用传统判例法中的"Howey Test"判断是否构成证券，构成证券则受到联邦证券法律约束。

2.6. 结合前述境外实践经验，我们认为，从法律规制层面，现有债券相关法律体系应当然适用于案涉债券，区块链簿记发行本身并不会导致案涉债券的发行行为存在瑕疵，案涉债券的法律效力仍应当与传统证券适用相同的法律及监管规则进行审查。

2.7. 根据《中华人民共和国证券法》《企业债券簿记建档发行业务指引》等法律法规，对于簿记发行过程予以规范，并提出原则性要求，其中，并未对簿记发行所采取的技术作出限制。可见，

只要能够满足前述指引，能够保证簿记发行遵守“公开、公平、公正”原则，遵守相关管理规定，不存在不正当利益输送、破坏市场秩序等行为，该等簿记发行应当有效。

2.8. 因此，不能仅因使用了区块链技术而认定案涉债券簿记发行存在效力瑕疵，亦不能以引入区块链技术为由否认案涉债券效力。

2.9. 投资者I仅以采用区块链技术为由主张债券簿记发行无效，并不充分，其仍需根据现有债券相关法律体系指明案涉债券存在何种具体的违法违规行为。

2.10. 虽然，区块链债券簿记发行存在有效的论证路径，且实践中发行试点已获行业认可甚至监管奖项，但专门性上位法规范仍处于空白状态。因此，为避免争议，我们建议仍需尽快结合我国实践及境外经验，通过立法或发布权威监管文件，进一步明确区块链数字债券的法律地位与效力判定规则。

3. 案涉债券跨境发行具备复杂性，案涉债券违约处置的相应法律制度或难以完全适配

3.1. 针对案涉债券所发生的违约处置行为，中债登在其《第三人意见书》中陈述，该等违约处置的制度依据为《银行间债券市场债券登记托管结算管理办法》第5条、第7条及第31条。根据中国人民银行的指定中债登作为相应的债券登记托管结算机构履行提供债券等抵押物的管理服务，包括债券质押登记等。

3.2. 但《银行间债券市场债券登记托管结算管理办法》第2条规定：

*固定收益类有价证券（以下简称债券）在**银行间债券市场**的登记、托管和结算适用本法。*

银行间债券市场通常指向投资者在我国境内进行债券交易的市场。中债登基于《银行间债券市场债券登记托管结算管理办法》取得担保品的违约处置权限，似限于该类在银行间债券市场交易的债券。

3.3. 案涉债券属于遵循发行端、投资端“两头在外”原则的上海自贸区离岸债券（明珠债），从其发行审批管理及债券要素等，更为偏向外债，是否能够纳入银行间债券市场或有争议。同时，案涉债券系面向自贸区投资者和境外机构投资者，投资者范围似更为限缩，亦与银行间债券市场的投资者范围有所不同。

3.4. 因此，中债登当前所采取的担保品违约处置与《银行间债券市场债券登记托管结算管理办法》或难以完全适配，有待进一步完善。

4. 案涉担保品违约处置行为是否可将业务规则纳入其中，并成为相应合同依据，仍有待结合案件事实进一步分析

4.1. 我们注意到，C公司与B2公司已签订《中央国债登记结算有限责任公司担保品处置业务指引（试行）》，且其中亦通过概括性描述将《中央国债登记结算有限责任公司担保品处置业务指引（试行）》纳入，据此C公司及中债登认为案涉担保品违约处置行为具有相应的合同依据。

4.2. 但该等业务指引是否能够通过当事人之间的协议引致适用后，仍需满足一定的条件，才能视为协议的一部分，对签约主体产生约束力，具体可参照（2022）沪74测试1号司法意见书中总结出的4项条件。该案中，上海清算所《清算协议》引致适用《业务规则》《违约处置细则三文件》，约定业务文件成为合同的组成部分。贵院认为：

《业务规则》《违约处置细则三文件》经由《清算协议》引致适用，属于双方合同的组成部分。又因上述规则系上海清算所单方制定，客观上存在不当侵害清算会员利益的可能。故对于上述规则应如何订入合同、又该如何确保规则内容的公平合理，确需通过法律加以控制。

审理庭认为，案涉规则欲对包括机构A在内的清算会员产生法律拘束力，需具备以下四项条件（1）向清算会员进行合理告知。（2）清算会员同意遵守规则。（3）对于需经监管批准方能生效的规则，应当获得监管部门的批准。（4）规则内容公平合理。其中第一、二项为规则订入的要件；第三、四项为规则内容的生效要件。

4.3. 在本意见书中，我们仅提出前述观点并引述相关司法裁判观点，案涉担保品违约处置行为是否具有相应合同依据有待于结合案件事实进一步分析。

5. 区块链数字债券的观察及思考：技术适用与制度冲突

5.1. 国内区块链数字债券的概念及实践

5.1.1. 目前，国内立法层面并未对区块链数字债券或与其类似的概念予以规定。《区块链数字债券白皮书》及《中债区块链数字债券发行平台规范》将区块链数字债券定义为：数字债券的一种，是应用区块链技术，具有通证形式，可支持账户松耦合的数字债券。

5.1.2. 该等概念定义侧重于技术描述较为抽象，但结合《区块链数字债券白皮书》及《中债区块链数字债券发行平台规范》中的业务描述，如前述，当前的区块链数字债券实践可以理解为在簿记发行阶段通过区块链技术完成的债券，其他环节与传统债券并无实质差异。

5.2. 境外区块链数字债券的概念及实践

5.2.1. 境外实践中，更为常见的概念表述为“分布式账本技术债券”（Distributed Ledger Technology Bond，DLT Bond），虽然分布式账本技术并不完全等同于区块链，区块链仅是分布式账本的一种运用形式，并非所有的分布式账本都是区块链，但我们亦注意到，DLT Bond也会被称为Blockchain Bonds（区块链债券），因此，我们认为在该类债券实际中可以予以概念等同。

5.2.2. 国际行业自律组织国际资本市场协会（International Capital Market Association，ICMA）在《Frequently Asked Questions on DLT and blockchain in bond markets》中，将DLT Bond定义为：

What are DLT bonds?

Whilst there is no single, widely accepted definition, the term "DLT bonds" is understood to be an instrument whose register of ownership is stored using DLT (see Q&A 1).

While the nature of DLT bonds continues to evolve, two different models can be distinguished:

a) *Bonds issued natively onto a distributed ledger or blockchain. Such securities are held and traded through the DLT or blockchain environment, ie* ***outside the traditional market infrastructure****. The creation and existence of such bonds will be specific to each transaction and will likely differ across transactions. This type of instrument could also be referred to as a "native digital asset", "security token" or "bond token" depending on the deal structure.*

b) *Traditional bonds which are immobilised from an operational perspective* ***ie held by an (I)CSD or custodian and represented through a token on a blockchain or DLT network*** *(see also Q&A 6). Whether a token holds legal value or not depends on the specific jurisdiction and the underlying operational configuration. This type of instrument could be referred to as a "tokenised bond", or "non-native security token".*

即国际资本市场协会（International Capital Market Association，ICMA）认为DLT Bond包括两类：第一类原生于分布式账本或区块链，并完全通过分布式账本或区块链环境，**脱离传统金融基础设施进行交易；第二类仍属于传统债券由中央存管机构或托管人持有，并由区块链或分布式账本技术网络上的“代币”表示。**其中，第二类DLT Bond与通常认知的债券相同，有赖于金融基础设施，仅是采用分布式账本技术或区块链技术将债券数字化。

5.2.3. 在我国香港特区，香港金融管理局对DLT Bond亦持有与国际资本市场协会（International Capital Market Association，ICMA）基本一致的定义，并在其发布的《香港债券市場代幣化》中，有如下说明：

“原生”和“非原生”代幣化發行

*在數字化債券發行中，**債券可直接在DLT 平台上發行（即“原生”發行），或先在平台外發行，然後在DLT平台上代幣化（即“非原生”發行）**。*

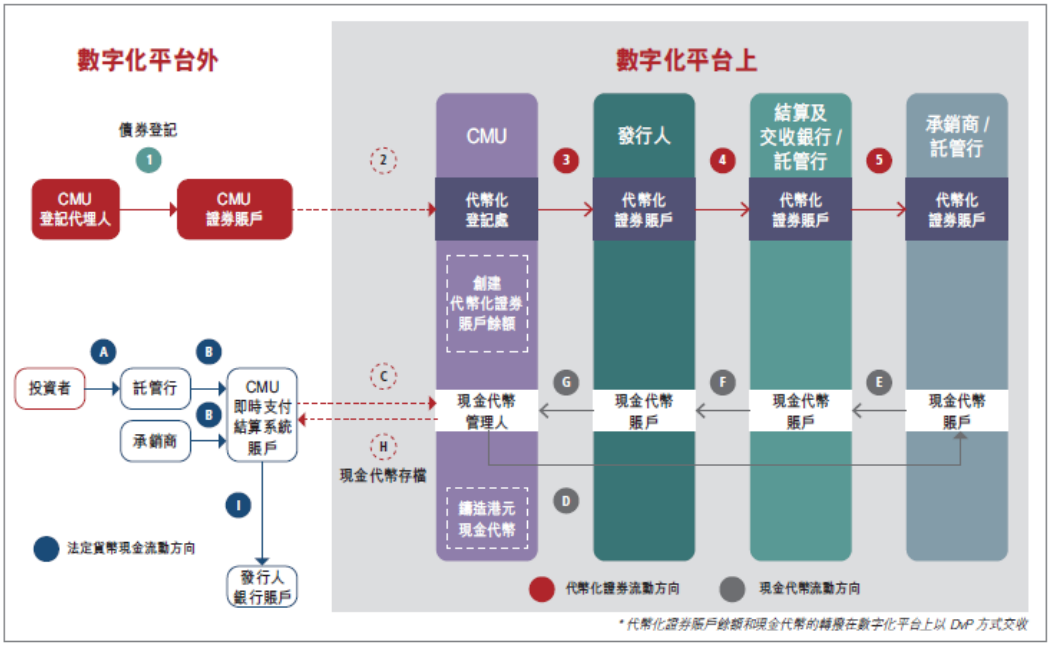
*Evergreen項目採用“非原生”發行方式。代幣化綠色債券採用記名形式，最初於發行日在平台外的CMU系統的證券數據庫中以電腦化帳簿條目形式記錄。代幣化綠色債券的實益權益之後於發行日記錄在數字化平台的代幣化證券賬戶中。**一些發行人可能較為傾向“非原生”的代幣化發行，由中央證券託管機構(CSD)的傳統系統按照其現行操作規***

则进行债券的代幣化，因為這種發行方式可能更加貼近現有市場慣例。

结合香港金融管理局的前述说明，可更为清楚的发现，两类DLT Bond的主要区分之一在于，是否有传统的金融基础设施（中央托管机构）参与其中。若为“非原生”代币化发行的债券，其发行方式与传统债券无异，只是后续将由金融基础设施按其规则将债券代币化，并未改变传统债券实质。

5.2.4. 考虑到“原生”DTL债券与传统债券实质差异较大，故我们在本意见书不予展开，仅就与传统债券更为类似的“非原生”DTL债券在意见书中进一步举例说明。如：香港金融管理局在《香港债券市場代幣化》所为例说明的Evergreen项目，区块链技术不仅贯穿簿记发行阶段，还结合货银对付制度（DvP），实现债券代币化登记、结算等功能。

圖 1總結了以 DvP 方式交收的 Evergreen 項目一級發行的工作流程程



又如：新加坡交易所发行的基于区块链的Olam公司数字债券，该债券的权利义务以智能合约形式记录，并实现了与传统债券同等效力的交收与服务，利用智能合约来掌握参与发行和资产服务各方的权利和义务，允许以多种货币进行无缝结算，实现发行人、安排人和投资托管人之间的进行收益转账。

5.3. 境内外区块链数字债券的差异及影响

5.3.1. 通过前述的举例，可见即便是与传统债券更为类似的“非原生”DTL债券，在具体业务模式中，境外DTL债券并非仅局限于簿记发行阶段，而是更为全流程“代币化”，区块链技术运用更为充分、上链程度更高，与案涉债券有较大差异

5.3.2. 我们理解，该等更为“保守化”的区块链技术运用，与我国当前全面禁止代币的司法实践保持一致。我国区块链数字债券逐步加强区块链技术的使用，将面临与代币模糊边界的情况，在法律制度仍持严格否认态度，区块链技术在债券中的适用仍需审慎研判，在避免风险及金融创新的两端寻求平衡。

5.4. 区块链技术的运用需要与现行债券相关法律体系匹配，避免因技术特性导致效力风险

5.4.1. 根据《中华人民共和国证券法》《证券登记结算管理办法》等法律法规，只有证券登记结算机构有权为证券交易提供集中登记、存管与结算服务。

5.4.2. 《中债区块链数字债券发行平台规范》中，案涉债券使用的区块链技术系中债登和市场机构共建共治理的联盟链。根据第

3.5条、5.4条、5.5.4条的定义，联盟链内部会指定多个预选节点为共识节点，每个块的生成由所有共识节点共同决定。而中债登会甄选市场机构以全节点方式接入，即该市场机构将部署共识节点。

5.4.3. 上述操作意味着，每个块的生成，需同时获得中债登和（全节点接入的）市场机构节点的一致意见，否则新生成的块无法加入到区块链中。从形式上理解，一个事项只有获得中债登和市场机构的一致同意，方可上链。

5.4.4. 若后续债券确权登记亦通过区块链技术完成，则上述操作可能被理解为中债登和市场机构共同履行登记职能，无疑将与我国法律法规构成冲突，影响区块链簿记的合法性。在技术平台涉及上，需考虑如何在使用分布式记账和共识机制的同时，确保证券登记结算机构依法独立履责。

第二部分：香港法相关事项

6. 原告适格性

6.1. 《募集说明书》第16(a)条约定:

适用法律： 债券、信托契据、代理协议、保证协议、国际债券 ISIN：US303280EU28 的担保契约受香港法律管辖。中国银行间债券市场交易的债券的担保协议受中华人民共和国法律管辖，为本条款之目的，不包括 香港特别行政区、澳门特别行政区及中国台湾地区法律。

6.2. 《信托契据》第15.1条亦约定债券、信托契据适用香港特别行政区法律。

6.3. 《信托契据》第9.1条约定：

法律程序 *在发生违约事件后，信托管理人可随时自行决定对发行人、保证人或担保提供者提起其认为适当的诉讼，以追讨债券下未支付的任何到期金额，或强制执行其在本信托契约或条件下之 任何权利，但没有义务根据第8条宣布债券立即到期应付，或提起任何诉讼，除非：（a）经特别决议指示，或至少四分之一未支付的债券本金的持有人书面要求，且（b）信托管理人已就其可能因此而承担的所有责任、诉讼、索赔和要求以及可能因此而产生的所有成本、费用和开支（包括但不限于获得其酌情认为合适的任何咨询意见）获得补偿和/或担保和/或预先筹集资金，且信托管理人对采取任何此类行动的后果不承担任何责任，并*

*可在不考虑此类行动对个别债券持有人的影响的情况下采取此类行动。**只有信托管理人可以执行债券或本信托契据的规定，任何债券持有人无权直接对发行人、保证人或担保提供者提起诉讼，除非信托管理人有义务提起诉讼，但未能在合理时间内提起诉讼，而且这种情形持续存在。***

6.4. 《募集说明书》第12条约定：

信托管理人可在任何时间依其自由裁量权并无需通知，提起其认为适当的法律程序，以执行其在《信托契据》项下关于债券、任何保证契据或任何担保协议的权利。但信托管理人并无义务采取该等行动，除非：（a） 已由不少于全部未偿债券本金总额25%的持有人以书面形式提出请求，或经特别决议指示；及（b）信托管理人已获得令其满意的赔偿和/或担保和/或预先资金安排。”

6.5. 在香港法下以及其他普通法司法管辖区，此类“禁诉条款”(no action clause) 债券发行中已属普遍，背后的法理基础和商业考量如下：

6.5.1. 设立信托管理人是一种有效集中债券的管理与执行的方法。债券持有人通过信托管理人行事，并在投资的成败中按比例（pari passu）分享，而非彼此竞争。信托管理代表并保护债券持有人，债券持有人被视为一个整体，并通过一定比例的持有人向信托管理人发出指示。此种安排促进了债权的流动性，个别债券持有人依赖信托管理作为唯一的执行渠道，并可确信在执行时，

本金与利息将按比例分配。若债券的个别终端投资者可以自由提起诉讼，则势必导致多重诉讼，或出现信托管理人与个别债券持有人同时提起重复诉讼的情况：见**Re Leading Holdings Group Ltd** [2023] 4 HKLRD 71第57至58段；引用英国上诉法院**Elektrim SA v Vivendi Holdings Corp** [2009] 2 All ER (Comm) 213一案。

6.6. 信托管理人作为债券的直接持有人，享有直接执行债券项下权利的资格。债券的终端投资者仅为该信托关系下的受益人（beneficiary）。根据衡平法原则，受益人无权直接就信托财产提起诉讼，也无资格就信托关系下的债权提出诉讼或公司清盘申请：**Re Leading Holdings**第75至79段；

6.7. 举例而言，在**Re China Oceanwide Group Ltd** [2023] HKCFI 455一案，提起呈请的债权人基于某些债券债务人公司进行清盘。高等法院原讼法庭法官陈静芬认为，提起呈请的债权人不是债券的直接持有人，因为其姓名和地址并未记录在债券登记册中。因此，提起呈请的债权人无权就债券展开法律程序或提起诉讼以执行债券项下的付款义务。法院因此撤销了清盘呈请。

6.8. 因此，一般而言，债券的终端投资者唯一可诉的对象为信托管理人。若信托管理人未能履行其受信责任（fiduciary duties），终端投资者可向其提起诉讼。此类法律关系被称为“不透视原则”（no look through principle），即每一方仅对其直接交易对手享有权利：**Re Leading Holdings**第60段；**Secure Capital SA**

v Credit Suisse AG [2017] 2 CLC 428第10段。

6.9. 当然，我们亦注意到，案涉债券与境外常见登记于信托管理人名下的债券有所不同，案涉债券直接登记于投资者I名下，但我们倾向于认为，该等差异并不会导致前述香港法规则完全失效，各方当事人之间的权利义务应按合同约定予以执行。

6.10. 因此，我们认为C公司有权在A公司未如约兑付SHA债券本息时以其名义向A公司、B1公司提起诉讼，但投资者I无权起诉。

7. 担保责任

7.1. 被申请人答辩状（C v. A、B1）第2.2至2.5段引用**Holme v Brunskill**一案确立的原则，以论证主债务加速到期系债权人行使变更权的结果，使债务履行期限变短， 期限利益降低， 属于加重债务人债务之情形。

7.2. 我们认为SHA 债券下的加速到期，并不属于可解除担保人责任的情形。

7.3. 在**AVC Property Development Co Ltd v Joyful Grace Trading Ltd** [2018] 3 HKC 47一案中，香港上诉法庭对**Holme v Brunskill**所确立的衡平法原则作出如下解释：若主合同当事人之间就主债务合同作出“变更”（alteration），担保人必须被征询意见；否则，如该变更可能对担保人造成不利，担保人即获解除责任，除非该变更属“无关紧要”。启动该原则的门槛颇高，要求该修改可能导致担保人承担额外风险：**AVC**

Property Development Co Ltd v Joyful Grace Trading Ltd [2018] 3 HKC 47第35至37段[4]。

7.4. 换言之，适用此原则的大前提是债权人与主债务人之间需就主债务合同作出“变更”。只有在此情况，才有可能对担保人造成不公。

7.5. 然而，本案中，C公司向A公司发出《SHA债券加速到期通知函》是按照《募集说明书》第8条帽子条款项下的“违约事件”发出。这属于信托管理人对其合同权利的履行，而非变更；而《募集说明书》第11条对《募集说明书》下条文的修改亦另有明确约定。

8. 交叉违约/预期违约

8.1. 被申请人答辩状（C v. A，B1）第1.4.2段指出：A公司主张其并未明确作出拒绝履行合同义务意思表示，不应适用预期违约条款进行救济，且HKA债券和有关银行贷款并非本案债务，A在其他合同下的履行情况， 不必然延及SHA债券的履行。

8.2. 被申请人答辩状（C v. A，B1）第1.4.2.2-1.4.2.3段引用了**Mersey Steel** 及**Woodar**等英国判例，以论证拒绝履行（repudiation）是一项严苛的认定， 其仅应在明确拒绝履行合同义务， 且该拒绝行为关乎合同根本的情形下，方可被认定成立。

[4] 以上原则亦跟被申请人答辩状第 2.4 段中引用的 **Balram Chainrai v Lakshmi Premises Private Ltd** [2023] 2 HKC 1 案吻合。

8.3. 然而，我们认为本案焦点在于，《募集说明书》第8(c)条的交叉违约条款约定情形是否存在：

8.3.1. 从申请人信托管理人C公司请求书第3.5至3.6段及申请人投资者I请求书第3.7至3.8段可见，C公司的请求基础为HKA公司未偿付到期HKA债券、 A公司未承担HKA债券的保证责任，触发了《募集说明书》第8(c)(i), (ii), (iii)条的交叉违约条款，而根据第8条的总则条款，债券立即到期应付。

8.3.2. 换言之，由于缔约方已经明确约定债券立即到期应付的情形，严格而言，申请人的申索并不需依赖普通法下拒绝履行（repudiation）及/或预期违约（anticipatory breach）的原则。

8.3.3. 我们理解，目前A公司与HKA债券投资人之间就偿付方案仍在沟通磋商阶段，尚未形成最终违约确认，且香港法院尚未就HKA债券违约问题作出不利判决。

8.3.4. 然而，香港法院是否已经就HKA债券违约问题作出不利判决，并不影响贵院独立审视相关条款及有关事实，从而判断第8(c)条下的交叉违约情形是否已被触发：

8.3.4.1. 事实上，950万美元的HKA债券确实未能在到期日完成付款实，且A公司的人民币500万贷款亦逾期未返还，确实已触碰第8(c)(i)条，即 “*发行人、保证人、担保人或其各自的任何主要子公司的任何**其他当前或未来债务未在到期时或（视情况而定）在任何最初适用的宽限期内未支付***”。

8.3.4.2. 在没有更多关于香港诉讼细节的前提下，我们注意到香港法院尚未形成违约确认似乎主要归因于A公司与HKA债券投资人之间证就偿付方案沟通（而非提出了任何实质的抗辩理由）。因此，我们认为申请人有一定基础认定第8(c)条已被触发。

8.4. 另外，虽然合同缔约方已在《募集说明书》第8条约定交叉违约条款，这并不代表双方已排除申请人依赖普通法下拒绝履行及/或预期违约的权利。以下，我们简单总结香港法下的相关法律原则，供贵院参考：

8.4.1. 如果在合同履行期限尚未到来之前，一方当事人表示其有意违约，或其行为足以使一个理性的人得出其不打算履行合同义务的结论，则构成预期违约：见**Chao Keh Lung v Don Xia** [2004] 2 HKLRD 11第26(4)段。

8.4.2. 若一方当事人因其自身的行为或过失，使其在某些关键方面丧失履行合同义务的能力，则另一方有权视合同为解除：**Chao Keh Lung**第26(5) 段。

8.4.3. 是否可以从一方的行为或不作为推断其拒绝履行，必须以客观标准进行评估，并结合双方全部交易背景予以考量：**Nobleseed Partners Ltd v Zhang Qian Qian** [2025] HKCFI 753 第24(2)段。

8.5. 考虑到上文第8.3.3至8.3.4段的分析，我们初步倾向认为由于A公司及其子公司HKA公司在多笔债务上出现到期未支付行为，鉴于金额可观，该等情形或可能使客观第三人合理认为其履行

合同的意图存在疑问。

此致

上海金融法院

本页为《金融市场案例测试机制三方意见书》的签署页

意见提供人：杜淦堃资深大律师（Victor Dawes SC）

杜淦堃

黄汇烺大律师（William Wong）

黄汇烺

上海虹桥正瀚律师事务所

卢晓成 王正 许诚

上海虹桥正瀚（临港新片区）律师事务所

郭勒洋 钱前

日期：二〇二五年十一月二十五日

附件一

意见提供人简历



杜淦堃资深大律师

Call: 1999 (HK)
Inner Bar: 2015
Accredited as a mediator by CEDR in 2006
Associate Member of Chartered Institute of Arbitrators

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	(+852) 2248 1881 (Yvonne Yim)

Victor is a commercial litigator with substantial experience in a wide range of commercial, chancery and regulatory disputes including international arbitration, equity and trusts, probate, company law, and banking and financial disputes.

Since the financial crisis in 2008, he appeared for a large number of financial institutions in the most significant mis-selling cases concerning a wide range of investment products: e.g. *Selina Kwok v HSBC, DBS Bank v Sit, Chang v Bank of Singapore and Shine Grace v Citibank*.

Victor also has a substantial practice in high value trust disputes, most recently appearing in *China Life Trustees Limited v China Energy Reserve and Chemicals Group and Anor* in the Court of Final Appeal.

As part of his ADR practice, Victor appears regularly as counsel in arbitrations and related court applications, and sits as arbitrator in a wide range of commercial disputes. He is on the HKIAC Panel of Arbitrator, the HKIAC Panel for Financial Services Disputes, the SHIAC Panel and the SCIA Panel.

As to his regulatory practice, throughout his career, Victor acted regularly as advocate for both regulators and market participants. Recent cases include acting for the Hong Kong Stock Exchange in a number of judicial review proceedings regarding decisions of the Listing Appeals Committee. In July 2020, Victor was appointed as a Non-Executive Director of the Securities and Futures Commission.

执业范畴

- 银行 / 金融
- 证券法及监管
- 商业纠纷
- 禁制令 / 藐视法庭
- 仲裁
- 诽谤 / 传媒
- 民事欺诈 / 资产追回
- 公司法
- 衡平法 / 信托
- 破产清盘
- 精神健康
- 财产及物业转移
- 遗产 / 继承
- 专业责任

案件选例

银行 / 金融

- ***Shine Grace Investment Ltd v Citibank N. A. & Anor*** [2022] HKCA 134; [2018] HKCFI 1737
- ***DBS Bank v Sit Pan Jit*** (FAMV 45/2016, CACV91/2015, HCA 382/2009)
- ***Chang Pui Yin v Bank of Singapore Ltd*** [2017] 4 HKLRD 458
- ***Kwok Wai Hing Selina v HSBC Private Bank (Suisse) SA*** (HCCL 7/2010, 21 June 2012)

商业纠纷

- ***Hong Kong Sai Kung Ngong Wo Resort Development Limited v. TotalCorp (Nominees) Limited*** (2022) 25 HKCFAR 376
- ***Bonds Group Company Ltd v Kwan Daniel and Others*** [2024] 1 HKLRD 541
- ***Hu Lan v David Golden*** [2024] 1 HKLRD 1252
- ***Bei Ni Ltd v Cornwell (Hong Kong) Ltd*** [2023] HKCFI 1799
- ***Far East Consortium Ltd and Another v The Trustees of the property of Margaret Chiu*** [2021] HKCFI 3707
- ***Delco Participation BV v HWH Holdings*** [2021] HKCA 1889; [2021] HKCFI 869; [2021] HKCFI 265; [2021] HKCFI 250; [2021] HKCFI 249; [2020] 5 HKLRD 712; [2020] HKCFI 2511
- ***Goldbay Fortis Ltd v. Asia Allied Infrastructure Holdings Ltd*** [2021] HKCFI 1684

公司法

- ***Shi Jiu Xing v. Hong Kong A-Sun Group Co Ltd*** [2023] HKCFI 1852
- ***Peng Yingzhen v Absolute Skill Holdings Ltd and Others*** [2022] HKCFI 3328
- ***Gentle Soar Ltd v. CMB Capital Finance Ltd & Ors*** [2021] HKCFI 3450
- ***Sand Aire Ltd & Ors v. Jin Zhanjie & Anor*** [2021] HKCA 1672; [2020] HKCFI 3015
- ***Hu Hung Chiu v. Pacific Electric Wire & Cable Ltd & Ors*** [2021] 2 HKLRD 477
- ***Wang Haihong & Ors v J. P. Morgan Securities (Asia Pacific) Ltd & Anor*** [2021] 4 HKLRD 770

财产及物业转移

- ***Sky Globe Holding Ltd v Hung Lee Estates Ltd*** [2023] 4 HKLRD 413
- ***Simply Power Ltd v Billy Chua and Others*** [2023] HKCFI 944

- ***Jumbo Fair Ltd and Others v Pacm Series 235*** Ltd [2022] HKCFI 3750
- ***Wharf Reality Ltd v Abebi Limited t/a "Armani Junior"*** [2022] HKCFI 2036
- ***Tan Wai Kee v Marspan Ltd and Another*** [2021] HKCFI 3707
- ***AFH Hong Kong Stores, Ltd v. Fulton Corporation Ltd*** [2021] HKCFI 873
- ***Bright Gold Ltd v Mega Well Development*** [2020] HKCA 575

衡平法 / 信托

- ***China Life Trustees Limited v China Energy Reserve and Chemicals Group and Another*** [2024] HKCFA 15; [2023] HKCA 966
- ***Leung Ping Chiu, Roy v Wai Wai Chen & Anor*** [2022] HKCA 1730; [2021] HKCA 941
- ***Jong Yat Kit as Sole Administrator of the Estate of Li Chung (Deceased) v Lee Man For also known as Lee Man For Dennis & Ors*** [2018] HKCA 235
- ***Herman Budihardjo (alias Sim Hok Tjiong) (since deceased) & Ors v Di Gunawan (alias Sim Hok Kui) & Ors*** [2018] HKCFI 145

禁制令 / 藐视法庭

- ***Sun Min and Others v Chu Kong*** (2022) 25 HKCFAR 318
- ***Airport Authority v Persons Unlawfully and Wilfully Obstructing with the Use of the Hong Kong International Airport*** [2019] HKCFI 2104
- ***Ming Hsieh v Xu Zhe & Ors*** [2019] HKCA 101
- ***SJ v Siew Yun Long & Ors*** [2018] 4 HKLRD 438

公法 / 司法复核

- ***China Trends Holdings Ltd v. The Stock Exchange of Hong Kong Ltd*** [2023] HKCA 705
- ***Fan Ren Da Anthony and another v. The Stock Exchange of Hong Kong Ltd*** [2023] HKCFI 2932
- ***Titan Petrochemicals Group Ltd v The Stock Exchange of Hong Kong*** [2023] HKCFI 2935
- ***CIL Holdings v The Stock Exchange of Hong Kong Ltd*** [2023] HKCFI 1618
- ***Sino Energy International Group Holdings Ltd v The Stock Exchange of Hong Kong Ltd*** [2022] HKCFI 3409
- ***The Hong Kong Journalist Association v The Commissioner of Police & Anor*** [2022] 5 HKLRD 20; [2020] 5 HKLRD 653
- ***Up Energy Development Group Limited (in provisional liquidation) (for restructuring purpose) v The Stock Exchange of Hong Kong Limited*** [2021] HKCFI 3813
- ***Cai Zhenrong v. The Stock Exchange of Hong Kong Ltd*** [2021] 4 HKLRD 57; [2021] HKCFI 1899
- ***Longrun Tea Group Co Ltd v. The Stock Exchange of Hong Kong Ltd*** [2021] HKCFI 1883
- ***Bolina Holding Co Ltd (in liquidation) v. The Stock Exchange of Hong Kong Ltd*** [2021] HKCFI 460

学历

1998 LLB – London School of Economics and Political Science

1999 PCLL – HKU

委任及公职

- Recorder of the High Court
- Non-Executive Director of the Securities and Futures Commission
- Chairman of the Investor and Financial Education Council
- Council Member of the HKIAC
- Chairman of the Hong Kong Bar Association (2022-2024)

语言

English and Chinese (Cantonese and Putonghua)



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William joined Chambers after completing pupillage with Mr Richard Khaw SC, Mr Anthony Chan SC, Mr Peter Chiu and Mr Danny Tang. He is developing a broad civil practice and accepts instructions in all areas of Chambers work.

Prior to commencing pupillage, William obtained his LLM degree from Harvard and BCL degree from Oxford, ranking second in his year. He has served as marshal to the Hon Madam Justice Linda Chan and worked as an assistant to leading independent arbitrators.

William was awarded the Bar Scholarship in 2023.

执业范畴

- 海事
- 仲裁
- 银行 / 金融
- 建筑物 / 建造
- 慈善
- 民事欺诈 / 资产追回
- 商业纠纷
- 调查委员会 / 研讯
- 公司法
- 竞争法
- 保密 / 私隐
- 冲突法
- 诽谤 / 传媒
- 纪律制裁
- 歧视
- 雇佣
- 衡平法 / 信托
- 家事 / 婚姻
- 禁制令 / 藐视法庭
- 破产清盘
- 保险
- 知识产权
- 调解
- 精神健康
- 人身伤亡 / 医疗疏忽
- 规划
- 遗产 / 继承
- 专业责任
- 财产及物业转移
- 公法 / 司法复核
- 差饷物业估价
- 归还索偿 / 不当得益
- 证券法及监管
- 税务
- 电讯

案件选例

商业纠纷

- ***Fine Vision Opportunity III Ltd v Xinyuan Real Estate Co., Ltd & Ors*** [2024] 5 HKLRD 300 obtained judgment in excess of US$15m for a noteholder against a Mainland real estate group (led by Victor Dawes SC)
- ***CNG v G & Anor***
  - [2025] HKCFI 3598 – successfully resisted applications to challenge an arbitrator and to set aside an arbitral award (led by Victor Dawes SC and Peter de Verneuil Smith KC)
  - (HCCT 66/2023148, HCCT 17149/2025) – resisting applications for stay of execution of enforcement orders (led by Victor Dawes SC, with Danny Tang)
- ***Foxtail Investments Ltd v V Capital Ltd*** (HCA 2165/2020, HCA 702/2021, HCA 150/2022) – 14-day trial in a joint venture dispute over a Mainland real estate project (led by Victor Joffe KC, SC and Queenie Lau SC)
- ***Golden Miles Group Holdings Ltd v Jacob & Co. Ltd*** [2025] HKCFI 663 – successfully defended a luxury brand in a 10-day trial over a distribution agreement (led by Anthony Chan SC)
- ***Li Yuhong v oOo Securities (HK) Group Ltd*** (HCA 475/2020) – 8-day trial for mis-selling claims (led by Anthony Chan SC, with Danny Tang)
- ***Global Sparkle Holdings IV Ltd v Ge Yiyang & Anor*** [2025] HKCFI 3823 – obtained judgment in excess of US$200m for noteholders (led by Douglas Lam SC)
- ***New Delta Trading Co., Ltd v South China Development (HK.) Ltd*** (HCA 1492/2023) – succeeded in a jurisdictional challenge in favour of the Mainland court in a sale of goods dispute (led by Victor Dawes SC, with Danny Tang)
- ***King Field Shipyard Ltd v Tai Pak Sea-Food Restaurant Ltd*** [2024] HKCFI 2320 – dispute over the preservation of vessels (led by Sara Tong SC)

仲裁

- HKIAC Rules – dispute in relation to investment agreements (led by Benjamin Yu SC, with Keith Lam)

- HKIAC Rules – dispute in relation to investment agreements (led by Benjamin Yu SC, with Keith Lam and Thomas Wong)
- HKIAC Rules – dispute in relation to investment agreements (led by Benjamin Yu SC, with Danny Tang)
- UNCITRAL Rules – cryptocurrency dispute (led by Bernard Man SC, with Danny Tang)
- HKIAC Rules – dispute in relation to loan and guarantee agreements (led by Queenie Lau SC)
- HKIAC Rules – dispute in relation to licensing of medical products (led by Laurence Li SC)
- HKIAC Rules – dispute in relation to repurchase of shares (with Danny Tang)
- HKIAC Rules – shareholders' dispute in the pharmaceutical industry
- Appointed regularly as tribunal secretary in various HKIAC arbitration

破产清盘

- ***Re Country Garden Holdings Co Ltd*** (HCMP 1366/2025) – representing a creditor in a scheme of arrangement application (led by Victor Dawes SC)
- ***Re Ever Harmony Enterprises Ltd*** [2025] HKCFI 3351 – winding up petition on insolvency grounds arising from a US$240 million judgment debt (sole advocate)
- ***Re Rise Top Asset Management Limited*** (HCCW 402/2025) – winding up petition on insolvency grounds (sole advocate)
- ***Re ZPMC-RED Box Energy Services Ltd (in liq)*** (HCCW 368/221) – successfully resisted application to set aside appointment of liquidators (with Danny Tang)
- ***Re Shunfeng International Clean Energy Ltd*** [2025] HKCFI 4119 – winding up petition on insolvency grounds (with Thomas Wong)
- ***Re BOCOM Holdings Ltd*** (HCCW 648/2024) – winding up petition on insolvency grounds (with Danny Tang)
- ***Re Chan Ka Chung*** (HCB 363/2024) – obtained an interim order to implement an individual voluntary arrangement for a debtor (led by Queenie Lau SC)
- ***Kho Luis Fabregas v Wu You*** (HCSD 59/2024) – resisting application to set aside statutory demand (led by Sara Tong SC)
- Advising liquidators on potential claims (led by Abraham Chan SC)

公司法

- ***Re Macking Development Ltd*** [2024] HKCFI 2436 – inspection of company documents under s.740 of the Companies Ordinance (Cap. 622) (with Danny Tang)
- ***Re Chung Tung Investment Ltd & Ors*** (HCMP 356-358/2025) – rectification of share register under s.42 of the Companies Ordinance (Cap. 622) (with Justin Ho)
- ***Re Goodwell Sam Cheong Grocery Co Ltd*** (HCMP 1466/2024) – unfair prejudice and just and equitable winding-up petitions

财产及物业转移

- ***Central Harvest Development Ltd v Secretary for Justice*** (HCA 2386/2019) – 6-day trial in a dispute over New Territories land (led by Eva Sit SC, with Julia Au)
- ***Wong Teck Sun v Sino Estates Management Ltd & Talent Ford Ltd*** (LDBM 199/2024) – claims in nuisance and breach of DMC (sole advocate)

- ***Wu Ka Ming formerly known as Wu Chi Keung v Wong Ka Leung & Anor*** (DCCJ 4802/2024) – claims in nuisance and breach of DMC (sole advocate)

公法 / 司法复核

- ***Tse Sai Kit v The Director of Environmental Protection*** [2025] 2 HKLRD 801 – successfully resisted substitution application in a challenge to the EIA report in the San Tin Technopole project (led by Benjamin Yu SC, with Bonnie Cheng)

遗产 / 继承

- ***Lie Ming, the Committee of the Estate of HJF v Cheng Kam Wa Thomas & Ors*** (HCAP 3/2024) – dispute on the validity of wills (led by Anthony Chan SC)

雇佣

- ***Haitham Ghattas v Deutsche Bank AG, Hong Kong Limited*** (HCA 9/2025) (led by Queenie Lau SC) – defending an employer against a claim for bonus payments
- ***Johnny Wong Lam v The Diary Farm Company, Limited & Anor*** (HCA 1893/2024) (led by Sara Tong SC) – acting for a former employee in a claim against employer
- Advising a charity on claims for retirement benefits by a former employee (led by Queenie Lau SC)

其他

- ***So Yip Fai Johnny v Sotheby's Hong Kong Ltd*** (HCA 2005/2024) – succeeded in striking out tort claims against an auction house (sole advocate)

学历

PCLL, University of Hong Kong (Distinction)

LLM, Harvard Law School

BCL, University of Oxford (Distinction)

LLB, London School of Economics (First Class)

奖学金 / 奖项

Bar Scholarship

Vinerian Scholarship (Proxime Accessit) for the Second Best Performance in the BCL

Law Faculty Prize in Corporate Insolvency Law (BCL)

3 Verulam Buildings Prize for Legal Concepts in Financial Law (BCL)

Keble College Roger Lui Scholarship

China Oxford Scholarship Fund

Lecturer's Prize for Best Performance in Jurisprudence

Linklaters Prize for Best Performance in Commercial Contracts

Mike Redmayne Prize for Best Performance in Law of Evidence

Charltons Prize for Best Performance in the First Year

Hughes Parry Prize for Contract Law/Law of Obligations

Hogan Lovells Prize for Obligations & Property I

出版刊物

- Hong Kong SAR chapter of the World Arbitration Reporter (2024) (with Queenie Lau SC and Chiann Bao)
- 合同法（第七版）, 陈明渝 (Mindy Chen-Wishart)/著, 徐之冠 宋金洋 张天舒 /译, 黄汇烺 (William Wong)/译校
- Contributor to *Judicial Review in Hong Kong* (3rd edn, 2025)

委任及公职

- Marshal, High Court, Hong Kong

语言

English, Cantonese, Putonghua



王正

律师 / 管理合伙人 / 上海市律师协会民商事诉讼研究委员会主任、规划与规则委员会副主任 / 复旦大学、上海交通大学硕士研究生实务导师 / 上海仲裁委员会、上海国际经济贸易仲裁委员会仲裁员 / 上海市法学会律师法学研究会理事

执业经验

王律师执业领域为重大商业诉讼与仲裁。作为上海虹桥正瀚律师事务所合伙人，王律师长期从事高端商业争议解决领域法律工作，承办了大量疑难复杂、争议金额巨大的商业诉讼和仲裁案件，处理案件总额达到数百亿元，对重大商业诉讼与仲裁具有丰富经验和独到见解，服务的客户包括中外资银行及金融机构、上市公司、大型国有企业等。此外，王正律师一直向全国各地的律师同行、多家国有及外资银行、大型央企国企及上市公司、复旦大学、上海交通大学等就多个专业或实务课题进行授课，受到广泛好评。连续多年荣登《钱伯斯大中华区及全球指南》争议解决领域榜、《商法》“ The A-List 法律精英”，获评《亚洲法律杂志》中国十五佳诉讼律师、LEGALBAND 诉讼律师 15 强、Benchmark Litigation 争议解决之星、上海市优秀青年律师等。

工作经历

2004 年，加入上海虹桥正瀚律师事务所任律师、合伙人。

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钱前

律师 / 合伙人 / 上海市律师协会信息化工作委员会委员、仲裁业务委员会委员 / 复旦大学法学院商事诉讼实务课程团队成员 / 交通大学凯原法学院商事诉讼课程团队成员

执业经验

钱律师的执业领域是重大商事争议解决与仲裁。曾代理诸多金融机构、上市公司、大型国有企业集团、民营企业集团的各类诉讼数百件，具有丰富的出庭代理经验。钱律师尤其擅长民商事合同以及各类金融类案件，领域涵盖金融衍生品、债券、证券、票据、资管、银行等各类纠纷。曾在多起新型金融案件中，结合同类金融审判思路以及法学基础理论，通过与法官不断的沟通，成功说服法官作出对客户有利的裁判，该审判先例最终成为该类案件的主流观点。获评 LEGALBAND 客户首选：新锐合伙人 15 强，《商法》律师新星。

工作经历

2010 年，加入上海虹桥正瀚律师事务所任律师、合伙人。

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毕业院校

华东政法大学

Ghent University of Belgium (比利时跟特大学)



许诚

律师 / 合伙人 / 上海市律师协会银行业务研究委员会委员 / 复旦大学法学院硕士研究生实务导师/ 上海市破产管理人协会跨境破产业务研究委员会、规划规则与行业发展委员会委员

执业经验

许诚律师的主要执业领域为银行及金融、债务重组及重大争议解决。拥有超过 18 年的丰富执业经验，对涉银行、信托、保险及外汇管理业务十分熟悉；许律师在金融监管、创新金融、外汇管理政策、不良资产化解和重大风险管控方面拥有丰富经验。基于丰富的金融背景和业务经验，许诚律师还经常为企业涉及的供应链债务化解、债务重组及破产重整、债权转股权交易等重大风险控制、债务回收、诉讼及仲裁等争议解决事务提供法律服务。

工作经历

2005 年起，加入上海虹桥正瀚律师事务所任律师、合伙人。

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卢晓成

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执业经验

卢律师的执业领域为重大商事诉讼与仲裁。曾参与多起高标的重大、疑难案件，在跨境争议解决案件积累了丰富经验，包括多起涉及适用香港法、BVI 法、美国法等的诉讼及仲裁案件，并与境外律师通力合作，为客户争取最大利益。参与案件涉及各层级法院及境内外主流仲裁机构。

工作经历

2019 年，加入上海虹桥正瀚律师事务所。

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毕业院校

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National University of Singapore（新加坡国立大学）



郭勒洋

律师

执业经验

郭律师执业领域为重大商事争议解决。具备扎实的法学理论功底，曾协助承办多起商事合同、侵权纠纷,涉及金融、投融资、房地产等诸多领域。同时为多家国内知名企业提供日常法律服务。

工作经历

2022 年，加入上海虹桥正瀚律师事务所。

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