CHINA DISPUTE RESOLUTION

NEWS LETTER



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NEWS ALERT

1. **Shanghai International Commercial Court Issues First-Ever Investigation Order in China in Support of Interim Measures Ordered in International Arbitration**

   On May 14 2025, the Shanghai International Commercial Court reviewed and granted an application submitted by the Shanghai International Economic and Trade Arbitration Commission (Shanghai International Arbitration Center) for an investigation order to assist in evidence collection. The order was granted in support of interim measures ordered by the arbitral tribunal. This landmark case represents the first time a Chinese court has used an investigation order to support interim measures made in international commercial arbitration, demonstrating the Shanghai Courts' commitment to facilitating international arbitration as a mechanism for effective dispute resolution.

2. **China-Saudi Judicial Assistance Treaty Takes Effect**

   On April 30, 2025, China ratified the Treaty on Judicial Assistance and Cooperation in Civil and Commercial Matters between the People's Republic of China and the Kingdom of Saudi Arabia (the "Treaty"). This marked the 35th anniversary of diplomatic relations between both countries. Upon the Treaty taking effect, judicial authorities in either country may directly request the other's Ministry of Justice to serve judicial documents through a streamlined process. Requests can be submitted electronically online without subsequent physical documentation. The Treaty also enables judicial authorities to seek assistance in obtaining evidence, including witness testimony, party statements, documents, and other physical evidence. Additionally, specific categories of judgments rendered by either country's courts may be submitted directly to the other country's competent courts for recognition and enforcement. This framework provides efficient and transparent judicial support for resolving cross-border civil and commercial disputes, significantly enhancing bilateral judicial co-operation.

3. **State Council Mandates Arbitration Role in Foreign-Related IP Disputes**

   With effect from May 1, 2025, the State Council's Provisions on Handling Foreign-Related Intellectual Property Disputes explicitly endorse the participation of arbitral institutions in resolving Intellectual Property disputes which have a foreign element. The new provisions establish an early-warning mechanism for IP conflicts and authorize measures against IP abuses which harm competition or national security under China's Anti-Monopoly Law and Anti-Foreign Sanctions Law,. Cumulatively, the provisions provide a clearer legal framework for cross-border IP enforcement.

4. **PRC MOJ Issues Draft Regulation on Commercial Mediation**

   On May 27, 2025, China’s Ministry of Justice released a draft of the "Regulation on Commercial Mediation”, inviting public feedback until June 25, 2025. This is the first national legislative attempt to establish a comprehensive framework for commercial mediation in China. The draft regulation consists of six chapters and 38 articles, covering the establishment of mediation

institutions, mediator qualifications, procedural rules, enforceability of agreements, and cross-border recognition mechanisms.

5. Platform of the International Commercial Arbitration Center (Beijing) Officially Launched

On May 7 2025, the operational platform of the International Commercial Arbitration Center (Beijing) ("Platform") officially launched. The Platform will fully leverage its functional advantages by bringing together diverse dispute resolution institutions — across mediation, arbitration, and litigation — as well as legal service providers and para-legal entities such as law firms, expert witnesses, notarization agencies, foreign law advisory services, and judicial accountants. The Platform aims to establish four core platforms: an "International Business Lounge," an "International Shared Hearing Center," a "Full-Cycle Commercial Dispute Resolution Mechanism," and an "Overseas Legal Services Talent Training Base." These initiatives are designed to provide market participants with comprehensive, one-stop, and multi-option services across the full spectrum of work which commercial dispute resolution entails.

6. The People's Bank of China issues *Measures for Data Security Management* in its Business Areas

On May 9, 2025, the People's Bank of China (PBoC) issued "Measures for Data Security Management in the PBoC's Business Areas" (Order [2025] No. 3), effective from June 30, 2025. This is the first dedicated regulation by the PBoC targeting data security within its jurisdiction. The Measures detail requirements on data classification, technical safeguards, incident management, and legal liability for data handlers.

The Measures apply to financial institutions and other PBoC approved or recognized entities operating within China, insofar as they manage data across key domains such as monetary credit, payment and clearing, credit reporting, and anti-money laundering. Data is classified into general, important, and core tiers, with corresponding differentiated protection levels.

Core compliance obligations include annual updates of data directories, maintaining logs for up to three years, regular emergency drills and audits, as well as the submission of annual risk assessment reports by January 15 each year. The Measures complement the "Banking and Insurance Data Security Measures" released in December 2024, underscoring the strong regulatory architecture for data security in the financial sector.

7. International Mediation Forum and the Signing Ceremony of the *Convention on the Establishment of the International Organization for Mediation*

The *Convention on the Establishment of the International Organization for Mediation* (IMO) was formally signed in Hong Kong on May 30, 2025, creating the world's first intergovernmental body exclusively dedicated to resolving international disputes through mediation. The Convention establishes the IMO's legal framework, defining its mandate, governance structure, operational procedures, privileges and immunities, as well as its jurisdictional scope. With its mission to advance peaceful conflict resolution and foster inter-state co-operation under the auspices of Article 33 of the UN Charter, the IMO represents a pivotal mechanism for achieving collaborative solutions and enhancing global governance. Following ratification by signatory states, the

organization will establish its global headquarters in Hong Kong, providing flexible and cost-effective mediation services that will solidify the city's position as an international dispute resolution hub.

8. Supreme People's Court and the China Securities Regulatory Commission jointly issue *Guiding Opinions on Strictly and Impartially Enforcing Laws and Judicial Practices to Serve and Safeguard the High-Quality Development of the Capital Market*

On May 15, 2025, the Supreme People's Court and the China Securities Regulatory Commission jointly issued *Guiding Opinions on Strictly and Impartially Enforcing Laws and Judicial Practices to Serve and Safeguard the High-Quality Development of the Capital Market* (the "Guiding Opinions"). The Guiding Opinions explicitly require further enhancement of investor protection awareness, continuous optimization of a healthy market ecosystem for investment, and comprehensive protection of the legitimate rights and interests of all investors. The Guiding Opinions also emphasize the need to crack down on fraudulent securities issuance and the disclosure of false financial information in accordance with the law. Further facets of the Guiding Opinions similarly underscore the need to improve the system of civil liability for compensation in cases of false statements, enhance the orderly conduct of representative lawsuits in securities disputes, facilitate investors' lawful protection of their own rights and interests, and reduce the costs for investors seeking legal remedies.

The Impact of Tariff Policy Changes on Contracts governing Cross-Border Transactions

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Trump's frequent and unpredictable tariff policy changes have, since April 2025, brought huge uncertainty to global trade, resulting in a sharp increase in tariff risks in international transactions. The sudden increase in tariffs may lead to a surge in the cost of contracts which had already been entered into, and may accordingly engender disputes between the contracting parties. Moreover, future contracts will need to carefully consider whether to adopt tariff clauses. This article will discuss the risks and countermeasures which may be warranted by the issues canvassed above.

I. Impact on Signed Contracts

In circumstances where a company's contractual performance is negatively impacted by tariff policy changes which come into effect after the contract has entered into effect, it is first necessary to confirm whether the contract specifies which party bears the risk of tariffs. In this regard, it is necessary to examine whether the contract includes a risk allocation mechanism for "changes in tariffs". If there are such provisions in the contract, the company should evaluate —based on the provisions and the tariff policy changes — whether the risk allocation mechanism is favorable. If the risk allocation provisions are unfavorable, the company may wish to further consider whether it can mitigate the risk through contract modification or termination mechanisms, or if it can resolve related disputes through other legal remedies. Finally, based on the above analysis, the company should develop a negotiation strategy and a dispute resolution plan.

Generally, the following types of clauses may apply to address changes in tariff policies:

1. Tariff Allocation Clauses

The incidence of tariffs is most commonly allocated in cross-border trade contracts, which generally specify which party bears the tariffs through the incorporation of Incoterms (International Commercial Terms). For example, under the Incoterm "DDP" (Delivered Duty Paid), the seller is required to deliver the goods to the buyer after having paid all applicable tariffs. Conversely, other delivery terms, such as the designation of sales as being FOB (Free on Board) and CIF (Cost, Insurance, and Freight), usually require the buyer to handle customs clearance and pay the applicable tariffs. In other types of contracts, tariff responsibilities may be specified through pricing clauses that clearly indicate which party bears the tariffs, and whether changes in tariffs constitute a valid reason for price adjustments. This helps determine which party assumes the risk of tariff fluctuations.

2. Risk Allocation or Exit Mechanisms for Tariff Changes

If a company is contractually responsible for tariffs and changes in tariff policy lead to adverse consequences, the company may consider invoking certain contractual clauses to share the risk with the counterparty, or to terminate the contract and limit its losses.

1) Change in Law Clause

Tariff policy changes are often regarded as a form of "change in law" under contract terms. Typically, change in law clauses provide that certain legal or regulatory changes allow the affected party to request price adjustments to offset the impact of the said changes. Tariff changes may fall within the scope of a change in law clause, but whether such a clause can be invoked depends on the specific wording of the clause in question. Some contracts explicitly contemplate tariff changes and include them within the definition of change in law. For example, in an engineering project requiring the import of specific steel materials, the contract of supply may expressly state that tariff changes constitute a change in law, enabling the supplier to raise the contract price when such changes occur. If the change in law clause does not clearly include tariff changes, the clause and its applicability fall to be construed by reference to the contract's wording.

2) Material Adverse Effect (MAE)

Complex commercial contracts such as investment agreements and financing agreements often contain Material Adverse Effect clauses. In the event of a tariff policy change, the affected party may consider invoking such a clause to terminate the agreement. For example, if the target company in an acquisition heavily relies on the import or export of goods and raw materials, the tariff policy change could severely impact its business and profitability. The investor may then invoke the MAE clause to refuse to proceed with closing the transaction. This will of course depend on, inter alia, the precise framing of the clause in question, as well as the extent of the effect the change in tariff policy has on the relevant party.

3) Force Majeure

Force majeure clauses typically relieve a party from liability if it is unable to perform contractual obligations due to unforeseeable, uncontrollable, and unavoidable events. These typically include war and natural disasters. Some force majeure clauses also include changes in law or legislation, or the imposition of embargoes, as qualifying events. In such cases, or indeed in cases where force majeure provisions do not expressly exclude changes in tariff levels, a party may consider relying on the force majeure clause to avoid losses caused by tariff fluctuations. This may give rise to issues as to foreseeability of the tariff changes, and will depend again on the precise wording of the relevant clause.

4) Termination Clauses

Contracts usually stipulate the parties' termination rights under different circumstances. These generally include, *inter alia*, (1) termination by mutual agreement; (2) termination under specific circumstances; and (3) termination at will. If the contract includes a termination-at-will clause, the company may choose to terminate the contract in a timely manner to manage risks or losses. However, it must comply with any notice or other procedural requirements.

In addition, if the contract does not expressly provide a right to terminate in the event of tariff changes, it may still be possible to rely on the governing law of the contract to terminate. This applies in particular to doctrines such as change of circumstance / change of position. If the governing law recognizes such doctrines, they may provide a party with the right to terminate, suspend performance, or to renegotiate the contract if performance becomes excessively burdensome. The latter option

may allow parties to maintain performance while managing the extra costs caused by the tariff policy changes. If the parties cannot reach an agreement, the affected party may then claim termination pursuant to a change of circumstances. It bears emphasis, however, that these doctrines typically have strict conditions for application. They accordingly will need to be assessed in light of the specific facts and legal framework.

II. Focus on Future Contracts

1. Inspiration from the "Brexit Terms"

In several senses, tariff policy changes bear similarities to Brexit, in that both involve major policy shifts that create high levels of uncertainty and significant commercial risk. Therefore, the contractual strategies developed during the Brexit transition period can provide valuable reference points for the current tariff climate.

Between June 23, 2016 (the Brexit referendum date) and December 31, 2020 (the formal withdrawal of the UK from the EU), it was unclear whether tariffs or quotas would apply to trade between the UK and the EU. During this period, many contracts adopted "Brexit Clauses", which — though drafted in various forms and with varying degrees of finesse — shared the common goal of allocating costs and risks based on the outcome of Brexit.

Drawing on these precedents, contracts involving cross-border transactions may address tariff-related risks by including clauses that specify how to handle the imposition of new tariffs, increases in existing tariffs, customs duties, or other customs-related measures. These may include cost-sharing arrangements or termination rights, based on the specific transaction and risk assessment.

2. Key Points for Drafting Future Contracts

Taking Brexit clauses as a reference, it is necessary (particularly from the perspective of the party bearing the tariffs) to focus in the drafting of contracts on setting up clauses that trigger adjustment or negotiation mechanisms based on "tariff policy changes". Conversely, parties not bearing tariff responsibilities should also assess tariff-related risks and strive to minimize potentially uncertain and open-ended adjustment mechanisms in the contract. The adjustment mechanisms which parties may wish to consider include the following:

1) Contract Duration and Termination Mechanism

Given the uncertainty of tariff policies, it is advisable — while balancing the need for commercial stability — to prioritize shorter-term contracts or to include flexible termination rights. This will serve to mitigate the legal and commercial risks arising from future tariff changes, the incidence or extent of which the parties may not have foreseen.

2) Scope of Supply and Procurement Obligations

Depending on the party's role (supplier or purchaser), the regularity of supply and procurement obligations may be calibrated to balance commercial certainty with the requisite flexibility for managing risk exposure.

3) Delivery Terms and Incoterms Selection

Selecting appropriate Incoterms to clearly allocate responsibilities for transportation costs, in-transit insurance, and import/export tariffs is another useful mechanism for ameliorating tariff-related risks. For example, a buyer may request Delivery Duty Paid (DDP), where the seller bears all tariff obligations, while a seller may prefer Ex Works delivery arrangements (EXW), so as to transfer all such responsibilities to the buyer.

4) Optimizing Force Majeure Clauses

Force majeure clauses should be carefully refined to explicitly include tariff policy changes as qualifying events (particularly above a *de minimis* threshold). This will provide a contractual basis for relief in the event of significant adverse tariff developments.

5) Flexible Price Adjustment Mechanism

From the perspective of the tariff-bearing party, it may be prudent to include price adjustment clauses that allow for renegotiation if increased tariffs result in significantly higher production or delivery costs. Such clauses should clearly define triggering events, methods for calculating adjustments, and the procedures for notification and renegotiation.

6) Keep the Possibility of Renegotiation

Contracts should include flexible renegotiation mechanisms to allow both parties to adjust contract terms in the event of significant economic changes. These clauses should also specify how to proceed if renegotiation fails, including potential termination or dispute resolution mechanisms.

Examining the Effectiveness of Keepwell Agreements in Cross-Border Financing: Insights from the Latest Judgment of the Hong Kong Court of Final Appeal

Yang Hua

Introduction

On June 10, 2023, the Hong Kong Court of Final Appeal delivered its judgment in in the Peking University Founder Group Keepwell Agreement case. This decision has drawn wide-ranging attention from the financial and legal sectors and is regarded as a milestone in relation to the enforcement of Keepwell Agreements in cross-border financing involving PRC-related entities. This article aims to elucidate the main points of the judgment, clarify the judicial attitude toward Keepwell Agreements, and discuss the practical implications for cross-border financing. This will be done with particular emphasis on the credit enhancement effect, i.e. the effectiveness of such agreements in improving the creditworthiness of debtors.

I. Overview of Keepwell Agreements

1. PRC USD Bonds

PRC USD bonds (U.S. dollar-denominated bonds issued by Chinese entities) serve as a major instrument for offshore financing by PRC companies, accounting for approximately 75% of the total volume of Chinese offshore debt. In recent years, amid rapidly changing market conditions, the scale of defaults on PRC USD bonds has increased year on year, reaching a peak in 2022. Cumulatively, the defaulted bonds accounted for nearly 17.5% of the outstanding PRC USD bonds. Real estate companies have been particularly prominent among the defaulting issuers.

Structurally, PRC USD bonds are issued using two main models: direct issuance and indirect issuance.

1) **Direct issuance** refers to PRC onshore enterprises serving directly as issuers of USD bonds in the international market, accounting for about 55% of the total.

2) **Indirect issuance** refers to PRC onshore companies using overseas entities or branches under their control as issuing vehicles, accounting for roughly 45% of the total bond value.

In order to boost credit ratings and attract investors, about 57% of primary PRC USD bonds are currently supported by credit enhancement measures. Among these, Keepwell Agreements represent a common type of credit enhancement, being employed in about 8% of the total issuance.

2. Application of Keepwell Agreements

Keepwell Agreements are typically used in indirect issuance structures, where the PRC parent company issues a letter undertaking to provide certain forms of liquidity support if the issuer encounters cash flow difficulties. This in turn ensures the issuer's ability to repay debts at maturity.

One notable feature of Keepwell Agreements is their non-guarantee nature — they often expressly state that they are not guarantees, and that the provider of the Keepwell agreement cannot be required to make payment of principal or interest directly to the creditor in the issuer's place.

The applicability of Keepwell agreements is closely related to their "non-guarantee nature" and China's foreign exchange policies. From June 2014 to January 2017, if a Chinese onshore entity wished to provide a guarantee for offshore debt, it was required to register the guarantee and obtain approval from the State Administration of Foreign Exchange (SAFE). The relevant authorities could reject such applications, or could refuse to allow any proceeds from offshore financing that included guarantees to be remitted into China in any form. To circumvent these foreign exchange restrictions, Keepwell agreements — which explicitly purport to not amount to guarantees — began to be widely adopted. Although the underlying foreign exchange control policies were abolished in 2017, the Keepwell Agreement, as a form of credit enhancement, has continued to be used in practice thereafter.

3. Typical Provisions in Keepwell Agreements

Based on incomplete statistics and industry observations, Keepwell Agreements typically include provisions such as:

1) **Non-guarantee clauses:** The Keepwell Agreement is expressly stated to not be a guarantee; it is similarly said to not be evidence of any obligation, liability, debt, or responsibility of the Keepwell provider to pay any sum of any kind or nature on behalf of the issuer under the laws of any jurisdiction (including China). On this basis, the agreement is said to not constitute a legally binding undertaking of guarantee.

2) **Regulatory approval conditions:** If and to the extent that the company is required to obtain necessary approvals, consents, directives, licenses, or other authorizations from relevant regulatory authorities to perform its obligations under the terms of the Keepwell Agreement, the performance of such obligations is typically in turn subject to the company having obtained such approvals. In this regard, the company generally will undertake to use its best efforts to obtain the relevant approvals within any statutory period (if applicable).

3) **Undertakings regarding net assets, liquidity, etc.:** The Keepwell provider also typically undertakes to procure that the issuer will maintain at all times a consolidated net asset value of at least a certain amount (or its equivalent in another currency). This serves to procure that the issuer has sufficient liquidity to ensure timely payment of all amounts due, and to procure that the issuer maintains total shareholder equity of not less than a specified amount at all times.

4) **Share purchase obligations:** The Keepwell provider will, as part of the core obligations under the agreement, undertake to assist the issuer in meeting its payment obligations. Generally, the provider will also agree to purchase the equity interests in subsidiaries incorporated outside China, with the purchase price no less than the amount required for the issuer to fully perform its obligations under the relevant debt instruments.

5) **Governing law:** Typically, the agreement is governed by overseas law, such as English Law, Hong Kong Law, or New York Law.

6) **Dispute resolution:** Typically, the agreement provides for the exclusive jurisdiction of overseas courts, often the Hong Kong courts.

II. Typical Cases

As previously discussed, a key reason for the adoption of Keepwell agreements is their "non-guarantee" nature — that is, the Keepwell provider undertakes only to maintain the issuer's liquidity but does not assume any obligation to directly repay principal or interest to creditors in the event of the issuer's default. The credit enhancement effect of Keepwell agreements has been tested in judicial practice. In recent years, Hong Kong courts have ruled on Keepwell agreement-related claims in three cases, which are outlined and summarized below.

1. The CEFC Shanghai Case

The issuer was a wholly-owned indirect subsidiary of CEFC Shanghai International Group Ltd. ("CEFC Shanghai") incorporated in the British Virgin Islands ("BVI"). The investor, Time Harvest Global Investment Fund SPC — Time Harvest Value Investment Fund (the "Investor"), purchased EUR-denominated bonds issued by the issuer. CEFC Shanghai executed a Keepwell agreement in favor of the investor. The Keepwell agreement was governed by English law, with exclusive jurisdiction conferred on the Hong Kong courts.

After the occurrence of a Keepwell trigger event, CEFC Shanghai entered bankruptcy proceedings. The investor brought claims before the Hong Kong courts. In CEFC Shanghai's absence, the Hong Kong court rendered a default judgment in favor of the investor, including orders for payment of the bond principal, interest, and other specified costs by CEFC Shanghai.

The investor subsequently applied to the Shanghai Financial Court to recognize and enforce the Hong Kong judgment. CEFC Shanghai argued that the Keepwell agreement was intended to circumvent PRC financial regulations and that the Hong Kong judgment therefore contravened public policy. The Shanghai Financial Court held that the substantive issue of the validity of the Keepwell agreement under PRC law did not fall within the scope of review for this case. The judgment did not affect the interests of individuals, did not violate due process, and recognition and enforcement did not amount to a breach of PRC public policy. As the Keepwell agreement was governed by non-PRC law, the PRC courts could not use domestic rules regarding the nature and validity of Keepwell agreements as the standard for determining whether the social or public interest had been breached. On these grounds, the Shanghai Financial Court ultimately granted the investor's application for recognition and enforcement of the Hong Kong judgment.

2. The Peking University Founder Group Case

The issuers, Nuoxi Capital Ltd. and Kunzhi Ltd. (collectively, the "Issuers"), were incorporated in the BVI and were indirect wholly-owned subsidiaries of Peking University Founder Group Company Limited ("Founder Group"). The bonds issued by the issuers were guaranteed by Hong Kong Jinghuicheng Ltd. and Hong Kong Founder Information Ltd. (the "Guarantors"), both ultimate holding companies of the issuers. Founder Group provided a Keepwell agreement (including a share purchase undertaking) in respect of the bonds, such agreement being governed by English law and subject to exclusive jurisdiction of the Hong Kong courts.

1) Declaring Creditors' Rights

After Founder Group entered bankruptcy proceedings, the issuers and the guarantors each sought to assert creditors' rights with the insolvency administrator, all of which were rejected. The administrator only admitted claims pertaining to Founder Group's direct guarantees of offshore bonds and rejected all claims relating to bonds supported solely by Keepwell arrangements.

2) Jurisdiction

The issuers and guarantors proceeded to file lawsuits before Hong Kong courts. The insolvency administrator applied to the Hong Kong court for recognition and assistance of the onshore restructuring proceedings and sought a stay of the Hong Kong proceedings. The court granted the recognition and assistance application but denied the motion for a stay.

The Hong Kong court held that, generally speaking, it would enforce exclusive jurisdiction clauses absent compelling reasons to the contrary, and would not deprive a party of its right to litigate in the agreed forum. An insolvency proceeding in one jurisdiction has no ipso facto extraterritorial effect, and filing a proof of claim with the administrator does not constitute an absolute bar to creditors seeking relief in other jurisdictions. However, creditors cannot rely on foreign proceedings to obtain benefits exceeding those available in bankruptcy. In this case, the issuers and guarantors were not seeking excessive benefits from the Hong Kong action. It was entirely open to Courts in different jurisdictions to coordinate, with one hearing contractual disputes and another overseeing the company's insolvency. Here, the Keepwell was governed by English law; Hong Kong's common law system is substantively aligned with English law, making its judgments referenceable by the onshore bankruptcy court. For these reasons, the court rejected the insolvency administrator's application to stay the Hong Kong proceedings.

3) First Instance Judgment

The first instance judgment was handed down by the Court of First Instance of the Hong Kong High Court. Among the claims by the issuers and the two guarantors, the court upheld only the claim of Hong Kong Founder Information Ltd., while rejecting those of the two issuers and the other guarantor. The key reason for the Court's decision was that the Keepwell obligation of Founder Group toward Hong Kong Founder Information Ltd. was triggered prior to Founder Group's entry into insolvency, whereas the Keepwell obligations toward the two issuers and the other guarantor were triggered only after the initiation of insolvency proceedings.

The Court further held that Founder Group ought to have made best efforts to obtain regulatory approval for compliance with its Keepwell obligations. In fact, Founder Group did nothing in this regard. If the Keepwell provider can demonstrate that obtaining the necessary approvals is impossible despite its best efforts, it need not perform further. Once bankruptcy proceedings commence, it is generally impossible to secure the required approvals. Since the relevant Keepwell obligations of Founder Group toward the two issuers and one guarantor were triggered after entering insolvency, those claims were rejected; only the claim for which the trigger event occurred pre-insolvency was granted.

4) Second Instance Judgment

The unsuccessful parties (being both issuers and one guarantor) appealed. The Court of Appeal overturned the judgment and upheld the appellants' claims.

The appellate court found that the Court of First Instance had failed to consider that there are specific ways of performing the Keepwell obligations that do not require regulatory approval, such as utilizing offshore assets, arranging financial support from third-party entities not subject to PRC restrictions, using standby credit facilities to deposit RMB into onshore bank accounts, and / or having the insolvency administrator pay dividends to the claimants. Since regulatory approval was not a prerequisite for performance, the Court of Appeal allowed the appellants' appeals.

5) Final Appeal Judgment

Founder Group then appealed to the Court of Final Appeal ("CFA"). On 19 March 2025, the CFA rendered its judgment, allowing Founder Group's appeal and reducing the awarded compensation to nominal damages.

The CFA held that the compensatory nature of damages for breach of contract is to put the creditor in the position it would have been had the contract been performed — the "net loss rule" flows logically and as a matter of principle from the compensatory nature of damages. Providing a loan is one way for Founder Group to fulfill its Keepwell obligations. If loans are made to the issuers and guarantors, their debts to bondholders become matched by debts to Founder Group. Thus, the failure by Founder Group to provide a loan caused no net loss to the issuers or guarantors for which damages could be claimed. The losses were suffered by the bondholders, not the issuers or guarantors. For these reasons, the CFA reduced the appellate damages to nominal sums.

3. Tsinghua Unigroup Case

The issuer, Unigroup International Holdings Ltd. ("Issuer"), was a Hong Kong-incorporated wholly-owned subsidiary of Tsinghua Unigroup Co., Ltd. ("Tsinghua Unigroup"). Tsinghua Unigroup International Co., Ltd. (the "Guarantor") acted as the guarantor for the bonds. Tsinghua Unigroup executed a Keepwell agreement (including a share purchase undertaking), governed by English law and subject to the exclusive jurisdiction of the Hong Kong courts.

Due to Tsinghua Unigroup's failure to perform its Keepwell obligations, Citicorp International Ltd. ("Trustee") filed a claim in the Hong Kong court. The Court of First Instance heard both the Founder Group and Tsinghua Unigroup cases together and noted that, while the parties were different, the transaction structures and documentation were nearly identical. The insolvency administrator also moved to stay the Hong Kong proceedings in Tsinghua Unigroup, but the grounds upon which the stay was sought differed from the Founder Group case; nevertheless, the court declined to grant the stay and proceeded to address substantive issues.

The Hong Kong court determined that Tsinghua Unigroup had made no effort to perform its Keepwell obligations or obtain regulatory approval, especially considering that it had received loans from the guarantor prior to default but never sought to apply these toward performance or to obtain the requisite approval. Given that the Keepwell obligation was triggered before Tsinghua Unigroup entered insolvency, the court upheld the trustee's claim and ordered payment of bond principal, interest, and related costs.

III. Conclusions and Insights

Based on the recent cases adjudicated by the Hong Kong courts relating to Keepwell agreements, the following conclusions can be drawn:

1. Jurisdiction:

The fact that a debtor is undergoing insolvency proceedings in Mainland China or that a creditor files proof of claim with a Mainland insolvency administrator does not, in itself, bar the creditor from bringing a lawsuit before the Hong Kong courts. Insolvency proceedings in one jurisdiction have no extraterritorial effect. Even if the Hong Kong court recognizes the Mainland insolvency administrator's status and agrees to assist in the Mainland restructuring process, this does not automatically result in a stay of proceedings in Hong Kong. Unless there are compelling reasons, the Hong Kong courts will not deprive parties of their right to litigate in the agreed forum. While creditors cannot use cross-border litigation to obtain benefits exceeding those available in the bankruptcy process, Courts in different jurisdictions may cooperate with each other to ensure that exclusive jurisdiction clauses are given their due effect.

2. Timing of the Triggering Event for Keepwell Obligations:

The timing at which the Keepwell obligations are triggered is not necessarily determinative. In the first instance judgments of the Founder Group and Tsinghua Unigroup cases, the timing of the Keepwell trigger was crucial — the Hong Kong Court of First Instance held that once a Mainland company had entered insolvency proceedings, obtaining regulatory approval became virtually impossible and, therefore, the Mainland company's Keepwell obligations were no longer operable. This formed the basis for different rulings regarding various issuers and guarantors in those cases. However, following the appellate judgment in the Founder Group case, the Hong Kong Court of Appeal held that, as there exist ways to perform Keepwell obligations without regulatory approval, a Mainland Keepwell provider may still be liable for inaction, notwithstanding entering insolvency proceedings. Thus, the timing of the triggering event for the Keepwell obligation is no longer determinative.

3. Proving Loss:

The ability of the Claimant to actually prove that it would have suffered loss arising out of breach of the Keepwell Agreement key factor. As demonstrated in the CFA's decision in the Founder Group case, where the issuer or guarantor sues the Keepwell provider for failure to perform, the court may award only nominal damages if the issuer or guarantor has suffered no net loss.

4. Recognition and Enforcement:

Where the Hong Kong courts issue judgments on disputes concerning Keepwell agreements, the likelihood of recognition and enforcement by Mainland courts is relatively high; refusal of recognition and enforcement on the ground of contravening public policy is unlikely.

5. Uncertainty in Mainland Courts:

Mainland courts have not yet directly adjudicated cases relating to Keepwell agreements. The outcome of such cases thus remains uncertain.

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