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Kirkland Alert

## Enforceability of Keepwell Deeds Tested Before Hong Kong Courts

08 February 2023

At the end of last week, the High Court in Hong Kong, The Honorable Mr. Justice Harris presiding, concluded the substantive hearing in *Citicorp International Limited v Tsinghua Unigroup Co. Ltd* (HCA 1269 of 2021), a landmark case concerning the enforceability of PRC company-issued, English law-governed keepwell deeds and equity interest purchase undertakings (EIPUs).

Kirkland & Ellis, representing an ad hoc committee of bondholders, instructed the plaintiff trustee to pursue the c. US\$480 million (principal and interest) proceedings, and closely managed their conduct. Of particular note:

- The keepwell deed contained, amongst others, the usual undertaking by the keepwell provider to ensure that specific entities within the group (in this instance offshore entities) at all times maintain sufficient liquidity to ensure timely payment of the bonds in question. The EIPU provided a contractual mechanism for doing so.
- The keepwell and EIPU provider went through PRC Enterprise Bankruptcy Law reorganization proceedings, which only concluded after the commencement of these proceedings. Pre-reorganization at least, they were a PRC state-owned investment holding company associated with the prestigious Tsinghua University.
- In making its judgment, the court is expected to address arguments in connection with the:
  - nature and scope of a keepwell provider's obligations under a keepwell deed and EIPU (in contradistinction to those under a guarantee), and the applicable burden of proof in the context of those obligations;
  - regulatory approvals (if any) required by a keepwell provider to perform its obligations under the keepwell deed and EIPU, and the likelihood of the regulator providing such approvals;

- effect on keepwell and EIPU obligations of reorganization proceedings during the period of the reorganization and post-reorganization; and
- proper quantification of damages for breach of keepwell and EIPU obligations when the action is pursued by the trustee (as opposed to the entity that should have been “kept well”).

Harris J. has indicated that he will hand down his reasoned judgment – and his judgment in the connected case *Nuoxi Capital Ltd v Peking University Founder Group Co. Ltd* (HCA 778 of 2021) – “comfortably in advance” of 3 August 2023. These decisions will be the first common law court decisions dealing substantively with keepwell obligations, and, given their prevalence as credit support in PRC-issued debt instruments amongst others, they are likely to have far-reaching implications and be of particular interest to the market.

We will circulate a summary of the decisions as and when they are handed down. In the meantime, if you have any questions, please contact the authors directly or your usual contact at Kirkland & Ellis.

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## Practices

- Restructuring
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## Suggested Reading

- 26 April 2023 Speaking Engagement PLI's Bankruptcy & Reorganizations 2023: Current Developments
- 13 February 2023 Speaking Engagement First Day by Reorg: A Review of Chapter 11 Filings in 2022
- 07 February 2023 In the News Musk Victory Unlikely To Move The Needle On Securities Trials

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