KIRKLAND & ELLIS

Kirkland Alert

Landmark Hong Kong High Court Decision on Enforceability of Keepwell Deeds in *Peking University Founder* Case

24 May 2023

On 18 May 2023, the High Court of Hong Kong gave the first of two landmark rulings on the enforceability of keepwell deeds in *Nuoxi Capital Ltd & Others v Peking University Founder Group Company Limited* [2023] HKCFI 1350. The key takeaways are as follows:

- As a matter of general principle, keepwell obligations are binding and enforceable contractual obligations, and there is no "public policy" objection to them *per se*. However, they are not guarantees and ordinary damages principles apply to the quantification of claims.
- On the terms of the keepwell deeds in question, the keepwell provider would be relieved of its keepwell obligations if it could prove on the balance of probabilities that despite using its best efforts it could not have obtained the necessary regulatory approvals to comply. In other words, regulatory approvals are in the nature of a defence.
- Unlike a guarantee, a keepwell agreement is unlikely to generate a claim that can be submitted in a PRC reorganisation process because the onset of the process is likely to prevent the necessary regulatory approvals from being obtained. This is a material limitation on the credit support a keepwell agreement is likely to provide.
- The judgment is declaratory only (i.e., it is not enforceable against the assets of the keepwell provider). This was by agreement of the parties in the case, and had nothing to do with the keepwell deeds in question.

The second landmark decision in *Citicorp International Limited v Tsinghua Unigroup Co. Ltd* (HCA 1269 of 2021) is eagerly anticipated.

Factual background

The Defendant is Peking University Founder Group Company Limited ("PKU"). PKU is the PRC incorporated holding company of a large commercial group specialising in IT, healthcare and pharmaceutical trading businesses ("PKU Group").

Between 2017 and 2018, two members of the PKU Group, namely, Nuoxi Capital Limited ("Nuoxi") and Kunzhi Limited ("Kunzhi"), issued bonds, guaranteed by HongKong JHC Co Limited ("HKJHC") and Founder Information (Hong Kong) Limited ("FIHK"), respectively (the "Bonds"). All four entities are incorporated in either the BVI or Hong Kong and are in liquidation.

In parallel, PKU entered into keepwell deeds with Nuoxi, Kunzhi, HKJHC and FIHK on materially identical terms. The keepwell deeds were English law governed and subject to the exclusive jurisdiction of the Hong Kong courts. By the keepwell deeds, PKU undertook, among other things, to (i) cause each of Nuoxi, Kunzhi, HKJHC and FIHK to have a consolidated net equity of at least US$1 at all times (the "Net Equity Obligation"); (ii) to have sufficient liquidity to ensure timely payment by each of Nuoxi, Kunzhi, HKJHC and FIHK of any amounts payable under the Bonds or guarantees (the "Sufficient Liquidity Obligation"); and (iii) HKJHC to have an aggregate total equity of at least HK$9,980,000 at all times (the "HKJHC Total Equity Obligation"). PKU further undertook to use its best efforts to obtain the necessary regulatory approvals to perform these obligations.

The financial state of the PKU Group subsequently deteriorated. On 19 February 2020, the Beijing First Intermediate People's Court ordered that PKU commence reorganisation pursuant to the PRC Enterprise Bankruptcy Law. On 21 February 2020, the Beijing Court directed PKU's creditors to submit their claims to the Administrator of PKU.

The Bonds only became immediately due and payable after 19 February 2020, following a series of events of default. Before that, no principal was due and all interest had been paid.

Each of Nuoxi, Kunzhi, FIHK and HKJHC submitted claims to the Administrator on the basis that PKU had breached the keepwell deeds by failing to ensure Nuoxi, Kunzhi, HKJHC and FIHK could discharge their payment obligations in respect of the Bonds. However, the Administrator rejected the claims of Nuoxi, Kunzhi and FIHK and refrained from adjudicating HKJHC's claim.

Thereafter, the liquidators of Nuoxi, Kunzhi, FIHK and HKJHC initiated proceedings before the High Court of Hong Kong. In December 2021, the High Court rejected PKU's challenge that the Court lacked jurisdiction to hear the case on the basis that the claim was subject to the PRC reorganisation proceedings. The case then proceeded to trial in January and February 2023, and judgment was handed down on 18 May 2023.

Ruling

Justice Harris dismissed the claims of Nuoxi, Kunzhi and HKJHC, but upheld the claim of FIHK and declared that PKU was liable for a loss of RMB1,154,012,000 (approximately US$166,670,837) to FIHK.

In arriving at this decision, Justice Harris held:

1. The keepwell deeds are generally binding on their terms, noting that "*It must reasonably be assumed that the Keepwell Deeds … were intended to create substantive rights, even if in practice they had less financial value than purchasers of the Bonds assumed, and any qualification to such rights was likely to be carefully circumscribed*." (at [54]).
2. On the basis of the factual evidence and pleaded cases:
    a. **Net Equity Obligation**: PKU failed to comply with this obligation in connection with: (i) Nuoxi and Kunzhi from 31 October 2020; (ii) HKJHC as at 16 April 2020; and (iii) FIHK as at 31 December 2019 (which had a negative consolidated net equity of RMB1,154,012,000, approximately US$166,670,837) (at [66] to [68]).
    b. **Sufficient Liquidity Obligation**: This obligation required PKU to ensure each issuer and guarantor had sufficient liquidity to make payments as they fell due. PKU therefore only failed to comply with this obligation after the Bonds became immediately due and payable, namely, after 19 February 2020 (at [70]).
    c. **Total Equity Obligation**: PKU failed to comply with this obligation from 30 June 2020 (at [72]).
3. PKU would be relieved of its obligations if it could prove on the balance of probabilities that despite using its best efforts it could not have obtained the necessary regulatory approvals to comply. In other words, regulatory approvals are in the nature of a defence.

4. Based on the expert evidence, once PKU entered into the reorganisation proceedings, there was no "*realistic prospect of the approvals being given*" (at [86]). On this basis, Justice Harris dismissed all claims pertaining to failures to comply with the keepwell deeds that occurred after 19 February 2020, but accepted pre-19 February 2020 claims. Accordingly, only FIHK's claim for a breach of the Net Equity Obligation as at 31 December 2019 was upheld (at that time, negative US$166,670,837 so this is the amount of the judgment). Nevertheless, Justice Harris made clear that but for this timing issue, he would have found in favour of the other Plaintiffs (at [93] to [94]).

Conclusions

Keepwell deeds have been a common feature of financing arrangements entered into by Mainland China-based business groups and foreign lenders for some time, and continue to be utilized in transactions as a means of credit enhancement. Justice Harris' decision is significant because it clarifies that keepwell obligations are binding and enforceable contractual obligations, and there is no "public policy" objection to them *per se* under Hong Kong and — at least based on the expert evidence filed in the proceedings — PRC law. In this sense, Justice Harris' interpretation of the contractual provisions is creditor friendly. Although the outcome of this decision will be disappointing to PKU bondholders, it is important to bear in mind that the decision is highly fact-sensitive. The key issue was whether the keepwell provider could have realistically used its best efforts to obtain regulatory approvals to comply with the relevant obligations *at the time of its failure to perform them*. Justice Harris indicated that he would have found for the plaintiffs in the PKU case but for the timing issue.

Justice Harris has yet to hand down his decision in the connected case, *Citicorp International Limited v Tsinghua Unigroup Co. Ltd* (HCA 1269 of 2021), although he has indicated that he will do so "comfortably in advance" of 3 August 2023. We will circulate a summary of this decision as and when it is handed down. In the meantime, if you have any questions, please contact the authors directly or your usual contact at Kirkland & Ellis.

Authors

Fergus Saurin

Partner / Hong Kong

Simon Shiu

Associate / Hong Kong

Zoey Zhang

Associate / Hong Kong

Related Services

Practices

- Restructuring
- Litigation

Suggested Reading

- 08 February 2023 Kirkland Alert Enforceability of Keepwell Deeds Tested Before Hong Kong Courts

KIRKLAND & ELLIS
凯易律师事务所

凯易简报

香港高等法院就*北大方正*案维好协议强制执行性问题作出标志性判决

2023 年 5 月 24 日

2023 年 5 月 18 日，香港高等法院就*诺熙资本有限公司等诉北大方正集团有限公司*（[2023] HKCFI 1350）一案中维好协议强制执行性问题颁发标志性判决，这是近期香港高等法院两项标志性案件中的第一项判决。主要内容如下：

- 作为一般原则，维好义务是具有约束力且可强制执行的合同义务，而且*该等义务本身并无违反"公共政策"原则*。但维好义务不是担保，在确定损害金额时适用一般损害赔偿原则。
- 根据涉案维好协议的条款，维好提供方如果能够按照或然性权衡标准（on the balance of probabilities）证明，尽管其尽了最大努力仍无法获得必要的监管批准以履行其义务，则其维好义务将被免除。也就是说，监管批准问题可以作为抗辩理由。
- 与担保不同，维好协议不太可能产生可在中国内地重整程序中申报的债权，因为重整程序的启动就可能导致维好提供方无法获得必要的监管批准。这对维好协议可能提供的信用支持而言，是一项重大限制。
- 此次判决仅为确权判决（declaratory judgment）（即，其对维好提供方的资产不具有强制执行性）。这是本案当事人同意的安排，与涉案维好协议本身的强制执行性无关。

香港高等法院将在*花旗国际有限公司诉紫光集团有限公司*（HCA 1269/2021）一案中作出另一项具有标志性的判决，对此外界非常期待。

事实背景

本案被告为北大方正集团有限公司（“北大方正”）。北大方正是一家在中国内地注册成立的大型商业集团（“北大方正集团”）控股公司，专门从事信息技术、医疗和医药贸易业务。

2017 年至 2018 年，北大方正集团的两家成员公司诺熙资本有限公司（“诺熙”）和坤智有限公司（“坤智”）发行多支债券（“债券”），分别由香港京慧诚有限公司（“香港京慧诚”）和香港方正资讯有限公司（“香港方正资讯”）提供担保。上述四家实体在英属维尔京群岛或香港注册成立，目前均在清盘中。

同时，北大方正分别与诺熙、坤智、香港京慧诚及香港方正资讯签订了条款基本相同的维好协议。这些维好协议受英国法管辖，且香港法院对其具有排他性管辖权。根据维好协议，北大方正承诺（其中包括）(i) 促使诺熙、坤智、香港京慧诚及香港方正资讯各自始终至少拥有 1 美元的综合权益净值（“权益净值义务”）；(ii) 拥有充足的流动资金，以确保诺熙、坤智、香港京慧诚及香港方正资讯各自及时支付债券或担保项下的任何应付金额（“充足流动资金义务”）；及 (iii) 香港京慧诚始终至少拥有 9,980,000 港元的权益总值（“香港京慧诚权益总值义务”）。北大方正进一步承诺尽最大努力获得必要的监管批准以履行这些义务。

北大方正集团的财务状况随后逐渐恶化。2020 年 2 月 19 日，北京市第一中级人民法院根据中国《企业破产法》裁定北大方正进入重整程序。2020 年 2 月 21 日，北京法院指示北大方正的债权人向北大方正的管理人申报债权。

发生一系列违约事件后，债券于 2020 年 2 月 19 日之后才变为立即到期应付。在此之前，概无债务本金到期，且所有利息都已支付。

诺熙、坤智、香港方正资讯及香港京慧诚分别向管理人申报债权，理由是北大方正不能确保诺熙、坤智、香港方正资讯及香港京慧诚履行与债券有关的偿付义务，从而违反了维好协议。但管理人拒绝了诺熙、坤智、香港方正资讯的债权申报，且未审裁香港京慧诚的债权。

随后，诺熙、坤智、香港方正资讯及香港京慧诚的清盘官向香港高等法院提起诉讼。对此，北大方正以相关债权属中国重整程序管辖范围为由提出管辖权异议，但香港高等法院于

2021 年 12 月驳回了北大方正的异议。香港高等法院随后于 2023 年 1 月和 2 月审理了该案，并于 2023 年 5 月 18 日作出判决。

判决

夏利士法官（Justice Harris）驳回了诺熙、坤智和香港京慧诚的申索，但判决香港方正资讯胜诉，认定北大方正对香港方正资讯承担人民币 1,154,012,000 元（约 166,670,837 美元）的损害赔偿。

在判决中，夏利士法官认为：

1. 维好协议通常根据其条款具有约束力，并指出“*必须合理地假设维好协议……旨在创设实质性权利，即使在实践中其财务价值低于债券购买者设想的价值，且该等权利的任何享有资格可能会受到严格限制。*”（判决第 54 段）。
2. 根据事实证据和案件答辩：
    a. **权益净值义务：**北大方正未能遵守关于以下各方的权益净值义务：(i) 自 2020 年 10 月 31 日起，关于诺熙和坤智的权益净值义务；(ii) 于 2020 年 4 月 16 日，关于香港京慧诚的权益净值义务；及 (iii) 于 2019 年 12 月 31 日，关于香港方正资讯的权益净值义务（综合权益净值为负人民币 1,154,012,000 元，约 166,670,837 美元）（判决第 66 至 68 段）。
    b. **充足流动资金义务：**该项义务要求北大方正确保各发行人和担保人有足够的流动资金支付到期款项。因此，北大方正仅在债券变为立即到期应付后，即 2020 年 2 月 19 日之后，才未遵守该义务（判决第 70 段）。
    c. **权益总值义务：**北大方正自 2020 年 6 月 30 日起未遵守该义务（判决第 72 段）。
3. 如果北大方正能够按照或然性权衡标准证明，尽管其尽了最大努力仍无法获得必要的监管批准以履行其义务，则北大方正的义务将被免除。也就是说，监管批准问题可以作为抗辩理由。

4. 根据专家证据，一旦北大方正进入重整程序，就不存在“*获得批准的现实可能*”（判决第 86 段）。因此，夏利士法官驳回了所有有关 2020 年 2 月 19 日后未能遵守维好协议的申索，但接受了有关 2020 年 2 月 19 日之前的申索。因此，仅香港方正资讯有关北大方正于 2019 年 12 月 31 日违反权益净值义务的申索得到了支持（当时为负 166,670,837 美元，因此这是判决金额）。但夏利士法官明确表示，如果不是因为该时序问题，他会支持其他原告（判决第 93 至 94 段）。

结论

一段时间以来，维好协议一直在中国大陆企业集团与外国贷款人之间融资安排中经常出现，并将继续作为一项增信手段在交易中使用。夏利士法官的判决之所以意义重大，是因为其明确了维好义务是具有约束力且可强制执行的合同义务，并且在香港法和（至少根据诉讼中提交的专家证据）中国内地法项下该等义务本身并无违反“公共政策”原则。从这个意义上说，夏利士法官对合同条款的诠释对债权人而言是有利的。虽然这一判决结果会令北大方正债券持有人感到失望，但请必须留意，判决的结果与案件事实高度相关。关键问题在于，*在不能履行相关义务时，*维好提供方是否确实为遵守义务尽最大努力获得监管批准。夏利士法官表示，如果不是时序问题，他会在北大方正一案中判原告胜诉。

夏利士法官尚未就关联案件*花旗国际有限公司诉紫光集团有限公司案*（HCA 1269/2021）作出判决，不过他表示“很有可能早于”2023 年 8 月 3 日作出判决。我们将在该判决下达后及时刊登判决概述。同时，如果您有任何问题，请直接联系作者或您在凯易的经常联系人。