KIRKLAND & ELLIS

Kirkland Alert

Second Landmark Hong Kong High Court Decision on Enforceability of Keepwell Deeds in the *Tsinghua Unigroup* Case

16 June 2023

On 15 June 2023, Justice Harris of the High Court of Hong Kong handed down his decision in *Citicorp International Limited v Tsinghua Unigroup Co., Ltd (紫光集團有限公司)* [2023] HKCFI 1572, the second of two landmark rulings on the enforceability of keepwell deeds. Kirkland & Ellis acted for the ad hoc group of bondholders instructing the successful plaintiff (the Trustee) and oversaw the conduct of the proceedings. The key takeaways are as follows:

- Consistent with the earlier decision in *Nuoxi Capital Ltd & Others v Peking University Founder Group Company Limited* [2023] HKCFI 1350, keepwell obligations are binding and enforceable contractual obligations, and there is no "public policy" objection to them per se.
- Unlike a guarantee, a keepwell agreement is unlikely to generate a claim that can be submitted in a PRC reorganisation process. This is because, at least where the keepwell obligation is engaged after the onset of the process, it is unlikely that the necessary regulatory approvals could have been obtained. This is a material limitation on the credit support a keepwell agreement is likely to provide, albeit on the facts of this case did not afford a defence.
- Keepwell obligations are not guarantees and ordinary damages principles apply to the quantification of claims. Applying these principles, Justice Harris gave judgment in the amount of US$483,843,533 consisting of the principal amount of the Bonds, accrued interest and certain costs. Unlike in *Nuoxi Capital*, this is a money judgment and may be enforced directly against Tsinghua and its assets in accordance with and subject to the law of the jurisdiction of enforcement.
- Depending on the circumstances, keepwell deeds can provide material credit support. However, while keepwell deeds are not worthless window dressing, the

case illustrates how sensitive keepwell obligations are to supervening events and to the PRC regulatory regime.

Factual background

The defendant, Tsinghua Unigroup Co., Ltd (紫光集團有限公司) (Tsinghua), is the PRC holding company of a large commercial group specialising in IT, semiconductors, and information and communication technologies amongst other things. It is also associated with one of the PRC's most prestigious universities.

In 2015 and 2016, Unigroup International Holdings Ltd (the Issuer), an indirect subsidiary of Tsinghua, issued US$450 million of 6% bonds due 2020 guaranteed by Tsinghua Unigroup International Co. Ltd (the Guarantor). Tsinghua entered into a keepwell deed with the Trustee by which it undertook amongst other things to cause each of the Issuer and the Guarantor to have sufficient liquidity to ensure timely payment of principal and interest due under the bonds (the Sufficient Liquidity Obligation), and to cause the Guarantor to have a consolidated net worth of at least US$50 million at all times (the Net Worth Obligation). The keepwell deed expressed the Sufficient Liquidity Obligation and Net Worth Obligation to be subject to regulatory approvals.

On 16 November 2020, Tsinghua failed to redeem RMB1,300,000,000 bonds issued in the PRC, which had matured. On 7 December 2020, the Guarantor (as lender) entered into a loan agreement with Tsinghua (as borrower) to lend US$523,000,000 to Tsinghua (the Guarantor's Loan Agreement). On 10 December 2020, the bonds matured, and the Issuer defaulted on payment. On 30 December 2020, the Trustee declared the bonds were immediately due and payable at their principal amount together with accrued interest.

Some seven months later, on 16 July 2021, Tsinghua entered into reorganisation under the PRC Enterprise Bankruptcy Law. The Trustee submitted a claim in those proceedings but was effectively excluded from any participation in the reorganisation (the claim was left "pending"). The size and seriousness of the Trustee's claim invited, in Justice Harris' view, suspicion about the motives of the Administrator and Tsinghua in dealing with such a substantial claim from overseas creditors. On 13 July 2022, the reorganisation was terminated, and Tsinghua returned to operation as a going concern.

Ruling

In awarding the Trustee US$483,843,533 consisting of the principal amount of the bonds, accrued interest and certain Trustee costs, Justice Harris held:

- Consistent with his earlier decision in *Nuoxi Capital*, that in order to rely successfully on regulatory approvals as a defence Tsinghua had to demonstrate that it could not obtain the necessary regulatory approvals despite using its best efforts. However, there was no evidence of Tsinghua giving any consideration to what regulatory approvals were required (or the means by which the Issuer or Guarantor could have been put in funds), let alone making any effort to obtain any ([28]).
- The Guarantor's Loan Agreement demonstrated that in December 2020 Tsinghua had access to US$ that could have been used to comply with its obligations under the keepwell deed and that Tsinghua clearly did not consider doing so ([35]).
- Tsinghua failed to demonstrate that it was not possible for it to perform the keepwell deed obligations before 10 November 2020 because it could not obtain the necessary regulatory approval. This was the relevant period because, according to Tsinghua's own evidence, in order to comply with the keepwell deed it would have been necessary for Tsinghua to have been considering its options at least a month in advance of the last date by which the Issuer and the Guarantor needed funds to pay the bonds when they matured ([37] and [47]).
- There is no principle that by the minimum act of submission (through a proof of debt) to a foreign insolvency proceeding exclusive jurisdiction is placed in the hands of the courts of that foreign jurisdiction. However, if the proof of debt had been fully argued before the Beijing Court with the Trustee's participation, Justice Harris would have readily granted a stay of these proceedings ([54]). And the fact that the Administrator did not determine the proof filed by the Trustee suggested that the Administrator found the novel and important issues, which this case gives rise to, very challenging and it was therefore reluctant to determine them ([55]).
- With respect to the assessment of damages, the relevant question in the context of the keepwell deed is what the Trustee has lost by the failure to comply with the keepwell deed. There was no dispute that the bonds matured and became payable on 10 December 2020. This was the date at which loss should be assessed, and the loss was the amount that should have been paid but was not (i.e., principal and interest on the bonds) ([59]).

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' latest decision is significant because it involves a clear application of the principles in connection with keepwell deeds he formulated in *Nuoxi Capital* and demonstrates that they can yield significant damages liabilities for keepwell providers. Depending on the circumstances, keepwell deeds can provide material credit support. However, while keepwell deeds are not worthless window dressing, the case does underscore how sensitive keepwell obligations are to supervening events and to the PRC regulatory regime.

Authors

Fergus Saurin

Partner / Hong Kong

Simon Shiu

Associate / Hong Kong

Related Services

Practices

- Restructuring
- Litigation

Suggested Reading

- 15 June 2023 Press Release Kirkland Advises NexTier Oilfield Solutions on Merger of Equals With Patterson-UTI Energy
- 15 June 2023 Award Chambers USA Awards 2023
- 12 June 2023 In the News GCs Say These Firms Have 'All Star' Attys For Client Services

凯易简报

香港高等法院就*紫光集团*案维好协议强制执行性问题作出第二项标志性判决

作者：孙亦珑（Fergus Saurin）和萧友维（Simon Shiu）

2023 年 6 月 15 日，香港高等法院夏利士法官（Justice Harris）就*花旗国际有限公司诉紫光集团有限公司案*（[2023] HKCFI 1572）作出判决，这是近期香港高等法院在两宗涉及维好协议强制执行性问题的重要案件中作出的第二项判决。凯易律师事务所代表指示胜诉原告（***信托人***）行事的债券持有人委员会，并监督诉讼的相关事宜。判决的重点如下：

- 如同先前对*诺熙资本有限公司等诉北大方正集团有限公司*（[2023] HKCFI 1350）一案的判决，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。

- 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。

- 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。夏利士法官根据这些原则判令被告向信託人支付 483,843,533 美元，包括债券的本金金额、应计利息和部分费用。与诺熙资本一案不同，本案作出了金钱给付判决，可以根据强制执行司法管辖区的法律并在遵守该等法律的前提下直接针对紫光集团及其资产强制执行。

根据具体情况，维好协议能够提供有力的信用支持。本案确实凸显了维好义务对情势变化和中国内地监管制度的敏感性。

事实背景

被告紫光集团有限公司（***紫光集团***）是一家大型商业集团的中国控股公司，专门从事信息技术、半导体以及信息和通信技术等。其还与中国最负盛名的大学之一存在联系。

2015 年和 2016 年，紫光集团间接子公司紫光国际控股有限公司（Unigroup International Holdings Ltd，***发行人***）发行了由紫光集团国际有限公司（Tsinghua Unigroup International Co. Ltd.，***担保人***）担保的 4.5 亿美元、利率为 6%、于 2020 年到期的债券。紫光集团与信托人签署了一份维好协议。根据该协议，紫光集团承诺（其中包括）促使发行人和担保人拥有充足的流动资金，以确保及时支付债券项下的到期本金和利息（***充足流动资金义务***），并促使担保人始终至少拥有 5,000 万美元的综合资产净值（***资产净值义务***）。维好协议阐明，充足流动资金义务和资产净值义务受限于监管批准。

2020 年 11 月 16 日，紫光集团未能赎回在中国境内发行的人民币 1,300,000,000 元到期债券。2020 年 12 月 7 日，担保人（作为贷款人）与紫光集团（作为借款人）签署了一份贷款协议，向紫光集团出借 523,000,000 美元（***担保人贷款协议***）。2020 年 12 月 10 日，债券到期，而发行人发生付款违约。2020 年 12 月 30 日，信托人宣布债券的本金金额连同应计利息立即到期应付。

大约七个月之后，2021 年 7 月 16 日，紫光集团根据中国《企业破产法》进入破产重整程序。信托人在相关程序中进行了债权申报，但实际上被排除在参与破产重整的行列之外（其债权被列为“暂缓确定”）。夏利士法官认为，信托人债权的数额规模和问题严重性令人对管理人和紫光集团处理境外债权人此类重大债权的动机产生怀疑。2022 年 7 月 13 日，紫光集团重整程序终结，作为持续经营主体继续运营。

判决

夏利士法官判决紫光集团向信托人支付 483,843,533 美元，包括债券本金、应计利息和部分信托人费用，且夏利士法官认为：

- 如同其先前对*诺熙资本*案的判决，紫光集团为了以监管批准问题作为抗辩理由，就必须证明，尽管其尽了最大努力仍无法获得必要的监管批准。但紫光集团并没有证据证明其考虑过需要哪些监管批准（或本可以用哪些方式向发行人或担保人提供资金），更不用说为获得监管批准做出了任何努力 （判决第 28 段）。

- 担保人贷款协议表明，紫光集团于 2020 年 12 月获得了一笔美元资金，且其本可以将该笔资金用于履行其在维好协议项下的义务，但紫光集团显然并没有考虑这样做 （判决第 35 段）。

- 紫光集团不能证明因其无法获得必要的监管批准而导致不能在 2020 年 11 月 10 日之前履行维好协议义务。该时间点之所以相关，是因为根据其自己的证据，紫光集团为遵守维好协议，必须在发行人和担保人需要资金支付到期债券前至少一个月考虑其方案 （判决第 37 及 47 段）。

- 没有原则规定仅仅在境外破产程序中提交债权证明就能将排他性管辖权交于该境外司法管辖区的法院手中。但如果信托人在北京法院就债权证明进行了充分论证，夏利士法官就会很容易批准中止这些程序。而且，管理人没有就信托人提交的债权证明作出认定，这一事实表明，管理人发现本案所产生的这些问题既前所未见又极为重要，非常具有挑战性，因此不愿认定这些问题 （判决第 55 段）。

- 关于损害赔偿的评估，本案的问题是紫光集团未能遵守维好协议使信托人遭受了什么损失。债券于 2020 年 12 月 10 日到期应付不存在异议。该日应为损失评估日期，而损失为应付但未付的金额（即，债券的本金和利息）（判决第 59 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。夏利士法官的最新判决之所以意义重大，是因为其明确适用了他在*诺熙资本*案中制定的维好协议相关原则，并证明了这些原则能够使维好提供方承担重大的损害赔偿责任。根据具体情况，维好协议能够提供有力的信用支持。根据具体情况，维好协议能够提供有力的信用支持。本案确实凸显了维好义务对情势变化和中国内地监管制度的敏感性。