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1. Brief Comments on China's Commitments on the Foreign Investment Access under the RCEP

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On November 15, 2020, the ten member states of ASEAN[1] and other countries including China, Japan, South Korea, Australia, and New Zealand formally signed the Regional Comprehensive Economic Partnership Agreement[2] ("**RCEP**"). RCEP establishes the world's largest free-trade zone, covering 30% of the world's population (2.2 billion people) and 30% of the global economy. RCEP is formulated based on existing "10+1" free trade agreements by and between the ten ASEAN member states and other contracting states, but the level of openness in RCEP is significantly greater than these preceding "10+1" agreements.

RCEP includes a preamble, 20 chapters, and 4 annexes, which cover terms such as trade in goods, trade in services, investment, intellectual property rights, movement of natural persons, and dispute resolution. In the chapters on trade in services and investment, the Chinese government commits for the first time to detailed market opening and reservation measures in a multilateral free-trade agreement. Aside from minor differences, these access commitments are generally in line with China's current policies on foreign investment access.

RCEP Negative List vs. PRC Negative List: a comparison

In RCEP Annex III (Schedule of Reservations and Non-Conforming Measures for Investment (China)), China makes a special reservation statement[3] for the following sectors: manufacturing, agriculture, fishery, forestry and hunting, and mining and quarrying[4]. RCEP Annex III enumerates items generally found in the *Special Administrative Measures (Negative List) for Market Access of Foreign Investment (2019 Edition)*[5] ("**Negative List 2019**")—the first time for China to do so in an international treaty or agreement. We notice that differences exist between RCEP Annex III and the current *Special Administrative Measures (Negative List) for Market Access of Foreign Investment (2020 Edition)*[6] ("**Negative List 2020**"):

1. The scope of industries covered by the Negative List 2020 is broader than that in RCEP Annex III.

[1] Association of Southeast Asian Nations ("**ASEAN**") currently comprises ten member states: Indonesia, Malaysia, the Philippines, Thailand, Singapore, Brunei, Cambodia, Laos, Myanmar, and Vietnam.

[2] As for the RCEP, as the first country participating in RCEP negotiations, India announced its withdrawal from the RCEP at the third leaders' meeting for the Regional Comprehensive Economic Partnership Agreement in 2019.

[3] For the full text of the RCEP, please refer to the website of the "China Free Trade Zone Service Network" of the Ministry of Commerce: http://fta.mofcom.gov.cn/rcep/rcep_new.shtml.

[4] According to the chapter and section settings of the RCEP, the commitments on commercial presence in the field of trade in services are stipulated in Chapter 8 (Trade in Services).

[5] 外商投资准入特别管理措施（负面清单）（2019 年版）[Special Administrative Measures (Negative List) for Market Access of Foreign Investment (2019 Edition)] (Nat'l Dev. Ref. Comm., Min. Com., Decree 25; promulgated June 30, 2019, effective July 30, 2019) 2019 ST. COUNCIL GAZ. 25.

[6] 外商投资准入特别管理措施（负面清单）（2020 年版）[Special Administrative Measures (Negative List) for Market Access of Foreign Investment (2020 Edition)] (Nat'l Dev. Ref. Comm., Min. Com., Decree 25; promulgated June 30, 2019, effective July 30, 2019) 2019 ST. COUNCIL GAZ. 32; promulgated June 23, 2020, effective July 23, 2020) 2020 ST. COUNCIL GAZ. 22.

The industries covered by the Negative List 2020 include 12 categories, that is, a total of 33 sub-industries, while RCEP Annex III only lists investment reservation measures for five sectors. In this regard, RCEP Annex III explains that non-conforming measures in the field of trade in services are listed in RCEP Annex II [Schedule of Specific Commitments for Services (China)]. We understand that this style follows the classification system in the WTO's General Agreement on Trade in Services, and the concession commitments for commercial existence in the services sector are also classified as trade in services and placed in the relevant annexes to the General Agreement on Trade in Services.

2. China cites the Negative List 2019 as the primary legal authority for the non-conforming measures listed in List A of RCEP Annex III. The differences between the investment reservation measures in industries covered by RCEP Annex III and those under the Negative List 2020 are as follows:

Industry	RCEP Annex III	Negative List 2020	Comments
Seed industry	Investments by foreign investors in the selection and breeding of new varieties of wheat or corn and seed production of wheat or corn ***require Chinese control***.	***The proportion of shares held by the Chinese investors*** in the selection and breeding of new varieties of wheat and seed production of wheat ***shall not be less than 34%***	The Negative List 2020 allows foreign investors to hold up to a 66% interest in wheat breeding and seed production.
Mining industry	Foreign investors may not invest in the exploration, exploitation or ore dressing of rare earth and tungsten.	Foreign investors may not invest in the exploration, exploitation or ore dressing of rare earth, radioactive minerals and tungsten	RCEP allows foreign investors to invest in the exploration and ore dressing of radioactive minerals
Automotive manufacture	Investments by foreign investors in the manufacture of complete automobiles, except for special purpose automobiles and new energy automobiles, require that the shareholding percentage of the Chinese party shall not be less than 50 per cent, and one foreign investor may establish up to two equity joint ventures that manufacture complete automobiles of the same category (passenger cars, commercial cars) within the territory of China.	Investments by foreign investors in the manufacture of complete automobiles, except for special purpose automobiles, new energy vehicles, and ***commercial vehicles***, require that the shareholding percentage of the Chinese party shall not be less than 50 per cent, and one foreign investor may establish up to two equity joint ventures that manufacture complete automobiles of the same category within the territory of China.	The Negative List 2020 allows vehicle manufacturing of wholly foreign-owned commercial vehicles

3. RCEP Annex III contains a catch-all provision (RCEP Annex III, List A, Item 9) which specifies that the Chinese government will not grant licenses, enterprise registrations, or any other relevant matters to a foreign investor who proposes to invest in a negative-listed industry not in conformity with the currently effective negative list, i.e., the Negative List 2020. In this regard, we understand that RCEP Annex III does not exceed the level of openness to foreign investment under the Negative List 2020—

for industries listed in RCEP Annex III, investments from RCEP contracting states will be implemented in conformity with the investment restrictions listed in RCEP Annex III, unless more favorable treatment currently exists under domestic law. For other sectors not listed in RCEP Annex III, investors from contracting states and non-contracting states should make investments in conformity with the Negative List 2020.

China's financial openness reflected at the highest level for foreign investment

As mentioned above, Chapter 8 (Trade in Services) of the RCEP contains service-related market access and national treatment, and the specific opening commitments of each contracting state may be listed in the form of a separate annex for each state. These annexes follow the style of WTO's Schedule of Specific Concession Commitments for Trade in Services and provide for each sector or sub-sector market access restrictions, national treatment restrictions, and other commitments in respect of the four methods for providing services (i.e., cross-border delivery, overseas consumption, commercial presence, and movement of natural persons). Among them, China lists opening commitments for 122 sectors in the form of a positive list. Compared with the 100 sectors for which commitments are made in the positive list of the WTO's Schedule of Specific Concession Commitments for Trade in Services, China has added 22 sectors such as R&D, management consulting, manufacturing-related services, and air transportation, which also reflect China's commitment to further opening up after its entry to WTO. In addition, the RCEP chapter regarding trade in services has three separate annexes for financial services, telecommunications services, and professional services.

Among the opening commitments related to trade in services, a highlight of RCEP is China's commitments in the field of financial services. In Annex II, Schedule of Specific Commitments for Services (China), China stipulates the detailed content of commitments in fields such as insurance, banking, transfers of financial information and data processing, investigations and analysis of financial-related information and credit, and securities services. Among them, the restrictions on the proportion of shares held by foreign investors are relaxed for insurance companies, securities companies, futures companies, fund management companies, financial information transfer and data processing companies, etc., and foreign investors are allowed to establish the above-mentioned types of companies as the sole investor, which echoes provisions of the *Opinions of the State Council on Further Fulfilling the Work of Using Foreign Capital* on fully abolishing the four major restrictions on foreign investment in the financial sector (i.e., business scope, access conditions, scope of shareholders, and shareholding ratio) and the special access administrative measures under the Negative List 2020[7]. At the same time, the RCEP also specifies that "criteria for authorization to deal in China's financial services sector are solely prudential (i.e., contain no economic needs test or quantitative limits on licenses)," which conforms to China's regulatory commitments for access to the financial service industry in the WTO's Schedule of Specific Concession Commitments.

In addition, the innovative commitments in Annex 8A (Financial Services) to RCEP regarding new financial

[7] In the Negative List 2019, the proportion of shares held by the foreign investors in securities companies, securities investment fund management companies, futures companies, and life insurance companies is limited to be 51%, while such limitations are cancelled in the Negative List 2020.

services, financial information transfer and processing, and transparency in financial supervision reflect the positive attitude of the Chinese government toward financial opening up and facilitate the increase of investors' confidence in China's policies, attract overseas financial institutions to China, and inject new blood into the domestic financial market.

In the field of e-commerce: why does the access threshold for members as the contracting states rise instead of being lowered?

RCEP provides for market access and national treatment restrictions related to value-added telecommunications services in the chapter on the trade in services (Chapter 8) and in another chapter separately lists the technical rules related to e-commerce transactions (such as electronic authentication and electronic signature, online consumer protection, and personal information protection). This contrasts with current relevant domestic law, the *Telecommunication Services Classification Catalog (2015)*, which considers e-commerce to be a part of value-added telecommunications under Category B21. This standalone treatment of e-commerce in RCEP may reflect the importance contracting states have attached to the promotion of inter-regional e-commerce development and regional cooperation.

In Annex II [Schedule of Specific Commitments for Services (China)] of RCEP, China's commitment to foreign investment market access under RCEP does not provide more liberalizations than those set forth in current domestic law for value-added telecommunication services. Foreign ownership cannot exceed 50% for e-mail, voice mail, online information and database retrieval, electronic data interchange, enhanced or value-added facsimile services (including store and forward, store and retrieve), code and protocol conversion, online information or data processing (including transaction processing) and several other categories of service sectors. China has made no other specific commitments under RCEP for other categories of telecommunications services. However, for online data processing and transaction processing business (operating e-commerce), the Ministry of Industry and Information Technology had already loosened restrictions on the proportion of shares held by foreign investors since 2015. For companies operating e-commerce business, the proportion of shares held by foreign investors can reach 100%[8]. Obviously, the current opening commitments under the RCEP for online transaction processing business (e-commerce) are lower than those under the existing domestic regulations. Should investors from one of the RCEP contracting states be governed by the RCEP or the domestic laws which are more favorable to such investors when they enter the Chinese e-commerce market? This issue still needs further interpretation or clarification by the Ministry of Commerce. Investors will need to understand the operating coverage of local commercial departments in specific cases.

Value-added telecommunications services have always been an industry restricted to foreign investment in China. With the development trends of globalization and "Internet +", the market potential brought about by inter-regional linkages has made investors more interested in investing and participating in value-added telecommunications services, especially cross-border e-commerce. Correspondingly, China is gradually relaxing restrictions on foreign investment access in value-added telecommunications services.

[8] 《关于放开在线数据处理与交易处理业务（经营类电子商务）外资股比限制的通告》Notice on Relaxing Restrictions on the Proportion of Shares Held by Foreign Investors in the Online Data Processing and Transaction Processing Business (E-commerce Operations) (Min. Indus. Info. Tech.; promulgated and effective June 19, 2015).

Several days ago, Liu Liehong, an official of the Ministry of Industry and Information Technology, mentioned at a forum on November 11 that China would open up the value-added telecommunications (including data center IDC business, cloud services, and other business) in an orderly manner, and first do so in Shanghai, Hainan, and other pilot free trade zones[9]. It can be foreseen that with the gradual relaxing of restrictions on foreign investment in value-added telecommunications services, the content of the relevant schedules of specific commitments for services under the RCEP may also be updated, while the regulations for domestic telecommunications regulatory field may also need to be adjusted accordingly so as to implement technical commitments such as regulatory methods, pipeline and pipe network access, international mobile roaming, and flexibility in selecting technologies as listed in the annex to the RCEP for telecommunications services.

Conclusions

In view of the foregoing, the opening commitments under the RCEP on the foreign investment access are basically consistent with China's current domestic laws on the foreign investment access, but the opening commitments for individual industries are different from those in the latest Negative List for Foreign Investment or the regulations of the competent authorities, and even in industries such as e-commerce, wheat seed breeding and production, and commercial vehicle manufacturing, the opening level prescribed by the latest domestic laws is higher than the commitments listed in the RCEP. We expect China to introduce relevant policies for interpretations or make regulatory adjustments on the commitments on RCEP-related market access and commitments on service levels, regulatory transparency, etc., so that the RCEP can be connected and echoed with the current domestic system for the foreign investment access and regulatory system, and we will further share the achievements of China's opening the foreign investment access with the other 14 RCEP contracting states.

[9] For "Economic Recovery and International Cooperation in the Post-COVID-19 Era" at China Development High-level Forum of 2020 on November 11, 2020, please refer to https://dy.163.com/article/FRBD77JR0511D6RL.html for details.

2. Investment Protection toward Globalization — Brief Comments on Substantive Rule Highlights of RCEP's Chapter on Investment

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On November 15, 2020, China concluded the Regional Comprehensive Economic Partnership Agreement ("**RCEP**") with 14 other Asia-Pacific countries, marking the inception of the world's largest free trade zone. RCEP contains an entire chapter on investment (Chapter 10), which is equivalent to a mini-multilateral investment agreement and provides for protection standards commonly seen in investment protection agreements, such as national treatment, most-favored-nations treatment, fair and equitable treatment, and full protection and security treatment. The chapter does not currently provide for any investor-state dispute settlement mechanism, which the signatories will further negotiate within two years of RCEP entering into force. However, compared with China's third-generation investment protection agreements [e.g. *China-Canada Bilateral Investment Treaty (BIT)*] and the *United States-Mexico-Canada Agreement* ("**USMCA**"), the investment protection standards under RCEP's investment chapter contain certain highlights signaling the careful protection of investments as well as a balancing of interests between the investor and the host state. It is anticipated that the entry into force of RCEP will further contribute to the maintenance of a fair, predictable, and stable business environment in China.

Scope of protected investments

RCEP defines "investment" by specifying its characteristics. Under Article 10.1, subpara. (c), these characteristics include the commitment of capital or other resources, expectation of gains or profits, or assumption of risk. These could potentially be factors to consider when a Party reviews whether their activities constitute an investment. Specifically, this subparagraph specifies:

First, rights under contracts may also constitute an investment. Article 10.1, subpara. (c)(iii)—consistent with the definition of investment under the USMCA—makes explicit reference to revenue-sharing contracts, including, *inter alia*, turnkey, construction, management, and production contracts.

It is worth noting that, unlike RCEP, the definition of investment under USMCA comprises "enterprise" *per se*, meaning that an investor is presumed to suffer losses immediately once the assets of an enterprise are expropriated, thus dispensing with the need for the investor to convert the enterprise's loss into a decrease in the value of the enterprise's equity. Article 1 of the *China-Japan-Korea Trilateral Investment Agreement*, concluded in 2012, also provides for enterprises and their branches as a form of investment. In contrast, RCEP makes no such stipulations, only confirming shares as a form of investment without including enterprises *per se*.

Second, as to whether the return on investment constitutes investment, Article 10.1, subpara. (c) of RCEP provides that "*returns that are invested shall be treated as an investment.*" This comes as a subtraction from the *China-Japan-Korea Trilateral Investment Agreement*, which provides that "investment" also covers the amounts yielded by investments, including profits, interest, capital gains, dividends, royalties,

[10] Mr. Haoyang Ma also contributed to this article during his internship with the firm.

and fees, without requiring that such returns be further reinvested.

Third, services may also be entitled to investment protection. Article 10.2, para. 3 of RCEP provides that investment-related services are entitled to protection, *mutatis mutandis*, in accordance with the standard of protection for investments such as the expropriation clause. This provision accords broader protection for investors.

Attribution of conduct of non-governmental bodies

RCEP, on a groundbreaking note, provides for a definition of "*measures by a Party,*" an uncommon move among existing investment treaties. Article 10.1, subpara. (h) lists two types of such measures by a Party. The first refers to measures by the central, regional, or local governments of a Party while the second refers to those by non-governmental bodies in the exercise of powers delegated by such governments. The subparagraph concerns attribution of conduct under international law, whereby conduct of a governmental organ is directly attributable to that state. For non-governmental bodies, Article 5 (which reflects customary international law) of the Articles on Responsibility of States for Internationally Wrongful Acts ("**ARSIWA**")—produced by the International Law Commission—stipulates that conduct of an individual or entities empowered by the law of a state to exercise elements of governmental authority shall be considered as state conduct under international law. RCEP's position on the attribution of conduct of non-governmental bodies is thus consistent with customary international law rules.

Adoption of customary international law standards in the application of fair and equitable treatment ("FET") and full protection and security treatment ("FPS")

Article 10.5, para. 1 of RCEP provides that "*[e]ach Party shall accord to covered investments fair and equitable treatment and full protection and security, in accordance with the customary international law minimum standard of treatment of aliens.*" Customary international law minimum standard of treatment of aliens manifests itself in the third generation Chinese BITs. For example, Article 4 (Minimum Treatment Standard) of the China-Canada BIT of 2012 stipulates that FET and FPS "*do not require treatment in addition to or beyond that which is required by the international law minimum standard of treatment of aliens as evidenced by general State practice accepted as law*," a statement that is also included in RCEP. This means that RCEP does not impose new obligations on the Parties beyond the minimum standard of treatment under customary international law. However, what constitutes the minimum standard of treatment is beyond a single and unified answer[11], but can only be ascertained through a survey of state practices. As a result, the application of FET and FPS will largely depend on "*a general and consistent practice of States that they follow from a sense of legal obligation*[12]," rather than on an interpretation of the text of the agreement by adjudicators. This, to a certain extent, weakens the interpretative authority of the dispute settlement institution that may be established under RCEP in the future.

[11] *ADF Group Inc v United States of America*, ICSID Case No. ARB(AF)/00/1 (NAFTA), Award, January 9, 2003, at para 180.

[12] *See* Annex 10A of the RCEP (Customary International Law).

Detailed rules on expropriation

Expropriation clauses are indispensable to any investment agreement. Article 10.13 of RCEP provides that a Party shall not engage in expropriation or nationalization except for a public purpose, in a non-discriminatory manner, on payments of compensation, and in accordance with due process of law. On top of this, the expropriation provisions of RCEP embrace the two following characteristics.

First, on the payment of compensation, Article 10.13 specifically provides that the amount of compensation "*shall not reflect any change in value occurring because the intended expropriation had become known earlier.*" This fully takes into consideration the possible decrease in the value of the investment by an early announcement of the decision to expropriate, suggesting more careful protection of investors. That said, land is treated somewhat specially, i.e., a host state must act in accordance with its existing laws and regulations when it comes to payment of compensation for land-related expropriation. The consequence is that the standard of compensation for land-related expropriation is to be determined by municipal, rather than international, law. This may be a provision with "ASEAN characteristics." Article 14 of the ASEAN Comprehensive Investment Agreement, concluded by ASEAN members in 2009 contains a similar statement[13]. Nonetheless, Article 10.13 of RCEP, on the other hand, restricts the host state's right to decrease the amount of compensation by unilaterally amending its laws and regulations. In other words, only those amendments that "*follow the general trends in the market value of the land*" shall be followed.

Second, the characteristics of expropriation have been explicitly spelled out. Article 1 of Annex 10B (Expropriation) explicitly provides that "*[a]n action or a series of related actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in a covered investment.*" This indicates that the essence of expropriation is to deprive the investment of its economic value. An act of the host state will not constitute expropriation if it does not cause any decrease in economic value. It is worth noting that such economic value also comprises a "*property interest,*" which may have a profound impact on the data-driven new economy as data obtained or extracted by an enterprise may constitute a protected investment under RCEP. According to footnote 1 to this provision, "property interest" refers to such property interest as may be recognized under the laws and regulations of a Party. Under PRC law, we observe that PRC courts have recognized in one case [(2018) Zhe 8601 Min Chu No.956][14] that data resources obtained through efforts fall within the protected "*proprietary/property interests*" under the *Law against Unfair Competition*. This renders it possible for data owned by investors of other Parties and located in China to be protected under RCEP. Accordingly, Chinese investors—to receive broader protection—should pay attention to whether similar stipulations exist under the laws and

[13] *See* ASEAN Comprehensive Investment Agreement, Article 14, *available at* http://investasean.asean.org/files/upload/Doc%2005%20-%20ACIA.pdf, last visited on November 23, 2020.

[14] In this case, the court held: "the company has proven through evidence that it used publicity to attract distributors to issue their non-public intent to participate on a certain website. The company received the brief participation information and manually conducted deep-level verification and obtained, analyzed, and integrated more participation information. Special labels were added to form more complete participation information in the final processing. The company argues that information relating to single distributors, as contained in the database, when accumulated to a large scale, may become a type of resource, element, or property. The database of distributors in this case the product of the company after long-term business operation, to which significant manpower and resources have been devoted. This constitutes the company's core competitive resource, has commercial significance and value, and should constitute the property interests protected by the Law against Unfair Competition."

regulations of the host state.

Third, explicit rules have been made on indirect expropriation. Article 2 of Annex 10B (Expropriation) refers to "*a series of related actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure,*" which holds fast to the trend of international investment law to regulate indirect expropriation. Reference is made to "creeping expropriation" in investment arbitration practice, with the test being whether the act of the host state has cast a major negative impact on the economic value of the investment or even completely deprives the investment of all its value[15]. An investment arbitral tribunal will also consider the cumulative effect of the acts. If a series of incrementally adopted measures are inter-related and the cumulative effect thereof ultimately has a major negative impact on the economic value of the investment, such measures will also be considered as expropriation[16].

Restrictions on nationality planning of investors

Nationality planning refers to the circumstance where an investor avails itself of the protection under an investment agreement by altering its nationality. For example, a BIT exists between State A and State B, but a company is registered in neither state. The company may establish a subsidiary in State A, through which it makes an investment in State B. The company therefore acquires the identity of an investor of State A, which entitles the company to invoke the BIT between State A and State B. Investment agreements do not generally prohibit nationality planning. However, in *Philip Morris Asia Ltd. v. Australia*, the investor engaged in nationality planning when it was foreseeable that the host state was about to implement intrusive tobacco plain-packaging measures, and instituted arbitration proceedings by reference to the Hong Kong-Australia BIT. The arbitral tribunal deemed such nationality planning to be an abuse of rights[17].

In comparison, Article 10.14 of RCEP directly restricts the entitlement of investors of a non-Party to the investment protection standards under RCEP by altering their nationalities. The article explicitly lists the circumstances whereby a Party may decline to grant benefits under Chapter 10 to a juridical person investor and its investment, including where such a juridical person investor is owned or controlled by persons of a non-Party. This indicates the difficulty for investors of a non-Party to RCEP to obtain protection under RCEP by establishing enterprises in the territories of an RCEP Party, thereby significantly restricting the leeway for investors to engage in nationality planning.

National security exceptions

Article 10.15 of RCEP stipulates the national security exceptions for the investment chapter, providing that a host state may resort to measures to safeguard its essential security interests. Such measures may constitute violations of the standards of protection under the investment chapter. If this provision is

[15] See *CME Czech Republic BV v Czech Republic*, UNCITRAL, Partial Award, September 13, 2001; *Seismograph Service Corp v National Iranian Oil Co*, IUSCT Case No. 443, Award, March 31, 1989.

[16] See *Compañía del Desarrollo de Santa Elena SA v Costa Rica*, ICSID Case No ARB/96/1, Award, February 17, 2000, at para 76.

[17] *Philip Morris Asia Ltd v Australia*, PCA Case No.2012-12, Award on Jurisdiction and Admissibility, December 17, 2015, at paras 586-588.

successfully invoked, the host state would be afforded a viable defense that the act of the state does not constitute a violation of the RCEP provisions. Security exceptions are not uncommon in investment agreements. Such measures typically take the form of non-precluded measures and endow the host state with a self-judging power. This is the case with Article 10.15, which explicitly provides that "*…nothing in this Chapter shall be construed to: … preclude a party from applying measures that it considers necessary for: … the protection of its own essential security interests.*" According to the WTO panel report in *Russia—Measures concerning Traffic in Transit*, language such as "that it considers necessary" by no means denotes that a state can determine with complete discretion as to what constitutes essential security interests. On the contrary, the panel asserted its authority to conduct a review thereon[18]. In particular, the panel held that a state shall act in good faith in making a specific item an essential security interest and shall not use it as a pretext for pursuing purely commercial interests. The restrictive measures that the host state takes shall also bear a minimum level of plausibility to the proffered essential security interest[19]. This case signaled the first time for an international adjudicatory body to make a determination as to issues related to national security, which provides highly valuable reference in applying the essential security interest exception under Article 10.15 of RCEP.

In conclusion, RCEP adopts a strategy of "priority of substance," i.e., to reach an agreement on substantive protective standards and to save for later the negotiation on an investor-state dispute settlement mechanism. Such an arrangement leaves space for formulating remedial measures for investment protection while also showcasing the flexibility and inclusiveness of the agreement.

[18] *Russia—Measures concerning Traffic in Transit*, WT/DSS12/R, Report of the Panel, April 5, 2019, at paras 7.132-7.133. *See* also *Saudi Arabia—Measures concerning the Protection of Intellectual Property Rights*, WT/SD567/R, Report of the Panel, June 16, 2020, which applied the analytical framework adopted in *Russia—Measures concerning Traffic in Transit.*

[19] *Ibid*, at para 7.138.

3. Guarantee or Independent Contract? — The Nature of Keepwell Deeds under PRC Law and Remedies for Breach

Authors: Andy LIAO | Yuxian ZHAO

The Shanghai Financial Court recently recognized a judgment[20] rendered by a Hong Kong court, which has become a widely watched development. The judgment originated from a lawsuit filed by a Hong Kong investment fund against a Shanghai company arising from a keepwell deed the Shanghai company provided for offshore bonds issued by its overseas affiliate. It was also previously reported that in a bankruptcy reorganization case the receiver rejected the creditor claims of certain bondholders that were based on the keepwell deed of a well-known Beijing company, which had offered the deed for bonds issued by its overseas subsidiary. Against this background, the Shanghai court's recognition of this judgment may to some extent alleviate anxiety in the financial industry concerning the effectiveness of keepwell deeds. While there is yet to be a published PRC court judgment addressing the nature and effectiveness of keepwell deeds, this issue and related questions such as foreign bond investors' remedies based on keepwell deeds under PRC law remain a worthwhile topic for discussion.

Legal discussions regarding keepwell deeds mostly focus on the relationship between keepwell deeds and guarantees. The conclusions drawn are highly consistent – a keepwell deed does not constitute a guarantee. In recent years, asset management product defaults have increased and disputes arising from credit enhancements have emerged in quick succession, such as third-party commitments to repay the balance of the agreed proceeds under the asset management products. Third-party credit enhancements are generally not structured as guarantees, given the unique legal structure of asset management products and the fear that the authorities could deem such products as guaranteeing principal and return on investment (which is prohibited by law). As such, PRC courts have generally viewed these arrangements as independent contracts as opposed to guarantees. Relevant judicial rulings concerning independent contracts are reflected in the Minutes of the National Court Work Conference for Civil and Commercial Trials ("**Ninth Civil and Commercial Minutes**")[21], a highly authoritative guideline on judicial practice. In light of this, it is necessary to reexamine – from the perspective of independent contracts – the nature and effectiveness of the keepwell deed and judicial remedies available to foreign bondholders in China.

In sum, a keepwell deed, as a third-party credit enhancement, may be recognized as an independent contract under PRC law. Where bonds mature or are declared mature and the party providing the keepwell deed ("**Keepwell Party**") fails to perform under the deed, the bondholders – if not fully paid – may directly request the Keepwell Party to compensate for the bondholders' resulting losses (by way of

[20] [2019] Hu 74 Ren Gang No. 1.

[21] See Article 91 of the Ninth Civil and Commercial Minutes. "[Nature of Credit Enhancement Documents] Where the parties concerned which are not under a trust contract provide similar undertaking documents such as the third party making up the balance of repayment, performance of matured buyback obligations on behalf, liquidity support, etc. as credit enhancement measures, and the contents thereof comply with the provisions of the laws on guarantees, the People's Court shall rule that a guarantee contract relationship is concluded between the parties concerned. If their contents do not meet the requirements of a guarantee, the corresponding relationship of rights and obligations shall be determined in light of the specific contents of the commitment documents, and the corresponding civil liabilities shall be determined in light of the facts of the case."

making up the balance of repayment), or commence a subrogation action against the Keepwell Party, demanding it to pay the bondholders the amount it should have paid to the issuer/guarantor for breach of the deed.

What a keepwell deed is and why it exists

Keepwell deeds generally refer to a type of credit enhancement document that PRC companies provide for the issuance of offshore bonds. A keepwell deed is generally signed jointly by the PRC company, the bond issuer, the guarantor, and the trustee (see Figure 1 for a typical bond issuance structure involving keepwell deeds). Such deeds typically stipulate, among other things, that the PRC company undertakes to procure that the issuer and the guarantor have adequate liquidity to repay the bonds upon maturity and that they maintain a certain level of net assets. Many keepwell deeds are also accompanied by an equity interest purchase undertaking (EIPU)[22] or the undertaking of liquidity support[23]. Keepwell deeds often express that they "shall not be deemed a guarantee."

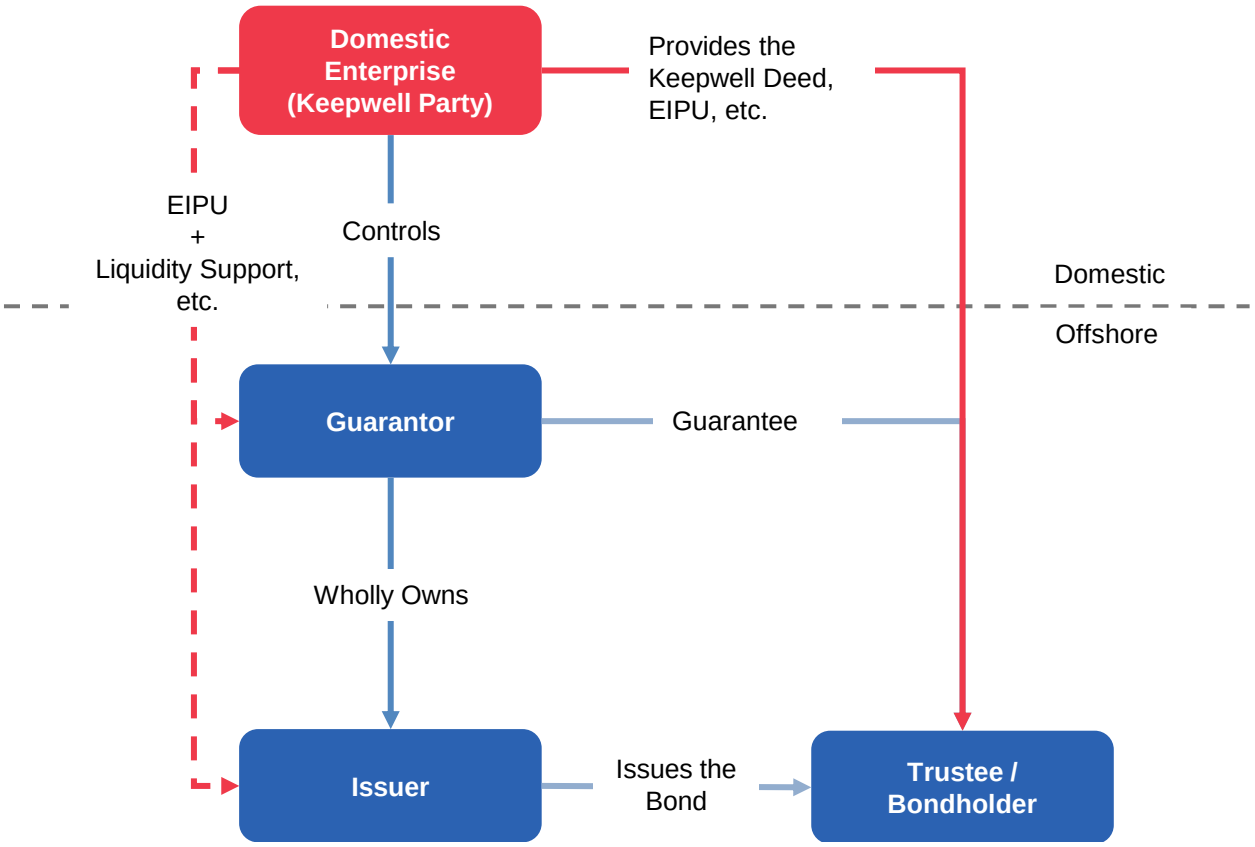

Figure 1: Typical bond issuance structure involving keepwell deeds

It is generally believed that keepwell deeds began to be adopted for offshore bond issuances in 2012 to bypass certain limitations PRC companies confronted when attempting to directly issue or guarantee

[22] It is generally stipulated that the Keepwell Party undertakes to purchase the equity of the issuer or the guarantor's subsidiary in order to provide the issuer or the guarantor with sufficient capital to repay the bond when the issuer and guarantor default.

[23] It is generally stipulated that the Keepwell Party undertakes to provide loans and other support to the issuer or the guarantor to repay the bond when the issuer and the guarantor defaults.

bonds in offshore markets. Previously, when PRC companies wished to directly issue bonds in offshore markets, they had to obtain potentially burdensome approvals from the National Development and Reform Commission ("**NDRC**") and even the State Council[24]. If an issuer wished to otherwise "indirectly" issue offshore bonds, i.e., guaranteeing bonds issued by their offshore subsidiaries, they would have to complete registration formalities with the State Administration of Foreign Exchange ("**SAFE**") and satisfy corresponding regulatory requirements. Moreover, funds raised by their subsidiaries in this way could not be remitted back to the PRC companies/guarantors but instead could only be used for overseas projects in which they had equity interests[25]. By contrast, keepwell deeds provided by PRC companies are not subject to NDRC or SAFE supervision[26] and can thus pave the way for conducting offshore financing. For this reason, PRC companies have widely adopted keepwell deeds in offshore bond issuances.

Viewing keepwell deeds as guarantees

Our research of public sources has not revealed any decision in which a PRC court ruled on the nature or effectiveness of a keepwell deed. That said, disputes over other credit enhancements are not uncommon. PRC court rulings on such enhancements may still suggest their view as to whether keepwell deeds constitute guarantees.

Under PRC law, a guarantee refers to a guarantor's promise to a creditor to assume the debtor's obligation and liability when the debtor defaults. On this basis, a guarantee must "attach" to a principal debt; by performing a guarantee, the guarantor is effectively performing the debtor's obligation to the creditor with respect to the debt. Any commitment without this characteristic does not constitute a guarantee. In determining whether a commitment constitutes a guarantee, a court will look to the wording of the commitment and see whether it explicitly demonstrates a party's intent to perform the debtor's obligation in the case of default.

In the case [2004] Min Si Zhong Zi No. 5 (which the Supreme People's Court (the "**SPC**") has compiled into its gazette, a non-binding but highly persuasive authority), the SPC maintained that where a third party unrelated to the loan agreement issued a letter of commitment to the creditor without clearly stating it would guarantee repayment, the letter of commitment would not be deemed a guarantee under the PRC Guaranty Law. In [2014] Min Si Zhong Zi No. 37, concerning a guarantee contract dispute, the SPC denied that the letter of commitment at issue satisfied the requirements of a guarantee under Article 6 of the PRC Guaranty Law, as the Government of Liaoning Province issued that document without expressing an intent to satisfy the debts of the debtor. The government instead stated only that it would provide

[24] See Article 2 of the Notice of the National Development and Reform Commission on Matters concerning Issuance of RMB Bonds by Domestic Non-financial Institutions in the Hong Kong Special Administrative Region, Fa Gai Wai Zi No. [2012]1162（国家发展改革委关于境内非金融机构赴香港特别行政区发行人民币债券有关事项的通知，发改外资[2012]1162号）; Article 2(2) of the Circular of the General Office of the State Council on Issuing the Proposals of the State Development Planning Commission and the People's Bank of China on Enhancing the Administration of the Issuing of Bonds on Overseas Markets, Guo Ban Fa No. [2000]23（国务院办公厅转发国家计委、人民银行关于进一步加强对外发债管理意见的通知，国办发[2000]23 号）.

[25] See Article 11 of the Provisions on Foreign Exchange Administration for Cross-border Guarantees, Hui Fa No. [2014]29（跨境担保外汇管理规定，汇发[2014]29 号）.

[26] See Part 4, Article 5 of Operational Guidelines for Foreign Exchange Administration of Cross-border Guarantees, Hui Fa No. [2014]29（跨境担保外汇管理操作指引，汇发[2014]29 号）.

"*assistance*" in repayment of the debts. In [2011] Min Shen Zi No. 1412, concerning a guarantee contract dispute, the Guangzhou Bureau of Foreign Trade and Economic Cooperation issued a letter of commitment to overseas creditors. The SPC held that the letter of commitment did not constitute a guarantee as it did not specify the bureau's intent to guarantee payment of the loan by the debtor. Instead, the document merely stated the bureau's commitment to urge the debtor to faithfully and timely repay the principal and interest on the loans, and to resolve problems and prevent creditors from suffering economic losses if the debtor defaulted on its obligations.

Given the above, whether a keepwell deed constitutes a guarantee ultimately depends on whether the deed manifests an express intent to perform the issuer's obligations. PRC courts are not likely to treat keepwell deeds as guarantees under the PRC Guaranty Law, considering that the Keepwell Party's commitment is generally not to repay the bonds for the issuer/guarantor but rather to maintain the issuer/guarantor's capability to repay such bonds, and that a keepwell deed usually states that it "shall not be deemed a guarantee[27]."

Keepwell deeds as independent contracts

While not being regarded as guarantees by PRC courts, keepwell deeds nonetheless do not constitute ordinary comfort letters or merely impose non-binding moral obligations on the Keepwell Party.

A typical keepwell deed usually states that it "shall not be deemed a guarantee." However, it also usually requires the Keepwell Party to perform certain seemingly binding obligations. Take for example the keepwell deed in the offering circular of a USD bond – the Keepwell Party's undertakings include but are not limited to holding a certain proportion of shares of the issuer and the guarantor and maintaining the net worth of the issuer and the guarantor as well as their liquidity and solvency[28]. Other keepwell deeds for USD bonds contain similar provisions[29]. In light of this, the assertion that a keepwell deed merely imposes non-binding moral obligations on the Keepwell Party contradicts the principle of interpreting a contract based on its plain wording.

Article 91 of the Ninth Civil and Commercial Trial Minutes further indicates that a credit enhancement could be binding even where it does "*not meet the requirements of a guarantee*." Courts must still determine the rights and obligations of the parties based on the wordings of the documents. In respect of keepwell deeds, courts must determine the rights and obligations of the Keepwell Party and the counterparty based on the content of the keepwell deed. When doing so, reference could be made to prior judicial decisions

[27] The USD Bond CEFCIG 5.950% 25Nov2018 contains a description of the keepwell deed in the offering circular that includes "[t]he Keepwell Deed is not, and nothing therein contained and nothing done pursuant thereto by the Company shall be deemed to constitute, a guarantee by the Company of the payment of any obligation, responsibilities, indebtedness or liability, of any kind or character whatsoever, of the Issuer or the Guarantor under the laws of any jurisdiction."

[28] See https://www.bondsupermart.com/main/file-depository/download-file?paramCategory=bondDocument&paramDocumentNo=3572, last accessed on November 17, 2020.

[29] For example, GRNCH 5.650% 13Jul2025 (link: https://www.bondsupermart.com/main/file-depository/download-file?paramCategory=bondDocument&paramDocumentNo=4996, last accessed on November 17, 2020); CCBL 1.990% 21Jul2025 (link: https://www.bondsupermart.com/main/file-depository/download-file?paramCategory=bondDocument&paramDocumentNo=4970, last accessed on November 17, 2020); GUAMET 1.507% 17Sep2025 (link: https://www.bondsupermart.com/main/file-depository/download-file?paramCategory=bondDocument&paramDocumentNo=5174, last accessed on November 17, 2020).

on asset management disputes, in which courts have frequently ruled that a "*commitment to make up the balance of repayment constitutes an independent contract.*" A typical form of such a commitment usually provides that a third party often promises to pay the investor the difference between the amount the investor should have received and that which it actually received.

Prior judicial decisions on such commitments reveal that creditors were entitled to request the promisor to make up the balance of repayment when the creditors were not fully paid upon the automatic or declared maturity of the bonds. Depending on its content, courts may deem such a commitment a guarantee, an accession to indebtedness (meaning that a third party to the contract actively assumes a party's contractual obligations jointly with that party), or an independent contract. If a commitment explicitly manifests the promisor's intent to guarantee the loan and the commitment meets the requirements of a guarantee, it is likely to be deemed a guarantee. The court may also deem the commitment to be a guarantee where such intent is not explicitly demonstrated but the commitment is made for the debtor's interest. By contrast, if the commitment is not made for the debtor's interest, the court may find it constitutes an accession to indebtedness to the extent of the balance of repayment. Where the content of the "commitment to make up the balance of repayment" is not identical to but only in parallel with the debtor's obligation under the contract, such commitment may be deemed an independent contract.

For instance, in [2018] Zui Gao Fa Min Zhong No. 127, concerning a contract dispute, the plaintiff had entered into an asset purchase agreement with the purchaser on the transfer to the purchaser of shares in the target company. Pursuant to the agreement, the purchaser was to pay the plaintiff a bonus if the target company achieved a performance commitment. At the same time, the defendant issued a letter of commitment to the plaintiff, setting forth that if the target company failed to achieve the performance commitment and rendered the plaintiff unable to receive the bonus, the defendant would pay an amount to the plaintiff equivalent to that of the bonus. The SPC found that the obligations under the letter of commitment were parallel to, rather than attached to, those under the asset purchase agreement. Therefore, when the payment condition under the letter of commitment was triggered (i.e., the target company's performance failed to reach the committed level), the defendant (the promisor) was obligated to pay the unreceived bonus to the plaintiff.

Another example is [2019] Zui Gao Fa Min Zhong No. 1524, which concerned a commercial trust dispute. In this case, natural person A granted a loan to company B in the name of a trust. A and the controller of B entered into an agreement on making-up the balance of repayment and transfer of beneficiary rights. Under this agreement, should B fail to fully perform its payment obligations, the controller is obliged to pay A the balance of the trust principal in conjunction with 13% annualized interest and to purchase from A the corresponding trust beneficiary rights. The SPC found that the controller's obligations under this Agreement did not guarantee the debts of B. Instead, the agreement was an independent and effective contract that manifested the genuine intent of the parties and complied with mandatory provisions of law. Therefore, the controller was obligated to make up the aforesaid balance and purchase the trust beneficiary rights from A.

Keepwell deeds could be regarded as "commitments to make up the balance of repayment" to bondholders, the issuer, or the guarantor. Such deeds were devised to help PRC companies raise funds overseas by bypassing certain domestic regulations and restrictions. They provide for Keepwell Parties' commitment

to maintaining the liquidity and solvency of its overseas subsidiaries serving as issuers or guarantors, so that bondholders can receive the balance of payments due that issuers/guarantors are unable to repay on their own. This is similar to a "commitment to make up the balance of repayment" discussed above. Given the aforementioned judicial decisions, keepwell deeds are likely to be deemed independent contracts as they neither directly require Keepwell Parties to make payments to bondholders nor manifest the intent of Keepwell Parties to repay bonds for issuers/guarantors.

Remedies bondholders may obtain from PRC courts

Given that PRC courts may treat keepwell deeds as independent contracts, bondholders can pursue the following court remedies when an issuer/guarantor defaults and the Keepwell Party also fails to perform its obligations under the keepwell deed. First, bondholders can request the court to terminate the bond subscription/issuance agreement as well as the keepwell deed and to hold the issuer, the guarantor, and the Keepwell Party jointly and severally liable for the bondholders' losses. Second, bondholders can also commence a subrogation action against the Keepwell Party, demanding it to pay the amount it should have paid to the issuer/guarantor for breach of the deed.

1. **Request the issuer, the guarantor, and the Keepwell Party to jointly and severally compensate for the bondholders' losses**

   This remedy derives from Keepwell Parties' obligations owed to bondholders. As mentioned above, a keepwell deed is usually signed jointly by the trustee (on behalf of the bondholders), the issuer, the guarantor, and the Keepwell Party. Also, an offering circular may set out that bond issuance documents including the trust deed and the keepwell deed apply to bondholders, which makes each bondholder a party to those documents.

   Although Keepwell Parties' commitments typically target issuers and guarantors (for example, the provision of liquidity support), they are actually made and performed for the benefit of bondholders. Thus, bondholders should be the counterparties of these commitments. If an issuer/guarantor defaults and the Keepwell Party fails to fulfill its commitments, bondholders may directly request the issuer, the guarantor, and the Keepwell Party to jointly and severally compensate the bondholders' losses resulting from their breach. The amount of losses should be equivalent to the balance of the principal and interest to be received by the bondholders[30].

   It is worth noting that the legal basis for the issuer, the guarantor, and the Keepwell Party to bear liability in this manner is not a joint-and-several guarantee (as discussed above, a keepwell deed is not generally deemed a guarantee). In PRC judicial practice, this kind of joint and several liability is usually called "disguised joint and several liability." It means – according to prior SPC decisions – each of the multiple debtors is required to fully perform similar obligations due to *different* reasons and

[30] For example, the offering circular for USD bonds CHMINV 3.800% 02 Aug2021. "Noteholders (as defined below) and the holders of the related interest coupons, if any, (the "Couponholders" and the "Coupons", respectively) are bound by, and are deemed to have notice of, all the provisions of the Trust Deed, the relevant Deed(s) of Guarantee, the Keepwell and Liquidity Support Deed, the Deed of Equity Interest Purchase Undertaking and the Agency Agreement applicable to them." (link: https://www.bondsupermart.com/main/file-depository/download-file?paramCategory=bondDocument&paramDocumentNo=1649, last accessed on November 17, 2020).

such obligations would be wholly extinguished by any of the debtors' full performance[31]. Under this theory, each debtor becomes liable for its own– as opposed to someone else's – breach. The creditor has *independent* claims against each of the debtors. When an issuer/guarantor defaults and the Keepwell Party meanwhile breaches the keepwell deed, bondholders would have separate claims for losses against the issuer/guarantor based on bonds and against the Keepwell Party based on the deed. The total amount of such claims would be equivalent to the balance of the principal and interest to be received by the bondholders. Thus, the issuer, the guarantor, and the Keepwell Party are not genuinely severally and jointly liable to the bondholders as each of their breach has to be established, as opposed to a genuine joint and several liability under which only one party's breach has to be established. In other words, the issuer, the guarantor, and the Keepwell Party's bearing of liability in this manner has only the pretext (and not the nature) of joint and several liability.

2. Initiate a subrogation action against the Keepwell Party

This remedy derives from the Keepwell Parties' obligations owed to the issuers/guarantors. When an issuer/guarantor defaults, bondholders would have a claim to demand repayment of the bond principal and interest. In the meantime, as the Keepwell Party had failed to perform under the keepwell deed, the issuer/guarantor would also be entitled to request the Keepwell Party to, among other things, provide liquidity support and/or inject capital to the issuer/guarantor.

Under the PRC Contract Law[32] and its judicial interpretation[33], if an issuer/guarantor fails to pursue its claims against the Keepwell Party, bondholders could directly claim against the Keepwell Party on behalf of the issuer/guarantor, requesting the Keepwell Party to pay the bondholders the amount the Keepwell Party should have paid to the issuer/guarantor due to breach of the keepwell deed. In particular, merely giving notice to the Keepwell Party to perform its obligations is not sufficient for the issuer/guarantor to avoid triggering the bondholders' right of subrogation. Instead, the issuer/guarantor must at least initiate litigation or arbitration against the Keepwell Party. Moreover, in a subrogation action, the Keepwell Party will bear the burden of proving that the issuer/guarantor has actively pursued its claim against the Keepwell Party[34]. If the Keepwell Party is in bankruptcy proceedings, the bondholders may also declare their subrogation claims to the receiver (depending on the probability of success in the subrogation action).

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[31] See, for example, [2014] Min Min Zhong Zi No.266; [2014] Min Shen Zi No.1589.

[32] Article 73 of the Contract Law reads, "[i]f a debtor causes losses to the creditor concerned by being indolent in exercising its matured claims, the creditor may apply to the competent people's court to subrogate the debtor to exercise the latter's claims under the creditor's name, except for claims that belong exclusively to the debtor."

[33] Article 11 of the Interpretation I of the Supreme People's Court on Several Issues concerning the Application of the Contract Law of the People's Republic of China sets forth that, "[w]here a creditor is to institute an action of subrogation pursuant to Article 73 of the Contract Law, the following requirements shall be satisfied: (1) The creditor's right against a debtor is lawful; (2) A debtor's indolence to exercise the matured claims as a creditor harms the creditor's interest; (3) The creditor's claims are matured; and (4) A debtor's right as a creditor is not a creditor's right exclusive to the debtor."

[34] Article 13 of the Interpretation I of the Supreme People's Court on Several Issues concerning the Application of the Contract Law of the People's Republic of China sets forth that, "[f]or the purposes of Article 73 of the Contract Law, the provision 'a debtor causes losses to the creditor concerned by being indolent in exercising its matured claims' shall mean that a debtor neither performs the debtor's due obligation toward a creditor nor asserts against its debtor a matured claim which involves the payment of money either through a lawsuit or through arbitration, thereby frustrating the realization of the creditor's due right. Where the secondary debtor (i.e. the debtor of the original debtor) denies the existence of the original debtor's indolence to exercise the matured claims, the secondary debtor shall bear the burden of proof."

Obstacles caused by forum selection clauses and solutions

In practice, the dispute resolution clause of a keepwell deed typically provides for the exclusive jurisdiction of overseas courts (such as courts of Hong Kong or the United Kingdom). When bondholders wish to seek damages from the Keepwell Party, they must first obtain a favorable judgment rendered by the overseas court, then apply to a competent PRC court for recognition and enforcement of the judgment against the Keepwell Party. If the keepwell deed provides for the exclusive jurisdiction of a UK court, it would be difficult for bondholders to enforce such a judgment before PRC courts due to the lack of a treaty or a precedent on mutual recognition of civil judgments between China and the United Kingdom.

That said, if the Keepwell Party has entered bankruptcy proceedings, claims against the Keepwell Party – whether for direct damages or a subrogation – should be filed with the court before which the bankruptcy proceedings are conducted, regardless of the forum selection clause[35]. In such case, the bondholders may under such circumstance obtain meaningful and enforceable remedies from the court in charge of the bankruptcy proceedings despite the forum selection clause granting exclusive jurisdiction to the UK court.

If the Keepwell Party does not enter bankruptcy proceedings, bondholders subject to such a forum selection clause may consider a subrogation action as the preferred option, because judicial interpretations provide that a subrogation action is subject to the jurisdiction of the court at the defendant's domicile[36]. Such a provision would prevail over the forum selection clause between the parties[37].

[35] Article 21 of the Enterprise Bankruptcy Law of the People's Republic of China sets forth that, "[a]fter the people's court accepts a petition for bankruptcy, civil actions concerning the debtor may only be brought in the people's court that accepts the petition for bankruptcy." See also [2020] Ji Min Zhong No. 659.

[36] Article 14 of the Interpretation I of the Supreme People's Court on Several Issues concerning the Application of the Contract Law of the People's Republic of China sets forth that, "[w]here a creditor institutes an action of subrogation pursuant to Article 73 of the Contract Law, the action shall be under the jurisdiction of the people's court of the place where the defendant is domiciled."

[37] See [2018] Zui Gao Fa Min Xia Zhong No.107. The Supreme People's Court held that the court's jurisdiction over the subrogation action against the creditor is a special kind of territorial jurisdiction provided by judicial interpretations, and its effect prevails the agreement between the parties.

4. Expansion Greenlighted for Certain R/QFII Investment Products

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Around one month ago, the China Securities Regulatory Commission (**CSRC**), the People's Bank of China (**PBoC**) and the State Administration of Foreign Exchange (**SAFE**) promulgated the combined R/QFII rules and expanded the investment scope of R/QFIIs to allow them to trade exchange-traded bond repos, depository receipts, NEEQ-listed securities, financial futures, commodity futures, options, etc., and to engage in margin trading and securities lending with China Securities Finance Corporation Limited (**CSF**). On 30 October 2020, mainland Chinese exchanges and other financial market infrastructures published relevant implementing rules two days in advance of the effectiveness of the combined R/QFII rules. These implementing rules detail some of the expanded investment products (i.e., depository receipts, NEEQ-listed securities, securities lending with CSF) and elaborate on relevant trading, settlement and monitoring arrangements. There is, however, no indication when other expanded investment products will become available.

Today is the first trading day after the new R/QFII rules came into effect, and foreign investors have already responded. China International Capital Corporation Limited (**CICC**) announced this morning that it had placed the first QFII market order for securities lending with CSF at 9:15 AM.[38]

We set out below a matrix of the detailed implementing rules issued by the relevant financial market infrastructures.

Financial Market Infrastructure	Notice/Rules	Highlights
Shanghai Stock Exchange (**SSE**)	■ *Guidelines No.1 on the Application of Securities Trading Rules of the SSE for Qualified Foreign Institutional Investors and RMB Qualified Foreign Institutional Investors* (《上海证券交易所证券交易规则适用指引第1号——合格境外机构投资者和人民币合格境外机构投资者》)[39] ■ *Business Guidelines of the SSE No.1 on Filing of Qualified Foreign Institutional Investors* (《上海证券交易所证券交易业务指南第1号——合格境外投资者证券投资业务信息报送》)[40]	■ Expands investment scope: R/QFIIs can invest in depository receipts, stock options, government-backed bonds, etc. and participate in margin trading, securities lending with CSF and bond repos ■ Lowers from 26% to 24% the disclosure threshold for A-shares of a listed company collectively held by foreign investors ■ Clarifies availability of negotiated transfers of listed shares and non-trade securities transfers[41] ■ Launch of stock options and bond repos subject to CSRC's further approval
Shenzhen Stock	*SZSE Implementing Rules on Securities*	Similar to the SSE's revisions[43]

[38] Please see the CICC press release at https://www.cicc.com/cmscontent/91150.html (Chinese).

[39] The SSE rule application guidelines are available at http://www.sse.com.cn/lawandrules/sserules/main/trading/universal/c/c_20201030_5250860.shtml (Chinese).

[40] The SSE filing guidelines are available at http://www.sse.com.cn/lawandrules/guide/jyznlc/jyzn/c/c_20201030_5250953.shtml (Chinese).

[41] Please see the SSE press release at http://www.sse.com.cn/aboutus/mediacenter/hotandd/c/c_20201030_5250820.shtml (Chinese) and http://english.sse.com.cn/news/newsrelease/c/5251119.shtml (English).

[43] Please see the SZSE press release at http://www.szse.cn/aboutus/trends/news/t20201030_582827.html (Chinese).

Financial Market Infrastructure	Notice/Rules	Highlights
Exchange (**SZSE**)	*Trading of Qualified Foreign Institutional Investors and RMB Qualified Foreign Institutional Investors (2020 Version)* (《深圳证券交易所合格境外机构投资者和人民币合格境外机构投资者证券交易实施细则（2020年修订)》）[42]	
China Financial Futures Exchange (**CFFEX**)	*Notice on Participation of Qualified Foreign Institutional Investors and RMB Qualified Foreign Institutional Investors in Stock Index Futures Trading* (《关于合格境外机构投资者和人民币合格境外机构投资者参与股指期货交易有关事项的通知》)[44]	Allows R/QFIIs to trade stock index futures for hedging purposes, the same as previous permissible product and trading patterns under the QFII stock index futures trading guidelines issued by CSRC in 2011 (invalidated on 1 November 2020)[45]
National Equities Exchange and Quotations (**NEEQ**)	■ *NEEQ Implementing Rules on Securities Trading of Qualified Foreign Institutional Investors and RMB Qualified Foreign Institutional Investors* (《全国中小企业股份转让系统合格境外机构投资者和人民币合格境外机构投资者证券交易实施细则》)[46] ■ *NEEQ Filing Guidelines for Qualified Foreign Institutional Investors and RMB Qualified Foreign Institutional Investors* (《全国中小企业股份转让系统合格境外机构投资者和人民币合格境外机构投资者信息报备指南》)[47]	Allows R/QFIIs to trade stocks and bonds listed and traded on NEEQ and to participate in their initial offerings through securities brokers registered with NEEQ[48]
China Securities Depository and Clearing Corporation Limited (**CSDCC**)	■ *Notice on Launch of the Relevant Services under the New R/QFII Registration and Settlement Regime* (《关于QFII、RQFII登记结算制度改革相关业务上线安排的通知》)[49] ■ *Implementing Rules on Registration and Settlement of Domestic Securities Investment by Qualified Foreign Institutional Investors and RMB Qualified Foreign Institutional Investors* (《合格境外机构投资者和人民币合格境外机构投资者境内证券投资登记结算业务实施细则》)[50] ■ *CSDCC Beijing Branch Guidelines on Registration and Settlement of Domestic*	■ NEEQ registration and settlement services launched from 1 November 2020, margin trading and stock options services to be launched upon completion of market development and testing ■ Clarifies specific circumstances and rules for non-trade transfer ■ Expands scope of clearing participants to banks and securities companies[52]

[42] The SZSE implementing rules are available at http://www.szse.cn/disclosure/notice/t20201030_582824.html (Chinese).

[44] The CFFEX notice is available at http://www.cffex.com.cn/jystz/20201030/24790.html (Chinese) and http://www.cffex.com.cn/en_new/ExchangeNews/20201030/24791.html (English).

[45] Please see the CFFEX press release at http://www.cffex.com.cn/jysdt/20201030/24792.html (Chinese).

[46] The NEEQ implementing rules are available at http://www.neeq.com.cn/important_news/200009280.html (Chinese).

[47] The NEEQ filing guidelines are available at http://www.neeq.com.cn/important_news/200009278.html (Chinese).

[48] Please see the NEEQ press release at http://www.neeq.com.cn/important_news/200009282.html (Chinese).

[49] The CSDCC notice is available at http://www.chinaclear.cn/zdjs/gszb/202010/59baa1c8eab0423891815cc34b153d00.shtml (Chinese).

[50] The CSDCC implementing rules are available at http://www.chinaclear.cn/zdjs/editor_file/20201030183705568.pdf (Chinese).

[52] Please see the CSDCC press release at http://www.chinaclear.cn/zdjs/xgsdt/202010/073c265cf8104c778667ef1a77b7ed0a.shtml (Chinese).

Financial Market Infrastructure	Notice/Rules	Highlights
	Securities Investment by Qualified Foreign Institutional Investors and RMB Qualified Foreign Institutional Investors (《中国证券登记结算有限责任公司北京分公司合格境外机构投资者和人民币合格境外机构投资者境内证券投资登记结算业务指南》)[51]	
China Securities Finance Corporation Limited (**CSF**)	*Notice on Application by Qualified Foreign Institutional Investors and RMB Foreign Institutional Investors for Securities Lending with CSF* (《关于合格境外机构投资者和人民币合格境外机构投资者申请参与转融通证券出借有关事项的通知》)[53]	Allows R/QFIIs to engage in securities lending with CSF through custodian settlement arrangements or broker settlement arrangements in accordance with the notice

Based on the implementing details above, we set out below a checklist for the major types of newly opened investment products to show their availability status:

Investment Scope	Availability Status
Exchange-traded depository receipts	√
Exchange-traded bond repos	subject to CSRC's further approval
NEEQ-listed shares and other securities	√
CFFEX-listed financial futures	stock index futures for hedging purposes √ treasury bond futures – unknown
Exchange-traded commodity futures	subject to CSRC's further approval
Exchange-traded options	stock options are subject to CSRC's further approval
Margin trading	subject to market development and testing
Securities lending with CSF	√

As the checklist above illustrates, only some of the newly expanded investment products will be available upon the effectiveness of the new R/QFII rules. Bond repos, stock options and margin trading will become available at a later stage. There is still no clear sign as to the availability of products and trading of other financial futures (e.g., treasury bond futures), commodity futures and options.

Apart from clarifying available investment products, the financial market infrastructures have also specified detailed trading and monitoring arrangements to further facilitate R/QFII investments, such as non-trade transfers, simplifying information reporting procedures, removing the limit on the number of securities brokers, etc. We believe the new R/QFII scheme shows encouraging beginnings and foreign investors should keep a close eye on further developments for those items that are still pending.

[51] The CSDCC Beijing branch guidelines are available at http://www.chinaclear.cn/zdjs/editor_file/20201030165607914.pdf (Chinese).

[53] The CSF notice is available at http://www.csf.com.cn/publish/main/1009/1010/20201030175735698195162/index.html (Chinese).

Important Announcement

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