



ARE KEEPWELL DEEDS
KEEPING WELL?

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INTRODUCTION

Keepwell deeds are typically executed by parent companies incorporated in the PRC [For the purpose of this article, “PRC” or “mainland China” means the People’s Republic of China other than Hong Kong and Macau Administrative Regions and Taiwan.] as credit enhancement for the financings of its offshore subsidiaries (see diagram), initially through bond issuances and more recently in loan transactions too.

Creditors take comfort from the undertakings of the keepwell providers that they will maintain the financial well-being of the relevant offshore debtor subsidiaries.

Keepwell deeds typically include undertakings requiring the keepwell provider to maintain the net worth of the offshore debtor, to provide it with liquidity to repay debts, and to maintain management control and ownership of such offshore debtor. Some of these undertakings are subject to the condition that the relevant governmental approvals to transfer funds out of the PRC are obtained, and the keepwell provider must use its best efforts to obtain such approvals. Keepwell providers usually execute, in addition to keepwell deeds, equity interest purchase undertakings (“EIPU”) pursuant to which a keepwell provider undertakes to purchase equity interest of its relevant offshore debt subsidiaries so as to transfer funds (i.e. the purchase consideration) out of the PRC.

Major differences between a keepwell deed and a guarantee

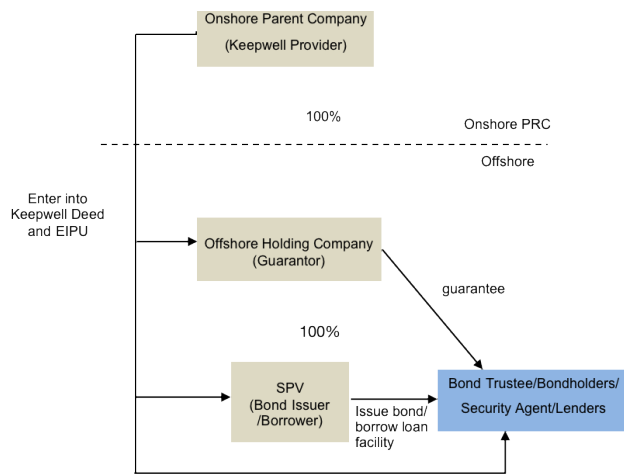
Keepwell deeds and guarantees are different in the following critical aspects:

	Guarantee	Keepwell deed
Obligations of grantor	To ensure performance by the debtor of its obligations, failing which it shall perform itself	To procure that the debtor has sufficient liquidity to repay the underlying debt, by providing loans and/or making capital contributions to, and/or purchasing equity interests from, the debtor
Trigger of performance of obligations	Failure to perform obligations relating to underlying debt by the debtor	Certain liquidity and solvency events
Creditor’s claim	Direct debt claim against the guarantor	Claim of breach of contract against the keepwell provider for failing to perform its obligations under the keepwell deed
PRC foreign exchange related registration requirement	Yes. Neibaowaidai registration with the State Administration of Foreign Exchange of the PRC	No
Additional conditions	Not applicable	Grantor’s obligations may be subject to obtaining the relevant approvals to remit funds from the PRC

1. For the purpose of this article, “PRC” or “mainland China” means the People’s Republic of China other than Hong Kong and Macau Administrative Regions and Taiwan.

The diagram below illustrates a typical transaction structure where a keepwell deed is provided.

Diagram of a typical loan/bond structure with keepwell and EIPU



The validity and enforceability of keepwell deeds have recently been tested in three Hong Kong court cases, namely, the CEFC case² (“**CEFC**”), the Peking Founder case³ (“Peking Founder”), and the Tsinghua Unigroup case⁴ (“Tsinghua”). While these cases involve keepwell deeds in the context of offshore bond issuances, the principles established in the rulings should be applicable to loan transactions too.

This article sets out the key facts and features of the three court cases and discusses the key issues and takeaways for loan market participants.

Our summary and discussions of the three court cases in this article are solely based on information publicly available.

2. Re The Joint And Several Liquidators Of CEFC Shanghai International Group Limited (In Liquidation In The Mainland Of The People’s Republic Of China [2020] HKCFI 167. Judgment available at: https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=126607&QS=%24%28cefc%29&TP=JU
3. [2023] HKCFI 1350: four related actions heard together against the Defendant, Peking University Founder Group Company Limited. Judgment available at: https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=152651&QS=%2B&TP=JU
4. Citicorp International Limited v Tsinghua Unigroup Co. Ltd [2023] HKCFI 1572. Judgment available at: https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=153235&QS=%24%28Tsinghua%29&TP=JU



THE FACTS AND THE DECISIONS

(1) CEFC

Timeline

Oct 2017	●	CEFC provided a keepwell deed in favour of the bondholders of CEFC Issuer, an offshore subsidiary of CEFC
Aug 2018	●	CEFC Issuer defaulted, and one bondholder obtained a default judgment in the Hong Kong court against CEFC
May 2019	●	The bondholder applied to Shanghai Financial Court for the recognition of the default judgment made by the Hong Kong court
Aug 2019	●	The bondholder obtained a garnishee order nisi from the Hong Kong court
Nov 2019	●	Shanghai No. 3 Intermediate People's Court wound up CEFC and appointed mainland administrators
Dec 2019	●	The administrators of CEFC made an application to the Hong Kong courts for recognition and assistance regarding the insolvency proceedings in the PRC. The Shanghai No. 3 Intermediate People's Court issued a letter of request
Jan 2020	●	Hong Kong court recognised the insolvency proceedings in the mainland and stayed the garnishee order nisi
May 2020	●	Shanghai Financial Court recognised the default judgment in Hong Kong under the Arrangement of the Supreme People's Court between the Mainland and the Hong Kong Special Administrative Region on Reciprocal Recognition and Enforcement of the Decisions of Civil and Commercial Cases under Consensual Jurisdiction

Facts

CEFC Shanghai International Group Limited ("CEFC") provided a keepwell deed in connection with the issuance of bonds by its offshore subsidiary ("CEFC Issuer"). CEFC Issuer defaulted. Right Time Global Investment SPC - Right Time Value Investment Fund SP as bondholder sued CEFC for its breach of obligations under the keepwell deed but CEFC did not appear in court.

In November 2019, CEFC entered into insolvency proceedings in mainland China, and Shanghai No. 3 Intermediate People's Court appointed the administrators. The administrators applied to the Hong Kong court for recognition and assistance in relation to the PRC insolvency proceedings.

Decision of the Hong Kong court

The bondholder obtained a default judgment against CEFC in Hong Kong in 2018 and a garnishee order nisi was granted in 2019 in favour of the bondholder.

In January 2020, the Hong Kong court granted recognition and assistance to the administrators of CEFC and stayed the garnishee proceedings.

The outcome in the mainland

CEFC did not pay under the default judgment given by the Hong Kong court, and the bondholder applied to Shanghai Financial Court for recognition and enforcement of the Hong Kong default judgment. In October 2020, Shanghai Financial Court recognised and enforced the Hong Kong judgment under the Arrangement of the Supreme People's Court between the Mainland and the Hong Kong Special Administrative Region on Reciprocal Recognition and Enforcement of the Decisions of Civil and Commercial Cases under Consensual Jurisdiction.

It is noteworthy that Shanghai Financial Court rejected CEFC's argument that the keepwell deed was in fact a guarantee which should be regulated by the relevant PRC authorities and that giving effect to the Hong Kong default judgment would harm the social and public interests of mainland China. The court reasoned that the standard of review for recognising and enforcing Hong Kong judgments is limited to procedural matters only, so they did not delve into the substantive provisions of the keepwell deed, as it falls outside the scope of their review in this case. Shanghai Financial Court further stated that "harm to the social and public interest" (i.e. whether enforcing the judgment would harm the interests of the unspecified majority), should be interpreted strictly.

Timeline

2017 & 2018	●	PUFG Issuers issued offshore bonds supported by keepwell deeds and EIPU from PUFG, and guarantees from other offshore subsidiaries
Feb 2020	●	Commencement of reorganisation proceedings of PUFG in the PRC
Feb 2020	●	PUFG Issuers defaulted under the bonds and demand was made against the Guarantors who had also defaulted
Feb 2020	●	PUFG Obligors applied to the Hong Kong court to seek declarations with respect to their rights under the keepwell deeds
Jun 2021	●	PUFG Obligors submitted claims supported by keepwell deeds to the administrators of PUFG appointed by the Beijing Court, but the administrators rejected the claims without explanation, save for a claim by one plaintiff, HongKong JHC Co Limited (“HKJHC”)
Nov 2021	●	PUFG initiated proceedings in the Hong Kong courts seeking recognition and assistance in relation to its reorganisation proceedings in PRC (including seeking a stay of the Hong Kong proceedings). PUFG’s application was supported by a letter of request from the Beijing Court
Dec 2021	●	Harris J gave a judgment with regard to the action by PUFG, which recognised PUFG’s reorganisation proceedings in the PRC but dismissed the application to stay the Hong Kong proceeding relating to the keepwell deed PUFG and the administrators appealed
Feb 2022	●	Appeal was dismissed in the Court of First Instance
Mar 2022	●	PUFG and the administrators renewed their application before the Court of Appeal for leave to appeal
Oct 2022	●	Appeal was dismissed in the Court of Appeal
May 2023	●	Hong Kong court ruled that PUFG had breached the keepwell deeds in relation to one of the plaintiffs and caused loss, and made a declaration of entitlement based on the loss of such plaintiff

Facts

In 2017 and 2018, two BVI incorporated subsidiaries (together, “PUFG Issuers”) of a PRC conglomerate associated with Peking University, Peking University Founder Group Company (“PUFG”) issued bonds of approximately USD1.7 billion guaranteed by two PUFG Hong Kong subsidiaries (the “Guarantors”, and the Guarantors together with PUFG Issuers, the “PUFG Obligors”). PUFG entered into keepwell deeds with the PUFG Obligors and the trustee in relation to each bond issuance. The keepwell deeds were English law-governed and contained an exclusive jurisdiction clause submitting disputes to Hong Kong courts.

In late 2019, reorganisation proceedings of PUFG were commenced with the Beijing First Intermediate Court (the “Beijing Court”) in the PRC. The Beijing Court invited creditors of PUFG to register their claims with the court-appointed administrators. In February 2020, PUFG Issuers defaulted under the bonds, and demands for payment had been made against PUFG Issuers and the Guarantors. All of the PUFG Obligors were then in liquidation. Between January 2020 and April 2021, the PUFG Obligors (in liquidation) submitted claims in PUFG’s reorganisation proceedings to the administrators, but the administrators rejected the claims (without giving reasons), save for one claim made by HKJHC. In June 2021, PUFG Obligors applied to the Hong Kong court to seek declarations with respect to their rights under the keepwell deeds. In response, PUFG started an action in November 2021, seeking recognition and assistance in respect of PUFG’s reorganisation proceedings (including an application seeking a stay of the proceedings in Hong Kong).

Decision

In December 2021, Harris J gave a judgment recognising the restructuring proceedings in the PRC and granted assistance to the administrators but dismissed its application to stay the Hong Kong proceedings relating to the keepwell deed.

PUFG and the administrators appealed in early January 2022, and the appeal was dismissed by the Court of First Instance two months later. In March 2022, PUFG and the administrators renewed their application before the Court of Appeal for leave to appeal. The appeal was dismissed in October 2022.

In May 2023, the Hong Kong Court of First Instance declared that PUFG had breached the keepwell deed because one of the offshore subsidiaries had failed a net worth requirement and PUFG had not used its best efforts to obtain governmental approval to remit funds to the relevant PUFG Issuer prior to the commencement of the reorganisation proceedings. However, for the offshore subsidiaries who defaulted under the issued bonds after the commencement of the reorganisation proceedings, the court found that there is no realistic likelihood of obtaining the relevant governmental authorisations for PUFG to remit the funds and thus the failure to take any steps by PUFG to obtain relevant governmental authorisation did not breach the “best efforts” undertakings. Hence, the claims under those bonds were not recognised by the Hong Kong court.

Timeline

2015	●	Tsinghua Issuer issued a series of bonds which were supported by a keepwell deed and an equity interest purchase undertaking in favour of Citicorp International Limited (“Citicorp”), the trustee of the bonds
Dec 2020	●	Tsinghua Issuer defaulted on the bonds
July 2021	●	Tsinghua Issuer defaulted on the bonds
Aug 2021	●	Citicorp issued a writ in Hong Kong making claims against Tsinghua, for breach of the keepwell deed and equity interest purchase undertakings
Sep 2021	●	Citicorp submitted a proof of debt to the administrators, which was left “pending”
Oct 2021	●	Tsinghua issued a summons in Hong Kong seeking various alternative orders to stay Citicorp’s Hong Kong action and to require Citicorp to pursue it before the Beijing Court
May 2022	●	Harris J dismissed the stay application
June 2023	●	Harris J handed down the judgment - held that Tsinghua is in breach of keepwell obligations, and ordered damages consisting of the principal amount of the bonds, accrued interest, and certain costs

Facts

In 2015, Unigroup International Holdings Ltd (“Tsinghua Issuer”), a subsidiary of Tsinghua Unicorp Co., Ltd (“Tsinghua”), issued a series of offshore bonds which were supported by a keepwell deed and an equity interest purchase undertaking in favour of Citicorp, the trustee of the bonds. Tsinghua entered into a keepwell deed which was English law-governed and contained an exclusive jurisdiction clause submitting disputes to Hong Kong courts.

In December 2020, Tsinghua Issuer failed to redeem the principal amount of the bonds.

In July 2021, the reorganisation proceedings of Tsinghua commenced in Beijing and the Beijing Court invited creditors to file claims to the court-appointed administrators.

In August 2021, as Tsinghua Issuer had defaulted on the bonds (which took place before the start of the reorganisation proceedings of Tsinghua in mainland China), Citicorp made a claim against Tsinghua in the Hong Kong courts for approximately USD500 million, for breach of the keepwell deeds. Citicorp sought a monetary judgment (unlike in Peking Founder where the plaintiffs sought declaratory relief). A month later, Citicorp submitted a proof of debt for its claim to the administrators of Tsinghua, which was left “pending”. In October 2021, Tsinghua commenced an action in the Hong Kong courts seeking various alternative orders to stay Citicorp’s action in the Hong Kong courts and to require Citicorp to pursue it before the Beijing Court.

Decision

In June 2023, Harris J gave a judgment applying principles similar to those applied in the Peking Founder case, but with different results. It was held that Tsinghua had breached its obligations under the keepwell deed by failing to cause the debtors to have sufficient liquidity to pay off the primary debt and by failing to use its best efforts to obtain the relevant PRC governmental approvals to remit the funds outside of mainland China. Since the default by Tsinghua Issuer and the subsequent breach of the keepwell deed occurred before the reorganisation of Tsinghua, damages were determined by reference to Citicorp’s losses due to Tsinghua’s failure to comply with the keepwell deed. Harris J gave a judgment in favour of Citicorp in an amount of US\$483,843,533 which consisted of the principal amount of the bonds, accrued interest, and certain costs.

(4) SALIENT FEATURES OF THE THREE COURT CASES

We set out below some key features of the three court cases:

	CEFC	Peking Founder	Tsinghua
Plaintiff	Bondholder	Offshore debtor subsidiaries of keepwell provider (in liquidation)	Bond trustee
Timing of bond default	Prior to the commencement of the reorganisation process of the keepwell provider	After the commencement of the reorganisation process of the keepwell provider	Prior to the commencement of the reorganisation process of the keepwell provider
Relief sought	Monetary judgment; interim relief (garnishee order)	Declaratory judgment	Monetary judgment
Outcome	Shanghai Financial Court recognised the default judgment obtained in Hong Kong	The court dismissed three out of four claims and made a declaration that PUFG breached two of the keepwell deeds and caused one of the plaintiffs approximately US\$167 million in losses (note: the plaintiffs' total claim amount was over US\$1.8 billion)	The court ordered Tsinghua to pay the plaintiff approximately US\$480 million, which consisted of the principal, interest, and related expenses of the bonds

KEY TAKEAWAYS

While we continue to follow the development of the Peking Founder and the Tsinghua cases, the judgments of the three court cases provide valuable insights on how keepwell deeds may be enforced in Hong Kong and mainland China, and we set out below the key takeaways for lenders:

#1 Creditors shall act quickly

The outcome of all three court cases underscores the importance of taking swift action by the creditors in enforcing keepwell deeds.

What it means for lenders

As a keepwell provider's obligations do not give rise to direct debt claims by creditors (as compared to a guarantee, for example), in order to enhance the chance of having the claim under a keepwell deed recognised by the administrators of a keepwell provider undergoing reorganisation proceedings, the creditors should, to the extent feasible, act quickly

to obtain a favourable judgment in a Hong Kong court before the keepwell provider enters into reorganisation.

In Peking Founder, the administrator rejected (without giving reasons) almost all of the creditors' claims and afterwards the creditors initiated the proceedings in Hong Kong. It may be challenging to determine the reasons for the rejection, but a possible explanation could be that the obligations of a keepwell provider do not result in as straightforward a claim as a guarantee or other debt claims the administrator would be more familiar with.

#2 Choice of governing law and dispute resolution is critical

In all three court cases, English law was selected as the governing law of the keepwell deeds, and the Hong Kong court had exclusive jurisdiction over disputes. In the Peking Founder and Tsinghua cases, the obligations of the keepwell providers were considered binding and enforceable contractual obligations under English law⁵.

5. It is noteworthy how Harris J assessed the nature of keepwell deeds under English law. He noted in the Peking Founder decision that keepwell deeds form part of one financial transaction as they were required specifically because onshore companies cannot provide guarantees, and they should be understood as placing strict obligations on the company. He further noted 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".



What it means for lenders

Lenders should be able to take comfort from the cases that keepwell deeds are likely to be recognised in a Hong Kong court as binding contractual obligations on the part of the keepwell provider under English law. It is advisable to choose English law (or Hong Kong law, which we expect will yield similar results) as the governing law of keepwell deeds and Hong Kong courts as the dispute resolution venue instead of choosing other untested jurisdictions. The additional benefit of choosing Hong Kong courts as the dispute resolution venue is the possible application of the reciprocal enforcement of judgments arrangements between Hong Kong and mainland China, which facilitates enforcement of a Hong Kong judgment on a keepwell deed in mainland China (see further #3 below).

#3 Recognition of Hong Kong court judgments in mainland China

In the CEFC case, the arrangement between Hong Kong and mainland China on the recognition and enforcement of Hong Kong court judgments on keepwell deeds in mainland China was considered by Shanghai Financial Court.

It was noted that “public interest” should be strictly interpreted and the nature and enforceability of an English law governed keepwell deed should not be used as a criterion for determining whether the recognition and enforcement of Hong Kong judgments contradicts the public interest of PRC society. The PRC court should only consider whether the result of recognition and enforcement of the relevant judgment goes against public interests at the time of the hearing of the case.

However, it is noteworthy that in the CEFC case, when considering the “public interest” issue, Shanghai Financial Court only concerned itself with the recognition of a Hong Kong court judgment. It remains to be seen how a PRC court may apply the “public interest” test to a keepwell deed if it has to adjudicate substantive disputes arising thereunder.

What it means for lenders

A Hong Kong court would be the preferred forum to resolve disputes under a keepwell deed.

The Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region (the “RRE Arrangement”) was signed on 18 January 2019. In Hong Kong, the RRE Arrangement has been implemented through the Mainland Judgments in Civil and Commercial Matters (Reciprocal

Enforcement) Ordinance (Cap. 645) (the “RE Ordinance”)⁶ which came into effect on 29 January 2024. The RE Ordinance replaces the existing framework set out in the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597). One of the key developments is that the new regime no longer requires judgment creditors to have an exclusive jurisdiction clause under the contract.

Despite the above development on reciprocal enforcement of judgments, we take the view that it is still preferable to specify exclusive jurisdiction of Hong Kong court in keepwell deeds to mitigate the risk of an application in a Hong Kong court by an administrator of a PRC keepwell provider for the stay of proceedings in Hong Kong based on the argument that the relevant bankruptcy court in the PRC is the more appropriate forum to adjudicate disputes under the keepwell deed. In both Peking Founder and Tsinghua, the Hong Kong court refused the PRC administrators’ application to stay the proceedings of keepwell deeds which are subject to exclusive jurisdiction of the Hong Kong courts.

#4 Timing is key when evaluating the “best efforts” provisions in keepwell deeds

Keepwell deeds may provide that the performance of the keepwell providers’ obligations is subject to obtaining the relevant PRC regulatory approvals, and the keepwell providers usually undertake to use their best efforts to obtain such regulatory approvals. In both the Peking Founder and Tsinghua cases, the judges considered at length how to apply these “best efforts” provisions. It was noted in the judgments that a keepwell provider has “to take all reasonable steps which a prudent and determined man acting in his own interests and anxious would have taken” to discharge such “best efforts” undertaking.

In both cases the Hong Kong court recognised that efforts in obtaining approvals from the PRC authorities would be futile after the keepwell providers entered into reorganisation proceedings. Harris J stated that “It seems to me clear that once the Company was in reorganisation there was no realistic likelihood of approvals being given to transfers out of the Mainland.”

What it means for lenders

Based on the judgments in the Peking Founder and Tsinghua cases, the keepwell providers’ best efforts obligations may become ineffective after the keepwell providers enter into reorganisation.

6. For details on the RRE Arrangement and the RE Ordinance, please see the KWM client briefing at: <https://www.kwm.com/hk/en/insights/latest-thinking/implementation-of-mainland-hong-kong-reciprocal-enforcement-arrangement.html>

To mitigate such risk, continuous monitoring by the creditors, and reporting of a keepwell provider's keepwell obligations by the keepwell provider and the subsidiary debtors to the creditors are important to ascertain when the keepwell obligations are triggered and when best efforts should be exercised by the keepwell provider to apply for the relevant governmental approvals⁷.

It would be beneficial for such reporting by subsidiary debtors (for example, its net assets condition) to be made not only to the creditors but also to the keepwell provider. This approach would make it more difficult for the keepwell provider to argue that it was unaware that it would need to take action to comply with its keepwell obligations at the relevant times.

It would also be useful to consider whether the condition to obtain the relevant governmental approvals should be subject to a "best efforts" qualification or, if the liability of the keepwell provider should be strict.

#5 Scrutinise the keepwell obligations

Keepwell deeds commonly contain obligations on the keepwell provider to maintain control and shareholding of its subsidiary debtors.

However, as can be seen in the Peking Founder case, where the bond default did not occur until after the commencement of the reorganisation of the keepwell provider, the earlier breach of the net worth maintenance obligation prior to PUFG entering into reorganisation proceedings proved to be critical for the court to find in favour of one of the plaintiffs for a breach of the keepwell provider's obligations.

What it means for lenders

It is clear that different keepwell obligations can be triggered at different times. Creditors can consider imposing obligations that could be triggered before a payment default under the relevant primary debt. For example, there could be financial covenants on the offshore debtors that are tested frequently, and if they are breached, the keepwell provider must make a payment to the relevant offshore debtor in an amount that would remedy the breach.

#6 Make issuer / offshore guarantors a party to the keepwell

The Peking Founder and Tsinghua cases showed that both offshore subsidiary debt obligors (represented by the liquidator in the Peking Founder case) or creditors (represented by the bond trustee in Tsinghua) can initiate proceedings against the keepwell provider as plaintiffs.

What it means for lenders

Where feasible, it is preferable for lenders to have both the offshore subsidiary obligors and the PRC keepwell provider as party to the keepwell deed. This may give lenders multiple recourse avenues against the keepwell provider, that is, suing in their own right as creditors and/or the liquidators of the offshore subsidiary obligors taking action themselves.

In addition, if the liquidator takes action against the keepwell provider, this can be a direct claim against the keepwell provider and it may be easier to prove the relevant loss. It may also reduce the scope for arguing that the keepwell deed is a de facto guarantee breaching the relevant PRC regulations.

in situations where timing is the key in accelerating a loan and/or taking enforcement action under keepwell deeds. Lenders may consider imposing more monitoring and reporting requirements in the keepwell deeds for loan transactions (see item #5 above).

7. The subsidiary debtors' obligations constitute the primary debt owed to the creditors (and hence must be closely monitored), yet because the keepwell providers' obligation is primarily maintaining the liquidity of the subsidiary debtors, it is crucial for the creditors to have sufficient and timely information from multiple channels to make a call on whether and when to make a call on the keepwell provider to inject liquidity into the relevant subsidiary; the creditors should avoid merely relying on the subsidiary debtors to make request the keepwell provider to take an action.

THE FACTS AND THE DECISIONS

Strong keepwell or not: that is the question

Although some takeaways from the three court cases may suggest certain specific contractual obligations should be strengthened from a creditor's perspective (see #5 above), it is equally crucial to strike a balance between having a keepwell deed with very robust terms and remedies in favour of the creditors and running the risk of such keepwell being re-characterised as a guarantee (which would have required registration under PRC regulations) and/or subject to "public interest" challenge.

Bonds v. Loans

While the three court cases involve bonds specifically, the principles established in those should also be applicable to loan transactions.

However, due to the differences between the way bonds and loans are operated, there are certain features that exist in the loan markets that lenders can take advantage of.

For example, monitoring compliance in the bond market can be challenging. Bondholders typically do not take an active role and it is not always easy to seek instructions from the requisite bondholders whereas, in loan transactions, the mandated lead arrangers often maintain substantial participation in the loans and may be able to make collective decisions through the facility agent more easily. This becomes particularly important in situations where timing is the key in accelerating a loan and/or taking enforcement action under keepwell deeds. Lenders may consider imposing more monitoring and reporting requirements in the keepwell deeds for loan transactions (see item #5 above).

Conclusion

The three Hong Kong cases have shown that keepwell deeds are capable of being enforced, including in the PRC courts. While this is reassuring for creditors, they should take note of the limitations of "best efforts" obligations and the nuances of different keepwell obligations which may yield vastly different results.

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