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Hong Kong Court of Final Appeal Clarifies Uncertainty Related to *Quistclose* Trusts in Landmark China Energy Case

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On 14 June 2024, the Hong Kong Court of Final Appeal (the CFA) handed down its landmark decision in *China Life Trustees Limited v China Energy Reserve and Chemical Group Overseas Company Limited & Ors, Ad Hoc Committee as intervener* [2024] HKCFA 15 concerning *Quistclose* trusts. Kirkland & Ellis' Hong Kong disputes team acted for the successful intervening ad hoc committee (the Committee). The key takeaways are as follows:

- The case concerned special purpose vehicle bond issuers coupled with treasury type accounting practices. Given their prevalence among corporate groups in the Greater China region, this judgment will likely be of interest to bondholders and other creditors of distressed groups in the region and may provide additional avenues for recovery, especially where transaction documentation provides that issuance/loan proceeds must be used for a particular purpose.
- Subject to any special agreement, where a transferor transfers property (usually money) to a transferee to be applied for a specific purpose and that purpose only, such that the property is not at the free disposal of the transferee, a trust of the property arises, with the transferee holding the property in favour of the transferor subject to the power or duty of the former to apply the property for the specific purpose.
- For these purposes, it is not necessary to show a positive statement of intention to retain some beneficial interest in the property by the transferor; nor must the parties have subjectively intended, anticipated or foreseen the transferor's retention of a beneficial interest in the property, as this is only the legal consequence of the requisite intention.

Background

China Energy Reserve and Chemicals Group Company Limited is the holding company of a group of companies (the Group) engaged in oil and natural gas exploration and the production and marketing of related chemical products. Between April 2015 and May 2018, eight members of the Group issued series of bonds to finance the Group's operations. The first series was denominated in Hong Kong dollars; the other 7 were in US dollars. All were guaranteed by the holding company of the Group.

As is common accounting practice regionally, the funds generated by the bonds were transferred to the Group's treasury company (Trading) for internal distribution, which transfers were accounted for as loans to Trading/intra Group receivables. As and when interest fell due on the bonds, Trading would remit funds to designated bank accounts so that payment could be made.

The 1st Appellant, China Energy Reserve and Chemicals Group Overseas Company Limited (SPV1), a special purpose vehicle and Group member with no assets or business, issued the first series of bonds, maturing in 2022 (the 2022 Bonds). The Respondent, China Life Trustees Limited (China Life), was the sole bondholder of the 2022 Bonds. A second series of bonds, issued by another special purpose vehicle of the Group, likewise with with no assets or business, China Energy Reserve and Chemicals Group Overseas Capital Company Limited (SPV2), was to mature on 11 May 2018 (the 2018 Bonds). The 2018 Bonds were held by several investors, including the 2nd Appellant, the Committee.

Both SPV1 and SPV2 used a bank account (the Account) maintained with Bank of Communications in the name of SPV1 to receive the funds from Trading and to facilitate transactions relating to the 2022 Bonds and the 2018 Bonds respectively, including the payment of interest. The Account opened by SPV1 comprised two sub-accounts denominated in HK$ and US$. The HK$ subaccount was used exclusively for the 2022 Bonds, whereas SPV2, for convenience, designated SPV1's US$ sub-account exclusively for the 2018 Bonds.

The 2018 Bonds matured on 11 May 2018, but the Group lacked the funds to pay the principal (US$350 million) plus interest falling due. The Group urgently tried to procure the required funds, but ultimately was unable to come up with enough funds, only raising a total of US$120 million (the Funds). Trading remitted the Funds in three tranches into the US$ sub-account in May 2018. The Group's inability to raise sufficient funds resulted in SPV2 defaulting on the 2018 Bonds, which triggered cross-defaults on the other bonds including the 2022 Bonds. Thereafter, China Life obtained

judgment against SPV1 in respect of the 2022 Bonds for HK$2 billion plus interest and costs and a garnishee order nisi over the Funds remaining in the Account.

Throughout the proceedings, the Committee and SPV1 contended that the Funds in the Account were subject to a *Quistclose* trust, the effect of which was that the Funds did not belong to SPV1 and the Group could apply the Funds towards its restructuring efforts. China Life, on the other hand, contended that the Funds wholly belonged to SPV1, meaning that they benefitted China Life exclusively as the only holder of the 2022 Bonds by virtue of its judgment and garnishee order.

The Court of First Instance and the Court of Appeal both rejected the *Quistclose* trust argument and held that China Life was entitled to a garnishee order over the Funds in the Account, albeit the Court of Appeal granted the AHG and SPV1 leave to appeal to the CFA.

The CFA's Judgment

The CFA unanimously allowed the appeal of the AHG and SPV1 and discharged the garnishee order. In a comprehensive judgment, the CFA concluded that the facts of the case *did* give rise to a *Quistclose* trust.

The CFA conducted a thorough review of the case law, including the recent judgment of the Privy Council in Prickly Bay Waterside Ltd v British American Insurance Company Ltd [2022] UKPC 8. The CFA explained that it is now firmly established that subject to any special agreement, where a transferor (i.e. Treasury in this case) transfers property (usually money) to a transferee (i.e. SPV1 in this case) to be applied for a specific purpose and that purpose only, such that the property is not at the free disposal of the transferee, a trust of the property arises, with the transferee holding the same in favour of the transferor subject to the power or duty of the former to apply the property for the specific purpose. A trust of this type is generally known as a *Quistclose* trust.

The CFA explained that where the evidence objectively points to this restrictive intention, whether expressly or by implication, it follows logically that the property is not intended to form part of the recipient's general assets to be at its free disposal. The legal consequence is that the beneficial ownership of the property does not pass to the recipient, who instead holds it as a fiduciary to apply it only for the specific purpose and if that purpose fails, must return it to the transferor.

The CFA made clear that it is not necessary — as the Court of Appeal may have interpreted *Prickly Bay* to require — to show a positive statement of intention to retain some beneficial interest in the Funds by the transferor. Nor must the parties have subjectively intended, anticipated or foreseen the transferor's retention of a beneficial interest in the property, as this is only the legal consequence of the requisite intention.

The CFA held that the uncontroverted evidence clearly established that (i) the Funds were paid into the US$ sub-account solely to be used to meet SPV2's obligations under the 2018 Bonds; (ii) the Funds were not intended to become part of SPV1's general assets or to be freely at SPVI's disposal; and (iii) that the Funds were assets of the Group, and on failure of the designated purpose, reverted, as a matter of legal consequence, to be used for the Group's purposes, particularly as part of its efforts at restructuring its debt. On that basis, the CFA unanimously allowed the appeals and discharged the garnishee order.

Conclusions

The CFA's decision contains a thorough exposition and application of the law of *Quistclose* trusts (a complex and challenging area of the law at the best of times) and provides clear guidance as to the interpretation of *Prickly Bay*.

Given the prevalence of special purpose vehicle bond issuers coupled with treasury type accounting practices among corporate groups in the Greater China region, this decision will be of particular relevance to bondholders and other creditors of distressed groups in the region and may provide additional avenues for recovery, especially where transaction documentation provides that loan proceeds must be used for a particular purpose.

It should also be of interest to lenders at the transaction stage when considering the utility of incorporating purpose provisions in loan documentation, and how trust type arrangements may be utilised to provide additional comfort.

Willa Wang also contributed to drafting this Alert.

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凯易简报

香港终审法院在具有里程碑意义的中国国储案中对 *Quistclose* 信托相关问题作出明确阐述

2024 年 6 月 14 日，香港终审法院就涉及 *Quistclose* 信托问题的*中国人寿信托有限公司诉 China Energy Reserve and Chemical Group Overseas Company Limited 等（特设委员会作为介入诉讼人）*（[2024] HKCFA 15）一案颁发了具有里程碑意义的判决。凯易律师事务所香港争议解决团队在本案中代表作为介入诉讼人的特设委员会并取得胜诉。本案要点如下：

- 本案涉及有“库务”（treasury）类型会计操作的特殊目的公司（SPV）债券发行人。鉴于此类情况在大中华区公司集团中甚为普遍，对该地区陷入财困的集团之债券持有人和其他债权人而言，本判决可能尤其相关，并可能会提供额外的追偿途径，特别是当交易文件规定发行所得款/贷款资金必须用于特定目的时。

- 根据任何特定协议，如果转让人仅是出于特定目的向受款人转让财产（通常是金钱），而受款人并不能自由处置该等财产，则会产生财产信托，受款人为转让人利益持有财产，而受款人受制于将财产用于特定目的的权力或责任。

- 为上述目的，无需明示转让人有意保留财产的部分实益拥有权；也无需双方在主观上意欲、预期或预见转让人保留财产的实益拥有权，因为对于作为要件的意图而言，这只是其法律后果。

背景

中国国储能源化工集团股份公司是若干集团公司（“集团”）的控股公司，主要从事石油与天然气勘探及相关化工产品生产和销售业务。2015 年 4 月至 2018 年 5 月期间，集团旗下的八家成员公司为了集团的营运融资分别发行了一系列债券。除了第一批债券以港元计价，另外七批以美元计价，全部债券由集团的控股公司提供担保。

按照大中华区内的会计惯例，由债券募集到的资金被划入集团的“总库”（即，中国国储能源化工贸易有限公司（“国储贸易”））进行内部分配，并作为贷款计入国储贸易/集团内部应收账款。债券利息到期时，国储贸易还会将资金汇入指定的银行账户，以支付利息。

第一上诉人 China Energy Reserve and Chemicals Group Overseas Company Limited（“SPV1”，一家特殊目的公司和集团成员公司，不拥有任何资产或业务）发行了于 2022 年到期的第一批债券（“2022 年债券”）。答辩人中国人寿信托有限公司（“中国人寿”）是 2022 年债券的唯一债券持有人。China Energy Reserve and Chemicals Group Overseas Capital Company Limited（“SPV2”，集团另一家特殊目的公司，同样不拥有任何资产或业务）发行了于 2018 年 5 月 11 日到期的第二批债券（“2018 年债券”）。2018 年债券由包括第二上诉人特设委员会在内的多名投资者共同持有。

SPV1 和 SPV2 均使用以 SPV1 名义于交通银行开立的银行账户（“账户”），以接收国储贸易汇入的资金，并进行分别与 2022 年债券和 2018 年债券相关的交易，包括支付利息。SPV1 开立的账户包括以港元计价和以美元计价的两个子账户。港元子账户专门用于 2022 年债券，而为方便起见，SPV2 指定 SPVl 的美元子账户专门用于 2018 年债券。

2018 年债券于 2018 年 5 月 11 日到期，但集团没有足够资金支付本金（3.5 亿美元）及到期利息。集团紧急尝试筹集所需资金，但最终未能筹到足够资金，仅筹得共 1.2 亿美元（“资金”）。国储贸易于 2018 年 5 月将资金分三期汇入美元子账户。由于集团未能筹得足够资金，导致 SPV2 发生 2018 年债券违约，进而触发了包括 2022 年债券在内的其他债券的交叉违约。之后，中国人寿取得针对 SPV1 关于 2022 年债券的判决，金额为 20 亿港元加上利息和讼费，并就账户内剩余资金取得暂准第三债务人命令（garnishee order nisi）。

在整个诉讼过程中，特设委员会和 SPV1 称账户内的资金是以 *Quistclose* 信托持有，其结果就是资金不归 SPV1 所有，且集团可以将资金用于其重组。另一方面，中国人寿辩称资金完全属于 SPV1，也就是说，只有作为 2022 年债券唯一持有人的中国人寿能凭借其判决及第三债务人命令而受益。

香港高等法院原讼法庭和上诉法庭均驳回了有关 *Quistclose* 信托的论点，并认为中国人寿有权就账户中的资金获得第三债务人命令，不过上诉法庭给予了特设委员会和 SPV1 向终审法院提出上诉的许可。

香港终审法院判决

香港终审法院一致裁定特设委员会和 SPV1 上诉得直，并撤销了第三债务人命令。在其详细的判决中，香港终审法院认定本案事实确实构成 *Quistclose* 信托。

香港终审法院细致深入地研究了相关案例，包括英国枢密院近期在 *Prickly Bay Waterside Ltd 诉 British American Insurance Company Ltd*（[2022] UKPC 8）案中作出的判决。香港终审法院解释称，现已明确，根据任何特定协议，如果转让人（本案中为国储贸易）仅是出于特定目的向受款人（本案中为SPV1）转让财产（通常是金钱），导致受款人不能自由处置该等财产，则会产生

财产信托，受款人为转让人利益持有财产，而受款人受制于将财产用于特定目的的权力或责任。这种类型的信托通常称为 *Quistclose* 信托。

香港终审法院认为，如果有客观证据指向这种限制性的意图，无论是明示还是暗示，那么从逻辑上讲，该财产并不是要成为受款人的一部分一般资产并供其自由处置。相应的法律后果就是该财产的实益拥有权未转移给受款人，受款人作为受托人持有该财产以仅将其用于特定目的，如果该目的未能实现，则必须将其退还给转让人。

香港终审法院明确指出，无需明示转让人（香港高等法院上诉法庭可能将 *Prickly Bay* 案诠释为需要）有意保留资金的部分实益拥有权。也无需双方在主观上意欲、预期或预见转让人保留资金的实益拥有权，因为对于作为要件的意图而言，这只是其法律后果。

香港终审法院认定，无可争议的证据清楚地表明：(i) 资金存入美元子账户仅用于履行 SPV2 在 2018 年债券项下的义务；(ii) 资金并不是要成为 SPV1 的一部分一般资产并由 SPVl 自由处置；及 (iii) 资金是集团的资产，若未能用于指定用途，则就法律后果而言，资金将归还用于集团之目的，特别是用于集团的债务重组。基于此，香港终审法院一致支持上诉请求并撤销第三债务人命令。

结论

香港终审法院的判决对关于 *Quistclose* 信托的法律（在最佳情况下，这也是一个复杂且具有挑战性的法律领域）进行了全面阐述和适用，并为解释 *Prickly Bay* 一案提供了清晰的指导。

鉴于有“库务”（treasury）类型会计操作的特殊目的公司债券发行人在大中华区公司集团中甚为普遍，本判决会与该地区陷入财困之集团的债券持有人和其他债权人尤为相关，并可能会提供额外的追偿途径，特别是当交易文件规定贷款资金必须用于特定目的时。

这也可能关系到贷款人在交易阶段考虑在贷款文件中纳入贷款用途条款的问题，以及如何使用信托类安排才能更令人安心。

王祎龄（Willa Wang）律师也参与了本简报的撰写。

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