

Keepwell deeds – an alternative to guarantees?

维好协议 – 担保的替代方案?



What are keepwell deeds?

什么是维好协议?

Keepwell structures have been widely used as a form of credit protection in recent years, especially in financing structures involving an offshore debtor with an ultimate parent incorporated in mainland China. Such structures would often involve an instrument known as a keepwell deed, which is executed by the onshore parent in favour of the financier.

近年来，维好结构被广泛用作信贷保护的一种形式，尤其常见于涉及最终母公司为中国境内注册企业的境外债务人的融资结构中。这种结构通常会牵涉一种由境内母公司签立并提供给融资方、被称为维好协议的文书。

Terms of the keepwell deed can vary, but they typically involve the onshore parent undertaking to maintain a certain shareholding, a positive net worth and sufficient liquidity in the offshore debtor. It is also usual for the onshore parent to agree to make available to the offshore debtor sufficient funds to enable it to perform its payment obligations.

维好协议的条款可能有所不同，但一般包括境内母公司承诺在境外债务人中维持一定的股权以及维持境外债务人正数的净资产额和足够的流动资金。境内母公司也通常会同意向境外债务人提供足够资金，以使其能够履行其付款义务。

While these terms create an obligation on the onshore parent to provide financial support to the offshore debtor in case it is unable to pay its debts, unlike corporate guarantees, keepwell deeds do not provide for a direct debt claim against the onshore parent for any due but unpaid obligation of the offshore debtor. In fact, there is usually an express provision in the keepwell deed that states neither the instrument itself nor anything contained therein constitutes a guarantee by the onshore parent.

虽然这些条款规定境内母公司有义务在境外债务人无力偿还债务时向其提供财务支持，但与公司担保不同的是，维好协议并无规定融资方可就境外债务人任何到期但未偿还的债务向境内母公司提出直接索赔。事实上，维好协议通常明文规定该文书本身或其中的任何内容均不构成境内母公司提供的担保。

Why are they used?

为什么使用维好协议?

The key reason for the popularity of keepwell deeds is the widely held perception that they are not subject to the same kind of regulatory requirements in mainland China as actual guarantees.

维好协议受欢迎的关键原因是不少人认为维好协议在中国境内无需受与担保同等的监管要求约束。

Currently¹, an arrangement which involves an onshore parent guaranteeing the financial obligations of its offshore subsidiary would be classified as an "offshore loan guaranteed by an onshore entity", and the relevant guarantee must be registered with the State Administration of Foreign Exchange of the People's Republic of China ("**SAFE**") within the prescribed period, failure of which will mean that the onshore parent will not be able to remit funds outside of mainland China to comply with its guarantee obligations. However, such registration may not always be successful, as it can be dependent on mainland China's latest policies on foreign exchange control. Because of this, keepwell deeds have become a popular alternative to guarantees. 目前¹，如境内母公司为其境外子公司的财务责任提供担保，相关安排将被归为“内保外贷”，而境内母公司作为担保人必须在规定期限内向中华人民共和国国家外汇管理局（“**外管局**”）登记相关担保，否则境内母公司将无法将资金汇出中国境外以履行其担保义务。然而，取决于中国境内关于外汇管制的最新政策，有关登记并不一定可以成功完成。正因为如此，维好协议已成为担保的一种流行的替代方式。

But are they really an alternative to guarantees? *但维好协议真的是担保的替代品吗？*

The above common perception is due to change very soon, at least when it comes to keepwell deeds given by central state-owned enterprises and their subsidiaries.

上述的普遍看法很快就会作出改变，至少在涉及到中央企业集团本部及所属各级子企业提供的维好协议时。

To control the excessive growth in guarantee scales, the expansion of implicit guarantee risks, and increased risks of compensation losses, the State-owned Assets Supervision and Administration Commission of the State Council released the "Circular on Strengthening the Management of Financing Guarantees of Central State-owned Enterprises" (the "**Circular**") on 19 November 2021 and an explanation document on 4 January 2022 in relation to the Circular.

为控制担保规模增长过快、隐性担保风险扩大、代偿损失风险升高等问题，国务院国有资产监督管理委员会于2021年11月19日发布了《关于加强中央企业融资担保管理工作的通知》（简称“**该通知**”），并于2022年1月4日发布了该通知的相关说明。

According to the Circular and the relevant explanation, a document which provides any "comfort undertaking" is considered one of the various forms of "implicit guarantees", which are subject to the same regulatory requirements as explicit guarantees. Keepwell deeds and letters of comfort are likely to fall under the definition of "implicit guarantees". Central state-owned enterprises are also expressly required to rectify their existing guarantees to ensure that they are in compliance with the latest regulations in mainland China.

根据该通知和相关说明，“安慰承诺”等支持性函件可视为“隐性担保”之一，所以亦应符合与担保相同的监管要求规定。而维好协议和安慰函有可能属于“隐性担保”。中央企业也被明确要求对存量违规融资担保行为进行整改，以确保其符合中国境内的最新规定。

¹ Pursuant to the "Provisions on Foreign Exchange Administration for Cross-Border Guarantees" and the related "Operational Guidelines for Foreign Exchange Administration of Cross-Border Guarantees"
根据《跨境担保外汇管理规定》及《跨境担保外汇管理操作指引》

What is the practical impact? 有什么实际影响?

It follows that going forward, keepwell deeds given by central state-owned enterprises may not function as intended and could be interpreted as guarantees in mainland China. In practice, this could mean that enhanced corporate authorisation procedures, such as board and shareholder approvals and public disclosures, will be necessary for the central state-owned enterprises' entry into keepwell deeds. 因此，在未来，中央企业提供的维好协议可能无法发挥预期作用，亦可能在中国境内被视为担保。在实践中，这可能意味着中央企业签订维好协议时需要经过更严格的企业授权程序，如董事会和股东会审批和公开披露等。

Financiers should take note of the impact of the Circular when accepting keepwell deeds as credit support and be aware of the relevant risks if it decides to treat keepwell deeds as guarantees. 融资方在接受维好协议作为信贷支持时应留意该通知的影响，尤其是如果融资方决定不把维好协议作为担保来处理时，应清楚理解相关风险。

We have yet to see whether SAFE will respond to this Circular and impose any restriction on outbound remittances by central state-owned enterprises on the basis of their obligations under keepwell deeds. 外管局是否会对该通知作出回应并基于中央企业于维好协议的义务对其向境外汇款实施限制，目前尚待观察。

For further information, please feel free to get in touch.
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