FANGDA PARTNERS
方達律師事務所

上海金融法院
金融市场案例测试机制

案号：（2022）沪 74 测试 1 号

第三方意见书

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二〇二二年十二月

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第三方意见书

上海金融法院：

贵院正在审理的申请人机构 A 与被申请人银行间市场清算所股份有限公司（下称“**上海清算所**”）关于中央对手清算业务违约处置的测试案例（“**测试案例**”，案号（2022）沪 74 测试 1 号），上海市方达律师事务所阅看了相关材料，依据《上海金融法院关于金融市场案例测试机制的规定》（试行）第十五条之规定，特此提出第三方意见，供贵院在审理过程中予以参考，并授权贵院在互联网平台公布本意见。

1. 关于上海清算所案涉违约处置依据规则[1]是否对于机构 A 产生约束力的意见

本法律争议焦点的本质在于，在上位法对于衍生品集中清算业务规则和违约处置机制仅作出纲领性、原则性规定的情况下，基于上海清算所系为金融市场提供集中清算服务的基础设施，以及其作为合格中央对手方为各清算会员提供集中清算服务的主体特性，上海清算所制定的相关规则及其更新是否可以基于上海清算所与各清算会员共同签署的《中央对手方清算协议》（“**《清算协议》**”）的有关约定[2]对各清算会员产生约束力。进言之，这一焦点问题的实质

[1] 包括《银行间市场清算所股份有限公司集中清算业务规则》（“**《清算业务规则》**”）、《银行间市场清算所股份有限公司集中清算业务违约处置指引》（“**《违约处置指引》**”）、《银行间市场清算所股份有限公司集中清算业务指南》（“**《清算业务指南》**”）、《银行间市场清算所股份有限公司违约处置专家组工作章程》（“**《专家组工作章程》**”）。

[2] 《中央对手方清算协议》

第二条 协议的构成与效力等级（二）甲乙双方共同确定：2、若本协议或本协议补充协议（若有）与甲方相关规则不一致，则应以甲方发布并不时修改的甲方相关规则为准；3、经制定、修改或补充后发布的甲方相关规则，以最新发布的甲方相关规则为准。甲方对甲方相关规则的修改以甲方官方网站（即 http://www.shclearing.com/）进行公告后，自公告中指定的日期开始生效。

涉及，如何在保障上海清算所有效履行其维护金融秩序、管控整体金融风险职能的同时，切实维护个体清算会员作为协议一方当事人的合法权益的价值平衡。对此，我们总体认为，当清算会员对于上海清算所有关规则及其更新是否对其具有约束力的问题与上海清算所产生纠纷时，有权而且应当通过司法审查方式予以明确，而这将涉及对于两个具体问题的查明与认定：（1）上海清算所有关规则及其更新本身是否合法有效；（2）如果合法有效，上海清算所有关规则及其更新是否已被有效纳入《清算协议》，并成为约束上海清算所及清算会员的有效权利义务约定。

主要意见如下：

1.1 人民法院在对上海清算所有关规则进行司法审查时，应注意上海清算所系金融市场基础设施的主体特殊性，以及其制定的有关规则基于金融习惯等通常具有普遍拘束力和规范作用的规则特殊性。

1.1.1 首先，上海清算所应当被认定兼有民事主体及类自律监管机构的特殊属性。理由如下：

第一，就上海清算所组织形式而言，其采用公司制模式，以法人形式对外参与市场活动。具体来看，上海清算所与各清算会员签署《清算协议》并依约为清算会员提供集中清算服务，就此而言，上海清算所具有民事主体性质。

第二，《中国人民银行办公厅关于实施〈金融市场基础设施原则〉有关事项的通知》（银办发〔2013〕187 号）（**见附件 1**）明确了上海清算所为金融基础设施[3]的特殊地位，上海清算所据此承担实施特定风险管理措施、保障金融体系的安全性和稳定性的公共管理

[3] 金融市场基础设施是指参与机构（包括系统运行机构）之间，用于清算、结算或记录支付、证券、衍生品或其他金融交易的多边系统，包含重要支付系统、中央证券存管、证券结算系统、中央对手和交易数据库等五类金融公共设施。

职能，以及为各类基础资产和金融衍生品交易活动提供基础性公共服务的系统及制度安排，是国家金融管理体系的一部分。鉴于其金融基础设施的特殊性质，上海清算所在设立、运营过程中受到有关管理部门适当、有效的管理、监管和监督，[4]是故上海清算所也应被认为具有一定的类自律监管机构的特殊属性。

第三，部分学者观点也认为金融市场基础设施在中国法上具有民事主体、公共管理相对人和准公共管理主体的三重法律地位：一方面从私法意义上，当前的基础设施都是依据民事法律规范设立的法人，当然属于民事主体；另一方面，从公法意义上，基础设施是金融主管机关监督管理行为的行政相对人，因其不属行政机关，又是根据民法设立的民事主体，实施或辅助实施市场行为。此外，我国的金融市场基础设施相对于其他“非政府公共组织”还有特别之处，其不属于互助式组织，在设立、管理层选任、运营上都具有强烈的行政色彩，而且独占性地履行职能，这些因素令基础设施愈发趋近于“行政主体”，赋予其准公共管理权渐成共识。拨开会员制、公司制的外观，我国的基础设施本质上是履行准公共管理职能“非政府公共组织”，虽然采取私法上的组织形式设立，却不同于普通的企业或社会团体。[5]（**见附件 2**）

1.1.2 其次，上海清算所作为金融基础设施基于其权力来源而相应制定的有关规则，实质上具有类自律监管规范性文件的特殊性质。理由如下：

[4]《中国人民银行办公厅关于实施〈金融市场基础设施原则〉有关事项的通知》：
金融市场基础设施原则和职责：职责 A：金融市场基础设施的管理、监管和监督金融市场基础设施应接受中央银行、市场监管者或其他有关管理部门适当、有效的管理、监管和监督。

[5]参见季奎明：《金融市场基础设施自律管理规范的效力形成机制》，《中外法学》，2019 年第 2 期。

第一，金融基础设施出于维护整体金融系统稳定、防范金融系统风险的职能要求，需要通过制定有关规则的方式对其进行自我管理，并以此对市场参与主体及其市场行为进行管理，这是对于缺少具体规则指引的行政监管的重要补充。根据长期形成的金融习惯，金融基础设施基于其权力来源相应制定的有关规则，一般会自动形成普遍意义上的拘束力，对于广大市场参与主体及其市场行为具有规范作用和指引作用。

第二，司法层面已对金融市场基础设施因其制定规则引发的纠纷的特殊性形成基本共识并制定相关司法解释，该等规则的特殊性不应予以忽视。例如：最高人民法院（**“最高院”**）在对《最高人民法院关于上海金融法院案件管辖的规定》的释明（**见附件 3**）中指出，“对除上海证券交易所、上海期货交易所、中国金融期货交易所股份有限公司以外的其他住所地在上海市的金融市场基础设施，所涉及的金融民商事案件和涉金融行政案件集中管辖有必要性……**因规则产生的纠纷，有可能通过民事诉讼或者行政诉讼进入司法程序由法院裁判**。如果不统一管辖，而由各地不同的法院通过个案解释规则，难免会产生执法不统一的现象，进而影响交易者的信心与交易场所的地位……当这些金融市场基础设施因履行其职能卷入诉讼时，需要统一司法裁判标准，避免其财产尤其是保证金成为随意扣划的对象”。[6]从上述释明中也不难看出，最高院已充分关注到金融基础设施制定的规则具有普遍适用的特殊性，进而希望通过集中管辖的方式对因该等规则而引发的有关争议的解决形成统一的司法裁判标准。

[6]《最高法立案庭负责人就上海金融法院案件管辖司法解释答记者问》，来源：http://www.court.gov.cn/zixun-xiangqing-111361.html, 2022 年 12 月 8 日访问。

1.2 人民法院在对上海清算所有关规则进行司法审查时，应从规则制定的程序合法性而非内容合理性角度对于该等规则的效力进行审查。

1.2.1 如前段所述，上海清算所制定的有关规则具有类自律监管规范性文件的特殊性质，为防范上海清算所在制定有关规则时存在利益严重失衡的情况，应当在因该等规则引发争议时由人民法院进行司法审查。参考上海市高级人民法院法官对(2009)沪高民二(商)字第 41 号案件的评述[7]（见附件 4），其对“证券交易所自律监管行为正当性的司法审查标准”进行了较为详细的阐述，即自律监管权仅靠内部规范和自我约束并不充分，需要外部力量的监督，而司法介入是监督制约自律管理的必不可少的外部力量，从而为交易相对方/被监管机构提供救济途径。以此类推，在探究上海清算所制定的有关类自律监管规范性文件的规则是否属于《清算合同》有效约定前，也应首先由人民法院介入，对该等规则进行效力合法性审查。

1.2.2 本案中，上海清算所制定有关规则的直接权力来源来自其主管机关中国人民银行（“**央行**”）。人民法院应当根据央行发布的《银行间市场清算所股份有限公司业务监督管理规则》（“**《业务监督管理规则》**”）对案涉的上海清算所有关规则的合法性进行审查。进一步而言，根据《中国人民银行办公厅关于实施〈金融市场基础设

[7] 该案主审法官指出“防范交易所滥用自律监管权，仅靠其内部规范和自我约束并不充分，尚需外部力量的监督。司法介入是监督制约交易所自律管理必不可少的外部力量。首先，承认司法对交易所自律监管的必要介入，是保障交易各方合法权益的必然要求。交易所在组织与监督市场交易的同时，其自身也必须在法律框架内运行。当投资者的合法权益受交易所侵害时，提供切实有效的司法途径予以救济，能保障资本市场参与者的基本利益，为证券市场稳健发展创造必要的外部环境。其次，司法介入交易所自律监管，并不会破坏自律监管体系。在国家权力的各个分支中，司法权是最消极的权力，按照不告不理原则和公开公正程序运行。由司法审查交易所的自律管理行为，符合了应采用危险性最小权力介入自律领域的这一理念。最后，司法权力的介入，对交易所开展自律管理进行监督制约的同时，也是一种积极的司法保障。如果法院审理确认了交易所自律管理行为正当性及合法性，则交易所的自律管理同时可以获得司法权威的保障，进而能从投资者不合理的纠缠中解脱出来。” 宋航（一审审判长、主审法官），张文婷：《证券交易所自律监管行为正当性的司法审查标准》，载《人民司法·案例》2011 年第 4 期。

施原则〉有关事项的通知》原则13和原则23的规定[8]，人民法院对于该等规则进行司法审查的重点也应在于有关规则制定的程序合法性，而非该等规则的内容合理性，即：在上海清算所有关规则的制定符合央行有关制定规则的情况下，该等规则内容的合理性应由上海清算所主管机关进行监督、管理。

1.3 **本案中，系争的上海清算所有关规则符合央行有关上海清算所制定操作细则的规范要求，应当认定其具有合法性。**

1.3.1 《业务监督管理规则》主要在第四条、第五条、第六条、第十二条[9]对于上海清算所制定规则是否应当进行央行批准、备案等作出规定。简要而言，对于上海清算所有关章程、内控制度、风险管理制度及**业务规则**和应急预案的制定和重大修改等应当经央行批准；对于有关中长期业务发展规划的制定和修改等应报央行备案；而为了保证上海清算所业务的正常开展，其有权制定相关业务规则和**操作**

[8]《中国人民银行办公厅关于实施〈金融市场基础设施原则〉有关事项的通知》
原则13：参与者违约规则与程序
金融市场基础设施应具有有效的、定义清晰的规则和程序管理参与者违约。设计的这些规则和程序应该确保金融市场基础设施能够采取及时的措施控制损失和流动性压力并继续履行义务。
原则23：规则、关键程序和市场数据的披露
金融市场基础设施应该具有清晰、全面的规则和程序，提供充分的信息，使参与者能够准确了解参与金融市场基础设施承担的风险、费用和其他实质性成本。所有相关的规则和关键程序应公开披露。

[9]《银行间市场清算所股份有限公司业务监督管理规则》
第四条下列事项，上海清算所应当报中国人民银行批准：
（一）章程的制定和修改；
（二）并购、合并、重组、分立、解散等重大事项；
（三）内部控制制度、风险管理制度、**业务规则**以及应急预案的**制定**和**重大修改**；
（四）开展新业务或变更现有业务模式；
（五）与境内外其他市场中介机构的重大业务合作；
（六）中国人民银行要求的其他事项。
第五条下列事项，上海清算所应当报中国人民银行备案：
（一）制定和修改中长期业务发展规划；
（二）中国人民银行要求的其他事项。
第六条上海清算所应当采取下列措施保证业务的正常开展：
（一）具有专用的业务系统、网络和必备的硬件设施；
（二）建立系统故障应急处理机制和灾难备份机制，具有完备的数据安全保护和数据备份措施，确保有关数据和系统的安全；
（三）建立健全内部控制机制和风险管理制度，具备完善的风险管理系统，定期进行业务风险分析评价；
（四）**根据中国人民银行的管理要求，制定相关业务规则和操作细则，并切实执行**；
（五）加强关键业务岗位管理，关键岗位应建立复核制度和轮岗制度。
第十二条 本规则**第四条第三、四项涉及外汇管理的，应当报国家外汇管理局批准**；第七、八条涉及外汇管理的，应当向国家外汇管理局报告。

细则，并切实执行。区别于应当经央行批准的“业务规则”表述，央行通过“操作细则”的表述对于上海清算所根据业务需要制定细则的权力作出了明确授权。鉴于此，本案应着重判断系争的上海清算所有关规则在制定时是否符合前述规定的程序性要求。具体而言：

1.3.2 《清算业务规则》已经人民银行批准，该等事实已有申请人和被申请人双方共同认可，不存在争议。

1.3.3 《违约处置指引》《清算业务指南》以及《专家组工作章程》（合称“**争议规则**”）仅由上海清算所制定并无央行批准或备案记录，并因此引发双方争议。核心争议在于，前述规则是属于对须经央行批准的“业务规则”的“重大修改”、进而也同样需要根据《业务监督管理规则》第四条的规定事先经央行批准方可生效？还是属于《业务监督管理规则》第六条中上海清算所可予自行制定的“操作细则”？对此，我们认为，争议规则应属于“操作细则”，上海清算所有权自行制定，不应因没有获得央行批准而无效。理由如下：

1.3.4 首先，引发双方较大异议的争议规则主要涉及两个方面：（1）对于永久性违约认定中的“关键时点”的细化规定，和（2）在进行永久性违约处置时，上海清算所引入的专家组的决策目标和其具体处置流程的细化或更新规定。具体集中于：（1）《清算业务规则》第四十七、四十八条与《清算业务指南》（第八版）第 3.3.1、3.3.2.3、6.4.1 条以及《违约处置指引》（第二版）第五、八条；（2）《清算业务规则》第五十二条与《违约处置指引》（第二版）第四十二、四十三、四十五条；（3）《违约处置指引》（第二版）第二十二、四十四条与《违约处置指引》（第一版）第二十二、四十五条。

1.3.5 其次，结合《清算业务规则》第四十七、四十八、五十、五十二条，上述争议规则涉及的两个方面在《清算业务规则》中实际均已有体现，并已确立了对于该等内容进行规定的总体框架。而争议规则仅系出于对违约处置业务的正常开展、在《清算业务规则》确立的整体框架下进行了细化规定，从内容上而言，并没有做出超出《清算业务规则》内容的重大修改。

1.3.6 基于此，在认可被申请人在《补充答辩意见书》第 1.1.3 段内容的基础上，我们倾向于认为，申请人在 1.11.2 段中提出的《违约处置指引》修订过程中对于专家组决策目标的变化，即从“应以获取最佳市场价格与减少对冲损失为目标”变更为“应以减少对冲损失为目标”仍属于《清算业务规则》第五十条上海清算所可以根据集中清算业务具体情况、具体实施永久性违约相关措施的授权范围内，同时也符合《清算业务规则》第一条中对于上海清算所开展集中清算业务制定相关规则的目的要求。[10]

1.3.7 此外，经查阅上海清算所官网目前已公开发布的其他规则，上海清算所在发布其他具体业务的违约处置指引[11]及清算业务指南[12]时，也均采用根据具体业务的相关业务规则制定或修改的方式进行公告，并未向央行履行报批或备案程序，此种对业务规则进行细化规定的行为除已获得央行授权外，也已形成一定的规则制定商业习惯，应当予以尊重，而不宜以未经央行批准或备案而否定其效力。

1.3.8 同时，我们认为，在司法程序介入审查上海清算所制定或修改相关

[10]《银行间市场清算所股份有限公司集中清算业务规则》
第一条 目的要求 为规范银行间市场清算所股份有限公司（以下简称上海清算所）集中清算业务，防范清算风险，提高清算效率，维护参与主体合法权益，保障金融市场稳定，上海清算所根据相关法律、法规、部门规章及规范性文件等，制定本规则。
[11] 例如《银行间市场清算所股份有限公司人民币利率互换集中清算业务违约处置指引》。
[12] 例如《跨境外汇交易中央对手清算业务指南》《大宗商品衍生品中央对手清算业务指南》。

业务规则或操作细则是否符合其主管机关的监管规定时，也可考虑以征询意见的方式同步向上海清算所主管机关（包括央行及国家外汇管理局）征询意见，并以该等征询意见作为司法审查该等规则合法性的一项重要参考依据。

1.4 上海清算所合法制定的争议规则应已通过《清算协议》约定被合法纳入协议，构成对上海清算所和清算会员权利义务的有效约定，对机构A具有约束力，且基于该等规则的特殊性，不应适用民法典关于格式条款的规则对其是否属于合同内容进行审查。

1.4.1 首先，我们认为，上海清算所与各清算会员之间本质上是分别形成一一对应的合同关系，一方是服务提供者，另一方是服务接受者，也即上海清算所与各清算会员之间仍然为清算服务交易的相对方。因此，对于双方在《清算协议》项下的具体权利义务的确定仍应以合同约定为准进行判断。

1.4.2 本案中，《清算协议》在首页“特别提示”部分明确约定，“签署本协议即视为乙方（笔者注：清算会员）已完全接受并同意遵守甲方（笔者注：上海清算所）已发布的甲方相关规则及甲方今后对其不时进行的修改和补充”，同时该“特别提示”还列明了上海清算所公布该该等规则的网址信息，便于机构A查询。我们认为，机构A正式签署《清算协议》的行为应当视为其对于上海清算所自行制定的规则及其不时更新会被自动纳入《清算协议》、形成对双方权利义务的具体约定的明知和同意，机构A应受基于该等约定而被纳入《清算协议》的上海清算所的争议规则的约束。

1.4.3 其次，承前述，基于争议规则所具有的类自律规范性文件的特殊性，以及其基于金融习惯等而具备的普遍约束力和规范指引性，我

们认为在判断该等争议规则是否已被有效纳入《清算协议》时不应适用格式条款规则。理由如下：

1.4.4 正如我们在上述第 1.3.3-1.3.6 段中所述，该等争议规则实际为上海清算所作为金融市场基础设施、根据其权力来源而依法制定的“操作细则”，该等规则具有超越传统契约性质，即在一定程度上具有即使未能与其交易相对方协商并获得对方事先同意，而直接对所有签署《清算协议》并接受集中清算业务的清算会员发生效力的“准法律效力”，因而不宜被认定为属于民商法概念下的“格式条款”。事实上，该等直接适用的“准法律效力”，也与上海清算所作为金融基础设施的特殊地位、其在客观上承担着稳定金融秩序、防范金融风险的社会经济管理职能所相适应。

1.5 上海清算所客观上也已经采取了特定方式确保了申请人的知情权和参与权，争议规则也不存在不合理侵害申请人合法权益的情况。

1.5.1 首先，就争议规则本身，上海清算所已通过事先公开，并根据该等规则以高效、有序、透明的交易流程，来保证市场参与方对于交易结果可以有明确的预期，而争议规则所涉的上海清算所的集中清算行为针对的是整个交易市场，其在做出违约处置的具体决策的过程中，不仅要考虑到个体清算会员的利益，也需要考虑整体金融市场的稳定、有序和安全，防范系统性风险的发生。因此，上海清算所在其制定、修改争议规则内容时并不会指向特定清算会员，而上海清算所也并不会从中获益[13]，其不具备不合理地免除或者减轻其责任、加重责任、限制主要权利的主观意图。

1.5.2 其次，根据被申请人的事实介绍，上海清算所已在制定和实施争议

[13]《银行间市场清算所股份有限公司集中清算业务规则》
第六条 资产保护 清算参与者在集中清算业务中的待结算证券、资金等资产，以及保证金、清算基金等履约保障资产，均属于清算参与者所有，仅可用于集中清算业务，上海清算所根据相关规定进行管理，其他单位和个人不得动用。

规则时采取了特定方式综合保障各清算会员的合法权益。例如：上海清算所在制定争议规则前，曾多次通过其官网公开征求意见，并实际吸收并采纳了部分清算会员意见；在争议规则制定后，上海清算所均会在官网如实披露该等规则；同时，上海清算所还会每年邀请全市场清算会员或采用轮换制邀请全市场清算会员参加有关争议规则所涉的违约处置演练，机构A曾作为受邀清算会员参与过违约处置演练。有合理理由认为，这些综合措施的实施足以在争议规则制定时和实施后保障申请人获得应有的知情权和参与权。

1.5.3 此外，值得关注的是，申请人在本案中向上海清算所递交的《清算会员运营违约承诺书》实际就是争议规则中《违约处置指引》的附件中的模板文件，由此可见，机构A本身的行为也表明其系知晓该等规定，并切实根据该等规定要求提出过相应申请，其已通过其行为认可该等规则对其的适用。

1.6 **总体而言**，基于上海清算所属于金融基础设施、具备公共管理职能的特殊主体性质，其制定的规则具有类自律监管规范性文件性质。在上海清算所同时为清算会员依约提供集中清算服务时，该等规则应被视为已经清算会员的事先同意而被纳入《清算协议》，并对各清算会员产生约束力。基于该等规则的特殊性，在认定其符合特定的法定制定程序并已具备合法性的前提下，不应机械适用有关格式条款规则判断其构成“格式条款”，并否定其构成《清算协议》的有效组成部分。

2. 关于上海清算所违约处置合理性的意见

2.1 法院对于上海清算所的违约处置合理性应具有司法审查权

2.1.1 上海清算所作为中央对手方，对于清算会员的违约处置在其相关规

则范围内具有一定的自由裁量权，这是与国际实践相一致的。2012年，国际清算银行下设的支付与市场基础设施委员会（CPMI）和国际证监会组织（IOSCO）技术委员会发布的《金融市场基础设施原则》中原则 13 的要点 2 就提到，“中央对手方应为其违约处置规则和程序的实施做好充分准备，包括其规则中规定的任何适当的自由裁量程序”。

2.1.2 但是，上海清算所在违约处置过程中的自由裁量权不应完全没有约束，法院对此应当具有司法审查权。参考相关国际、国内实践（具体见以下第 2.2 部分），并考虑上海清算所作为中央对手方的特殊市场地位（具体见以下第 2.3 部分），合理的规则应当是：**法院可以审查上海清算所的违约处置过程是否符合合理性原则，即其在违约处置时应当满足诚实信用原则，不应任意、武断、不合理地进行违约处置；但是，该等合理性原则的要求不应过高，特别是不应要求上海清算所为清算会员的利益行事，或保证违约处置过程中清算会员利益最大化。**

2.2 国际、国内相关实践的参考

2.2.1 由于我国对于中央对手方违约处置过程并没有相关司法实践，因此我们认为可以借鉴相关国际实践。我们注意到国际上中央对手方违约处置相关案例并不多，[14]因此也可以借鉴其他一方有自由裁量权、可能影响另一方利益的一方在行使自由裁量权时面对的司法审查的实践，例如 ISDA 主协议项下金融衍生品净额结算相关案例、清算经纪商与其客户之间关于场内衍生品净额结算的案例以及国内期货强制平仓相关案例。

[14] Murphy, David and Braithwaite, *Central counterparties (CCPs) and the law of default management. Journal of Corporate Law Studies*, 2017 17(2). pp. 291-325.

中央对手方违约处置相关案例

2.2.2 中央对手方违约处置相关的一个可资参考的案例为*Re MF Global (in special administration) [2015] EWHC 2319 (Ch)*。在该案例中，全球曼氏金融（MF Global）是伦敦的一家金融衍生品及期货经纪公司，其在 2011 年 10 月进入接管状态（administration），在当时其与伦敦清算所集团（LCH.Clearnet）下分别位于伦敦和巴黎的清算公司（LCH.Clearnet Limited 和 LCH.Clearnet SA，作为中央对手方）仍有敞口头寸。由于进入接管状态构成相关合同项下的违约，清算公司即对全球曼氏金融敞口头寸进行了平仓，造成了全球曼氏金融大约4.22亿欧元损失，其中由于意大利政府债券的敞口平仓导致的损失大约为 1.273 亿欧元。全球曼氏金融的管理人认为清算公司在前述交易中的平仓价格与彭博公布的屏幕报价存在显著差异，并以此要求清算公司披露与结算相关的文件和信息。对此，法官指出，本案中，彭博屏幕上的报价是 2500 万欧元的类似意大利政府债券的交易价格，与 22 亿债券的出售数量级完全不同。2500 万份债券的交易价格对 22 亿份债券的成交价格几乎没有影响，即使后者可以被拆分为多个小份。一个市场吸收相对少量债券的能力并不能说明市场吸收大量债券的能力，也不能说明市场参与者准备购买这些债券的价格。法官还指出，平仓后一日的交易价格并不能作为很好的参考，特别是考虑到当时在欧元危机的情况下几乎每小时都会有重要事件发生。因此，法官认定，仅仅是价格差异并不足以让法院支持管理人该等影响较大的关于信息披露的请求。（**见附件 5，第 52 段**）

2.2.3 从该案例可以看出，英国法院并不倾向于轻易介入对中央对手方的

违约处置，这可能也解释了为什么中央对手方违约处置过程受到司法审查的案例较少。但是，该案例另一方面也说明，如果原告有足够多的观点和依据，法院还是有可能对中央对手方的违约处置合理性进行审查甚至进行质疑，但只是平仓价格和第三方数据的差异本身应该说尚不足以证明中央对手方的违约处置存在问题。

ISDA 主协议项下金融衍生品净额结算相关案例

2.2.4 就法院对于中央对手方的违约处置的审查，也可以参考 ISDA 主协议下金融衍生品中计算方对终止净额的结算受到司法审查的案例。ISDA主协议下金融衍生品的计算方对于终止净额结算也在ISDA主协议的范围内具有一定的自由裁量权，在司法实践中，该等计算方在结算过程中的自由裁量权可能被非计算方所挑战从而受到司法审查，因此该等 ISDA 主协议项下金融衍生品争议的国际实践有一定参考价值。

2.2.5 1992 年和 2002 年 ISDA 主协议均提到“商业合理性”。根据 1992 年ISDA主协议第14条，如果市场报价法不能得出一个具有商业合理性的结果，可以以另一种计算方法损失法来计算终止净额。2002 年ISDA主协议第14条约定，“任何终止净额应当由计算方（或其代理）决定，其应当善意行事，并适用具有商业合理性的程序从而得到一个具有商业合理性的结果”。

2.2.6 *Peregrine Fixed Income Ltd v Robinson Department Store Public Co Ltd [2000] C.L.C. 1328* 案件中讨论了 1992 年 ISDA 主协议中的 “商业合理性”。该案件中，Peregrine 与 Robinson 达成了一系列衍生品交易。Robinson 作为非违约方采用市场报价法进行了终止净额结算，但 Peregrine 认为市场报价法导致了不具有“商业合理性”的结果。

法院认为，在该等争议中应当适用主审法官格林（Lord Greene）在1948年经典案例 *Associated Provincial Picture Houses v. Wednesbury Corporation* 提出的“*Wednesbury test*”，即应当满足诚实信用原则，不应任意、武断、不合理地行事。（**见附件6，第39段；附件7，第117段**）

2.2.7 从该案件可以看出，法院在审查衍生品终止净额结算时不仅会考虑合同约定，也会考虑普通法下的合理性原则，即要求在合同中有自由裁量权、可能影响另一方利益的一方在行使自由裁量权时需要满足合理性原则，即上述“*Wednesbury test*”。上海清算所与机构A的业务协议和相关规则中虽然没有明确提到“合理性原则”，但上海清算所作为对违约处置具有一定裁量权的一方，也应当借鉴上述普通法规则，要求其在违约处置时满足合理性原则，即应当满足诚实信用原则，不应任意、武断、不合理地行事。

清算经纪商与其客户之间关于场内衍生品净额结算的案例

2.2.8 在场内衍生品交易中，清算经纪商和其客户之间关于净额结算的争议也可以提供一定参考。场内衍生品的结算一般是通过特定的清算所进行，非清算会员只能与清算经纪商达成交易，而清算经纪商作为清算会员则会相应与清算所达成交易。在该等清算经纪商与其客户（即非清算会员）之间的交易中，清算经纪商可能在特定条件下对其客户的敞口头寸进行净额结算，清算经纪商对于该等结算也存在一定自由裁量权，因此相关实践也具有参考价值。

2.2.9 在 *Euroption Strategic Fund Ltd v Skandinaviska Enskilda Banken AB [2012] EWHC 584 (Comm)* 案件中，Skandinaviska Enskilda Banken AB（“**SEB**”）即为清算经纪商，而 Euroption 作为非清算会员需

要通过SEB达成场内衍生品交易。该案中，法官认定，SEB作为清算经纪商在结算时应当有一定的自由裁量权，并受到诚实信用和合理性原则的约束，但不能进一步要求其在结算时尽到合理的注意义务（reasonable care）以及适当的专业标准（suitably professional standard），特别是考虑到清算经纪商是在紧急情况下系代表其自身利益行事。即使不考虑该等标准，从事实层面，法官也认为SEB提交的专家证据也已经支持了其有充分的理由进行相关交易，并没有证据证明 Euroption 提出的假设性的其他方案有可能在同一天可以交易，或者即使可以交易，可能得到对 Euroption 更有利的结果。因此，法院没有支持 Euroption 对于 SEB 结算的质疑，即使其没有最大化 Euroption 的利益。（**见附件 7，第 128-129 段、第 164 段**）

2.2.10 以上案例对于“合理性原则”的标准具有一定参考价值。参考该等案例，对于清算经纪商的裁量权的约束不应采用过于严格的标准，例如普通法下的合理的注意义务（reasonable care）以及适当的专业标准（suitably professional standard），而只是应限定在“合理性标准”；换言之，不应要求清算经纪商保证结算过程中最大化其客户利益。考虑到上海清算所特殊的市场主体地位（具体如以下第 2.3 部分所述），其应当尽到的义务标准不应当高于该等清算经纪商。

国内期货强行平仓相关案例

2.2.11 除了国际实践之外，国内期货交易强制平仓案例也具有一定参考意义。例如，在最高院公报案例“范有孚与银建期货经纪有限责任公司天津营业部期货交易合同纠纷再审案”[15]中，双方的争议焦点之

[15] (2010)民提字第 111 号，来源《最高人民法院公报》2011 年第 6 期(总第 176 期)。

一即按照何种价格计算强制平仓的损失。对此，法院认为：“期货市场上对已经发生的价格走势，谁都可以做出准确判断并可以选择有利于自己的价格去适用，但对尚未发生的价格走势预测，谁也不能十分肯定其判断就一定准确。所以，基于已经发生的强行平仓事实，不能往后寻找而只能往前寻找强行平仓损失的计算基准点，才是客观和公正的。”（**见附件 8，第 19 页**）同理，在判断上海清算所违约处置是否具有合理性时，也不应当以事后判断的方式，而应当站在交易当时的节点，判断上海清算所的违约处置是否符合合理性原则。

2.3 中央对手方的特殊市场地位应纳入考量

2.3.1 在判断中央对手方在违约处置时应满足的合理性原则的程度时，应当考虑其具有的特殊市场地位。中央对手方的主要意义在于，在某个市场参与者发生违约事件时，中央对手方通过及时的违约处置，避免因某一个结算参与人的违约或破产而引发结算系统的连锁反应，从而维持市场秩序的稳定、有效减少系统性风险。如果要求中央对手方在违约处置时尽到较高标准的义务，很有可能导致中央对手方无法进行及时的违约处置；在更为极端的情况下，较高标准的义务可能导致中央对手方自身面对风险敞口，甚至导致中央对手方出现无力偿还或破产的情况，最终可能对整个金融市场产生严重的系统性风险。

2.3.2 对此，许多国家和地区立法以及清算所交易规则都将中央对手方的特殊性以及其在减少系统性风险的特殊地位作为衡量其违约处置合理性的一个重要考虑因素。例如，欧盟在其《关于支付和证券结算系统的结算最终性的第 1998/26/EC 指令》第 48 条即指出：“交易

所首先应当采取快速的行动来减少损失并缓释流动性压力，来减少系统性风险。”《伦敦清算所违约处置规则及清算会员协议》违约处置规则附录 3 第 2.1 条亦指出：“投资组合拆分的首要原则是需要优先保护清算所的资源。”本案中，《违约处置指引》第二十七条及《专家组工作章程》第二条也规定，专家组履行职责应当最大程度保护上海清算所风险资源，并以维护金融市场和中央对手方稳定为优先。

2.3.3 考虑以上情况，我们认为，一个比较合理的司法审查规则是，上海清算所在违约处置时应满足合理性原则，即满足诚实信用原则，即不应任意、武断、不合理地行事，但不应要求上海清算所为清算会员的利益行事，或保证违约处置过程中清算会员利益最大化。

2.4 本案中机构A对于上海清算所的违约处置违反合理性原则应负有举证责任

2.4.1 本案中，机构A认为上海清算所违约处置过程的问题包括以下四点：1）头寸分割不合理，导致对冲交易中的即期交易未能按照当日带量行情图的最优价格成交；2）询价次数不合理，上海清算所进行即期交易时仅进行三次询价，不符合行业惯例操作，未能获得充分的市场报价；3）对冲交易中掉期交易与待平仓头寸的远端清算日期及头寸金额匹配不合理，未能充分匹配，降低风险敞口；4）交易方案从作出到实施的间隔时间长，导致方案实施时的市场行情发生变化，交易方案已丧失时效性，并非最佳方案。

2.4.2 我们认为，仅仅提出上海清算所违约处置过程中的问题并不足以满足机构A的举证责任。暂且不论上海清算所应满足的合理性原则应达到什么程度，如果上海清算所对于上述问题均可以做出合理的解

释的话，机构A应进一步举证证明，一个合理的第三方在交易当天面对同样的市场会采取机构A所提出的某种替代交易方案，该等替代交易方案在当天具有可行性，且会得到对机构A更有利的结果。换言之，机构A仅从操作流程指出其认为可能的问题，并事后通过提供第三方数据的方式认为交易价格存在不合理性，仍不足以证明上海清算所的违约处置违反了合理性原则。

2.4.3 参考国际实践和我国相关证据规则，机构A可以考虑根据《最高人民法院关于适用〈中华人民共和国民事诉讼法〉的解释》第一百二十二条和第一百二十三条，向法院申请由一至二名具有专门知识的人员出庭，对上述专业问题提出意见；人民法院可以对出庭的具有专门知识的人进行询问；当事人各自申请的具有专门知识的人也可以就上述专业问题进行对质。

此致

上海金融法院

意见提供人：上海市方达律师事务所

团队负责人：

李春 律师 / 冯璐 律师

日期：2022 年 12 月 9 日

附件：

1. 中国人民银行办公厅关于实施《金融市场基础设施原则》有关事项的通知（银办发〔2013〕187号）
2. 季奎明：《金融市场基础设施自律管理规范的效力形成机制》，《中外法学》，2019年第2期
3. 《最高法立案庭负责人就上海金融法院案件管辖司法解释答记者问》
4. 宋航（一审审判长、主审法官），张文婷：《证券交易所自律监管行为正当性的司法审查标准》，载《人民司法·案例》2011年第4期
5. Re MF Global (in special administration) [2015] EWHC 2319 (Ch)
6. Peregrine Fixed Income Ltd v Robinson Department Store Public Co Ltd [2000] C.L.C. 1328
7. Euroption Strategic Fund Ltd v Skandinaviska Enskilda Banken AB [2012] EWHC 584 (Comm)
8. 范有孚与银建期货经纪有限责任公司天津营业部期货交易合同纠纷再审案

上海市方达律师事务所金融争议团队简介

方达金融争议团队有多位专注于金融争议的资深合伙人，有长期从事金融争议、深入了解金融业务的律师群体，代表客户在中国处理了大量的相关金融争议，并与我们的资本市场和金融机构业务团队紧密合作，共同处理各种大型与复杂金融争议。我们在包括银行、保险、证券、信托、资管等不同金融业务领域的争议拥有丰富的经验，包括相关争议发生前的协商谈判，代表客户提起或应对相关的诉讼及仲裁，推动相应裁判结果的强制执行程序，协助客户进行内部调查，应对金融监管机构的调查、处罚所引起的行政复议和诉讼，以及就金融争议所暴露出的合规及风险问题向客户提供法律意见，协助客户进行刑事报案。方达金融争议团队在复杂的期货和金融衍生品领域有丰富的经验，代理客户成功处理了多起期货和金融衍生品的诉讼和仲裁，并从监管、争议解决等方面为客户各类期货和金融衍生品业务提供全方面的咨询和建议。

本第三方意见书核心团队成员（具体简历可点击姓名访问）

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【法宝引证码】CLI.4.209443

中国人民银行办公厅关于实施《金融市场基础设施原则》有关事项的通知

制定机关： 中国人民银行 机构沿革

发文字号：银办发〔2013〕187号

时效性： 现行有效

效力位阶： 部门规范性文件

法规类别： 银行类金融机构

中国人民银行办公厅关于实施《金融市场基础设施原则》有关事项的通知

（银办发〔2013〕187号）

中国人民银行上海总部，各分行、营业管理部，各省会（首府）城市中心支行，各副省级城市中心支行；国家开发银行、各政策性银行、国有商业银行、股份制商业银行，中国邮政储蓄银行；中国外汇交易中心、中国人民银行清算总中心，中央国债登记结算有限公司、中国银联股份有限公司、银行间市场清算所股份有限公司、城市商业银行资金清算中心、农信银资金清算中心：

金融市场基础设施是经济金融运行的基础。安全、高效的金融市场基础设施对于畅通货币政策传导机制、加速社会资金周转、优化社会资源配置、维护金融稳定并促进经济增长具有重要意义。2008年金融危机爆发后，国际社会对构建高效、透明、规范、完整的金融市场基础设施十分重视并达成广泛共识。2012年，在汲取金融危机的教训，吸收现有重要支付系统、证券结算系统和中央对手等国际标准执行经验的基础上，支付结算体系委员会（CPSS）和国际证监会组织（IOSCO）技术委员会联合发表了《金融市场基础设施原则》（以下简称《原

则》），全面加强对金融市场基础设施的管理，并要求其成员尽快将《原则》落实到位。我国是这两个组织的正式成员。为促进我国金融市场基础设施安全、高效、稳定运行，现就实施《原则》有关事宜通知如下：

一、《原则》的主要内容

《原则》识别和消除了原有国际标准之间的差异，强调全面加强风险管理要求，提高了各类金融市场基础设施安全高效运行的最低标准，是对金融市场基础设施风险管理经验的全面总结，适用其成员认定的各类金融市场基础设施。

（一）《原则》将各类金融市场基础设施纳入整体考虑，全面加强风险管理要求。根据《原则》的定义，金融市场基础设施是指参与机构（包括系统运行机构）之间，用于清算、结算或记录支付、证券、衍生品或其他金融交易的多边系统，包含重要支付系统、中央证券存管、证券结算系统、中央对手和交易数据库等五类金融公共设施。《原则》从总体架构、信用风险和流动性风险管理、结算、中央证券存管和价值交换结算系统、违约风险管理、一般业务风险和运行风险管理、准入、效率和透明度等 9 个方面详细规定了各类金融市场基础设施安全、高效运行应遵守的 24 条原则，还指出了金融监管部门应遵守的 5 项职责（见附件）。此外，《原则》强调金融市场基础设施之间的相互依赖性，要求金融监管部门关注系统间的相互影响，实施全面的风险管理措施，从而更有效地保障金融体系的安全性和稳定性。

（二）《原则》提高了金融市场基础设施风险管理的最低要求。与以往的国际标准相比，《原则》要求特定种类的金融市场基础设施维持较高水平的金融资源以应对信用风险、流动性风险和一般业务风险；指出了金融市场基础设施抵御信用风险、流动性风险等主要风险因素的量化要求和管理手段；对金融市场基础设施的运行管理和分级参与机制提出了更详细的指导意见。此外，《原则》还突出强调了要增强透明度。

（三）《原则》加强了实施要求。与以往的国际标准不同，支付结算体系委

员会和国际证监会组织此次加强了国际标准的实施要求，采取了对达标的金融市场基础设施参与机构给予净资本要求优惠等手段强化其市场约束力，同时明确了监管部门的实施责任。支付结算体系委员会和国际证监会组织将定期监测和评估各成员实施《原则》的情况。

二、充分认识实施《原则》的重要性

构建安全、高效的金融市场基础设施是一项艰巨、复杂、富有挑战性的系统性工程。我国金融市场正处于开放型、国际化的发展过程中。经济社会持续快速发展，金融改革深入推进，支付、证券和衍生品的交易活动日益频繁，金融市场的广度和深度不断拓展，国内外支付系统、证券结算系统、中央对手等各金融市场基础设施之间的相互依赖程度不断加深。在新形势下落实《原则》，推动我国金融市场基础设施的建设，建立更加完善的支付、清算、结算法规制度，协调发展的支付系统、证券结算系统和中央对手等金融市场基础设施，以及协同一致的监督管理政策，是保持经济平稳运行和科学发展的内在要求。

目前，我国已经承诺在管辖范围内最大限度地采纳这些金融市场基础设施原则。世界银行、国际货币基金组织和金融稳定理事会也将在接下来开展的金融部门评估规划（FSAP）和同行评估项目中逐步采用新的标准。

三、积极稳妥实施《原则》

现阶段运行重要支付系统、中央证券存管、证券结算系统，以及承担中央对手和交易数据库职责的机构属于金融市场基础设施运行单位，需要遵守《原则》，并采取适当的行动将《原则》落实到位。作为上述金融市场基础设施的参与者，各金融机构也应符合《原则》相应的要求。作为监管部门，中国人民银行将依据《中华人民共和国中国人民银行法》等法律制度，尽快将《原则》与自身职责相整合。

（一）开展学习和培训。各单位应高度重视实施《原则》的重要意义，深入

【法宝引证码】CLI.4.209443

学习，认真领会，确保实施工作的顺利进行。《原则》已经在国内公开出版，中国人民银行分支机构应组织辖内相关业务人员开展系统性学习，全面掌握其主要内容，提高从业人员的业务水平和专业素养；要理论联系实际，结合辖内工作实际，明确其在辖区内适用的范围。

（二）开展自评估和评估。各金融市场基础设施运行单位应对照《原则》尽快开展自评估活动，比较、总结自身发展与《原则》要求的差异，制定落实《原则》的具体方案。此外，中国人民银行还将组织开展评估活动，确保自评估工作的一致性，明确金融市场基础设施运行单位符合 24 项原则需要改进的内容，以及中国人民银行自身符合监管金融市场基础设施的 5 项职责要求及需要加强和改进的工作。有关单位可采取适当方式披露自评估结果。

（三）全面落实《原则》。根据评估结果，各单位应就《原则》的相关要求，采取适当的改进措施。中国人民银行将制定实施《原则》的总体方案，推动完善金融市场基础设施相关法律法规，提出我国金融市场基础设施发展的指导意见和监督管理金融市场基础设施的相关政策。现阶段运行重要支付系统、中央证券存管、证券结算系统，以及承担中央对手和交易数据库职责的机构，应在评估基础上将 24 条原则纳入其制度办法中。各相关金融机构应配合中国人民银行和各金融市场基础设施运行单位做好《原则》的落实工作。

附件：金融市场基础设施原则和职责

附件

金融市场基础设施原则和职责

原则 1：法律基础

在所有相关司法管辖内，就其活动的每个实质方面而言，金融市场基础设施应该具有稳健的、清晰的、透明的并且可执行的法律基础。

原则 2：治理

金融市场基础设施应具备清晰、透明的治理安排，促进金融市场基础设施的安全、高效，支持更大范围内金融体系的稳定、其他相关公共利益以及相关利害人的目标。

原则 3：全面风险管理框架

金融市场基础设施应该具备稳健的风险管理框架，全面管理法律风险、信用风险、流动性风险、运行风险和其他风险。

原则 4：信用风险

金融市场基础设施应该有效地度量、监测和管理其对参与者的信用暴露以及在支付、清算和结算过程中产生的信用暴露。金融市场基础设施应以高置信度持有充足的金融资源完全覆盖其对每个参与者的信用暴露。此外，涉及更为复杂的风险状况或在多个司法管辖内具有系统重要性的中央对手，应该持有额外的、充足的金融资源来应对各种可能的压力情景，此类情景包括但不限于在极端但可能的市场条件下，两个参与者及其附属机构违约对中央对手产生的最大信用暴露。所有其他中央对手应该持有额外的、充足的金融资源来应对各种可能的压力情景，此类情景包括但不限于在极端但可能的市场条件下，单个参与者及其附属机构违约对中央对手产生的最大信用暴露。

原则 5：抵押品

通过抵押品来管理自身或参与者信用暴露的金融市场基础设施，应该接受低信用风险、低流动性风险和低市场风险的抵押品。金融市场基础设施还应该设定并实施适当保守的垫头和集中度限制。

原则 6：保证金

中央对手应该具备有效的、基于风险并定期接受评审的保证金制度，覆盖其

在所有产品中对参与者的信用暴露。

原则 7：流动性风险

金融市场基础设施应该有效度量、监测和管理其流动性风险。金融市场基础设施应该持有足够的所有相关币种的流动性资源，在各种可能的压力情景下，以高置信度实现当日、日间（适当时）、多日支付债务的结算。这些压力情景应该包括但不限于：在极端但可能的市场环境下，参与者及其附属机构违约给金融市场基础设施带来的最大流动性债务总额。

原则 8：结算最终性

金融市场基础设施应该至迟于生效日日终提供清晰和确定的最终结算。如果有必要或更好，金融市场基础设施应该在日间或实时提供最终结算。

原则 9：货币结算

金融市场基础设施应该在切实可行的情况下使用中央银行货币进行货币结算。如果不使用中央银行货币，金融市场基础设施应最小化并严格控制因使用商业银行货币所产生的信用风险和流动性风险。

原则 10：实物交割

金融市场基础设施应明确规定其有关实物形式的工具或商品的交割义务，并应识别、监测和管理与这些实物交割相关的风险。

原则 11：中央证券存管

中央证券存管应该具有适当的规则和程序，以帮助确保证券发行的完整性，最小化并管理与证券保管、转让相关的风险。中央证券存管应该以固定化或无纸化形式维护证券，并采用簿记方式转账。

原则 12：价值交换结算系统

如果金融市场基础设施结算的交易涉及两项相互关联的债务（如证券交易或

外汇交易）结算，应该通过将一项债务的最终结算作为另一项债务最终结算的条件来消除本金风险。

原则 13：参与者违约规则与程序

金融市场基础设施应具有有效的、定义清晰的规则和程序管理参与者违约。设计的这些规则和程序应该确保金融市场基础设施能够采取及时的措施控制损失和流动性压力并继续履行义务。

原则 14：分离与转移

中央对手应具有规则和程序，确保参与者客户的头寸和与之相关的、提供给中央对手的抵押品可分离和转移。

原则 15：一般业务风险

金融市场基础设施应识别、监测和管理一般业务风险，持有充足的权益性质的流动性净资产覆盖潜在的一般业务损失，从而在这些损失发生时其能持续运营和提供服务。此外，流动性净资产应始终充足，以确保金融市场基础设施的关键运行和服务得以恢复或有序停止。

原则 16：托管风险与投资风险

金融市场基础设施应保护自有资产和参与者资产的安全，并将这些资产的损失风险和延迟获取风险降至最低。金融市场基础设施的投资应限于信用风险、市场风险和流动性风险最低的工具。

原则 17：运行风险

金融市场基础设施应识别运行风险的内部和外部源头，并通过使用适当的系统、制度、程序和控制措施来减轻它们的影响。设计的系统应当具有高度的安全性和运行可靠性，并具有充足的可扩展能力。业务连续性管理应旨在及时恢复运行和履行金融市场基础设施的义务，包括在出现大范围或重大中断事故时。

原则 18：准入与参与要求

金融市场基础设施应该具有客观的、基于风险的、公开披露的参与标准，支持公平和公开的准入。

原则 19：分级参与安排

金融市场基础设施应识别、监测和管理由分级参与安排产生的实质性风险。

原则 20：金融市场基础设施的连接

与一个或多个金融市场基础设施建立连接的金融市场基础设施应识别、监测和管理与连接相关的风险。

原则 21：效率和效力

在满足参与者及所服务市场的要求方面，金融市场基础设施应有效率和效力。

原则 22：通信程序与标准

金融市场基础设施应使用或至少兼容国际通行的相关通信程序和标准，以进行高效的支付、清算、结算和记录。

原则 23：规则、关键程序和市场数据的披露

金融市场基础设施应该具有清晰、全面的规则和程序，提供充分的信息，使参与者能够准确了解参与金融市场基础设施承担的风险、费用和其他实质性成本。所有相关的规则和关键程序应公开披露。

原则 24：交易数据库市场数据的披露

交易数据库应该根据有关管理部门和公众各自的需求对其提供及时、准确的数据。

职责 A：金融市场基础设施的管理、监管和监督

金融市场基础设施应接受中央银行、市场监管者或其他有关管理部门适当、

有效的管理、监管和监督。

职责 B：管理、监管和监督的权力和资源

中央银行、市场监管者及其他有关管理部门应当具有权力和资源来有效履行管理、监管和监督金融市场基础设施的职责。

职责 C：金融市场基础设施相关政策的披露

中央银行、市场监管者及其他有关管理部门应明确规定和披露其管理、监管和监督金融市场基础设施的政策。

职责 D：金融市场基础设施原则的应用

中央银行、市场监管者和其他有关管理部门应采纳 CPSS-IOSCO 的《金融市场基础设施原则》，并一致地应用这些原则。

职责 E：与其他管理部门合作

中央银行、市场监管者以及其他有关管理部门应在国内层面和国际层面（适当时）相互合作，促进金融市场基础设施的安全和效率。

【法宝引证码】CLI.4.209443

附件2

中外法学 Peking University Law Journal
Vol.31, No.2(2019)pp.541－559

金融市场基础设施自律管理规范的效力形成机制

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摘 要 金融市场基础设施通过自律管理规范对市场及相关主体实施自我约束，是对行政监管的重要补充。无论会员制还是公司制基础设施制定的自律管理规范都存在两方面困惑：其一，无法形成明确的对世效力；其二，不能取得相对于一般民商事法律的优先适用力。在比较法上，大都通过高位阶法律，将基础设施的属性定位在市场化与行政化之间。我国应将其明确界定为“非政府公共组织”，先行制定《金融市场基础设施条例》，通过行政法规的路径赋予自律管理规范对世的普遍拘束力。同时，将自律管理规范认定为《民法总则》第10条中的“习惯”，运用商法漏洞填补的司法技术实现其优先适用力。

关 键 词 基础设施 非政府公共组织 自律管理规范 普遍拘束力 优先适用力

广义的金融市场基础设施(Financial Market Infrastructure，以下简称“基础设施”)泛指一切为金融交易提供服务的机构、组织，但制度意义上更受关注的则是那些为大规模金融交易提供集中、统一、有序服务的基础设施。〔1〕次贷危机之后，“基础设施”逐步开始作为一种法律概念出现，美国的《多德·弗兰克法案》、国际支付结算体系委员会(CPSS)和国际证监会组织(IOSCO)联合发布的《金融市场基础设施原则》对“基础设施”的定义均围绕其交换、清算、

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〔1〕 参见郑彧、季奎明、曾大鹏：《金融市场基础设施的法律保护：现状、冲突与改进》，上海人民出版社2018年版，第1页。

结算、记录等功能展开。〔2〕而我国的金融当局则基本认可并援引上述《金融市场基础设施原则》中关于“基础设施”的界定。〔3〕在此基础上，结合我国金融市场的发展现状，本文所谓之“金融市场基础设施”是指为有组织、成规模的合法金融交易提供登记、存管、支付、清算、结算等服务的机构、组织。

金融市场的自律管理是指基础设施作为独立的主体，对市场自身的参与者及其相应的市场行为，实行自我规范、自我约束、自我控制，是相对于行政监管而言的，并且对行政监管形成重要补充。〔4〕“自律”并非只是对基础设施进行内部管理，而是要通过基础设施及其制定的规范性文件来管理市场主体和市场行为。但是，在我国实现这样的自律管理至少面临两大困难：第一，实施自律管理、制定自律管理规范的权限如何形成，目前真正获得法律授权进行自律管理的只有证券交易所，〔5〕其他基础设施（尤其是公司制的基础设施）何以有权制定自律管理规范并使该等规范形成对世的强效力，仍存争议；第二，相当一部分的自律管理规范来自于金融习惯、行业惯例或是国际标准，而这与我国现行的民商事法律有所扞格，自律管理规范能否获得优先适用的效力，尚须澄清。本文试图以基础设施法律地位的厘定为中心，探求自律管理规范形成双重效力的适当路径。

一、自律管理规范的效力困境

我国现阶段已经出现并发展相对成熟的基础设施包括（沪、深）证券交易所、中国证券登记结算有限责任公司、中央国债登记结算有限责任公司、中国金融期货交易所股份有限公司、上海票据交易所股份有限公司、银行间市场清算所股份有限公司等。近两年新设立的基础设施还有上海保险交易所股份有限公司、中国信托登记有限责任公司、跨境银行间支付清算有限责任公司等。这些基础设施的组织方式、权力来源不尽相同（见下表），〔6〕却都肩负着稳定市场、防范金融系统风险的重要使命。

〔2〕 See Dodd－Frank Wall Street Reform and Consumer Protection Act, Section 803(6); CPSS－IOSCO, Principles for Financial Market Infrastructure, 1.8, 1.9.

〔3〕 我国国务院或金融协调监管的层面都没有对“金融市场基础设施”进行界定，只有中国人民银行办公厅的“银办发〔2013〕187 号”文件和中国证券监督管理委员会办公厅的“证监办发〔2013〕42 号”文件直接援引《金融市场基础设施原则》，对基础设施的定义和分类进行了规定。

〔4〕 参见卢文道：《证券交易所自律管理论》，北京大学出版社 2008 年版，第 27 页。

〔5〕 参见《证券法》第 102 条：“证券交易所是为证券集中交易提供场所和设施，组织和监督证券交易，实行自律管理的法人”；第 108 条：“证券交易所依照证券法律、行政法规制定上市规则、交易规则、会员管理规则和其他有关规则，并报国务院证券监督管理机构批准。”

〔6〕 参见郑彧等，见前注〔1〕，第 38 页。

表1

基础设施名称	类型	批准/主管机关	权力机构	有无法律授权设立
上海、深圳证券交易所	会员制	国务院	会员大会	《证券法》
上海期货交易所	会员制	证监会	会员大会	《期货交易管理条例》
中国证券登记结算有限责任公司	公司制	证监会	股东会	《证券法》
中央国债券登记结算有限责任公司	公司制	中国人民银行	股东会	无
中国信托登记有限责任公司	公司制	银监会(现银保监会)	股东会	无
中国金融期货交易所股份有限公司	公司制	证监会	股东大会	《期货交易管理条例》
银行间市场清算所股份有限公司	公司制	中国人民银行	股东大会	无
上海保险交易所股份有限公司	公司制	保监会(现银保监会)	股东大会	无
上海票据交易所股份有限公司	公司制	中国人民银行	股东大会	《票据交易管理办法》

为实现预期功能,基础设施所制定的自律管理规范应当在两个层次上彰显效力:第一,形成普遍意义上的拘束力,对市场主体、市场行为乃至第三人具有规范作用;第二,在与基础设施相关的场合中,如与一般民商事法律冲突时,应当优先适用,否则自律管理的功能将被消解。

(一)自律管理规范无法形成普遍拘束力

我国现有的基础设施分为会员制与公司制两类,这两类基础设施试图赋予自律管理规范拘束力的路径有所不同,但效果都不尽理想。

1.会员制基础设施:法律授权或协议的路径无法对抗第三人

在我国,会员制的基础设施主要是指证券交易所和上海期货交易所,其特征是会员大会是最高权力机构,自律管理同时具备"权力"和"权利"的双重属性。〔7〕具体而言,自律管理规范的效力一部分来源于《证券法》《证券交易所管理办法》或者《期货交易管理条例》的授权,〔8〕另一部分则是基于会员制基础设施本身的性质、目的和独立人格。首先,会员制基础设施作为典型的社团法人,由享有自由意志的市场参与人创立或加入,章程是会员意志的集中体现,依据章程制定的自律管理规范自然可以对全体会员形成约束力。其次,会员制基础设施之所以制定自律管理规范,目的在于承担个体通过自治无法实现的功能,比如降低交易成本和抵御政府干预,制定自律管理规范是对个体诉求的整合和升华。再者,会员制基础设施具有独立的人格,一旦成立就有自己的意思、行为和财产,具备制定规范协调团体利益并因此而承担责任的可能。

〔7〕 参见徐明、卢文道:"从市场竞争到法制基础:证券交易所自律监管研究",《华东政法学院学报》2005年第5期,第27页。

〔8〕 参见《证券法》第118条、《证券交易所管理办法》第15条、《期货交易管理条例》第13条。

特别值得说明的是，会员制基础设施的自律管理规范对非会员也可能形成约束力。例如，上市公司并非证券交易所的会员，同样要遵守证券交易所制定的规范。这不仅是因为《证券法》和《证券交易所管理办法》在交易所对上市公司的监管职能方面有授权，也是因为证券交易所与上市公司之间最基础的法律关系来自于契约——上市协议，以私人却又不失正式的方式将上市公司遵守交易所规则、接受交易所监管的义务确立下来。

但是，自律管理规范对于契约当事人以外的非会员一般无法形成约束力，而这种先天缺陷带来的负面影响不容小觑。例如，公开市场的金融产品交易过程大致包括交易时段的撮合及成交确认、交易时段后的清算、产品交收与资金交付，在大多数情况下，交易撮合成功后至金融产品交收完成前有一段时间窗口，称为清算交收期。已被确认“交易”而尚未交收“过户”的金融产品，根据“T＋N”规则，只是被冻结而未发生所有权转移，出卖人的债权人能否对该产品采取强制措施？《证券法》第 167 条虽然对证券此时所处的特殊“担保”状态有所确认，但仍不足以完全排除证券被冻结、划扣的可能，事实上确有大量的法院到证券登记结算机构要求司法协助。〔9〕“金融交易不可逆”在中央对手方机制下的自律管理规范中是最基本的规则，它对现行法律的含糊或者缺漏之处有很好的补充作用，如果不能得到遵循，市场的稳定势必受到巨大的冲击。

相比公司制的基础设施，会员制基础设施的自律管理规范在相关市场内通常是可以得到遵守的，但以作为市场参与者的债权人为代表的第三人往往并不认可该等规范，第三人的强制执行可能妨碍自律管理规范维持市场秩序的目标实现。

2.公司制基础设施：准会员制或监管授权的路径缺乏普适性、正当性

公司制基础设施数量众多且法律地位更加模糊。这些“公司”大多是依据监管部门的批复而设立的企业法人，在法理上面临着企业法人如何对外行使“管理”职责的问题。除了特别法另有规定（比如《证券法》对中国证券登记结算有限责任公司的性质与职能有专门界定）外，公司本身作为一种营利组织，未经法律的授权只能与其他主体存在平等的民商事关系，即使其可能为了自身经营需要而发布一定的交易规则（如结算规则、清算规则、交收规则等），也难以形成普遍的拘束力。为获得法律效力，公司制基础设施采取了以下两种路径。

其一，以形式上的公司制、实质上的会员制获得权利让渡。以上海保险交易所股份有限公司（以下简称“保交所”）为例，由于无法通过公司章程形成对于全体保险商的约束，保交所推出了《上海保险交易所股份有限公司会员办法（试行）》。该办法是根据《保险法》等法律法规以及《上海保险交易所股份有限公司章程》而制定的，依据该办法，在境内外依法设立的企业、事业

〔9〕《证券法》第 167 条规定：“证券登记结算机构为证券交易提供净额结算服务时，应当要求结算参与人按照货银对付的原则，足额交付证券和资金，并提供交收担保。在交收完成之前，任何人不得动用用于交收的证券、资金和担保物。”但是，该规定的缺陷明显：第一，这些规则在采“证券”狭义理解的立法背景下仅适用于股票、债券，无法推及更多的金融产品；第二，通说认为此条规定只限定二级结算机制中作为一级净额结算人的券商交付责任，并没有明确在二级结算过程中客户托管于券商的证券是否处于“担保状态”；第三，“任何人”是否指代私人主体，司法机关能否基于特殊地位而享有处置权尚存争议。正因如此，大量法院（尤其是基础设施所在地以外的法院）在金融产品出卖人之债权人的申请下，要求基础设施冻结、划扣金融产品。这样的司法实践使得“金融交易不可逆”的基本市场规则难以单纯通过解释论来确立。

单位、社会团体和其他组织等都可以自愿申请成为保交所的会员，并在保交所审查许可后拥有会员身份。由此，保交所通过“自愿申请—审批同意”的契约方式确立了基础设施与会员之间的关系，并依照《会员办法》第13条要求会员“遵守本所及附属机构的管理规范和相关业务规则”，“接受本所的自律管理”。“准会员制”在某种程度上可以促进自律管理规范在金融市场参与主体之间的执行，但缔结入会协议的自愿属性令该模式缺乏普适效果，而且也同样无法克服会员制对抗第三人时的效力缺陷。

其二，以行政主管机关的规章、规范性文件或者批复作为自律管理规范的效力来源。以上海票据交易所股份有限公司（以下简称“票交所”）对票据的交收为例，中国人民银行《票据交易管理办法》第62条规定，“票据市场基础设施依照本办法及中国人民银行有关规定制定相关业务规则，报中国人民银行同意后施行”。据此，票交所先后发布了《上海票据交易所票据交易规则》和《上海票据交易所票据登记托管清算结算业务规则》，后者的第41条规定了“票据交易的资金结算完成后，结算指令不可撤销”等体现结算最终性的业务规则，对相关市场的交易安全有重要的意义。这种模式的主要特点是通过行政机关的规章授权公司制基础设施制定规则，又因不具备会员制的特殊属性，规则形成效力还需主管机关的批准或备案。值得质疑的是，上述做法是否在本质上构成一种行政授权，监管权能否转授，基础设施是否属于适格的被授权主体，恐怕都难以得到有依据的正面回答。

综上，少数基础设施得到了法律的授权进而享有自律管理的职权，部分基础设施通过会员契约的方式寻求市场参与者的私人授权，大多数基础设施只是得到监管部门不同形式的许可而制定自律管理规范，事实上缺乏法理基础，难以形成普遍意义上的规范拘束力。况且，即便是有法律授权的基础设施所制定的自律管理规范也存在对抗第三人的效力诉求，这种更强的规范效果仍有待通过合理的路径予以确立。

（二）自律管理规范难以获得优先适用力

随着金融创新的深化，金融交易经常缺乏有针对性的特别规范，行政监管也无法做到及时、周延，为了增强市场的稳定预期，自律管理规范的适用就显得很有必要。然而，在一般民商事法律规范与自律管理规范之间如何安排适用顺序也是一个棘手的问题。基础设施自律管理规范往往来源于金融交易习惯、行业惯例或者是国际标准、示范性法律文件等，这些规范对金融市场有很好的适用性，但其特殊规则经常与《物权法》《担保法》《合同法》《破产法》等一般民商事法律发生冲突。

自律管理规范与民法一般规则的矛盾最为突出，这方面例证众多。前文论及的金融商品交易的“T＋N”规则，从传统所有权的观念来看，标的在交收期尚未转移权属，但处于自律管理规范设定的“过户担保”状态，民法意义上的所有权应当受到限制。特别是当基础设施作为中央对手方介入交易时，基础设施固定地作为唯一的买方或者卖方，由其对各市场参与人交付资金和交收金融产品，承担履约义务，且不受任何一方结算参与人是否正常履约的影响，〔10〕以

〔10〕 参见范向阳：“《关于查询、冻结、扣划证券和证券交易结算资金有关问题的通知》的理解与适用”，《人民司法》2008年第3期，第39页。

确保交易的顺利进行不受制于个别市场参与人的信用状况。如果不尊重以“金融交易不可逆”为核心思想的相关自律管理规范,一味以《物权法》中的普通规则来判定财产状态,允许另行处置标的资产,会迫使中央对手方用自有资金来维系交易体系的稳定。一旦此类情形大量出现,由于基础设施的资金能力终有限度,很容易引致系统性的风险。

此外,金融交易一般均以担保作为履约安全的保障,基础设施在实现担保权时普遍通过自律管理规范进行快速处置。例如,中央国债登记结算有限责任公司对已人工终止扣款的已融资业务,可以对质押债券进行清偿处理并生成“债券清偿过户通知单”。〔11〕快速处置的特点是通过事先的协议与出质人进行约定,要求出质人同意基础设施按照其颁布的业务规则来直接处置质押券,或者要求出质人承诺认可基础设施快速处置的后果。由于质押权的实现并未通过拍卖、变卖,上述快速处置在实践中会受到“禁止流质”的司法审查,《担保法》第 66 条和《物权法》第 211 条都禁止直接流质,不允许质权人对担保物事先约定所有权的归属转移。事实上,除了《证券法》第 167 条授权证券登记结算机构按照业务规则处理交收财产以外,再无法律直接、明确地对基础设施的快速处置进行赋权,用自律管理规范对抗一般的担保权制度显然力有不逮。

从性质上说,基础设施的自律管理规范也属于商法规范,但与传统的商法规则之间也存在不协调。以金融交易最常采用的“提前终止净额结算”为例,具有清算职能的基础设施一般都会借鉴 ISDA 主协议,在自律管理规范中对此加以规定。“提前终止净额结算”的操作流程主要包括:第一,合同提前终止,当出现违约事件或终止事件时,所有未完成合同均提前终止并加速到期;第二,债务计算,在合同终止日或其后合理的最短时间内,各方应按规定计算其账目;第三,轧差付款,根据约定的计算方法总括性地抵冲或轧差计算出一笔净额,由处于净支付方地位的交易者交付给处于净收入方地位的交易者。〔12〕由于“提前终止净额结算”的触发事件往往是交易参与人的资不抵债,净额结算的实施会使得部分债权人获得优先的受偿地位,违背《破产法》的公平受偿原则,进而受到破产撤销权、否认权以及追回权的影响。“提前终止净额结算”作为基础设施的自律管理规范,目标在于降低系统风险、提高现金流运用效率,但是在遭遇同样具有群体利益保护属性的破产法规则时,并不具备优先适用力,反而受制于破产规则。

通过上述的例证,不难发现,自律管理规范与作为一般法的民商事规范之间确实有不一致。那么,在同金融市场基础设施有关的特殊场合中,自律管理规范可以当然地作为特别法而被优先适用吗?根据《立法法》第 83 条的规定,只有在同一机关制定的规范性文件之间才有特别法优于一般法、新法优于旧法的适用顺序,据此来解释自律管理规范与一般民商事法律之间的关系是不可行的。为防止不当的规范效果,自律管理规范的优先性应当被承认,而承认的路径尚需创造性地探寻。

〔11〕 参见《中央国债登记结算有限责任公司自动质押融资业务实施细则》(2014 年)第 32 条。

〔12〕 参见 ISDA 2002 年主协议第 6 条。

二、自律管理规范效力形成的前提问题:廓清基础设施法律地位的比较法经验

依托基础设施制定自律管理规范来实现对行政监管的补充,早已成为成熟金融市场的经验,在我国尚缺少完备立法与充分实践的背景下,比较法上的考查、借鉴便十分具有价值。次贷危机之后,国际支付结算体系委员会与国际证监会组织联合颁布的《金融市场基础设施原则》(FMI 原则)对各国都形成了不同程度的影响,〔13〕其中的原则 1 就有关于"法律基础"的要求:金融市场基础设施在其司法管辖区域内应具有稳健的、清晰的、透明的以及可执行的法律基础。这种"法律基础"事实上是要求设立、发展基础设施的法域赋予其明确的法律地位,解决好制定主体的法律地位问题,自律管理规范才有可能找到效力形成的合理机制。下表梳理了世界主要金融市场中基础设施法律规制的基本格局,关于基础设施的法律地位存在着一些共通的趋势。〔14〕

表 2

国家/地区	基础设施类型	监管部门	法律依据
英国	CCP	英国金融行为局	1. Financial Services and Markets Act 2012 2. Financial Services Act 2012
美国	CCP/CSD/SSS SSS/CSD	美国证券交易委员会 英国财政部	15 U.S. Code § 78q - 1 Uncertificated Securities Regulations 2001
	CCP (Derivatives)	美国商品期货 交易委员会	7 U.S.C. § 7a - 1
德国	CCP/CSD/SSS (信贷机构)	德国联邦金融监管局	Gesetz über das Kreditwesen
法国	CCP	法国金融市场管理局 法国审慎监管管理局	CodeMonétaire et Financier
	CSD/SSS	法国金融市场管理局	1. CodeMonétaire et Financier 2.Règlement général de l'Autorité des marchés financiers

〔13〕《FMI 原则》中涉及的基础设施主要包括支付系统(SIPSs)、中央证券存管系统(CSDs)、证券结算系统(SSSs)、中央对手方(CCPs)和交易数据库(TRs),各国或多或少都从中择取了对本国最重要的基础设施及其基本规则,在国内立法中予以吸收。

〔14〕参见郑彧等,见前注〔1〕,第 19—21 页。

新加坡	CCP/CSD/SSS	新加坡金融管理局	Securities and Futures Act
日本	CSD/SSS	内阁总理大臣 法务大臣	社債、株式等の振替に関する法律
	CCP	内阁总理大臣	金融商品取引法
韩国	CCP	韩国金融服务委员会	자본시장과 금융투자업에 관한 법률
	CSD/SSS	—	자본시장과 금융투자업에 관한 법률
我国 香港特别 行政区	CCP	香港证监会	《证券及期货条例》
	CSD/SSS	香港金管局 金融管理专员	《结算及交收系统条例》
我国 台湾地区	CCP/CSD/SSS	“金融监督管理委员会” “证券期货局”	1.“证券交易法” 2.“期货交易法” 3.“票券金融管理法” 4.“证券集中保管事业管理规则” 5.“金融监督管理委员会组织法”

(一)对基础设施的设立采取区别于一般市场主体的严格特许制

正是由于意识到了基础设施对金融市场稳定所可能形成的重大影响,任何一个法域都不允许自由设立基础设施,而对其准入施加管控。次贷危机发生后,欧盟委员会颁布了《欧洲议会和理事会第 648/2012 号关于场外衍生品、中央对手方及交易信息库的规则》,其后又公布了一系列监管和实施的技术标准,这些规范性文件共同构成了完整的《欧洲市场基础设施规则》(European Market Infrastructure Regulation,即 EMIR 规则)。根据第 648/2012 号规则,欧盟每一成员国均应指定有权机构履行对衍生品中央对手方授权与监管的职责;成立于欧盟范围内的法人组织应向其所在成员国的有权机构提交书面申请,并提供申请中央对手方资格所需的一切信息,由有权机构授予相应资格;有权机构决定授予某法人组织中央对手方资格后,应立即通知欧洲证券与市场管理局(European Securities and Markets Authority,即 ESMA),由 ESMA 对该中央对手方所清算的衍生品履行“公开注册”(Public Register),包括对衍生品交易种类、清算时间、清算机构、清算责任等信息进行披露,并将该等信息公布于官方网站。〔15〕 而根据德国《信贷法》(Gesetz über das Kreditwesen),中央对手方的清算、证券托管等业务属于信贷业务的范畴,需向德国联邦金融监管局(Bundesanstalt für Finanzdienstleistung-

〔15〕 See Regulation(EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC Derivatives, Central Counterparties and Trade Repositories, Article 5, Article 14, Article 17, Article 22 (1).

saufsicht)提交书面申请并取得许可。〔16〕法国《货币与金融法》(Code Monétaire et Financier)对此也有类似的规定。〔17〕

总体上,在《金融市场基础设施原则》发布后,各国家或地区基本都对于CSD、CCP、SSS等基础设施的设立、运营进行严格监管,不允许基础设施像一般企业一样自由地进入市场。在西方强调经营自由、结社自由的市场背景下,对一个经济组织的准入施加特许制的严格管控是十分罕见的。与之相对应的是,被有权机构许可之后获得的明确授权。这已经显示了金融市场基础设施是不同于营利性企业的特殊市场主体,按照自由意愿设立、经营的规则完全不适用于基础设施,其因特许而获得的寡头地位也不受制于竞争法规范。

(二)基础设施的法律属性介于市场化与公共化之间

如果从法律属性来看,基础设施的特殊地位就更加凸显。虽然会员制或公司制的基础设施二者皆有,但当前更主流的法律组织形式无疑是公司制,上表中大部分国家或地区的监管部门都是根据立法授权公司来承担基础设施的职责。例如,我国香港特别行政区的《支付系统及储值支付工具条例》允许任何公司依据该条例所规定的条件向香港金融管理局申请结算及交收系统的商业运营牌照(虽然获准取得牌照的并不多)。〔18〕在英国,则可以根据《金融服务与市场法》(Financial Services and Markets Act),由当事人书面申请成为提供中央对手方服务的清算所或者仅提供清算服务的清算所,该项申请须经英国金融服务局(Financial Service Authority)〔19〕审核后进行授权。〔20〕目前,英国经授权的主要清算机构有LCH.Clearnet Ltd、ICE Clear Europe Ltd、EuroCCP、CME Clearing Europe以及Euroclear UK & Ireland。据此看来,英国的基础设施同香港一样,允许一定程度的竞争,似乎显露出一定的市场化特征。

从理论上讲,基础设施之所以采取公司制来组织,主要是为了发挥公司这种商业实体自身的决策理性与趋利性,以适应基础设施之间的竞争。换句话说,如果基础设施的设立是独占性的,至少是不开放的,公司制就未必是最佳选择。然而,不少国家的实践并未遵循这一论断,独占性的基础设施依然采取了公司制。根据新加坡《证券期货法》(Securities and Futures Act),在新加坡设立证券清算设施需向新加坡金融管理局(Monetary Authority of Singapore,MAS)提出申请,并由其书面同意。〔21〕迄今为止,新加坡金融管理局仅授予Central Depository Pte Ltd从事证券清算业务的资格,且所有证券均托管于该公司,由其在事实上履行《证券期货法》所规定的中央证券托管机构职能。韩国《金融投资服务与资本市场法》更是直接限定,仅韩国证券集中托管公司(Korea Securities Depository)可以根据该法设立并从事证券集中托管、账户间证券移转、证券结算业务,禁止任何组织或者个人使用与"韩国证券集中托管公

〔16〕参见德国《信贷法》(Gesetz über das Kreditwesen)第1条、第32条。

〔17〕参见法国《货币与金融法》(Code Monétaire et Financier)第L.440-1条、第L.440-2条。

〔18〕参见香港地区《支付系统及储值支付工具条例》(第584章)第8E条、第8F条。

〔19〕2012年《金融服务法》(Financial Services Act 2012)将金融服务局(Financial Service Authority)更名为金融行为局(Financial Conduct Authority)。参见英国2012年《金融服务法》第1A条。

〔20〕参见英国2000年《金融服务与市场法》(Financial Services and Markets Act 2000)第285条。

〔21〕参见新加坡《证券期货法》(Securities and Futures Act)第47-56条。

司”相类似的名称，从事证券集中托管业务。〔22〕所以，不能因公司制的组织方式以及对于公司制的市场化预期来简单地理解基础设施的法律属性，大量存在的独占性公司制基础设施一样承担着特殊的职能，进而呈现出公共化的趋向。

基础设施的法律属性其实并不取决于会员制抑或公司制的组织方式。从各国家或地区现有的实践来看，会员制也有被行政化的例证，比如我国的证券交易所就被认为有沦为证监会监管代理机构的嫌疑；〔23〕取得独家资格进而更多承担起公共职能的公司制基础设施也不在少数。基础设施的法律组织方式不仅在不同法域会有选择差异，在同一国家或地区的不同经济时期，市场化与公共化之间的转换、混合也是完全有可能的。回到我国的语境下，不宜拘泥于会员制或公司制的外观来界定基础设施的法律属性，应当结合其介于市场化与公共化之间的本质特征，在我国的法律框架内寻找合理的定位。

（三）对于基础设施的规范属于“法律保留”事项

在我国，设立、运营、监管基础设施的依据绝大多数是“管理办法（条例）”式的部门规章，甚至只是一个监管部门的“批复”，显然有悖于“法治市场”的基本要求，也导致了基础设施地位不清、权责不明。从域外经验来看，关于金融市场基础设施的规范基本都属于“法律保留”的事项，由位阶较高的法律来予以明确。

美国的清算组织根据自身结算证券的种类，分别向证券交易委员会（Securities and Exchange Commission，即 SEC）或者商品期货交易委员会（Commodity Futures Trading Commission，即 CFTC）提出书面申请，由相应的主管机构根据《美国法典》（United States Code）进行审核。〔24〕2010 年通过的《多德·弗兰克法案》第八章对金融市场基础设施进行了定义，同时在 SEC 和 CFTC 分别对金融市场基础设施进行监管的基础之上，明确金融稳定监管理事会（Financial Stability Oversight Council）可以对影响系统稳定性的重要基础设施进行认定，并联合相关监管机构实施更为有效的监管。在以判例法作为主要法律渊源的美国，《美国法典》和《多德·弗兰克法案》都是对市场具有绝对影响力的高层级的成文法，有很强的适用力。

在亚洲的日本，从事金融商品结算业务、获得 CCP 授权，申请人需根据《金融商品交易法》（金融商品取引法）向内阁总理大臣递交申请许可，内阁总理大臣根据许可标准进行审查。〔25〕要成立 CSD 以经营证券集中托管业务，则需根据《债券、股份等簿记与转让法》，向内阁总理大臣与法务大臣提出申请，并由其进行审查后作出批准或者不予批准的书面决定。〔26〕根据韩国《金融投资服务与资本市场法》，经营单一中央对手方清算业务须在向韩国金融服务委员会

〔22〕 参见韩国《金融投资服务与资本市场法》（자본시장과 금융투자업에 관한 법률）第 294－295 条。

〔23〕 参见彭冰、曹里加：“证券交易所监管功能研究——从企业组织的视角”，《中国法学》2005 年第 1 期，第 84 页。

〔24〕 SEC 受理申请并授予结算资格的法律依据为《美国法典》第 15 章第 78q－1 条（15 U.S. Code § 78q－1）；CFTC 受理申请并授予结算资格的法律依据为《美国法典》第 7 章第 7a－1 条（7 U. S. Code § 7a－1）。

〔25〕 参见日本《金融商品交易法》（金融商品取引法）第 156 条。

〔26〕 参见日本《债券、股份等簿记与转让法》（社債、株式等の振替に関する法律）第 3－4 条、第 285 条。

提出预申请与正式书面申请后，由该委员会根据其注册资本、主要股东、建立中央对手方清算系统的条件是否充分、是否具备防止利益冲突的系统等各方面因素综合考量后决定是否授予中央对手方清算业务的经营资格。〔27〕可见，亚洲代表性国家对于基础设施的规范也是被规定在最重要、最基本的金融法律中，而不像我国只有一个部门规章层级的“监督管理办法”，甚至完全无章可循。

但是，需要客观看待的是，在深具普通法传统的英美，金融市场的迅猛发展迫使国家不得不制定更多、更详尽的成文法规范，在从无到有的立法过程中对基础设施作出回应性的规定也是理所当然。而日、韩等大陆法系国家则在近年显著出现了金融混业的趋势，制定统合的金融市场基本法是其立法的形式取向，这也为基础设施的相关规则写入基本法提供了契机。反观我国，至少在名义上尚不允许混业经营，短期内对各行业既有的基本法律进行修订或者统合更是难以做到，因此在着力提升基础设施相关规范的效力层级时，要充分体察国情，做出符合现状的选择，而不宜盲目等待制定金融市场基本法的时机成熟。

综上所述，从比较法上可以得出的有益结论是：无论基础设施的组织方式属会员制抑或公司制，基础设施都不是一个市场化的经营主体，对金融市场承担着一定的公共管理职能，同时自身的设立、运营又受到严格的行政监管，进而超脱于公司法、竞争法的规范，需要在高位阶的立法中专门确立其特殊的法律地位，为自律管理规范的效力形成扫清障碍。

三、自律管理规范效力形成的中国式双轨路径

随着我国金融市场的不断发展以及对于国际市场的融入，基础设施愈发多样，其自律管理的职能也更加受到重视。要保障自律管理规范的效力，当前行政批复式的路径显然存在着明显的缺陷，而英美、日韩的模式也依赖其特定的传统或背景，要确立自律管理规范的效力恐怕不是通过一两部立法可以一蹴而就的，还需要依靠司法的协同。但在此之前，需要先厘定基础设施在我国的法律属性，这样立法对其予以授权、司法对其规则执行予以保障才具有正当性。

（一）自律管理规范效力形成的法理基础：确立基础设施的“非政府公共组织”属性

我国在发展金融市场、创立基础设施的过程中，更多关注的问题是采取会员制还是公司制来作为基础设施的法律形式，而忽略了会员制、公司制基础设施共同的本质。以证券交易所为例，有的学者认为，以非互助化为特点的公司制证券交易所不是我国的最优选择，而当前“会员制”的交易所组织方式也不是真正意义上的会员制，应当尽快实现真正会员制性质的归复；〔28〕另一些学者认为，我国具备对证券交易所实行公司制改造的基本条件，交易自动化使

〔27〕 参见韩国《金融投资服务与资本市场法》(자본시장과 금융투자업에 관한 법률)第 12 条、第 323 条、第 377－378 条、第 393 条。

〔28〕 参见郑彧：“我国证券交易所法律性质之重塑——兼论证券交易所互助化与非互助化的取舍”，《法商研究》2008 年第 6 期，第 127－128 页。

证券交易所失去采取会员制的必要，公司制更能保证交易公正和保护投资者利益；〔29〕还有学者主张，会员制并非交易所的必经阶段，我国的证券市场一开始就是在政府推动之下建立起来的，会员制交易所产生的历史背景在中国并不存在，而且完全由券商所有和控制的会员制交易所恐怕也无法为监管部门接受，因此应当改为政府控股的公司制交易所。〔30〕然而，作为我国最成熟的基础设施，证券交易所已经运行了二十余年，它在实践中表现出的特点与典型的会员制、公司制都不一样。

为了取得自律管理的权限，我国的法律文本多次使用“会员”的表述方式，并暗示当前的交易所是施行会员制的，〔31〕但是交易所的真实属性却有特殊之处。首先，交易所与每个券商分别形成一一对应的合同关系，一方是服务提供者，另一方是服务接受者；券商之间并未缔结合同，只有利益彼此对立的交易当事人群体，而不存在一个受共同利益驱动的互惠联合体。其次，交易所的治理结构是排斥会员制的，且带有强烈的行政色彩，比如交易所的理事分为成员理事和非成员理事，非成员理事可达到理事总人数的一半；成员理事由成员选举产生，非成员理事由中国证监会直接委派；成员理事既不能提名理事长、副理事长，也没有足够的信息、权威去判断证监会提名的人选是否称职，对理事长、副理事长的任免表决缺乏实效。再次，根据法经济学的理论，决定交易所最优组织方式的两个变量是竞争环境和成员规模，竞争激烈的条件下，或者因成员众多而集体决策成本较高的条件下，公司制是理想的选择，我国的交易所不存在竞争（沪、深两交易所的分工明晰），似乎应当选择会员制，却又因为公权力的强力介入而不存在会员制的“一人一票”必然引发的集体决策成本，这也佐证了我国的证券交易所并非一个市场化的会员联合组织或公司法人。此外，就交易技术而言，我国早就实施了电子化的证券统一存管，运用电脑系统竞价撮合买卖，交易大厅、席位、会员的概念及其物理存在早已成了历史文物，交易所的组织方式并无必要刻意仿效一百多年前西方国家证券交易刚刚兴起时的会员制，完全可以发展出符合自己国情的特色。基于上述的分析，我国的证券交易所既不是民法意义上的公司法人，也不是会员制社团，而是政府创设、政府管理之下的一个承担证券市场组织、营运职能的“非政府公共组织”。强行将交易所的属性归入西方式的会员制或公

〔29〕 参见廖华：“顺潮流而动抑或逆之——也论我国证券交易所法律性质的选择”，《法商研究》2009 年第 3 期，第 42 页。

〔30〕 参见谢增毅：“我国证券交易所的组织结构与公司治理：现状与未来”，《财贸经济》2006 年第 6 期，第 20 页。

〔31〕 《证券法》第 105 条规定，实行会员制的证券交易所的财产积累归会员所有，其权益由会员共同享有，在其存续期间，不得将其财产积累分配给会员。而《证券法》中并没有提及公司制证券交易所，这似乎暗示了我国的交易所实行会员制。《证券交易所管理办法》第 17 条规定，会员大会为证券交易听的最高权力机关。该条文表明了会员在交易所运营中享有决策的权力，这也符合会员制交易所由会员控制的基本特征。此外，在《证券法》和《证券交易所管理办法》中多次使用“会员”的提法，而会员的提法通常仅用于会员制交易所。

司制，反映了一种在思维和表达上试图“与国际惯例接轨”的路径依赖。〔32〕

推而广之，在我国，无论是会员制还是公司制的基础设施，都具备如下的几个重要特征：①基础设施与市场参与人之间存在协议，各市场参与人相互之间不存在互助式的协议；②由行政机关发起或推动设立，甚至直接由国有投资主体控股；③管理层的选任受制于监管部门，经营行为接受监管部门的行政指令，不采用市场化的决策机制；④不存在具有竞争关系的其他基础设施；⑤运用现代信息技术摆脱了场所、容量、时空等物理束缚。法律组织形式只是提供给当事人某种可供选用的范本，而对某种形式的组织究竟从事营利活动或者非营利活动并不强求，非营利组织也不妨采取公司等组织形式。〔33〕即便是公司制的基础设施也显然不以营利为主要目的，这在其章程或者相关的监督管理办法中都有明确体现，它们在客观上承担着与所谓“会员制”基础设施相仿的社会经济管理职能，均应被认定为“非政府公共组织”。

作为“非政府公共组织”的金融市场基础设施在中国法上具有民事主体、公共管理相对人和准公共管理主体的三重法律地位。〔34〕从私法意义上，当前的基础设施都是依据民事法律规范设立的法人，当然属于民事主体。《民法总则》将法人分为营利法人与非营利法人，根据《民法总则》第86条，“为公益目的或者其他非营利目的成立，不向其出资人或者设立人分配所取得利润的法人，为非营利法人。非营利法人包括事业单位、社会团体、基金会、社会服务机构等”。具体而言，基础设施虽有经营行为但不以利润分配为目标，属于非营利法人，但是否法条所指之“社会服务机构”抑或未列举的其他类型，并不明确。更重要的是，对于非营利法人，虽被规定在《民法总则》中，事实上整个私法体系都对此缺乏具体的规定。曾经有学者建议，在民法中确立一种三元化的非营利组织分类方式，其中一项标准即是依设立基础系人的结合抑或财产的结合，将非营利组织分为社会团体、捐助团体与非营利公司。〔35〕虽然，这种分类未被《民法总则》采纳，却可以从中看出“非营利组织”的概念要比“非政府公共组织”更为宽泛，就基础设施而言，该“非政府公共组织”更趋近于“非营利性组织”中的“非营利公司”。恰恰是这种组织在《民法总则》《公司法》等私法中缺乏充分的规范，也无法脱离其特殊属性仅通过私法实现规范。

从公法意义上，基础设施是金融主管机关监督管理行为的行政相对人，因其不属行政机关，又是根据民法设立的民事主体，实施或辅助实施市场行为，这种公共管理相对人的地位是毋庸置疑的，在此不予赘述，更值得分析的是其准公共管理主体的地位。作为

〔32〕 参见方流芳：“证券交易所的法律地位——反思‘与国际惯例接轨’”，《政法论坛》2007年第1期，第69页。

〔33〕 参见史际春、张扬：“非营利组织的法学概念与法治化规范”，《学术月刊》2006年第9期，第6页。

〔34〕 参见任进：“中国非政府公共组织的若干法律问题”，《国家行政学院学报》2001年第5期，第22页。

〔35〕 参见伍治良：“我国非营利组织内涵及分类之民法定位”，《法学评论》2014年第6期，第83页。

“非政府公共组织”的基础设施，不同于行政法上的“授权组织”，后者取得权力的依据是法律、法规中的授权许可条款，行政机关据此授予该组织以国家权力，而“非政府公共组织”本质上行使的是一种通过章程、规约等方式达成的契约权力，属于社会自治权，是国家向社会分权（还权）的结果，一般由“非政府公共组织”固定行使，因此比被授权行使权力的稳定性更强。基于这样的特征，有学者甚至主张对“行政主体”理论进行调整，以解决实际问题为导向，直接把“非政府公共组织”作为一类新的行政主体看待，研究它们在行使公共权力的过程中产生的法律问题，而不再在它们是否具有行政主体资格、能否成为行政诉讼的被告等问题上展开争论。代表性的大陆法系国家不再以是否具有公法人身份作为界定行政主体的标准，而是要结合组织形式、活动规则、权力与行为的性质等来综合判断某一组织是否为行政主体。例如，法国的同业公会究竟是公法上的组织还是私法上的组织，学界并未达成一致，但同业公会的主要活动受公法支配，而它的组织规则受私法支配，这个原则毫无争议；德国判断行政主体的依据也并非在于组织方式，而是在于作用，凡得以自己名义行使权利、负担义务来执行公权力的都属行政主体，而不论其为公法或私法组织。〔36〕基础设施作为一种私法组织形式的“非政府公共组织”，如果能够纳入扩张以后的“行政主体”范畴，将更加有利于其法律地位的厘清、自律管理权力的证成，同时也便于实现对其的法律约束。此外，我国的金融市场基础设施相对于其他“非政府公共组织”还有特别之处，其不属于互助式组织，在设立、管理层选任、运营上都具有强烈的行政色彩，而且独占性地履行职能，这些因素令基础设施愈发趋近于“行政主体”，赋予其准公共管理权渐成共识。

拨开会员制、公司制的外观，我国的基础设施本质上是履行准公共管理职能的“非政府公共组织”，虽然采取私法上的组织形式设立，却不同于普通的企业或社会团体。据此，通过立法的路径肯定基础设施的自律管理权并确认其制定的自律管理规范的普遍拘束力才是具有正当性的。同时，鉴于基础设施维护市场稳定的准公共管理职能的存在，自律管理规范必须要与金融惯例、金融标准等相协调，进而在司法活动中被认定为金融习惯法，取得民法中的法源地位，方有可能形成优先适用的效力。

（二）自律管理规范形成普遍拘束力的行政立法路径

如前所述，基础设施的自律管理权属于社会自治权，在缺乏法律授权的情况下，最基本的实现方式是基础设施与相关市场主体之间通过契约让渡权力。然而，金融市场是联动、开放的，为适应市场安全、稳定、迅捷之需求，自律管理规范仅在契约当事人之间形成对抗力是远远不够的，特别是在我国的金融交易、托管、结算均非直接而呈层级式结构的背景下，契约式约束的范围更为有限，遑论对交易有影响的第三人形成对抗力。

为了使自律管理规范形成对世的普遍拘束力，比较法上的经验是通过立法来促成自律管理、确认自律管理规范的效力。例如，美国 1934 年《证券交易法》将证券交易所、证券业协会、支付结算机构等均界定为“自律性组织”，并且赋予这种“自律性组织”制定的规则以法律效力

〔36〕 参见石佑启：“论公共行政之发展与行政主体多元化”，《法学评论》2003 年第 4 期，第 61 页。

和强制执行力，保障“自律性组织”在交易、交收服务过程中对于交易结果的确定性、不可逆性，实现对整个市场交易秩序和交易对手的保护。这种立法授权并非将监管机关的部分行政权力授予基础设施，而是承认并维护已经存在的社会自治权，基于立法的强制力而赋予原本具有契约属性的自律管理规范以对世的普遍效力。

美国《证券交易法》所称之“自律性组织”，其创设、运营方式更为市场化，虽然其与我国基础设施的行政化色彩有所差异，但在“非政府公共组织”的属性及其规范、确权模式上，两者是共通的。然而，在借鉴该立法路径时应当充分考量我国的一些国情：其一，我国立法尚不接纳开放、宽泛的、统一的“证券”定义，美国对基础设施的集约式立法确权建立在证券法对所有具备“证券”特征的金融产品均有管辖权的基础之上，缺乏包容性的概念令我国很难通过修改一部既有的法律来完成对证券、期货、保险、信托、票据等种类繁多且不断创新发展的金融产品的统合规范，包括对各种基础设施的规范，制定一部关于金融市场基础设施的统一法律成为必要；其二，英美法系不存在成文法意义上的效力严苛的所有权、担保权规则，通过证券法的确权，基础设施所制定的自律管理规范不易受到其他强效力法律规范的挑战，而《物权法》《担保法》《破产法》等在我国均属全国人大或常委会制定的基本民商事制度，即便自律管理规范的制定与实施被专门的法律所保障，这些规范亦不必然取得优先于基本民商事法律的效力。因此，在我国制定一部关于基础设施的法律只能回应自律管理规范如何形成对世效力的困惑，而无法解决自律管理规范怎样获取优先适用力的难题，立法确权的模式只能是我国基础设施自律管理规范效力形成机制的一翼，技术性的司法保障同样是不可或缺的。

几乎所有重要金融市场所在的国家或地区都将基础设施的相关规定列为必须由法律加以规定的“法律保留事项”。根据我国《立法法》第 8 条，“下列事项只能制定法律：……（八）基本经济制度以及财政、税收、海关、金融和外贸的基本制度”，事关所有金融市场基础设施的一般规范也应当由人大或常委会制定法律。但是，《立法法》第 65 条也规定：“应当由全国人民代表大会及其常务委员会制定法律的事项，国务院根据全国人民代表大会及其常务委员会的授权决定先制定的行政法规，经过实践检验，制定法律的条件成熟时，国务院应当及时提请全国人民代表大会及其常务委员会制定法律。”据此，在获得立法机关授权的前提下，国务院可以对基本金融制度制定行政法规，以此作为立法条件成熟前的过渡。基于下列几项原因，建议由国务院在《FMI 原则》的基础上先行制定统一的《金融市场基础设施条例》：第一，基础设施的自律管理对金融市场的稳定发展影响深远，除了证券交易所之外，再无其他基础设施获得法律的授权以确立其法律地位、保障其自律管理规范的效力，这已成为构建金融市场多层次监管体系的重大障碍，确有立法之必要；第二，从长远来看，基础设施的规范应当由基本法律来完成，这也是目前的国际趋势，但基础设施在法律意义上对我国而言仍是新生事物，即行立法的准备确实不足，短期内难以实现，而行政法规的起草过程相对简单、高效，可行性更强；第三，就规范性文件的层级而言，只有法律、行政法规才能对与基础设施有关的合同之效力形成足够的影响，部

门规章只能作为监管依据，不能作为司法裁判的依据，〔37〕因此基础设施的规范性文件至少也应将效力层级维持在行政法规之上；第四，我国仍坚持金融分业，暂无制定统合的金融交易法的可能，在一部金融市场基本法中专列基础设施的规范或者逐一修改金融部门法加入基础设施的规范都几乎没有可行性，虽然各类基础设施服务的市场不同，但其自律管理规范的效力诉求是一致的，完全有可能被统合到一部《金融市场基础设施条例》之中。

《金融市场基础设施条例》无需也不宜求全，重点是概括性地回应各类基础设施实施自律管理所须解决的共通问题，其核心内容包括但不限于：①确立基础设施“非政府公共组织”的法律性质，为授权提供法理基础；②在基础设施的准入、出资、运营、监管方面反映“公共性”因素，同时限定行政干预的范围，保障基础设施基本的市场化自决；③授予基础设施制定自律管理规范的权限，完善制定规范的程序，赋予自律管理规范对世的普遍约束力；④基础设施自身的风险防范与困境拯救机制。

（三）自律管理规范形成优先适用力的司法技术路径

依靠《金融市场基础设施条例》抑或《金融市场基础设施法》可以令基础设施制定的自律管理规范形成对世的普遍约束力，但仍需要回应个别与基本民商事制度不一致的自律管理规范何以优先适用的问题。根据《立法法》的规定，规范性文件的效力层级首先取决于制定机关，在同一级制定机关的前提下，才遵循新法优于旧法、特别法优于一般法的规则。自律管理规范是《金融市场基础设施条例》或《金融市场基础设施法》授权基础设施制定、实施的，属“非政府公共组织”制定的具有约束力的规范。而《物权法》《合同法》《担保法》《破产法》等属于全国人大或常委会制定的基本民商事法律，效力显然高于自律管理规范，因此仅通过立法路径是无法赋予自律管理规范优先适用力的。从这个意义上来讲，制定《金融市场基础设施条例》不仅是基于立法成本的考量，就效果而言也是充分且必要的选择。

本文认为，赋予自律管理规范相对于一般民商事法律的优先适用力应当采用商法漏洞填补的司法技术。处理民法与商法的适用关系时，依特别法优先的原则，商法有规定的优先适用，商法未作规定的适用民法的一般规定。这不仅符合《立法法》规定的基本精神，在逻辑上似乎也能够自洽。然而，这项原则的成立隐含着一个至关重要的前提：特别法是完美的，不存在法律漏洞。否则，不经漏洞填补，而将民法一般规范适用于具有商事属性的争议，将难以符合事理和特别法所追求的价值。事实上，任何采取形式理性的法律都不可能做到没有漏洞。作为一般法的民法规范有漏洞，作为特别法的商事单行法同样也有漏洞。随着现代市场经济和技术革命的迅猛发展，商品市场和资本市场都日趋现代化、复杂化，商法的漏洞更是难以避免。法律依意旨应当规范而未予规范的，构成“明显的漏洞”，自律管理规范与民法冲突的场合多属此类；法律已有规范却未对特别情形加

〔37〕 参见最高人民法院关于适用《中华人民共和国合同法》若干问题的解释（一）第 4 条：“合同法实施以后，人民法院确认合同无效，应当以全国人大及其常委会制定的法律和国务院制定的行政法规为依据，不得以地方性法规、行政规章为依据。”

以考虑，并对一般规定予以限制的，构成“隐藏的漏洞”，自律管理规范与商法冲突的场合多属此类。由于我国商法的历史比较短，加上立法上采取民商合一的体制，当司法实践中出现商法规范缺失时往往意识不到是法律漏洞，直接、当然地援引民法规定予以补充适用。这种做法忽略了商法未作特别规定的，尚应区分为“无需作出特别规定”和“应当作出特别规定而未作特别规定”两种情形。正是因为商事特别法同样存在漏洞，所谓的商事特别法“有规定”或者“没有规定”，就不能仅仅从形式意义上的法律规范进行辨识，而应当从实质意义上的法律规范加以判断。〔38〕

实质意义上的商法在何处，是一个法源界定的问题。《民法总则》第10条规定：“处理民事纠纷，应当依照法律；法律没有规定的，可以适用习惯，但是不得违背公序良俗。”鉴于我国民商合一的体例，上述条文规定的不仅是民法的法源，还包括商法的法源。也就是说，习惯也是商事特别法的形式之一。尤为重要的是，商法漏洞的存在需要“法律没有规定”形成一种更准确的限缩解释——特别法没有规定时，可以适用习惯。这种解释确立了“商法—习惯—民法”的适用顺序，改变了“商法—民法—习惯”的一般认知，却更符合比较法的通例。日本《商法典》第1条第2款即规定：“关于商事活动，本法中未规定的事项遵照商习惯；无商习惯的，适用民法规定。”〔39〕韩国《商法典》的规定大抵相同。据此，对于金融交易规则“明显的漏洞”，习惯可以在民法之前进行填补，缓和特别法与一般法的矛盾；而对于“隐藏的漏洞”，习惯的适用本身即能提升特别法体系内部的圆满性。

在金融市场中，基础设施制定的自律管理规范就是最重要的“习惯”。作为法源之一的习惯应为习惯法而非单纯的事实习惯。事实习惯需要形成法的确信，方能构成习惯法。〔40〕事实习惯仅为一种惯行，如果一般人尚未具有“此种惯行必须遵从，不遵从则共同生活势将不能维持”的确信，这种事实习惯便不具有法源性。〔41〕要取得法的确信进而构成一种习惯法，必须具备以下要件：须有习惯之存在；须为人人确认其有法之效力；须属于法规所未规定之事项；须不悖于公共秩序与善良风俗；须经国家（法院）明示或默示承认。〔42〕基础设施制定的自律管理规范完全可以符合上述要求：其一，基础设施存在的基本价值在于促进和保障标准化的金融交易，标准化的形成本身即为一个逐步趋同并寻求规模的过程，基础设施制定规则的意图正是固化该过程中确立的共同习惯；其二，基础设施与每位市场参与人都存在类似于服务（管理）协议的关系，而且公示这种关系，使其为第三人所知，除了市场参与人通过缔约方式当然地认可自律管理规范之外，已知悉交易风险却依然选择与受到基础设施约束的市场参与人交易的第三人也应当认定为默示接受了该等习惯；其三，在准确区分“特别法无需规定”与“特别法应规定却未规定”的基础上，自律管理规范规定之事项显然属于商法漏洞，而在一般法的涵射范

〔38〕 参见钱玉林：“商法漏洞的特别法属性及其填补规则”，《中国社会科学》2018年第12期，第97－98、101、103页。

〔39〕 《日本最新商法典译注》，刘成杰译注，中国政法大学出版社2012年版，第7页。

〔40〕 参见姚辉、梁展欣：“民法总则中的法源及其类型”，《法律适用》2016年第7期，第58－59页。

〔41〕 参见王泽鉴：《民法总则》，北京大学出版社2008年版，第47页。

〔42〕 参见梁慧星：《民法总论》，法律出版社2011年版，第28页。

围之外；其四，作为“非政府公共组织”的基础设施绝不以营利为目标，相关自律管理规范是为了在维持金融系统稳定的基础上公平保护各方主体，与公序良俗的价值诉求完全契合，且法律或行政法规的授权、监管机构的介入在某种程度上也使自律管理规范代表着公序良俗；其五，对基础设施的自律管理规范予以司法确认也是有先例可循的，最高人民法院先后颁布过多个同证券登记结算机构有关的规范性文件，以求对证券基础设施及其自律管理规范予以特殊保障，〔43〕十三届全国人大一次会议之后，国家深化改革委员会审议同意设立上海金融法院，最高人民法院又进一步明确了上海金融法院对辖区内涉金融市场基础设施之案件的专属管辖权，〔44〕专业化的审判将进一步提升法院对于自律管理规范的认可程度。鉴于此，法官可以将金融市场基础设施制定的自律管理规范认定为“习惯”，以“习惯”填补商法漏洞，昭示着“习惯”自身的特别法属性，自律管理规范由是取得优先适用力。

四、结　语

随着成规模、标准化的金融交易大量出现，市场对于基础设施的需求越来越明显，进而使基础设施的法律规范成为了近年来的一个学术热点问题。抛开“基础设施”这一舶来术语，像证券交易所这样的特殊组织早已为理论与实务界所熟知，关于其法律地位、监管规则形成了不少的成果，而本文最重要的初衷有三：其一，证券交易所是我国少有的既有法律授权又通过会员制方式组织的基础设施，可以说是众多研究对象中的非典型，难以用它的经验来推及所有出现类似问题的基础设施，而自律管理规范在普遍拘束力和优先适用力上的困惑在大量公司制的新兴基础设施中不断出现，本文所试图解决的议题算是对实践需求的回应；其二，在不同的组织形式下，于各自服务的金融市场中，基础设施都存在很多共通的法理，割裂的论争难见其真实全貌，统合地对基础设施的一般理论进行研究，即便暂时未能达致深刻、准确的理想目标，该努力本身仍具有一定进步意义；其三，有学者提出，借助与基础设施相关的各基本法律的解释即可满足金融实践的大部分诉求，然而司法实践的立场分歧与各基础设施单位对规范稳定性、可预期性的迫切渴求让笔者无法赞同上述的解释论观点，走出自律管理规范在我国的效力困境，需要立法与司法的双重协同。

〔43〕 参见《最高人民法院关于冻结、划拨证券或期货交易所证券登记结算机构、证券经营或期货经纪机构清算账户资金等问题的通知》《最高人民法院关于冻结、扣划证券交易结算资金有关问题的通知》《最高人民法院关于中国证券登记结算有限责任公司履行职能相关的诉讼案件指定管辖问题的通知》《最高人民法院最高人民检察院公安部中国证监会关于查询、冻结、扣划证券和证券交易结算资金有关问题的通知》《最高人民法院执行局关于法院能否以公司证券登记结算地为财产所在地获得管辖权问题的复函》。

〔44〕 《最高人民法院关于上海金融法院案件管辖的规定》第 3 条：“以住所地在上海市的金融市场基础设施为被告或者第三人与其履行职责相关的第一审金融民商事案件和涉金融行政案件，由上海金融法院管辖。”该司法解释已于 2018 年 8 月 10 日起施行，其中不仅规定了基础设施为被告的专属管辖，还将基础设施因履行职责而成为第三人的案件也纳入专属管辖的范围，为自律管理规范对金融交易关系以外的第三人形成拘束力提供了可能。考虑到绝大部分金融市场基础设施集聚上海，上海金融法院的集中化管辖、专业化审批无疑会大大促进国家对于自律管理规范的认可。

本文的基本结论是：我国金融市场中的会员制基础设施和公司制基础设施都是“非政府公共组织”，应当拨开组织形式的外观来看待其准公共管理职能。制定、实施自律管理规范是发挥上述职能的核心途径，为确保有效性，自律管理规范应当具有对世的普遍拘束力和相对于民商事法律的优先适用力，而这两种效力在当下尚无法形成。解决这一困境应当采取一条中国式的双轨路径：通过制定《金融市场基础设施条例》的行政法规，固化基础设施制定自律管理规范的权力和自律管理规范自身的强效力；借助识别、填补商法漏洞的司法技术，将自律管理规范认定为商事“习惯”，进而成为特殊法的一种形态，取得优先的适用力。

Abstract: Financial Market Infrastructures (FMIs) require the market and related subjects to bind themselves to the self-regulation norms, which is an important supplement to the administrative regulation. The self-regulation norms made by the FMIs organized either in membership or corporate system are confronted with two main difficulties: Ffirst, the legal forces are not specific and absolute; second, the norms are in no preferential positions than other general civil and commercial laws when applied. Most comparative foreign laws define the character of these FMIs between being marketized and being administrative. The suggestion is It is advised that China should clearly define FMIs as 'non-governmental public organizations', and enact Regulations of Financial Market Infrastructures to : vesting the self-regulation norms with general binding forces by way of enacting administrative regulation. At the same time, the norms should be defined as the 'custom' in Article 10 of the General Rules of the Civil Law inof China to achieve their preferential application forces by way of a judicial technique of filling the loopholes in cCommercial lLaw.

Key Words: Financial Market Infrastructures; Non-governmental Public Organization; Self-regulation Norms; Preferential Application Force

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附件3

最高法立案庭负责人就上海金融法院案件管辖司法解释答记者问

来源：人民法院新闻传媒总社 发布时间：2018-08-07 20:57:51 字号： 打印本页

明确案件管辖范围 服务保障国际金融中心建设

——最高人民法院立案庭负责人就上海金融法院案件管辖司法解释答记者问

为服务和保障上海国际金融中心建设，进一步明确上海金融法院的案件管辖，根据《中华人民共和国民事诉讼法》《中华人民共和国行政诉讼法》《全国人民代表大会常务委员会关于设立上海金融法院的决定》等规定，2018年7月31日，最高人民法院审判委员会第1746次会议，审议通过了《最高人民法院关于上海金融法院案件管辖的规定》（以下简称《规定》），决定自2018年8月10日施行。最高人民法院立案庭负责人就《规定》涉及的主要问题，回答了记者的提问。

问：请介绍一下《规定》的出台背景和起草过程?

答：习近平总书记指出，“金融安全是国家安全的重要组成部分，是经济健康发展的重要基础”。2017年，《中共中央、国务院关于服务实体经济防控金融风险深化金融改革的若干意见》（中发［2017］23号）明确提出，“根据需要设立金融公诉和审判机构，健全涉众型金融纠纷案件诉讼机制，完善行政和解调解、仲裁等多元化纠纷解决机制”。2018年3月28日，中央全面深化改革委员会第一次会议审议通过了《关于设立上海金融法院的方案》（以下简称《方案》），明确上海金融法院专门管辖上海市应由中级人民法院管辖的金融商事案件和涉金融行政案件。2018年4月27日，第十三届全国人大常委会第二次会议作出《关于设立上海金融法院的决定》（以下简称《决定》），明确上海金融法院专门管辖上海金融法院设立之前由上海市的中级人民法院管辖的金融民商事案件和涉金融行政案件，管辖案件的具体范围由最高人民法院确定。

制定上海金融法院案件管辖的司法解释是落实《方案》和《决定》的重要举措。近年来，上海法院已初步建立起比较完善的金融审判体系和审判工作机制，积累了丰富的金融审判实践经验，建立了一支较强的金融审判队伍。在《决定》作出后，按照周强院长关于设立上海金融法院“有利于增强中国金融司法的国际影响力、有利于国家金融战略的深入实施、有利于上海国际金融中心的发展建设”的指示要求，我们立即开展起草工作，充分调研了上海金融审判实际，全面听取了上海高院关于司法解释的意见建议。2018年5月，专门在上海高院召开座谈会，与中国人民银行上海分行、上海市金融服务办公室以及上海黄金交易所、中国金融期货交易所等在沪金融监管机构和单位进行了交流沟通。在此基础上，我们完成了司法解释的起草工作，征求了全国人大常委会法工委及相关部门意见。

可以说，《规定》的起草，坚持宪法和法律规定基本框架，紧扣服务保障上海国际金融中心建设主题，立足充分发挥上海金融法院专门审判职能，积极回应当前金融审判案件管辖实践，凝聚形成多方共识，为即将挂牌的上海金融法院准确适用法律提供了制度保障。

问：请介绍一下《规定》的亮点?

答：《规定》共七个条款，其中，最大的亮点，是第一条明确了金融民商事案件范围，分为五项表述，分别是：

（一）证券、期货交易、信托、保险、票据、信用证、金融借款合同、银行卡、融资租赁合同、委托理财合同、典当等纠纷；

（二）独立保函、保理、私募基金、非银行支付机构网络支付、网络借贷、互联网股权众筹等新型金融民商事纠纷；

（三）以金融机构为债务人的破产纠纷；

（四）金融民商事纠纷的仲裁司法审查案件；

（五）申请承认和执行外国法院金融民商事纠纷的判决、裁定案件。在这一条的起草过程中，我们主要采用的是“案由为主、主体为辅”方式。

第一项规定的11类纠纷，在2011年4月1日起施行的《民事案件案由规定》（法〔2011〕41号）里均有规定，其中，证券、期货交易、信托、保险、票据、信用证纠纷属于二级案由。

实践中，上述11类纠纷，争议一方的主体一般都是金融机构，故属于金融民商事案件并无争议。这里讲的金融机构，是指经国家金融监管机构批准设立的从事金融相关交易的机构，主要包括：银行、证券交易所、期货交易所、黄金交易所、证券登记结算公司、证券公司、期货公司、信托公司、保险公司、基金公司、金融资产管理公司、融资租赁公司、汽车金融公司、财务公司(有金融许可证)、担保公司、典当行、小额贷款公司、保理公司、经中国证券投资基金业协会登记备案的私募投资基金等。这些机构，往往持有特定金融牌照，需要经过专门的审批或者备案登记，以便于确认。而像普通的民间借贷案件，则不纳入上海金融法院的管辖范围。

第二项属于《民事案件案由规定》没有予以规定的纠纷，但是，相关司法解释已经予以明确，或者急需司法解释予以确定。

其中，《最高人民法院关于审理独立保函纠纷案件若干问题的规定》（法释[2016]24号）明确规定了独立保函纠纷，保理纠纷的相关司法解释正在制定过程中。私募基金纠纷，包括私募股权、私募证券基金，涵盖了私募基金内外部纠纷。非银行支付机构网络支付纠纷，俗称“第三方支付”纠纷。网络借贷纠纷，俗称“P2P”纠纷，当事人双方中一方是网络借贷平台的，属于金融民商事案件；如当事人双方都是公民的，目前我们考虑不列入金融民商事案件范围，属于普通民事案件。互联网股权众筹纠纷，是指投资者通过互联网渠道出资获取融资公司一定比例股份引发的纠纷。实践中，互联网众筹还涉及到慈善捐款、买卖产品等类型，因此类众筹不涉及到投资营利这一金融属性，不属于金融民商事案件。区别于第一项的纠纷类型，我们使用了新型金融民商事纠纷的表述。同时，我们也注意到上述第一、第二项规定的纠纷，可能不能完全涵盖上海金融审判实际，故采用了“等”的表述。《规定》施行后，上海市高级人民法院可以从实际出发，在《规定》的框架内出台具体的实施细则。

第三项规定了以金融机构为债务人的破产纠纷，主要考虑是以金融机构为债务人的破产纠纷，涉及特殊的程序设计与法律安排，与普通商事主体的破产程序有较大的不同，而且涉及的利益主体众多，稍有不慎可能引发更大的风险。上海金融法院对此类案件进行专门管辖，可以统一裁判标准，防范金融风险。

第四项、第五项属于《民事案件案由规定》提及的程序性案件。

其中，第五项突出强调申请承认和执行外国法院金融民商事纠纷的判决、裁定，既体现了上海金融法院的开放性、合作性，也符合金融审判实际。当然，涉及到申请认可和执行香港特别行政区、澳门特别行政区及台湾地区法院金融民商事纠纷的判决，也应参照《规定》执行。

需要强调的是，上海金融法院是上海市的专门法院，审级上对应的是中级法院，管辖上述五项案件的前提是应当由上海市辖区中级人民法院管辖的第一审案件，不能跨上海市行政辖区管辖金融民商事案件。

当然，为充分发挥上海金融法院专业审判职能，服务保障金融创新需要，对于实践中出现的上海市辖区外确实存在着适用法律、认定事实重大争议情形的案件，根据诉讼法的相关规定，最高人民法院可以另行指定上海金融法院进行管辖，但《规定》不涉及这方面的内容。

问：刚才您提到了一审金融民商事案件的范围，请问上海金融法院管辖的涉金融一审行政案件范围怎么理解？

答：《方案》明确规定上海金融法院专门管辖上海市辖区中级人民法院受理的以金融监管机构为被告的一审、二审和再审申请涉金融行政案件。该规定将“以金融监管机构”为被告来定义“涉金融行政案件”，较为清晰明确。

目前，上海地区的金融监管机构主要分为两类：一是中国人民银行上海分行、中国银监会上海监管局、中国证监会上海监管局、中国保监会上海监管局（目前，根据中央机构改革要求，原银监会、保监会已经合并成为银保监会，但是在上海的银监局、保监局尚未合并），二是上海市金融服务办公室。

除上海市金融服务办公室在上海市黄浦区外，上述其他金融监管机构均位于上海市浦东新区。《中华人民共和国行政诉讼法》第十四条规定，“基层人民法院管辖第一审行政案件”。《中华人民共和国行政诉讼法》第十五条规定，“中级人民法院管辖下列第一审行政案件：(一)对

附件3

国务院部门或者县级以上地方人民政府所作的行政行为提起诉讼的案件；(二)海关处理的案件；(三)本辖区内重大、复杂的案件；(四)其他法律规定由中级人民法院管辖的案件”。《中华人民共和国行政诉讼法》第十八条第一款规定，“行政案件由最初作出行政行为的行政机关所在地人民法院管辖。经复议的案件，也可以由复议机关所在地人民法院管辖”。因此，以这些金融监管机构为被告提起的一审行政诉讼案件，管辖法院一般是上海市黄浦区人民法院和浦东新区人民法院管辖。

上海金融法院成立前，当事人不服上海市黄浦区、浦东新区人民法院涉金融一审行政案件判决、裁定提起的上诉，由上海市第三中级人民法院审理。上海金融法院成立后，上海市第三中级人民法院不再审理涉金融二审行政案件，此类二审案件均由上海金融法院审理。

但是，对于上海市辖区内出现的新型、疑难、复杂的涉金融行政案件，以及法律及司法解释规定的特定情形的案件，上海金融法院作为审级上的中级法院，可以对应由基层人民法院受理的涉金融行政案件进行管辖，故《规定》也进行了明确。

问：金融市场基础设施在上海国际金融中心建设过程中发挥着重要的作用，请问《规定》对涉金融市场基础设施案件的管辖是怎么考虑的？

答：金融市场基础设施是经济金融运行的基础。安全、高效的金融市场基础设施对于畅通货币政策传导机制、加速社会资金周转、优化社会资源配置、维护金融稳定并促进经济增长具有重要意义。在上海金融法院设立之前，最高人民法院先后出台《关于对与证券交易所监管职能相关的诉讼案件管辖与受理问题的规定》、《关于中国证券登记结算有限责任公司履行职能相关的诉讼案件指定管辖问题的通知》、《关于审理期货纠纷案件若干问题的规定（二）》等司法解释和规范性文件，指定以上海证券交易所、上海期货交易所、中国金融期货交易所股份有限公司等金融市场基础设施为被告或者第三人与其履行职能引发的一审民事、行政案件，由上海市辖区中级人民法院管辖。由于上述金融市场基础设施住所地位于上海市第一中级人民法院辖区，目前相关案件均由上海市第一中级人民法院管辖。上海金融法院成立之后，根据《决定》，此类案件应移交由上海金融法院管辖。

除上海证券交易所、上海期货交易所、中国金融期货交易所股份有限公司以外，近年来，随着上海金融中心建设的深入发展，住所地在上海市的金融市场基础设施不断增加完善。2018年5月，我们赴上海调研，专门召集在上海的金融市场基础设施代表举办了座谈会，了解其相关职能，听取上海金融法院案件管辖的意见。与会金融市场基础设施代表纷纷表示，集中管辖有助于案件的统一审理和业务的风险防控，还减少了为解决纠纷耗费的成本，故对最高人民法院集中管辖非常支持。我们认为，对除上海证券交易所、上海期货交易所、中国金融期货交易所股份有限公司以外的其他住所地在上海市的金融市场基础设施，所涉及的金融民商事案件和涉金融行政案件集中管辖有必要性，且不会引发很大争议。

一是符合民事诉讼法、行政诉讼法地域管辖的基本原则。根据民事诉讼法、行政诉讼法“原告就被告”的一般地域管辖基本原则，上海法院对住所地在上海的金融市场基础设施为被告或者第三人的民事、行政案件本身就具有法定管辖权；

二是有利于防范系统性金融风险。金融市场基础设施大都属于系统重要性金融机构，业务规模较大、业务复杂程度较高，一旦发生风险事件将给地区乃至全球金融体系带来冲击。许多国家与地区已经专门制订了系统重要性金融机构名单，在法律与监管上予以特别对待；

三是有利于提升中国国际金融交易规则话语权。有的金融市场基础设施属于交易场所，系交易的组织者，其规则的解释及变动，不仅对于参与交易的各方利益有极大的影响，还会影响到我国在国际金融市场上对规则的话语权。因规则产生的纠纷，有可能通过民事诉讼或者行政诉讼进入司法程序由法院裁判。如果不统一管辖，而由各地不同的法院通过个案解释规则，难免会产生执法不统一现象，进而影响交易者的信心与交易场所的地位；

四是有利于维护国家金融安全。如属于交易场所的金融市场基础设施，往往涉及保证金的缴纳、收取、集中管理等，对交易的安全具有重要意义。当这些金融市场基础设施因履行其职能卷入诉讼时，需要统一司法裁判标准，避免其财产尤其是保证金成为随意扣划的对象。

基于上述考虑，《规定》明确诸如上海证券交易所、上海期货交易所、中国金融期货交易所股份有限公司等金融市场基础设施为被告或者第三人，与其履行职能相关的第一审金融民商事案件和涉金融行政案件，集中由上海金融法院管辖。至于金融市场基础设施的范围，中国人民银行曾指出，“金融市场基础设施是指参与机构（包括系统运行机构）之间，用于清算、结算或记录支付、证券、衍生品或其他金融交易的多边系统，包括重要支付系统、中央证券存管、证券结算系统、中央对手和交易数据库等五类金融公共设施”。

实践中，对于被告或者第三人是否属于金融市场基础设施，应以中国人民银行等主管部门认定为准。基于司法解释制定严谨、开放、周延的考虑，《规定》没有直接列举这些金融市场基础设施名称，比如说，现在是金融市场基础设施的主体，今后出现更名、合并、退出等情形，我们就没有必要再行修改司法解释。同样，今后如出现住所地在上海市的新的主体，属于中国人民银行等主管部门认定的金融市场基础设施，则显然适用本《规定》，对此我们也没有必要再行出台新的司法解释。（孙航）

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DOI:10.19684/j.cnki.1002-4603.2011.04.011

附件4

文/宋 航（一审审判长、主审法官） 张文婷

证券交易所自律监管行为正当性的司法审查标准

■案号 一审：(2008)沪一中民三(商)初字第68号 二审：(2009)沪高民二(商)字第41号

【案情】

原告：邢立强。

被告：上海证券交易所。

2005年11月16日，武汉钢铁(集团)公司(以下简称武钢集团)发布《关于武汉钢铁股份有限公司人民币普通股股票认购权证和认沽权证上市公告书》(以下简称武钢权证上市公告书)，其中关于认沽权证的发行，公告称，本次发行备兑认沽权证47400万份，认沽权证交易代码"580999"，权证交易简称"武钢JTP1"，权证存续期间为2005年11月23日至2006年11月22日，权证行权日为2006年11月16日至2006年11月22日，上市时间为2006年11月23日，标的证券代码"60005"，标的证券简称"武钢股份"，行权价为3.13元，行权比例为1:1，结算方式为股票给付方式。

截至2005年11月25日，经中国证券业协会评审，中信证券等13家证券公司取得从事相关创新活动的试点资格。2005年11月21日，上海证券交易所(以下简称上交所)发布《关于证券公司创设武钢权证有关事项的通知》(以下简称《创设通知》)称，取得中国证券业协会创新活动试点的证券公司(以下简称创设人)可按照本通知的规定创设权证，创设人创设的权证应与武钢认购或认沽权证相同，并使用同一交易代码和行权代码。创设认沽权证的，创设人应在中国登记结算有限责任公司上海分公司(以下简称中国结算上海分公司)开设权证创设专用账户和履约担保资金专用账户，并在履约担保资金专用账户全额存放现金，用于行权履约担保。创设人应将上述账户报上交所备案。创始人向上交所申请创设权证的，应提供中国结算上海分公司出具的其已提供行权履约担保的证明，经上交所审核同意，通知中国结算上海分公司在权证创设专用账户生成次日可交易的权证。权证创设后，创设人可向上交所申请注销权证，创设人每日

申请创设或注销权证不得超过一次,每次创设或注销数量均不低于100万份。该通知自2005年11月28日起施行。2005年11月25日,上交所审核批准光大证券等10家券商创设武钢认沽权证的申请,总计创设武钢认沽权证共11.27亿份,定于2005年11月28日上市。2005年11月26日,10家券商在《证券时报》等媒体披露了上述创设权证即将上市的信息。

武钢权证上市后,原告邢立强在2005年11月24日、25日分别买入武钢认沽权证73100份(1.51元/份)、13100份(1.688元/份)、28600份(1.767元/份)、200份(1.806元/份),累计买入武钢认沽权证115000份。创设权证上市后,同年11月30日,邢立强又买入武钢认沽权证100份,每份1.09元。至此,其共计持有武钢认沽权证115100份,平均买入成本价为1.604元/份。2005年12月5日,邢立强卖出全部武钢认沽权证115100份,成交价为1.09元/份。此后,邢立强在武钢权证存续期间,又多次买入和卖出。

原告邢立强认为,上交所的《创设通知》自2005年11月28日起施行。按此通知,创设权证最早上市时间应为2005年11月29日。但在2005年11月25日,上交所却提前3天发布公告,称已同意批准券商创设11.27亿武钢认沽权证,并于2005年11月28日上市交易,该提前天量创设行为使原告持有的115000份武钢认沽权证失去交易机会,由此造成巨大亏损,对此上交所应承担赔偿责任。遂起诉要求法院判令:确认上交所的提前创设行为是违法、违规、欺诈及操纵市场的过错行为,与原告的损失间存在因果关系,并请求判令上交所依法承担赔偿责任。

【审判】

上海市第一中级人民法院经审理后认为,本案的争议焦点在于:一、原告作为投资者因权证投资产生损失后,以上交所为被告提起的侵权之诉是否具有可诉性。二、投资者投资权证产生的损失与上交所的监管行为是否存在法律上的因果关系,上交所是否应当赔偿原告的交易损失。就第一个争议问题,法院判决认为,权证创设行为系证券交易所根据国务院证券监督部门批准的业务规则作出的履行自律监管的行为,相关受众主体如认为该行为违反法律规定和业务规则,可以对交易所提起侵权民事诉讼。就第二个争议问题,法院判决认为,上交所审核证券公司创设武钢权证是合法的自律监管行为。该行为本身并未违反权证管理业务规则,主观上并非出于恶意,也并非针对特定的投资者,且原告的交易损失与上交所审核权证创设的市场监管行为之间亦不存在直接、必然的因果关系,原告的诉请不符合侵权行为的构成要件,上交所无须对其损失承担赔偿责任。据此,判决驳回原告邢立强的全部诉讼请求。

一审判决后,邢立强不服,提起上诉。因邢立强未按规定预交上诉费,上海市高级人民法院于2009年5月26日作出裁定:本案按自动撤回上诉处理。一审判决已发生法律效力。

【评析】

一、权证纠纷案件的相关背景

本案系一起投资者以上交所违规审核权证创设为由而提起的侵权损害赔偿纠纷。权证是指标的证券发行人或其以外的第三方发行的,约定持有人在规定的期间内或特定到期日,有权按约定的价格向发行人购买或出售标的证券,或以现金结算方式收取结算差价的有价证券。与传统的股票、债券等金融产品不同,权证属于新型证券衍生品种,在性质上是一种期权,是证明持有人拥有特定权利的契约。按照契约所约定的未来权利的不同,权证又可分为认购权证和认沽权证。其中,认购权证是指发行人发行的,约定持有人在规定期间内或特定到期日,有权按照约定价格向发行人购买标的证券的有价证券;认沽权证则指发行人发行的,约定持有人在规定期限内或特定到期日,有权按照约定价格向发行人出售标的证券的有价证券。本案系争武钢权证即为认沽权证。

我国目前发行的权证主要是股改权证,是股权分置改革的产物,系因政策推动而形成,因而颇具中国特色。自2005年8月22日,第一只股改权证宝钢权证上市交易后,又有多只权证陆续在交易所挂牌上市。在此过程中,权证以其以小博大的高杠杆性特征,吸引了资金相对不充裕的大量个人投资者入市,促使我国权证市场一度异常繁荣,至2006年底,我国权证交易金额已居全球第一。然而,个人投资者多出于跟风买卖权证产品,其中绝大多数的投资者对权证类产品的创设、交易规则、产品特征等并不十分熟悉,致使权证上市不久便产生了很多纠纷,并陆续诉至法院;而相对于异常繁荣的权证市场,我国的权证交易规则相对滞后,至今尚未有相关法律或行政法规出台,目前对权证的规范只限于

证券交易所根据证券法和证监会的授权制定的权证管理办法,效力层级较低,导致法院审判依据有限。鉴于权证类案件具有明显的群体性特征,个案若处理不妥,有可能产生连锁反应,对整个权证市场造成消极影响,故法院在处理此类案件时不得不较为谨慎,既要考虑维护投资者的合法权益,又要兼顾司法判决对证券市场可能产生的冲击,利益较难平衡。

作为一起被《最高人民法院公报》刊载的典型案例,本案在确立以交易所为被告的侵权案件的受理原则,以及投资者损失的责任归属等方面明确了标准,具有一定的示范作用,同时也为该类案件的审理厘清了思路。

二、案件的可诉性:司法介入的必要性及法律依据

交易所是权证交易市场的组织者,提供的是一体化的交易平台,并不与权证投资者直接发生关系。然而,长期以来,国内交易所在法律性质上,一直定位不明确。虽然从相关规定的表述上可以看出,交易所是实施自律监管的法人,然而在实际运作中,它也承担了大量源于行政机关的监管职责。实践中上述两种监管方式和监管权力来源的模糊性又反过来进一步放大了交易所法律地位的不确定性,以至于很多投资者在权证投资产生损失后,迳行选择将交易所列为被告,以交易所违规审核权证等为由,请求法院判决交易所承担侵权赔偿责任。在审理这类案件时,法院必须首先解决针对交易所自律监管行为所产生的纠纷是否具有可诉性这一前提问题。

(一)交易所自律监管行为是否可诉的观点之争。对于权证产品的发行和交易,我国目前尚未有单行法律和行政法规出台。上交所根据证券法和证监会授权制定的业务规则即权证暂行管理办法对权证的发行、交易等活动进行规范。本案涉及的权证创设问题,权证管理暂行办法第二十九条作了授权性规定,即对于已上市交易的权证,上交所可以允许合格机构创设同种权证。具体的权证创设规则也是由交易所根据权证管理暂行办法的规定在某一具体的权证产品的上市公告中予以确定。因此,交易所允许合格机构创设权证,是根据国务院证券监管部门批准的业务规则作出的履行自律监管职责的行为。

有观点认为,交易所承担证券市场监管职能,其自律监管行为针对的是广泛的、相对不特定的市场主体,因而不具有可诉性。另一种观点则认为,针对交易所的自律监管行为,投资者可以就其损失向法院提起诉讼。因为就侵权纠纷的诉讼基础而言,投资者基于交易所核准券商创设权证的行为所提起的侵权行为之诉,并不受诉讼主体资格的限制,在当前并无明文规定禁止此类案件诉讼的情况下,只要符合法院立案受理的一般标准,法院即可进行审理。

表面上看,交易所自律监管行为是否可诉,涉及的仅仅是如何确定案件的受理标准,然而这里同时也隐含着司法如何介入金融市场监管的一个根本问题,即:如何在保持交易所自律地位和自治能力的基础上,加强必要的司法监督,推动交易履行监管职责。

(二)司法介入交易所自律监管行为的必要性。交易所作为证券市场自律组织,具有监督管理会员公司、上市公司及其相关人员以及众多投资者的公共职能。如果允许投资者随意针对交易所的自律监管行为提起诉讼,将有可能产生大量不必要的甚至是恶意的诉讼,从而不利于交易所及时、快速、高效地实行市场监管。应当承认,这一担忧并非毫无道理,然而,与其他权力一样,交易所的自律监管行为也有可能被滥用。防范交易所滥用自律监管权,仅靠其内部规范和自我约束并不充分,尚需外部力量的监督。司法介入是监督制约交易所自律管理必不可少的外部力量。首先,承认司法对交易所自律监管的必要介入,是保障交易各方合法权益的必然要求。交易所在组织与监督市场交易的同时,其自身也必须在法律框架内运行。当投资者的合法权益受交易所侵害时,提供切实有效的司法途径予以救济,能保障资本市场参与者的基本利益,为证券市场稳健发展创造必要的外部环境。其次,司法介入交易所自律监管,并不会破坏自律监管体系。在国家权力的各个分支中,司法权是最消极的权力,按照不告不理原则和公开公正程序运行。由司法审查交易所的自律管理行为,符合了应采用危险性最小权力介入自律领域的这一理念。最后,司法权力的介入,对交易所开展自律管理进行监督制约的同时,也是一种积极的司法保障。如果法院审理确认了交易所自律管理行为正当性及合法性,则交易所的自律管理同时可以获得司法权威的保障,进而能从投资者不合理的纠缠中解脱出来。①

①徐明、卢文道:“证券交易所自律管理侵权诉讼司法政策”,载《证券法苑》第一卷,法律出版社2009年9月第1版,第16页。

（三）司法介入交易所自律监管行为的法律依据。针对交易所的自律监管行为，最高人民法院曾于2005年以司法解释的形式具体确立了如下标准，以衡量投资者是否具备诉讼资格：投资者对证券交易所履行监管职责过程中对证券发行人及其相关人员、证券交易所会员及其相关人员、证券上市和交易活动做出的不直接涉及投资者利益的行为提起的诉讼，人民法院不予受理。最高法院的这一司法解释，延续了我国诉讼法上的当事人适格理论，即一般所说的直接利害关系说，按照这一标准，投资者就交易所监管职责中不直接涉及其利益的行为提起的诉讼，法院应当不予受理。最高法院确定这一标准的本意在于，设置诉讼门槛，以此将部分不必要的诉讼排除在法院的大门之外。然而，这一规定在司法实践中相对难以执行，因为直接利害关系这一概念本身过于弹性，对于什么样的利害关系才是直接的，直接与间接的区分标准何在，理论界和实务界也一直未停止过争论。此外，依直接利害关系确立原告起诉资格，亦有实体审查和形式审查之区分。

如实体审查，则在案件受理阶段，即对原告主张的利益损害与诉称的特定行为是否存在直接利害关系作出认定，如不存在，则不予受理。理论上，如对直接利害关系的构成要素进行实质性判断，则意味着即使存在起诉人主张的合法利益和一个可诉行为，也并不意味着原告资格的必然成立，如果其中缺乏因果关联性，仍不能构成直接利害关系。因此，在原告诉讼资格的实体审查中，核心点是审查原告主张的损害与诉称的具体行为之间的因果关系。问题在于，现实的诉讼中，开启诉讼的起诉及受理活动在先，通过诉讼程序判定权利义务的审理活动在后，如在案件受理阶段就衡量实体权利有违诉讼原理。因此，采用形式审查在理论上更具有说服力，即在起诉阶段，仅核查原告的法律主体资格和身份证明，直接利害关系则是观念上的，是否真正存在属于实体性问题，留待案件审理阶段作认定。

事实上，本案正是在认可形式审查标准合理性的基础上，肯定了交易所自律监管行为的可诉性，具体思路是：普通投资者系通过交易所会员进场交易，投资者与交易所之间不存在直接的交易合同关系，因交易发生损失，交易所虽然对投资者不承担契约上的义务，但如果投资者不选择违约之诉，而是以被告上交所审核券商创设权证违规等为由提起侵权之诉，则根据民法通则第一百零六条第二款的规定，因原告提起侵权之诉不受主体限制，人民法院可以受理。相对于民法通则而言，证券法虽然系特别法，由于该法没有作出特别规定，故本案应适用一般民法关于民事侵权的规定。据此，证券交易所根据国务院证券监管部门批准的业务规则作出的履行自律监管行为如果违反了法律规定和业务规则，相关受众主体可以对交易所提起民事诉讼。

三、责任认定：承担监管侵权责任抑或由投资者自行承担损失

在司法实践中，法院认定侵权责任通常从损害事实、过错、损害与过错行为因果关系以及违法性等一般要件进行考察。本案的焦点在于，证券交易所在履行自律监管行为中的过错以及过错与损失之间因果关系应如何认定。

（一）过错的认定。过错，是侵权责任中的重要构成要件。就其性质而言，过错概念是一种评价性概念，是法律对于行为人实施侵害行为时主观态度的否定性评价。本案中，原告邢立强认为，上交所在审核武钢认沽权证时存在违规、欺诈行为，具体表现在未按公告时间创设权证、创设权证严重超量等方面，这些行为直接导致了他的交易损失，应当由上交所进行赔偿。对此，法院主要从目的正当性标准、行为依据合法性标准这两个角度，对交易所是否存在监管过错予以把握。

第一，目的正当性标准。交易所履行自律监管以维护证券市场秩序和公共利益为目标，对权证交易进行监督和管理，是证券法赋予交易所的一项职能。在武钢认沽权证上市后，投资者对该权证进行了非理性的投机炒作，使得该权证严重背离内在价值。上交所为抑制这种过度炒作行为的继续，及时审核创设人的创设权证，通过增加权证供应量的手段平抑权证价格，其目的在于维护权证交易的正常秩序，作为市场监管者，其核准创设权证的行为系针对特定产品交易异常所采取的监管措施。该行为主观上并非出于恶意，行为本身也并不针对特定投资者，实施的是对权证交易活动本身作出的普遍监管行为，属交易所的职责所在。

第二，依据合法性标准。交易所自律监管应当是合法监管，具有法律法规和业务规则层面的依据。依据合法有效的规则进行监管，通常应无过错可言。本案中，上交所系根据权证管理暂行办法第二十九条的规定，审核合格券商创设武钢权证，该审核行为符合业务规则的具体要求，是上交所履行证券法赋予其自律监管职能的行为，具有

合法性。根据权证管理办法的有关权证发行的规定,具有权证创设资格、开设专用账户且提供履约担保资金的证券公司,在其认为权证价格高估时,可以创设权证,并在市场上卖出,增加权证的供给;在权证价格回归价值时,可以回购并注销权证,释放履约担保品。根据上述业务规程,上交所在武钢权证创设过程中,上交所履行了相关权证上市信息披露、监管和相关手续的审查义务,其行为并无过错。

(二)因果关系的认定。因果关系,是侵权责任中的重要构成要件,包括责任确定的因果关系与责任范围的因果关系两层含义。前者要求可归责的行为与一定的损害之间存在因果关系上的联系;后者要求损害与相应的责任之间存在因果关系上的联系。具体的因果关系确定标准两者各有不同。

责任确定的因果关系采用的是等值理论,即损害的产生通常具有多个原因,诸多原因同等对待。资本市场具有更高的风险性,引发投资者损失的因素具有多样性,在这些众多因素中,交易所行使自律监管职能的行为,可能会对相对人和市场投资者产生一定影响和效应,这样的影响因素通常也是诸多因素的一种。本案中,证券交易所采取的监管行为与原告损失之间,满足责任确定因果关系中的等值理论并无争议。

需要进一步分析的是,确定侵权责任一般也应满足责任范围上因果关系的判断标准。责任范围的因果关系采用的是相当性理论,即损害与责任之间具有相当性。具体在判断上要求损害的可能性被显著提高。此处的可能性判断应该从行为发生之时最佳判断者的立场出发,应用其具有的经验进行综合判断。在普通的民事法律关系中,将最佳观察者设定为理性的普通人并无不当。[①]然而,如果以理性的普通人为标准来确定证券自律监管是否构成责任范围意义上的因果关系则忽略了资本市场的专业性和高风险性。交易所的监管行为针对的是整个证券交易市场,在做出决策的过程之中,不仅要考虑到个别投资者的利益,也要考虑整个资本市场的稳定、有序和安全,尽量避免不必要的过度市场炒作,防范系统性风险的发生,在综合判断相关因素之后进行必要的利益权衡。为此,交易所监管赔偿责任中理性观察者也相应地转化为处于波动性资本市场环境下,具有有限的监管信息和历史数据,但是必须及时做出决策行为的理性自律监管机构。法院主要审查的是,证券交易所做出的监管行为是否超出了合理与必要的限度。只有在交易所在有限信息条件下,做出的监管行为不合理、不必要或者监管措施引发的投资者损失大于给整个证券市场带来的利益时,交易所才承担监管侵权责任。

本案中,原告认为,上交所核准券商超量创设权证亦是造成其交易损失的基本原因。对原告的这一主张,法院做了如下论断:证券交易所作为证券市场的一线监管者行使监管职能,必然会对相对人和社会产生一定影响和效应。创设权证制度在我国属于一项金融创新制度,是基于股权分置改革的总体要求,结合股改权证的运行特点,借鉴成熟市场的类似做法,产生的一种市场化的供求平衡机制。鉴于这项制度仍处于探索阶段,故在创设程序、创设品种、创设数量等方面尚无规范可循,在具体实施时创设人可以根据发行权证的具体情况自由决定实施方案,交易所仅对其资格和上市程序进行审查。对于创设权证的具体规模,业务规则本身亦无限制。虽然涉案认沽权证的创设量远远超出了最初的发行量,但权证管理办法对此并无禁止性规定,而创设量的多少也无客观参照标准,只能根据具体权证产品的交易情况和特点确定适当的数量,以达到供求平衡。本案原告邢立强在武钢认沽权证交易中的损失,虽与券商创设权证增加供给量存在关联,但在上交所事先已履行必要的信息披露和风险揭示的情况下,原告仍然不顾风险冒然入市,由此造成的交易风险与上交所履行市场监管行为不存在导致损害赔偿责任的因果关系,故原告要求上交所赔偿权证交易差额损失和可得利益损失,没有法律依据。

综上,就本案创设权证审核行为而言,上交所的行为不符合侵权行为的基本要件,原告主张上交所侵权,依据不足,故法院判决驳回其全部诉讼请求。通过本案判决,法院确立了正当监管免责价值取向下的买者自负原则。

(作者单位:上海市第一中级人民法院)

①叶金强:“相当因果关系理论的展开”,载《中国法学》2008年第1期。

附件5

England and Wales High Court (Chancery Division) Decisions

Neutral Citation Number: [2015] EWHC 2319 (Ch)
Case No: No.9527 of 2011

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice
Rolls Building
London, EC4A 1NL
31 July 2015

B e f o r e :

MR JUSTICE DAVID RICHARDS

Between:

IN THE MATTER OF MF GLOBAL UK LIMITED (IN SPECIAL ADMINISTRATION)
AND
IN THE MATTER OF THE INVESTMENT BANK SPECIAL ADMINISTRATION REGULATIONS 2011

RICHARD FLEMING, RICHARD HEIS AND MICHAEL PINK (ACTING AS JOINT SPECIAL ADMINISTRATORS OF MF GLOBAL UK LIMITED) — **Applicants**

- and -

(1) LCH.CLEARNET LIMITED
(2) LCH.CLEARNET SA — **Respondents**

Felicity Toube QC (instructed by Weil, Gotshal & Manges) for the Applicants
Gabriel Moss QC (instructed by Freshfields Bruckhaus Deringer) for the Respondents
Hearing dates: 12, 13, and 14 May 2015

HTML VERSION OF JUDGMENT

Mr Justice David Richards:

1. The Joint Special Administrators of MF Global UK Limited (MF Global) apply for an order under section 236 of the Insolvency Act 1986 against LCH.Clearnet Limited (LCH UK) and LCH.Clearnet SA (LCH France). The order seeks the production of documents and a full description by way of witness statement of the sales or auction processes by which the respondents closed out MF Global's open positions with the respondents very shortly after the appointment of the administrators.

2. The respondents oppose the making of the order. LCH France submits that the court has no jurisdiction to make an order against it under section 236. Both LCH UK and LCH France, if there is jurisdiction to make an order against it, submit that the

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court should not exercise its discretion to make the order sought.

3. In the alternative, the administrators seek an order against LCH France under section 237(3) that the court should issue a request to the French court under Council Regulation (EC) No.1206/2001 of 28 May 2001 (the Evidence Regulation) to examine a responsible officer of LCH France in compliance with sections 236 and 237(3) and to receive from the responsible officer copies of all existing documents that can be located following a reasonable and proportionate search, the extent of which is to be determined by the English court if not agreed between the parties, and setting out the information requested in the schedule to the proposed order. LCH France resists this alternative order and submits that, in the circumstances of this case, a request cannot be made under the Evidence Regulation.

4. MF Global was a member of the MF Global group of companies which carried on business as broker-dealers in financial markets throughout the world. The group's principal operations were in New York and London, the latter being carried on by MF Global. MF Global and other companies in the group entered formal insolvency proceedings in the United States and England on 31 October 2011. The administrators of MF Global were appointed under the Investment Bank Special Administration Regulations 2011. Under the terms of those Regulations, sections 236 and 237 of the Insolvency Act (apart from section 236(1)) apply in the special administration of MF Global.

5. The respondents operate clearing houses in securities and other financial instruments in a number of jurisdictions, including England and France. As with other clearing houses, the system operates on the basis that the relevant respondent is interposed as a principal party to trades in securities or other financial instruments. Accordingly, a sale of securities from A to B becomes a contract for the sale of the securities from A to the clearing house and a back-to-back contract for the sale of those securities from the clearing house to B. The purpose of a clearing house is to reduce and allocate the inherent risks arising from transactions between market participants. They protect their members from the potential losses that would otherwise result from the default of a clearing member and they provide protection to the market from systemic risk. The respondents, like all clearing houses, have rules, arrangements and resources to ensure that they can respond in an orderly and efficient way to defaults by members. They are entitled to close out the open positions of defaulting members and they can use netting procedures to set-off amounts that would otherwise arise from non-cleared trades.

6. When MF Global went into administration on 31 October 2011, it had a number of very large open positions with the respondents, in particular with LCH France, involving European sovereign debt. The contracts were repurchase to maturity contracts whereby MF Global sold bonds to a counter-party for a cash payment on day 1 and agreed to repurchase the same quantity of bonds for a specified amount on a specified future date, typically a few days before the bonds matured. These contracts were cleared through one or other of the respondents, with the result that MF Global sold the bonds and received the initial payment from the relevant respondent which in turn sold the same bonds and received the same amount from the original counter-party. The relevant respondent remained liable to the counter-party to repurchase the bonds on the specified future date and had back-to-back contracts with MF Global. The open positions taken by MF Global were very large, including €2.8 billion of Italian government debt and €1.49 billion of Spanish government debt cleared through LCH France. Other European government debt positions were also held with both LCH UK and LCH France.

7. These positions were held at a time of extreme uncertainty regarding the debts of certain states in the Eurozone, in particular Greece but involving other states as well. Italy's sovereign debt rating was downgraded by Standard & Poor's from A+ to A- on 19 September 2011 and by Fitch Ratings from AA- to A+ on 7 October 2011. At much the same time the sovereign debt rating of Spain was downgraded by the rating agencies. On Thursday 27 October 2011, Eurozone states agreed a plan to resolve the European sovereign debt crisis, including a proposal that holders of Greek sovereign debt should cut the value of their holdings by 50%. On Monday 31 October 2011, the day on which MF Global entered administration, the Greek government issued a statement, calling for a referendum on the Eurozone proposal and suggesting that Greece might leave the euro.

8. The appointment of administrators of MF Global constituted an event of default under the rules governing its contracts with the respondents. The respondents exercised their rights to close-out MF Global's open position. Losses against the repo prices totalling approximately €422 million were suffered on those close-outs, which were deducted from the margin held by the respondents. In particular, losses of approximately €127.3 million were suffered on the close-out of MF Global's position in Italian sovereign debt.

9. The administrators accept that it was inevitable that the close-outs would result in significant losses but they are concerned that, when compared with contemporary prices quoted on Bloomberg screens, the losses were exceptionally large. The administrators have calculated that if all the open positions had been closed at or around the prices quoted by Bloomberg, on the relevant termination dates, the discount suffered would have been €241 million, as opposed to €422 million. In particular, losses of €127.3 million arose on the sale on 2 November 2011 of €2.2 billion of Italian Government bonds at 5.83 points below the corresponding Bloomberg price and 5.51 points below the price obtained by the respondents for the residual €625 million of the position sold via an auction the next day. The administrators state in their evidence that it is not clear to them why there were such significant differences between the Bloomberg price and the close-out prices or why the prices fluctuated so much between the various close-outs.

10. It is against this background that the administrators make the present application for the disclosure of documents and information relating to these close-outs. Mr Richard Heis, one of the joint administrators, explains the reasons for the present application in paragraphs 10 and 13 of one of his witness statements in support of the application:

> "10. In light of the scale of the losses described above, and the discrepancies between the prices obtained for the bonds, the JSAs are concerned to establish whether the LCH Entities conducted the close outs in a manner consistent with their duties under the appropriate laws and regulations. Accordingly, the purpose of the Application is to provide the JSAs with sufficient information in order to make this determination including whether it is appropriate for the JSAs to make claims against the LCH Entities in England, France or both.

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> 13. ... If there is evidence to suggest that the LCH Entities did not close out the RTMs in accordance with their duty of care, then it is incumbent upon the JSAs to seek recovery of MFGUK's losses. As matters stand, the information that has been provided by the LCH Entities leaves many questions unanswered as to why the RTMs were terminated at a discount of approximately €422 million rather than a discount of approximately €241 million according to the Bloomberg prices on the relevant dates."

11. The administrators' position was summarised in the skeleton argument of their counsel, Ms Toube QC:

> "6.2 ... at present, however, all that concerns the JSAs is to understand the option process in order to determine whether there is any claim that should be brought. In that context, the variance from Bloomberg pricing remains of concern to the JSAs, particularly in the absence of any transparency as to what exactly happened at the auction."

12. The application notice, as issued, sought an order that the respondents provide to the administrators' solicitors:

> "a witness statement from the appropriate person on behalf of each Respondent exhibiting copies of all existing documents and setting out the information request in the attached schedule."

13. The schedule sought, in paragraph 2, a "full description (by way of witness statement) of each sale or auction process, and any documentation relating to it", including a range of information specified in 5 sub-paragraphs. Further paragraphs of the schedule specified internal communications within the respondents and external communications between the respondents and any actual or potential bidders and others between 24 October 2011 and 31 December 2011. The schedule also sought all tapes recording telephone conversations between 24 October 2011 and 31 December 2011 between the respondents and any actual or potential bidder or any other party regarding the close out of the open positions.

14. During the week preceding the hearing of the application, the solicitors for the administrators supplied to the respondents' solicitors copies of the orders that would be sought at the hearing. Two draft orders were provided, dealing separately with LCH UK and LCH France. In the draft order relating to LCH France, a new order was included as an alternative to the order already sought. The new alternative order was in the following terms:

> "The English Court hereby requests the French Court to examine a responsible officer of the Second Respondent in France before the French Court in compliance with sections 236 and 237(3) Insolvency Act 1986 in accordance with the EU Regulation on Co-Operation Between the Courts of the Member States in the taking of Evidence In Civil Or Commercial Matters (1206/2001), and that the French Court shall receive from the said responsible officer copies of all existing documents that can be located following a reasonable and proportionate search, the extent of which is to be determined by the Court if not agreed between the parties within 7 days of the date hereof, and setting out the information requested in the attached schedule."

15. It was already apparent from the evidence filed on behalf of the administrators and from the skeleton argument of their counsel that the primary focus of interest on the administrators' part was the close-out of the positions in Italian and Spanish government debt which took place on 2 November 2011. It was those close-outs which the administrators submit showed a marked difference from the Bloomberg prices, noting in particular that the close-out of the position in relation to Italian government debt on 3 November 2011 differed only to a small extent from the Bloomberg prices on that day. In the course of her submissions on the first day of the hearing, Ms Toube was able to confirm that this was indeed the prime focus of the administrators' attention. After the hearing on that day, the administrators' solicitors wrote to the respondents' solicitors, stating that in the interests of narrowing the issues before the court, the administrators were content to limit the information requested in the application to the sale of €2.2 billion of Italian government bonds and two tranches of Spanish government bonds, all of which occurred on 2 November 2011.

16. In order to understand the scope of the disclosure sought by the administrators, it is I think appropriate to set out the schedule to each draft order in the amended form supplied on 12 May 2015:

> "**Close Out Rules and procedures**
>
> The LCH rule books and any other written rule, policies, procedures, notifications or member instructions in effect during October 2011 insofar as they relate to the RTMs.
>
> **Specific process used to close out MFGUK RTMs**
>
> A full description (by way of witness statement) of the sale and/or auction processes that occurred between 1 and 3 November 2011 (inclusive) in relation to Italian bond ISIN IT000467369, Spanish bond ISIN ES00000120L4, and Spanish bond ISIN ESOL01212148 (the "Bonds"), and any documentation relating to them, to include:
>
> (a) a list of parties contacted as part of the sale process, the positions they were contacted in respect of and the dates of contact,
>
> (b) an explanation of how parties were chosen to bid on positions and by whom at LCH they were chosen;
>
> (c) an explanation of how bids were obtained and reviewed and by whom at LCH they were obtained and reviewed;
>
> (d) a list of parties who bid for and/or purchased the bonds (i.e. identification of counterparty A, B, C, etc);
>
> (e) information relating to any phone conversations (unless covered by 6 below) by which LCH sought to solicit bids for positions (including that had not attracted bids) or other conversations with actual or potential bidders.

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Copies of all bid sheets sent out to market participants in relation to the Bonds (excluding those already provided by LCH to the Joint Special Administrators on 7 September 2012).

All written communications between LCH and any actual or potential bidder, member or other party relating to the close out, sale or auction of the Bonds between 1 November 2011 and 3 November 2011 (inclusive).

All LCH communications made between 1 November 2011 and 3 November 2011 (inclusive) regarding the margining, close out, sale or auction of the Bonds, including notes, minutes or materials of any meetings, conversations or presentations.

All tapes recording phone conversations made between 1 November 2011 and 3 November 2011 (inclusive) between LCH and any actual or potential bidder or any other party regarding the margining, close out, sale or auction of the Bonds.

Other

A list of participants and transcript from the LCH Clearnet market wide conference call on 1 November 2011 and any similar calls in which the close out, sale or auction of the Bonds was discussed."

17. The effect of this amendment was to narrow significantly the scope of the information and documents sought by the administrators. The evidence filed on behalf of the respondents had estimated the total cost of retrieving the documents and tapes sought at approximately £135,000 and the cost of legal review of the documents and tapes at between approximately £3.13 million and £4.625 million. Not surprisingly, the administrators challenged these figures, although I think it likely that substantial costs would be incurred in the retrieval and necessary review of the documents and tapes sought. The late reduction in the scope of the order sought did not leave time for the respondents to prepare new calculations of the likely costs. In any event, the administrators have offered, as a condition of orders if made, that they will bear the reasonable costs of compliance with those orders to be assessed on an indemnity basis.

18. Sections 236 and 237 of the Insolvency Act 1986, so far as relevant, provide as follows:

"236. Inquiry into company's dealings, etc.

...

(2) The court may, on the application of the office-holder, summon to appear before it—

(a) any officer of the company,

(b) any person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or

(c) any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company.

(3) The court may require any such person as is mentioned in subsection (2)(a) to (c) to submit to the court an account of his dealings with the company or to produce any books, papers or other records in his possession or under his control relating to the company or the matters mentioned in paragraph (c) of the subsection.

(3A) An account submitted to the court under subsection (3) must be contained in—

(a) a witness statement verified by a statement of truth (in England and Wales), and

(b) an affidavit (in Scotland).

(4) The following applies in a case where—

(a) a person without reasonable excuse fails to appear before the court when he is summoned to do so under this section, or

(b) there are reasonable grounds for believing that a person has absconded, or is about to abscond, with a view to avoiding his appearance before the court under this section.

(5) The court may, for the purpose of bringing that person and anything in his possession before the court, cause a warrant to be issued to a constable or prescribed officer of the court—

(a) for the arrest of that person, and

(b) for the seizure of any books, papers, records, money or goods in that person's possession.

(6) The court may authorise a person arrested under such a warrant to be kept in custody, and anything seized under such a warrant to be held, in accordance with the rules, until that person is brought before the court under the warrant or until such other time as the court may order.

237 Court's enforcement powers under s. 236.

...

> (3) The court may, if it thinks fit, order that any person who if within the jurisdiction of the court would be liable to be summoned to appear before it under section 236 or this section shall be examined in any part of the United Kingdom where he may for the time being be, or in a place outside the United Kingdom.
>
> (4) Any person who appears or is brought before the court under section 236 or this section may be examined on oath, either orally or (except in Scotland) by interrogatories, concerning the company or the matters mentioned in section 236(2)(c)."

Provisions to similar effect apply in bankruptcy: see sections 366 and 367.

19. The three transactions which were closed out and which now are the subject of the application were all made between MF Global and LCH France and they were all closed out by LCH France. The order now sought against LCH France therefore relates to the closing out by it of those transactions, while the order sought against LCH UK seeks information and documents in its possession or under its control relating to the actions not of it but of LCH France.

20. The onus lies on the administrators to satisfy the court that the orders sought come within the powers conferred by sections 236 or 237 and that, as a matter of discretion, it is appropriate for the court to make the orders sought.

21. LCH France is a company incorporated and carrying on business in France, with no presence in England. It submits that section 236 does not have extra-territorial effect and that therefore there is no jurisdiction to make an order against it under that section. It relies primarily on the decision of the Court of Appeal in *Re Tucker* [1980] Ch 148, a decision on section 25 of the Bankruptcy Act 1914 which, as applied to bankruptcy, was in substantially the same terms as sections 236 and 237. In particular, section 25(6), re-enacted as section 237(3), provided:

> "The court may, if it thinks fit, order that any person who if in England would be liable to be brought before it under this section shall be examined in Scotland or Ireland, or in any other place out of England."

22. In *Re Tucker,* the respondent, who the court agreed was capable of giving relevant information concerning the debtor, his dealings or property, was resident in Belgium. The Court of Appeal held that no order under section 25 could be made against him. Dillon LJ, giving the lead judgment, referred at p.158 to the rule of construction that, unless the contrary is expressly enacted or plainly implied, United Kingdom legislation is applicable only to British subjects or to others who by coming to the United Kingdom, whether for a short or a long time, have made themselves subject to British jurisdiction. Dillon LJ continued:

> "I look, therefore, to see what section 25(1) is about, and I see that it is about summoning people to appear before an English court to be examined on oath and to produce documents. I note that the general practice in international law is that the courts of a country only have power to summon before them persons who accept service or are present within the territory of that country when served with the appropriate process. There are exceptions under R.S.C., Ord 11, but even under those rules no general power has been conferred to serve process on British subjects resident abroad. Moreover, the English court has never had any general power to serve a subpoena ad testificandum or subpoena duces tecum out of the jurisdiction on a British subject resident outside the United Kingdom, so as to compel him to come and give evidence in an English court. Against this background I would not expect section 25(1) to have empowered the English court to haul before it persons who could not be served with the necessary summons within the jurisdiction of the English court.
>
> I then find that an alternative procedure is provided by orders in aid under section 122 which could be used to secure the examination of persons resident in Scotland or Ireland or within the jurisdiction of other British courts before the bankruptcy courts of those countries. This procedure, while taking advantage of the jurisdictions of those other courts, also respects those jurisdictions.
>
> Finally, and to my mind conclusively, by section 25(6) the court is given a power (the scope of which will have to be considered on the respondent's notice) to order the examination out of England of "any person who if in England would be liable to be brought before it under this section." This wording carries inevitably, in my judgment, the connotation that if the person is not in England he is not liable to be brought before the English court under the section."

23. Where a statutory provision is re-enacted in substantially the same terms, it is a principle of construction that the re-enactment is intended to carry the same meaning as its predecessor. No doubt the principle could be displaced, for example, if new provisions in the new legislation showed that the re-enacted provision was intended to have a different meaning. The principle is particularly in point if the earlier provision has been the subject of authoritative decision. In such circumstances, it is presumed that, if substantially the same words are used in the new provision, Parliament did not intend to change the meaning as held by the court. *Re Tucker* is clearly an authoritative decision on the lack of extra-territorial effect of section 25 of the Bankruptcy Act 1914 and, although it was decided after the enactment of the Insolvency Act 1986, it is a binding interpretation of section 25 which will apply equally to the successor sections in the Insolvency Act 1986, unless the context of the new legislation shows that the meaning must be taken to have changed.

24. Ms Toube QC, counsel for the administrators, submitted that *Re Tucker* is not a binding authority on the effect of section 25, either because it was decided *per incuriam* or because the reasoning of Dillon LJ suffers from the logical fallacy of contraposition. I am unable to accept either of these bold submissions. The submission that the decision was *per incuriam* is based on a detailed trawl through the Bankruptcy Acts of the 19th century which was not presented in argument to the Court of Appeal in *Re Tucker*. In particular, Ms Toube relied on section 215 of the Bankruptcy Act 1861 which incorporated section 1 of an Act of 1854 as showing that the English court had power to order the private examination in England of a person in Scotland or Ireland and that such power would not have been lost by the legislative changes leading up to the Bankruptcy Act 1914. The submission founders for a number of reasons, but the principal reason is that section 1 of the 1854 Act was

concerned with requiring the personal attendance of witnesses at a trial. It was not concerned with private examinations. Quite apart from the difficulty of a judge at first instance concluding that a decision of the Court of Appeal was reached *per incuriam*, the analysis is in any event in my judgment wrong. Still less would it be appropriate or even permissible for a judge at first instance to conclude that a decision of the Court of Appeal was wrong on grounds of illogicality. In any event, I consider that the submission is misconceived. The position taken by Dillon LJ, and endorsed by Lord Mance in a case to which I later refer, involves a logical approach to the construction of the words of section 25(6) of the Bankruptcy Act 1914.

25. Ms Toube also submitted that the reference in section 237(3) to "any person who if within the jurisdiction of the court would be liable to be summoned to appear before it under section 236" referred not to the physical location of the person but to whether that person fell within the jurisdiction conferred by section 236. This submission, advanced for the first time in reply, is in my judgment plainly wrong. The phrase "within the jurisdiction of the court" is the commonly used expression to describe presence within the territorial jurisdiction of the court and is no more than an elaborate way of saying "in England" (and Wales), the phrase used in section 25(6) of the Bankruptcy Act 1914.

26. Ms Toube relies on authorities on other sections of the Insolvency Act 1986 which have been held to have extra-territorial effect.

27. In *Re Seagull Manufacturing Co Ltd* [1993] Ch 345, the Court of Appeal affirming the decision of Mummery J reported at [1992] Ch 128, held that the provision for the public examination of directors and others under section 133, which was a new provision in the 1986 Act, had extra-territorial effect. In reaching this decision, the decision in *Re Tucker* was considered without any suggestion that it was wrong. The conclusion that the provisions for private examination did not have extra-territorial effect was distinguished on the grounds that the persons who could be the subject of a public examination under section 133 were more narrowly confined, being limited to officers of the company and persons who have been concerned or taken part in its promotion, formation or management, whereas under section 236(2)(c) an order for private examination can be made against any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company. Secondly, while section 25(6) which Dillon LJ considered to be conclusive was re-enacted in section 237(3), no similar provision applies in relation to section 133.

28. Recently, in *Jetivia SA v Bilta* [2015] UKSC 23, [2015] 2 WLR 1168, the Supreme Court has held that section 213 of the Insolvency Act, providing remedies in respect of fraudulent trading, has extra territorial effect. Lord Sumption at [108] referred generally to provisions contained in United Kingdom and foreign insolvency legislation empowering the court to set aside transactions made before the commencement of the liquidation and to require those responsible to make good the loss and continued:

> "In the case of a company trading internationally, it is difficult to see how such provisions can achieve their object if their effect is confined to the United Kingdom."

To similar effect are statements made by Lord Toulson and Lord Hodge in their joint judgment at [213]-[214].

29. In *Re Paramount Airways Ltd* [1993] Ch 223, the Court of Appeal held that section 238 of the Insolvency Act, dealing with transactions at an undervalue, had extra territorial effect for similar reasons.

30. In *Masri v Consolidated Contractors International Co SAL* [2009] UKHL 43, [2010] 1 AC 90, which concerned the territorial effect of the power under CPR 71 to order the examination of an officer of a judgment debtor, the decision in *Re Tucker* was discussed at some length in the lead judgment of Lord Mance at [19]-[24], without any suggestion that it was wrongly decided. At [23], Lord Mance drew attention to the significance of section 25(6) of the Bankruptcy Act 1914 which, as mentioned earlier, Dillon LJ had regarded as "conclusive".

31. In *McIsaac & Anor Petitioners (Joint Liquidators of First Tokyo Index Trust Ltd*) [1994] BCC 410, the Outer House of the Court of Session in Scotland gave extra-territorial effect to section 236, but neither party places reliance on it. They agree that it was based on the mistaken belief that the United States fell within the definition of a relevant country or territory for the purposes of section 426(5) of the Insolvency Act 1986.

32. In the absence of authority and in the absence of what is now section 237(3), there would in my view be a good deal to be said for concluding that section 236 was intended to have extra-territorial effect, leaving it to the discretion of the court to keep its use within reasonable bounds. But it is in my judgment impossible to overlook the authoritative standing of the decision in *Re Tucker,* the re-enactment of the earlier private examination provisions in substantially the same terms and the presence of what is now section 237(3). I conclude that section 236 does not have extra-territorial effect and that therefore an order cannot be made under it against LCH France. I should add that the parties are agreed that Council Regulations (EC) No.1346/2000 of 29 May 2000 on insolvency proceedings does not apply to the special administration of MF Global as it was an investment undertaking providing services involving the holding of funds or securities for third parties and is therefore excluded by Article 1.2.

33. LCH France does not submit that the court lacks jurisdiction to make an order against it under section 237(3) in an appropriate case. The Court of Appeal held in *Re Tucker* that an order could be made under section 25(6) of the Bankruptcy Act 1914 against a person resident in a foreign state. However, before making any such order, the court will need to be satisfied that the case is covered by available procedural machinery by which the respondent could be compelled to comply with the order to produce documents or give evidence.

34. The administrators do not in this respect rely on any provisions of French domestic law but rely on the Evidence Regulation, to which reference is made in their proposed order. Article 1.1 provides:

> "This Regulation shall apply in civil or commercial matters where the court of a Member State, in accordance with the provisions of the law of that State, requests:

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> (a) the competent court of another Member State to take evidence; or
>
> (b) to take evidence directly in another Member State."

35. Ms Toube correctly submits that the taking of evidence for the purposes of the Regulation extends to orders for the production of documents. She submits that a request can properly be made under the Regulation for the examination of a responsible officer of LCH France by the French court and the production to the French court of copies of all relevant documents.

36. In my judgment, Mr Moss QC for the respondents is correct in his submission that the proposed request is outside the scope of the Evidence Regulation.

37. Article 1.2 of the Regulation provides:

> "A request shall not be made to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated."

38. The details required by Article 4 to be stated in the request include the names and addresses of the parties to the proceedings and "the nature and subject matter of the case and a brief statement of the facts". The intended purpose and scope of the Regulation also appears from the recitals. In particular, recital (7) provides:

> "As it is often essential for a decision in a civil or commercial matter pending before a court in a Member State to take evidence in another Member State, the Community's activity cannot be limited to the field of transmission of judicial and extrajudicial documents ..."

39. It is a pre-requisite of a request under the Evidence Regulation that the evidence is intended for use in judicial proceedings, commenced or contemplated, which will result in a decision. That requirement is not satisfied in the present case. The purpose of the request is not the production of information and documents for use in proceedings contemplated by the administrators. They make clear in their evidence that the purpose is to enable them to consider whether it would be appropriate to bring proceedings. Ms Toube's submission that the relevant proceedings were the administration proceedings is not in my view sustainable. For the purposes of the Regulation, the proceedings relevant to the request would be such proceedings, if any, as the administrators chose to instigate against LCH France.

40. I am inclined also to think that Mr Moss was correct in his submission that the Regulation contemplates requests being made by the court in which the relevant judicial proceedings will take place. It hardly seems likely that the Regulation contemplates a request by the English court to the French court for the provision of evidence for use in proceedings in the French court.

41. Accordingly, I conclude that the request for which provision is made in the draft order proposed under section 237(3) cannot be made under the Evidence Regulation and that therefore the court should decline to make the order sought.

42. Mr Moss had a further submission on jurisdiction. He submitted that the English court had no jurisdiction to make an order under section 236 against LCH France on the grounds that the jurisdiction rules in Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Judgments Regulation) applied, so that proceedings would have to be brought against LCH France in France.

43. Article 1 of the Judgments Regulation provides that it applies "in civil and commercial matters whatever the nature of the court or tribunal". Article 1.2 provides that the regulation does not apply to "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings". The administration of an insolvent company, whether under schedule B1 to the Insolvency Act or under any special regime applying to particular types of company such as investment banks, is within the scope of this exception. Mr Moss submitted that as the application against LCH France was an application for disclosure of evidence to be used in subsequent non-insolvency litigation, it did not fall within the exception. The Court of Justice has held that the decisive criterion to be adopted is not the procedural context of which the action forms part but its legal basis. Does the basis of the action find its source in the common rules of civil and commercial law or in the rules specific to insolvency proceedings: see *Nickel & Goeldner Spedition Gmbh v "Kintra" UAB (Case-157/13)* [2015] QB 96. An action for the payment of a debt based on the provision of transport services was not within the exception for insolvency proceedings.

44. I do not accept this submission made by Mr Moss. In my judgment, it is clear that the powers conferred by section 236 in relation to companies, and the analogous powers conferred in relation to bankruptcy, are specific to insolvency proceedings. The application is not for the production of evidence for use in proceedings to be brought against LCH France but is for the production of information to enable the administrators, exercising their specific statutory functions as such, to investigate the circumstances of the close-out of MF Global's positions with a view to seeing whether there is a proper basis for a claim against LCH France.

45. This does not however affect my overall conclusion that there is no jurisdiction to make the order sought against LCH France under section 236 and that, by reason of the non-applicability of the Evidence Regulation, the court should not make the alternative order sought against it under section 237(3).

46. LCH UK does not dispute the jurisdiction of the court to make an order against it under section 236. It submits that the circumstances of the case are such that, in its discretion, the court should decline to make any order.

47. It is important to have in mind that, because the administrators have narrowed their application to the close-outs of the three positions relating to Italian and Spanish government bonds on 2 November 2011 all of which were carried out by LCH France, the application against LCH UK is for the production of documents and information relating to steps taken by LCH France, not

LCH UK. The assumption is that LCH UK will or may have information relating not to its own business but to that of LCH France which is itself conducted in France, not England. I have earlier set out the extensive and detailed list of information, documents and tapes which are sought by the administrators. Whether or not LCH UK has any or any significant part of this information and documents is unknown, but Ms Toube pointed to the fact that the person who made the witness statements on behalf of the respondents is based in London and describes himself as the global head of fixed income at LCH UK, adding that his role includes responsibility for fixed income at LCH France. Equally, it should be noted that the administrators are not seeking an order under section 236 against that particular individual.

48. The circumstances in which proceedings may be brought against either LCH UK or LCH France in respect of the exercise by them of their contractual rights to close-out positions are severely limited. In the case of LCH UK it is not liable unless bad faith is shown. That is no longer directly relevant, now that the administrators are seeking information and documents relating only to close-outs undertaken by LCH France. I was taken to provisions of the documents which govern the relationship between LCH France and its clearing members including MF Global. Those provisions are governed by French law. Mr Moss submitted that there was a complete exclusion of liability in the case of closing out positions following an event of default, alternatively that any claim was limited to cases of "severe negligence or intentional omission or act". Ms Toube disputed that there was a complete exclusion of liability but accepted that the limitation of severe negligence or intentional omission or act applied. I cannot resolve the disputed issue of construction on this application, but on any footing MF Global would clearly have to establish at least a high level of culpability in any proceedings, whatever "severe negligence" precisely means as a matter of French law. If I had been able to accept Mr Moss' submission on the complete exclusion of liability, no purpose would have been served by an order under section 236 against LCH UK and I would have declined to make any order on that ground.

49. I have earlier said that the administrators' purpose in seeking the order under section 236 is not to obtain evidence for use in proceedings against LCH France but to obtain documents and information so as to investigate the circumstances of the close-outs of the relevant positions in Italian and Spanish government bonds and to consider whether there are proper grounds for bringing proceedings against LCH France in that respect. It is clear from the authorities that that is a proper basis on which an order under section 236 can be made.

50. The issue is whether the circumstances of this case justify the making of the order sought against LCH UK. The basis of the application by the administrators really comes down to two points. First, the prices at which the positions were closed out were materially lower than the prices appearing on the Bloomberg screens. Secondly, the price at which €2.2 billion of Italian government bonds were closed out on 2 November 2011 was materially less than the close-out price for the remaining €625 million of Italian government bonds the following day.

51. Before the court will make an order under section 236 for the provision of information and documents, it must be satisfied that there is something which requires investigation. As Harman J said in *Re Adlards Motor Group Holding Ltd* [1990] BCLC 68 at 74:

> "For the court to order a private examination, even at the instance of an officer of the court, it is necessary for the court to see that there is something that warrants being enquired into. On a summons for an order for private examination the court should not conduct, as counsel for the liquidator rightly submitted to me, a mini-trial and determine what the likely answer to the matter would be. On the other hand the court must see whether there is a case to be enquired into, a case for enquiry."

52. In the present case, the prices quoted on the Bloomberg screens were prices at which deals could be struck for similar Italian government bonds in parcels of €25 million. A sale of €2.2 billion of bonds is of a quite different order of magnitude. €2.2 billion equals €25 million x 88. A dealing price for a parcel of €25 million of bonds tells one very little about the dealing price for a parcel of €2.2 billion of bonds, even if the latter is sub-divided into more than one parcel. The ability of a market to absorb a relatively small quantity of bonds gives no indication of the ability of the market to absorb a much larger quantity of bonds or the price at which market participants would be prepared to purchase those bonds. In my judgment, the resulting difference in price is simply not of itself sufficient to justify the far-reaching order for the production of information, documents and tape recordings sought by the administrators in this case. As to the difference between the prices achieved on the 2 November 2011 and those achieved on 3 November 2011, the evidence shows that at this point in the euro crisis, highly significant events were taking place on an almost hourly basis. The evidence sets out the course of events and it is not necessary to repeat it here. Dealing prices on one day are often not a good guide to dealing prices on another day and, having regard to the extraordinary events on those two days, I am satisfied that the differences in prices achieved for the Italian government bonds are not such as to warrant the making of the order sought under section 236.

53. I should add that a further ground on which the making of orders was resisted was that any proceedings against LCH France would be out of time. Article 1.3.6.2 of LCH France's Clearing Rule Book provides that any claim must be notified not more than 12 months "from the Clearing Day the Clearing Members become aware, or should have become aware using due diligence, of the occurrence of the harmful event". The harmful event was clearly the sale of the relevant bonds in November 2011. MF Global became aware of the close-outs of the positions on or shortly after the dates on which they took place. Notification of a claim was given in clear terms in July 2014, a significant time after the expiry of the relevant 12 month period. The administrators rely on a letter sent by their solicitors to the solicitors for the respondents dated 11 October 2012. The letter records certain confirmations given by the administrators and continues:

> "For the avoidance of doubt, these confirmations do not constitute an admission that your clients have applied their rules correctly, in particular with regard to the way in which they closed out MFG UK's positions. MFG UK and the Administrators' position is entirely reserved in that regard."

54. Ms Toube submitted that, as a matter of French law, the terms of the letter were sufficient to constitute the notification of a claim within the meaning of the article quoted above. There was no evidence of French law before the court but Ms Toube

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informed me that this was the advice as to French law given to her clients and she explained the absence of any expert evidence on the grounds that it was not appreciated until receipt of the skeleton argument of counsel for the respondents that this point would be taken. The point had in fact been canvassed in earlier correspondence and I think that the administrators had sufficient notice and opportunity to deal with a point which was clearly live between the parties. I would be surprised if the terms of the letter dated 11 October 2012 were sufficient to constitute the notification of a claim, and if I was entirely satisfied that it did not do so, I would have refused the application on the grounds that the order sought would serve no purpose, as any proceedings which might flow from the provision of information and documents would be bound to fail. In the circumstance, however, it is not a ground on which I refuse the application.

55. For the reasons given in this judgment, I refuse to make any of the orders sought and I dismiss the application.

Peregrine Fixed Income Ltd v. Robinson Department Store Public Co. Ltd [2000] EWHC Commercial 99 (18th May, 2000)

IN THE HIGH COURT OF JUSTICE Claim No.2000 – Folio 277

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

THE HONOURABLE MR JUSTICE MOORE–BICK

BETWEEN

PEREGRINE FIXED INCOME LIMITED (IN LIQUIDATION)

Claimant

and

ROBINSON DEPARTMENT STORE PUBLIC COMPANY LIMITED

Defendant

Defendant

JUDGMENT

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1. Mr. Mark Hapgood Q.C. and Mr. Michael Swainston instructed by Clifford Chance appeared for the claimant.

2. Mr. Iain Milligan Q.C. and Mr. Andrew Baker instructed by Slaughter and May appeared for the defendant

3. Pursuant to the Practice Statement issued by the Master of the Rolls on 9th July 1990 I hereby certify that the attached text records my judgment in this matter and direct that no further record or transcript of the same need be made.

The Hon. Mr. Justice Moore-Bick

1. This matter comes before the court by way of the trial of a claim under Part 8 of the Civil Procedure Rules in which the claimant, Peregrine Fixed Income Ltd ("Peregrine") seeks the determination of a number of issues between itself and the defendant, Robinson Department Store Public Company Ltd ("Robinson"), relating to the construction of the Master Agreement (Multicurrency – Cross Border) (1992) of the International Swaps and Derivatives Association Inc. ("the Agreement"). The facts giving rise to the dispute are set out in a long and carefully drafted agreement between the parties from which the following summary is derived.

2. Peregrine is a company incorporated in Hong Kong which up to 12th January 1998 carried on business as a provider of finance and financial products, including swaps and other derivatives. On 12th January 1998 the board of directors of its parent company resolved to seek the appointment of a provisional liquidator to the company and on 16th January 1998 provisional liquidators of Peregrine were appointed following the presentation of a winding-up petition against it in the High Court of the Hong Kong SAR on 15th January 1998.

3. Robinson is a company incorporated in Thailand and carries on business as an operator of department stores in that country. It is currently in the process of initiating a restructuring of its debts under the supervision of the court. It has been accepted by Robinson and its creditors that under the proposed restructuring arrangement the creditors' claims will be converted into equity. The eventual value of those claims will therefore depend on the performance of Robinson's shares.

4. On various occasions prior to December 1997 Peregrine and Robinson entered into derivatives transactions. In particular, on or about 20th November 1997 Peregrine and Robinson executed and exchanged the execution copy of a letter dated 20th November 1997 ("the Confirmation Letter") which was expressed to confirm a swap transaction under which, inter alia, Robinson agreed to pay Peregrine 25 annual instalments of US$6.85 million beginning in November 1998 and ending in November 2022. The Confirmation Letter incorporated the 1991 Definitions published by the International Swaps and Derivatives Association and provided that if they were not already parties to a 1992 Master Agreement the parties would use their best endeavours to enter into one. On or about 16th December 1997 Peregrine and Robinson executed a copy of the Agreement and Schedule dated 17th February 1997. It is common ground that the terms of the Agreement and Schedule govern the contract between them and that English law is the proper law of the contract.

5. The Agreement and Schedule are highly complex documents which give the parties the opportunity to choose how the contract is to operate under certain defined circumstances. The parties exercise that choice through the Schedule. In order to understand the issues to which this claim gives rise it is necessary to set out some of the terms of the Agreement at length, but in the interests of brevity I shall confine myself to those that are central to the dispute and summarise others where I think that may be of assistance. Most of the terms used in this judgment are defined in the Agreement and such defined terms are denoted by initial capitals.

For ease of understanding I have adopted that convention throughout this judgment and accordingly expressions which have been given initial capitals should be understood as referring to those expressions as defined in the Agreement.

6. Section 2 of the Agreement is headed "Obligations" and includes the following provisions:

   "(a) General Conditions

   (i) Each party will make each payment or delivery specified in each Confirmation to be made by it, subject to the other provisions of this Agreement.

   . . . . . .

   (iii) Each obligation of each party under Section 2(a)(i) is subject to (1) the condition precedent that no Event of Default . . . . . with respect to the other party has occurred and is continuing, (2) the condition precedent that no Early Termination Date in respect of the relevant Transaction has occurred . . . . . ."

7. Section 5 is headed "Events of Default and Termination Events". It sets out a number of situations which constitute Events of Default; these include an application by a party for the appointment of a provisional liquidator for itself or for all or substantially all of its assets. It is common ground that steps were taken by Peregrine on 15th January 1998 to seek the appointment of a provisional liquidator which fell within this provision. It is also important to note, however, that Section 5 also provides for what are called "Termination Events" which may lead to the termination of outstanding transactions but do not constitute Events of Default. Termination Events fall into five categories described as "Illegality", "Tax Event", "Tax Event Upon Merger", "Credit Event Upon Merger" and "Additional Termination Event", the last of these being additional circumstances agreed by the parties to constitute Termination Events.

8. Section 6 deals with "Early Termination". It is important to note at the outset that it provides for Early Termination of transactions under a variety of different circumstances. The first is on the occurrence of an Event of Default for which Section 6(a) provides as follows:

   Right to terminate Following Event of Default. If at any time an Event of Default with respect to a party (the "Defaulting Party") has occurred and is then continuing, the other party (the "Non-defaulting Party") may, by not more than 20 days notice to the Defaulting Party specifying the relevant Event of Default, designate a day not earlier than the day such notice is effective as an Early Termination Date in respect of all outstanding Transactions. If, however, "Automatic Early Termination" is specified in the Schedule as applying to a party, then an Early Termination Date in respect of all outstanding Transactions will occur immediately upon the occurrence with respect to such party of an Event of Default specified in Section 5(a)(vii) . . . . . (6) [an application for the appointment of a provisional liquidator]".

   In the present case the parties had specified Automatic Early Termination in the Schedule to the Agreement.

9. Section 6(b) deals with the right to terminate transactions following the occurrence of one of the Termination Events already mentioned. It recognises that one or other or both of the parties may be affected by the event in question. Such a party is described as an "Affected Party".

10. Section 6(e) is headed "Payments on Early Termination". Again, it is important to note that it deals separately with termination following Events of Default in sub-paragraph (i) and termination following Termination Events in sub-paragraph (ii). Moreover, sub-paragraph (ii) contains different provisions depending on whether there are one or two Affected Parties. In the

case of termination resulting from Events of Default the parties have the opportunity at the time of entering into the Agreement to choose between different formulae for calculating and paying the amount due from one to the other. It is unnecessary at this point to analyse the different formulae; it is sufficient for the moment to say that these parties chose what is described in Section 6(e)(i)(3) as the "Second Method and Market Quotation" formula which provides as follows:

"Second Method and Market Quotation. If the Second Method and Market Quotation apply an amount will be payable equal to (A) the sum of the Settlement Amount (determined by the Non-defaulting Party) in respect of the Terminated Transactions and the [US dollar] equivalent of the Unpaid Amounts owing to the Non-defaulting Party less (B) the [US dollar] equivalent of the Unpaid Amounts owing to the Defaulting Party. If that amount is a positive number, the Defaulting Party will pay it to the Non-defaulting Party; if it is a negative number, the Non-defaulting Party will pay the absolute value of that amount to the Defaulting Party."

The parties had chosen the United States dollar as the Termination Currency Equivalent, that is, the currency in which all outstanding obligations should be expressed for the purposes of this calculation. I have therefore inserted references to the US dollar in this sub-paragraph for the sake of simplicity. The expression "Unpaid Amount" is self-explanatory, but in fact Peregrine had fulfilled all its payment obligations under the contract and there were therefore no Unpaid Amounts outstanding in favour of Robinson as the Non-defaulting Party.

11. In order to understand the effect of Section 6(e)(i)(3) it is necessary to turn next to the definitions of "Settlement Amount" and "Market Quotation". It is also convenient at this stage to consider the definition of "Loss". These are all defined in Section 14 of the Agreement.

12. "Settlement Amount" is defined as follows:

"Settlement Amount" means, with respect to a party and any Early Termination Date, the sum of:-

(a) The [US dollar] Equivalent of the Market Quotations (whether positive or negative) for each Terminated Transaction or group of Terminated Transactions for which a Market Quotation is determined;

and

(b) such party's Loss (whether positive or negative and without reference to any Unpaid Amounts) for each Terminated Transaction or group of Terminated Transactions for which a Market Quotation cannot be determined or would not (in the reasonable belief of the party making the determination) produce a commercially reasonable result."

13. The definition of "Market Quotation" is very long and complex. The concept behind it is that of obtaining an open market valuation of the obligation which the Non-defaulting party has lost as a result of the default by obtaining from a representative number of first-class market - makers (the "Reference Market-makers") quotations for replacing the Defaulting party in the transaction. The material parts of the definition for present purposes provide as follows:

"Market Quotation" means, with respect to one or more Terminated Transactions and a party making the determination, an amount determined on the basis of quotations from [not less than three] Reference Market-makers. Each quotation will be for an amount, if any, that would be paid to such party (expressed as a negative number) or by such party (expressed as a positive number) in consideration of an agreement between such party (taking into account any existing Credit Support Document with respect to the obligations of such party) and the quoting Reference Market-maker to enter into a transaction (the "Replacement Transaction") that

would have the effect of preserving for such party the economic equivalent of any payment or delivery (. . . . assuming the satisfaction of each applicable condition precedent) by the parties under Section 2(a)(i) in respect of such Terminated Transaction . . . . . that would, but for the occurrence of the relevant Early Termination Date, have been required after that date."

14. The definition of "Loss" is also long and complex. For present purposes it is sufficient to quote the following parts:

    "Loss" means, with respect to . . . . . a party, the [US dollar] Equivalent of an amount that party reasonably determines in good faith to be its total losses and costs (or gain, in which case expressed as a negative number) in connection with the Terminated Transaction . . . . . including any loss of bargain, cost of funding or, at the election of such party but without duplication, loss or cost incurred as a result of its terminating, liquidating, obtaining, or reestablishing any hedge or related trading position (or any gain resulting from any of them). . . . . ."

15. In the present case the transaction embodied in the Confirmation Letter automatically terminated on 15th January 1998 when Peregrine took steps to seek the appointment of a provisional liquidator. That was the combined effect of the occurrence of an Event of Default falling within Section 5(a)(vii)(6) and the parties' specifying Automatic Early Termination as contemplated in Section 6(a). There were no other outstanding transactions between the parties at that date and it was therefore for Robinson as the Non-defaulting Party to determine the Settlement Amount in accordance with Section 6(e)(i)(3) of the Agreement. Quotations were sought from a number of Reference Market-makers who were asked to quote a price for entering into a replacement transaction, that is, to purchase Robinson's outstanding obligations. Three quotations were provided which, after disregarding the highest and lowest as required by the Agreement, produced a figure of US$9,694,901. In other words, those who were agreed to represent the market for these purposes valued Robinson's obligation to pay US$6.85 million each year for twenty five years (a total of US$171.25 million, or a little over US$87.3 million at present day values using conventional discounting methods) at just over US$9.5 million. If one adopts the Market Quotation measure as the basis for calculating the Settlement Amount, the amount payable by Robinson to Peregrine under Section 6(e)(i)(3) is US$9,694,901. That, therefore, is the amount for which Peregrine would be entitled to prove in the liquidation (or in this case the reconstruction) of Robinson.

16. Against that background Mr. Hapgood Q.C. on behalf of Peregrine submitted that in this case the use of the Market Quotation measure to calculate the amount payable under Section 6(e) does not produce a commercially reasonable result because it grossly undervalues Robinson's obligation, or more accurately, what Robinson has gained as a result of the termination of the transaction. That much, he said, is demonstrated by the extent of the discrepancy between the present discounted value of Robinson's obligation and the figure obtained by Market Quotation. The possibility that a Market Quotation might not produce a commercially reasonable result is one which is expressly contemplated in the definition of the Settlement Amount. In such cases, he submitted, the definition requires that the Settlement Amount be calculated by reference to the Defaulting Party's actual Loss rather than a Market Quotation. Accordingly, instead of using Market Quotation Robinson should have used the alternative measure, Loss, for the purposes of calculating the Settlement Amount. That would have resulted in the amount payable under Section 6(e) being US$87.3 million.

17. This is all very well as far as it goes, but it is important not to lose sight of the fact that the calculation of the amount payable under Section 6 is the responsibility of the Non-defaulting Party and in cases where the parties have chosen the Market Quotation measure the Agreement only requires the calculation of the Settlement Amount to be made by reference to the Loss measure if in that party's reasonable belief the use of Market Quotation would not produce a

commercially reasonable result. Robinson has said that it does believe that Market Quotation produces a commercially reasonable result and Mr. Milligan Q.C. on its behalf has explained why, in his submission, the result which it produces is both reasonable and in accordance with the wider principles of the Agreement.

18. Against this background Peregrine has asked the court to determine the following five questions:

    (1) Is Peregrine entitled to challenge Robinson's belief that the Market Quotation payment measure has produced a commercially reasonable result?

    (2) If so, does the Market Quotation payment measure produce a commercially reasonable result?

    (3) If the answer to question (2) is 'No', is Peregrine entitled to require Robinson, and/or is Robinson bound, to use the Loss payment measure in determining the Settlement Amount?

    (4) If the answer to question (3) is 'Yes', or if the court is willing to determine this question in any event, is Loss to be determined

    (a) as Peregrine contends; or

    (b) as Robinson contends?

    (5) Without prejudice to the generality of question (4), is the creditworthiness of Robinson relevant to the assessment of Loss, and if so, is there any condition, limitation or restriction on the extent to which, or in respect of the manner in which, such creditworthiness should be considered as relevant or taken into account?

19. On the face of it one can well see why Peregrine considers that the use of Market Quotation as the basis for calculating the amount payable under Section 6 produces an unreasonable result in this case. Two closely related questions immediately spring to mind: how can an obligation which has a nominal present value of US$87.3 million be worth only US$9.7 million; and why does a valuation derived from the market (which in principle ought to provide a reliable assessment of the value of the transaction) apparently fall so far short of the figure which would ordinarily be attributed to the contract if one were valuing the loss of the bargain?

20. I think the answer to both of these questions lies partly in the fact that Robinson is itself in serious financial difficulties, as the restructuring arrangements demonstrate. By seeking quotations from a group of Reference Market-makers in accordance with the Agreement Robinson was effectively asking the market how much it would pay to take over the benefit of its obligation. Unless precluded from doing so, it is inevitable that when answering that question the market would consider not just the nominal amount of the obligation but many other factors as well, including the period over which the payments were due to be made and the risk of default on the part of Robinson. It has to be remembered that in this case none of Peregrine's obligations remained outstanding and there was no form of security or credit support in place. In reality Peregrine was simply holding a long-term unsecured debt due from Robinson. If the debtor is financially weak, the market cannot be expected to regard his unsecured debt in the same way as it might regard the debt of a first-class financial institution.

21. It was common ground that Reference Market-makers who are approached for quotations under the terms of this Agreement are not required or expected to ignore the financial standing of the Non-defaulting Party when considering what they would pay, or demand, as the price of entering into a Replacement Transaction. The definition of Market Quotation expressly requires them to quote on the basis of entering into a contract with the Non-defaulting party that would

have the effect of preserving for that party the economic equivalent of any payment due under the original contract and when doing so to take into account any existing Credit Support Document relating to that party's obligations. As both parties recognised, this reflects an assumption that the financial status of the Non-defaulting Party will be taken into account. The Reference Market-makers are required to assume the satisfaction of each applicable condition precedent, but that only requires them to assume that all conditions precedent to performance by the Non-defaulting party have been, or will be, performed. It has no bearing on the ability of the Non-defaulting Party to perform when the time comes. The Market Quotation measure is, therefore, one which in certain circumstances may result in the payment which has to be made by the Non-defaulting Party to the Defaulting Party under Section 6(e) failing to a substantial degree to reflect fully the nominal value of the obligation owed by the Non-defaulting Party.

22. It was fundamental to Mr. Hapgood's argument that the Market Quotation and Loss measures should lead to a broadly similar result, and indeed he relied in part on the difference in the results he said they produced in this case as evidence of the fact that the result produced by the Market Quotation measure is commercially unreasonable. Whether any given result is in fact commercially unreasonable must very largely depend on the extent to which it departs from the result which the parties must be taken to have had in mind, and that, of course, is a matter which has to be determined by reference to the terms of the Agreement. One of the interesting characteristics of the Agreement is that on Early Termination as a result of an Event of Default the Non-defaulting Party may be required to make a payment to the Defaulting Party. Mr. Hapgood submitted that where the parties have specified Automatic Early Termination the occurrence of an Event of Default effectively closes out all their open transactions at once and a payment will then become due from the Non-defaulter to the Defaulter if, taken overall, the Defaulter is "in the money", as was the case here. Mr. Milligan, on the other hand, submitted that an important distinction is drawn in the Agreement between termination as a result of an Event of Default and termination following a Termination Event. In the former case the Agreement, he submitted, is only concerned with preventing the Non-defaulting Party from obtaining a windfall benefit as a result of the other party's default. It was not intended to enable the Defaulting Party to obtain the full benefit of any obligations owed to him. In this respect it seemed that there might be a clear difference between the parties as to the philosophy of the Agreement.

23. In Section 6(e) the Agreement provides for two fundamentally different methods of handling payments on Early Termination. Under what is termed the "First Method" the Defaulting Party pays the Non-defaulting Party an amount equal to the value of the outstanding obligations under the transactions which have been terminated less any unpaid amounts owed to him by the Non-defaulting Party. The Defaulting Party recovers nothing in respect of the loss of his bargain, notwithstanding that he may have been "in the money" at the time of default. This reflects the position under English law following the repudiation of a contract: accrued liabilities are unaffected and the defaulter must compensate the non-defaulter for the loss of any unperformed obligations but he is not entitled to receive anything himself in respect of the lost bargain. Under the "Second Method" a payment may be made either way depending on whether the net balance of gain and loss favours the Defaulting or Non-defaulting Party. That appears most clearly from Section 6(e)(i)(4) and the definition of Loss from which it is clear that the Non-defaulting Party's "loss" in respect of the Terminated Transactions may be a negative amount (i.e. a gain), in which case a payment of that amount must be made to the Defaulting Party.

24. These provisions seem to me to support Mr. Hapgood's submission that the object of the Second Method of payment (whether combined with Market Quotation or Loss as the basis of measurement) is to move away from a simple breach-based approach towards one under which all the transactions covered by the Agreement are effectively closed out. I think that it would be

going too far to say that they are intended in all cases to operate neutrally as between the parties, but the fact that the Non-defaulting Party must account to the Defaulting Party for any gain clearly deprives the Event of Default of most of its characteristics as a breach of contract. However, the parties are free to agree to that and there are no doubt good commercial reasons for doing so. It is interesting to note that in the absence of any other choice Section 6(e) provides that the Second Method is to apply. It is necessary, however, in order to give full consideration to Mr. Milligan's argument, also to examine Section 6(e)(ii) which deals with Early Termination resulting from Termination Events, i.e. events which do not constitute Events of Default.

25. Section 6(e)(ii) distinguishes between the situation in which there is one Affected Party and the situation where there are two. To understand the operation of Section 6(e)(ii), therefore, it is necessary first to turn to Section 5(b) which describes what constitute Termination Events and defines the term "Affected Party". Termination Events fall into four categories: (i) Illegality, (ii) Tax Event, (iii) Tax Event Upon Merger and (iv) Credit Event Upon Merger. (One can ignore for present purposes the fifth category of Additional Termination Events which covers additional events specified by the parties. There were none in the present case.) The definition of Affected Party differs in each case to reflect the nature of the event in question. For the purposes of Illegality it is defined as a party which is prevented by supervening illegality from further performance; for the purposes of Tax Event it is defined as a party which becomes liable to bear an additional tax burden as a result of some supervening change in the applicable tax régime; for the purposes of Tax Event Upon Merger it is defined as a party which becomes subject to an additional tax burden as a result of a merger; and for the purposes of Credit Event Upon Merger it is defined as a party whose creditworthiness is materially weakened as a result of a merger. The one thing these four categories have in common is that they all involve a material alteration in the position of one party as a result of an event which does not amount to an Event of Default. They give rise to a right to terminate the transaction under certain circumstances which are set out in Section 6(b).

26. Section 6(e)(ii) deals with the consequences of termination arising from a Termination Event. If there is only one Affected Party the amount payable as a result of early termination is determined in accordance with Section 6(e)(i)(3) if the Market Quotation payment measure has been chosen and in accordance with Section 6(e)(i)(4) if the Loss payment measure has been chosen. For these purposes references in those sub-paragraphs to the Defaulting Party and the Non-defaulting Party are to be read as references to the Affected Party and the party which is not the Affected Party respectively. In either case, however, the Second Method of payment applies. If there are two Affected Parties, the position is more complicated. Each party determines it own loss in relation to the Terminated Transaction (using the Market Quotation or Loss payment measure as appropriate) and a payment of half the difference is then made by one to the other to balance the gains and losses equally between the two parties.

27. Mr. Milligan submitted that an Event of Default is a breach of contract and that the way in which the Agreement deals with Termination Events shows that a different régime was intended to apply where neither party was at fault from that which applies when there has been an Event of Default. In my view, however, when one examines Section 6(e)(ii) as a whole one can see that that is only partly true. One of the striking features of these provisions is that where there is only one Affected Party the position exactly mirrors that under Sections 6(e)(i)(3) and (4). This strikes me as significant in two respects. In the first place, having regard to the fact that Termination Events occur without fault of either party, it is perhaps not surprising that the Affected Party should retain the benefit of the transaction if it is "in the money" at the date of termination and should not be penalised by the occurrence of an event for which he is not in legal terms responsible. That is presumably why the calculation of the amount to be paid must be carried out in accordance with sub-paragraphs (3) and (4) of Section 6(e)(i) to the exclusion

of sub-paragraphs (1) and (2). In the second place, however, it underlines the similarity between the treatment of the parties in the case of a Termination Event where only one of them is affected and the case of default on the part of one party where the parties have chosen the Second Method of payment. In other words, where, for example, the transaction is terminated as a result of supervening illegality affecting only one party the transaction is closed out in just the same way as it would be if that party were in default. This in turn highlights the distinction between the First and Second Methods of payment. Where there are two Affected Parties they are both in precisely the same position and neither can be equated to the Defaulting or Non-defaulting Party. I think that provides a sufficient explanation for the particular way of calculating the payment in that particular case. In the event, therefore, I do not think that Mr. Milligan gains much assistance from the provisions relating to Termination Events.

28. Finally some further indication of the general purpose of Section 6(e) can be found in sub-paragraph (iv) which provides as follows:

"Pre-Estimate. The parties agree that if Market Quotation applies an amount recoverable under this Section 6(e) is a reasonable pre-estimate of loss and not a penalty. Such amount is payable for the loss of bargain and the loss of protection against future risks and except as otherwise provided in this Agreement neither party will be entitled to recover any additional damages as a consequence of such losses."

This, of course, provides further support for Mr. Hapgood's submission that the payment called for under Section 6(e) is intended broadly to reflect the loss of bargain.

29. Much of Mr. Hapgood's argument in the present case proceeded on the premise that the object of Section 6(e)(i)(3) is to preserve the benefit of the bargain for the party "in the money" at the time of termination. However, although that is no doubt how it will work in most cases, it is not the way in which this part of the Agreement is constructed. Section 6(e)(i) does not require the Non-defaulting Party to compensate the Defaulting party for the loss of the bargain he suffers by reasons of his own default; it requires the Non-defaulting party to calculate his loss and to account to the Defaulting Party for any gain he has made by being relieved of further performance. That appears most clearly from Section 6(e)(i)(4) in which the Loss measure is used, but applies equally to Section 6(e)(i)(3). A payment will therefore only become due to the Defaulting Party if and insofar as it represents a gain to the Non-defaulting Party resulting from its being relieved of a disadvantageous contract.

30. I think Mr. Hapgood was right in saying that when one is seeking to determine what outcome is broadly contemplated by the Agreement when Market Quotation is used in the calculation of the Settlement Amount and hence the amount payable under Section 6(e)(i)(3) some assistance can be derived from Section 6(e)(i)(4) which is concerned with the alternative calculation based on the Loss payment measure. I say that because Loss is defined in terms which make it clear that loss of bargain is one of the principal heads of damage intended to be covered and both Section 6(e)(i)(3) and Section 6(e)(iv) indicate that the Market Quotation measure and the Loss measure are intended to lead to broadly the same result. My attention has also been drawn to Australia and New Zealand Banking Group Ltd v Société Général (Court of Appeal, 29th February 2000, unreported) in which the Court of Appeal considered the definition of Loss in this form of Agreement with reference to certain hedging contracts. The details of the case do not matter for present purposes, but it is interesting to note that Mance L.J., with whose judgment the only other member of the court, Kennedy L.J., agreed, also considered that the Market Quotation measure and the Loss measure were intended to lead to broadly the same result. If the parties had chosen to adopt the Loss measure for these purposes the primary element in Robinson's calculation would have been the gain represented by being relieved of the obligation to perform the contract. In this case the termination of the transaction has relieved Robinson from the performance of an obligation whose present nominal value is

US$87.3 million. When assessing damages for the loss of a bargain one does not normally discount its nominal value for the chance that the obligor will fail to perform and I can see nothing in the definition of Loss to suggest that a different approach is called for under this Agreement. By normal standards, therefore, the present value of its obligation, US$87.3 million, reflects the amount Robinson has gained by being relieved of the requirement to perform its obligations and I find it difficult to accept that it has gained only to the extent that it might actually have been capable of performing those obligations. If Robinson were financially strong, it is likely that Market Quotation would have produced a Settlement Amount somewhere near that figure, although there would presumably always have been some discount for contingencies.

31. Mr. Milligan submitted, however, that even applying the Loss measure Robinson's gain was far less that the full nominal value of the obligation. He submitted that allowance should be made for the cost of funding an immediate payment of US$87.3 million which would itself cost Robinson a total of US$71.436 million because of its poor credit rating. That, he said, reduced Robinson's net gain to a little under US$15.9 million.

32. I am unable to accept that argument. I think it is clear both from the language of the definition itself and from the wider context of the Agreement that the definition of Loss is directed to identifying the loss which a party has suffered as a result of the termination of the transaction or transactions in question and is not concerned with the steps which a party may take to fund any payment required pursuant to Section 6(e). Loss is simply one step on the road which leads to the assessment of the amount payable by one party to the other in respect of Early Termination. It must be remembered that in many cases an Event of Default will result in the termination of several transactions between the same parties and the calculation by the Non-defaulting Party of his overall loss or gain may call for an analysis of the position under each one. The definition of Loss is in my view intended to go some way towards identifying the heads of loss which can properly be taken into account when analysing the position under any one transaction. It has nothing to do with the means by which the amount, if any, ultimately payable by the Non-defaulting Party to the Defaulting Party is funded.

33. In these circumstances I think Mr. Hapgood is right in saying that in the present case the Market Quotation measure and the Loss measure yield significantly different results when calculating the amount to be paid by Robinson to Peregrine. Is that something which is consistent with the wider objects of the Agreement? I do not think it is. This case is far from being typical of those to which these provisions are likely to apply. Only one transaction between these two parties has been affected by the Early Termination provisions of Section 6 and that transaction is itself far from being a typical swap transaction. Moreover, the discrepancy between the results produced by adopting these different measures results from an unusual combination of factors, namely, the extreme financial weakness of the Non-defaulting Party and an Event of Default brought about by the party which was not simply the party "in the money" but which had already performed the whole of its side of the bargain.

34. With this in mind I turn again to the language of Section 6(e)(i)(3) and thence to the definition of "Settlement Amount". The critical words are

"Settlement Amount" means . . . . . the sum of:-

(a) the [US dollar] Equivalent of the Market Quotations (whether positive or negative) for each Terminated Transaction . . . . . for which a Market Quotation is determined;

and

(b) such party's Loss . . . . . for each Terminated Transaction . . . . . for which a Market Quotation cannot be determined or would not (in the reasonable belief of the party making the

determination) produce a commercially reasonable result."

35. The first thing to notice is that the Agreement here recognises that it may be appropriate to adopt the Loss measure even in a case where a Market Quotation could be obtained. The second is that the definition itself recognises that there may be circumstances in which the Market Quotation measure will not operate satisfactorily. This provides further support for the proposition that Loss as defined in the Agreement provides a benchmark by reference to which the Market Quotation measure should be judged. It is clear, however, that whether Market Quotation would or would not produce a commercially reasonable result is a matter of judgment and is a matter to be determined by the Non-defaulting Party. Mr. Milligan submitted that the option to move to the Loss measure had no application once a Market Quotation had been obtained. He submitted that paragraph (a) of the definition of Settlement Amount makes it clear that if a Market Quotation has been obtained, the situation contemplated by paragraph (b) cannot arise and the calculation proceeds automatically in accordance with the prescribed formula. The use of the words "would not" in the phrase "would not produce a commercially reasonable result", which pointed to the obtaining of a Market Quote at some time in the future, should therefore be read as meaning "would not, if obtained, produce a commercially reasonable result". It follows, he submitted, that, once obtained, a Market Quotation necessarily produced a commercially reasonable result.

36. I am unable to accept this submission which in my view fails to give sufficient weight to the underlying objective of Section 6(e). There are various circumstances in which a Market Quotation may not produce a commercially reasonable result, some of which were canvassed in argument, and paragraph (b) of the definition of Settlement Amount recognises that that is so. If, when he comes to determine the Settlement Amount, the Non-defaulting party already believes that to be the case, he is relieved of the need to obtain a Market Quotation, but at that time he may be unaware of the existence of circumstances which would cause it to have that effect. Alternatively, he may be unaware of the extent to which factors of which he is generally aware will influence the market. Or again, he may not have fully in mind all the factors which he ought to take into account when forming an opinion about whether the result would be commercially unreasonable. For my own part I think the phrase "would not produce a commercially reasonable result" can equally well be construed as meaning "would not, if used, produce a commercially reasonable result". If that is so, the obtaining of a Market Quotation as contemplated by paragraph (a) does not inevitably preclude the use of the Loss measure in the circumstances contemplated by paragraph (b). Such a construction is in my view more conducive to the object of the Agreement which is to assess with reasonable accuracy the loss or gain to the Non-defaulting party as a result of the termination of the transaction. I see no reason why the parties should be taken to have agreed that they should in effect be bound by the decision of the Non-defaulting Party to seek a Market Quotation even if, for some reason which that party failed to appreciate at the time, it would produced an obviously unreasonable result and I can find nothing in the language of the Agreement which compels me to that conclusion.

37. I come next to the question whether the use of a Market Quotation would in fact produce a commercially unreasonable result in this case and, if so, what if any steps can be taken by Peregrine to challenge the calculation by Robinson of the amount payable under Section 6(e)(i) of the Agreement. As to the first of these, although I am aware that commercial men are generally by far the best judges of what is and is not commercially reasonable, I am satisfied that the use of Market Quotation would not produce a commercially reasonable result in this case. This is a matter which has to be judged not simply by reference to the interests of one or other party but by reference to the aims and objects of the Agreement insofar as they are to be gathered from its terms as a whole. Adopting that approach it seems to me that where Market Quotation produces a result as far removed from that which would be produced by the use of

the Loss measure as it does in this case it is possible to say with some confidence that the result is commercially unreasonable by the standards of the Agreement.

38. That of itself is not enough, however. The Non-defaulting Party is responsible for determining the Settlement Amount and the Agreement provides for the use of the Loss measure only if Market Quotation would not, in the reasonable belief of that party, produce a commercially reasonable result. The court cannot, therefore, simply substitute its own judgment of what is commercially reasonable for that of the Non-defaulting Party. However, I do think that the Agreement by necessary implication requires the Non-defaulting Party to consider whether the Market Quotation measure would produce a commercially reasonable result and to adopt the Loss measure instead if it does not believe that it would. Moreover, there is some protection for the Defaulting Party in the fact that the view taken by the Non-defaulting Party must be "reasonable", that is, it must be based on reasonable grounds. That in turn requires that it must be one which can reasonably be held taking into account all the factors which ought properly be taken into account. In many cases there may well be room for different opinions, but in others it may be possible to say that a view one way or the other cannot reasonably be justified. If in such a case the Non-defaulting Party acted on the basis of a view of the matter which could not reasonably be justified, the Defaulting Party would in my view be entitled to relief on the basis that the adoption of the wrong measure in determining the Settlement Amount would amount to a breach of the Agreement.

39. Leaving aside cases where there is or may be a lack of honest belief, when the court is asked to decide in a case of this kind whether a person has acted in breach of contract it should in my view adopt a similar approach to that taken in the well-known case of Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223. It should not regard any act done by him honestly and in good faith as unjustified or involving a breach of contract unless it is clear that the belief in which he acted was flawed in one of the ways identified in that case. Mr. Hapgood submitted that the established approach to judicial review of discretionary decisions represented by the Wednesbury case was the proper approach in a case of this kind and Mr. Milligan did not disagree. In order for Peregrine to challenge the calculation of the amount payable under Section 6(e)(i)(3), therefore, it is necessary for it to show that the decision to use a Market Quotation for the purpose was flawed in the sense I have just indicated. It has been agreed in this case that Robinson believes that the use of the Market Quotation measure has produced a commercially reasonable result and it has not been suggested that that belief is not honestly held. However, in reaching that conclusion I do not think that Robinson can have taken proper account of the various terms of the Agreement to which I have referred, to the gain which accrued to it as a result of its having been relieved of the obligation to perform its contract or to the purpose behind the calculation of the Settlement Amount. It must also have failed, in my judgment, to take proper account of the discrepancy both between the nominal value of the obligation and the amount payable under Section 6(e) which is produced by using the Market Quotation measure, and also the substantial difference between the amount payable to Peregrine under Section 6(e) produced by using the Market Quotation measure and that produced by using the Loss measure. These are all factors which ought to be taken into account when considering whether the result is commercially reasonable by the standards of the Agreement and I do not think that anyone who had taken them into account could have formed the view that the use of Market Quotation in this case would produce a commercially reasonable result. In these circumstances I do not think that Robinson's belief was one which a reasonable person in its position, properly directing himself in accordance with the Agreement, could hold. In adopting the Market Quotation measure for the purposes of calculating the Settlement Amount rather than the Loss measure, therefore, Robinson acted in breach of the Agreement.

40. I therefore answer the questions set out in the claim form as follows:

(1) 'Yes';

(2) 'No';

(3) 'Yes';

(4) 'Loss is to be determined as the claimant contends and in accordance with the principles set out in this judgment';

(5) 'No'.

Neutral Citation Number: [2012] EWHC 584 (Comm)

Case No: 2010 Folio 221

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings, London EC4A 1NL

Date: Thursday 15 March 2012

Before :
MRS JUSTICE GLOSTER, DBE

- -

Between :

Euroption Strategic Fund Limited	**Claimant**
- and -	
Skandinaviska Enskilda Banken AB	**Defendant**

- -
- -

Sharif Shivji Esq (instructed by **Stewarts Law LLP**) for the **Claimant**
Daniel Toledano Esq, QC & Sam O'Leary Esq
(instructed by **Clifford Chance LLP**) for the **Defendant**
Hearing dates: 18th-22nd July 2011; and 25th, 26th and 29th July 2011
Further written submissions received on 2nd August 2011

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE GLOSTER, DBE

Mrs Justice Gloster DBE:

Introduction

1. The claimant, Euroption Strategic Fund Limited ("Euroption"), is an investment fund incorporated in the British Virgin Islands. Its principal trading activity at the material time was options trading on European exchanges, including the London International Financial Futures Exchange ("LIFFE"). In particular, at the material time, Euroption traded European equity options.

2. At all material times, Option Strategist Limited ("OSL"), a company also incorporated in the British Virgin Islands, acted as its investment manager. This role was in fact performed by Stefano Scattolon ("Mr. Scattolon"), a trading advisor employed by Alternative Strategies Trading SA, a company incorporated in Switzerland and which acted as trading advisor to OSL. Effectively, Mr. Scattolon was Euroption's principal trader.

3. The Defendant, Skandinaviska Enskilda Banken AB ("SEB"), is a Swedish investment bank, which has a branch in London and significant operations in the United Kingdom. SEB acted as Euroption's clearing broker between May and October 2008 pursuant to an Exchange Traded Futures & Options Mandate entered into on 12 May 2008 ("the Mandate"). Settlement of exchange-traded derivatives takes place through a clearing house associated with a particular exchange. Only clearing members of an exchange (such as SEB) can enter into contracts with the clearing house. Therefore, non-members, such as Euroption, had to contract with a clearing member, such as SEB, which in turn held an equivalent contract with the clearing house.

4. Clause 11 of the Mandate obliged Euroption to pay margin when asked to do so by SEB to support the exposure on Euroption's portfolio. Pursuant to clause 11, where Euroption at any time failed to provide sufficient margin or other payment due in respect of any transaction as required, SEB was entitled "to close out [Euroption's] open contracts at any time without reference to [Euroption]". SEB was also entitled, at its discretion, to close out Euroption's positions having made reasonable efforts to contact Euroption, *inter alia*, "at any time SEB deem[ed] it necessary for its own protection".

5. Euroption employed an execution broker called Tavira Securities Limited ("TSL"). When Euroption had identified a trade that it wished to enter into, such trades were executed by TSL and given up to SEB for clearing. The result was a contract between Euroption and SEB as principals and a back-to-back contract between SEB and the relevant clearing house.

6. In the action Euroption sues SEB in respect of what Euroption alleges was SEB's negligent conduct of a forced liquidation or close out of Euroption's portfolio of equity index options in October 2008, following several missed margin calls by Euroption. Originally Euroption claimed damages for breach of contract, negligence and/or breach of fiduciary duty, but by the end of the trial the breach of fiduciary duty claim had been withdrawn. Euroption complains that the person SEB appointed to conduct the close out appeared to have no real understanding of options trading or the

risks faced by the portfolio in volatile markets and that, in the circumstances, the close out was slow, disorganised and often misdirected.

7. The period in question was a time of great turbulence in the financial markets. The crisis caused a massive increase in volatility in the markets in which Euroption had positions. It also caused markets to fall heavily. It was common ground that, at the start of the week of 6 October 2008, Euroption had enormous open positions which, taken as a whole, were weighted heavily towards what amounted to a bet that markets would rise. It was also common ground that, as a result, Euroption's margin commitments on its open positions had dramatically increased over a short period of time and that Euroption could not meet those commitments. After the close of the European markets on 9 October 2008, markets around the world plummeted.

8. From 7 October 2008, SEB made calls for Euroption to pay margin to cover this exposure which Euroption did not meet or respond to. At the same time, the clearing house was making margin calls on SEB in respect of the back-to-back contracts referred to above. SEB was obliged to meet, and did meet, those margin calls.

9. SEB gave Euroption the opportunity to meet its margin obligations and/or reduce its positions between 7 and 9 October but Euroption did not take that opportunity. While some positions were closed out, many new positions were opened.

10. It is common ground that, in the circumstances, SEB was contractually entitled to conduct a close out of Euroption's account and to choose the moment when it exercised that right (subject to its overriding regulatory obligations). It was also common ground that SEB exercised its right to close out Euroption's portfolio, although the date on which it exercised that right and began the close out was one of the principal issues in dispute in the litigation. The entire close out process took less than 3 or 4 days in total, depending on whether it started on Thursday, 9 October (Euroption's case) or Friday, 10 October (SEB's case). It continued on Monday, 13 October and part of Tuesday, 14 October by which time all the positions had been closed out. In the end, SEB was able to return to Euroption a final positive ledger balance of €2,049,437.29.

Euroption's case

11. By the time of its closing submissions, Euroption's case was articulated by Mr. Sharif Shivji, counsel appearing on behalf of Euroption, as follows:

SEB's duties

i) Having exercised its right to close out, at the time it chose to do so, SEB had a duty to conduct the close-out in a manner that was not arbitrary, capricious, perverse and/or irrational; see *Socimer International Bank Ltd (in Liquidation) v Standard Bank London Ltd (No 2)* [2008] 1 Lloyd's Rep 558; *Paragon Finance Plc (formerly National Home Loans Corp) v Nash* [2002] 1 WLR 685.

ii) In addition, or in the alternative, SEB had a contractual and/or tortious duty of care to conduct the close out exercise competently and with reasonable care.

iii) The contract conferred no discretion on SEB as to how to carry out the forced liquidation of the portfolio once it had decided to do so; clause 11 was a narrow clause requiring SEB to close out the entire portfolio with no delay; it had no contractual entitlement to put on new positions or to manage the portfolio over any period of time; in circumstances where SEB breached that obligation, and "stepped outside" what it was entitled to do under the contract, it assumed a tortious responsibility to Euroption.

SEB's breaches of duty

iv) SEB was in breach of all three duties in its conduct of the close out of the portfolio. Euroption's complaints about such breaches were articulated under three different heads of claim:

a) Claim 1: that SEB, having begun the close out at, or around, 12:44 on 9 October 2008, negligently, and in breach of its duty not to act in an arbitrary, capricious, perverse and/or irrational manner, delayed in the close out of the portfolio. All the positions could and should have been closed out by close of business on 9 October. However, Claim 1 was not contingent on Euroption showing that the entire close out could and should have been completed by the end of 9-10 October, since Euroption alleged that closure of some of the positions on 9-10 would still have yielded a better return for Euroption. (However if, as Euroption contended, the portfolio could and should have been closed out in its entirety by the close of business on 9 October 2008, then there would have been no need to put on any new trades on 10 October 2008, which was the subject matter of Claim 2.)

b) Claim 2: that SEB opened new "combination" positions without contractual or other authority on 10 October 2008 which caused loss to the portfolio. Claim 2 only arose for consideration if, contrary to Euroption's position under Claim 1, there would still have been positions left on the books on 10 October.

c) Claim 3: in the event that SEB had begun the forced liquidation on 10 October 2008 or that positions were left open on that date, that SEB negligently, and in breach of its duty not to act in an arbitrary, capricious, perverse and/or irrational manner, delayed the closure of five short call positions which should have been closed on 10 October (but were only closed on 13 or 14 October) and one short call position which should have been closed on the morning of 13 October 2008 (instead of in the afternoon), which caused Euroption loss. (This claim was an alternative claim to Claim 1).

Quantum

v) The quantum of Euroption's claim in respect of the direct losses (namely the difference between the value of the positions as closed out compared to their value if they had been closed out by close of business on 9 October 2008) allegedly suffered in respect of Claim 1, as a result of SEB's alleged delay in the close out of the portfolio, varied between approximately €31 and €6.2

million (depending on whether the Court were to find that all or just some part of the positions should have been closed out on 9 October 2008), subject to an appropriate deduction to reflect:

a) the need for Euroption to pay a bid/offer spread to close the positions; and

b) the effects of "slippage" (namely, the extent to which the market might have been moved as a result of a very large open position being closed out).

vi) The quantum of Euroption's claim in respect of the direct losses allegedly suffered under Claim 2 was €666,700 and £1,072,224.

vii) The quantum of Euroption's claim in respect of the direct losses allegedly suffered under Claim 3 was:

€40,460	
€6,547	
€214,750	
	£247,887
	£104,060
	(£165,000) (credit)
€261,757	**£186,947**

viii) In addition to its claim for diminution in the value of its fund as a result of the close out, Euroption claimed damages for consequential loss of profits. Euroption contended that, if the Fund had been liquidated at close of business on 9 October, it would have had a value of €36.1 million on that date; that sum would have been re-invested and employed as part of the Fund's trading strategy, as part of a larger fund. Accordingly, Euroption claims damages in respect of the profits, which it alleges that the Fund would have earned had the value of the Fund not been damaged by SEB's actions, calculated by reference both to the Fund's historical performance prior to October 2008 and its actual performance thereafter.

ix) At the start of the trial, based on Euroption's expert report, the quantum of the claim for consequential loss of profits appeared to be in the region of about €135m. In his closing submissions, Mr. Shivji, suggested that, if I were minded to accede to the loss of profits claim, then I should rule on certain points of principle relating to quantum (namely: (a) average monthly percentage growth (b) time period (c) percentage level of redemptions as at October 2008) with a view to the parties themselves carrying out the appropriate calculation.

SEB's defence

12. SEB's case, as presented by Mr. Daniel Toledano QC and Mr. Sam O'Leary, leading and junior counsel appearing on behalf of SEB, was that, under clause 11 of the Mandate, SEB had a wide and unfettered discretion in relation to the conduct of the close out once it had begun. The close out could be effected in a number of ways which would require further decisions to be made by SEB (ranging from whether to close out by sale of the whole book or by individual trade and, if by individual trade, what trades to do and when). The Mandate did not seek to dictate what conclusions SEB reached on each of those decisions. It followed that the only limit on SEB's close out right was that such decisions should be made honestly, in good faith and not arbitrarily, capriciously, perversely or irrationally. That approach was supported by the principles that emerged from *Paragon v Nash* and other authorities such as *Socimer International Bank Ltd (In Liquidation) v Standard Bank London Ltd (No 2)* (*supra*), see in particular Rix LJ at paragraph 66.

13. Accordingly, SEB submitted that each of Euroption's arguments in relation to duty was misconceived; there was no statutory implied term relevant to the close out and no contractual or tortious duty of care.

14. SEB further contended that the evidence did not establish any breach of SEB's admitted duty to act honestly, in good faith and not arbitrarily, capriciously, perversely or irrationally, nor (if it existed) any breach of a contractual or tortious duty to act competently or with reasonable care.

15. In relation to Claim 1, SEB contended that it exercised its contractual right to close out Euroption's positions on 10 October, not 9 October and that it was Euroption itself which made the trading decisions on 9 October. Further, SEB contended that, even if Euroption could establish that the close out began on 9 October, Euroption had not established a case that SEB's conduct on that day was negligent (let alone irrational). There was nothing that SEB should have done differently on that day.

16. In relation to Claim 2, SEB submitted that Euroption's case, viz. that there was no authority to make the relevant trades, was "hopeless", since, SEB contended, Euroption's own expert had agreed that such combination trades were a legitimate (if relatively unattractive) means of closing out an options position. SEB also submitted that the evidence showed that both combination trades on 10 October were expressly authorised by Mr. Scattolon, and that, on any basis, one combination trade had been made on his instruction and without the knowledge of SEB. There was no basis for Euroption's criticism of the strategy, if and so far as it was said it was in breach of the duty to act rationally, or in breach of a duty to take care.

17. In relation to Claim 3, SEB's position was also that there was no factual basis for Euroption's alternative case that SEB was in breach of duty by virtue of delay in closing out the short calls and that Euroption's expert had himself accepted that the strategy adopted by SEB was reasonable.

18. SEB submitted that, in relation to the calculation of the quantum of Euroption's direct losses, the court should adopt the methodology advanced by its, SEB's, expert. So far as Euroption's claim for consequential loss of profits was concerned, the claim was for pure economic loss and not recoverable as a matter of law. In any event, such

damages were plainly too remote and the alleged loss of an opportunity to trade was too speculative to be capable of having any monetary value placed upon it or to enable Euroption to satisfy the burden of proof.

Issues that arise for determination

19. In the circumstances, the following issues arise for the Court's determination:

Duty

i) Did SEB have a contractual and/or tortious duty of care to conduct the close out exercise competently and with reasonable care or was its only duty to act honestly, in good faith and not arbitrarily, capriciously, perversely or irrationally? (I define this latter duty as "the duty to act rationally".)

ii) If SEB had a duty of care to conduct the close out exercise competently and with reasonable care, what was the scope of that duty?

iii) What, if any, discretion did SEB have as to the conduct of the close out once it had decided to liquidate Euroption's portfolio? In particular was SEB contractually entitled, as part of the close out process, to execute further trades?

Breach

iv) Claim 1:

a) When did SEB begin to exercise its right to close out Euroption's positions?

b) If SEB exercised this right on 9 October, did SEB carry out the close out in breach of its duty of care and/or to act rationally on that day?

c) In particular, should SEB have closed out all, or at least some, of Euroption's positions on 9 October?

v) Claim 2:

a) Did SEB have authority under clause 11 of the Mandate to execute new "combination" trades?

b) Did Euroption in any event give instructions for one of the combination trades and expressly authorise/ratify the other?

c) In any event, were the combination trades in breach of any relevant duty of care or to act rationally?

vi) Claim 3: Was SEB in breach of its duty of care and/or to act rationally by virtue of delay in closing out the short calls?

Damages

vii) What was the quantum of Euroption's claim in respect of its alleged direct losses?

viii) Was Euroption entitled as a matter of law to claim consequential loss of profits?

ix) Were the damages claimed too remote and too speculative to be capable of having any monetary value placed upon them?

x) If not, what was the quantum of such losses?

20. As I explain below, my determination of the relevant issues does not strictly follow the order set out above. Nor, in the light of my determination of certain issues, has it been necessary to determine all the issues identified above.

Order of determination of the issues

21. Both sides were agreed that Euroption's primary case was to a large extent dependent upon it establishing that, as Euroption contended, and SEB denied, SEB had indeed exercised its rights under the Mandate to close out Euroption's positions on Thursday, 9 October 2008. Likewise it appeared to me that any discussion or determination of the scope of the duties owed by SEB, needed to be addressed in the context of what actually happened, rather than in a factual vacuum. Accordingly, after setting out relevant background facts which were not, or were not substantially, in dispute, I summarise my relevant factual findings in relation to, and then determine, the issue as to when SEB first began to exercise its right to close out Euroption's positions, before determining the subsequent issues including those relating to the scope of SEB's duties.

Relevant background facts

Equity index options

22. With effect from May 2008, TSL executed equity index options on various global financial exchanges on behalf of Euroption. An equity index option is an option whose underlying instrument is a particular exchange equity index, for example the UK FTSE 100. Other indices traded on behalf of Euroption on exchanges were the CAC 40 index (a weighted average of the leading 40 shares listed on the Paris Bourse (now Euronext Paris)), the DAX 30 index (a weighted average of the leading 30 shares listed on the Frankfurt stock exchange) and the Eurostoxx 50 index (a weighted average of the leading 50 Eurozone shares listed on various Eurozone stock exchanges). The trades that were executed by TSL on behalf of Euroption were then given up to SEB for clearing.

23. Exchange traded derivatives based on equity indices essentially fall into two categories, linear and non-linear. The most common form of linear derivative is a futures contract based on an equity index. Such a contract is in essence an agreement between two counterparties to exchange payments based on the value of the specific index reached on a specific date - the expiration date. Such a contract is linear first

because the profits and losses are entirely symmetric; and second because there is a one for one relationship between the movement in the level of the index and the level of profit or loss attributable to the counterparties.

24. Options, on the other hand, are non-linear. They are either "put" options or "call" options. A put option gives the holder of the option the right (but not an obligation) to sell the underlying asset (i.e. the index) at a specified price (called the "strike price") at a specified date in the future (called the "expiry date"). A call option gives the holder of the option the right (but not the obligation) to buy the underlying asset (i.e. the index) at the strike price of the option at a specified date in the future.

25. In the case of equity index options, the underlying instrument is the equity index (e.g. the FTSE 100). On the exercise of a FTSE 100 option, the instrument is cash settled on the basis of the difference between the strike price and the level of the index at the point of expiry. Thus, for example, on the exercise of a FTSE 100 option, if the level of the FTSE 100 on expiry is above the strike price, the buyer of the call option receives from the seller a sum representing the difference between the two. Conversely, if the level of the FTSE 100 on expiry is below the strike price, the buyer of a put option receives a sum from the seller representing the difference between the two. In the circumstances, the price of an option, and for that matter the future, is correlated to the performance of the underlying index. Of course, it is also open to the holder of the option to sell his option at any point up to exercise, at the market price.

26. Where the market price of the underlying instrument exceeds the strike price of the call option, or is below the strike price of a put option, the option is referred to as being "in the money", since if prices remain unchanged, the exercise of the option will yield a return. Where the market price of the underlying instrument equals the strike price of the option, the option is referred to as being "at the money". Where the market price of the underlying instrument is below the strike price of the call option, or is above the strike price of a put option, the option is referred to as being "out of the money".

27. The non-linearity of option derivatives arises because an option is a right and not an obligation. The owner of an option can abandon it if the right to buy or sell is not worth using. The maximum loss which the owner of an option experiences is the original premium (or price) which he has paid to buy the option, no matter how much the index goes down (in the case of a call option) or how much the index goes up (in the case of a put option). By contrast there is no limit to the profits that can be earned by a buyer of an option in the event that the index goes up (in the case of a call option) or the index goes down (in the case of a put option). Thus the buyer of an option has a strictly limited loss and a potentially unlimited gain.

28. By contrast, since the seller of an equity index option, (also known as the "writer" of an option), has an obligation to fulfil the contract, his maximum gain is limited to the premium received from the buyer. But his losses are potentially unlimited. Thus, on a call option, the theoretical risk to the option seller is unlimited, because the price of the underlying equity index (for example, the FTSE 100) could potentially go to infinity. Similarly, the theoretical risk on a put option is equally substantial, as the index could fall to zero.

29. Options, by their nature, are complex financial instruments. The price of an option, known as the premium, is made up of a number of different elements.

    i) The intrinsic value: This is the difference between the strike price and the market price of the underlying instrument. The ratio between changes in the value of the underlying instrument and changes in the option price is measured using a concept called "delta". The delta of an option is dynamic, such that the delta changes as the price of the underlying instruments moves in comparison to the strike price. The ratio of a change in the delta of an option compared to a change in the value of the underlying asset is measured using a concept called "gamma".

    ii) The volatility of the underlying instrument: in the case of the more volatile instruments, the price of the option tends to be higher because there is an increased chance that on any one day the market in the underlying instrument will move sharply, so that the option is in the money for a period of time. Volatility is measured using a concept called "vega". The vega applicable to an option will fluctuate over the life of the option.

    iii) The period of time remaining before expiry of the option: the longer the period remaining before expiry of the option, the more valuable the option will be. This is because there is a greater chance that, over the life of the option, the market in the underlying instrument will move sharply so that the option is in the money for a period of time. This is measured using a concept called "theta". The value of theta falls over the life of the option.

    iv) The impact of a one percent change in either the interest rate or the dividend yield on the price of an option; this is measured using a concept called "rho".

30. Not surprisingly, these methods of calculating option price sensitivities are referred to as "the Greeks".

31. Since the price of an option is driven by the above factors, all of which change over time, there is no single correct answer in the pricing of an option, and the precise value of an option can be very subjective, albeit within a narrow bandwith. While there are certain industry-accepted option pricing models, the most well-known being the Black-Scholes model, and these models are generally used as the underlying engine behind a trader's approach to pricing, most option traders will take their own, bespoke, approach to pricing, in that they will want to deviate, in a subtle, but nonetheless significant, way, from the results predicted by such models.

32. Traditionally, hedge funds, like Euroption, manage these risks by entering into opposing trades that eliminate or reduce much of the risk associated with the initial position. These trades are known as "hedging" trades, or "hedges", and the process of putting on these trades is called "hedging". Owing to the dynamic nature of option pricing and risks, professional option traders usually use sophisticated mathematical models to monitor the risks associated with the options in which they trade, to ensure that they are minimising their risks and maximising their profits.

33. In order to manage the risks associated with trading in derivatives, such as futures and options, the international financial exchanges insist that their members deposit margin

in cash, with the clearing house, to reflect the potential risk of an adverse move in their members' positions. Margin is generally calculated on a daily basis, and is the proportion of the total market value of the contract which the member must pay in cash to cover its exposure.

34. For an option contract, the margin requirement is set by the relevant clearing house. Volatility is a significant factor in a clearing house's calculation of margin requirements. The higher the level of volatility, the greater the possibility of loss, and therefore the greater the margin requirement.

Euroption's strategy

35. During the relevant period, leading up to October 2008, Euroption's principal trading strategy was short selling of options, i.e. Euroption was a net seller of options. This strategy included the sale of short strangles, whereby a put option was sold with a low strike price, and a call option was sold with a higher strike price. Such a strategy is profitable where the markets are stable, i.e. where volatility is minimal.

36. However, such a strategy involves unlimited exposure to increases in volatility in the market, and a sudden and substantial movement in the market can turn a short strangle into a large and unlimited loss. In opening and closing its positions, Euroption executed outright purchases and sales (referred to as "naked trades") as well as "combination trade" or "combos", where the option was traded as part of a package with another. In essence, selling short calls exposed Euroption to upside risk (i.e. losses in a rising market), whereas selling short puts exposed Euroption to downside risk (i.e. losses in a falling market).

37. In very general terms, Euroption's trading strategy was to sell fairly short-term, deep out-of-the-money options. This meant that the option's strike price was sufficiently distant from the current price of the underlying asset to suggest that it would not be likely to be profitable for the option holder to exercise the option. The intrinsic value of the option was therefore very low. Provided that the volatility of the underlying assets remained at or around the levels that Euroption was expecting, and there were no significant movements in the market, the option would become progressively cheaper as the time value component decayed, hopefully expiring worthless. In the meantime, Euroption benefitted from the premium it received when it first sold the option.

The relevant terms of the Mandate

38. The relevant terms of the Mandate provided as follows:

    i) OSL was defined as "the Fund Manager";

    ii) Recital (a) provided: "SEB carries on investment business, including that relating to exchange traded futures and options";

    iii) Recital (b) provided: "SEB is willing to settle and/or execute exchange traded futures and options, and settle OTC futures and options that are cleared via an exchange on behalf of the Client subject to the terms and conditions set out herein";

iv) Under clause 2, "margined transaction" was defined as:

"… a contract under the terms of which a customer will be, or may be, liable to make deposits in cash or collateral to secure performance of obligations under the contact".

v) Clause 3 provided so far as material:

"SEB is a Swedish bank and authorised to conduct securities business under Swedish law. Finansinspektionen in Sweden is the home-country supervisor of SEB. However, in relation to its exchange traded futures and options at the London branch, SEB is also regulated by the FSA."

vi) Clause 4 provided:

"4. APPOINTMENT OF A FUND MANAGER

(a) The client has appointed the Fund Manager as its agent to enter into transactions with SEB under this Agreement on its behalf.

(b) The Client authorises and requests that SEB accepts and acts upon any instructions or communications from, enters into transactions with, and makes and receives payments to and from the Fund Manager (including any person who SEB believes in good faith to be the Fund Manager's authorised representative) in each case on the Client's behalf. The Client also authorises SEB to communicate all details concerning its account with SEB and any transactions under this Agreement to the Fund Manager.

(c) SEB shall be entitled to presume the continuing authority of the Fund Manager and its representatives until it receives written notification to the contrary."

vii) Clause 6 provided that:

"[Euroption] will make all trade decisions. The services SEB will provide are, subject to the restrictions contained in Clause 7 below [best execution], advisory services regarding dealing in exchange traded futures and options (and securities where the securities transaction in question is ancillary to a transaction in the foregoing) or such other services as may be agreed from time to time between SEB and [Euroption] in writing.

SEB will contract only as a principal in respect of contracts in the terms of an Exchange Contract. In respect of every contract made between SEB and the Client, SEB shall have made an

equivalent contract on the relevant market either by open outcry or in the electronically traded market.

These services may include preparing and executing margined transactions in the investments referred to above. SEB may at any time impose or alter limits applicable to the Clients activities under this Agreement."

viii) Clause 11 provided:

"11. MARGIN PAYMENT

Where SEB effects transactions for the Client pursuant to Clause 6 above, the Client must, immediately upon SEB's request, transfer to SEB a margin payment of an amount specified by SEB and representing at least the amount stipulated for the transaction by the relevant exchange on which the transaction is to be carried out. The Client will be required to supplement that payment at any time when the Client's account with SEB shows a debit balance or an increase in the Client's margin requirement. Time shall be of the essence with respect to margin payments from the Client to SEB.

Margin transfer must be made in cash unless otherwise agreed between the Client and SEB.

The parties agree that all right, title and interest in and to any margin (whether cash or other property) will, at the time of transfer, vest in SEB free and clear of any liens, claims, charges or encumbrances or any other interest. Each transfer of margin will be made so as to constitute or result in a valid and legally effective transfer of all legal and beneficial title to SEB.

The parties do not intend to create in favour of SEB any mortgage, charge, lien, pledge, encumbrance or other security interest in any cash or other property transferred as margin.

The Client is warned that, if at any time it has failed to provide sufficient margin or other payment or delivery due in respect of any transaction as required, SEB shall be entitled to close out the Client's open contracts at any time without reference to the Client. Furthermore, it is an FSA requirement that where clients' margin calls are not met within five business days, all positions must be closed out. Any sum due to SEB as a result of closing out those contracts will be payable by the Client to SEB immediately.

> SEB also reserves the right, at its discretion, to close out the Client's position having made reasonable efforts to contact the Client in the event of the Client's insolvency, or in the event of the Client having a winding-up, bankruptcy, administration or similar order made against it, or in the event of any failure by the Client to meet any obligations, whether in this Agreement or otherwise, or in the event that the Client makes any misrepresentation to SEB, or at any time SEB deems it necessary for its own protection.
>
> In addition, the Client authorises SEB to transfer any funds which SEB may be holding on the Client's behalf as may be necessary to meet any of the Client's obligations, including the obligation to make margin payments, in respect of the Client's dealings with SEB.
>
> In some instances the original securities or the original type of securities may not be returned to the Client and where the securities have matured, the Client will be credited with the equivalent value of the collateral."

ix) Clause 12 (c) provided:

> "SEB may at its absolute discretion refuse any instruction given in accordance with this Clause".

Regulatory provisions

39. In addition to its obligations under the Mandate, SEB was regulated in this jurisdiction by the FSA and subject to the rules of the exchanges to which it was a member. Euroption relied on various LIFFE Rules as relevant to its case. These imposed obligations on SEB in relation to the collection of margin payments and provided as follows:

> "3.27 Margin Liability of Clients
>
> 3.27.1 Not less often than once each Business Day a Member shall calculate or recalculate the liability for Margin of each of his clients, including clients who are Members, in respect of open positions in his books. The amount of such liability shall on each occasion be calculated to be no less than the amount of a Clearing Member's liability to the Clearing House for Margin in respect of the same open positions if they, and no other positions, were at that time registered with the Clearing House in his name.
>
> 3.27.2 Subject to LIFFE Rule 3.27.4, Margin shall be promptly collected in full from a client whenever the

> calculation made under LIFFE Rule 3.27.1 shows that a new or increased liability for Margin has arisen on the part of the client. Subject further to LIFFE Rule 9.2.5, a Member shall take all steps reasonably necessary and available to ensure such collection or, in the event of the client's default, such steps as are open to him to reduce the client's liability.
>
> ...
>
> 3.27.4 A Member shall not be obliged to collect Margin arising from open positions in full promptly from a client pursuant to LIFFE Rule 3.27.2 provided that such Member's decision not to collect Margin in full promptly is made pursuant to prudent management policies and procedures which satisfy any criteria which may be specified by the Board from time to time".

40. Under LIFFE General Notice No 2296, a member (such as SEB) is deemed to have "prudent management policies and procedures" in the event that it is authorised by the FSA and has an Adequate Credit Management Policy ("ACMP") as defined by the FSA Rules.

Events leading up to SEB's close out of Euroption's positions

41. On 15 August 2008, following the placing into public ownership of the US Federal National Mortgage Association and Federal Home Loan Mortgage Corporation, Lehman Brothers collapsed. In the days following there was unprecedented volatility in global financial markets.

42. This resulted in SEB making substantial margin calls on Euroption on 17, 18 and 19 September. TSL, on behalf of Euroption, assured SEB that funds would be transferred to SEB to meet the margin calls. However only €3 million was transferred leaving an outstanding unpaid balance of approximately €18 million. These calls went unpaid, which gave rise to considerable disquiet on SEB's part. However on the afternoon of 19 September 2008 the majority of the short options in Euroption's portfolio expired worthless, thereby reducing the contingent liabilities on Euroption's account, leaving a positive ledger balance of €54,369,914.54 by close of business and removing the need for the posting of additional margin. The evidence at trial showed that, although a Mr. Gary Caldon, a director of TSL, had informed SEB that Euroption had arranged for the money to be transferred to SEB with a value date of 22nd September, but had then cancelled the instruction once the market rallied and the options expired worthless, Euroption in fact did not have €18 million to remit to SEB by way of margin. At trial Mr. Scattolon gave evidence to the effect that he was not aware until after the commencement of proceedings that Mr. Caldon had so informed SEB, and that Mr. Caldon was well aware that Euroption did not have the necessary €18 million of funds with which to meet the margin call and was not intending to do so. Whether or not this was the case, it was clear that Mr. Steve Martin, the Head of SEB Futures Clearing (London), and the person responsible for overseeing the close out of Euroption's open positions, was dissatisfied with Euroption's failure to meet its

margin calls in September 2008. In an e-mail dated 19 September he told Mr. Caldon:

> "can we meet face-to-face to discuss? Early next week please. If we are unable to trust clients to meet calls we really don't want them as clients".

In fact no such meeting took place, but no doubt SEB's confidence in Euroption's ability to meet margin calls had been undermined as a result of this incident.

43. Throughout the remaining days of September 2008 large financial institutions in various countries collapsed and had to be supported by government intervention. This led to a series of major movements on the global financial markets and a substantial increase in volatility. By early October 2008, global financial markets were in turmoil and experiencing a major liquidity crisis. During the week beginning 6 October 2008 the Dow Jones index fell by around 21% and the FTSE 100 suffered two of its worst ever daily performances. In short, market conditions were both exceptionally difficult and volatile.

44. At the beginning of October 2008, Euroption had a large number of open equity index option positions within its portfolio at SEB, including a mixture of short calls and short puts. The increased volatility of the relevant markets had had a dramatic impact on the price of out of the money options (which made up a substantial amount of Euroption's short portfolio) which led to significant increases in the margin requirements on Euroption's account.

45. As at close of business on 6 October 2008 Euroption had a negative Ledger balance of €36,803,445.21. On Tuesday, 7 October SEB issued a margin call in that amount sent by e-mail at approximately 07:31 to Euroption with a copy to TSL. Mr. Caldon of TSL instructed Mr. Scattolon and others at Euroption not to respond to any e-mails from SEB, saying that TSL would liaise directly with SEB.

46. Thereafter Mr. Martin was involved in regular dialogue (by telephone and e-mail) with Mr. Caldon. Mr. Martin requested that Euroption should take immediate steps to pay the margin calls and close out its positions so as to reduce the amount of risk on its account. At about 09:30 Mr. Caldon told Mr. Martin over the telephone that Euroption wasn't in a position to "send that sort of money" but was aggressively cutting positions. There were a number of phone calls and e-mails during the day between the two men, with Mr. Martin seeking an update on the progress Euroption was making. The fact that Mr. Martin was communicating with Euroption through the agency of Mr. Caldon and TSL, and not directly with Euroption, was consistent with the way in which the relationship between the parties had been conducted from the outset. Indeed Euroption had been introduced to SEB by TSL.

47. During the course of trading on 7 October, Euroption took various steps to reduce its exposure. This, combined with movements in the markets, meant that, by 17:03 that day, Mr. Martin took the view (which he communicated to his superior, Ms Ulla Nilsson, then the Global Product Head of SEB Futures) that the margin call would be zero or a negligible amount at the opening of trading. In his oral evidence Mr. Martin described the progress which Euroption had made in the reduction of its positions as follows:

> "… they'd reduced their margin call by €33 million, so I was in a far more comfortable position"

48. On the same day, Mr. Martin and his colleagues formed an SEB Futures "crisis team" comprising senior members of the SEB Futures business, together with Ms Nilsson and Mr. Fredrik Barnekow (then SEB's Head of Securities Finance Department (Stockholm)). The crisis team was formed for the purposes of managing the problems relating to several of SEB's customers arising as a result of the financial crisis. Euroption was not the only customer of SEB in relation to which problems had arisen.

49. Euroption's debit Ledger balance at the close of business on Tuesday, 7 October was €3,822,856.15. At 08:22 SEB made a margin call in the sum of €3.8m (as compared with €36.8 million the previous day). During the course of the day Mr. Martin communicated on several occasions to Mr. Caldon, insisting not only on the provision of margin in cash but also in the reduction of Euroption's Positions.

50. At 10:18 TSL, by Mr. Caldon, represented to Euroption that, absent full payment of the margin call SEB would liquidate the account:

> "… won't help I'm afraid. They want the whole amount, or liquidation. We have to show them that we are closing some positions. Again, this is about buying you more time. So let's decide what to cover. SEB are expecting constant updates".

51. Mr. Martin denied that, at this point, he had communicated any such ultimatum to TSL. In his oral evidence he explained that although the prospects of the margin call being covered by cash were fading, he continued to employ a dual strategy of pursuing both a cash payment and margin reducing trades:

> "A. I wanted cash and I wanted positions cut, and, you know, at this stage I didn't know I was getting cash, but I don't think I'd ever said to anybody that I was going to liquidate the portfolio at this stage."

52. Subsequently, in a telephone conversation with Mr. Caldon at 10:26 Mr. Martin said:

> "Mr. Martin: We need to do these in parallel. You get the positions out and I want to know if the client's got any cash because if he hasn't I'll take some action. So I need to know.
>
> Mr. Caldon: Well, OK. What are you talking about "taking action"?
>
> Mr. Martin: I'll take the whole lot out."

According to Mr. Martin's own evidence, the reference to "… take the whole lot out." was a reference to a forced liquidation of the portfolio.

53. At the relevant time SEB used a trade matching engine (referred to as "MarketWatch") to clear trades on behalf of its customers. It was possible to set rules within MarketWatch to govern the way in which trades were to be cleared on behalf of that particular customer. One such rule was the "carte blanche acceptance" rule, which meant that trades which were given up to SEB for clearing on behalf of a particular customer would be automatically accepted for clearing and booked to the customer's account, without the need for any further action by SEB staff. At 09:06 on the morning of 8 October, Mr. Martin e-mailed his colleagues and suggested to them that they should lift the carte blanche acceptance rule for a number of customers, including Euroption. The effect of so doing would be that any new trades that were given up to the clearing bank by the executing broker on behalf of one of those customers would need to be manually reviewed before they were cleared. By turning off the rule, both Mr. Martin and his colleagues at SEB would be able to keep a much closer eye on the trades which were being undertaken by certain customers. That would have the effect of assisting SEB staff in monitoring their portfolios, the extent of any margin deficit and whether steps were being taken to reduce the deficit.

54. At 09:34 instructions were given by Mr. Martin to Martin Ward, Head of SEB's operations in London at the time, to lift the carte blanche rule in relation to Euroption. Thereafter, trades that were given up to SEB by TSL on behalf of Euroption were reviewed, either by Mr. Martin or by a member of SEB's Futures Client Services team. Mr. Martin's evidence was that the key principle to which they were working was to consider whether a particular trade reduced risk on the portfolio. If it did it would be accepted; if it did not, it would be brought to his attention so that he was aware of what was going on.

55. At 13:21 on 8 October, Simon Mason of TSL informed Euroption that SEB had put limits on the account, "… SEB won't let us increase the positions until the account is off call". Mr. Martin's evidence was that, at no time on 8 October, did he actually impose a limit on Euroption's account or tell TSL or Euroption that SEB was not letting Euroption increase positions. However Mr. Martin accepted that, because of the pressure Mr. Martin was putting on Mr. Mason to cut positions, the latter may have got the impression that SEB was not letting Euroption increase its positions.

56. Although the trades Euroption carried out in the morning of 8 October were relatively small and risk reducing, a series of trades given up later that day involved a large roll-down of positions (meaning that a position in an expiring contract in one option series had been closed whilst a position in a later expiring contract had been opened). By 13:00 on 8 October, the only trades given up to SEB were (a) the buying back of 3,250 FTSE 4100 October puts and (b) the sale of 1,000 FTSE 4900 October calls. The remainder of the FTSE trades that were carried out that day were not given up to SEB until after trading had closed on the relevant exchanges. Because of these late give-ups, SEB was unable to see until after trading had closed the extent to which Euroption had been opening new positions as part of roll-down or combination trades (rather than merely closing positions). The net trades which were given up late to SEB involved Euroption buying back 15,108 short puts (which reduced downside risk), but also selling 12,433 new puts (increasing risk on the downside) and selling 9,995 new calls (increasing risk on the upside).

57. All of Euroption's trades on 8 October were spread trades or combination trades (i.e. the closure of short positions, accompanied by the opening of a new position).

Critically, however, the reports that TSL were giving to Mr. Martin only identified the closure of short positions and failed to mention the opening of the new positions. This gave Mr. Martin the misleading impression during the day that around 17,658 short option contracts were being closed out naked.

58. Between 16:37 and 18:14 on the evening of 8 October several trades were given up to SEB that were executed much earlier in the day, some as much as seven hours earlier. Mr. Martin's evidence was that under normal circumstances he would expect a trade to be given up anytime from a few seconds to within 30 or 40 minutes of execution. The trades given up to SEB that evening revealed to Mr. Martin that all the closing trades Mr. Caldon had reported to him throughout the day were in fact spread or combination trades. Further, Mr. Caldon had not reported anything at all about Euroption rolling 5,000 FTSE 5800 call options down to 5200, 600 points closer to the money, or the CAC 3000/3400 put spread.

59. In his evidence Mr. Martin accepted that he had subsequently discovered that he was being told of closing positions but not the opening of new positions, and that he was cross (he described it as "a bit grumpy", but it was probably more than that) when he discovered the additional trades including the fact that Euroption had sold a further 23,358 options on that day.

60. Whether or not he spoke to Mr. Caldon that evening, Mr. Martin was clearly concerned early on the morning of 9 October when he reviewed the trades which had been given up on behalf of Euroption during the course of the previous day. By that time, the markets had moved heavily against Euroption. At 08:13 SEB issued a margin call for €57 million.

61. I turn now to determine the first issue, namely the date on which SEB began to exercise its right to close out Euroption's positions.

Issue 1: when did SEB begin to exercise its right to close out Euroption's positions?

The evidence

62. The principal witness who gave contemporaneous evidence in relation to this issue was Mr. Martin. Euroption accepted that he was an honest witness, and did not suggest otherwise. However, Mr. Shivji submitted that his recollection of key events was vague, imprecise and sometimes unreliable, and that, given the pressures on him during the second week of October 2008, it was perhaps unsurprising that he did not have a clear recollection. I disagree. I found Mr. Martin to be a careful witness who clearly had a genuine independent recollection of the critical week in October 2008, which was supported by contemporaneous documentation. He convincingly rejected the suggestion that he had no independent recollection of the relevant events, whilst readily and realistically conceding that, in certain limited and unimportant respects, he was unable to remember precise details of what occurred. I have no hesitation in accepting Mr. Martin's evidence, which he gave in a straightforward fashion, to the effect that he took the decision to close out Euroption's position on the morning of 10 October and not on the afternoon of 9 October. To the extent that he was challenged in his recollection by Mr. Shivji, Mr. Martin was clear in adhering to his evidence that the decision was indeed taken that day.

63. Mr. Scattalon, the only witness called by Euroption, was also an honest witness, but, by his own admission, his direct, independent recollection of relevant events was limited, and largely derived from or reconstructed by his subsequent reading of contemporaneous documents and Skype messages as between himself and TSL. He could add very little to these. Insofar as he sought to suggest, in his witness statement, that SEB began to close out Euroption's position on the morning of 9 October, and that this was reflected in the trades carried out that day, I reject his evidence. The evidence at trial clearly showed that it was Mr. Scattalon, not Mr. Martin at SEB, who gave the instructions for the trades which TSL entered into on 9 October. Moreover, it was clear from answers which Mr. Scattalon gave in cross-examination, that many paragraphs of his witness statement had been drafted by Euroption's lawyers, in an attempt to construct a case from a retrospective analysis of the documents, some of which Mr. Scattalon had not read at the time of his statement.

64. Mr. Shivji complained that SEB had not called witnesses from TSL, despite the fact that SEB's case management information sheet had indicated an intention to do so on SEB's part, and that accordingly, I should draw an adverse inference against SEB for failing to do so. In a letter sent shortly before the start of the trial, SEB indicated that it was not proposing to call the TSL witnesses. I draw no adverse inference against SEB. Until the time of SEB's decision to close out, TSL was acting as Euroption's execution broker. In such circumstances, I see no reason why there was any evidential burden on SEB to call Euroption's own agents. It was, of course, open to Euroption to call such witnesses. I do not propose to draw any adverse inference against SEB in this respect.

65. Mr. Shivji also criticised SEB's "failure" to call a Mr. Fredrik Barnekow from SEB Stockholm, to whom Ms Ulla Nilsson, Mr. Martin's superior, reported. SEB did however call a Mr. Olof Westring, a senior specialist in the Securities Finance Department of SEB, who assisted and reported to Mr. Barnekow in providing a high-level oversight of the close out of Euroption's open positions. Mr. Westring was in a position to provide evidence as to the suitability of Mr. Martin and SEB's satisfaction with Mr. Martin's close out of the portfolio. In my judgment, there was nothing in Euroption's criticism of the alleged failure to call Mr. Barnekow or other witnesses at SEB. It was a matter for SEB whom it called as witnesses. There was no evidential burden imposed on it as a result of evidence adduced by Euroption that required SEB to call such persons.

66. In addition to contemporaneous emails and other documents, there were in evidence: (i) transcripts of telephone conversations between Mr. Martin and Mr. Caldon of TSL in the relevant period; and (ii) transcript of Skype messages between Mr. Scattalon and Mr. Caldon and other employees of TSL. Euroption persisted at trial in complaints about alleged failures on the part of SEB to make adequate disclosure. I did not find these to be borne out, in the light of the full explanation which was given by Clifford Chance as to the manner in which SEB had discharged its disclosure obligations.

67. Euroption's contention is that the evidence shows that SEB began the forced liquidation of Euroption's portfolio by no later than 12:44 on the afternoon of the 9 October. It contends that an e-mail sent by SEB to TSL at that time and TSL's subsequent conduct clearly indicated that the latter reasonably understood the 12:44

email to be an instruction to commence a forced liquidation of the account. Mr. Shivji supported this contention with the following submissions:

i) Mr. Martin's own established practice in relation to margin calls dictated that he would have taken the decision to close out Euroption's positions by 12:44 on the 9 October 2008;

ii) whether or not Mr. Martin intended to commence a close out of Euroption's open positions, TSL's conduct indicated that it understood the e-mail to be such an instruction;

iii) under the terms of the Mandate a close out commenced when, at 12:44, Mr. Martin assumed responsibility for making trade decisions on Euroption's account;

iv) under the relevant regulatory framework, as Mr. Martin understood it to operate, SEB was bound to commence the close out on 9 October 2008.

68. I do not accept this analysis of the evidence. It is contrary to the evidence given by Mr. Martin, the evidence given by Mr. Scattolon at trial and the contents of the contemporaneous documents.

69. As I have already said, on the morning of 9 October at 08:13 SEB issued a margin call for €57 million. Mr. Martin subsequently spoke to a former administrator of Euroption, a Mr. van Willigenberg, in relation to the ability of Euroption to transfer margin call into its account with SEB that day. Mr. van Willigenberg seemed unaware of the margin deficit. Mr. Martin said nothing about closing out Euroption's positions.

70. In the course of the morning of 9 October Mr. Martin, in his e-mails and telephone conversations with Mr. Caldon, put pressure on Euroption via TSL to reduce its positions. Mr. Martin made it clear that he wanted the absolute number of trades down. For example at 12:13 Mr. Martin e-mailed Mr. Caldon to say that Euroption's absolute exposure had to be reduced and that every opportunity had to be taken to wind down Euroption's open positions to a more manageable size. It was clear however that, under the terms of the Mandate, SEB was entitled to give instructions, and impose limits without at the same time exercising its right to close out.

71. At 12:44 Mr. Martin e-mailed Mr. Caldon saying:

> "Sorry. I have not been explicit about this, but I guess you are working on this assumption anyway. No new positions on this account whatsoever until further notice. We are working to close only"

72. In his evidence Mr. Martin explained that by this e-mail he was imposing a limit on Euroption's trading, such that the only trades which could be conducted on the account were naked buybacks. In other words, the only trades that could be executed were close out trades, the last sentence of the e-mail merely restating the limit imposed by the second sentence. In cross-examination Mr. Shivji suggested to Mr. Martin that the words "working to close only" were a reference to the closure of

the entire account and that there was a distinction between the concept of "reducing" or "cutting" the positions and the concept of "closure" of the positions. Mr. Martin convincingly rejected the suggestion explaining that this was an instruction to Mr. Caldon at TSL to say to Euroption:

> "no new positions, working to close positions only. Not close the entire portfolio, not shut it down, but the third line relates to the second line. So your interpretation of that e-mail I'm afraid is one hundred percent incorrect."

73. I accept Mr. Martin's evidence on this issue. In my judgment, the e-mail cannot be construed as the decision by Mr. Martin communicated to TSL to close out the entirety of Euroption's portfolio. Mr. Caldon's response in an e-mail timed 12:56 does not contain anything to suggest that Mr. Caldon for one moment thought that TSL was now being instructed to close out the entire account. Nor do the further series of e-mails between the two men on that day suggest that SEB itself was giving specific instructions for a close out. It was clear that SEB had attempted to limit the trading on Euroption's account, without itself taking over the conduct of the trading.

74. Other evidence supports this analysis. First of all, an examination of all of the trades carried out on 9 October demonstrated that it was Mr. Scattolon, and not SEB, who gave the instructions for the trades which TSL entered into on that date. These five sets of trades, numbered A to E (as set out in a chart on A3 paper) were meticulously reviewed in evidence and in the course of argument. In cross-examination Mr. Scattolon effectively accepted that he had given instructions for these trades.

75. Second, I conclude from the evidence which he gave about his trading on 9 October and his communications with TSL, that Mr. Scattolon himself knew that the close out had not started on that date. Thus he acknowledged that from 7 October he was given warnings by TSL that SEB wanted the positions cut; and that he knew that he was being given an opportunity to cut positions himself but that if he did not do that then SEB might step in at some point themselves. On the morning of 9 October Mr. Trimming of TSL told Mr. Scattolon "SEB are already demanding we close everything … we are trying to stop them doing it themselves." Mr. Scattolon replied, "Thank you Steve, today the market will bounce!" Mr. Trimming explained:

> "It doesn't matter. Our only chance is to show SEB that we are closing positions from the open. We have to start with the CAC. If SEB decide we are not closing fast enough, they will take over."

And at 12:08 on 9 October, Mr. Trimming expressed concern that:

> "SEB are really increasing the pressure on us Stefano. They have told us that we are not reducing exposure fast enough. I am worried that they will start covering some positions themselves."

76. However Mr. Scattolon's evidence did not go further than complaining that he did not have "full control" of Euroption's trading on 9 October. He acknowledged that he was given the message at 12:08 on 9 October that if he reduced his risk, then he

would be able to stop SEB from stepping in. He also – significantly - acknowledged that at no point after that on 9 October did anyone from TSL tell him that the position had been changed or that SEB had taken him out of the loop and taken control. On Euroption's case, one would have expected to find something in the Skype messages from TSL at or shortly after 12:44 indicating to Mr. Scattolon that SEB had began a close out. Yet there is nothing at all in the Skype messages to support this proposition. The first time that there is anything in the Skype messages to indicate that a close out has commenced was at 08:05 on 10 October, when Mr. Mason of TSL informed Mr. Scattolon that SEB had ordered TSL to liquidate the account. Moreover, Mr. Scattolon did not go so far as to say that SEB had already started closing out positions on 9 October. The highest he put it was to say that some of his instructions were not followed on that day. This was consistent with the fact that Mr. Martin had placed limits on Euroption's ability to open new positions and was placing heavy pressure on Euroption to close positions. But it does not predicate that SEB had already commenced the close out. Mr. Scattolon acknowledged that on 9 October he had it within his power to close positions to remove the pressure coming from SEB but decided not to do so. None of this evidence suggested that SEB had already begun its close out.

77. Thus, although Euroption had made some close out trades on October, it had failed, in Mr. Martin's view, to implement an appropriate close out strategy, choosing instead to close out some positions whilst keeping other positions open and/or rolling them forward. As at close of business on 9 October, Euroption still had massive open option positions on its portfolio. According to Mr. Martin, Euroption had a potential exposure on its positions as at close of business of nearly €94 million while its portfolio liquidation value was only €36 million. Prior to the significant drop in the markets that occurred overnight on 9 October 2008, SEB was therefore facing, using clearing house calculations, a potential loss of over €50 million.

78. On the evening of 9 October, the Dow Jones index fell nearly 700 points. Before the opening of business in Europe on Friday, 10 October, the Asian markets also fell sharply. In addition, the level of volatility in the financial markets had continued to increase significantly since 8 October 2008. Dr. Fitzgerald described it as "… a period of almost unparalleled volatility, and enormous downward pressure on markets". Accordingly, the European markets were also expected to fall sharply. The expected fall in the markets meant that Euroption faced very substantial risks on its open put positions which together constituted a substantial bet that the markets would not fall. The portfolio was "long delta", meaning that Euroption would benefit from a market rally, not a market fall. As described above, there was a significant imbalance in the directional exposure of Euroption's positions.

79. The status of Euroption's portfolio just prior to the European markets opening on 10 October 2008 presented SEB with a major concern. Euroption was positioned to benefit from a market rally, and yet the overnight movements and the pre-opening bids and offers pointed to the likelihood that the European markets would face significant falls. Mr. Martin's evidence was that his focus was to make sure that, if the markets did fall significantly, SEB was protected as far as possible against its potential substantial losses.

80. Once the markets opened it was clear that his concerns were justified. Because of the fall in the markets overnight (the FTSE opened about 1.2% down before full trading

and was very soon about 11.3% down), Euroption's portfolio liquidation value (i.e. the value of the assets in the portfolio if all open positions had been closed at the previous day's settlement values) of around €36m as at close of business on 9 October had been reduced by around €28m by the time the markets opened on 10 October. That left the portfolio liquidation value at approximately €8 million. Accordingly, as at the opening of the markets on 10 October, there was a real risk that SEB could be left facing a loss of many millions after the close out of positions was complete, especially in light of the extremely volatile market conditions and the very large positions that needed to be unwound.

81. It was against this background that Mr. Martin stated in his evidence that he decided early in the morning on 10 October to close out Euroption's positions. In an e-mail timed at 07:07 he requested Mr. Caldon to telephone him as soon as he arrived at the office. When Mr. Caldon replied that he would telephone Mr. Martin in 20 minutes, Mr. Martin sent Mr. Caldon a further e-mail at 07:20 which stated "ASAP please!!!" At 07:30 Mr. Martin spoke to Mr. Caldon on the telephone to give him instructions about specific positions which he wanted TSL to concentrate on closing. As Mr. Martin accepted in his witness statement and in his oral evidence, the transcript of the telephone call does not contain a specific or express instruction to close out. In his witness statement Mr. Martin said:

> "Looking back at the transcript of that call now, I think that I did not feel it was necessary at the time to spell out that SEB would be giving the instructions in relation to the portfolio from this point onwards. Mr. Caldon and I are both professionals, and we had both seen the carnage on the markets from the opening of trading on 10 October 2008. My sense at the time was that it would have been absolutely clear that Euroption's trading of its portfolio was over and that SEB would be calling the shots from then on."

82. That does indeed appear to have been the case since at 08:15 a Mr. Mason at TSL informed Mr. Scattolon that "SEB have ordered us to liquidate the account". On that date Euroption was also called for €26.173m in margin.

83. I accept Mr. Martin's evidence that the decision to close out was taken, and the instructions to close out were given, on 10 October.

84. In addition to the evidence to which I have already referred, Mr. Martin's account is supported by a memorandum entitled "Euroption …. Close out time line", which Mr. Martin prepared on 22 October 2008, only a week after the close out, and sent to Mr. Martin's superiors including Ms Nilsson and a Mr. David Lockie. This memorandum also strongly supported the analysis that SEB's close out did not start until 10 October. In relation to Wednesday, 8 October, Thursday, 9 October and Friday, 10 October Mr. Martin wrote:

> "**Wednesday 8th October**
>
> The client was called for Euro 3,822,856.15, and again there was no response to our call. Tavira were called again and advised us that the client could not meet the margin call.

Tavira were instructed to immediately commence cutting the clients positions.

The client cut

[details of trades]

Although these were cutting existing positions, the client had rolled a number of positions to position himself further down the market. New positions given up on the day were.

[details of trades]

Further increased volatility hurt the client on the overnight revaluation. As at COB Wednesday October 8th the client had negative free cash of Euro 57,002,822.39 and Equity balance of Euro 71,294,333.02 and a portfolio liquidation value of Euro 31,529,928.

Thursday October 9th

The client was called for Euro 57,002,882.39, the call was not responded to. Tavira were advised that SEB wanted naked positions cut aggressively. The market conditions were exceptionally volatile with liquidity hard to come by in any serious size.

We believed that Tavira were best placed to execute the closing trades, as they knew the clients, and the market makers. Executing close out instructions in these indexes via a fixed income desk, was considered to be too risky.

The client along with Tavira closed

[details of trades]

However, again a lot of these were closed by rolling positions further down the price curve and further out the time line.

The combo trades tied to the closures resulted in the following new positions

[details of various call and put options]

It was clear to us that the client was managing the position as opposed to cutting the position.

Although the client's actions improved the cash position slightly as at COB Thursday 9th October the client had a negative cash balance of Euro 26,173,887.52 and Equity balance of Euro 67,715,510 and a portfolio liquidation value of Euro 35,684,966.

Friday October 10th

Friday October 10th opened with stock markets in full rout mode. Heavy overnight losses in Asia transferred to large opening losses on the European indices and another significant volatility spike.

Mindful of the clients reluctance to close naked positions, and also aware of the rapidly reducing liquidation value of the client, Tavira were instructed to close only in accordance with SEB instructions.

The client was taken out of the loop and we commenced cutting positions ourselves. Again given Tavira's knowledge of the markets and the clients positions it was considered sensible to work the closing orders through their broking desk.

Although our aim was to liquidate the entire portfolio as quickly as possible we were mindful of market conditions. We concentrated on liquidating the closest to the money strikes, in either direction first.

By close of the markets we had closed

[details of various put options]

The vast majority of these we had managed to close naked, however in some cases we had to pick up a little upside exposure to get the trades away.

New positions taken on were

S1300 November Eurostox 2650 Calls (traded against some of the 2350 puts that were closed)

S2083 November FTSE 4600 Calls (traded against some of the 3600 puts that were closed)

Friday 10th October closed with record falls in most major European Stock Indices, and volatility at records levels.

Despite aggressive cutting of close to the money positions, the clients account with SEB Futures remained on call.

As at COB Friday 10th October the client had negative free cash of Euro 58,580,816.39, a positive equity balance of Euro 38,562,715, but portfolio liquidation value that was Euro 7,636,594 negative." (Emphasis supplied)

85. As can be seen, in his memorandum, Mr. Martin specifically identified 10 October as the date when the close out began. TSL was:

> "… instructed to close only in accordance with SEB instructions. The client was taken out of the loop and we commenced cutting positions ourselves".

The memorandum was written at a time when the start date of the close out was not known to have any legal significance.

86. Mr. Shivji suggested to Mr. Martin in cross-examination that the memorandum was a self-serving document prepared by the latter to appease Mr. Martin's superiors at SEB. I reject that criticism and accept Mr. Martin's explanation that the document was prepared in anticipation of a possible claim by Euroption rather than as a back-protecting exercise. There was no evidence to suggest that SEB's senior management was concerned about Mr. Martin's handling of the Euroption account or the close out.

87. Other criticisms made by Mr. Shivji in cross-examination were to the effect that the memorandum contained a few specific minor inaccuracies and that the memorandum excluded reference to certain facts. There was no substance in any of these. Mr. Martin told the court that the memorandum was prepared during the course of the morning and relied upon his memory and the relevant account statements, and that he had not conducted a review of e-mails and telephone transcripts to prepare the document. Finally, it was not suggested to Mr. Martin that he had not been telling the truth when he recorded in the memorandum that the close out had begun on 10 October. In my judgment, it supports his evidence on the issue.

88. Further, Mr. Martin's account that the close out only began on 10 October is supported by a comparison of the trades made on 9 October with (a) trades made by Euroption on 8 October and (b) trades made by SEB on 10 October. This matter was also the subject of expert evidence given by Mr. W A Beagles on behalf of Euroption and Dr. M. Desmond Fitzgerald on behalf of SEB.

89. The trading of Euroption's positions on 9 October continued to follow the same basic pattern as on 8 October. This was not a strategy that aimed to close out Euroption's positions but one which rather looked to reduce risks while opening new positions. By contrast, the trading of Euroption's positions on 10 October had a completely different profile. Trades were closed naked wherever possible with the exception of the two combination trades (one of which Mr. Martin saw as a necessary evil to buy back the relevant position and the other of which was made pursuant to Mr. Scattolon's instructions and without Mr. Martin's knowledge or approval). This supported SEB's case that Mr. Scattolon remained in control of trading on 9 October (albeit with a "gun to his head") and was inconsistent with Euroption's case that SEB was already closing out Euroption's positions on 9 October.

90. The evidence showed that Mr. Scattolon's general approach to trading on 8 October was to enter into combination trades and diagonal put spreads (which reduced risk while maintaining a level of open positions) in the hope that it might be enough to meet the margin call. Mr. Scattolon suggested in his witness statement (paragraph 55) that on 8 October he had:

> "… continued to close out put options (especially the Eurostoxx 2600 puts and FTSE 4000 and 4100 puts)".

91. However under cross-examination, Mr. Scattolon rightly acknowledged that his witness statement had given a misleading and incomplete account of this trading in that what Euroption was actually doing was closing and opening positions at the same time. Mr. Scattolon acknowledged that on 8 October Euroption had rolled down the positions by buying back October puts and selling November puts in a "diagonal spread". Mr. Scattolon said that this reduced the fund's exposure to vega, delta and gamma (thus reducing the margin call by a small amount) but acknowledged that this left the fund exposed to downside risk.

92. He explained that part of his strategy was based on his hope that there would be a market rally so that he would be able to buy back the November puts at a profit. He was also trying to generate premium by selling new positions to cover the fund's trading losses. To achieve this, Mr. Scattolon sold a large number of FTSE October calls on 8 October, which increased Euroption's exposure to a market rise. He also considered selling foreign exchange options with the same purpose in mind.

93. The trading on 9 October continued this pattern. Although some positions were bought back naked, the bulk of trading involved diagonal spreads (i.e. the buy back of October puts together with the sale of November puts) and combination trades (i.e. the buy back of puts funded by the sale of calls). Mr. Scattolon acknowledged that this was the same strategy he had used on 8 October. What he was doing on 8 and 9 October were trades that were the best he could do in the circumstances while he waited until SEB might take the decision to close out.

94. This was particularly so in the afternoon of 9 October where (as Mr. Beagles acknowledged) Sets C and D (as shown in the chart) involved diagonal put spreads which rolled the risk down from October to November. Mr. Beagles agreed that these were not the sort of trades that would usually be found if a clearing member was effecting a close out. Although the total trade reduced risk, the new positions opened were large and risky. If instead of carrying out diagonal put spreads, Euroption had bought the October FTSE puts back naked, Euroption would have substantially reduced its margin call at close of business on 9 October. Mr. Beagles also acknowledged that, inasmuch as diagonal put spreads were involved, the trading pattern on the afternoon of 9 October was the same as or broadly similar to the trading pattern on 8 October.

95. Mr. Beagles agreed that, unlike on 8 and 9 October, there were no diagonal put spreads traded on Euroption's account on 10 October. The trades carried out on 10 October in Sets F, G, I, K and L (as likewise shown in the chart) involved the naked buying back of puts. Mr. Beagles accepted that these were the types of trade that he would ordinarily expect to see if a clearing member was closing out a position. Indeed, he said they would be his first choice for closing out a position. In the case of Set H and Set J, part of the position was bought back naked and part was bought back against the sale of calls. Mr. Beagles accepted that the naked part of H and J would also be what one would expect to see if a clearing member was effecting a close out.

96. Finally the communications on 9 and 10 October between Mr. Scattolon and TSL, as compared with the communications between SEB and TSL on the same date (as conveniently set out in a spreadsheet for my use), demonstrated the reality that on 9 October it was Mr. Scattolon who was exercising control over the trades that were

being executed, whereas on 10 October such control was clearly being exercised by SEB.

97. Euroption sought to support its argument that the close out began on 9 October by reference to statements made by Mr. Martin in a letter dated 16 March 2009. In opening, Euroption also relied on a letter from Clifford Chance dated 6 August 2009. That letter sets out a "sequence of events" and is essentially consistent with the letter of 16 March. I was not persuaded by this argument. It is not necessary to engage in a detailed analysis of the two letters. Although neither the 16 March letter nor the 6 August letter expressly pinpoints the morning of 10 October as the point in time when the close out was commenced, I accept Mr. Toledano's submission that those letters are consistent with (a) that proposition; (b) Mr. Martin's evidence; (c) Mr. Martin's 22 October memorandum; and (d) SEB's case. Moreover, the significance of the 9/10 October point did not emerge until service of the Particulars of Claim on 24 February 2010, when Euroption asserted specifically for the first time that SEB began closing out on the 9 October. SEB then pleaded in its Defence that the close-out began on 10 October and joined issue on that topic. Interestingly a note in Euroption's audited accounts for the year ended 31 December 2010 in relation to "Litigations and claims" also refers to the closeout taking place "from October 10 to October 17, 2008". However Mr. Toledano did not seek to rely on this point.

98. It follows that I reject Mr. Shivji's submission that Mr. Martin's own established practice in relation to margin calls (based on his earlier conduct in September), or the terms of the Mandate, or the relevant regulatory framework, as Mr. Martin understood it to operate, predicated that he would have taken the decision to close out Euroption's positions by 12:44 on the 9 October 2008. Not only am I satisfied that the evidence does not establish this but also I disagree with the assertion that either the terms of the Mandate or the relevant regulatory framework required SEB to begin the close out on that date.

99. First, as Mr. Toledano submitted, the right to impose limits on SEB's trading or to refuse instructions given by Euroption or TSL were rights conferred by clause 6 and clause 12(c) respectively, which were separate from the right conferred by clause 11 to close out. The fact that SEB exercised the former did not amount to an exercise of the right to close out.

100. Second, so far as the point relating to the regulatory framework was concerned, in cross-examination, a line of questions was put to Mr. Martin regarding SEB's obligation under LIFFE rule 3.27.2 (when faced with a client in default of its margin obligations) as set out above "to take such steps as are open to him to reduce the client's liability". It was suggested to him that in order to comply with its obligation Mr. Martin had no alternative other than to close out immediately. In response to this, Mr. Martin set out an outline of what he thought such steps would generally involve. Mr. Martin said that the first thing to do was to call the client for money. Once the client was on margin call, there were then a further three general steps that a broker would go through, namely: (i) to try to get the money in and to try to increase pressure on the client to reduce its positions willingly; (ii) to restrict the client (if possible) in what it can do; and (iii) only when that has failed to "go hostile" on the client. The main reason a broker will be reluctant to take this final step is that "when you go hostile, whatever you do, you're wrong". He pointed out that every

circumstance was different and that there might be many reasons "why the bank would wait one, two, three days".

101. Mr. Beagles agreed that it was reasonable for a broker to provide a grace period to a client that had not paid margin call in order to enable them to close positions themselves. The length of the grace period was not set in stone: it would depend on the circumstances and would vary from case to case. During that grace period, he said he would expect the clearing member to encourage the client to close positions itself.

102. The point which was taken by Euroption in relation to LIFFE rule 3.27.4 was irrelevant. Rule 3.27.4 provides an exception to rule 3.27.2 and sets out the circumstances in which a clearing member may be entitled to decide not to insist on the prompt collection of margin from its clients. However in this case the sub-rule was not applicable since there had been no decision by SEB not to insist on the prompt collection of margin from Euroption. In this case SEB had decided to collect margin from its client and had endeavoured to do so on each day during the relevant period. Accordingly, I do not consider that the LIFFE rule can shed any light on the factual issue as to when the close out began.

103. I also reject Mr. Shivji's further submission that, whether or not Mr. Martin intended to commence a close out of Euroption's open positions, TSL's conduct indicated that it understood the e-mail timed 12:44 on 9 October to be such an instruction. There was nothing in the trading pattern or the Skype messages that supported such a conclusion and, moreover, Mr. Mason's Skype message timed at 08:15 on 10 October to which I have already referred, is to contrary effect.

104. Accordingly, I determine Issue I in SEB's favour. All that SEB attempted to do on 9 October was to impose conditions on, or limit, Euroption's trades. However Mr. Scattolon retained control of directing Euroption's trades. It was only on 10 October 2008 that SEB itself took control of the Euroption portfolio and began to close out its positions.

Issue II: did SEB owe Euroption contractual or tortious duties to conduct SEB's close out of Euroption's positions with reasonable care and skill?

105. It was common ground between the parties that, having exercised its right to close out, SEB had a duty to act honestly, in good faith and not arbitrarily, capriciously, perversely or irrationally; see *Paragon v Nash* (*supra*); *Socimer International Bank Ltd (In Liquidation) v Standard Bank London Ltd (No 2)* (*supra*). I refer to this duty as the duty to act rationally. No issue of want of good faith arose in the present case. What was in contention was whether SEB had any contractual or tortious duty of care to conduct the close out exercise competently and with reasonable care, and, if so, what was the scope of that duty.

106. As paragraph 66 (quoted below) of the judgment of Rix LJ in *Socimer* makes clear, if the court is considering the issue of rationality alone, the decision remains that of the decision maker; if, on the other hand, the court is considering whether there has been compliance with an obligation to act competently and take reasonable care, the arbiter is the court itself, based on entirely objective criteria. Effectively, if a duty of care were to exist in the present case, SEB's conduct of the close out would fall to be

subjected to the scrutiny of a retrospective, hindsight analysis of the trades which SEB entered into, in order to enable the court to determine whether, by reference to (necessarily uncertain) objective criteria applying to this particular close out situation, it had complied with its obligation to take reasonable care and act competently.

107. I turn first to consider whether the contract between Euroption and SEB imposed such an obligation on SEB in relation to the close out.

108. Mr. Shivji's first argument was that the Mandate contained an implied term pursuant to section 13 of the Supply of Goods and Services Act 1982 ("the Act") to the effect that SEB had a duty to provide its services with reasonable care and skill and that this covered a situation where SEB was providing the service of conducting a forced liquidation of Euroption's portfolio. This, Mr. Shivji submitted, was not surprising, since the eventuality that the bank might liquidate the portfolio following a missed margin call was something that was expressly contemplated by the contract. Accordingly, he submitted, given the commercial context a client might well choose its clearing bank based on its perception of the bank's standing and presence in the market, and having regard to its ability to preserve value in the event of a forced liquidation.

109. Second, he argued that the terms of the Mandate were very different from those in *Socimer.* In that case, the power to sell or retain the relevant assets was described as being in the seller's "sole and absolute discretion ... at such price as it deems reasonable and appropriate". Such explicit wording, Mr. Shivji submitted, was notably absent from the Mandate in the present case; the Mandate in this case was a standard form agreement put forward by SEB; if SEB had intended that it should have discretion over the conduct of the close out, as well as the timing, then it would have been straightforward for this to have been included into the contract. In this regard, the contract should be read *contra proferentem* and as being subject to an implied term that any close out should be conducted competently and with reasonable care.

110. For the reasons largely advanced by Mr. Toledano, I reject Euroption's arguments that the Mandate should be read as subject to an implied term that the close out would be conducted competently and with reasonable care, whether by reason of section 13 of the Act or otherwise.

111. In my judgment, SEB's rights under the Mandate to impose limits on Euroption's activities under clause 6, to close out Euroption's positions under clause 11, or to refuse instructions under clause 12 (c) cannot be characterised as "services" within the definition contained in section 12 (1) of the Act. The definition in section 12(1) of "contract for the supply of a service" is (subject to exclusions) "a contract under which a person ('the supplier') agrees to carry out a service". Thus the "implied term about care and skill" imposed by section 13 of the Act only applies to services agreed to be provided under a contract for services and not to all rights and obligations under such a contract. Section 13 provides:

> "In a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill." [Emphasis supplied.]

112. The Mandate contemplated that two types of services might be provided by SEB. These were set out at clause 6 (subject to the provisions of clause 7) as follows:

i) advisory services regarding dealing in exchange traded futures and options (and securities where the securities transaction in question was ancillary to a transaction in futures or options); and

ii) settlement and exchange services whereby SEB acted as clearing broker for trades executed by or on behalf of Euroption.

These services were to be provided in the course of SEB's business and, accordingly, section 13 of the Act would have applied to the provision of them.

113. However, there is no basis in the Act or otherwise to suggest that a similar implied term applied to SEB's right to impose limits, its right to refuse instructions, or its right to close out, since these were not on any basis services which SEB had agreed to carry out under the Mandate. First, it is difficult to see how, in ordinary language, the exercise of such rights by SEB, at its discretion, for the purposes of protecting its own position, could be characterised as a "service" being provided "to" Euroption. Even if, contrary to my view, the exercise of such rights could arguably be so characterised, since SEB had not agreed under the Mandate, to provide any such "service", it is difficult to see how rights exercisable at SEB's discretion could be said to be "services" for the purpose of section 13.

114. As Mr. Toledano submitted, Euroption's case not only fails to have regard to the actual wording of section 13, but also fails to have regard to the distinction drawn in the relevant authorities between the situation before and after a default. Following default, the broker is entitled to put its own interests first and is primarily carrying out the forced liquidation of the portfolio in order to reduce and ultimately eliminate the risk (i.e. the exposure on its back-to-back contracts with the clearing house) to which it had been exposed by its client's failure to provide margin. This is fundamentally different from providing services under the contract prior to a default.

115. In *Socimer* (*supra*), the Court of Appeal had to consider, in the context of trading between banks in forward sales of emerging markets securities, the exercise of a right by one counterparty bank, following a default by the other bank, to determine the value of a portfolio. The agreement expressly permitted the defendant enforcing bank an "absolute discretion" whether to liquidate or retain the portfolio to satisfy the amount due to it, but obliged it to carry out an immediate valuation of the portfolio as at the date of transmission and to credit the resultant amount to the claimant. The question for the court was whether the defendant's contractual obligation was to conduct an honest but otherwise subjective valuation of the retained assets, or whether, as a matter of contractual implication, or, alternatively, as a matter of equity by analogy with the duties of a mortgagee with a power of sale, the defendant was under a duty to take reasonable care to determine their true market value.

116. The Court of Appeal held that:

i) When a contract allocated only to one party a power to make decisions under the contract which might have an effect on both parties, a decision maker's discretion was limited, as a matter of necessary implication, by concepts of

honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern was that the discretion should not be abused. Although terms such as "reasonableness and unreasonableness" were also concepts deployed in the context of a duty to act rationally, those words were not being used in that context in the same sense as when speaking of a duty to take reasonable care.

ii) In the circumstances of the case, no term was to be implied to the effect that an objective valuation or one which complied with a duty to take reasonable care, was required. Such an implied term was not necessary or sufficiently certain.

117. In his judgment (with which the other members of the court agreed), Rix LJ emphasised that the court does not replace the view of the broker conducting a close out as to what was reasonable in the circumstances, with the court's own view. It was the closing out broker's decision to make, in its own interest, as to how to conduct the close out, provided that the broker did not step outside the bounds of its duty of acting honestly, in good faith and not arbitrarily, capriciously, perversely or irrationally. At paragraphs 66 and 112, he said:

> "66. It is plain from these authorities that a decision maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern was that the discretion should not be abused. Reasonableness and unreasonableness are also concepts deployed in this context, but only in a sense analogous to *Wednesbury* unreasonableness, not in the sense in which that expression is used when speaking of the duty to take reasonable care, or when otherwise deploying entirely objective criteria; as for instance when there might be an implication of a term requiring the fixing of a reasonable price, or a reasonable time. In the latter class of case, the concept of reasonableness is intended to be entirely mutual and thus guided by objective criteria. Gloster J was therefore, in my judgment, right to put to Mr Millett in the passage cited at para 57 above the question whether a distinction should be made between the duty to take reasonable care and the duty not to be unreasonable in a *Wednesbury* sense; and Mr Millett was in my judgment wrong to submit that it made no difference which test you deployed. Lord Justice Laws in the course of argument put the matter accurately, if I may respectfully agree, when he said that pursuant to the *Wednesbury* rationality test, the decision remains that of the decision-maker, whereas on entirely objective criteria of reasonableness the decision maker becomes the court itself. A similar distinction was highlighted by Potter LJ in para 51 of

> his judgment in *Cantor Fitzgerald*. For the sake of convenience and clarity I will therefore use the expression 'rationality' instead of *Wednesbury*-type reasonableness, and confine 'reasonableness' to the situation where the arbiter on entirely objective criteria is the court itself.
>
> …
>
> 112. Thus in the specific context of a default and a forced - retention of designated assets, Standard is compelled by its buyer's default to retain what it never sought, save to the extent that it can immediately liquidate the assets on the termination date. The question whether it can sensibly in the interests of either party liquidate on the termination date is part of the complex uncertainties of this emergency situation. If it decides not to liquidate, it is forced to retain. If in that context it has to value the assets, why should it not be entitled to value them at a value which reflects the value of such assets to itself? It may dislike the risk they pose, in terms of the nature of the particular asset, its currency and/or nationality and so on. The decisions have to be taken very quickly, namely, 'on the date of termination' …. Once the asset is not immediately sold, the risk of retention is entirely transferred to Standard. In theory and sometimes in practice anything may happen the next day, or within the time in which a sale might become possible. The difficulty multiplies if the asset is relatively or entirely illiquid. Then there is no market price by which the value can be set on the relevant day. Who knows at what price the asset can be sold when a buyer appears? In such circumstances, Standard is entitled, it may be said, to consult its own interests, subject of course to the requirements of good faith and rationality. Those factors include both subjective and objective elements, but the essence of that construction is that the decision remains that of Standard, not of the market or the court, and that in coming to its assessment, subject to the limitations of good faith and rationality, it is entitled primarily to consult its own interests."

118. Similar types of considerations were taken into account by David Steel J and Blair J respectively in declining to find closing brokers guilty of negligence in *ED & F Man Commodity Advisers Ltd & Another v Fluxo-Cane Overseas Ltd & Another* [2010] EWHC 212 (Comm), *Sucden Financial Limited v Fluxo-Cane Overseas Limited* [2010] EWHC 2133 (Comm) and *Marex Financial Ltd* v *Fluxo-Cane Overseas Ltd* [2010] EWHC 2690. Perhaps surprisingly, no reference was made to *Socimer* in any of these cases. However, although rejecting arguments that specific standard terms of

business applied to impose a duty of care, David Steel J and Blair J respectively proceeded on the basis that there was, or least assumed to be (see e.g. per Blair J at paragraph 65 of *Sucden Financial Limited v Fluxo-Cane Overseas Limited*), a duty of care to act reasonably and to conduct the liquidation to the highest possible professional standards required in the circumstances. Thus they actually considered whether there had been any negligence by the closing out broker rather than the antecedent issue as to whether such broker was subject to a contractual or tortious duty of care.

119. In the first case, the defendant, Fluxo-Cane, had traded sugar futures and options and, as a result, had a substantial short position. This resulted in the claimant broker, MCA, exercising its right to conduct a forced liquidation of Fluxo-Cane's position. One of the issues which arose was whether the forced liquidation was conducted by MCA in a proper fashion. It was argued by Fluxo-Cane that MCA had an obligation under the relevant FSA New Conduct of Business Sourcebook ("COBS") to act "in accordance with the client's best interests". In rejecting this argument David Steel J said (at paragraph 76 of his judgment):

> "COBS 2.1.1 provides: 'A firm must act honestly, fairly and professionally in accordance with the client's best interest' but COBS 2 is also excluded from counterparty business. Even if applicable, it is not suggested as such that MCA acted other then [sic] honestly, fairly and professionally. As regards the best interests of the client, this is a difficult concept in circumstances where the client is refusing to pay margin and expecting MCA to close out as best it can. MCA was in effect trading on its own account. Furthermore, the interests of MCA were in common with FCO namely to limit the loss that might be sustained as a result of the liquidation. Thus I reject the suggestion if it be made that MCA were obliged by COBS 2.1.1 to manage FCO's position as if still acting as FCO's broker but at its own risk and without the provision of margin."

120. In *Sucden* similar submissions were made by Fluxo-Cane to the effect that the broker, Sucden, had conducted the liquidation negligently and in breach of its duties of care. Again reliance was placed on COBS to support an argument that the broker had a duty to act in the best interests of its client and subject to a best execution obligation. Blair J (at paragraph 53 of his judgment) agreed with David Steel J's approach. He said:

> "53. However, I am equally satisfied that the COBS (and the annex to the letter of 26 October 2007 so far as it creates an independent obligation) do not apply when the broker is liquidating the customer's account pursuant to an Event of Default. That is because these rules apply when the broker is executing its customer's orders, which is not the case in a liquidation. It is not correct either that in those circumstances the firm has to act in the best interest of its client. It cannot ignore the client's interests, but as the present case shows, the firm has interests of its own to consider. Here,

> liquidation was required to eliminate Sucden's own exposure with its counterparty. It was, in my judgment, entitled to put its own interest ahead of that of its client in that regard, although in practice both parties had a mutual interest in liquidation on the best terms possible. This conclusion is the same as that reached in *ED & F Man* at [75] and [76]. There David Steel J rejected the suggestion that the claimant was obliged to manage the defendant's position as if it was still acting as the defendant's broker, but (as he put it) at its own risk and without the provision of margin."

121. Blair J then went on to consider what standard did apply to the conduct of a liquidation of the position in circumstances where, under the relevant Terms of Business ("TOB") between the parties, the broker was not liable for losses suffered by the customer "unless arising directly from our gross negligence, wilful default or fraud". He approached the question:

> "… by asking whether Fluxo-Cane can demonstrate negligence, because unless it can, it will clearly be unable to demonstrate gross negligence. It is not suggested that this is the case of wilful default or fraud."

He then went on to consider whether the forced liquidation had been conducted negligently and concluded that it had not. At paragraph 65 he emphasised that it was important to resist the temptation of hindsight when judging the reasonableness of the broker's actions. He said:

> "65. I have discussed the evidence in this respect in some detail already. There are two principal reasons why in my judgment Fluxo-Cane's submissions cannot be accepted. The first, I have already referred to, and is that it was not negligent to wait until after the meeting of 29 January 2008 in Sao Paulo before finally liquidating the account. On the contrary, this was (I am satisfied) a reasonable course to take. The other is that I am quite satisfied that Dr Fitzgerald is correct to express the view that it is only with the benefit of hindsight that it can be seen that liquidation during the period 22 to 25 January 2008 would have been most advantageous. The market might have risen, as Mr Levy thought it would, or Mr Garcia might have been proved correct in his conviction that the market would fall. I am satisfied that following the action taken by the Exchange, the liquidation of Fluxo-Cane's positions was going to be extremely problematic, as indeed both Mr Garcia and Mr Overlander foresaw. I very much doubt in these circumstances whether there is a single template by reference to which it can be said that liquidation was, or was not, negligent. Be that as it may, I am satisfied in this case that the criticisms made

> of Sucden's conduct of the liquidation are unfounded. The highest Fluxo-Cane puts the required standard is that Sucden was under a duty of care to act reasonably and to conduct the liquidation to the highest possible professional standards required in the circumstances. Even if that is correct as a matter of law, which is not something which I need to decide in this case, I do not consider that the duty has been breached. Negligence has not been established, let alone gross negligence."

122. In the third of the series of cases, *Marex Financial Ltd v Fluxo-Cane Overseas Ltd*, David Steel J again had to consider whether there was any liability for negligence on the part of the clearing broker which was closing out Fluxo-Cane's position. At paragraphs 88 and following he said:

> "88. Further, under the new client classification that applied from 1 November 2007, FCO was not a retail client, but was either an eligible counterparty or a professional client. If an eligible counterparty, the exemption referred to above would have applied, and if a professional client, Marex's Order Execution Policy (which was incorporated by reference in the letter dated 8 October 2007) expressly provided that the duty of best execution owed by Marex to professional clients only applied 'where we execute orders on your behalf and where we receive and transmit client orders'. Since however, the close out of FCO's positions under clause 14.1 (or clause 15.1) was in Marex's discretion pursuant to its independent right to close out rather than pursuant to FCO's orders, it follows that the duty of best execution (or COBS 11.2.1) was inapplicable anyhow.
>
> 89. Indeed, the distinction between executing FCO's orders and exercising a right to close out upon FCO's default was, in my respectful judgment, rightly relied upon by Blair J in the *Sucden* proceedings in support of the general proposition that 'the COBS ... do not apply when the broker is liquidating the customer's account pursuant to an Event of Default ... because these rules apply when the broker is executing its customer's orders, which is not the case in a liquidation' (para. 53 of the *Sucden* judgment).
>
> 90. Such an approach is consistent with general market understanding, which is described by Dr Fitzgerald as follows:
>
> '[The] general market understanding [is] that best execution and best interests obligations do not apply in a situation where a broker is liquidating positions on behalf of a client who is in a state of default'

'... Moreover, in my view, the requirements of best execution and bests interests would cease to apply if the client is deemed to be in default, when I believe the broker would have a wide discretion in limiting and closing down the set of positions, which could now constitute a direct risk exposure for the broker itself.'

91. Moreover, as I held in the *Man* proceedings, the application of COBS 2.1.1 (where there is no issue as to the honesty, fairness and professionalism of the broker, but a question as to whether he has acted in the client's best interests) is a difficult one:

[and he quoted paragraph 76 already cited above]

92. I conclude that the correct approach has to be that the only relevant standard applicable to Marex's close out of FCO's positions was that resulting from clause 15.1 of the Terms of Business (or clause 17.1 of the New Terms of Business), namely, that Marex would not be liable to FCO save in respect of losses 'arising directly from [Marex's] gross negligence, wilful default or fraud'. Since there is no suggestion by FCO that there was any wilful default or fraud on the part of Marex, the relevant question is whether Marex conducted the close out with 'gross negligence'.

93. Quite what the epithet 'gross' adds is not at all clear. For the moment it is sufficient to consider Marex whether has made out its case that it conducted the close out in a professional and competent manner. For this purpose, it is important to bear in mind that a broker's liquidation or close out of its client's positions when the client is in default is an exercise in risk reduction or elimination. The broker's primary interest in that situation is (rightly) to reduce or eliminate risk since any resulting losses could end up being borne by the broker. As Dr Fitzgerald put it:

'2.6 ... It needs to be recognised that futures and options brokers are not normally in the business of taking outright risk positions, since they generally have neither the market expertise nor the level of capital required to do so. ...

2.7 It is also worth pointing out that a broker left with client positions is generally in a more risky situation than a client, such as Fluxo, who is classified as a hedging client. Such a client has the potential to delivery physical commodities against its derivatives positions, and the derivatives losses if any will be offset by profits on the physical positions. The broker by contrast

> will only have one side of the client's position, and thus end up with a purely speculative position of someone else's choosing. In my view, a reasonable broker in such circumstances would be concerned to eliminate the risks as quickly as possible.'

94. It is important to resist the temptation of hindsight when judging the reasonableness of the broker's actions. Blair J was well aware of that temptation. As he put it at para. 65 of the *Sucden* judgment:

[which Steel J then quoted]

95. Indeed the natural reaction of a broker, anxious to mitigate his exposure (and indeed the liability of his client) would be to close out the position quickly, liquidating as much as possible, as soon as possible, even if in the event the exposure was enhanced. This is precisely what Marex did. That such was the only sensible course is reinforced by the following considerations:

i) the persistent failure on the part of Mr Garcia to pay margin or give orders to buy;

ii) the extraordinary and unprecedented intervention of ICE in respect of FCO's positions;

iii) the severe impact that such intervention had had on the market on 16 January 2008;

iv) the continuing and significant upward trend in prices throughout 17 January 2008 (rising from 11.77 to 12.57 ct/lb between 6.30 a.m. and 6.30 p.m.);

v) the sheer number of brokers who held FCO's positions and were affected by the problems of unpaid margin and need to reduce positions;

vi) the uncertainty as to whether any co-ordinated way forward would be possible, failing which mass liquidation was likely to follow;

vii) the general uncertainty, speculation and panic that was rife throughout the market at that time.

96. The liquidation process was handled by the joint Heads of Agriculture at Marex. They were senior members of Marex's management with a long history of experience in the commodities markets. The proposition that people

> of that experience and calibre grossly (or even negligently) mismanaged the close out is difficult to conceive, all the more so in circumstances in which the broker's interest in risk reduction or elimination in this context would be expected to be aligned with the client's interest. I reject the allegation."

123. He accordingly concluded that Marex was not liable in negligence. Dr. Fitzgerald, whose evidence was accepted, was also a witness in all three cases.

124. It is, however, right to say that, in each of the *Fluxo-Cane* cases, the court considered the issue whether whether there had been negligence on the part of the broker, because of the apparent assumption that the exclusion clause implied the existence of a duty of care. As can be seen from the passage cited from paragraph 65 of his judgment above Blair J specifically stated in *Sucden* that there was no need for him to decide the issue as to whether a duty of care in the terms asserted existed.

125. I do not accept Mr. Shivji's argument that the approach in *Socimer* can be distinguished because of the attachment in that case of the words "in the seller's sole and absolute discretion … at such price at as it deems reasonable and appropriate" to the power to sell or retain the relevant assets on default, and their absence in the present case. In *Socimer* the relevant power under consideration was in fact a power to determine the value of the Designated Assets on the date of termination, to which no express words of discretion were attached.

126. Of course, in each case, the implication, or otherwise, of a term that a party to a contract will exercise reasonable care and/or act competently in discharging a contractual function will depend on the particular terms of the contract in question and the relevant contractual context. As I have already said, I see no basis for the implication of a term pursuant to section 13 of the Act. Likewise, I see no justification in the present case for the implication of such a term on any other grounds.

127. In *Socimer* Rix LJ, at paragraph 105 of his judgment, referred to the case of *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 as "… a useful and authoritative modern restatement of the relevant principles upon which terms may be implied and the rationale of so doing or not doing so." He quoted extensively from the judgment of the court given by Sir Thomas Bingham MR. at pages 480 to 482.

128. I see no reason why, applying those well-recognised principles, it is appropriate to imply a term into the Mandate that SEB would conduct the close out using reasonable care and to a suitably professional standard. Such a term was not necessary to give business efficacy to the contract; it was uncertain how such a duty could be defined, given that the closing broker was acting in its own interest urgently to protect its own position; it was far from clear how, given the highly volatile market, and the extremely difficult trading conditions applying in the period 10 to 14 October, where it was not possible to forecast what might happen, objective criteria could be retrospectively applied by a court to determine whether the closing broker had satisfied the relevant standard; as Blair J put it in *Sucden,* it is almost impossible to see how the court could apply "a single template by reference to which it can be said

that liquidation was, or was not, negligent". Nor would the implication of such a term be so obvious that "it goes without saying".

129. On the contrary, all the circumstances of a close out in the type of conditions that were pertaining in October 2008 and the need for a closing broker in the position of SEB to act urgently in its own interests, suggest that it would be far from obvious that any closing broker would agree to the assumption of a duty that would retrospectively subject its conduct to a minute analysis of every single trading decision, measured against every available alternative, which was effectively the exercise that was conducted at trial by Mr. Shivji on Euroption's behalf. As Mr. Toledano put it in his closing submissions, in terms of risk allocation, why would a broker providing clearing services for a modest commission per trade (and not holding itself out as an expert options trader) put itself at risk of having its trading decisions second guessed in this way when faced with an unwanted portfolio as a result of a customer default? I agree. I see no reason why the contract contained in the Mandate should be subjected to the implication of a term imposing a duty of care on the closing broker. In my judgment, the right to close out after a customer default as contained in the Mandate must afford the broker considerable discretion and be subject to limitations of good faith and rationality only.

130. For similar reasons, I reject Euroption's argument that SEB owed it a tortious duty to take reasonable care in the conduct of the close out. I can accept that, if SEB acted in the conduct of the close out in a manner that was not contractually authorised (e.g. entered into trades which were not authorised by the Mandate), then SEB might well be regarded as having assumed a responsibility in tort towards Euroption, and be subject to a duty to take reasonable care. In any event, in such a situation SEB would be liable for breach of contract, having acted in excess of its powers, and liable to compensate Euroption for any damage it suffered as a result. Whether or not SEB acted in excess of its contractual powers is one of the issues that arise for determination under Claim 2 below. However, apart from the particular situation of acting in excess of its powers, in my judgment SEB owed no duty of care to Euroption in tort.

131. Mr. Shivji relied upon the decision of the House of Lords in *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181 in support of his argument that SEB was subject to a tortious duty of care. He referred to the three tests which can be used to consider whether a duty of care arises in the context of purely economic loss, namely: (a) the assumption of responsibility test, (b) the threefold "fair, just and reasonable" test, and (c) the incremental test.

132. However, once Euroption's case on implied statutory or contractual term fails, there is in my judgment no room for the imposition of a tortious duty of care, which is more extensive than that which was provided for under the Mandate; see e.g. *Tai Hing Cotton Mill Ltd. v Liu Chong Hing Bank Ltd* [1986] A.C. 80, per Lord Scarman 107; as explained in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, Lord Goff at 186; *Downsview Nominees Ltd v First City Corporation Ltd* [1993] 1 AC 295 per Lord Templeman at 316; and *Chitty on Contracts*, 30th Edition, at paragraph 1-147. As Lord Templeman said in *Downsview*:

> "The House of Lords has warned against the danger of extending the ambit of negligence so as to supplant or

> supplement other torts, contractual obligations, statutory duties or equitable rules in relation to every kind of damage including economic loss: see *C.B.S. Songs Ltd. v Amstrad Consumer Electronics Plc* [1988] AC 1013, 1059; *Caparo Industries Plc v Dickman* [1990] 2 AC 605 and *Murphy v Brentwood District Council* [1991] 1 AC 398. … There will always be expert witnesses ready to testify with the benefit of hindsight that they would have acted differently and fared better."

133. But even on the assumption that Euroption could overcome this hurdle, and whether one approaches the question on the basis of assumption of responsibility or by reference to the question whether it would be fair, just and reasonable to impose a duty on SEB in this context, I see no justification for the imposition of a duty of care on a clearing broker closing out a client's positions under the terms of the Mandate. As Mr. Toledano submitted:

i) This was not a case where the basis of the relationship involved Euroption relying on SEB to make sensible trading decisions with care and skill. Euroption was the specialist options trader and had responsibility (in the usual course of events) for making all trading decisions.

ii) Although SEB acted voluntarily, it did so only because of the difficult position it had been put in by Euroption.

iii) It was within Euroption's power to avoid SEB taking over by complying with its obligations to make margin payments, but Euroption did not take the steps which would have allowed it to retain complete control over the trading decisions.

iv) Euroption was in the business of taking high risks for high rewards. Euroption ought to have made sure that it was in a position to manage the risks. By contrast, SEB was providing an administrative clearing service that did not involve taking such risks.

v) The parties expressly agreed that, in circumstances where Euroption failed to pay margin, SEB could act to protect itself by closing out Euroption's positions. To hold that, in doing so, SEB assumed a responsibility to Euroption, would, in effect, be to turn that agreement on its head.

vi) On Euroption's case, the result would be that Euroption could, by defaulting on its margin, place the responsibility for ensuring the careful management of its portfolio in a highly volatile market onto SEB's shoulders. This was not something that Euroption had contracted for. If Euroption had contracted for SEB to assume such responsibility, the contract would have looked very different.

vii) The imposition of a duty of care would be inconsistent with the nature of a clearing broker's right in a close-out context to take whatever steps it considers appropriate in order to protect its own interests.

134. Likewise, in relation to the incremental test, Mr. Toledano submitted that the imposition of a duty of care in the present case would involve expanding the law into a new context, namely that of a clearing broker conducting a close out. This was not an appropriate relationship for a duty of care to be imposed. Euroption also seeks to recover in respect of what would be, in the law of negligence, a new type of loss: the loss of hypothetical investment opportunities. This would involve an expansion of the law of negligence beyond the normal heads of damage (an award of interest has previously been held sufficient to compensate a claimant for being kept out of its judgment sum).

135. I found these submissions compelling. Accordingly, I reject Euroption's submission that SEB owed it a tortious duty of care.

Issue III - Claim 2: were the combination trades: (a) in breach of the Mandate as being in excess of SEB's contractual authority; and/or (b) in breach of its duty to take reasonable care or act rationally?

136. Under Claim 2 Euroption complains about two combination trades executed by SEB on 10 October 2008. These combination trades involved the purchase of put options to close part of the existing short put positions and the simultaneous sale of further out of the money call option positions. The quantum of Euroption's claim in respect of the direct losses allegedly suffered under Claim 2 was €666,700 and £1,072,224.

137. The two combination trades carried out on 10 October were:

i) the Set H trades (as described on the chart) which involved the purchase of 1,300 Eurostoxx November 2350 puts and the sale of 1,300 Eurostoxx November 2650 calls; and

ii) the Set J trades (as described on the chart) which involved the purchase of 2,083 FTSE 100 November 3600 puts and the sale of 2,083 FTSE 100 November 4600 calls;

138. Euroption's complaint relates to the call leg of the two combination trades. It alleges that there was liquidity in the put leg of both combination trades and that SEB could have closed these positions naked (i.e. without opening a new trade); but that, instead, SEB authorised TSL to use combination trades (purchase of a put and sale of a call) as part of the forced close out. TSL executed trade J (the FTSE combination trade) for SEB and, as Euroption admits, following instruction from Mr. Scattolon, executed trade H (the Eurostoxx combination trade). Euroption complains that SEB took both trades without demur and made no effort to close the call leg of either trade; and that consequently, when the market rallied on 13 October further losses were sustained. Euroption contends that there was no authority in clause 11 (or anywhere else in the contract) to open new positions in the forced liquidation and that, even if there was such authority, the trades were a breach of SEB's duties of reasonable care and skill.

139. I should mention that, at the post-judgment hearing, Mr. Shivji sought to persuade me, by reference to his opening and closing submissions, that Euroption had not sought to argue that such trades were in breach of the alleged duty to take reasonable care or act rationally. If that was the case, I had certainly been under the impression, from

Mr. Shivji's cross-examination of Dr. Fitzgerald and Mr. Martin, and paragraph 13.1 of the Particulars of Claim, that such an allegation was indeed being made. Mr. Toledano informed me that he was likewise under such an impression. For that reason, I have addressed the point in this judgment.

140. In relation to this issue I had assistance from the two experts, Mr. Beagles and Dr. Fitzgerald. Both experts had considerable experience in the trading of derivatives, including equity index futures and options, in risk management, of execution and clearing arrangements on futures and options exchanges and of the process of liquidating complex derivatives positions. Likewise they both had extensive experience of the relevant markets. Both experts did their best to assist the court in giving their evidence. Where they differed, I tended to prefer the evidence of Dr. Fitzgerald, who was less dogmatic and technical than Mr. Beagles, and who adopted what appeared to me to be a more market-orientated and realistic approach to the issue of close out in highly difficult and volatile market conditions. On occasions Mr. Beagles had a tendency to be over-partisan.

141. Although Mr. Beagles in his expert report referred to the call trades in the combinations as "entirely new option positions", I regard this as an unhelpful description since, as Dr. Fitzgerald explains, the call trades were mapped entirely into the put option purchases.

142. Both experts agreed in their reports that a combination trade was indeed a recognised means of closing out an open position, although Mr. Beagles considered that other alternative strategies should be exhausted first before deciding to do a combination trade. However in cross-examination he agreed that he was not suggesting that there was a fixed and inflexible hierarchy that had to be adhered to in every situation. He took the view that it was reasonable for a clearing member closing out to explore the best choices first before using combination trades. Dr. Fitzgerald's evidence, which I accept, is that there are a wide variety of strategies and timings that a clearing member in the position of SEB could adopt in liquidating or closing out a client's position on a forced basis. Such strategies might involve hedging the continuing exposures with futures or combination trades or, where it was not possible to close out all positions, by retaining an unhedged position. Necessarily what was appropriate for the particular clearing member in any situation was heavily fact-dependent.

143. Dr. Fitzgerald characterised close-out trades in three categories: Category 1 was the simplest; such trades would involve the immediate closing out of customer positions by transacting equal and opposite transactions in the same contract; Category 2 trades would be those in closely related contracts which eliminated or almost eliminated the risks of existing positions; by way of example he gave a trader closing out the risk of a short FTSE 100 put with a strike of 6000 by buying another FTSE 100 put with a strike of 6025; Category 3 trades were those which might not be specifically related to the set of positions originally existing in the customer's account, but where the effect of introducing the new trades into the book was to reduce significantly the price or volatility risks of the overall position. Dr. Fitzgerald regarded the use of such trades, if the clearing member determined in good faith that this was the best and most timely way of bringing the overall risk under control, as a normal and reasonable business practice. In their joint report both experts agreed that the combination trades entered into on 10 October fell within Dr. Fitzgerald's Category 3.

144. In my judgment, Clause 11 of the Mandate, which gave SEB power "to close out" Euroption's open contracts, permitted SEB to do so in a manner which both experts agreed was a recognised market method of closing out an open position as part of a forced liquidation process. As Mr. Toledano submitted, it would be surprising if the Mandate did not cover a recognised means of closing out trades, in circumstances where clause 11 was clearly designed to protect the interests of the broker and to give the broker a degree of flexibility. There is nothing in the clause, or indeed in the Mandate itself, which would indicate any limitation excluding new trades. As Dr. Fitzgerald's three categories indicate, even in the simplest type of close out trade, Category 1, a new trade is written. Accordingly, I conclude that, as a matter of interpretation of the Mandate, SEB had power to execute combination trades of the kind in question. It is not necessary to imply a term into the contract, since all the court is doing is determining the meaning of the words "close out" in their relevant context, assisted by expert evidence as to the market understanding of the term.

145. But even if I were wrong in this conclusion, the evidence showed that Mr. Scattolon gave the instructions for one of the combination trades and expressly authorised/ratified the other.

146. Thus in relation to Set H, the trades involved the buy back of 4,000 Eurostoxx 2350 November puts. 2,700 were bought back naked and 1,300 were bought back in combination with the sale of 1,300 November Eurostoxx 2650 calls. At 11:03 on 10 October, Mr. Scattolon wrote to TSL by Skype, "please work a combo for the esx [i.e. Eurostoxx]". Mr. Trimming or TSL replied at 11:17 "We have already bought 2700 of the ESX total today". Mr. Scattolon asked, "2700 lots on which average?" and Mr. Trimming replied "199". Since 2,700 puts had already been closed naked, there remained a further 1,300 which needed to be closed. Mr. Scattolon then gave a specific instruction, "please work some combos for the 1,300 esx lots". Mr. Trimming responded at 11:23, "I will try" to which Mr. Scattolon replied, "thank you". At 11:41, Mr. Neild reported back to Mr. Scattolon, "Eurostks combo filled 1,300 times". Moreover, Mr. Scattolon agreed in cross-examination that he had indeed given the trading instruction for this combination trade. At 13:00 that day, Mr. Caldon provided Mr. Martin with an update on the status of the close out, and informed him for the first time that this combination trade had been carried out as part of the close out of the 4,000 Eurostoxx 2350 puts.

147. Likewise in relation to Set J, the trades involved the buy back of 6,483 November FTSE 3600 puts. 4,400 of these were closed out naked and 2,083 were closed out in combination with the sale of 2,083 November FTSE 4600 calls. At 09:58, Mr. Caldon explained to Mr. Martin that TSL was having trouble closing the 3600 puts due to the size of the position and the fact that the market was dropping by 10 points every time they tried to bid for those positions. Mr. Caldon said that they could "combo" those positions "… into a 4700 Call or something and still pay about 50" but that the market was otherwise quiet. Mr. Caldon said that if they just tried to close the whole position then it could push the price too far. Mr. Martin approved the buy back of half of the 3600 puts in combination but added, "… then we'd best start working at buying those Calls back". In his witness statement Mr. Martin said that, in his view, Mr. Caldon had made it clear that there was no market for a naked purchase of those puts at an acceptable price. In his oral evidence, Mr. Martin acknowledged that he authorised the FTSE combination trades. He also acknowledged that every position

could be closed at a price but he was not prepared to spend any kind of money just to get out of a position. He also accepted that he didn't consider prior to authorising the combination trade whether it was possible to buy back a FTSE put at a similar but not identical strike price.

148. At around 10:30, 502 of the 3600 puts were bought back and 400 of the 4600 calls were sold but there was then a break in TSL's trading of this position until 11:35. During that one hour window (with only 400 of the 4600 calls sold), Mr. Trimming spoke to Mr. Scattolon about this trade. At 10:40, Mr. Scattolon asked for an update and Mr. Trimming told him:

> "We're covering 37 Puts, we are trying to work a combo on the 36 Puts against 46 Calls, and covering the rest of the ESX. The market is so thin it is very very difficult."

Mr. Scattolon replied, "thank you please work all the combos you can". Mr. Scattolon confirmed in cross-examination that he wanted a combination trade to be done in relation to the 3600 puts and the 4600 calls. A further 1,683 lots were then sold with Mr. Scattolon's express authorisation.

149. In the circumstances, I hold that it was not open to Euroption to complain that SEB executed the trades without authority or in excess of the powers which it had to close out under the Mandate.

150. It follows from this conclusion that Euroption cannot contend that the combination trades imposed a tortious duty of care on SEB on the grounds that, to use Mr. Shivji's words, SEB had "strayed outside the territory of clause 11 of the contract".

151. It was also difficult to see how in the circumstances Euroption could complain that, even on the assumption that such trades were contractually permitted under clause 11, such a strategy was in breach of SEB's duty of care (if, contrary to my conclusion under Issue II above, one existed), or was in breach of SEB's duty not to act irrationally. As formulated in Mr. Shivji's closing submissions, the complaint appeared to be that Mr. Scattolon:

> "… was in the dark about precisely what was going on at the time (SEB not having given notice to Euroption of the close out) and was interested (unlike SEB) in rolling out the strike prices so that the portfolio could survive the period of volatility"

and therefore could not be said to have authorised the trades or waived any breach of duty on SEB's part; and that Mr. Martin was negligent/irrational in accepting these trades without demur in circumstances where the combination trades "substantially increased the exposure of the portfolio to upward movements in the market"; see Particulars of Claim, paragraph 13.1.

152. On the facts, as I find them, I reject Euroption's claim under this head (if, indeed, any such claim was made) that such a strategy was negligent or in breach of SEB's duty of care (if one existed), or was in breach of SEB's duty not to act irrationally. First of all, as I have already found, Mr. Scattolon was aware on 10 October that SEB was

conducting a close out. Second, even on the assumption that SEB had a duty of care in relation to the close out, as opposed to merely a duty not to act irrationally, I am satisfied that the execution of these combination trades was neither negligent nor irrational.

153. First of all I cannot accept the assertion that the combination trades "substantially increased the exposure of the portfolio to upward movements in the market". As the expert and non-expert evidence showed, as at 10 October, Euroption and SEB remained excessively exposed to downward movements in the market, and SEB's aim was to reduce this risk. Dr. Fitzgerald's opinion (which I accept) was that it was completely reasonable for a clearing member in the position of SEB to accept a modest increase in upside risk to achieve a much more substantial reduction in downside risk (which is exactly what this trade achieved). The combined effect of the combination trades was a reduction in downside risk of €12,281,138 and an increase in upside risk of €1,485,394. In Dr. Fitzgerald's opinion, any clearing member in the position of SEB, bearing in mind the then market circumstances and with a weekend ahead, would have regarded that risk impact as "highly satisfactory".

154. However SEB did not simply ignore the upside risk presented by the new short call positions. In his call with Mr. Caldon at 10:12 on 10 October, Mr. Martin stated that "... we'd best start working at buying those Calls back". At 11:14, Mr. Martin said to Mr. Caldon that:

> "… I've now got to get rid of those 46 … I've now got to get rid of 4600 calls as well. Look I don't want any risk on this … account over the weekend."

Mr. Martin therefore made it absolutely clear that he wished to exit these new calls (and indeed all remaining positions) as soon as possible.

155. In his report, Mr. Beagles criticised SEB's decision to allow TSL to carry out the combination trades on the ground that, even when faced with an absence of liquidity, it should have exhausted all of the alternative strategies before resorting to such a method. Mr. Beagles asserted that, "… it is surely the case that simply shifting risk in this way is less desirable than removing or mitigating risk by an alternative method." Such alternatives included, he states, "… selling the position as a whole to another bank, closing out the open positions expeditiously, delta hedging with relevant futures etc…". Thus Euroption's case appeared to be that in failing to take these steps, SEB was in breach of duty.

156. In his report, Dr. Fitzgerald explained that it was not a question of exhausting other strategies: there was no strict and inflexible hierarchy of options. It was a question of SEB doing the trades that were available at the time and that were advantageous from a risk reduction point of view. If there was inadequate liquidity at sensible prices to close the position naked, it was to be expected that the positions would be closed in whatever manner could be achieved in the prevailing market conditions.

157. In cross-examination, in relation to Set J, Mr. Beagles said he had no reason not to take at face value what Mr. Caldon told Mr. Martin about the market for the 3600 puts, at the time when he suggested the FTSE combination trade; in other words the absence of liquidity. Mr. Beagles did not suggest that SEB, as a reasonable clearing

member, should not have taken into account what Mr. Caldon was saying. Indeed Mr. Beagles said that he thought liquidity was "a very real consideration". Mr. Beagles also said that the impact of liquidity on price was a consideration to be taken into account, inasmuch as it was sensible not to do too much at one time and to try only to do what the market could stand (because otherwise one was in danger of moving the price). Mr. Beagles also accepted that, if it was possible to buy back the 3600 puts as part of a combination trade at a significantly better price than could be obtained if one was doing the trade naked, that might be one factor that one would take into account when deciding what to do in the close out. Mr. Beagles commented that his theory was that it would be highly unlikely that the price would be significantly better, but conceded that this was not based on any concrete evidence from trading on 10 October. He accepted that, taking it at face value, TSL was clearly indicating to SEB that there might well be an advantage in doing the trade as a combination trade.

158. In cross-examination, Mr. Beagles also repeated his view that other alternatives should be exhausted before a broker decides to do a combination trade. The focus seemed to be on so called Category 2 trades (i.e. options with a strike price similar to the option in the portfolio). While Mr. Beagles referred to a hierarchy of options, he said that he was not suggesting that there was a fixed and inflexible hierarchy that everyone has to adhere to in a fixed and inflexible way.

159. According to Dr. Fitzgerald, there was no "sequential order of preference". As Mr. Toledano submitted, Dr. Fitzgerald's evidence on this point reflects the entitlement of a clearing member to give priority to its own interests in the course of a close out and the flexibility afforded to such a clearing member to determine how those interests are best served.

160. Mr. Beagles also accepted that the combination trades were beneficial so far as the directional risk exposure on 10 October was concerned. Although he attempted to qualify this by adding "but to a limited extent", he said that he accepted Dr. Fitzgerald's conclusion that the FTSE combination trade resulted in a very substantial reduction in the positive delta of the order of €64m and a reduction in the negative gamma of around €600,000.

161. Dr. Fitzgerald said that he might have been "quite tempted by the combination trade" because of its impact on the portfolio's long delta. The trades "knocked out" a significant amount of downside risk at the price of putting on a small amount of upside risk. He also accepted that "potentially" an even more preferable approach would have been to execute the combination trade, buy back the call and sell futures equivalent to the delta of the call.

162. In my judgment, Euroption has failed to demonstrate any grounds to support its claim under this head that SEB was negligent or irrational in executing the combination trades as part of the close out. If and to the extent that Mr. Beagles was suggesting that a clearing member must adhere in some way to his hierarchy of preferred trades, in order to be considered to be acting reasonably, I reject that evidence. I find the evidence of Dr. Fitzgerald far more realistic. A clearing member conducting a close out in its own interests in circumstances such as those prevailing on 10 October was under no obligation to consider every possible alternative trade at every moment on that day. The fact that it might have been possible to structure a group of trades

which included options and futures, which might have been even more beneficial from a risk reduction perspective than the trades that were done, did not mean that the trades which were done did not themselves have very substantial benefits or that it was anything other than reasonable to execute such trades.

163. I accept Dr. Fitzgerald's evidence that a clearing member in the position of SEB must, for practical reasons, have a good deal of flexibility in carrying out the close out process, choosing the sequence of trades in order to achieve it and deciding on the timing of those trades. I accept Dr. Fitzgerald's view that a clearing member must have the unquestioned right to carry out its own assessment of the risks of the client's positions and choose that order and timing of trades which it deems most effective in reducing those risks, in the light of market conditions and liquidity. Indeed such an approach is supported by the authorities to which I refer below

164. In the present case, the combination trades were reported by TSL and accepted by SEB for perfectly good reasons, which were supported by the expert evidence. Indeed it was not put to Mr. Martin in cross-examination that he could or should have executed an alternative trade instead of the FTSE combination trades (Set J). Nor was it clear from the evidence whether any of Euroption's hypothetical alternatives could have been executed on 10 October or that, if executed, they would have improved Euroption's position given, for example, the cost of such alternative trades and the need to unwind them in due course.

165. Accordingly, I reject Euroption's Claim 2 on the facts, even if I were wrong in my conclusion that as a matter of law and in the circumstances no contractual or tortious duty of care existed.

Issue IV: Claim 3: Was SEB in breach of any duty of care and/or to act rationally by virtue of delay in closing out certain short calls?

166. Euroption's complaint under this head is that, on the assumption that the close out began on 10 October, SEB delayed in the buying back of certain short call positions. Specifically Euroption complains that

i) 200 November 2650 Eurostoxx calls were not closed out (i.e. bought back) until the afternoon of 13 October, even though the rest of the position (1100 lots) had been closed out early on 13 October;

ii) 1,760 October 3800 CAC40 calls were not closed out (i.e. bought back) until 13 October, when they should have been closed out on 10 October;

iii) 2,000 November 4200 CAC40 calls were not closed out (i.e. bought back) until 13 October, when they should have been closed out on 10 October;

iv) 2,725 October 4800 FTSE 100 calls, 2,200 October 4900 FTSE 100 calls and 11,000 October 5200 FTSE 100 calls were not closed out (i.e. bought back) until 14 October 2008, when they should have been closed out on 10 October.

167. Euroption contends that these call positions ("the Claim 3 calls") could, and should, have been closed at an earlier stage; that the markets were continuing to fall on 10 October; and that removing the portfolio's upside risk would have been prudent and

could have been effected with significant costs savings in a falling market. In its reply Euroption criticised SEB for having "overlooked the short call positions" on 10 October. Euroption contended that the delay in closing the Claim 3 calls amounted to a breach of SEB's duty of care and its duty to act rationally. As already mentioned, the quantum of Euroption's claim for direct losses under Claim 3 was:

€261,757	**£186,947**

168. I received a meticulous and micro analysis of the strategy which Euroption contended that SEB should have adopted in relation to closing out the Claim 3 calls, both from Mr. Beagles and from Mr. Shivji in his closing submissions. Added to Euroption's complaints about the actual strategy, were allegations that:

i) Mr. Martin was a wholly unsuitable person to conduct or supervise the close out because, in particular, he did not have an advanced understanding of "the Greeks";

ii) SEB failed adequately to consider and discuss the possibility of selling the entire portfolio to a single market maker or equity prop (i.e. proprietary) desk;

iii) if closing trades naked was not possible, SEB ought to have given more consideration to the possibility of delta hedging the portfolio by selling futures;

iv) in the event of it not having been possible to close options naked, SEB ought to have sought to carry out "Category 2" trades so as to create put and call spreads;

v) SEB should not have used or relied upon TSL as the execution broker for the close out.

169. The detail with which Euroption conducted this retrospective analysis demonstrated the difficulties which a court faces if indeed it is required to conduct its own objective assessment of a close out by reference to so-called objective criteria. Indeed Mr. Shivji effectively invited the court, by reference to suggested alternate trading strategies and asseOted market considerations, to re-run the entire close out from 10 to 13 October. Euroption's case relied upon a forensic comparison between various trading options which ignored the practical reality of close-out trading. As Dr. Fitzgerald said in cross-examination:

> "I think these close-outs, actually, if I can just make a general point, are not done in this kind of scientific modelling way that you're trying to imply. I think the main point is, as I've said, to get rid of positions quickly."

170. On the basis of Mr. Martin's, Mr. Scattolon's and Mr. Westring's evidence and the expert evidence which I received from both Mr. Beagles and Dr. Fitzgerald, I am satisfied that even if, contrary to my conclusion, SEB was subject to a duty to take reasonable care, Euroption's complaints that SEB was in breach of that duty or in breach of its duties of rationality were unfounded. As Mr. Toledano, based upon Dr. Fitzgerald's evidence, submitted, it is important to step back from the minutiae of

alternative trading decisions that Euroption put forward as the basis of its case. There are always likely to be matters that the trader could look back on and say that a different strategy could have been adopted. Dr. Fitzgerald rightly referred to the fact that there are an "… infinite variety of [ways of] closing out a given set of positions". The decisions have to be taken quickly against the background of a client default and in difficult market conditions. Thus, the issue for the Court is not the relative strengths and weaknesses of another strategy compared with the strategy in fact adopted but whether the decisions actually taken were within the bounds of reasonableness and flexibility that brokers put in this position have.

171. The relevant facts were that, as a result of Euroption's failure to pay margin in breach of contract, and as a result of Euroption's trading strategy, which continued up to and including 9 October, SEB found itself having to close a massive portfolio of options on a day of unparalleled volatility and huge downward movements in world markets. Despite the extraordinary conditions, SEB managed to carry out on 10 October a series of closing trades on Euroption's account which Mr. Beagles accepted achieved a very substantial reduction in market risks on the portfolio.

172. Once the close out began on 10 October, all but two of the put positions were closed on that day. The two that were left were the 3300 and 3400 November puts. Mr. Beagles accepted that if those two positions had been bought back sooner, Euroption would actually have been worse off, not better off, because of the market rally over the weekend. Mr. Beagles accepted that, if there was to be some criticism about the fact that these particular puts were not closed on 10 October but were closed on 13 October, then that delay would actually have benefited Euroption as opposed to causing a loss. Not surprisingly, in its closing submissions Euroption made no complaint about this delay.

173. SEB decided that it would concentrate first on removing downside risk in the portfolio. Having considered a range of other possible approaches for removing delta, Mr. Martin determined that the only viable option available to SEB was to buy back naked as many of Euroption's short put positions as possible. SEB chose to start by closing, in an orderly manner, those puts that were closest to expiry and those with the strike price closest to the market price (or "nearest to the money"), as these produced the highest delta. Both experts agreed that this was a reasonable approach to take. Mr. Beagles accepted that it was reasonable for SEB, on 10 October, to focus first on the puts because they were presenting the greatest risk to the portfolio, until the directional exposure switched to the upside. He also agreed that, looking at the risks from an overall portfolio basis (which Mr. Beagles accepted was not unreasonable), the risk did not switch to the upside until the morning of 13 October. I conclude therefore that it was reasonable for SEB not to commence the close out of the calls until 13 October, by which time SEB was focusing on closing out the remaining puts as well as the calls.

174. Mr. Beagles' only real criticism of SEB's conduct of the close out in relation to the alternative case, was that it "… failed to focus on the calls when the directional risk changed". Mr. Beagles repeated this in cross-examination, going so far as to say that "… the evidence suggests to me that SEB ignored the upside risk. They weren't trying to close the out of the money calls". However, this is difficult to accept since the directional risk on the Euroption portfolio did not switch to the upside until sometime during the course of trading on 13 October. Dr. Fitzgerald's opinion was

that the portfolio remained heavily exposed to the downside at the close of trading on 10 October and that the short call positions that remained open offered protection in the event of a further fall in the markets. Mr. Scattolon also agreed that the directional exposure of the portfolio shifted to the upside at some time early on 13 October. It was certainly a reasonable view for SEB to take that it was not until 13 October that it became sensible to close any of the short call positions, and that, had any of the short call positions been closed on 10 October, the closure would have added to the long delta of the portfolio and therefore increased the imbalance in the directional exposure. Indeed Mr. Beagles accepted that if one knew that the risk had not yet switched to the upside at close of business on 10 October, it was reasonable not to be seeking to buy back the calls on the afternoon of the 10 October.

175. Mr. Martin said that the portfolio had become short delta at some time on Monday 13 October but that he had not known the exact time when it did so. Whether or not he knew the precise moment of the change in directional exposure is beside the point, since he began closing out the calls on the morning of 13 October as the delta switched.

176. There was real difficulty in Euroption's claim, since the first step in its analysis required all of the puts to have been closed on 10 October instead of partly on 10 October and partly (as regards the 3300 November FTSE puts and the remaining 3400 November FTSE puts) on 13 October. But the closure of the outstanding puts on 13 October actually benefited Euroption because of the market rally over the weekend. Had these puts been closed out on 10 October, the additional loss to Euroption would have more than wiped out any benefit to Euroption from the closure of some or all of the calls on 10 October. But Euroption's approach effectively required the court to cherry pick those trades which were disadvantageous to Euroption and exclude from consideration those which were advantageous. This seemed to me to be a flawed approach to a critique of SEB's strategy.

177. Moreover, on the evidence the two likely explanations for any alleged delay in closing out calls between 10 October and 13 October were the absence of liquidity in the market and Mr. Scattolon's own conduct. Thus the evidence demonstrated that there was a general lack of liquidity and real concerns about downward pressure on the indices as a result of the large positions which SEB was having to trade out of. The other factor which might have caused delay was Mr. Scattolon's persistent attempts to have TSL slow down the close out as the contemporaneous communications demonstrated.

178. Accordingly, I cannot accept that Euroption has demonstrated any breach of duty to take reasonable care (on the assumption that such a duty existed), let alone any breach of its duty to act rationally, in relation to the delay in closing out the calls between 10 and 13 October.

179. Euroption had a different complaint in relation to the close out of the final 200 Eurostoxx 2650 calls on the afternoon of 13 October. This position was opened on 10 October on the instructions of Mr. Scattolon (the "Eurostoxx combination trade" or Set H). The bulk of the position was closed out on the morning of 13 October and Mr. Martin was wrongly notified by TSL that everything had been closed, when in fact 200 positions remained open. Mr. Martin did not realise at the time that 200

positions had only been closed later that day and Euroption did not raise the matter at the time either.

180. It was unclear on the evidence why the 200 call options were left to the afternoon of 13 October and only closed out then. Euroption's case appeared to be that it was a mistake by TSL for which SEB should be held accountable. Although the delay may have been TSL's fault, there may well have been another explanation. In any event, the Eurostoxx combination trade had been opened by Euroption on 10 October during the course of the close out after Mr. Scattolon knew the close out was taking place.

181. In the circumstances I see no reason why SEB should be liable for the financial consequences of the trade having been closed out on the afternoon of the 13 October rather than in the morning. Given the pressures operating on Mr. Martin to conduct and complete the close out not only of Euroption's portfolio, but also those of SEB's other clients, it was perhaps not surprising that one set of trades was overlooked – if indeed that was the case rather than an absence of liquidity or something similar, which prevented the close out of the 200 calls being concluded earlier in the morning of the 13 October. Euroption has not established that the failure to do so was negligent, let alone that it demonstrated a breach of SEB's duties of rationality.

182. I should, for the sake of completeness, add that the evidence did not establish any supportable basis for Euroption's additional complaints as itemised in paragraph 167 above. Mr. Westring and Dr. Fitzgerald gave convincing evidence as to Mr. Martin's suitability to conduct or supervise the close out. There was nothing in the complaint that, because he did not have an advanced understanding of "the Greeks" he was unable to do the job of closing out the portfolio. Not only did he have an understanding of the relevant concepts based on his experience over the course of a long career in SEB Futures, but, as was indeed obvious, he recognised that the portfolio was long delta and short volatility at the time when the close out began on 10 October. His decision-making process did not require detailed modelling of the portfolio risk, given its massive over exposure to increases in volatility in the market. As Mr. Westring pointed out, the risk profile of the portfolio "was readily apparent to the naked eye". Mr. Martin had appropriate systems and methodologies available to him and was able to provide adequate information to the members of SEB's management to whom he was reporting. The evidence also showed that Mr. Martin did indeed consider and discuss the possibility of selling the entire portfolio but decided not to do so. He also said that SEB considered the possibility of delta hedging the portfolio by selling futures, but that that course was discounted for various reasons. Dr. Fitzgerald gave evidence (which I accept) that, in all the circumstances then prevailing, the decision whether to delta hedge was not clear-cut, and that although he might well have done so, it was not unreasonable for a clearing member to take a different view. Likewise Dr. Fitzgerald expressed the view (in relation to Euroption's allegation that SEB ought to have sought to carry out "Category 2" trades so as to create put and call spreads, if it was not possible to close options naked), that, although this was one of the routes that a competent bank might follow, it was not necessarily a preferable course to selling calls. Although Mr. Beagles criticised the appointment of TSL as execution broker, even he accepted that its appointment was within the degree of flexibility that was accorded to a clearer in the course of undertaking a close out. Dr. Fitzgerald believed that the choice of TSL as executing broker was reasonable notwithstanding it had previously acted as

Euroption's executing broker, and not in conflict with market practice. Moreover, it was not suggested that any of these particular complaints was directly causative of any particular loss. In my judgment, there was no foundation to any of these criticisms. They were decisions that were well within the discretion of a clearing member closing out a client's position after default in the provision of margin. They could not be characterised as either negligent or irrational.

183. Accordingly, I reject Euroption's Claim 3.

Issue V: What is the quantum of Euroption's direct claim for damages under Claims 2 and 3?

184. In the circumstances quantum and causation issues do not arise for consideration, since I have rejected Euroption's claims 1, 2 and 3.

185. However, even if I were wrong in this determination, on the basis of Dr. Fitzgerald's evidence, I am not satisfied that Euroption has established that it did indeed suffer any loss in relation to Claim 2 - the combination trades. Euroption's claim in respect of the straight losses on the two call positions which were opened as part of the two combination trades on 10 October, does not take into account what the downside risk of Euroption's book would have been at the close of business on 10 October had either or both of the combinations not been carried out.

186. As set out at paragraphs 3.17 - 3.20 of Dr. Fitzgerald's first report, the combination trades had a favourable impact on the risk profile of Euroption's book, reducing downside risk by €12,281,138 at the expense of increasing upside risk by €1,485,394. I accept his view that, accordingly, it was not appropriate to consider the call positions within the combination trades in isolation, and that they had to be considered in the context of the impact of the closure of the puts on the downside risk of Euroption's portfolio. Dr. Fitzgerald expressed the view in paragraphs 4.33 and 4.34 of his report that there was no ready way to modify the directly calculable losses on the closure of the calls to account (or give credit) for the risk effects of closing the puts. I accept Mr. Toledano's submission that, in the circumstances, Euroption has not established a quantifiable loss arising out of the combination trades. Looked at in their context, the combination trades produced an advantageous impact for Euroption at the time that they were executed. The fact that the calls were subsequently bought back for a higher price than they were sold does not produce a recoverable loss.

187. As for Euroption's suggested alternatives to combination trades, there was no evidence before the Court that these would have produced a better result than the trades that were actually executed. By way of example, if SEB had executed the combination trades and then bought back the calls and replaced them with an equivalent short futures position (as suggested to Dr. Fitzgerald in cross-examination), then the short futures positions would have had to be bought back at some point. Had it been bought back on 13 October after the market rally, it is likely to have produced a loss. Whether this loss would have been more or less than the loss sustained by the calls was not established by Euroption.

188. In relation to Euroption's Claim 3 (the alleged delayed close out of the Claim 3 calls), I likewise find that Euroption has not established the quantum of its claim for direct losses. In formulating this claim, Euroption "cherry-picked" a sub-set of six of the

positions that were still open at the close of business on 10 October 2008. In particular (and as accepted by Mr. Beagles), Euroption's claim excluded the 15,421 November 3300 FTSE 100 puts and the 2,200 November 3400 FTSE 100 puts, which were two positions that were also not closed on 10 October; they were in fact closed on 13 October.

189. Dr. Fitzgerald's evidence is that the "delayed" closing of the 15,421 November FTSE 3300 puts from 10 to 13 October 2008 resulted in a better price being achieved for the closure of those puts than the mid-price that was available for a closure taking place on 10 October 2008 (see Dr. Fitzgerald's first report, paragraph 4.38). The price difference in relation to the November FTSE 3300 puts resulted in a saving of £1,526,679 or €1,925,295.

190. Mr. Beagles accepted that there was a gain of nearly €2 million to Euroption as a result of the November FTSE 3300 puts not being closed until 13 October, compared to what would have happened had they been closed on 10 October. Mr. Beagles also accepted that, if the gist of Euroption's alternative claim is that the closure of certain positions was delayed until 13 - 14 October, when closure should have occurred on 10 October, it would be right and proper for Euroption to include in its calculation all of the positions that were still open at the close of business on 10 October, rather than rely on a sub-set of them. If Euroption's analysis for its alternative claim should have included the November 3300 FTSE 100 puts and the November 3400 FTSE 100 puts, the more favourable prices that were (in fact) achieved through closure on 13 October would eliminate the losses that Euroption complained of under its claim. Accordingly, in my judgment, Euroption has not established that it suffered any loss in respect of Claim 3.

Issue VI: does Euroption have any claim for loss of investment opportunity damages?

191. Euroption also sought to recover damages for profits that it says it would have made had the fund not been depleted as a result of SEB's alleged breach of contract or negligence. In the light of my rejection of Euroption's claims 1, 2 and 3, this issue does not arise for determination. All I need say, in the circumstances, is that from both a factual and a legal viewpoint, I regarded this claim for damages for pure economic loss with considerable scepticism.

Disposition

192. Accordingly, I dismiss Euroption's claim.

193. I am very grateful to leading and junior counsel and the respective firms of solicitors for the considerable assistance which I have received from both sides' written and oral submissions.

【法宝引证码】CLI.C.367770

范有孚与银建期货经纪有限责任公司天津营业部期货交易合同纠纷再审案

案由： 民事> 与公司、证券、保险、票据等有关的民事纠纷> 其他与公司、证券、保险、票据等有关的民事纠纷

案 号：(2010)民提字第 111 号

审理法官： 贾纬 沙玲 周伦军

文书类型： 判决书

公开类型： 文书公开

审理法院： 最高人民法院

审结日期：2010.12.24

案件类型： 民事再审

审理程序： 再审

权责关键词： 撤销 委托代理 合同 过错 无过错 合同约定 证明 诉讼请求 申请再审 审判监督 执行

来源：《最高人民法院公报》 2011 年第 6 期(总第 176 期)

裁判规则

关键词：期货交易,强行平仓

核心问题：1.在期货交易纠纷中，期货公司在何种情况下可以强行平仓？

裁判要点：《期货交易管理条例》第三十八条第二款规定，客户保证金不足时，应当及时追加保证金或者自行平仓。客户未在期货公司规定的时间内及时追加保证金或者自行平仓的，期货公司应当将该客户的合约强行平仓，强行平仓的有关费用和发生的损失由该客户承担。最高人民法院《关于审理期货纠纷案件若干问题的规定》第三十六条第二款亦规定，客户的交易保证金不足，又未能按期货经纪合同约定的时间追加保证金的，按期货经纪合同的约定处理；约定不明确的，期货公司有权就其未平仓的期货合约强行平仓，强行平仓造成的损失，由客户承担。由该两条规定可知，期货公司强行平仓时应符合以下条件：一是客户保证金不足，二是客

户没有按照要求及时追加保证金，三是客户没有及时自行平仓。只有满足了上述三个法定条件，期货公司才有权强行平仓。（北大法宝编写）

范有孚与银建期货经纪有限责任公司天津营业部期货交易合同纠纷再审案

[裁判摘要]

根据《期货交易管理条例》第三十八条第二款的规定，期货公司采取强行平仓措施必须具备三个前提条件：一是客户保证金不足；二是客户没有按照要求及时追加保证金；三是客户没有及时自行平仓。期货公司违反上述规定和合同约定强行平仓，导致客户遭受损害的，应依法承担相应的责任。

最高人民法院

民事判决书

(2010)民提字第 111 号

申请再审人(一审被告，二审上诉人)：银建期货经纪有限责任公司天津营业部。住所地：天津市和平区新华路 314 号。

负责人：韩兵，该公司经理。

委托代理人：于学会，北京市众天律师事务所律师。

委托代理人：詹敏，北京市中咨律师事务所律师。

被申请人(一审原告，二审上诉人)：范有孚，男，1960 年 7 月 15 日出生，汉族，无职业，住天津市东丽区华明镇范庄村十九区新兴大街西 3 条 15 号。

委托代理人：李玲，北京市汉韬律师事务所律师。

委托代理人：申利，北京市汉韬律师事务所律师。

申请再审人银建期货经纪有限责任公司天津营业部(以下简称天津营业部)为与范有孚期货交易合同纠纷一案，不服天津市高级人民法院(2009)津高民二终字第 0028 号民事判决，向本院申请再审。本院以(2010)民申字第 147 号民事裁定提审本案并依法组成由审判员贾纬担任审判长，代理审判员沙玲、周伦军参加的合议庭进行了审理，书记员赵穗军担任记录。本案现已审理终结。

2008 年 4 月 7 日，范有孚向天津市第一中级人民法院提起诉讼称，根据合同约定和《期货交易管理条例》规定，天津营业部强行平仓损害了其权益，请求判令天津营业部赔偿其损失 9 027 085．66 元并承担诉讼费用。

天津市第一中级人民法院一审查明： 2007 年 3 月 5 日，范有孚与天津营业部签订期货经纪合同及其补充 1、2 配套协议，委托天津营业部按照交易指令为范有孚进行期货交易。该合同第六条约定：“天津营业部有权根据期货交易所的规定或者按照市场情况随时自行通知保证金比例。天津营业部调整保证金、以天津营业部发出的调整保证金公告或者调整为准。”第七条约定：“天津营业部有权根据自己的判断，随时对范有孚单独提高保证金比例。在此种情形下，提高保证金通知单独对范有孚发出。”第八条约定：“范有孚在下达新的交易指令前或者在其持仓过程中，应随时关注自己的持仓，保证金和权益变化。”第十条约定：“范有孚因交易亏损或者其他原因，其风险率小于 100％时，天津营业部停止接受范有孚下达的开仓指令，并按照本合同约定的方式向范有孚发出追加保证金的通知，范有孚应当在下一交易日开市前及时追加保证金或者立即采取减仓措施，否则，天津营业部有权在事先不通知范有孚的情况下，对范有孚的部分或者全部未平仓合约强行平仓，最高可至范有孚的风险率大于 100％。范有孚应承担强行平仓的手续费及由此发生的损失。”第十一条约定：“范有孚在不能及时追加保证金情况下应自行采取减仓措施以符合天津营业部的保证金要求，尽量避免由天津营

业部执行强行平仓措施。范有孚不得以天津营业部强行平仓的时机、价位和数量不佳为由向天津营业部主张权益。”第十四条约定：“天津营业部在每一交易日闭市后向范有孚发出每日交易结算单、调整保证金通知、追加保证金通知等通知事项……。”

合同签订后，2007 年 12 月 24 日前，范有孚持有 Cu0802 合约 33 手、Cu0803 合约 369 手、Cu0804 合约 10 手。2007 年 12 月 24 日，范有孚根据天津营业部的通知，自行平仓大豆 270 手，达到天津营业部要求的保证金水平。天津营业部在 15 时收市后，于 18 时 50 分通知范有孚追加保证金。范有孚于 2007 年 12 月 25 日 13 时 48 分存入保证金 150 万元。2007 年 12 月 25 日 8 时 59 分，天津营业部在集合竞价时对范有孚所持空仓合约 412 手强行平仓，其平仓价位分别为 Cu0802 合约 33 手 62 390 元 / 吨，Cu0803 合约 369 手 61 250 元 / 吨、 Cu0804 合约 10 手 60 840 元 / 吨。当日，收盘价格分别为 Cu0802 合约 58 850 元 / 吨、 Cu0803 合约 57 970 元 / 吨、Cu0804 合约 58 050 元 / 吨。按照强行平仓价格与当日收盘价格的差价计算，范有孚持有 Cu0802 合约 33 手的差价损失为 471 900 元、 Cu0803 合约 369 手的差价损失为 6051 600 元、Cu0804 合约 10 手的差价损失为 139500 元，共计损失为 6 663 000 元。

天津市第一中级人民法院认为，范有孚与天津营业部于 2007 年 3 月 5 日签订的期货经纪合同及补充协议，未违反有关法律规定，合法有效，双方当事人均应依约全面履行合同约定的权利义务。期货交易具有高风险特征，在本案中，范有孚作为天津营业部的期货交易客户，天津营业部在《开户申请书》、《期货交易风险说明书》中均给范有孚进行了风险提示，并经范有孚签字确认；同时在双方签订的期货经纪合同的第三条中对在交易中可能出现的风险及造成的后果也做了明确的约定，范有孚作为交易客户，在持仓过程中，应随时关注自己的持仓保证

金及权益的变化，预见风险加大有可能造成强行平仓的后果时，应主动追加保证金或主动减仓，以避免损失的发生。因此范有孚应承担相应的责任。天津营业部作为交易场所，对期货市场风险具有监管的责任，应就交易中有可能或已经出现的风险，对客户进行提示并应在合理的时间内通知客户追加保证金。本案中，天津营业部虽然依据期货交易的相关规定及双方约定，向范有孚发送了追加保证金的通知，但因其未能提供给范有孚追加保证金的合理时间，以致造成范有孚强行平仓的损失，对此天津营业部应承担相应赔偿责任。范有孚的实际损失应以 33 手 Cu0802 合约强行平仓价与当日收盘价的差价 471 900 元、369 手 Cu0803 合约差价 6051600 元、10 手 Cu0804 合约差价 139500 元为损失依据，共计损失 6 663 000 元。范有孚诉讼请求以 2007 年 12 月 28 日的最低价格为据计算损失 9 027 085. 66 元的事实依据不足。天津营业部以强行平仓行为符合有关法律规定，不应赔偿范有孚经济损失的抗辩理由，法律依据不足，不予支持。据此，对范有孚造成的损失，双方应共同承担责任。综上，该院依据《中华人民共和国合同法》第一百二十条，最高人民法院《关于审理期货纠纷案件若干问题的规定》第三十九条的规定，判决：一、天津营业部于该判决生效后十日内赔偿范有孚经济损失 6 663 000 元的 60%，计 3 997 800 元。二、驳回范有孚其他诉讼请求。一审案件受理费 74 989 元，范有孚负担 44 993. 4 元，天津营业部负担 29 995. 6 元。

天津营业部和范有孚均不服天津市第一中级人民法院的一审判决，向天津市高级人民法院提起上诉。范有孚上诉称：一审判决认定事实不清，析责失当，应依法改判。一、一审判决书认定事实不清。1. 已有证据充分证明，2007 年 12 月 24 日下午 2 时余，天津营业部经理王建玲分别以口头和书面通知范有孚，因其保证金不足，需追加保证金或自行平仓铜合约 65 手。范有孚当即采取了自行平仓的措施，挂单平仓铜合约 65 手，天津营业部亦擅自重复为范有孚挂单铜约 65 手，

共计 130 手。因市场原因未平出去，范有孚按天津营业部要求自行平仓大豆合约 270 手，已达到天津营业部要求的保证金水平。同时范有孚按照合同约定，以支票的方式向天津营业部支付保证金，但遭拒绝。2．一审判决认为范有孚于 2007 年 12 月 25 日 13 时 48 分存入保证金 150 万元，与事实不符。2007 年 12 月 25 日上午 9 时许，范有孚就将资金即时到账的银行资金卡按惯例交给天津营业部支付保证金，而天津营业部拖至下午才转到公司自己的账上，实际范有孚上午 9 时许就支付了保证金。3．天津营业部没有按照合同第十条规定的时间，前后如一地通知范有孚追加保证金，24 日天津营业部经理王建玲分别以口头和书面通知，而第二次提高保证金后，通知追加保证金的时间既不合理又严重地违反了合同的规定。4．一审判决书在损失的计算及责任的分担方面计算有误。二、一审判决书析责失当。一审判决书判定天津营业部承担 60%的责任，范有孚承担 40%的责任，确为失当。此案是由于天津营业部严重违反合同，肆意侵害范有孚追加支付保证金、自行平仓之权利而造成。范有孚按照合同支付保证金并按照合同采取减仓措施，而天津营业部却滥施平仓之为，依法应当承担全部的责任，即赔偿范有孚经济损失 9 027 085．66 元。二审诉讼中，范有孚又变更其诉讼请求，要求判决天津营业部赔偿其平仓损失 13066500 元。范有孚请求：1．撤销一审判决，改判天津营业部赔偿范有孚经济损失 9027085．66 元；2．本案一、二审案件受理费均由天津营业部承担。针对范有孚的上诉理由和请求，天津营业部答辩称，天津营业部强行平仓的行为符合双方合同约定。由于 2007 年 12 月 24 日收盘时，范有孚所持仓的铜合约出现涨停板，市场发生变化，使范有孚保证金不足。因该公司只允许从登记的结算账户中支付保证金，范有孚于 25 日向天津营业部提交单位支票支付保证金被拒绝。因此，范有孚账户损失应由其自己负责。

天津营业部上诉称：一审法院认可双方签署的《期货经纪合同》及补充协议

合法有效。该《期货经纪合同》第十条约定：范有孚因交易亏损或其他原因，其风险率小于 100%时，天津营业部停止接受范有孚下达的开仓指令，并按照本合同约定的方式向范有孚发出追加保证金的通知。范有孚应当在下一交易日开市前及时追加保证金或者立即采取减仓措施，否则，天津营业部有权在事先不通知范有孚的情况下，对范有孚的部分或者全部未平仓合约强行平仓，最高可至范有孚的风险率大于 100%。范有孚应承担强行平仓的手续费及由此发生的损失。”最高人民法院《关于审理期货纠纷案件若干问题的规定》第三十六条第二款规定：“客户的交易保证金不足，又未能按期货经纪合同约定的时间追加保证金的，按期货经纪合同的约定处理；约定不明确的，期货公司有权就其未平仓的期货合约强行平仓，强行平仓造成的损失，由客户承担。”本案天津营业部对范有孚执行强行平仓完全符合上述合同约定及司法解释的规定，因此，强行平仓的行为应为合法有效，由此造成的损失，理应由范有孚承担。其次，范有孚的账户损失是因其交易方向错误，无法及时追加保证金遭遇的市场风险，并非天津营业部未能提供追加保证金的合理时间所致。2007 年 12 月 24 日收盘后，天津营业部向范有孚发出强行平仓通知书，要求范有孚在第二日开盘前追加保证金 1336 万元，否则，将对范有孚的持仓予以全部或部分平仓。如果范有孚在 25 日的 9 时 30 分前后将资金追加到位，而在此之前天津营业部已将其账户合约强行平仓，则范有孚可以指责天津营业部未给其提供合理的追加保证金时间。而事实是，12 月 25 日，范有孚已经无力按天津营业部要求追加保证金，到下午 13 时 48 分才追加到账 150 万元，其到帐时间及金额均与天津营业部追加保证金通知的要求相差甚远。因此，范有孚的账户损失与天津营业部是否提供合理的追加保证金时间根本无关。综上，一审判决认定的事实及适用法律有误，应予撤销。请求：撤销一审判决，依法改判驳回范有孚的诉讼请求。针对天津营业部的上诉理由和请求范有孚答辩

称，天津营业部的上诉理由不成立，应驳回其上诉请求。天津营业部擅自大幅度提高保证金，不合常规地强行平仓412手铜合约，应对范有孚损失承担全部赔偿责任。

天津市高级人民法院除确认一审法院查明的事实以外，另查明：2007年12月25日，天津营业部将保证金比例提高到 16．5%。天津营业部向范有孚出具的2007年12月25日范有孚《交易结算单》成交记录显示，平仓盈亏为：-13 066 500元。

天津市高级人民法院二审认为，本案争议的焦点为天津营业部对范有孚因强行平仓所造成的损失是否承担赔偿责任，承担何种赔偿责任；强行平仓损失的计算标准如何确定。

关于天津营业部对范有孚因强行平仓所造成的损失是否承担赔偿责任，承担何种赔偿责任的问题。该院认为，保证金制度是期货交易风险控制的重要组成部分，是期货市场稳定和健康发展的前提。保证金的数额是由期货交易管理机构根据期货交易的实际状况作相应的调整。但期货交易所或期货公司应当给予客户合理追加保证金的时间。本案天津营业部在2007年12月24日15时收盘后，于18时50分通知范有孚追加保证金1336万元。2007年12月25日8时59分，天津营业部在集合竞价时即强行平仓范有孚持有铜合约412手，该行为使范有孚持仓虚亏变为实亏，而该期间范有孚根本无法将追加的保证金交到天津营业部账户上。特别是2007年12月24日范有孚根据天津营业部的通知自行平仓，已达到天津营业部要求的保证金水平，其已尽到注意义务。当日收盘后的 18时50分，期货公司又大幅度提高了保证金比例达到16．5%，对此突变情形，天津营业部也未向范有孚特别告知，从而使范有孚失去对追加保证金数额的合理预期。为了保护客户的利益，由此造成的损失应由天津营业部承担。虽然双方签订的期货经纪合同及

补充协议第十条约定：范有孚因交易亏损或其他原因，其风险率小于 100%时，天津营业部按照合同约定的方式向范有孚发出追加保证金的通知。范有孚应当在下一交易日开市前及时追加保证金或者立即采取减仓措施，否则，天津营业部有权在事先不通知范有孚的情况下，对范有孚的部分或者全部未平仓合约强行平仓，最高可至范有孚的风险率大于 100%。范有孚应承担强行平仓的手续费及由此发生的损失。但上述合同并未就追加保证金的合理时间进行约定，天津营业部挂单强平时银行尚未营业，显属未给予范有孚追加保证金的合理时间。对此，范有孚并无过错，天津营业部的强平行为与范有孚损失具有直接的因果关系，其应承担相应的赔偿责任。关于天津营业部以范有孚并未在 2007 年 12 月 25 日 9 点 30 分前后将资金追加到位，到下午 13 时 48 分才到账 150 万元，其到账时间及金额与天津营业部追加保证金通知的要求相差甚远，因此，范有孚的账户损失与天津管业部是否提供合理的追加保证金时间无关的主张，因天津营业部于 2007 年 12 月 25 日期货市场开盘前已挂单强平范有孚 412 手铜合约，相应的损失已经发生，故此后范有孚是否追加保证金与该损失并无法律上的因果关系，该院对天津营业部的主张不予支持。

关于按照何种标准计算强行平仓损失的问题。对于强行平仓损失的计算标准，我国法律及其行政法规并无相应的规定。根据天津营业部向范有孚出具的 2007 年 12 月 25 日范有孚《交易结算单》反映的内容，范有孚一审诉讼中主张的 9 027 085．66 元确属强平损失，应予支持。综上，一审判决认定事实清楚，但适用法律不当，应予纠正。依照《中华人民共和国民事诉讼法》第一百五十三条第一款第(二)项之规定，该院判决：一、撤销天津市第一中级人民法院 (2008)一中民二初字第 61 号民事判决；二、天津营业部于该判决生效后十日内赔偿范有孚经济损失 9 027 085．66 元。如未按该判决规定的期间履行给付金钱义务，应当按

照《中华人民共和国民事诉讼法》第二百二十九条的规定，加倍支付迟延履行期间的债务利息。一审案件受理费人民币 74 989 元，二审案件受理费人民币 74 990 元，由天津营业部负担。

天津营业部不服天津市高级人民法院二审判决，向本院申请再审称：(一)二审判决适用法律错误。二审判决书认为天津营业部应当在强行平仓前给予客户合理追加保证金的时间，该认定没有法律依据，属于法律适用错误。根据双方《期货经纪合同》第十条约定，只要天津营业部按照约定向范有孚发出追加保证金通知，而范有孚没有在第二日开市前及时追加保证金或者立即采取减仓措施，天津营业部就有权对范有孚的持仓合约强行平仓。一审判决书却认为：“上述合同未就追加保证金的合理时间进行约定。”就是说二审判决书不认可双方上述合同的约定。(二)二审判决认定的基本事实没有证据支持。前一日收盘后，天津营业部向范有孚发出追加保证金通知，要求范有孚在第二日开盘前追加保证金 1300 余万元；第二日开盘时，范有孚没有追加保证金，也没有自行平仓的指令，天津营业部在开盘后强行平仓部分合约 412 手；下午 13 时 38 分，范有孚追加 150 万元到账户。无论从到账时间还是到账金额都是“不合理”的。因此，二审判决认定天津营业部的过错是不成立的。(三)损失计算有误。2007 年 12 月 25 日，范有孚《交易结算单》上显示范有孚平仓盈亏为-1300 余万元，这是范有孚的平仓合约从建仓起到平仓止的全部盈亏，这是由于范有孚选择买卖方向错误造成的投资亏损。并非天津营业部强行平仓给其造成的损失。天津营业部 8 时 59 分强行平仓，如果范有孚的资金在 9 时 30 分前到账，范有孚可以要求天津营业部立即为其恢复持仓或自己下单恢复持仓。这时强行平仓与重新恢复建仓之间产生的差价，就是天津营业部“过错”给范有孚造成的实际损失；由于范有孚没有在“合理”时间内追加保证金，其账户就不存在恢复持仓合约的问题，天津营业部的过错也就没

有相应的后果。因此，按照二审判决书认定的责任，天津营业部的过错并未给范有孚账户造成实际的损失。综上，请求撤销二审判决，改判驳回范有孚的全部诉讼请求，并由其承担本案全部诉讼费用。

被申请人范有孚答辩称：(一)二审判决于法有据，应依法予以维持。(二)天津营业部的申诉不符合事实、证据和法律，应当依法予以驳回。首先，天津营业部擅自大幅度提高保证金的比例缺乏依据，且其通知范有孚追加保证金的时间不合理。其次，天津营业部的强平时间不合理且违规，剥夺了答辩人自行减仓的权利，其平仓行为不仅超量，平仓顺序也不符合惯例和规定。(三)应当依法对天津营业部惯用的黑箱操作进行彻查。请求驳回申诉，维持原二审判决。

本院再审期间另查明：2007 年 12 月 21 日(周五)，上海期货交易所 Cu0802、Cu0803、Cu0804 合约的保证金比例均为 7%：天津营业部保证金比例均为 9．5%。12 月 24 日，Cu0802 合约出现第一个涨停板， Cu0803 合约、Cu0804 合约出现第二个涨停板。当日收市后，上海期货交易所交易发布公告称：今日 Cu0803、Cu0804 合约出现第 2 个涨停板，按交易规则，下一交易日上述合约涨／跌停板幅度调整为 6%，交易保证金比例调整为 9%；Cu0802 合约出现第 1 个涨停板，下一交易日上述合约涨／跌停板幅度调整为 5%，交易保证金比例仍为 7%。据此，24 日收市后天津营业部将 Cu0802 合约的保证金比例调整为 14．5%， Cu0803、Cu0804 合约的保证金比例调整为 16．5%。25 日收市，Cu0803、Cu0804 合约未出现第 3 个涨停板，上海期货交易所将两合约保证金比例调整为 6．5%；Cu0802 合约未出现第 2 个涨停板，上海期货交易所该合约保证金比例仍为 7%。天津营业部则将 Cu0803、Cu0804 合约保证金比例调整为 9%，将 Cu0802 合约保证金比例调整为 9．5%。

范有孚在 Cu0802、Cu0803、Cu0804 合约开空仓的时间、价格及合约当日收盘

价格如下：Cu0802 合约，2007 年 12 月 20 日开仓 33 手，开仓均价为 55 659．09 元，当日收盘价为 56 020 元。Cu0803 合约，同年 11 月 23 日开仓 15 手，开仓均价为 54 412．67 元，当日收盘价为 55 500 元；11 月 26 日开仓 22 手，开仓均价为 55 369．09 元，当日收盘价为 54 620 元；11 月 27 日开仓 35 手，开仓均价为 54 051．43 元，当日收盘价为 54 300 元；11 月 28 日开仓 22 手，开仓均价为 54 533．18 元，当日收盘价为 55 500 元；11 月 29 日开仓 25 手，开仓均价为 56 467．60 元，当日收盘价为 57 040 元；11 月 30 日开仓 4 手，开仓均价为 56 965．00 元，当日收盘价为 57 880 元；12 月 4 日开仓 60 手，开仓均价为 55 913．50 元，当日收盘价为 55 690 元；12 月 5 日开仓 50 手，开仓均价为 55 428．40 元，当日收盘价为 56 930 元；12 月 6 日开仓 31 手，开仓均价为 56 577．74 元，当日收盘价为 56 300 元； 12 月 10 日开仓 19 手，开仓均价为 5677420 元，当日收盘价为 56 900 元；12 月 14 日开仓 5 手，开仓均价为 53 820．00 元，当日收盘价为 54 120 元；12 月 17 日开仓 8 手，开仓均价为 54 345．00 元，当日收盘价为 53 950 元；12 月 18 日开仓 73 手，开仓均价为 52 641．92 元，当日收盘价为 52 410 元。Cu0804 合约，12 月 13 日开仓 9 手，开仓均价为 54 628．89 元，当日收盘价为 54 990 元；12 月 17 日开仓 1 手，开仓价为 54 850．00 元，当日收盘价为 54000 元。以上，范有孚 33 手 Cu0802、396 手 Cu0803、 10 手 Cu0804 合约开空仓卖价均价分别为 55 659．09 元、54 860．78 元、54 651 元。

天津营业部提供的 12 月 24 日范有孚交易结算单，显示：“当日结存：15 342772．36 元；浮动盈亏：-7 733 100．00 元；客户权益： 7609672．36 元；保证金占用：20 968 191．75 元；可用资金：-13 358 519．39 元；风险度： 36．29%；追加保证金：13 358 519．39 元。 Cu0802、Cu0803、Cu0804 三张合约 24

日结算价分别为：59 690 元、58 330 元、58 630 元。”该交易结算单是天津营业部在 24 日收市后，按照下一交易日 Cu0802 保证金比例调整为 14．5%，Cu0803、Cu0804 调整为 16．5%计算得出的。如果 24 日保证金比例均按照 9．5%计算，则范有孚资金账户当日结存 24 124 957．86 元；浮动盈亏为-7 733 100．00 元；客户权益 16 391 857．86 元；保证金占用 12 186 006．25 元；风险度为 74．34%。

12 月 25 日 8 时 55 分，天津营业部将范有孚所持 412 手空仓合约以涨停价格强行平仓挂单。如此，Cu0802 合约则是第 2 个涨停价，Cu0803、Cu0804 合约已是第 3 个涨停价。集合竞价期间，三张合约 412 手全部以非涨停价格成交，成交价格为一审查明的价格。Cu0802、Cu0803、Cu0804 合约分别于 2008 年 2 月 15 日、3 月 15 日和 4 月 15 日到期，交割价分别为 63 660 元、 66 810 元和 64 200 元。

范有孚与天津营业部签订的期货经纪合同第二十八条约定，“如期货公司强行平仓不符合约定条件，天津营业部应当恢复被强行平仓的头寸，并赔偿由此造成的直接损失”。

本院再审认为，本案当事人之间签订的期货经纪合同第六条、第七条、第十条、第十一条和第十四条约定了保证金比例及追加、强行平仓实施条件等风险控制内容。同时，国务院《期货交易管理条例》第二十九条、第三十八条，本院《关于审理期货纠纷案件若干问题的规定》第三十六条、第四十条对维持保证金标准以及合法依约强行平仓均作出了明确规定。故范有孚依据双方合同和《期货交易管理条例》等法律规定认为天津营业部强行平仓行为不当、侵犯其合法权益提起的民事赔偿之诉，是合同责任与侵权责任竞合之诉。双方当事人于本案争议的焦点为天津营业部强行平仓是否存在过错及应否承担民事责任、范有孚的损失构成和天津营业部的责任范围。

(一)关于天津营业部强行平仓是否存在过错及应否承担民事责任。

强行平仓是法律规定与合同约定的，当客户账户保证金不足且未按要求追加，客户也未自行平仓的前提下，则期货公司为控制风险有权对客户现有持仓采取方向相反的持仓从而结清客户某金融资产持仓的行为。对客户而言，强行平仓是其期货交易亏损到一定程度后由他人实施的最严厉的风险控制措施。所以，《期货交易管理条例》第三十八条第二款规定的“客户保证金不足时，应当及时追加保证金或者自行平仓。客户未在期货公司规定的时间内及时追加保证金或者自行平仓的，期货公司应当将该客户的合约强行平仓，强行平仓的有关费用和发生的损失由该客户承担”内容，为期货公司采取强行平仓措施之前，设定了以下三个条件：一是客户保证金不足，二是客户没有按照要求及时追加保证金，三是客户没有及时自行平仓。只有满足了上述三个法定条件，期货公司才有权强行平仓。如果期货公司不严格按照法律规定和合同约定执行强行平仓，这将使得客户不仅要承担市场交易风险可能造成的损害，而且还要承担市场运行机制中人为风险对其造成的损害。

天津营业部强行平仓是否存在过错，是否损害了范有孚的权益，应当根据上述三个条件进行分析。第一、范有孚保证金是否不足。2007 年 12 月 24 日(星期一)收市后，上海期货交易所将下一交易日的 Cu0803、Cu0804 保证金比例调整为 9%， Cu0802 保证金比例调整为 7%。天津营业部则相应大幅度调高下一交易日 Cu0803、 Cu0804 保证金比例为 16．5%、Cu0802 保证金比例为 14．5%。因为上海期货交易所和天津营业部是在 24 日收市后调高 25 日的保证金比例，所以 24 日当日结算仍应执行 21 日(星期五)的保证金比例。而 21 日上海期货交易所 Cu0802、Cu0803、Cu0804 合约的保证金比例均为 7%；天津营业部该三张合约保证金比例均为 9．5%。天津营业部诉讼提交的 24 日范有孚交易结算单，执行的却

是25日大幅度提高后的16．5%和 14．5%保证金比例。如果该交易结算单的数据是真实的，天津营业部就不该在25日才采取强行平仓措施，24日交易期间就应强行平仓。因为根据该交易结算单上数据，保证金占用/客户权益计算得出的风险率，不会是该交易结算单上的36．29%，而是 275．54%。风险率为275．54%，意味着范有孚保证金不仅全部被持仓合约占用，而且令天津营业部还为其支付了合约占用资金的175．54%。所以，天津营业部提交的按照 25日保证金比例计算的交易结算单，不能证明范有孚24日结算保证金不足。这种以下一交易日保证金比例作为当日结算依据的结算方式与上海期货交易所的交易规则相悖，故本院不予采信。保证金比例如按照 9．5%计算，24日收市后的范有孚账户客户权益为16 391 857．86元，保证金占用为 12 186 006．25元，风险率为74．34%，可用资金为正值。故本院对范有孚关于其24日根据天津营业部的通知，自行平仓270手大豆合约，使账户达到了天津营业部当日保证金比例要求的答辩意见予以支持。如果范有孚继续持仓而不追加保证金，即使不提高保证金比例，随着合约价格的波动，其账户以后也可能要发生穿仓的事实。尽管如此，但也不能以尚未发生的事实而认定范有孚账户保证金24日已经不足。第二、范有孚是否按照要求及时追加保证金。首先，风险率也称风险度，是期货交易客户账户中合约占用保证金金额与客户权益金额之比得出的风险控制参数。风险率越低，客户可用资金越多，合约占用保证金就越少，保证金风险就越小。格式期货经纪合同一般约定风险率大于100%，即客户账户可用资金小于0时，期货公司在交易期间或者结算时向客户发出限制开仓、追加保证金或者自行平仓的通知，客户应当及时追加或者在交易期间及时平仓，使风险率低于100%，即账户可用资金大于0，否则，期货公司有权对客户的部分或全部持仓合约强行平仓，直至客户可用资金大于0，也即风险率小于100%。本案双方期货经纪合同第十条约定的却是风险率小于100%

时，天津营业部就可以向范有孚发出限制开仓、追加保证金或者自行平仓的通知，范有孚则需及时追加保证金或者立即采取减仓措施，不然天津营业部有权在事先不通知范有孚的情况下，对范有孚的部分或者全部未平仓合约强行平仓。显然，该条约定内容与风险率参数设置内涵、保证金风险控制目的和方法相左。将“大于 100%”条件更换为“小于 100%”，这意味着天津营业部任何时候都可以采取限制开仓、通知追加保证金和自行平仓、如不满足要求直至强行平仓等措施。其次，法律规定和合同约定客户保证金不足时应当及时追加，但及时是建立在有追加的可能前提下。24 日收市后，根据大幅度提高后的保证金比例，范有孚账户 25 日面临保证金不足需要追加，天津营业部却迟至晚 18 时 50 分才通知范有孚提高保证金比例并要求在 25 日开盘前追加保证金 1336 万元，否则强行平仓。而当晚 18 时 50 分至次日 9 时，银行等金融机构处于休息状态并不营业，这期间范有孚没有追加保证金的可能。25 日 9 时以前，期货市场集合竞价期间，天津营业部即对范有孚 412 手空头合约以第 3 个和第 2 个涨停价实施强行平仓且全部以非涨停价格成交。所以，范有孚没有追加保证金的事实，应认定天津营业部没有给范有孚追加保证金的机会，而不应认定范有孚没有按照要求或者没有能力追加保证金。第三、天津营业部 25 日保证金比例是否合理。保证金比例高低直接关系到期货交易和结算占用资金的多少，关系到客户期货交易结算风险的高低。法律规定期货公司向客户收取的保证金，不得低于期货交易所规定的标准，但高于多少却没有确定。12 月 21 日，天津营业部的保证金比例相对上海期货交易所的没有高过 3%。但 24 日收市后，天津营业部大幅度提高标准，三张合约保证金比例均超过上海期货交易所标准 7．5%。25 日收市，上海期货交易所没有调整保证金比例，而天津营业部自行将三张合约的保证金比例又分别回调到 9．5%和 9%，故天津营业部 25 日保证金比例变动具有随意性和突发性。尽管本案合同没有明确约

定保证金比例高于上海期货交易所标准多少，根据双方约定的“随时自行通知保证金比例，随时对范有孚单独提高保证金比例”内容，天津营业部随意单日对范有孚大幅度提高保证金比例似乎并不违约。但是，在风险很高的期货市场，这种随意单日远超过期货交易所标准的对客户大幅度提高保证金比例的行为，客观上使得客户在承受期货市场交易风险的同时还承受了来自市场交易风险之外的运行机制中人为导致的风险。“随时自行通知保证金比例，随时对范有孚单独提高保证金比例”的约定，属于概括性约定且以格式合同为表现。当格式合同履行中出现不同理解或履行中发生不公平现实时，应当适用《中华人民共和国合同法》第四十一条的规定，向有利于非格式合同提供方(客户)作合同解释和认定。所以，仅就25日一个交易日单独对范有孚实施远超过上海期货交易所标准的提高保证金比例行为，是不公平和不合理的。第四、范有孚是否有及时自行平仓的机会。法律没有规定强行平仓前多长期间内自行平仓属于及时平仓，但现实要求自行平仓必须发生在期货交易时间之内，如果当日没有开市，即要求客户平仓或者挂出平仓单，是对法律规定的及时自行平仓操作的曲意理解，是对客户的苛刻要求。25日尚未开市的集合竞价期间，范有孚的412手合约即被强行平仓，天津营业部不仅没有给予范有孚追加保证金的机会，甚至连自行平仓的机会也没有给予。

根据本案强行平仓的时间、报价和数量，结合大幅度单日提高保证金比例，可以认定天津营业部不是出于善意的目的，其没有满足法律规定和合同约定条件实施的强行平仓行为存在过错。根据双方合同第二十八条“如期货公司强行平仓不符合约定条件，天津营业部应当恢复被强行平仓的头寸，并赔偿由此造成的直接损失”的约定，本院《关于审理期货纠纷案件若干问题的规定》第四十条“期货交易所对期货公司、期货公司对客户未按期货交易所交易规则规定或者期货经纪合同约定的强行平仓条件、时间、方式进行强行平仓，造成期货公司或者客户

损失的，期货交易所或者期货公司应当承担赔偿责任”之规定，天津营业部应对其强行平仓给范有孚造成的损失承担民事责任。本院对天津营业部关于范有孚没有追加保证金，也没有自行平仓的指令，其有权对范有孚的持仓合约强行平仓的再审理由不予支持。范有孚关于天津营业部追加保证金时间要求和强行平仓时间不合理且违规，剥夺了其自行减仓权利的答辩理由成立，本院予以支持。

(二)关于范有孚的损失构成以及天津营业部的责任范围。

期货市场的风险包括市场交易风险和市场运行风险两大部分，市场交易风险法定由期货交易人自行承担，而市场运行风险并不法定由期货交易人承担。如果市场运行机制人为错误导致期货交易人发生风险损失，则应由责任人承担。期货交易风险主要是因期货交易人对合约走势判断错误和合约价格波动而产生，加之保证金交易制度放大风险所导致。具体本案，范有孚对 Cu0802、Cu0803 和 Cu0804 三张合约自开空仓至被强行平仓，共计亏损 13 066 500 元．其中就包括了范有孚自己期货交易判断错误导致的亏损和天津营业部强行平仓过错而加大的亏损，即期货交易损失和强行平仓损失两部分。首先，对期货交易损失的分析。根据范有孚在 Cu0802、Cu0803 和 Cu0804 合约开空仓的时间和价格、开仓后三张合约价格的整体走势、三张合约到期日的交割价、逐日交易结算单等，证明范有孚对三张合约价格走势的判断发生了根本性错误。范有孚在三张合约价格相对底部开空仓，在三张合约价格震荡走高趋势中持续持仓，是范有孚本案期货交易损失的根本原因。根据期货交易实行的当日无负债结算制度，累计至 24 日收市结算，交易结算单显示范有孚浮动亏损达 7 733 100 元。该浮动亏损，完全是由于范有孚判断错误和持续持仓所导致。换言之，只要该三张合约价格不跌至范有孚开仓价格以下，且范有孚持续持仓，那么范有孚始终将处于浮动亏损状态，这期间无论谁平仓，浮动亏损都将变成实际亏损。所以截至 24 日收市，范有孚期货交易累

计结算发生的浮动亏损并非天津营业部强行平仓所引发，也即该 770 余万元浮动亏损变为实际亏损与天津营业部强行平仓没有直接的因果关系。其次，具有过错的强行平仓的责任方式。如果期货公司强行平仓具有过错，行为损害了客户利益应当承担民事责任的，根据《中华人民共和国民法通则》第一百三十四条民事责任承担方式的规定，则期货公司应当采取恢复客户被强行平仓头寸的补救措施，不能恢复头寸的则应按照公平合理的价格赔偿客户因此发生的损失，本案双方合同第二十八条对此也作了约定。因本案三张合约已经到期交割，恢复被强行平仓的头寸成为不可能，故天津营业部只能赔偿范有孚因强行平仓发生的损失金额。再次，强行平仓损失的计算。站在天津营业部的角度而言，强行平仓后三张合约价格仍震荡走高，直至到期交割期间每日结算价的平均价、三张合约交割价均高于强行平仓价格。对范有孚来说，*三张合约 25 日当日收盘价格就低于 24 日的收盘价格，28 日收盘价格更低，假设其追加了保证金或者自行平仓可以减少更多的损失*。双方上述观点都是建立在假设基础之上且都从有利于自己的角度出发，而不是基于已经强行平仓的事实来正确思维和公平认识。同时，双方的观点也不符合期货市场的特征，因为期货市场上对已经发生的价格走势，谁都可以做出准确判断并可以选择有利于自己的价格去适用，但对尚未发生的价格走势预测，谁也不能十分肯定其判断就一定准确。所以，基于已经发生的强行平仓事实，不能往后寻找而只能往前寻找强行平仓损失的计算基准点，才是客观和公正的。故本院对双方当事人有利于自己而忽视对方利益的观点，均不予采信和支持。综上所述，以 24 日收市后范有孚持仓的事实和结算的数据为基准，确定天津营业部过错的责任范围，对双方而言相对客观公正。那么，25 日强行平仓后的范有孚账户亏损金额 13 066 500 元与 24 日收市后浮动亏损 7 733 100 元之差的 5 333 400 元，是天津营业部对范有孚因强行平仓导致的损失且应承担的赔偿范围。

本案一、二审判决均认为天津营业部强行平仓存在过错，应对范有孚承担相应责任正确。但天津市第一中级人民法院一审以三张合约强行平仓价格与平仓之后当日收盘价格之差计算损失为6 663 000元，是以强行平仓以后某个时间点的合约价格作为参照得出的，难以客观公正，也与范有孚和天津营业部双方各自主张的时间点价格不同，当事人双方都不予以认可。该院不仅损失计算方法不符合期货市场特征和规律，而且还将本应由天津营业部因强行平仓过错导致的损失，错误认定为双方混合过错所导致，判由天津营业部承担60%，范有孚自行承担40%，所以一审判决部分事实认定不清，责任划分不当。天津市高级人民法院二审则完全依据范有孚的诉讼请求，未将范有孚因期货交易判断错误和持续持仓产生的交易损失从整个损失中分离出来，而与天津营业部强行平仓过错导致的损失混同，判决天津营业部全部承担范有孚以28日收市价格计算得出的 9 027 085．66元损失，同样是部分事实认定不清和责任划分不当。故本院再审对本案一、二审判决予以纠正。

综上，本院依据《中华人民共和国民事诉讼法》第一百八十六条第一款、本院《关于适用<中华人民共和国民事诉讼法>审判监督程序若干问题的解释》第三十八条之规定，判决如下：

一、撤销天津市高级人民法院(2009)津高民二终字第0028号民事判决；

二、撤销天津市第一中级人民法院 (2008)一中民二初字第61号民事判决；

三、银建期货经纪有限责任公司天津营业部于本判决生效后十日内赔偿范有孚损失5 333 400元；

四、驳回范有孚其他诉讼请求。

一审受理费74 989元，二审案件受理费74 989元，均由银建期货经纪有限

责任公司天津营业部负担。

本判决为终审判决。

审　判　长　贾　纬

代理审判员　沙　玲

代理审判员　周伦军

二０一０年十二月二十四日

书　记　员　赵穗军