



ARTICLE

The Credit Suisse AT1 bond crisis: 3 months on – Perspectives from the far east

22 JUNE 2023 | APPLICABLE LAW: JAPAN, SINGAPORE | 8 MINUTE READ

Three months have gone by since the unprecedented write-down of Credit Suisse AT1 bonds, wiping out over billions of bonds as part of the UBS rescue takeover. The move by FINMA the Swiss regulator has been decried by investors and indeed regulators all over the world and Asia has felt the impact no less than anywhere else in



the world. Indeed, investors from the far east form a substantial part of the exposure. Withers is leading Singapore's largest contingent of affected bondholders with over 180 investors in a multi-million dollar claim. It is reported that Japanese investors suffered an aggregate loss of about USD 1 billion from the crisis. The actual impact of the fallout on asian investors remain to be seen. Nevertheless, three months on, the dust has settled somewhat and perhaps some new perspectives can be gleaned.

There is a zen belief that putting some space between oneself and the problem brings clarity. And so perhaps in many ways, the time that has transpired since the collapse of Credit Suisse has brought a little greater clarity into the matrix of options available to investors.

While many investors from across the world have chosen to pursue an administrative action against FINMA before the Swiss Courts by the prescribed deadline of 3 May 2023, many other investors in Asia have decided not to enter the fray. FINMA did not act on its own but was sanctioned by emergency laws passed by Swiss government on 19 March to write down AT1 bonds. To the extent where the action is premised on the Swiss Constitution, there are questions as to what extent investors from the Far East can avail themselves of any arguments arising from the Constitution. Three months on, it remains to be seen how the administrative action would result in compensation to investors. The action, even if successful, could mean that the decision by FINMA to write down the AT1 bonds contradicts Swiss law and therefore needs to be reversed. Given however that any capital allocation was made pursuant to UBS' acquisition of Credit Suisse, FINMA would not appear to have the monies from the written down bonds to return to the investors.

Indeed, as per the international disputes principle of *lis pendens*, if you have three arrows in your quiver, and you only have one shot, you would need to use your best arrow. The principle is found in Article 94(6) of the



Agreement on Free Trade and Economic Partnership between Japan and Switzerland ("**EPA**"):

A disputing investor may submit the investment dispute to international conciliation or arbitration if:

(a) the disputing investor has not initiated any proceedings for the resolution of the investment dispute before courts of justice or administrative tribunals or agencies of the disputing Party; or

(b) where the disputing investor has initiated any proceedings for the resolution of the investment dispute before courts of justice or administrative tribunals or agencies of the disputing Party, the disputing investor withdraws the investment dispute from such proceedings. For the purpose of withdrawal, a written waiver shall be included in the written request for conciliation or arbitration by which the disputing investor waives any right to initiate or continue before any courts of justice or administrative tribunals or agencies under the law of either Party, any proceeding

Accordingly, investors who have joined the administrative action would first need to withdraw from that action before they can pursue any compensation-centric claims under the EPA.

What would be a compensation centric claim? An example of this would be a claim for unlawful expropriation under international investment law, where a State has expropriated the investment of a foreign investor and the expropriation was not made in the public interest, done in a discriminatory manner, not in accordance with due process of law, or without prompt, adequate and effective compensation. Investors' interests against unlawful expropriation can be found enshrined in express commitments made between States, such as Art 91 of the EPA between Japan and Switzerland.

Indeed, there have been some illuminating revelations uncovered since the collapse which could be taken into consideration with regard to claims pursuant to bilateral investment treaties and free trade and economic partnership agreements. On 19 March 2023, Swiss Finance Ministry publicly described the UBS takeover deal as a purely private transaction. In any event even if the acquisition of Credit Suisse is meant to stabilize the Swiss banking sector, the actual decision to write down AT1 bonds arguably only benefitted the private equity shareholders many of whom are not even Swiss equity investors.



Withers has a document dated 22 March 2023 which reportedly shows that Group General Counsel of Credit Suisse had raised to the Swiss government that the crisis did not constitute a "viability event" to justify any write downs of AT1 bonds. This arguably meant that even if there was a power to write down, the legal criteria allowing for such power to be exercised was not met. Indeed, very recently in May 2023, the Europe, Middle East and Africa Credit Derivatives Determinations Committee met and effectively decided that a bankruptcy credit event (to justify a write down) had not occurred.

Three months on, another potentially key revelation include a 19 March 2023 document from FINMA which reportedly stated that since the beginning of March 2023, arising from the global banking crisis as a result of the collapse of Silicon Valley Bank in the United States and the domino effect thereof with the loss of confidence, Credit Suisse had already experienced serious issues with deposit withdrawals which became more serious as of 13 March 2023. In addition, the document suggests that Credit Suisse had reached its internal liquidity limit with the Swiss National Bank in mid-March 2023. These appear to call for an explanation around the public statements made on or about 15 March 2023 that Credit Suisse met the higher capital and liquidity requirements applicable to systematically important banks.

Nevertheless, the best arrow need not necessarily cause the greatest injury, not when the aim is simply to hit the target. It is common to find in bilateral trade agreements prescription of an amicable dispute resolution process before any formal treaty claims may be pursued. For example, Art. 94(2) of the EPA between Japan and Switzerland prescribes:

Any investment dispute shall, as far as possible, be settled amicably through consultations between the investor and the disputing Party at the request of the investor.

Accordingly, the Swiss State is obliged under the EPA to settle the dispute amicably with Japanese investors as far as possible.

The amicable process allows for international negotiations and/or mediation. Negotiations and mediations are existing vital elements of many **Asian cultures** in resolving disputes. From the Japanese principle of "信義誠実の原則" to Indonesian *adat* law, the doctrine of good faith is an overarching legal expectation in many asian legal traditions. From a cultural perspective, it can be of paramount importance to preserve the



investor's dignity and integrity while in the process of resolving disputes, not to unnecessarily burn bridges, while trying to see if commercial and business relations can be sustained notwithstanding the resolution of a dispute. An aggressive fight is a last resort and even then, may not be an option that many asian investors would consider.

Indeed, the privacy of the mediation process is paramount to many investors. The privacy of the process is also critical in encouraging a defendant to resolve the dispute privately with investors. Importantly, not only is mediation a cost efficient way of resolving a dispute, it is an international process before a neutral and independent forum. This means that the dispute is not resolved under the Swiss legal system. Global mediation centres such as the [Singapore International Mediation Centre](#) ("**SIMC**") can suitably administer such mediations.

Mediation may be perceived as essentially negotiations with a mediator involved. The mediator is not a Judge with powers. The mediator cannot determine the dispute and does not have any legal powers to make a decision. However, the mandate would be to help parties reach a compromise. The mediator would often be someone experienced in the relevant sector, an expert even, and should help parties gain perspectives which they would not otherwise have in the course of the mediation. The SIMC has a panel of distinguished mediators. Where helpful, there can be a tribunal of three mediators.

Indeed, given that international mediation is a consensual process which does not entail any strict technical considerations, it could possibly be the only option available to affected investors from countries which do not have any relevant bilateral investment treaties or free trade agreements.

Mediated settlement agreements can be enforced in various countries around the world under the [Singapore Convention on Mediation](#) (the "**Singapore Convention**"), a uniform and efficient framework for international settlement agreements resulting from mediation. The Convention's travaux preparatoires is clear that commercial investor state disputes fall within the scope of the Singapore Convention (unless a State expressly reserves that it shall not; and only Saudi Arabia, Iran and Belarus amongst the 56 countries which have signed the Convention as of June 2023 have expressly kept the reservation). Indeed, investor state treaty disputes are commonly settled privately and so it should come as no surprise that a mediated settlement agreement with a State



over a commercial dispute is enforceable under the Singapore Convention.

Get in touch with us

Withers has a global team to support clients affected by the AT1 crisis from across our Withers' offices, with our Partner [Shaun Leong](#), [FCI Arb](#) who specialises in cross-border disputes from Singapore, and [Japan Desk in the Singapore office](#) with Japanese qualified and Japanese speaking lawyers, working closely with Withers' office in Tokyo. This article does not contain legal advice under any laws and should not be relied on as legal advice. Please get in touch with Shaun Leong, FCI Arb and Withers' Japan Desk in Singapore if you would like us to share our expertise or to understand in further detail any of the points covered in this piece.

Get in touch



Shaun Leong

PARTNER | SINGAPORE



Email Shaun



+65 6238 3035

[VIEW PROFILE](#)





Yutaka Hashita

PARTNER | SINGAPORE



Email Yutaka



+65 6238 3277

[VIEW PROFILE](#)

Related experience

As a full-service law firm, we are able to provide advice and information about a wide range of other issues. Here are some related areas.

Banking and finance

Commercial litigation

Financial services

International arbitration

Crisis management

Join the club



We have lots more news and information that you'll find informative and useful. Let us know what you're interested in and we'll keep you up to date on the issues that matter to you.

[SIGN UP HERE](#)

