

THE WRITE-OFFS OF CREDIT SUISSE'S AT1 BONDS: OPTIONS FOR MALAYSIAN INVESTORS

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In March 2023, Swiss banking giant UBS' acquisition of Credit Suisse dominated the news all around the world. However, while the collapse of Credit Suisse, which had been in existence for well over 150 years, itself came as a shock to financial markets, the decision by the Swiss Financial Market Regulator *Finanzmarktaufsicht* ("FINMA") to completely write off AT1 bonds stood out even more.

As a result of FINMA's decision to zero the value of the bonds, investors around the world, but predominantly located in Europe and Asia, lost 100% of their investment. According to reports, the combined amount of the affected bonds exceeds the equivalent of approximately RM 70 billion.

About a week after Credit Suisse's fall, we published a write-up entitled *The US\$ 17 billion loss in Credit Suisse and available avenues for Malaysian investors: a preliminary overview*¹ in which we gave a summary of potential avenues available to Malaysian investors. Since then, a few Malaysian banks have had discussions with us in respect of the sale of Credit Suisse's AT1 bonds.

As banks and investors in Malaysia alike are in search of avenues to recoup their losses, we note from our discussions with affected Malaysian investors and banks, which sold the AT1 bonds to these investors, that there is a misconception: everyone seems to have the impression that only a Singaporean firm is taking action, for investors from Singapore. However, several actions have been taken around the world in the last few months as follows:

(i) Investors from the USA

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¹ Mubashir Bin Mansor, Dr. Harald Sippel and Vishnu Vijandran, *The US\$ 17 billion loss in Credit Suisse and available avenues for Malaysian investors: a preliminary overview*, 28th March 2023, available at [www.skrine.com/insights/alerts/march-2023/the-us\\$-17-billion-loss-in-credit-suisse-and-avail](http://www.skrine.com/insights/alerts/march-2023/the-us$-17-billion-loss-in-credit-suisse-and-avail) (last accessed on 3rd June 2023).

We understand from the news that investors from the USA have challenged *FINMA's* decision on an administrative level before the Federal Administrative Court.² This was possible because *FINMA's* decision to order Credit Suisse to write off the bonds is an administrative decision. Challenging the decision on an administrative level was only possible up to 3rd May 2023; such action is now time barred.

(ii) Investors from Singapore

According to news reports, investors from Singapore are in the process of preparing an investor-state arbitration against Switzerland. Their claim is based on the free trade agreement (“FTA”) between Singapore and the European Free Trade Association (“EFTA”), which includes Switzerland.³ The Singapore-based investors claim that the circumstances of the takeover breached the FTA’s provisions for investment protection.⁴ Malaysia and EFTA have been in discussions over an FTA since 2014. However, no agreement has been reached to date, despite almost a decade having passed.⁵

(iii) Investors from Japan

It is further known from news reports that Japanese investors are examining the possibility to initiate an investment arbitration. Their claims are based on the Japan-Switzerland Economic Partnership Agreement (JSEPA).⁶ The JSEPA provides for disputes to be resolved under the International Centre for Settlement of Investment Dispute

² CNN business, Credit Suisse bondholders file lawsuit against Swiss authorities, 21st April 2023, available at www.edition.cnn.com/2023/04/21/business/credit-suisse-bondholder-lawsuit/index.html (last accessed on 3rd June 2023).

³ For details, see Global Arbitration Review, Bondholders prepare treaty claim over Credit Suisse, 19th April 2023, available at www.globalarbitrationreview.com/article/bondholders-prepare-treaty-claim-over-credit-suisse (last accessed on 3rd June 2023).

⁴ Ibid.

⁵ EFTA, Malaysia, available at www.efta.int/free-trade/ongoing-negotiations-talks/malaysia (last accessed on 3rd June 2023).

⁶ For details, see Global Arbitration Review, More Credit Suisse Bondholder claims loom 18th May 2023, available at www.globalarbitrationreview.com/article/more-credit-suisse-bondholder-claims-loom (last accessed on 3rd June 2023).

(ICSID) Rules or the United Nations Commission on International Trade Law (UNCITRAL) Rules.⁷

(iv) Investors from Qatar

It is noteworthy that according to news reports, Credit Suisse's formerly second-largest investor, the Qatar Investment Authority (QIA), is examining the possibility of initiating a claim.⁸ We understand that they base their claims on the Qatar – Switzerland BIT from 2001. As is the case under the JSEPA, this treaty also allows for disputes to be resolved under the ICSID Rules.⁹ Importantly, QIA would initiate arbitration as a *shareholder*, not as a bondholder.

LOST COURT BATTLE AND MORE TROUBLE AHEAD FOR CREDIT SUISSE

Aside from the AT1 bonds, Credit Suisse also ended up in the news for losing legal battles. *The Star* reported earlier in 2023 that the Singapore International Commercial Court (SICC) ruled in favour of former Georgian Prime Minister Ivanishvili in a dispute between him and Credit Suisse. The SICC ordered Credit Suisse to pay an ex-Georgian prime minister US\$926 million (RM4.26 billion) for failing in its duty to safeguard his assets.¹⁰

Already before *FINMA*'s drastic action on 19th March 2023, investors in the USA filed a claim against Credit Suisse, saying the latter had made “materially false and misleading statements” in its 2021 annual report. Credit Suisse acknowledged that the hold-up on its 2022 annual report was because of “material weaknesses” in its reporting and controls procedure which may have led to

⁷ *Ibid.*

⁸ Reuters, Exclusive: Qatar Fund explored claims against Switzerland for Credit Suisse losses, Reuters, 18th May 2023, available at www.reuters.com/business/finance/qatar-fund-explored-claims-against-switzerland-credit-suisse-losses-2023-05-17 (last accessed on 3rd June 2023).

⁹ For details, see United Nations Conference on Trade and Development, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/2815/qatar---switzerland-bit-2001-> (last accessed on 3rd June 2023).

¹⁰ *The Star*, Singapore court orders Credit Suisse to pay Georgian ex-PM RM4.26 billion, 27th May 2023, available at www.thestar.com.my/aseanplus/aseanplus-news/2023/05/27/singapore-court-orders-credit-suisse-to-pay-georgian-ex-pm-rm426-billion (last accessed on 3rd June 2023).

“misstatements” of financial results.¹¹ It was reported in September 2023 that the United States Securities and Exchange Commission was looking into that matter.¹²

Meanwhile, there are also reports that hundreds of bankers are leaving Credit Suisse every week. We understand that Credit Suisse has offered retention bonuses to key employees, but that this was not enough to stop bankers from talking to rivals.¹³ Importantly for investors from Malaysia and other countries in Southeast Asia, among the key employees to leave is Robert Huray, Credit Suisse's Vice Chairman for Southeast Asia.¹⁴

FORMER BONDHOLDERS TAKING ACTIONS AGAINST BANKS

In addition to the above, news has also emerged that former bondholders have taken actions directly against the financial institutions that were selling them the Credit Suisse AT1 bonds, usually claiming that they were not advised properly about the risks involved.

It emerged in the news already in May that a Malaysian retiree was suing his bank, claiming that he lost MYR 500,000 in AT1 bonds. According to the reports, he was told that his investment into the AT1

¹¹ The Guardian, Credit Suisse hit by legal action from US investors amid banking turmoil, 17th March 2023, available at www.theguardian.com/business/2023/mar/17/credit-suisse-legal-action-us-investors-banking (last accessed on 3rd June 2023).

¹² Reuters, US authorities scrutinize if Credit Suisse misled investors before rescue -filing, 20th September 2023, available at www.reuters.com/business/finance/us-authorities-scrutinize-if-credit-suisse-mislead-investors-before-rescue-2023-09-19 (last accessed on 27th December 2023).

¹³ Financial News, Credit Suisse is losing 200 bankers every week after UBS takeover, 31st May 2023, available at www.fnlondon.com/articles/credit-suisse-is-losing-200-bankers-every-week-after-ubs-takeover-20230531 (last accessed on 3 June 2023).

¹⁴ Bloomberg, Credit Suisse's Huray to Join Deutsche Bank as SEA Vice Chair, 1st June 2023, available at www.bloomberg.com/news/articles/2023-06-01/credit-suisse-s-huray-to-join-deutsche-bank-as-sea-vice-chair (last accessed on 3 June 2023).

bonds was a low-risk income fund and that he was not told about the possible consequences.¹⁵

Meanwhile, *Bloomberg* reported at the end of July that a Japanese citizen has also sued his bank, for similar reasons, claiming that his bank had been mis-selling risky debt. This is after in June, other investors had already made it clear that they were going to sue their banks in an attempt to limit the losses they had suffered.¹⁶ Credit Suisse's bonds exceeding the value of one billion US Dollars were sold to Japanese investors.

Over the next months, it must be expected that further disgruntled investors will turn against their banks. Whether these banks will be entitled to raise a claim against Switzerland remains to be seen. As they were not the purchasers of bonds themselves, they would likely not qualify as "investors" under applicable investment treaties, although a case-by-case analysis will be required to determine this point.

POSSIBLE RECOURSE FOR AFFECTED MALAYSIAN BONDHOLDERS

As we highlighted in our update on 28th March 2023, Malaysian investors in Credit Suisse AT1 bonds might be protected by provisions in the Malaysia Switzerland BIT of 1978¹⁷ (the "BIT"). The BIT contains a definition of the term "investment", which among others includes as examples

¹⁵ Free Malaysia Today, Retiree says Credit Suisse collapse cost him RM500,000, 13th May 2023, available at www.freemalaysiatoday.com/category/nation/2023/05/13/retiree-says-credit-suisse-collapse-cost-him-rm500000 (last accessed on 18 June 2023).

¹⁶ Nikkei Asia, Japanese investors plan to sue MUFG unit over Credit Suisse bonds, 9th June 2023, available at <https://asia.nikkei.com/Business/Finance/Japanese-investors-plan-to-sue-MUFG-unit-over-Credit-Suisse-bonds> (last accessed on 18 June 2023).

¹⁷ The full name of the agreement is *Agreement between the Government of the Swiss Confederation and the Government of Malaysia concerning the promotion and reciprocal protection of investments* (1978).

“*Shares and other forms of equity participation*” and “*Monetary claims and rights to any performance having an economic value.*”¹⁸ Arguably, this definition includes AT1 bonds.

According to the BIT, Switzerland agreed that it

“*Shall protect within its territory investments made in accordance with its legislation by nationals or companies of the other Contracting Party.*”¹⁹

This among others includes the expropriation of an investment. To that end, expropriations are only allowed if the measures are taken (i) in the public interest; (ii) on a non-discriminatory basis (iii) in observance of legal requirements; and (iv) when there is effective and adequate compensation.

Given that Credit Suisse wrote off the bonds upon the instruction of *FINMA*, the Swiss Regulator acting for the government, there is room to argue that by making such write-off and at the same time giving priority to shareholders, the investment of AT1 bondholders was deprived of its value in a discriminatory manner and without receiving effective and adequate compensation in return. It is therefore arguable that the writing-off amounts to an expropriation, which is not permitted under the BIT.

In addition to the above, the BIT obliges Switzerland to give “*fair and equitable treatment to investments of [Malaysian] nationals or companies.*”²⁰ This is commonly referred to as “FET” – fair and equitable treatment. The FET standard generally protects against (i) any treatment that is considered unreasonable, arbitrary and discriminatory; (ii) the host country’s failure to offer a stable and predictable legal framework; (iii) the host country’s failure to provide for transparency, as well as due process and justice; and (iv) the frustration of the investor’s legitimate expectations.

The decision by *FINMA* to instruct Credit Suisse to completely write-off the bonds and at the same time giving preferential treatment to shareholders, who are generally compensated *after* bondholders in

¹⁸ Article 3(2) of the BIT.

¹⁹ Article 3(1) of the BIT. For the avoidance of doubt, this obligation applies equally to Malaysia with respect to Swiss nationals/companies investing in Malaysia.

²⁰ Article 3(2) of the BIT. For the avoidance of doubt, this obligation applies equally to Malaysia with respect to Swiss nationals/companies investing in Malaysia.

the hierarchy of claims in the Swiss legal framework is questionable against this standard. In addition to that, it is noteworthy that contrary to the write-off, *FINMA* previously stated that Credit Suisse's capital requirements were met and that Credit Suisse's liquidity would be guaranteed.²¹

INCREASED DOUBTS OVER THE SWISS AUTHORITIES' ACTIONS

Following *FINMA*'s write-down, time over time more information has emerged, which has cast doubts over *FINMA*'s actions. While this cannot be regarded as the "missing piece of the puzzle" evidencing that *FINMA* acted in breach of bilateral investment treaties, it certainly does not leave the regulator, and the authorities overall, in a positive light:

A full six months prior to the write-down of the AT1 bonds, the head of the Swiss central bank wanted to inject 50 billion Swiss francs (approx. USD57.5 billion) into Credit Suisse and nationalise it, according to three sources with direct knowledge of the matter. Since *FINMA* and the Swiss Finance Ministry opposed the idea, as did Credit Suisse's management, the Swiss authorities ultimately decided the best solution was to let the company find its own way, the three sources added.²²

There also appears to be somewhat of a power struggle at the moment, with *FINMA* demanding the authority to impose fines, a move that the Swiss Bankers Association clearly opposes (although accepting some other demands by *FINMA*).²³ This reconfirms that even within Switzerland, many were not satisfied with *FINMA*'s decisions in March 2023.

²¹ *FINMA*, *Finma and the SNB issue statement on Market Uncertainty*, 15th March 2023, available at www.finma.ch/en/news/2023/03/20230315-mm-statement/ (last accessed on 3rd June 2023).

²² Reuters, *How Swiss authorities bungled Credit Suisse oversight*, 19th December 2023, available at www.reuters.com/business/finance/how-swiss-authorities-bungled-credit-suisse-oversight-2023-12-18 (last accessed on 28th June 2023).

²³ Marketscreener, *Swiss bankers open to talks on some of measures demanded by country's regulator*, 19th December 2023, available at www.marketscreener.com/quote/stock/UBS-GROUP-AG-19156942/news/Swiss-bankers-open-to-talks-on-some-of-measures-demanded-by-country-s-regulator-45599627 (last accessed on 28th June 2023).

CLAIMS FOR PROTECTION BY INVESTORS – DEMYSTIFYING RUMOURS

There are many rumours, including among the legal fraternity in Malaysia, that supposedly, Malaysian investors cannot initiate a claim against Switzerland themselves. The general view is that such a possibility is only open to the Malaysian government and that the Malaysian government is rather unlikely to ever take any according actions.

This view is based on the wording of Article 9 of the BIT:

- (i) It' para. 1 makes it clear that disputes: “*as to the interpretation or application of the provisions of this Agreement*” are to be settled via diplomatic channels; and
- (ii) its para. 2 allows for either of the Contracting Parties – that is either Malaysia or Switzerland – to initiate arbitration; however,
- (iii) there is no provision allowing investors to take recourse against a Contracting Party. In other words, according to Article 9 (or any other provision in the BIT), only either of the countries, Malaysia or Switzerland, as the case may be, is entitled to initiate arbitration proceedings.

In spite of its seemingly clear wording, it is important to not read this provision in isolation of the rest of the BIT. Article 3(2) sets forth that the treatment that Switzerland gives to Malaysia (and vice versa)

“Shall not be less favourable than that granted [...] to nationals or companies of the most favoured nation.”

Switzerland must give the same treatment to Malaysian investors that it gives to investors from other countries (and vice versa). This is referred to in investment law as MFN (the principle of the most favoured nation or most favoured nation clause).

While there is not one single view on this matter, arbitral tribunals acting in investment arbitration matters previously found that such treatment encompasses the dispute resolution mechanism.²⁴ The Malaysian High Court relied on one of these arbitrations and the reasoning therein in a decision from 27th November 2023 in a dispute

²⁴ E.g. *Emilio Augustín Maffezini v The Kingdom of Spain* (ICSID Case ARB/97/7).

arising out of an investment arbitration by investors in Zimbabwe, who pursued their claims and ultimately won their arbitration.²⁵

Based on the position taken by arbitral tribunals that the MFN clause should extend to the dispute resolution mechanism, which as shown above is not a novel argument in investment arbitration and, indeed one, that the Malaysian High Court relied upon recently, arguably, Malaysian investors are entitled to pursue their claims directly. They should, of course, only do this with the help of counsel, who is very experienced in international arbitration matters.

CONCLUSION

To what extent Malaysian investors in AT1 bonds – both institutional and retail – can claim protection under the BIT will depend on various factors, which need to be assessed on a case-by-case basis.

Importantly, it is very common in international investment arbitration to see settlement. Indeed, many dispute resolution mechanisms provide for a mandatory negotiation phase before recourse to arbitration is possible. While there is no guarantee for this, there is a great likelihood that the Swiss government would be want to avoid a public investment arbitration, with all details surrounding FINMA's decision and potentially other confidential information possibly becoming public. This could potentially allow Malaysian investors to find it much easier to get back at least some of their investment.

While every investor must decide on his own whether he wants to pursue his potential claim against Switzerland, it is necessary for investors to remember that with third party funding opportunities available, the financial risk they have in pursuing a claim is close to zero. The only visible risk is having high hopes and not ending up with anything after all. However, this is exactly the same outcome when just not taking any action altogether.

²⁵ See *Elisabeth Regina Maria Gabriele Von Pezold & Ors v Republic of Zimbabwe* [2023] MLJU 2657.