侵權與疏忽：與瑞士比較

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時效

侵權訴訟必須在訴因產生後六年內提出；就疏忽而言，訴因在損害發生之日產生。[1] 至於潛在損害，例如在被利用前多年已出現的漏洞，時效期延長至由申索人具備提起訴訟所需知悉之日起計三年，但最長不超過15年。[2] 針對曾參與欺詐的受託人提出的違反信託申索，不受任何時效期限制；這是在事實許可時以衡平法申索提出的另一優點。[3]

根據《瑞士債務法》（OR/CO）第41條，瑞士侵權法要求存在不法行為；就純經濟損失而言，這意味着違反了旨在保護申索人財產的規範。這項要求比*Spandeck*案嚴格，使在瑞士就純經濟損失提出疏忽申索比在新加坡更困難。另一方面，瑞士法提供針對DAO參與者的簡單合夥途徑，以及《瑞士債務法》第55條下僱主的嚴格責任，而該責任並不以同樣方式取決於僱員是否在受僱過程中行事。申索人如須在兩個審裁地之間選擇，就侵權向託管人提出申索，而託管人位於新加坡，通常會選擇新加坡。申索人如追究DAO參與者，則可能會發現瑞士更有希望。第D部分第VII章載有瑞士方面的詳情。

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申索	新加坡	瑞士
疏忽託管導致損失	*Spandeck*責任；純經濟損失可予追討；UCTA規管免責條款	合約責任（《瑞士債務法》第97條）；《瑞士債務法》第100條限制免責條款；只有在違反保護性規範時才構成侵權
開發者就協議漏洞的責任	未有定論；去中心化協議不大可能存在近因關係	《瑞士債務法》第41條；須有不法性；未有定論
DAO參與者	不會自動構成合夥；須尋找具控制權的個人及實體	簡單合夥（《瑞士債務法》第530條及其後條文）；共同及個別責任
審計師的疏忽報告	透過*Spandeck*適用*Hedley Byrne*；免責聲明通常有效	在少數情況下的信賴責任（Vertrauenshaftung）
僱員欺詐	按密切聯繫測試承擔轉承責任	《瑞士債務法》第55條的僱主責任；合約中的輔助人適用《瑞士債務法》第101條
時效	6年；潛在損害可延長；欺詐性違反信託不設時效	由知悉起計3年，絕對時效10年（2020年修訂後的《瑞士債務法》第60條）

實務提示

託管人如希望其責任制度經得起新加坡法院的審查，應做好四件事。草擬免責及責任限制條款時，以明確字眼同時涵蓋侵權申索及合約申索。把責任上限定於與託管資產有合理關係的水平，因為僅相等於費用的上限會招致合理性方面的挑戰。記錄遵從新加坡金融管理局（MAS）《科技風險管理指引》的情況，因為這些記錄正是已符合謹慎標準的證據。此外，購買真正能就熱錢包盜竊作出賠償的保險，即在簽署前細閱有關「自願交出」及「未經授權存取」的除外條款。

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註釋

1. Limitation Act 1959，第6(1)(a)條。 ↩
2. Limitation Act 1959，第24A條（潛在損害）。 ↩
3. Limitation Act 1959，第22(1)條（欺詐性違反信託或向受託人追討信託財產不設時效期）。 ↩

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