免責條款與《1977年不公平合約條款法》

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平台條款載有大量免除及限制責任的條款。新加坡的《1977年不公平合約條款法》（Unfair Contract Terms Act 1977）重新制定了英國的同名法例，以三種方式對這些條款加以規管。因疏忽導致死亡或人身傷害的責任不得免除；因疏忽導致其他損失的責任，則只有在條款合理的情況下才可免除。[1] 如一方以消費者身份交易，或按另一方的書面標準業務條款交易，該另一方不得免除或限制其本身違約的責任，除非有關條款合理。同一準則亦適用於聲稱有權作出與預期實質上不同的履行的條款。[2] 合理性按第11條及附表二的指引評估。法院會考慮雙方的相對議價能力、客戶能否在沒有該條款的情況下與他人訂約、客戶是否知悉該條款，以及貨品或服務是否按客戶的訂單調整。[3]

交易所條款有三項特點容易受到挑戰。第一項是全面免除對客戶資產損失的責任，「不論因何引致」。這類條款適用於平台本身的疏忽時，必須通過合理性測試，而針對零售客戶則難以通過。第二項是容許平台「全權酌情」暫停、凍結或關閉帳戶的條款，屬於第3(2)(b)條所指聲稱有權作出與預期實質上不同的履行的情況。第三項是免除市場波動期間系統停頓責任的條款，而

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波動期間正是客戶最需要交易的時刻。新加坡法院對強加於個人的標準條款相當嚴格地適用該法，對按公平交易原則進行談判的商業各方則給予較大空間。[4]

平台的條款即使以外國法律為適用法律，亦不能因此規避該法。第27條規定，如選擇外國法律看來完全或主要是為了規避該法而強加，該法仍然適用。如客戶以消費者身份交易、慣常居於新加坡，並在新加坡採取訂立合約的必要步驟，該法亦適用。[5] 因此，一名居於新加坡、在新加坡網上開戶的零售客戶，可援引該法對抗離岸交易所的免責條款，前提是她能把交易所帶到新加坡法院席前。

註釋

1. Unfair Contract Terms Act 1977，第2條。 ↩
2. Unfair Contract Terms Act 1977，第3條。 ↩
3. Unfair Contract Terms Act 1977，第11條及附表二。 ↩
4. *Kenwell & Co Pte Ltd v Southern Ocean Shipbuilding Co Pte Ltd* [1998] SGHC 316，以及其後在新加坡把Unfair Contract Terms Act 1977第11條適用於標準格式免責條款的案例。 ↩
5. Unfair Contract Terms Act 1977，第27(2)條。 ↩

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