

# The TOKYO PRO-BOND Market

End of March 2012 saw the first programme listing on the TOKYO PRO-BOND Market, a new professional debt securities market that was established by TOKYO AIM in May 2011, with a draw-down bond issue listing under the programme taking place in mid-April 2012. We take this opportunity to explore the requirements of this unique Japanese market which, while being a listed securities market where certain disclosure is required, caters for securities to be sold within the framework of a private placement, where only professional investors and certain non-residents of Japan are permitted to participate in the market.

This briefing note is aimed at issuers considering accessing this market as a possible alternative to traditional "samurai bonds", and their advisers.

## Listing on the TOKYO PRO-BOND Market and private placement to professional investors only

The TOKYO PRO-BOND Market, as the name suggests, is a debt securities exchange market for Professional Investors (as defined below) only, established by TOKYO AIM, Inc. ("**TOKYO AIM**"), a wholly-owned subsidiary of Tokyo Stock Exchange Group, Inc. (the "**Tokyo Stock Exchange**")<sup>1</sup>. Many types of debt securities may be listed on the TOKYO PRO-BOND Market, but for the purposes of this briefing, as it is aimed at issuers considering the market as a possible alternative to traditional samurai bonds<sup>2</sup>, we have assumed that the securities being offered are Japanese law governed debt securities, denominated in Japanese Yen, issued or to be issued by a non-Japanese issuer, targeting Professional Investors in Japan.

A listing on the TOKYO PRO-BOND Market allows for an offering of debt securities in Japan within the "Private Placement to Professional Investors Only" exemption from full securities registration.

### Key issues

- Listing on the TOKYO PRO-BOND Market: listing criteria, offering to professional investors only, transfer restrictions
- Listing logistics – programme/standalone, documentation, language, uploading on websites, GAAP, clearing, listing fees
- Liabilities for disclosure and "front running"
- Continuous disclosure
- Delisting

1 TOKYO AIM was initially established as a joint venture between the Tokyo Stock Exchange and London Stock Exchange plc. It became a wholly-owned subsidiary of the Tokyo Stock Exchange on 28 March 2012, and the Tokyo Stock Exchange has announced its intention to integrate TOKYO AIM into the Tokyo Stock Exchange effective 1 July 2012 and to rebrand the TOKYO AIM market (an equity market for growth companies) as the "TOKYO PRO Market".

2 For a discussion of the procedures for issuing traditional samurai bonds, see our briefing note: [http://www.cliffordchance.com/publicationviews/publications/2012/03/samurai\\_bonds.html](http://www.cliffordchance.com/publicationviews/publications/2012/03/samurai_bonds.html)

"Private Placement to Professional Investors Only" is one of the types of exemptions from the securities registration requirements under the Financial Instruments and Exchange Act of Japan (Act no. 25 of 1948, as amended, the "FIEA"). The requirements for falling under the Private Placement to Professional Investors Only exemption, insofar as the TOKYO PRO-BOND Market is concerned, are as follows:

- *Listing.* The issuer must have or will have the bonds being offered listed on TOKYO PRO-BOND Market.
- *Offerees.* The offerees of the initial distribution of the bonds must be limited to Professional Investors. (Note also that solicitation to a Professional Investor (except for solicitation to a QII (defined below), the Japanese government and Bank of Japan) must be conducted by Japanese licensed securities companies).
- *Transfer restrictions.* Transfers of the bonds by an investor to other investors is restricted unless the transferees are Professional Investors or certain non-residents of Japan.

We take each of the above requirements in turn below.

### Listing criteria for the TOKYO PRO-BOND Market

There are only two listing criteria for a listing on the TOKYO PRO-BOND Market:

- *Rating.* The bonds (or, in the case of a programme listing, the programme) must be assigned a credit rating. Any level of rating is acceptable, but ratings must be assigned from certain qualified rating agencies, such as Moody's, Standard & Poor's and Fitch, as well as Japanese domestic rating agencies such as Rating and Investment Information, Inc. and Japan Credit Rating Agency, Ltd. A rating downgrade does not impact on the listing eligibility. There are limited exemptions from the credit rating requirement, including government bonds and government-guaranteed bonds.
- *Underwriters.* The bonds must be underwritten by at least one dealer listed on the "Lead Managing Underwriter List" which has been prepared and published by TOKYO AIM. The current list can be found at [http://www.tokyo-aim.com/probond\\_e/hope/list-of-securities.html](http://www.tokyo-aim.com/probond_e/hope/list-of-securities.html). A dealer wishing to register on the list must file an application with the TOKYO AIM, which will examine the application taking into account factors such as the applicant's appropriate domestic and overseas experience as a lead managing underwriter.

Listing Regulations and Q&A relating to the TOKYO PRO-BOND Market are available at TOKYO AIM's website ([http://www.tokyo-aim.com/probond\\_e/](http://www.tokyo-aim.com/probond_e/)).

### Offering to Professional Investors only

The offerees of the initial distribution of the bonds to be listed on the TOKYO PRO-BOND Market must be limited to Professional Investors, in order to fall within the "Private Placement to Professional Investors Only" exemption from securities registration under the FIEA.

"Professional Investors", among others, include:

- Qualified Institutional Investors ("QIIs") (as further explained below);
- The Japanese government;
- Bank of Japan;
- Corporations that have been incorporated by a special act of incorporation under a special law in Japan;
- Investors' protection funds;
- The Deposit Insurance Corporation of Japan;
- The Agricultural and Fishery Co-operative Saving Insurance Corporation;
- Insurance policyholders' protection associations;
- Special purpose companies incorporated under the Japanese securitisation law;
- Companies listed on a Japanese exchange;
- Stock corporations which reasonably appear to have at least 500 million Japanese Yen in their capital;

- Registered financial instruments dealers or an entity which has applied for the QII special business license under Article 63 of the FIEA; and
- Foreign companies.

QIIs include, among others, Japanese licensed securities companies, banks, investment managers, insurance companies, regulated investment corporations, Shinkin banks and federations of Shinkin banks, labour banks (*roudou kinko*) and federations of labour banks (*roudou kinko rengoukai*), Norinchukin Bank and Shokochukin Bank, Government Pension Investment Fund (*nenkin shikin unyou kikin*), limited liability investment partnerships (*toushi jigyou yugen sekinin kumiai*), certain employees' pension funds (*kousei nenkin kikin*), certain new employees' pension funds (*kigyuu nenkin kikin*) and certain federations of employees' pension funds (*kigyuu nenkin rengoukai*) which have filed notifications with the Financial Services Agency of Japan.

The status of an investor may be changed by a contractual arrangement between the investor and a securities broker. An entity which is categorised as a Professional Investor (except for a QII, the Japanese government and Bank of Japan) can be treated as a non-Professional Investor if the entity so agrees with the securities broker. In a similar way, an entity (including a local government) which is categorised as a non-Professional Investor can be treated as a Professional Investor if the entity so agrees with the securities broker. Although an individual is, in principle, treated as a non-Professional Investor, a high net worth individual can be treated as a Professional Investor if the person so agrees with the relevant securities broker.

Solicitation to a Professional Investor (except for solicitation to a QII, the Japanese government and Bank of Japan) must be conducted by Japanese licensed securities companies. Therefore, the attendees of a roadshow presentation by the issuer must be limited to a QII, the Japanese government and Bank of Japan. We have assumed in this briefing that the issuer itself will not be involved in such solicitation or marketing activities.

## Transfer restrictions

A holder of bonds listed or to be listed on the TOKYO PRO-BOND Market may only transfer such bonds to Professional Investors or certain non-residents of Japan. Additionally, such bonds may also be transferred without restriction to:

- The issuer;
- A majority shareholder of the issuer (being a company holding (either in its own name or in another person's name), voting rights in the issuer exceeding 50% of all voting rights in the issuer (excluding voting rights pertaining to treasury stock));
- A Connected Officer of the issuer. A "**Connected Officer**" comprises an officer (meaning directors, corporate auditors, executive officers or persons equivalent thereto) of the issuer holding (either in his/her own name or in another person's name), voting rights in the issuer exceeding 50% of all voting rights in the issuer (excluding voting rights pertaining to treasury stock); and
- A person controlled by a Connected Officer (a "**Controlled Person**", being a juridical person over 50% of whose total voting rights (excluding voting rights pertaining to treasury stock) are held by a Connected Officer (or jointly by a Connected Officer and another Controlled Person)).

To ensure compliance with this transfer restriction, a transfer restriction agreement must be entered into between (i) the issuer and the initial investor, and (ii) the initial investor and the relevant distributing securities company (such as underwriting securities companies and other selling group members) by the date of issue of the bonds. Practically, it would be very difficult for the issuer to enter into such agreement with each of the initial investors, so certain alternative methods of achieving this has been considered, such as:

- A lead managing underwriter obtaining authorities from all initial investors in order for it to enter into the transfer restriction agreement with the issuer on behalf of the investors; and/or
- A lead managing underwriter obtaining authority from the issuer in order for it to enter into the transfer restriction agreement with all the initial investors.

## Listing logistics

### Programme or standalone?

An issuer can have its debt issuance programme listed when it obtains a credit rating in respect of the programme and appoints a prospective lead manager from the Lead Managing Underwriter List. However, even where the issuer issues the bonds by means of a draw-down from the listed programme, it needs to have such issued bonds actually listed as well in order to offer and sell them within the framework of the Private Placement to Professional Investors Only exemption.

Note that, while in this briefing note we focus on the offering of Japanese law governed debt securities denominated in Japanese Yen, there are no restrictions on governing law or currency of denomination. It should be possible to list an existing euro/global medium term note ("**MTN**") programme on the TOKYO PRO-BOND Market.

The issuer can also choose to do a standalone bond issue for the purposes of the offer and listing.

### Filing and disclosure documents

#### Programme listing

Where an issuer chooses a programme listing, the following documents must be filed with the TOKYO AIM, and also published at the issuer's website:

- The "**Programme Information**", at the time of the programme listing.  
The Programme Information is filed and published in order to have the issuer's debt issuance programme listed on TOKYO PRO-BOND Market. Draw-downs under the programme becomes possible upon the filing and publishing of the Programme Information, and the draw-down period lasts for one year from the filing date. The Programme Information basically contains the issuer's corporate information. Although TOKYO AIM has published a prescribed form for the corporate information<sup>3</sup>, it is not required for the issuer to follow such prescribed form, and the issuer can prepare the Programme Information by using materials from its MTN programme base prospectus or any other existing offering documents prepared in English if so permitted by TOKYO AIM. If the issuer wishes to use its MTN programme base prospectus or any other existing offering documents, it will be requested by TOKYO AIM to confirm that those documents have been prepared in accordance with relevant laws or regulations in the jurisdiction of the issuer.
- The "**Supplemental Specified Securities Information**", at the time of the draw-down.  
The Supplemental Specified Securities Information is filed and published in order to have the drawn-down bonds listed. Apart from the corporate information (which would normally be incorporated by reference to that contained in the Programme Information), the Supplemental Specified Securities Information contains the issue-specific information such as the terms and conditions of the bonds, the rating of the bonds and the underwriting arrangements; certain additional information is also required but it is unlikely to exceed the information that has been published in the issuer's home jurisdiction.

Although there is no "established market practice" as such yet for the TOKYO PRO-BOND Market, we believe that (i) the Programme Information (with indicative terms and conditions of the Bonds and the issuer's corporate information) will be filed first to list the programme and start the marketing, and (ii) the Supplemental Specified Securities Information with the entire terms and conditions (with pricing terms) will be filed after book-building and pricing.

#### Standalone bond listing

Where an issuer chooses to do a standalone issue, it only needs to file with TOKYO AIM and publish at the issuer's website the Specified Securities Information. The corporate information to be included in the Specified Securities Information can be prepared in the same way as that contained in the Programme Information mentioned above.

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<sup>3</sup> The prescribed form of corporate information in the Programme Information and the Specified Securities Information mainly consists of (i) financial highlights for the most recent three years, (ii) business description, (iii) description of affiliated companies and (iv) the consolidated financial statements for the latest completed fiscal year and the audit report in respect thereof.

Although there is no established practice yet, we believe that (i) the Specified Securities Information (with indicative terms and conditions of the Bonds and the issuer's corporate information) will be filed at the time of launch or deal announcement and marketing will then start, and (ii) an Amendment to the Specified Securities Information with pricing terms will be filed after book-building and pricing.

### Language

All of the filing and disclosure documents mentioned above can be in English or Japanese.

### Website

The issuer must keep the Programme Information and the Supplemental Specified Information (for a programme listing) or the Specified Securities Information (for a standalone listing) published on its website for one year from the date of initial publication and must amend the contents thereof when it deems necessary. The same documents will be published on TOKYO AIM's website for the same period. It would be advisable for the issuer to create a new page within its existing website dedicated to uploading of its TOKYO PRO-BOND Market-related information.

### GAAP

In terms of generally accepted accounting principles ("**GAAP**") under which the issuer's financial statements are to be prepared, TOKYO AIM generally accepts US GAAP, IFRS (including IFRS adopted by EU) and Japanese GAAP. Other GAAPs can be negotiated with TOKYO AIM.

### Clearing

The bonds will be dematerialised and electronically settled and issued under the "Book-Entry Transfer System" of the Japan Securities Depository Center, Inc. ("**JASDEC**", a Japanese clearing system similar to Euroclear Bank S.A./N.V. or Clearstream Banking, *société anonyme*).

## Transaction documents and other documents

### Principal transaction documents

The following comprise the principal transaction documents prepared by and/or entered into by an issuer:

- Conditions of the Bonds (Terms and Conditions);
- Subscription Agreement;
- Fiscal Agency Agreement; and
- Transfer Restriction Agreement.

These transaction documents can be prepared in English or Japanese. Although TOKYO AIM's requirements do not insist on these being governed by Japanese law, to the extent the objective for listing on the TOKYO PRO-BOND Market is as "an alternative to a traditional samurai bonds offering", they are likely to be governed by Japanese law.

Further, although there is no established practice yet, legal counsels will likely be required to provide relevant legal opinions, and the issuer's external auditors will be required to provide comfort letters. Because a trustee structure is not common in Japan for straight debt issues, no trust deeds are executed.

### Other documents

Other documents prepared by and/or entered into by an issuer include the following:

- Listing application documents to TOKYO AIM (in a form set by TOKYO AIM, in either English or Japanese);
- Standard form letters relating to the application to JASDEC (in English and Japanese, but supporting documents such as the certificate of incorporation and the incumbency certificate must be translated into Japanese);
- Standard form letter relating to application to the Tokyo Stock Exchange for an issuer code (in Japanese);
- For Japanese Yen issues of above 1 billion Japanese Yen, a foreign exchange report to the Bank of Japan after the issue of the Bonds (in a set form, in Japanese); and

- Various other peripheral documents and letters (e.g. process agent appointment letter, powers of attorney and other corporate authorisation documents).

## Listing fees

TOKYO PRO-BOND Market's fees charged for listing are currently as follows:

- Programme listing:
  - Initial listing of the programme: 1 million Japanese Yen;
  - Annual renewal of the programme: no fees;
  - Increase in the programme amount (the maximum nominal amount of bonds issuable under the programme): 1 million Japanese yen; and
  - Draw-down bond issue listing under the programme: no fees.
- Standalone bond listing: 1 million Japanese Yen.

Above fees are payable together with applicable Japanese consumption tax. Fees are payable by the end of the month following the date of listing, and will be invoiced by TOKYO AIM. Please check the TOKYO PRO-BOND Market website for the latest level of fees payable from time to time<sup>4</sup>.

## Liabilities for disclosure and "front running"

### Disclosure liability

#### Liability for disclosure documents

The FIEA and other applicable Japanese laws impose certain civil, administrative and/or criminal liabilities on the Responsible Persons (as defined below) in respect of the Disclosure Documents (as defined below). In this briefing, we focus on the liabilities imposed by the FIEA.

The following comprise the "**Responsible Persons**":

- the issuer;
- the persons (the "**Providers or Publishers**", as described below) who are deemed to have submitted the Programme Information or the Specified Securities Information to TOKYO AIM or published them at the issuer's website; and
- the directors of the issuer, including non-executive directors and independent directors of the issuer (the "**Directors**").

The person who is named as a representative of the issuer on the cover page of the Disclosure Documents will be considered to be a "Provider or Publisher". In addition, the Chief Executive Officer and the Chairman of the issuer may also be deemed to be "Providers or Publishers".

In addition, the underwriters are also liable for any misstatements in the Disclosure Documents.

The Responsible Persons are liable for the Programme Information and the Specified Securities Information, including any amendments and supplements thereto (collectively, the "**Disclosure Documents**"). Note that even if the Disclosure Documents are prepared in Japanese, the Responsible Persons will be liable. The FIEA does not stipulate any disclosure liabilities of the issuer or its directors on any misstatement in the marketing materials (such as roadshow materials) other than the Disclosure Documents; however, the issuer is not totally free from such liability in connection with the marketing materials – general rules under the Civil Code or the Penal Code of Japan may apply.

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<sup>4</sup> Note that as of the date of the writing of this briefing note, the English version of the TOKYO PRO-BOND Market rules ([http://www.tokyo-aim.com/english/files/rule\\_collection/303\\_rule\\_eng.pdf](http://www.tokyo-aim.com/english/files/rule_collection/303_rule_eng.pdf)) had not been updated to reflect the February 2012 revision of the fees payable, and still mentioned the pre-revision fee levels (2 million Japanese Yen for programme listing and so on). The updated rules in Japanese are available at [http://www.tokyo-aim.com/japanese/files/contrast\\_table/20120223\\_merge.pdf](http://www.tokyo-aim.com/japanese/files/contrast_table/20120223_merge.pdf).

### Civil liability

Civil liability applies to the issuer and the Directors in relation to both initial and secondary investors of the bonds, in connection with untrue material statements or omissions of material statements in the Disclosure Documents, unless they can prove that the relevant investor was aware of the untrue material statements or omissions of material statements when the investor purchased the bonds (or, in the case of the Directors, unless they can prove that (i) they were not aware of such untrue material statements or omission of material statements, and (ii) it was not possible to know of such untrue material statements or omission of material statements even if they had taken due care). The amount of damages payable by the issuer will be calculated pursuant to the FIEA and the investors do not need to prove the actual amount of damages.

### Criminal liability

Criminal liability applies to the issuer and the Providers or Publishers of the Disclosure Documents in connection with untrue material statements included fraudulently in these documents. The issuer may be liable for a fine of up to 0.7 billion Japanese Yen. The Providers or Publishers may be liable for a fine of up to 10 million Japanese Yen and/or imprisonment of up to 10 years.

### Administrative monetary penalties

Administrative monetary penalties can be imposed by the Japanese authorities on the issuer for untrue material statements or omission of material statements in the Disclosure Documents. The amount of the penalty will be 2.25% of the issue amount of the Bonds.

### Liability for "front running"

Either the Programme Information (for a programme listing) or the Specified Securities Information (for a standalone listing) must be published at both TOKYO AIM's website and the issuer's website prior to the commencement of any solicitation, marketing or offering of the bonds in Japan. Such publication needs to be carried out simultaneously at TOKYO AIM's website and the issuer's website in order to avoid any risk of "front-running", because if one publication occurs in advance of the other, some proactive investors may contact the issuer and the underwriters, but they cannot respond to the investors until after the publication at the other website is completed. Criminal liability and administrative monetary penalties will be imposed on the issuer and the underwriters who fail to do this and "front runs" an offering.

## Continuous obligations

Following the offering of the bonds, the issuer will become obliged to file:

- Any amendments to the Specified Securities Information for one year starting on the date of its publication;
- Any amendments to the Programme Information for one year starting on the date of its publication (TOKYO AIM does not currently have mechanisms for a withdrawal of a programme);
- The Issuer Filing Information (as explained below) and any amendments thereto; and
- Timely disclosure documents.

All of these documents can be in English.

The issuer's continuous disclosure obligations in Japan relating to the Issuer Filing Information and timely disclosure documents will cease when none of the offered bonds are outstanding any longer.

### Amendments to the filings

Although the FIEA and the TOKYO PRO-BOND Market Listing Regulations (the "**Listing Regulations**") require the issuer to file and publish amendments to the Specified Securities Information, the Programme Information and the Issuer Filing Information, the thresholds for filing and publishing the amendments are not provided. Basically, the issuer must file and publish an amendment when it thinks it is necessary. Although there is no established practice yet, we believe that in addition to any amendment to the Specified Securities Information required for the purposes of providing pricing information, an amendment should generally be filed when the issuer publishes a supplement to its MTN programme base prospectus.

## Issuer Filing Information

The "**Issuer Filing Information**" is an equivalent to the annual report which the issuer publishes in its home jurisdiction. This obligation will be imposed on the issuer after it actually offers the bonds, i.e., if only a programme listing is made and no drawdown or issue has yet occurred, the issuer does not need to file or publish the Issuer Filing Information.

While TOKYO AIM has published a prescribed form of Issuer Filing Information<sup>5</sup>, the issuer does not have to follow it and can instead prepare it by using sections of its annual report prepared in English if so permitted by TOKYO AIM. If the issuer wishes to use its annual report prepared in its home jurisdiction, it will be requested by TOKYO AIM to confirm that it has been prepared in accordance with the relevant laws and regulations applicable in its jurisdiction.

Although the Listing Regulations require the Issuer Filing Information to be filed within three months after the end of the relevant fiscal year, TOKYO AIM will likely give an extension period to the issuer if it applies with rational reasoning. For example, if the issuer is able to explain to TOKYO AIM that the deadline for the filing of its annual report in its own jurisdiction under the applicable rules is later than three months after the end of the fiscal year (e.g., under the EU Transparency Directive, an issuer must publish a compliant annual report within four months of the end of the fiscal year), then this will be considered sufficiently rational for an extension period to be granted.

## Timely disclosure

In addition to the amendments to the filings mentioned above, the issuer must also make timely disclosure in cases such as dissolutions, bankruptcies and default on the bonds. This however will be exempted if the issuer has its shares listed on any stock exchange, or if the issuer is a wholly-owned subsidiary of a listed company.

However, these TOKYO AIM disclosure requirements are not necessarily aligned completely with insider trading regulations in Japan, so that the methods of disclosure of for "cleansing" inside information to ensure that no insider trading breaches occur have not yet been established as a matter of Japanese regulations.

## Disclosure liability for continuous disclosure

Civil, criminal and/or administrative (including those imposed by TOKYO AIM) liability will apply in connection with the continuous disclosure documents as well as applicable administrative penalties for not filing such documents.

## Delisting

A credit rating downgrade does not trigger a delisting.

The Bonds will be delisted when, among other things:

- the bonds mature, or are otherwise redeemed in full;
- any material misstatement is found in the Specified Securities Information, the Issuer Filing Information or (if applicable) the Annual Securities Report (the annual report filed in accordance with Japanese regulations in respect of certain registered issuers);
- the bonds become due and payable by reason of default; or
- TOKYO AIM has decided to delist the Bonds for any other reason.

Delisting at the application of the issuer is not permitted.

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<sup>5</sup> The prescribed form of Issuer Filing Information consists of (i) financial highlights for the most recent three years, (ii) business description, (iii) description of affiliated companies and (iv) the consolidated financial statements for the latest completed fiscal year and the audit report in respect thereof.



## Conclusion

The TOKYO PRO-BOND Market procedures for listing are generally fairly flexible, and this, together with the possible use of English as the language for documentation, may prove to be of particular interest to non-Japanese issuers offering bonds to Japanese investors for the first time, to the extent that the narrower range of target investors (as compared to traditional samurai bonds) and the restriction of transferability are not material issues for such issuers. Translation costs (including legal fees in relation to the documentation and auditors' fees being incurred in respect of the translation of the financial statements) and printer costs (in respect of the conversion of filing data into html and the hard copy printing of prospectuses) will be considerably reduced in a TOKYO PRO-BOND Market listed offering as compared to a traditional samurai bonds offering; however, to the extent there are any pricing differences between a TOKYO PRO-BOND Market listed offering and a traditional samurai bonds offering, the issuer will need to perform a cost-benefit analysis in deciding which market to access.

The first listing of bonds on the market was in respect of Japanese Yen denominated, Japanese law governed bonds issued by a non-Japanese issuer; it remains to be seen whether the market will continue to develop simply as an "alternative to traditional samurai bonds", or whether it will develop further to encompass other debt products (such as foreign law governed MTNs or sukuks) and/or Japanese issuers which are not already registrants under the FIEA.

***Clifford Chance Tokyo and Amsterdam acted as legal advisers to ING Bank N.V. on its programme listing and draw-down bond listing on the TOKYO PRO-BOND Market, the first programme and bond listings on such market.***

*Where Japanese legal concepts have been expressed in the English language, the concepts concerned may not be identical to the concepts described by the equivalent English terminology as they may be interpreted under the laws of other jurisdictions.*

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