免责条款与《1977年不公平合同条款法》

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平台条款包含大量免除和限制责任的规定。新加坡《1977年不公平合同条款法》（重新颁布的英国同名法规）从三个方面对其加以规制。因过失造成死亡或人身伤害的责任不得免除；因过失造成其他损失的责任，只有在条款合理的情况下方可免除。[1]一方以消费者身份交易，或按照另一方的书面标准营业条款交易的，该另一方不得免除或限制其自身违约的责任，但条款合理者除外。对于主张有权提供与预期实质不同之履行的条款，适用同一标准。[2]合理性根据第11条及附表二的指引进行评估。法院会考虑当事人相对的议价能力、客户能否在没有该条款的情况下与他人订约、客户是否知悉该条款，以及货物或服务是否按客户订单定制。[3]

交易所条款中有三类规定容易受到挑战。第一类是对客户资产损失“无论因何种原因造成”的概括性免责。就平台自身过失而言，此类条款必须通过合理性检验，而面对零售客户时很难通过。第二类是赋予平台“全权酌情”暂停、冻结或关闭账户之权利的条款。此类条款属于第3(2)(b)条所指的主张有权提供与预期实质不同之履行的条款。第三类是免除行情剧烈波动期间系统

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停机责任的条款，而这恰恰是客户最需要交易的时刻。新加坡法院对强加于个人的标准条款适用该法相当严格，同时给予公平协商的商业当事人更大的空间。[4]

平台条款以外国法律为准据法，并不能因此规避该法。第27条规定，如选择外国法律看来完全或主要是为了规避该法而强加的，该法仍然适用。客户以消费者身份交易、惯常居住于新加坡并在新加坡完成订立合同的必要步骤的，该法同样适用。[5]因此，一名在新加坡居住、从新加坡在线开户的零售客户，可以援引该法对抗离岸交易所的免责条款，前提是她能够将该交易所带到新加坡法院面前。

注释

1. Unfair Contract Terms Act 1977，第2条。 ↩
2. Unfair Contract Terms Act 1977，第3条。 ↩
3. Unfair Contract Terms Act 1977，第11条及附表二。 ↩
4. *Kenwell & Co Pte Ltd v Southern Ocean Shipbuilding Co Pte Ltd* [1998] SGHC 316，以及其后在新加坡将Unfair Contract Terms Act 1977第11条适用于标准格式免责条款的案例。 ↩
5. Unfair Contract Terms Act 1977，第27(2)条。 ↩

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