Choosing Among Authorities for Consumer Financial Protection in Taiwan: A Legal-Theory-Of-Finance Perspective

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CHOOSING AMONG AUTHORITIES FOR CONSUMER FINANCIAL PROTECTION IN TAIWAN: A LEGAL-THEORY-OF-Finance PERSPECTIVE*

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Introduction

In 2008, an economic crisis struck most of the world’s financial markets.\(^1\) During the Global Financial Crisis (“GFC”), the global markets were devastated by bank over-lending, and therefore several international financial institutions were unable to continue business, precipitating a serious controversy around international financial markets. Taiwan’s financial market was one of those seriously affected by the GFC. Retail investors in Taiwan who invested in structured notes issued or arranged by Lehman Brothers Holdings Inc. (“Lehman Bros.”) might have been unaware of the real risk these financial products posed (“the structured notes debacle”).\(^2\)

According to Professor Pistor’s seminal paper, “A Legal Theory of Finance” (“LTF”), in times of distress or crisis, it may be socially optimal for the state to intervene in private contracting; on top of that, under conditions of extreme uncertainty, future adjustment in contracts can be required not merely at the apex of the financial system, where law tends to be relatively more elastic, but also at the periphery if ex ante legal commitments are relaxed or suspended as a sort of “safety valves” so as to take changes in circumstances into consideration.\(^3\) The structured notes debacle in Taiwan during the GFC can shed some light on questions about whether courts, regulators, or other agents would be best placed to create safety valves, especially on the periphery of the financial system.

When it comes to whether courts would be best placed to fashion safety valves, Art. 227-2 of the Taiwanese Civil Code (“CC”), the legal foundation for applying the rule of changed circumstances in Taiwan, has empowered courts to initiate interventions on behalf of retail investors or financial services consumers in times of distress. As the structured notes debacle showed, some retail investors left holding

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2. The structured notes are hybrid financial products that combine derivatives and debt securities and that link to other investment products in the market. See C. H. Chen, ‘Structured Notes Fiasco in the Courts: A Study of Relevant Judgments between 2009 and 2010’, *中研院法學期刊 [Academia Sinica Law Journal]*, 10 (2012), 161, 211. See also P. Chen, ‘Behind the News - Structured Notes: Who’s at Fault?’. Chen briefly defined structured notes as “a type of debt instrument whose value is based on an underlying derivative product rather than on fixed rates for periodic payout.” To give a snapshot of the scope of the structured notes debacle, “more than 50,000 Taiwanese invested more than NT$42 billion (US$1.25 billion) in structured notes issued by Lehman Brothers alone.” Ibid.
worthless financial products in the wake of the 2008 crash were quick to seek legal redress for their losses, but these disputes were difficult to address by properly using the civil remedies then available in Taiwan. Few of the possible causes of actions listed in the Taiwanese Civil Code (“CC”) or in other special laws were available to address disputes over structured notes. In theory, the most applicable remedy available in the legislation available at the time was Art. 227-2 of the CC, which governs the rule of changed circumstances, but in practice it was referred to extraordinarily rarely in such disputes. In other words, the substantive aspect of the rule of changed circumstances, which requires courts’ intervention, was little applied in Taiwan during the GFC.

However, interventions by the Financial Supervisory Commission (“FSC”), the sole financial market watchdog in Taiwan, showed that the procedural aspect of the rule of changed circumstances emerged instead to address the structured note controversies at the time. Specifically, the change of circumstances caused by the bankruptcy of Lehman Bros. contributed to a wave of controversies in Taiwan in which retail investors argued that bank salespersons did not fully disclose the risk of these structured notes. Meanwhile, there was no professional authority to handle this kind of financial product controversy at that time. The FSC, appearing to create a safety valve for retail investors, intervened by establishing the makeshift Alternative-Dispute-Resolution (“ADR”) system, which was created in a hurry partially due to courts’ failure simultaneously to handle such a great number of cases and the court’s lack of professional knowledge and related resources. In addition to setting up the makeshift ADR system, the FSC intervened and used discretionary power to force financial intermediaries selling structured notes to settle complaints from retail investors and share the credit risk of Lehman Bros. and the concomitant systemic risk. This demonstrated a procedural aspect of the rule of changed circumstances.

From the LTF perspective, the FSC seemed to redistribute losses to the banks, thus granting the relaxing of binding commitments to retail investors in such a way as flexibility relief is created for apex players in a theoretical sense. From a political economy perspective, however, it is important to ask why the FSC intervened. Mounting public sentiment agitated by the media and aroused by various Structured Notes Self-Salvation Organizations (“SNSSOs”), which were formed via social networks on the Internet, insisted that “something must be done.” Shaping a national “we must act now” type of environment, SNSSOs exerted pressure on the

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4 See Part II.A.4 below.
5 See Part II.A.3 below.
6 Likewise, in terms of U.S. corporate financial regulations such as the Sarbanes-Oxley Act and the
government by resorting to street protests and various informal channels. The structured notes debacle in Taiwan demonstrates that financial services consumers generally may not be as dispersed, apathetic, and weak as many think when it comes to pressuring the government by resorting to such methods of political mobilization in times of crisis. This meanwhile indicated that retail investor action groups sought to bring financial consumer position to the attention of the government, therefore obtaining the special, flexible treatment. Therefore, the tentative ADR scheme was created in a hurry during the GFC; in order to prevent similar problems in the future, the Financial Consumer Protection Act (“FCPA”) was adopted in 2011, formalizing the tentative ADR scheme into the Financial Ombudsman Institution (“FOI”) in 2012. In doing so, the FSC in theory appears to have treated retail investors’ concerns similarly to those of private banks that are closer to the financial system’s apex.

Despite these efforts, flaws remain in Taiwan’s consumer financial protection infrastructure. The government could manipulate society’s perceptions of how the structured notes debacle was addressed through the tentative ADR scheme, leading people to believe that the FOI could use ADR to prevent future problems similar to the structured notes controversy. From a political-economy perspective, executive-branch rule-makers, enforcers and legislators receive the benefit of a public perception that the tentative ADR scheme is pro-investor and the newly-enacted FCPA is a tough formalization of an ex post facto ADR channel, avoiding blame for failing to prevent wrongdoing through ex ante regulation that should have been implemented prior to the GFC.

Ex post action replaces ex ante regulation. This is not just beneficial to legislators and executive branch officials appearing to be tough in establishing an alternative ADR body and forcing banks to share the systemic risk on a small scale. It benefits banks too, because the focus on ex post facto ADR channels directs discussion about responses and remedies away from ex ante regulation and supervision by the FSC. However, the FSC, which under the current financial regulatory architecture is a unified regulator and tends to focus more on prudential regulation concerns than consumer financial protection, might not be best placed to produce a safety valve for financial services consumers.

This chapter argues that in order not to leave Taiwanese retail investors with only one option to influence their position in the financial system via non-legal informal channels such as street protests whenever a financial crisis arises, Taiwan could consider reforming the structure of its financial regulatory system by adopting a

stronger consumer financial protection watchdog such as the U.S. Consumer Financial Protection Bureau (“CFPB”), where prudential regulation concerns do not predominate over consumer financial protection. A professional consumer complaint body that is separate from and independent of the FSC, including with exclusive control over its own rulemaking, supervision, and enforcement of consumer financial protection measures in Taiwan, would be able to create safety valve flexibility when necessary. This would bring the position of financial services consumers to the attention of the government, so that the accommodations would flexibly be provided even at the periphery of Taiwan’s domestic financial system.

This chapter unfolds as follows: Part I deals with the question of whether the substantive aspect of the rule of changed circumstances is applicable in such circumstances as financial crises, bearing in mind the issue of whether courts are suitable bodies to create safety valves for consumer financial protection. Part II discusses the emergence of the procedural aspect of the rule of changed circumstances, a variation of its substantive form and the legislation introduced following the GFC. It then offers a political economy analysis of whether the FSC would be a better choice than courts to create safety valve waivers of law on the periphery of the financial system. Part III, from the LTF and political economy perspective, assesses why the FSC intervened in the structured notes debacle and its regulatory aftermath in Taiwan. To conclude, this paper advocates creating an independent agency such as a Taiwanese version of the CFPB to act independently of the FSC and exclusively control its own rulemaking, supervision, and enforcement of consumer financial protection measures in Taiwan. This body would be better placed to offer the legal flexibility of safety valves within the financial system. In short, the structured notes saga illuminates the power relationships within the Taiwanese financial system, illustrating how law is applied under pressure.

I. Courts as Bodies Creating Safety Valves for Consumer Financial Protection

A. Basic Theories

If the effects of GFC on contracts in Taiwan are taken into account, the theoretical basis appears to rest on the rule of fundamental change of circumstances (clausula rebus sic standibus), or the concept of frustration of contracts.

The first issue to be explored under the GFC herein is the “rule of changed circumstances,” which is related to sudden events that impact the foundation of
transactions. In the GFC context, the question may involve whether those structured note contracts can be terminated or rescinded, just as some retail investors assert, because in some instances the GFC has totally changed the circumstances at the moment a contract is signed.

As a matter of legal theory, the rule of changed circumstances is an exception to the principle of *pacta sunt servenda*—that is, the promise must be kept. The rule of changed circumstances has been developed under both the common law and the civil law,\(^7\) and is often applied to dramatic changes resulting from wars.\(^8\) The idea of changed circumstances was also created and applied in German civil law cases.\(^9\) Pistor explains that court-made principles designed to adapt contracts to new circumstances have been incorporated into the German civil code:

> If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration.\(^{10}\)

The rule of changed circumstances also exists in the Taiwanese Civil Code, albeit with somehow different wording, as discussed below.

**B. The Substantive Aspect of the Rule of Changed Circumstances in the Taiwanese Civil Code**

Some provisions of the CC share certain characteristics of the rule of changed circumstances. Even prior to the codification of the Taiwanese version of this rule, similar concepts were present in other Taiwanese laws and court decisions.

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\(^{10}\) Pistor, ‘A Legal Theory of Finance’, 329.
1. Historical Review

Art. 227-2\(^{11}\) of the CC is equivalent to the rule of changed circumstances in Taiwan. The CC follows the approach of civil law and is mainly patterned after the German Civil Code. Before the codification of Art. 227-2, when it came to the issue of changed circumstances, Taiwan’s and Germany’s laws even shared similar developmental backgrounds with regard to changed circumstances. The problems with enforcing contracts during and after a time of war shed light on the demands to address this issue\(^{12}\) in that local market conditions then tended to be extremely unstable.\(^{13}\)

Although the rule of changed circumstances was not directly imported from Western legal systems, Taiwanese courts have long relied on the principle of good faith to address contact disputes under changed circumstances, thus sharing the same basis as its development in other civil law countries such as Germany.\(^{14}\) In Taiwan, the idea of changed circumstances was usually cited by courts to deal with dramatic changes of price levels and the change of currencies after the Second World War (WWII).\(^{15}\) The first attempt to codify the rule of changed circumstances was Art. 397 of the Code of Civil Procedure (CCP),\(^{16}\) which is worded similarly to the current Art. 227-2 of the CC. The former also emphasizes that the circumstances in question must not result from the actions of either party.\(^{17}\) In 1968, this Article was initially placed in the CCP rather than the CC for the sake of expediency.\(^{18}\) Prior to the codification

\(^{11}\) The full text and elements necessary to apply this Article will be discussed in Part I.B.2.

\(^{12}\) The current ROC government moved to Taiwan after the end of the Second World War (WWII) due to the defeat by the Chinese Communist Party during a civil war. Therefore, cases relating to contract enforcement during a time of social change were often brought to the court during and after the war. See Hou, ‘A Study on Rules of Changed Circumstances’, 108.

\(^{13}\) Ibid.

\(^{14}\) Chen Erh Lin, Rethinking the Rule of Changed Circumstances, 台灣本土法學雜誌 [Taiwan Law Journal] 12 (2000), 57, 61. For example, the German Supreme Court (Reichsgericht) used to invoke the principle of good faith under Germany’s civil code to adjust contracts to changed circumstances. Pistor, ‘A Legal Theory of Finance’, 329 (noting that the German Supreme Court “used the principle of good faith embodied in the civil code to adapt contracts to new circumstances”).

\(^{15}\) Hou, ‘A Study on Rules of Changed Circumstances’, 108-9. Taiwan’s currency changed once after the end of the WWII in an effort to control inflation. Most of the court cases related to this event dealt with the value difference between the New Taiwan Dollar and the original Taiwan Dollar.

\(^{16}\) Art. 397 formerly stipulated: “(1) The court shall, ex officio, make just determination and give judgment to increase, decrease, or make payment, or change other effect of any juristic act which has its effect become unjust after it is done due to change of circumstances upon cause not attributable to the parties concerned and beyond their expectation. (2) The above provision shall apply mutatis mutandis to legal relationship originated from non-juristic act.” Please note that this Article was later modified in February 2003, and now no longer covers changed circumstances in terms of substantive law (as opposed to procedural law).

\(^{17}\) Lin, ‘Rethinking the Rule of Changed Circumstances’, 66-67.

\(^{18}\) The amendment was made in February 1968, when there was no official plan to amend the CC, so
of the rule under the CC, courts repeatedly tried to apply similar concepts to this rule based on previous court decisions, such as the interpretation of the principle of good faith and Art. 397 of the CCP.19

Art. 227-2, an official legal basis of the rule of changed circumstances, was finally added in 1999 when the CC was amended.20 This is now the legal or statutory foundation for applying the rule of changed circumstance under the CC, as will be discussed in detail as follows.

2. The Elements

Art. 227-2 of Taiwan’s Civil Code states:

(1) If there is change of circumstances which is not predictable then after the constitution of the contract, and if the performance of the original obligation arising therefrom will become obviously unfair, the party may apply to the court for increasing or reducing his payment, or altering the original obligation.
(2) The provision in the preceding paragraph shall apply mutatis mutandis to the obligation not arising from the contract.

Nevertheless, even after the enactment of this Article, the requirements for applying the rule of changed circumstances did not become fully clear, and continued to be supplemented by legal theories and court decisions. With those elements in the CC, the question is therefore whether the events of the GFC qualify as exceptional circumstances. If so, we must then discuss whether this rule has legal applications that retail investors can take advantage of.

Concepts similar to the rule of changed circumstances had already been invoked by courts before enactment of Art. 227-2,21 and these decisions are important references for interpreting the Article.22 In the context of financial crises, the core issues requiring interpretation seem to be the standards of “obviously unfair” and “foreseeability”.

Firstly, the wording of Art. 227-2 itself provides no clue as to how to decide

that the rule of changed circumstances was placed under the CCP as a temporary solution. See ibid, 66.

20 Ibid.
21 See Part I.B.1 above.
22 Lo, ‘An Introduction to Contract Defenses (Part II)’, 74.
what constitutes “obviously unfair.” There are two cases that may serve as particularly clear demonstrations of the problem: both share a similar factual background, but came to different conclusions.

In 2009 the Taiwan Supreme Court ruled\(^\text{23}\) that if a contractor is not economically disadvantaged, and if there is a price-index-adjustment term included in the contract, a rise in price is insufficient justification for invoking the rule of changed circumstances.\(^\text{24}\) Nonetheless, the Supreme Court also held\(^\text{25}\) that when a significant rise in price would lead to unfair results if the contract remained in force, then the rule of changed circumstances could be invoked and the contract terms adjusted. In this case the Supreme Court applied the rule without additional requirements such as weighing the economic strength of contracting parties.

Secondly, an unforeseeable event is another element that might necessitate invoking the rule of changed circumstances. In another 2009 case, the court determined the following precedent that the worsening of marine conditions was not unforeseeable because the contractor knew that the construction site was in an area where the weather was unstable, and therefore the change was foreseeable.\(^\text{26}\)

Regardless of whether the rule of changed circumstances can be applied in controversies resulting from the GFC, it is another question whether the legal effects of this rule meet the needs of retail investors. That will be explored closely below.

3. The Legal Effects

In accordance with Art. 227-2, the legal effects of applying the rule of changed circumstances appear to be clear, including “increasing or reducing payment” or “altering the original obligation.”

Nonetheless, in theory there are two tiers of possible judicial action when applying the rule of changed circumstances. The first is to adjust the contract terms

\(^{23}\) Zuigao Fayuan [Supreme Court], Civil Division, Tai-Shang No. 2470 (2009) (Taiwan).

\(^{24}\) Cases addressing price level changes also exemplify the standard to determine foreseeability. In these typical cases, the courts determined that if the price level term had been included in a contract, the rule of changed circumstances would generally not apply, unless the result of a change was unconscionable. See M. C. Cheng, *The Rule of Changed Circumstances Applied to Price Level Changes*, 174 萬國法律 [FT Law Review], 9, 11-12 (2010). See also the following similar court decisions: Zuigao Fayuan [Supreme Court], Civil Division, Tai-Shang No. 760 (1995) (Taiwan); Gaodeng Fayuan [High Court], Civil Division, Jian-Shang No. 126 (2007) (Taiwan); Gaodeng Fayuan [High Court], Civil Division, Jian-Shang No. 99 (2007) (Taiwan); Gaodeng Fayuan [High Court], Civil Division, Jian-Shang-Geng (Yi) No. 32 (2009); Gaodeng Fayuan [High Court], Civil Division, Jian-Shang No. 59 (2009) (Taiwan); Gaodeng Fayuan [High Court], Civil Division, Jian-Shang No. 53 (2008) (Taiwan). Based on these court decisions, the interpretation of terms in a contract involving financial products such as structured notes might be an important key to the issue of whether the investment or credit risk thereof is unforeseen.

\(^{25}\) Zuigao Fayuan [Supreme Court], Civil Division, Tai-Shang No. 2299 (2009) (Taiwan).

while maintaining its validity. However, if adjustment cannot produce a fair result, the
second tier would theoretically come into play: i.e., termination or rescission of a
contract.\textsuperscript{27}

Civil courts in Taiwan have been found to have jurisdiction to decide contract
adjustment in cases involving a change of a currency value.\textsuperscript{28} The Supreme Court
stated that the advantages and disadvantages faced by both parties due to the change
of circumstances should be taken into consideration in order to reach a fair
adjustment.\textsuperscript{29} Only if an adjustment would fail to achieve a fair result, as one
commentator has argued, would the court rescind the contract and award damages if
necessary, based on the principle of good faith.\textsuperscript{30} The idea behind this two-tier
approach is that the validity of a contract should be maintained to the extent possible,
as, in accordance with the principles of the CC, the court should not interfere in
private transactions unless absolutely necessary.\textsuperscript{31}

The second tier of rescission has yet to be applied by a Taiwanese court, so
opinion has it that only “adjustment”—the primary consequence—is allowed by the
CC.\textsuperscript{32} As one commentator pointed out, the only choice provided in Art. 227-2 and
the former text of Art. 397 in the CCP is “adjustment,” and it is possible that
Taiwanese courts have never tried to broaden this interpretation to cover the
secondary consequences of the rule.\textsuperscript{33}

\textbf{C. Application of Changed Circumstances to Investor Contracts?}

It is thus possible to make a temporary argument concerning the application of
the rule of changed circumstances to a dispute over structured notes. According to the
current text of Art. 227-2, the interpretation of investment or credit risk will determine
whether the rule of changed circumstances can be applied. Even if the rule does apply,
the Article and previous court decisions imply that the court may only adjust, not
rescind, the contract. More importantly, it is necessary for retail investors who took
part in transactions involving structured notes to apply to the court in order to benefit
from this remedy.\textsuperscript{34}

\textsuperscript{27} Ibid., 114.
\textsuperscript{28} Ibid., 115.
\textsuperscript{29} Ibid. See also the following court decisions supporting this ruling: Zuigao Fayuan [Supreme
Court], Civil Division, Tai-Shang No. 1771 (1958) (Taiwan); Zuigao Fayuan [Supreme Court],
Civil Division, Tai-Shang No. 2630 (1997) (Taiwan).
\textsuperscript{30} J. Y. Lin, ‘The Theory and Practice of the Rule of Changed Circumstances (II)’, 法律評論 [Chas
\textsuperscript{31} Lo, ‘An Introduction to Contract Defenses (Part II)’, 75.
\textsuperscript{32} Hou, ‘A Study on Rules of Changed Circumstances’, 114.
\textsuperscript{33} Ibid., 115.
\textsuperscript{34} K. C. Huang, ‘Should a Claim on the Rule of Changed Circumstances Necessarily Be Made Via
However, as shown in Part II, the makeshift ADR system was created in a hurry due to courts’ failure to handle the volume of cases filed and the courts’ lack of professional knowledge and related resources. Moreover, it was extremely rare to apply Art. 227-2 in cases of structured notes. This may be due to the strict conditions required by law, which deter retail investors from applying the rule of changed circumstances in actual cases. In other words, even though courts, independently of the FSC, have been empowered to act to create safety valves for consumer financial protection in times of distress, the rule of changed circumstances as potentially applied through court intervention was impeded from working in Taiwan during the GFC.

II. The Financial Supervisory Commission as a Maker of Safety Valves for Consumer Financial Protection

A. The Procedural Aspect of the Rule of Changed Circumstances: A Case Study on the Structured Notes Debacle

1. The Background

Financial institutions in Taiwan began promoting structured notes around 2001, and at that time investors had to purchase them through foreign banks. In 2003, the Ministry of Finance (“MOF”) announced retail investor protection regulations on disclosing information related to investment-linked insurance policies. In September 2008, Lehman Bros. went bankrupt, and all transactions involving structured notes issued or arranged by Lehman Bros. were suspended during the period of bankruptcy protection in Taiwan. This event set off a wave of lawsuits against banks, in which retail investors argued that the banks’ sales representatives had not fully disclosed the risks inherent in the structured notes.

See Part II.A.3 below; see also Part II.B.2 below.

See Part II.A.4 below.


Id. at 46.
2. Common Disputes

At the core of the disputes outlined above are “Designated Money Trusts” ("DMTs"), a type of contract used by banks to sell structured notes to retail investors.\(^4\) Under DMT contracts, investor clients retain the right to decide how to use their money, while banks are required to offer financial products that entail a risk level appropriate for the respective client, as well as to disclose investment risks.\(^4\)

In cases where a dispute over structured notes entered into renegotiation procedures or the parties to a DMT contract went to court, the most common sort of dispute was that the client lacked information for one reason or another. For example, a retail investor lacked the necessary knowledge to understand the financial product(s) he or she was offered, a bank did not fully disclose necessary information, or information was not given at a proper time.\(^4\) Another common dispute was whether banks (or their salespersons) had adequately discharged their fiduciary duties.\(^4\)

3. Makeshift Resolution

Before the FCPA was passed, there was no professional authority to handle these kinds of disputes over financial products. The provisional authority in charge was the Bank Bureau under the FSC, dealing with cases in which the disputed value was larger than 1 million New Taiwan Dollars ("NTD"). Other cases for less than 1 million NTD were handled by either the Securities and Futures Investors Protection Center ("SFIPC") if a Lehman product was involved, or by the Bankers Associations of R.O.C. ("BAROC") if non-Lehman structured notes were involved. All such cases, if they passed procedural review, were finally assigned to the Appraisal Committee of Financial Consumer Disputes under the BAROC ("Appraisal Committee") for substantive review.\(^4\) Regardless of whether they were nominally public or private in their capacity, these are the organizations that the FSC controlled.

Nonetheless, some cases involving structured notes did not fit the legal definition of “consumer disputes” in the Consumer Protection Act (“CPA”), and

\(^4\) Ibid.
\(^4\) Ibid., 120.
therefore did not fall under the BAROC’s jurisdiction. In response to public pressure, the BAROC addressed this issue by amending its own internal administrative rules to include any cases referred to it via the appropriate authorities mentioned above.\(^\text{45}\)

As at April 1, 2011, 25,214 cases had been reviewed under this provisional system; nevertheless, only the first 100 decisions made by the Appraisal Committee were open to the public for reference at that time.\(^\text{46}\) Members of the general public were thus not in a position to acquire information about the provisional ADR procedures introduced above. Moreover, adjudications made by the Appraisal Committee had no binding force on individual complaints when neither party had agreed to settlement terms; decisions were only binding on banks under certain conditions.\(^\text{47}\) Meanwhile, with a view to maintaining its neutral position, the Bank Bureau under the FSC could not itself make any decision on an individual case unless the bank in question had been proved to have violated the law. In this regard, the BAROC was therefore the actual authority operating the makeshift ADR mechanism.\(^\text{48}\)

\textbf{4. Hindrance to the Application of Available Remedies}

Even though a makeshift mechanism cobbled together in a hurry appeared to be available, the uncertainty over what constituted a valid cause of action was still problematic. Applicable remedies were so scattered among various statutory provisions that it was difficult for retail investors to identify sufficient and effective remedies.\(^\text{49}\) Among the other causes of action for retail investors to seek legal redress or to modify a contract term involving structured notes, Art. 227-2 might, in theory, be taken into account to adjust the terms of DMT contracts in structured note cases.\(^\text{50}\) In practice, this type of claim was extremely rarely made, which could be attributed to the strict conditions required by law, hence deterring retail investors from applying the rule of changed circumstances in actual cases.

\(^{45}\) Ibid. For further discussion on how political pressure exerted by SNSSOs pushed the FSC to intervene, together with these controlled organizations, see Part III.B below; see also Part III.A below.

\(^{46}\) Ibid. at 212; Li, ‘An Analysis of Disputes in Sales’, 37.


\(^{50}\) See Part I.B above.
Apparently, there were no sufficient and effective rules or regulations targeting so unusual a financial product as the structured note. In order for Taiwan’s government to prevent similar problems in the future, the FCPA finally went into effect in 2011.

B. The Legislation of the Financial Consumer Protection Act: A Thorough Solution?

1. A Profile of the Financial Consumer Protection Act

When the FCPA was enacted in June 2011, the Taiwanese legislature required that the FSC, as the competent authority of this Act, establish an additional professional ADR authority to handle financial consumer controversies for procedural and substantive review.

However, commentators indicated that this legislation merely provided another new ADR channel for seeking relief, not an ultimate solution for every future dispute arising in connection with products similar to structured notes.

In addition, the FCPA imposes new obligations on financial service enterprises, particularly regarding new causes of action to be applied in financial consumer disputes. To summarize, the FPCA supplies two new causes of action available for financial consumers: (1) Liabilities for false advertising (Art. 8); and (2) Breach of duties for implementing KYC and the suitability test (Art. 9), as well as the duties of explanation and disclosure (Paragraphs 1 and 3 of Art. 10).

51 When it comes to financial services enterprise, the statutory definition includes the following entities: banking enterprises, securities enterprises, futures enterprises, insurance enterprises, electronic stored value card enterprises, and enterprises in other financial services as may be publicly announced by the competent authority. Jinrong Xiaofezhebaochu Fa (金融消費者保護法) [Financial Consumer Protection Act] Art. 3 (promulgated Jun. 29, 2011, effective Dec. 30, 2011, as amended Dec. 28, 2016) (Taiwan). As for financial consumers, the FCPA defines them as “parties that receive financial products or services provided by a financial services enterprise,” but excludes consumers with a certain level of income or with professional knowledge of investment. Ibid. at Art. 4. Therefore, investment companies apparently cannot be consumers under the FCPA. C. T. Chiu, S. I. Hu & K. H. Lin, 金融消費者保護法與案例解析 [Cases & Analysis on Financial Consumer Protection Act] (Angle Publishing, 2012), p. 25. In addition, the FCPA (Art. 5) only copes with CC disputes of financial products or services. Ibid. at 26. However, these financial consumer disputes also include disagreements that arise during contracting or advertising, and other similar disputes between parties that relate to financial products or services. Ibid.


action may prove to be more direct and powerful weapons for retail investors to use against financial institutions than the remedies that existed before the FCPA came into effect. More importantly, the FCPA provides other procedural rules to resolve disputes over this kind of financial transaction, as are discussed below.

2. The Creation of the Financial Ombudsman Institution

One major regulatory effort under the FCPA in response to the structured notes saga that followed the collapse of Lehman Bros. is the creation of an independent ADR body that exclusively handles financial controversies: the Financial Ombudsman Institution (“FOI”).\(^{55}\) The FOI is an official answer to a previous situation in which financial consumer disputes were widely dispersed in various courts with slow proceedings and not decided under a common guideline.\(^{56}\)

The FOI is a semi-official foundation funded by both regulated private enterprises and government agencies.\(^{57}\) The decision-making organ of dispute resolution is the ombudsman committee (Art. 17 and Art. 18), which is composed of 9–25 members, including scholars, experts, and other professionals with sufficient practical knowledge. Because the FOI is merely a semi-official foundation, the FCPA vests the committee with the power to ask financial services enterprises to provide necessary documents (Art. 20).

However, retail investors still have to make a complaint to those financial services enterprises before they are allowed to apply to the ombudsman committee (Art. 24).\(^{58}\) The process of dispute resolution generally goes as follows: after a retail investor brings a complaint to the financial services enterprises concerned, the investor may then file a case with the FOI. The FOI will first review the case to determine whether there is any possibility of reaching a settlement; if not, the ombudsman committee will start the committee hearing procedure. From the moment the case is referred to the FOI, the decision must be made within three months.\(^{59}\) The system was designed to address disputes in a reasonable and timely manner.

Nevertheless, some problems remain with the design of the current system. The first issue is the protection of a retail investor’s right to choose from various dispute-resolution procedural frameworks. The FCPA leaves room for the two parties to agree freely on whether to be bound by the ombudsman committee’s decision. The

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56 Tsai, ‘Meditations on Liability Rules’, 16.
58 Ibid.
FCPA also devised an “agreement in advance” mechanism: if a financial institution agrees to enter into dispute resolution procedures under the FCPA, either through a written statement before entering into the procedures or in a contract involving the disputed financial products or services, the financial institution will automatically be bound by the ombudsman committee’s decision in cases where the value of the disputed products or services is less than a certain amount. Nevertheless, in cases where there is no agreement in advance or the value of the disputed products or services exceeds “a certain amount,” the financial institution retains the final say on whether it will be bound by the FOI’s decision. This is unfair to retail investors with inferior bargaining power.

In addition, the authority of the committee is also important. As it stands, the FCPA does not impose a real duty on financial services enterprises to cooperate with the committee, such as to provide necessary documents. Art. 20, for example, allows the committee to ask financial institutions to provide necessary documents, but it does not grant the committee the power to impose punishment for a failure to cooperate, thus further weakening the committee’s authority. Therefore, penalties for non-compliance need to be clearly codified in the FCPA in the future.

Furthermore, based on the limited range of subjects covered in the FCPA, it appears that different authorities continue to regulate other relevant financial products or services. For example, in one court decision involving investment-linked insurance policies, the financial product in question was in fact linked to structured notes; nonetheless, whether this case could have been reviewed by the FOI under the current provisions of the FCPA is unclear. One commentator indicated that this conundrum substantiates the necessity of integrating the regulation of all financial-consumer-related cases under one law, thus providing full protection to financial consumers as the U.S. Consumer Financial Protection Bureau (“CFPB”) does.

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60 C. C. Lian, 金融消費者保護法與評議案例解析 [The Financial Consumer Protection Act and Case Studies], (Taiwan Academy of Banking and Finance, 2013), p. 108. Please note that “a certain amount” is to be determined according to product types. Take investment-linked products or services for example, the threshold amount is 1 million NTD, while the amount for non-investment-linked ones is 100,000 NTD. Notice of Financial Supervisory Commission, Executive Yuan, No. 10000423911, 18 EXECUTIVE YUAN GAZETTE 324, 324 (Jan. 4, 2012) (Taiwan).


64 Ibid. at 1990.
C. Merely Adding an Additional Channel Did Not Provide Sufficient Relief

The procedural aspect of the rule of changed circumstance, exemplified by the FSC interventions via the Appraisal Committee of the BAROC during the GFC and the FOI controlled by the FSC after the GFC, remained insufficient. Even though additional ADR channels with more professional resources were set up to handle a huge number of complaints within a short period of time, they remained in the shadow of the FSC with a predominantly prudential focus. Under the current financial regulatory architecture, the FSC cannot help but focus more on prudential regulation concerns than on consumer financial protection. Accordingly, the FSC is not well placed to create safety valves in contract law on the periphery of the Taiwanese financial system.

III. Reflections from the Legal-Theory-of-Finance Perspective on the Structured Notes Debacle in Taiwan

A. The Influence of the Structured Notes Self-Salvation Organizations

The structured notes debacle demonstrates from a political economy viewpoint that whereas substantive application of the rule of changed circumstances in Taiwanese courts could not be achieved, a procedural channel, illustrated by the FSC interventions, did emerge to address the problem. From the LTF perspective, even if retail investors are located on the periphery of the domestic financial system, they formed various Structured Notes Self-Salvation Organizations (SNSSOs) during the

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66 See Part III.C below.
67 Without government bailouts during the GFC, homeowners might still have been at the periphery of the U.S. financial system. Pistor, ‘A Legal Theory of Finance’, 320. Likewise, Taiwanese retail investors in the very beginning of the structured notes debacle needed to assume all the credit risk of Lehman Bros. and the concomitant systemic risk alone, whereas Taiwanese banks selling notes arranged by Lehman Bros. were literally waiting for the final liquidation of its holdings, thereby passing losses on to domestic investors but keeping the fees they had received. See Chen, ‘The Resolution’, 123; Chen, ‘Judicial Inactivism’, 186; Chen, Li, Cho & Hsu, Analysis of the Financial Consumer Protection Act, pp. 81-2. In this regard, Taiwanese investors might be deemed to be on the periphery of the domestic financial system as well.
GFC to draw attention to the plight of investors and exert pressure on the FSC to intervene. Specifically, in a national atmosphere where “something must be done,” SNSSOs became influential interest groups and pressured the government. They used informal channels like street protests, picketing the FSC building to demand action against the banks, complained that the government was siding with the banks, and called for the resignation of then-FSC Chairman Sean Chen. In the face of the FSC’s failure to play a hard game with banks from the start, SNSSOs held press conferences, announcing they were preparing to file lawsuits against banks and even the FSC to recover losses. SNSSOs also complained to Legislator Wei-cher Huang, who helped them hold a public hearing in the legislature on July 11, 2008. On September 12, 2009, SNSSOs initiated a large-scale demonstration, marching to the Presidential Palace, the Control Yuan, the Legislature, and the Cabinet. The Control Yuan further issued an investigation report, concluding that the FSC failed to adequately supervise banks in selling structured notes.


70 Chen, ‘The Resolution’, 119 (noting that “[o]bviously, it is a daunting challenge to settle such a massive number of disputes of such magnitude. Mounting political pressure and public opinions in such situations mean that regulators cannot afford to do nothing....”).

71 Chen, ‘Judicial Inactivism’, 175 (vividly illustrating that “[f]or example, in Taiwan, some victims of the Lehman-related structured notes protested against a bank by carrying a coffin to the door of the bank.”).

72 Teng, ‘Profession or Fraud?’, 1, 8, 10, 66. The SNSSOs also held a press conference on May 30, 2008 before the headquarters of the China Trust, one of the banks involved in the dispute, which happened to be the most successful private commercial bank in Taiwan at the time.

73 Chen, ‘Behind the News - Structured Notes’.


75 See Lin, ‘Reviewing Current Mechanisms’, 45; Teng, ‘Profession or Fraud?’, 60, 62.

76 Teng, ‘Profession or Fraud?’, 62-3; Chen, ‘Judicial Inactivism’, 183.

77 The founding father of the Republic of China (Taiwan), Dr. Sun Yat Sen, drew from the Western system of checks and balances among the legislative, executive, and judicial powers and added two traditional Chinese government powers of examination and supervision (control) to complete the five-power system. The Constitution of the Republic of China (Taiwan) was enacted on December 25, 1947; on June 5, 1948, the Control Yuan was officially established, following the enactment of the Constitution. See Control Yuan’s website, http://www.cy.gov.tw/ct.asp?xItem=6036&CntNode=989&mp=21 (visited 10 Dec 2017) (Taiwan).

78 Teng, ‘Profession or Fraud?’, 64.

79 Ibid. at 69.
From the LTF perspective, mounting political pressure and public sentiment meant that SNSSOs representing Taiwanese retail investors, who could traditionally be regarded as less concentrated interest groups, raised their message to the apex of the domestic financial system, where they could benefit from informal flexibility via various non-legal means.80

**B. The FSC Interventions**

The tide of the political opinion stirred up by SNSSOs forced the FSC to react in order to create the perception of toughness and avoid blame for failing to prevent or take regulatory action against banks for their wrongdoing.81 Even if the FSC could not simply require banks to absorb all of the losses, the second best option for the FSC was to help retail investors recover as much as possible via “elastic” means.82 For example, the FSC started to lay a heavier hand on banks by requiring the BAROC to amend its own internal administrative rules to include any cases involving structured notes referred to it, thereby expanding the jurisdiction of the tentative ADR channel with a view to alleviating public sentiment aroused by SNSSOs.83 In response to initial recalcitrance on the part of banks, the FSC in mid-2009 intervened to increase the settlement rate by auditing the business operations of those targeted banks with a low settlement rate. The FSC also held up applications for new businesses made by non-cooperating financial institutions and threatened to forfeit licenses of trust enterprises that had sold structured notes to unsophisticated investors but declined to fully compensate those investors.84 Therefore, during the GFC, the FSC intervened through structuring the makeshift ADR system85 while forcing

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81 Li, ‘An Analysis of Disputes in Sales’, 26 (a commentator then wrote an op-ed in a major Taiwanese newspaper, accusing that officials of the FSC should be legally liable for its inaction or slack in dealing with the structured notes controversies).
83 See Li, ‘An Analysis of Disputes in Sales’, 26; see also Part II.A.3 above.
84 See Lin, ‘Effectively Resolving New Financial Disputes’, 31; Lin, *Financial Consumer Protection Act*, pp. 85, 87; Teng, ‘Profession or Fraud?’, 56, 66. Interestingly, similar intervention measures to bail out those at the periphery of the financial system could also be observed in the United States to an extent: “In the wake of financial crises, public authorities often respond by using law to modify private contracts, transferring value from those who fare better in the crisis to those who fare worse. From the perspective of the crisis victim, this is a bailout. ...Recent examples include staying foreclosures, authorizing bankruptcy courts to modify mortgage terms, or threatening criminal prosecution to induce banks to undo transactions made with their clients.” A. Aviram, ‘Bail-ins: Cyclical Effects of a Common Response to Financial Crises’, *University of Illinois Law Review* 2011 (2011), 1633.
85 Chen, ‘Judicial Inactivism’, 175 (noting that “[a]s required by the Financial Supervisory Commission (FSC), the sole financial regulator in Taiwan, the Bankers Association of the Republic of China (Bankers Association) was tasked to form a dispute resolution panel to handle structured note disputes”).
financial intermediaries selling structured notes to settle complaints from retail investors and hence to share both the credit risk of Lehman Bros. and the concomitant systemic risk. From the LTF perspective, the FSC in theory redistributed loss to the banks, thus bailing out retail investors, or rather giving them treatment normally reserved for the financial system’s apex.86

According to the LTF, “law tends to be relatively elastic at the system’s apex, but inelastic on its periphery.”87 Owing to the dramatic political mobilization of SNSSOs, however, retail investors managed to influence the government, eliciting treatment at the apex of the domestic financial system, where law tends to be relatively more “elastic,” not least as illustrated by the FSC interventions to force banks to share the systemic risk via “elastic” means. Alternatively, from the other perspective (from the periphery of the system), during the GFC, when the FSC was pressured to exercise its discretionary power via “elastic” means to rescue retail investors ex post facto to some extent, it played a tentative and unexpected role as a provider of safety valves even for financial services consumers on the periphery of the system.88

C. Did the Interventions by the FSC and the Enactment of the FC PA Have a Placebo Effect?

While in hindsight the FSC providing elastic safety valves for retail investors or financial consumers at the periphery in the system may be a fait accompli beyond anyone’s control, the next question would be whether the FSC is best placed to perform such a role and to initiate an intervention in times of future distress.89 In reality, there are still flaws in Taiwan’s consumer financial protection infrastructure, as the government might arguably have just manipulated society’s perceptions of regulatory quality rather than actually achieving it. We formulate this manipulation as a “placebo effect” in following.

The FSC did not come down hard on banks from the start of the structured note controversies, possibly because “the overall exposure was simply too massive for banks to swallow.”90 In the LTF view, “the survival of the system is determined at its

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86 Pistor, ‘A Legal Theory of Finance’, 320 (describing that “the Hungarian government intervened and forced creditors to adjust loans and share their currency risk. In doing so they have brought homeowners a step closer to the system’s apex”).
88 See ibid., 329.
89 See ibid.
90 Chen, ‘The Resolution’, 121. The FSC and the BAROC in the FSC’s shadow might worry that requiring banks to highly compensate retail investors for their losses would severely damage the business safety and soundness of banks. See Teng, ‘Profession or Fraud?’, 57, 69; Chen, ‘Legal Risk and Investor Protection’, 130-1.
and this systemic risk explanation could account for the FSC’s light-handed approach from the start, because the rhetoric (public-spirited justifications) of banks’ systemic importance reinforces their location at the apex in the system by influencing regulators through social or political ties. However, the political sentiment later aroused by SNSSOs insisted that the FSC do something. This chapter thus argues from a political-economic perspective that the procedural aspect of the rule of changed circumstances (i.e., the FSC interventions) emerged to address the structured note controversies because public pressure was brought to bear on the apex of the system. Under pressure from SNSSOs, the FSC set up the tentative ADR body (i.e., the Appraisal Committee under the BAROC) and used its discretionary power to increase the settlement rate. Finally, the FOI was created under the FCPA as a formalized and strengthened version of the tentative ADR channel.

Being seen to do something had tangible benefit for both legislators and the FSC as executive-branch rule-makers and enforcers. It allowed each group to avoid blame for failing to prevent wrongdoing through regulation and scrutiny that should have been implemented prior to the GFC. This political action is well described by Aviram’s bias arbitrage theory:


From a political economy perspective, banks as concentrated, motivated industries have a strong incentive to band together and affect policy. From the “public choice” perspective, the political process is a competition among interest groups to secure rents with “public-spirited justifications used to disguise interest group rent-seeking.” See M. Kahan & E. Rock, ‘Symbolic Corporate Governance Politics’, Boston University Law Review 94 (2014), 2027; see also B. Orbach, Regulation: Why and How the State Regulates, (Foundation Press, 2013), p. 199 (footnote omitted) (“The term ‘rent-seeking’ is often used to describe the pursuit of private interest through regulation. Rent-seeking activities are all actions that interest groups may take to promote their goals, and their costs are added to the burden interest groups impose on society”). That is, interest groups will become involved in the political process to advocate for the common interests of their members. D. C. Mueller, Public Choice III, (Cambridge University Press, 2003), p. 475. Banks, as strong interest group lobbyists, might, in the name of avoiding systemic risk, indirectly interfere in the process of the FSC’s decision-making with respect to how to deal with retail investors’ complaints in the very beginning of Taiwan’s structured notes debacle, in effect “capturing” regulatory agencies. See B. Orbach, ‘Invisible Lawmaking’, University of Chicago Law Review 79 (2012), 15. See also B. Orbach, ‘What Is Regulation?’, Yale Journal on Regulation Online 30 (2012) 5-6; Orbach, Regulation, p. 199 (“Capture” theories or regulatory capture indicate that “regulators are captured by the regulatees; that is, they serve those they intend to regulate rather than the public”); George Stigler, ‘The Theory of Economic Regulation’, Bell Journal of Economics and Management Science 2 (1971), 3, 5 (“[A]s a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit”).

See Part II.B.2 above. The structured notes debacle was one of the reasons for the enactment of the FCPA; the FOI was established as another ADR body for financial disputes. See Lin, Financial Consumer Protection Act, p. 92-3, 95; Wang, ‘Developments in the Law’, 1974-5, 1989; Lin, ‘Effectively Resolving New Financial Disputes’, 27.

From a public choice perspective, government agencies such as the FSC tend to be averse to risk, “defensive, threat-avoiding, scandal-minimizing,” and “reluctant to take on activities that embrace seemingly intractable problems and that are fraught with the danger of unintended consequences including regulatory failure and criticism.” M. L. Stearns & T. J. Zywicki, Public Choice Concepts and Applications in Law, (West Academic Publishing, 2009), p. 348 (footnotes omitted).
Bias arbitrage is the extraction of private benefits through actions that identify and mitigate discrepancies between actual risks and the public’s perception of the same risks. Politicians arbitrage these discrepancies by enacting laws that address the misperceived risk and contain a “placebo effect”—a counter-bias that attempts to offset the pre-existing misperception. If successful, politicians are able to take credit for the change in perceived risk, while social welfare is enhanced by the elimination of deadweight loss caused by risk misperception.\(^95\)

Accordingly, it can be inferred that Taiwan’s government might have complex incentives to ensure consumer financial protection. Specifically, why is bias arbitrage beneficial for legislators and the FSC to look tough through setting alternative ADR bodies during the GFC and in its aftermath? It might be because the Taiwanese government, by setting additional ADR bodies that appear to be very strict actually allowed most banks to avoid generously compensating retail investors and financial consumers or writing off their losses. Taiwanese politicians could try to maximize their positions by manipulating the public’s perception of the effectiveness of the seemingly pro-investor regulations and enforcement while reaping a private profit from the placebo effects of the FSC interventions and the enactment of the FCPA, which mitigated the discrepancy between the actual and the perceived risk of future disputes such as the structured notes saga.\(^96\) This argument is to an extent supported by retail investors’ low expected recovery rate offered by either courts or the Appraisal committee under the BAROC both during and after the GFC.\(^97\) Therefore Taiwanese banks in the very beginning of the GFC had few incentives to share the credit risk of Lehman Bros. and the concomitant systemic risk—or rather, to offer much in settling investors’ complaints voluntarily and then to proactively negotiate with liquidators of Lehman Bros. or a foreign issuer to recover remaining value.\(^98\) Even though the FSC, as the sole financial market watchdog, has taken action, including its interventions during the GFC and later pushing through the enactment of the FCPA, it might not strive to put consumer financial protection into practice thoroughly enough.

Why may the FSC be less incentivized to effectively create safety valves for


\(^{97}\) Chen, ‘Legal Risk and Investor Protection’, 134.

financial consumers at the periphery of the system, especially in times of future distress? When it comes to the institutional design of the FSC, it was created in 2004, patterned after the design of the former Financial Services Authority in the United Kingdom ("FSA"). Nonetheless, the former U.K. model of a unified regulator places too many responsibilities under one universal regulator, "thereby masking the conflicts that can arise between consumer protection and maintenance of bank solvency and soundness." Under the old U.K. model, the FSA’s supervision and regulation theoretically focused more on the “safety and soundness” of financial institutions than on consumer financial protection. This institutional incentive factor is partially evidenced by the general settlement result of low compensation to retail investors under the Appraisal Committee indirectly controlled by the FSC in Taiwan. Even if the FSC required the Appraisal Committee under the BAROC to handle structured note disputes, a possible reason for the Appraisal Committee not forcing banks to return large amounts of cash to investors might be to protect banks from encountering serious solvency failures and to guard financial soundness of the banking system. In the LTF view, during the GFC, retail investors at the periphery were in practice more likely to face greater economic stress than banks at the apex, even after the FSC interventions; banks in Taiwan could by and large pass on the credit risk of Lehman Bros. and the concomitant systemic risk to domestic investors. With its current institutional design, the FSC is not best placed to create safety valves for financial consumers on the periphery of the financial system.

Furthermore, establishing additional ADR channels such as the Appraisal Committee under the BAROC during the GFC, as well as the FOI in its aftermath, has not solved all the problems, although these measures benefit banks because the focus on ex post facto ADR channels directs discussion about responses and remedies away from the regulatory design of a stronger and independent consumer protection watchdog. Specifically, this chapter argues that in order not to leave financial consumers with street protests or other informal channels as their only option to bring themselves a step closer to the flexibility of the financial system's apex whenever a financial crisis occurs, we could consider moving consumer financial protection into a

103 Ibid., 182-3.
separate and single agency; that way prudential regulation concerns would not predominate over consumer financial protection.\textsuperscript{106} This regulatory proposal is to concentrate the mission of consumer financial protection, including rulemaking, supervision, and enforcement, in the hands of a single professional agency such as the U.S. CPFB, who would be at the same hierarchical level as the FSC while simultaneously independent of it.\textsuperscript{107} Accordingly, a stronger and independent consumer financial protection body could be best placed to create safety valves on the periphery of the system, not least in times of future distress.\textsuperscript{108}

\section*{Conclusion}

Are courts, regulators, or other agents best placed to offer the flexibility of safety valves and to initiate interventions for retail investors or financial services consumers in times of economic distress?\textsuperscript{109} The structured notes debacle in Taiwan during the GFC shed some light on the aforementioned issues.

When it comes to whether courts are best placed to fashion safety valves, the structured notes debacle demonstrated that Art. 227-2 of the CC, the statutory foundation of the rule of changed circumstances in Taiwan, was extremely rarely invoked and decided by courts. Even though courts, independently of the FSC, were empowered to intervene per se, they did not in Taiwan during the GFC, possibly due to their inability to handle a great number of cases at the same time with insufficient professional knowledge and related resources, and possibly due to the law’s standing, pleading and proof requirements, hence deterring retail investors from applying the rule of changed circumstances in actual cases.

The procedural aspect of the rule of changed circumstances (i.e., interventions by the FSC) emerged instead. Specifically, the FSC interventions via the Appraisal Committee of the BAROC during the GFC and the FOI in its aftermath illustrated the procedural aspect of the rule of changed circumstance. The FSC, appearing to produce safety valves for retail investors, intervened by structuring the makeshift ADR system while forcing financial intermediaries selling structured notes to settle complaints and to share both the credit risk of Lehman Bros. and the concomitant systemic risk. From


\textsuperscript{108} Of course, fleshing out the detailed regulatory design of a Taiwanese version of the CFPB would remain a difficult issue requiring more research in the future.

the LTF perspective, the FSC in theory seemed to redistribute loss to the banks, thus bringing retail investors a step closer to the flexibility of the financial system’s apex.

But why did the FSC intervene? From a political economy angle, even if retail investors are usually located on the periphery of the domestic financial system, the actions of SNSSOs made the losses of retail investors nationally relevant. In the time of a national “we must act now” mood, SNSSOs exerted pressure on the Taiwanese government through street protests, picketing, publicly complaining that the government was siding with the banks and even calling for the resignation of the FSC Chairman. This moved the traditionally peripheral concerns of retail investors towards the apex of the domestic financial system, where they were most likely to benefit from sympathetic flexibility. Although the FCPA was finally legislated in 2011, hence formalizing the tentative ADR scheme into the FSC-controlled FOI, flaws remained in Taiwan’s consumer financial protection infrastructure. The FCPA’s lacking bite indicates that the government may arguably just have sought to manipulate the society’s perceptions of whether the structured notes debacle was addressed through the tentative ADR scheme, without really preventing potential problems similar to the structured notes controversies from arising or being addressed via the FOI. Even though additional ADR channels with more professional resources were set up to handle a huge number of complaints quickly, they are still in the shadow of the FSC and have a predominantly prudential focus. In short, the FSC might not be best placed to provide safety valves for financial services consumers.

In order not to leave Taiwanese retail investors with informal channels such as street protests as their only option to influence financial regulators whenever a financial crisis occurs, we could preliminarily consider a holistic reform agenda, i.e., adopting a fully independent consumer financial protection watchdog such as the U.S. CFPB. With a newly created single professional agency playing the role in creating safety valves for retail investors independently from the FSC, the concerns of financial services consumers might therefore be brought a real step closer from the periphery of Taiwan’s domestic financial system to the power found at its apex.