

Dokument	CapLaw-2026-57
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Titel	Kapitalmarktrecht im Fokus 2026 – Conference Report 19 August 2026, SIX ConventionPoint, Zurich
Publikation	Swiss Capital Markets Law
Herausgeber	René Bösch, Matthias Courvoisier, Benjamin Leisinger, Ralph Malacrida, Thomas Reutter, Nina Reiser, Patrick Schleiffer, Philippe A. Weber, Thomas Werlen
Verlag	CapLaw Editors

Kapitalmarktrecht im Fokus 2026 – Conference Report | 19 August 2026, SIX ConventionPoint, Zurich

On 19 August 2026, practitioners, academics and market participants convened at SIX ConventionPoint in Zurich for Kapitalmarktrecht im Fokus 2026. Under the Title “Clarity or Room for Interpretation? Challenges in Interpreting Bond Terms and Conditions” (*Klarheit oder Auslegungsspielraum? Herausforderungen bei der Interpretation von Anleihebedingungen*), the conference examined how standardized bond terms should be interpreted, the interaction between contractual provisions and regulatory requirements and the significance of prospectuses, risk factors and changing market practice. Particular attention was paid to regulatory capital instruments and the Point of Non-Viability (PONV), against the background of the write-down of Credit Suisse AT1 instruments and the related decision of the Swiss Federal Administrative Court. The conference combined doctrinal analysis, a comparison with the European resolution framework and practical perspectives from issuers, banks, counsels and other advisers.

1) Introduction

Sandro Fehlmann (Advestra) welcomed the participants and introduced the central question of the conference: should bond terms be treated as ordinary bilateral contractual arrangements, in which the parties' actual or tacit intentions take precedence, or as standardized capital-markets instruments that must have the same meaning for every investor?

This question has considerable practical importance. Bonds are commonly publicly offered and listed on exchanges and then held and traded by an anonymous and changing group of investors. The original subscribers may sell their instruments in the secondary market, and subsequent investors will generally have had no access to negotiations or discussions between the issuer, the lead managers or any relevant supervisory authority, where applicable. At the same time, certain bonds – in particular regulatory capital instruments – are designed to perform a specific supervisory function and must be interpreted against a complex statutory and regulatory background.

The discussion was framed by the recent litigation concerning the write-down of Credit Suisse AT1 instruments in connection with the takeover by UBS. While the Swiss Federal Administrative Court appears to give priority to the subjective interpretation, legal scholarship and practice clearly favor the objective interpretation of bond terms – not least for reasons of market certainty and tradability. The protection of individual investors should be achieved not so much through subjective interpretation as through efficient price formation. The Swiss Federal Administrative Court's approach raised broader questions about the interpretation of standardized bond documentation, including the relevance of the parties' subjective intentions, the status of the prospectus and its risk factors and the relationship between private-law contractual rights and FINMA's public-law powers.

2) Dogmatic Foundations for Interpreting Bond Terms and Conditions

Nina Reiser (University of St. Gallen) began by examining the legal characteristics of bonds and their terms and conditions. A bond is generally understood as a large loan divided into individual amounts and issued subject to uniform conditions. Although each bondholder has a separate legal relationship with the issuer, the relevant rights and obligations are based on the same standardized terms and conditions.

Several features distinguish bond terms from individually negotiated contracts. They are designed for a large and changing group of investors, support fungibility and secondary-market trading, ordinarily have a long duration and can be difficult to amend. For certain amendments, substantial bondholder majorities may be required. These features make bond terms comparable, in some respects, to general terms and conditions (AGB) rather than to a conventional bilateral agreement.

The presentation indeed also considered whether bond terms should be treated in the same manner as general terms and conditions (AGB). However, while bond documentation is possibly pre-formulated (i.e. based on a previous transaction or precedent and/or aligned with market standards) and used for multiple contractual relationships, the traditional justification for a special review of general terms and conditions (AGB) is less persuasive in the capital-markets context. Institutional investors and lead managers frequently influence the structure, pricing and content of an instrument. In addition, the market can respond to unattractive or unusual terms through pricing or by declining to participate in an issuance. Accordingly, doctrines developed for general terms and conditions (AGB), including the unusualness rule, should not be applied to bond terms. The ambiguity rule may have a limited role, but only after the ordinary interpretative methodology has failed to produce a sufficiently clear result.

The central proposition of the presentation was that bond terms should generally be interpreted objectively and consistently for all investors. Fungibility and legal certainty require identical provisions to have the same meaning irrespective of the identity or individual understanding of a particular holder. This is especially important for regulatory capital instruments: their regulatory classification and loss-absorption function cannot reasonably depend on the subjective understanding of individual investors.

The appropriate benchmark is therefore not an unidentified original investor, but a professional market participant with the expertise reasonably required to understand the instrument, its economic characteristics and its regulatory setting. This capital-markets-oriented standard would take account of the expectations of a knowledgeable investor purchasing and trading the instrument in the relevant market.

The wording of the terms and conditions remains the starting point, but should not be the exclusive consideration. The systematic context, purpose and function of the relevant provision, the structure of the instrument and its regulatory environment may also be relevant. In the case of AT1 instruments, for example, their qualification as regulatory capital and their intended loss-absorption function form part of the context in which the contractual provisions must be understood.

At the same time, purposive interpretation has limits. Courts should not use interpretation or supplementation to introduce new obligations that have no sufficient basis in the instrument. The objective is to determine the meaning of the existing bargain, not to rewrite the product retrospectively.

The LIBOR-to-SARON transition provided a practical example. A purely literal application of legacy benchmark provisions could have produced commercially irrational outcomes, including the unintended conversion of floating-rate instruments into fixed-rate instruments. A coordinated and market-oriented approach instead sought to preserve the economic function reasonably contemplated when the instruments were issued.

3) Determining PONV for Regulatory Capital Instruments in the EU

Holger Hartenfels (Freshfields) then discussed the criteria for determining the Point of Non-Viability for regulatory capital instruments under the European framework.

AT1 instruments are intended to absorb losses while a bank remains a going concern. They are perpetual, subordinated instruments that are senior only to common equity tier 1 capital (CET1) within the relevant loss-absorption hierarchy. Coupon payments may generally be cancelled at the issuer's discretion without this constituting an event of default, and redemption is subject to regulatory conditions and approval.

The discussion highlighted a possible divergence between the market perception and the regulatory function of AT1 instruments. Investors may focus primarily on their debt characteristics and comparatively attractive coupons. From a regulatory perspective, however, the instruments are expressly designed to absorb losses before ordinary insolvency and, where necessary, in connection with supervisory or resolution measures.

In the European framework, a distinction must be drawn between a contractual capital trigger and PONV. A contractual trigger is ordinarily linked to a specified CET1 ratio and is therefore relatively objective and capable of mathematical determination. PONV, however, forms part of a broader recovery and resolution framework and may require a more complex assessment of the institution's viability and available alternatives.

Under the European resolution framework, intervention generally requires a determination that the institution is "failing or likely to fail", that there is no reasonable prospect that alternative private-sector or supervisory measures would prevent the failure within a reasonable period and that resolution action is necessary in the public interest.

An institution may be failing or likely to fail for reasons extending beyond conventional insolvency. Relevant factors can include an inability to meet capital or authorization requirements, serious governance or risk-management failures and repeated regulatory breaches. A breach of a capital buffer does not automatically establish PONV, but it can result in distribution restrictions, supervisory intervention and, in more serious cases, contribute to a finding that the institution is failing or likely to fail.

The European framework coordinates regulatory capital requirements with the statutory recovery and resolution regime. Resolution authorities have a range of possible tools, including bail-in, a transfer of assets or liabilities, a sale of the institution or the use of a bridge institution. The choice of tool depends on the institution's circumstances, the protection of critical functions and the public-interest assessment.

The bail-in hierarchy generally follows the relevant insolvency ranking. The "no creditor worse off" principle provides an important safeguard: creditors should not suffer greater losses in resolution than they would have incurred in the applicable insolvency counterfactual. Where that safeguard is infringed, the affected creditor may have a compensation claim under the relevant resolution framework.

The write-down of Credit Suisse AT1 instruments attracted particular attention because shareholders received UBS shares while the AT1 instruments were written down in full. European authorities responded by emphasizing that, within the European framework, common equity would generally absorb losses before AT1 instruments. The discussion nevertheless cautioned that the legal and economic application of the creditor hierarchy is more nuanced than a simple chronological rule and depends on the particular resolution strategy and insolvency situation.

The session also addressed whether a comparable crisis could have been handled differently under the European regime. A range of tools could in principle have been considered, including a bridge bank, a transfer to another institution or a combination of transfer and bail-in. Whether any such strategy would be feasible would depend on factors such as the continuity of critical functions, licensing requirements and access to financial-market infrastructure.

The European experience showed that the contractual features of AT1 instruments cannot be analyzed in isolation. The principal loss-absorption risk may arise from statutory resolution powers rather than from the contractual capital trigger. Investors and advisers must therefore understand both the instrument and the broader statutory regime in which it operates.

4) Changing Market Practice: Who Says It Cannot Be Done?

Manuel Gadiot (UBS) provided a market perspective, examining how established practices in international Swiss bond issuances evolve and how structures once considered impracticable can become accepted.

Market practice is established to allow for standardization and to support efficiency. A proven practice reduces execution risk for issuers, lead managers, trading desks and investors. Market practice represents the commercially optimal route within the boundaries of what's legally permissible.

Change generally begins when a market participant challenges an established assumption and is willing to assume the execution risk of a new approach. If the transaction succeeds, it provides a precedent and reduces the perceived risk for subsequent issuers and intermediaries.

The presentation discussed three developments in particular.

First, EUR-denominated bonds subject to Swiss withholding tax had long been regarded as commercially unattractive or impracticable. UBS challenged this assumption in connection with its covered bond programme. The successful placement demonstrated that Swiss withholding tax did not necessarily prevent international distribution or materially impair pricing. Other Swiss issuers subsequently followed suite.

The experience also demonstrated the importance of clear investor communication. Where a structure differs materially from the customary market model, the relevant feature needs to be highlighted clearly when addressing investors.

Second, English law has traditionally been the standard governing law for EUR-denominated bonds. Swiss law has, however, become increasingly accepted for international issuances, first among Swiss financial institutions and subsequently among corporate issuers. This development indicates that the choice of English law is not a set requirement of the market, provided investors and intermediaries are comfortable with the chosen legal framework.

Third, the use of SIX Swiss Exchange in connection with EUR-denominated bond transactions has increased. This development reflects growing acceptance of alternative, unregulated listing and trading venues (including MTFs) and may offer practical advantages to Swiss issuers.

The broader lesson was that “market practice” is not necessarily synonymous with a legal requirement. It may instead reflect a historically successful solution that market participants continue to use because the perceived risks of change outweigh the anticipated benefits. Legal advisers and banks can help to develop practice by identifying which assumptions are truly required and which can be reconsidered.

Successful innovation nevertheless requires engagement throughout the value chain. Issuers, lead managers, trading desks, sales teams and investors must understand the proposed structure and its consequences. A legal analysis alone will not establish a new market practice; the structure must also be executable, marketable and clearly explained.

5) Panel Discussion: Interpretation, Prospectus Disclosure and Regulatory Discretion

The panel discussion was moderated by Benjamin Leisinger (Homburger) and brought together Marc Bussmann (Julius Baer), Vanessa Isler (Zurich Insurance), Markus Pfenninger (Walder Wyss) and Sten Rasmussen (Zürcher Kantonalbank).

The panel broadly supported an objective interpretation of bond terms. Uniform interpretation is essential for fungibility and secondary-market trading. A subjective approach based on discussions between the original issuer, lead manager and regulator would be difficult to apply to investors acquiring the instrument later, who were neither involved in nor aware of those discussions.

Bond terms were described as “pre-negotiated” rather than simply imposed. Standard provisions frequently reflect a lengthy process involving issuers, banks, legal advisers, investors and, for regulatory capital instruments, supervisory authorities. This market process further clearly distinguishes bond terms from conventional consumer-facing general terms and conditions (AGBs).

The panel also discussed the role of FINMA. FINMA does not negotiate bond terms as a representative of investors. FINMA's statutory mandate is to protect financial market customers and policyholders as well as to ensure the proper functioning of the financial markets in Switzerland. Hence, its function is to assess compliance with statutory and supervisory requirements and, where applicable, whether the instrument qualifies for regulatory capital treatment. An interpretation based on a supposed common subjective intention of the issuer, lead manager and FINMA would therefore be problematic, particularly for subsequent investors.

A distinction must also be drawn between private-law and public-law discretion. A calculation agent or independent expert may be authorized under the terms to determine a benchmark replacement, make calculations or apply an established market convention. Such authority derives from the contractual mandate. FINMA's powers, by contrast, derive from public law and remain subject to the legal requirements governing the proper exercise of administrative discretion.

a) The Role of the Prospectus and Risk Factors

A significant portion of the panel was devoted to the relationship between the bond terms and the prospectus. The bond terms define the issuer's and bondholders' substantive rights and obligations. The prospectus primarily performs a disclosure function and forms the basis for potential prospectus liability. It should not be used to create additional contractual obligations or contradict the operative terms.

Nevertheless, the prospectus and its risk factors may provide relevant interpretative context. They can explain the instrument's commercial and regulatory purpose, the economic consequences of particular provisions, the meaning attributed to technical concepts and the risks that professional investors were expressly instructed to consider.

The panel was critical of an approach that disregards the prospectus altogether when interpreting complex regulatory capital instruments. A prospectus is not merely ancillary marketing material; it reflects a statutory pre-contractual disclosure obligation and forms part of the information made available to investors.

This is particularly relevant for secondary-market investors. In practice, issuers may continue to make the bond terms available on their websites while removing the full historic prospectus after a certain period. The panel noted that continued access to the original prospectus – or at least the risk factors – may nevertheless be important for understanding the instrument's disclosure and regulatory context.

Risk factors have particular importance for AT1 and bail-in instruments. They may explain coupon cancellation, subordination, contractual write-down or conversion, statutory intervention powers and the relationship between capital requirements, contractual triggers and resolution measures. However, risk factors should not substitute for clear operative drafting. A fundamental product feature or statutory consequence should not be obscured by describing it merely as an investment risk.

The panel also rejected a rigid numerical limit on risk factors. The risks associated with an issuer and instrument vary and cannot meaningfully be reduced to an arbitrary maximum. A fixed limit could result in the exclusion of a material risk or increase litigation concerning the ranking of risks. The preferable approach is a disciplined, issuer-specific review that removes outdated or boilerplate disclosure and focuses on risks that are material to the investment decision.

b) Objective and Functional Interpretation in Practice

The panel considered several examples in which a literal reading could fail to reflect the commercial purpose of the instrument.

The LIBOR-to-SARON transition again demonstrated the importance of interpreting legacy provisions in a way that preserved the intended floating-rate function. Similar issues can arise with zero-floor provisions and negative interest rates, particularly where a bond, loan and related hedge do not operate as a fully integrated contractual package.

A further example concerned a merger in the insurance sector and an event-of-default provision referring to mergers, reorganizations or similar transactions. Although the wording required careful analysis, the transaction was structured as an absorption merger and did not materially impair the bondholders' position. The continued trading price of the bond was considered as possible supporting evidence that the market did not view the transaction as an adverse event, although the panel acknowledged the risk of relying on subsequent market movements with the benefit of hindsight.

c) Delegation and Flexibility

The panel generally accepted that certain technical questions can appropriately be delegated to a calculation agent or independent expert. Examples include benchmark replacement, compounding, rounding and adjustments to payment dates. The delegate should have appropriate expertise and apply a recognized market standard.

Some degree of flexibility is unavoidable for perpetual or long-dated instruments. Regulation, supervisory expectations and market conventions may change in ways that cannot be fully anticipated at issuance. Drafting that attempts to prescribe every possible future outcome may itself create uncertainty or become unworkable.

The challenge is to preserve necessary flexibility without conferring unstructured discretion. The documentation should distinguish technical determinations from legal or regulatory decisions and should specify the relevant decision-maker's mandate, standard and process.

d) Contractual and Statutory PONV Mechanisms

The panel returned to the distinction between contractual triggers and statutory resolution powers. For bail-in instruments, the substantive loss-absorption mechanism may be established primarily by statute, with the terms containing an acknowledgement that the instrument is subject to the relevant regime.

Statutory regulation may reduce disputes over the subjective intention behind a PONV clause, but it cannot eliminate every uncertainty. Questions will remain concerning supervisory discretion, proportionality, the selection of the appropriate crisis-management tool and the interaction between the statutory regime, contractual documentation and investor disclosure.

The panel also considered whether elements of the Swiss insurance framework, under which FINMA determines the relevant trigger and bondholders acknowledge the regulatory mechanism, might provide a model for banking instruments. No definitive conclusion was reached.

6) Key Take-Aways

The key take-aways from the panel discussion could be summarized as follows:

- Bond terms should generally be interpreted objectively and consistently for all holders, taking account of their standardized nature, fungibility and secondary-market function. The protection of individual investors should be achieved not so much through subjective interpretation as through efficient price formation in the secondary-market.
- For complex capital-markets instruments, the appropriate interpretative benchmark is a knowledgeable professional investor familiar with the relevant product and regulatory environment.
- Wording remains the starting point, but the systematic context, commercial purpose and regulatory function of the instrument may also be relevant.
- Doctrines developed for general terms and conditions (AGB) should not be applied mechanically to bond terms that reflect professional market input.
- The prospectus and risk factors should not override the bond terms or create new contractual obligations, but may provide important interpretative context.
- Contractual capital triggers must be distinguished clearly from statutory PONV and resolution mechanisms. Documentation should explain their respective conditions, consequences and decision-makers.
- Risk factors should be material, issuer-specific and consistent with the operative terms. They should not be used as a substitute for clear product descriptions or contractual drafting.
- Technical decisions may appropriately be delegated to calculation agents or independent experts, but their mandate, expertise and applicable standard should be clearly defined.
- Perpetual and long-dated instruments require sufficient flexibility to accommodate changes in regulation and market practice, while unstructured discretion should be avoided.
- The LIBOR-to-SARON transition demonstrates that coordinated, market-oriented solutions can preserve the commercial function of existing instruments despite unforeseen developments.

Sandro Fehlmann concluded the conference before participants continued the discussion during the lunch.

The views and opinions expressed during the presentations and panel discussion were those of the respective speakers and do not necessarily reflect the views or positions of any entities they represent.

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