

立法會
Legislative Council

LC Paper No. LS 122/00-01

**Paper for the House Committee Meeting
of the Legislative Council
on 15 June 2001**

**Legal Service Division Report on
Bank of China (Hong Kong) Limited (Merger) Bill
(Private Member's Bill)**

Objects of the Bill

To provide for the transfer to and vesting in Po Sang Bank Limited ("Po Sang") the business, existing property and liabilities of -

- (a) Bank of China, Hong Kong branch;
 - (b) the Hong Kong branches of The Kwangtung Provincial Bank, Sin Hua Bank Limited, The China & South Sea Bank Limited, Kincheng Banking Corporation, The China State Bank, Limited, The National Commercial Bank Limited and The Yien Yieh Commercial Bank Limited (collectively "the Mainland incorporated banks");
 - (c) Hua Chiao Commercial Bank Limited ("Hua Chiao");
 - (d) the Shenzhen branches of The Kwangtung Provincial Bank and Sin Hua Bank Limited ("the two Shenzhen Branches") to the extent that such business, property and liabilities are governed by Hong Kong law or the transfer of which is governed by Hong Kong law.
2. To provide for the transfer to Po Sang shares held by Bank of China or its nominees in -
- (a) Nanyang Commercial Bank Limited;
 - (b) Chiyu Banking Corporation Limited;
 - (c) BOC Credit Card (International) Limited.

3. To provide that the name of Po Sang be changed to "Bank of China (Hong Kong) Limited" ("BOC(HK)") and that, subject to the Financial Secretary obtaining the approval of the Chief Executive in Council and exercising his powers under the Legal Tender Notes Issue Ordinance (Cap. 65), BOC(HK) becomes a note-issuing bank in place of Bank of China.

LegCo Brief Reference

4. No LegCo Brief has been issued.

Date of First Reading

5. 13 June 2001.

Comments

Private Member's Bill

6. This is a private bill presented by Dr Hon David LI Kwok-po. According to the Preamble of the Bill, it is expedient that the undertakings of those banks referred to in paragraph 1 above (collectively "the merging banks") be merged for the better conduct of the businesses of the Bank of China Group. And in view of the extent of the contractual and other legal relationships affecting the conduct of the undertakings, it is also expedient to make provision to facilitate such merger without interference with the conduct and continuity of the businesses. For the better conduct of the businesses of the Bank of China Group too, it is expedient that the shares referred to in paragraph 2 be transferred and provision be made to facilitate such transfer.

7. The President has ruled that the Bill relates to Government policy within the meaning of Rule 51(4) of the Rules of Procedure and requires the written consent of the Chief Executive for its introduction. The policies that the Bill relates to are the regulation of banks, the set-off of losses against profits of corporations and the control of tenancies as reflected in the relevant legislation. By letter dated 26 May 2001, the Chief Executive gave consent for the Bill to be introduced into the Council. In accordance with Rule 54(1) of the Rules of Procedure, such written consent was signified by the Secretary for Financial Services before the Council entered upon consideration of the second reading of the Bill on 13 June 2001.

Monetary Authority's support of the proposed merger

8. The Administration has advised that the Monetary Authority considers that the proposed merger should help promote cost-effectiveness and enhance internal controls of the banks concerned. The Authority is also satisfied that the proposed merger would not adversely affect the interest of the merging banks' depositors. A copy of the Administration's letter dated 12 June 2001 is at the **Annex A**.

Appointed time

9. The vesting of undertakings, the transfer of shares, the change of name and the authorization to issue bank notes described in paragraphs 1 to 3 above would all take effect at the appointed time. Under Clause 3 of the Bill, Po Sang shall give notice in the Gazette of the day and a time of that day to be the appointed time, and such notice is not subsidiary legislation.

10. At the appointed time, without further act or deed, (a) BOC(HK) would succeed to the branches of the merging banks as if it were the same person in law as the relevant merging banks and (b) BOC(HK) would become the beneficial owner of all the shares in Nanyang Commercial Bank Limited, Chiyu Banking Corporation Limited and BOC Credit Card (International) Limited previously held by Bank of China or its nominees. All existing instruments entered into by a merging bank including documents granting or comprising any security interest shall be construed and have effect at and from the appointed time as if BOC(HK) had been a party thereto instead of such bank.

Status of merging banks after the appointed time

11. Bank of China and the Mainland incorporated banks are established and incorporated under national laws. Banking licences have been granted to them to carry on banking business in Hong Kong through its branches. After the appointed time, the Hong Kong branches of Bank of China and the Mainland incorporated banks will become the local branches of BOC(HK).

12. According to Clifford Chance, solicitors for Bank of China ("the Solicitors") :

- (a) Po Sang will apply for and obtain the approval of the Monetary Authority under section 44 of the Banking Ordinance (Cap. 155) for establishing or maintaining local branches after the Bill is enacted but before the appointed time;
- (b) Bank of China and the Mainland incorporated banks will request the Monetary Authority to revoke their banking licences in accordance with Part V of the Banking Ordinance.

13. Hua Chiao is a company incorporated under the laws of Hong Kong. According to the Solicitors, the Monetary Authority gave its approval under section 69 of the Banking Ordinance on 24 May 2001 for Hua Chiao to make an arrangement or enter into an agreement for the sale or disposal of all of its banking business. After the appointed time, it will continue to exist as a limited company with its name changed to ensure compliance with the restriction on use of name "bank" under section 97 of the Banking Ordinance. Hua Chiao will request the Monetary Authority to revoke its banking licence in accordance with Part V of the Banking Ordinance.

14. Nanyang Commercial Bank Limited, Chiyu Banking Corporation Limited and BOC Credit Card (International) Limited are companies incorporated under the laws of Hong Kong. After the appointed time, they would become the subsidiaries of BOC(HK). According to the Solicitors, Po Sang intends to apply for and obtain before the appointed time a notice of consent from the Monetary Authority under section 70 of the Banking Ordinance that there is no objection to BOC(HK) being the shareholder controller of Nanyang Commercial Bank Limited and Chiyu Banking Corporation Limited.

15. According to the Solicitors, the Kwangtung Shenzhen Branch and Sin Hua Shenzhen Branch will become the branches of BOC(HK) after the appointed time. The types of documents used by the two Shenzhen branches that are governed by Hong Kong law are set out in the Schedules of the letter of the Solicitors dated 5 June 2001 attached at **Annex B**. According to the Solicitors, parties to these documents may not necessarily be Hong Kong residents. In this connection, the Solicitors have confirmed that actual notices will be issued to all of their customers (including those who are parties to these documents but who do not reside in Hong Kong) after the Bill is enacted.

Issue of legal tender notes

16. Under Clause 6 of the Bill, Bank of China shall cease to be a note-issuing bank and BOC(HK) shall become a note-issuing bank, in each case with effect from the appointed time, subject to the Financial Secretary (with the approval of the Chief Executive in Council) by a written notice authorizing BOC(HK) to issue bank notes and by notice in the Gazette amending the Schedule to the Legal Tender Notes Issue Ordinance (Cap. 65). The notice in the Gazette will be subsidiary legislation.

17. Clause 6 also provides that all legal tender notes issued by Bank of China before the appointed time shall be deemed to have been issued by BOC(HK) who shall be liable to pay the bearer on demand at its office in Hong Kong. Subject to the terms and conditions imposed by the Financial Secretary under section 3 of the Legal Tender Notes Issue Ordinance, BOC(HK) has the power (a) to produce, store, distribute and issue bank notes in the name of Bank of China, using the same designs and in the same denominations as Bank of China was authorized to issue immediately before the appointed time, and (b) to destroy any legal tender notes issued or deemed

to be issued by it. All certificates of indebtedness issued to Bank of China under section 4 of the Exchange Fund Ordinance (Cap. 66) and all indebtedness owed to Bank of China thereunder shall be transferred to BOC(HK).

18. Under section 3(3) of the Legal Tender Notes Issue Ordinance, the Financial Secretary shall not authorize a bank to issue bank notes unless he is satisfied that, if the bank so authorized, its issue of bank notes subject to such terms and conditions as he thinks fit will be in accordance with, inter alia, the provisions of an Ordinance or memorandum of association under which the bank is incorporated. The Solicitors have confirmed that amendments, approved by the Monetary Authority and the Financial Secretary, would be made to the memorandum of association of Po Sang before the appointed time.

19. The remaining parts of the Bill are supplementary provisions that are similar to existing provisions in other ordinances concerning merger of banks enacted prior to 1997. The main exceptions are highlighted in paragraphs 20 to 26 below.

Taxation

20. Clause 10 of the Bill is a new clause in that there are no matching provisions in the existing ordinances. Under Clause 10(1), BOC(HK) would be treated at and from the appointed time as if it were the continuation of and the same person in law as the merging banks for the purposes of the Inland Revenue Ordinance (Cap. 112). By virtue of this provision, BOC(HK) would be able to qualify under section 19C(4) of the Inland Revenue Ordinance to claim set-off of loss which may have been incurred by merging banks against the profits of BOC(HK). Clause 10(2)(b) makes it beyond doubt that this would be the case by deeming the aggregate amount of losses of the merging banks which are capable of but have not been set off to be losses of BOC(HK) and available for set off against the assessable profits of BOC(HK).

21. We would advise Members that existing provisions in other ordinances have the same legal effect. The existing provisions deem the surviving bank as if in all respects it were the same person in law as the merged bank, and any profits or losses of merged bank shall be treated for all purposes as profits or losses of the surviving bank from the beginning of the financial year of the merger.

22. We have asked the Administration to assess the financial implications of Clause 10 in terms of the estimated amount of revenue forgone. The Administration is unable to provide the information as it would involve the disclosure of confidential tax information of the merging banks by the Commissioner of Inland Revenue. Such disclosure is not permissible in the performance of the Commissioner's duties under the Inland Revenue Ordinance (Cap. 112) and would constitute a breach of section 4 of that Ordinance.

Personal Data (Privacy) Ordinance

23. Clause 8(1) of the Bill is an unprecedented provision since there are no ordinances for merger of banks enacted after the commencement of the Personal Data (Privacy) Ordinance (Cap. 486). Under that sub-clause, the transfer to and vesting in Po Sang of the branches of the merging banks, and any disclosure to Po Sang of any information in contemplation or as a result thereof shall not amount to a breach of any duty of confidentiality to which a merging bank is subject immediately before the appointed time or to a contravention by Po Sang or a merging bank of the Personal Data (Privacy) Ordinance or the data protection principles.

24. The effect of this sub-clause is :

- (a) to overcome the difficulty of breaching the common law duty of confidentiality that exists between a banker and its customers, and between a credit company and its customers;
- (b) to deal with the possible contravention of the requirements under the Personal Data (Privacy) Ordinance;
- (b) to preclude the need for the relevant banks and BOC Credit Card International Limited to obtain prescribed consent from the data subjects under data protection principle 3 of the Personal Data (Privacy) Ordinance.

25. According to the Solicitors, all customers who have accounts with the merging banks in Hong Kong have been issued with and are dealing with the relevant bank on the basis of the Bank of China Group's General Terms and Conditions for Banking Services. These Terms and Conditions contain a clause authorizing the relevant merging bank to provide and divulge information in respect of the customer or in connection with the bank account or any service or transaction to any other member of the Bank of China Group. However, it is unclear whether this agreement would amount to prescribed consent as certain conditions specified in section 2(3) of the Personal Data (Privacy) Ordinance have to be complied with.

Remuneration or scale fees

26. Under Clause 7(2) and (3) of the Bill, a reference (however worded and whether express or implied) to terms and conditions of, or to a scale of fees of, the merging bank in any existing instrument, order of the court or will under which a merging bank holds any property in a fiduciary capacity or acts as an executor would not be construed and have effect as if, there were substituted a reference to the terms and conditions of or to a scale fees of BOC(HK). The intention is that BOC(HK) would only be permitted to charge fees in accordance with the relevant merging bank's standard scale of fees, subject to variation in accordance with the terms of the relevant instrument and order. Similarly, under Clause 8(c), any account between a merging

bank and a customer shall, on the appointed day be transferred to BOC(HK) subject to the same conditions and incidents provided that nothing shall affect the right of BOC(HK) or the customer to vary those conditions or incidents.

Contracts of employment and benefits

27. Clause 11 of the Bill deems for all purposes employment with any of the merging banks under a contract for the employment of any person by such bank to be a single continuing employment, with the exception of the directors, secretary and auditor of these banks. Clause 12 relates to provident funds and gratuity benefits payable by the merging banks.

28. According to the Solicitors, once the decision has been made regarding the directors and the chief executive of BOC(HK), an application will be made to the Monetary Authority for its consent under section 71 of the Banking Ordinance.

Waiver of prohibition

29. The effect of Clause 13 of the Bill is to deem the following provisions to be waived :

- (a) those contained in any contract or other document to which one of Po Sang or any of the banks and credit company mentioned in paragraphs 1 and 2 above or any of their respective subsidiaries is a party and which prohibits or has the effect of prohibiting the transactions referred to in the Bill;
- (b) those contained in the said contracts or documents to the effect that a breach of contract or a default shall occur or deemed to occur as a result of the transactions referred to in the Bill.

30. The application of this clause is wider than the existing provisions in other ordinances in that it extends to contracts and other documents to which any of the subsidiaries is a party.

Savings clauses

31. Clause 20 of the Bill provides that nothing in the Bill shall exempt the banks mentioned in paragraphs 1 and 2 above or their subsidiaries from the provisions of any enactment regulating the carrying on of the business of any of them. This means that the passage of the Bill would not exempt these banks from obtaining the necessary approvals or consent from the Monetary Authority under the Banking Ordinance.

32. Clause 22 of the Bill follows substantially saving provisions in Private Members' Bills enacted since 1997. It provides that nothing in the Bill shall affect or be deemed to affect the rights of the Central Authorities or the Government of the Hong Kong Special Administrative Region under the Basic Law and other laws, or the rights of any body politic or corporate or of any other person except such as are mentioned in the Bill and those claiming by, from or under them.

Payment of stamp duty

33. The Solicitors have confirmed that an authentic copy of the Bill enacted as an Ordinance would be stamped with the stamp duty chargeable on the transfer and vesting of immovable properties and Hong Kong stocks in accordance with section 4(8) of the Stamp Duty Ordinance (Cap. 117).

Public Consultation

34. No public consultation has been carried out.

Consultation with the LegCo Panel

35. No consultation with any LegCo Panel has been carried out.

Conclusion

36. Subject to Members' views, the legal and drafting aspects of the Bill are in order.

Encl.

Prepared by

Wong Sze-man, Bernice
Assistant Legal Adviser
Legislative Council Secretariat
13 June 2001

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G4/16/23C

12 June 2001

By Fax: 2877 5029
Ms Bernice Wong
Assistant Legal Adviser
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear Ms Wong,

Bank of China (Hong Kong) Limited (Merger) Bill
The Bank of East Asia, Limited Bill

The Hong Kong Monetary Authority (HKMA) considers that the proposed mergers under the Bank of China (Hong Kong) Limited (Merger) Bill and The Bank of East Asia, Limited Bill should help promote cost-effectiveness and enhance internal controls of the banks concerned. The surviving banks' competitiveness should be enhanced. These will contribute to the stability of the banking sector.

As a bank incorporated in Hong Kong, Po Sang Bank Limited will come under the HKMA's consolidated supervision after the merger. Compared with the current situation where eight out of the ten merging banks are incorporated in the Mainland and thus not subject to HKMA's consolidated

supervision, HKMA's supervision of the Bank of China Group's operation in Hong Kong will become more effective after the merger.

The HKMA is also satisfied that the proposed mergers under the two Bills will not adversely affect the interest of the merging banks' depositors.

Yours sincerely,

(Stanley Wong)
for Secretary for Financial Services

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LS/B/46/00-01
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30 May 2001

BY FAX & BY POST

Fax No. : 2825 8800
Total no. of page(s) : 4

(Attn : Mr Roger Denny / Mr Jonathan Grant)

Dear Mr Denny / Mr Grant,

Bank of China (Hong Kong) Limited (Merger) Bill

I refer to the above draft Bill published in the Gazette on 25 May 2001 and write to seek your clarification on the following :

Status of transferring banks

1. Please clarify whether the existing banking licences are granted to the Bank of China and the Mainland incorporated banks or to their Hong Kong branches to carry on banking business in Hong Kong. Would these licences be revoked after the appointed time in accordance with Part V of the Banking Ordinance (Cap.155)? Are the Hong Kong branches of the Bank of China and the Mainland incorporated banks separate legal entities? What would be the legal status of these Hong Kong branches after the appointed time?

2. Would the banking licence granted to Hua Chiao be revoked after the appointed time in accordance with Part V of the Banking Ordinance? Is it the intent for Hua Chiao to continue to exist as a company incorporated in Hong Kong?

Approval of the Hong Kong Monetary Authority

3. Has the Monetary Authority given the following approval or consent in writing under the Banking Ordinance :

- (a) the approval under section 69 for Hua Chiao to make any arrangement or enter into any agreement for the sale or disposal of all of its banking business;
- (b) the notice of consent under section 70 that there is no objection for Po

Sang to be the shareholder controller of Nanyang and Chiyu;

- (c) the consent under section 71 for certain persons to become the chief executive or a director of the Bank of China (Hong Kong) Limited (BOC(HK));
- (d) if the Hong Kong branches of Bank of China and the Mainland incorporated banks would become the branches of BOC(HK) after the appointed time, the approval under section 44 for establishing or maintaining such local branches; and
- (e) any other approval or consent under the Banking Ordinance?

Issue of legal tender notes

4. Under section 3(3) of the Legal Tender Notes Issue Ordinance (Cap. 65), the Financial Secretary shall not authorize a bank to issue bank notes unless he is satisfied that, if the bank so authorized, its issue of bank notes subject to such terms and conditions as he thinks fit will be in accordance with, inter alia, the provisions of an Ordinance or memorandum of association under which the bank is incorporated. Would there be amendments made to the memorandum of association of Po Sang, or is it intended that the Bill, when enacted, be regarded as an Ordinance under which BOC(HK) is incorporated?

Kwangtung Shenzhen Branch and Sin Hua Shenzhen Branch

5. Please elaborate the type of business, property and liabilities of the Shenzhen Branches of Kwangtung and Sin Hua that are governed by Hong Kong law or the transfer of which is governed by Hong Kong law.

Stamp duty

6. Please confirm that an authentic copy of the Bill enacted as an Ordinance would be stamped with the stamp duty chargeable on the transfer and vesting of immovable properties and Hong Kong stocks in accordance with section 4(8) of the Stamp Duty Ordinance (Cap. 117).

Personal Data (Privacy) Ordinance

7. Under Clause 8(1) of the Bill, the transfer to and vesting in Po Sang of the merging branches, and any disclosure to Po Sang of any information in contemplation or as a result thereof shall not amount to a breach of any duty of confidentiality to which a merging bank is subject immediately before the appointed time or to a contravention by Po Sang or a merging bank of the Personal Data (Privacy) Ordinance (Cap. 486) or the data protection principles. Is there any additional information that would assist Members in considering this Clause? Would your clients obtain prescribed consent from the data subjects or have they already done so?

Drafting matters

8. Bank of China and the Mainland incorporated banks are established or incorporated under national law. Do all of these banks have official English names? If any of them only have their names in Chinese, should it be reflected in the English text of the Bill accordingly?

9. Please explain the reason for including the issued and unissued share capital and rights in respect thereof of Po Sang in the definition of "excluded property and liabilities".

To assist Members of the House Committee to consider the Bill, I would appreciate it if your reply could reach me before 5 June 2001.

Yours sincerely,

(Bernice Wong)
Assistant Legal Adviser

c.c. LA

Dr Hon David Li Kwok-po, JP
(Fax no. : 2526 1909)

LS/B/46/00-01

B1602-00006.RMD/JCXG

5 June 2001

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BY HAND & BY FAX: 2877 5029

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Attn: Ms. Bernice Wong
Assistant Legal Advisor

Dear Sirs,

Bank of China (Hong Kong) Limited (Merger) Bill (the "Bill")

Thank you for your letter of 30 May 2001. We have discussed this with our client and, adopting the numbering used in your letter, we set out responses to your questions below. Terms defined in the Bill shall bear the same meaning in this letter.

Status of transferring banks

1. Section 15(1) of the Banking Ordinance (Cap. 155) provides that:

"A **company** which proposes to carry on -

(a) *banking business*.....

shall apply to the Monetary Authority for authorisation to carry on that business." (our emphasis)

"Company" is defined in section 2(1) of the Banking Ordinance to mean a body corporate incorporated under the Companies Ordinance, incorporated by any other Ordinance or incorporated outside Hong Kong.

Based on the above analysis of the Banking Ordinance, it is our view that it is the entire entity of Bank of China or the relevant Mainland incorporated bank which is authorised, not just its Hong Kong branch.

From a Hong Kong law perspective, the Hong Kong branches of Bank of China and the Mainland incorporated banks are not separate legal entities. They are part of the same legal entity as their respective head offices and other branches.

On the basis that all the business of a merging branch is transferred to Po Sang, that branch shall cease to exist. In such circumstances, the Hong Kong Monetary Authority ("**HKMA**") is expected to revoke the Hong Kong banking licence of the relevant bank upon the application of that relevant bank and subject to the requirements of Part V of the Banking Ordinance.

2. We understand from our clients that Hua Chiao intends to apply for the revocation of its banking licence in due course. The HKMA is expected to revoke the Hong Kong banking licence of Hua Chiao upon the application of Hua Chiao and subject to the requirements of Part V of the Banking Ordinance.

The Bill does not provide for the dissolution of Hua Chiao and therefore after the appointed time Hua Chiao shall continue to exist as a company incorporated in Hong Kong. The intention is that the main property which Hua Chiao shall hold after the appointed time is the shares it shall receive in consideration for the transfer of its business to Po Sang, although Hua Chiao may also hold certain other assets and liabilities (e.g. non-Hong Kong property and liabilities which can only be transferred with the consent of a counterparty and such consent has not yet been obtained) the holding of which does not constitute the carrying on of banking business in Hong Kong.

We understand that the HKMA is likely to require Hua Chiao to change its name at the appointed time so the name no longer includes the word "bank". This is to ensure that Hua Chiao does not breach section 97 of the Banking Ordinance. Our client has no objection to Hua Chiao doing this. The expectation of our client is that Hua Chiao will be wound-up voluntarily at a date subsequent to the appointed time. It is, however, premature at this stage to indicate when precisely this may happen.

Approval of the Hong Kong Monetary Authority

3. Adopting the numbering used in your letter, we can confirm the position or our client's intention as follows:
 - (a) On 24 May 2001, the HKMA gave its approval under section 69 of the Banking Ordinance for Hua Chiao to make an arrangement or enter into an agreement for the sale and disposal of all of its banking businesses.
 - (b) Po Sang intends to make an application to the HKMA under section 70 of the Banking Ordinance for a notice of consent that there is no objection to Po Sang becoming the majority shareholder controller of Nanyang and Chiyu. In

accordance with such section, this application should be made, and the notice of consent obtained, before the appointed time.

- (c) Once a final decision has been made regarding who are to be the directors and the chief executive of Bank of China (Hong Kong) Limited ("**BOCHK**") after the appointed time, an application will be made to the HKMA for it to consent to such directors and such chief executive under section 71 of the Banking Ordinance. These consents should be obtained before the relevant appointments.
- (d) Our client has not yet made an application to the HKMA under section 44 for the HKMA to approve those local branches of the merging banks which are to become local branches of BOCHK at the appointed bank. Our client's intention is to make this application and obtain the approval of the HKMA before the appointed time.

No other approvals or consents have been given under the Banking Ordinance in relation to matters covered by the Bill. Our clients are working closely with the HKMA to ensure that all relevant applications are made and approvals obtained at the appropriate times.

Issue of Legal Tender Notes

- 4. It is intended that amendments will be made to the objects clause of the Memorandum of Association of Po Sang in order to include issuing legal tender notes as one of Po Sang's objects. Such an amendment to the Memorandum of Association will need to be reviewed and approved by the HKMA and the Financial Secretary. It is not intended that the Bill, when enacted, should be regarded as an Ordinance under which BOCHK is incorporated.

Kwangtung Shenzhen Branch and Sin Hua Shenzhen Branch

- 5. Kwangtung and Sin Hua have provided us with information regarding the types of documents which are used by their Shenzhen branches and which are governed by Hong Kong law. Attached as Schedule 1 to this letter is a list of the types of documents currently used by Kwangtung Shenzhen Branch which are governed by Hong Kong law. Attached as Schedule 2 to this letter is a list of the types of documents currently used by Sin Hua Shenzhen Branch which are governed by Hong Kong law.

Stamp Duty

- 6. We can confirm that an authentic copy of the Bill enacted as an Ordinance will be stamped with the stamp duty chargeable on the transfer and vesting of immovable properties and Hong Kong stocks in accordance with section 4(8) of the Stamp Duty Ordinance (Cap. 117).

Personal Data (Privacy) Ordinance

7. The Bill will be the first bank merger private bill to be introduced into the Legislative Council since the coming into force of the Personal Data (Privacy) Ordinance ("PDPO") on 20 December 1996. Clause 8(l) of the Bill deals with such data privacy issues. It is based on a provision which has been included in a number of bank merger private acts in the UK to deal with issues arising from the Data Protection Acts (e.g. Citibank International Act 1993, the Lloyds TSB Act 1998, and the Alliance & Leicester plc (Group Reorganisation) Act 2000).

Clause 8(l) has been reviewed by the Privacy Commissioner for Personal Data ("Privacy Commissioner"). All the Privacy Commissioner's comments on clause 8(l) have been included in the Bill.

Clause 8(l) has two purposes:

- (e) to provide that the Privacy Commissioner may exercise in respect of BOCHK any power which he may, before the appointed time, have exercised in respect of a merging bank (so, for example, the Privacy Commissioner can serve an enforcement notice on BOCHK in respect of a breach of the PDPO committed by a merging bank before the appointed time); and
- (f) to provide that the transfer of personal data from a merging bank to BOCHK at the appointed time does not result in a breach of any duty of confidentiality or a contravention of the PDPO.

You have asked whether the merging banks will obtain or have obtained the prescribed consent of data subjects. We would be surprised if such prescribed consent needed to be obtained as a result of the merger. As you will be aware, the relevant provision of the PDPO here is Data Protection Principle 3 in Schedule 1 to the PDPO. This provides that:

"Personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than -

- (a) *the purpose for which the data were to be used at the time of the collection of the data; or*
- (b) *a purpose directly related to the purpose referred to in paragraph (a)".*

The two main categories of data subject in respect of which the merging banks hold personal data are customers and employees. The personal data of data subjects who are customers shall, for the most part, continue to be used for the same purposes (i.e. to provide banking services) after the appointed time as they are being used before the appointed time. Similarly, the personal data of data subjects who are employees shall, for the most part, continue to be used for the same purposes (i.e. human resources management purposes) after the appointed time as they are being used before the appointed time.

However, there may be some instances where there is some doubt as to whether prescribed consent should be obtained. In a number of these instances the data subject will have given his prescribed consent. For example, where a customer has agreed to the Bank of China Group's General Terms and Conditions for Banking Services, clause 10.2 of these terms and conditions provides that:

" the [relevant merging bank] is hereby further authorised to and may, at its discretions, provide and divulge information in respect of the Customer or in connection with any Bank Account or (as the case may be) any Service or any transaction made thereunder in writing or otherwise, to ... (ii) any other member of the Bank of China Group..."

Clause 8(l) is intended to deal with those cases where there may be some doubt as to whether prescribed consent should be obtained and such prescribed consent has not been obtained at the appointed time for the merger.

Drafting Matters

8. Bank of China and the Mainland incorporated banks do not have official English names under PRC law. However, they have registered English names with the Registrar of Companies under Part XI of the Companies Ordinance and with the HKMA under section 20 of the Banking Ordinance. It is these English names which have been used in the English text of the Bill. In the draft of the Bill submitted to the Law Drafting Division of the Department of Justice, we did include the Chinese names of these banks next to their English names. However, the Law Draftsman did not include these Chinese names in the English text of the Bill which he certified pursuant to Rule 51(2) of the Rules of Procedure of the Legislative Council. We can only assume that the inclusion of the Chinese names in the English text of the Bill would not conform to the general form of Hong Kong legislation.
9. The issued and unissued share capital and rights in respect thereof of Po Sang have been included in the definition of "excluded property and liabilities" because each of the transferring banks will receive consideration for the transfer of their relevant merging branches. This consideration may consist of Po Sang shares. If this is the case, and this share capital of Po Sang is not designated "excluded property and liabilities" there is a risk that clause 5 of the Bill, when enacted, could operate to transfer the Po Sang shares issued to that transferring bank back to Po Sang, which would result in a body corporate being a member of a company which is its holding company, in contravention of section 28A(1) of the Companies Ordinance.

I hope the above answers your questions, but if you require any further information, please do not hesitate to get in touch with either of us.

Yours faithfully,

Clifford Chance

c.c. Dr. The Hon David Li Kwok-po, JP (By fax: 2526 1909)

Isabelle Tsang, Bank of China (By fax: 2230 2563)

SCHEDULE 1

**TYPES OF DOCUMENTS CURRENTLY USED BY KWANGTUNG SHENZHEN BRANCH
WHICH ARE GOVERNED BY HONG KONG LAW**

Deed of Guarantee
Charge on Deposit(s)
Undertaking for Repayment of Loan

SCHEDULE 2

**TYPES OF DOCUMENTS CURRENTLY USED BY SIN HUA SHENZHEN BRANCH
WHICH ARE GOVERNED BY HONG KONG LAW**

Deed of Charge on Deposits and Set-off
Undertaking for Repayment of Loan
Deed of Indemnity - Charge over Deposit(s) and Set-off
Direct Debit Authorisation
Guarantee
Deed of Guarantee
Agreement of Pledge
Customer's Agreement
General Letter of Hypothecation
Request for Letter of Indemnity or Letter of Guarantee