

立法會
Legislative Council

LC Paper No. LS 107/01-02

**Paper for the House Committee Meeting
on 31 May 2002**

**Legal Service Division Report on
Citic Ka Wah Bank Limited (Merger) Bill**

(Private Member's Bill)

I. SUMMARY

1. **Object of the Bill** To provide for the vesting in The Hong Kong Chinese Bank, Limited of part of the business of CITIC Ka Wah Bank Limited and for other related purposes.
2. **Comments**
 - (a) This is a member's bill introduced by Dr The Hon David LI Kwok-po, GBS, JP with the consent of the Chief Executive.
 - (b) The Bill is different from recently enacted bank merger ordinances in that :
 - it is the parent company that transfers its business to the subsidiary;
 - only banking business and related property is to be transferred;
 - after the merger, the parent company would continue to exist.
 - (c) Other than provisions giving effect to the above differences, the Bill follows recently enacted bank merger ordinances in other respects.
3. **Public Consultation** No public consultation has been carried out.
4. **Consultation with LegCo Panel(s)/ Committee(s)** The policy aspects of the Bill were discussed at the meeting of the LegCo Panel on Financial Affairs on 9 April 2002.
5. **Conclusion** The Bill is legally in order. Subject to Members' views, the Bill is ready for resumption of the Second Reading debate.

II. REPORT

Object of the Bill

To provide for the vesting in The Hong Kong Chinese Bank, Limited ("HKCB") of part of the business of CITIC Ka Wah Bank Limited ("CKWB") and for other related purposes.

LegCo Brief Reference

2. LegCo Brief dated 17 May 2002 issued by Dr The Hon David LI Kwok-po, GBS, JP.

Date of First Reading

3. 29 May 2002.

Comments

Private Member's Bill

4. This is a member's bill presented by Dr The Hon David LI Kwok-po, GBS, JP. According to the LegCo Brief, HKCB is a wholly owned subsidiary of CKWB. Both banks are licensed under the Banking Ordinance (Cap. 155) and are incorporated in Hong Kong. It is stated in the Preamble of the Bill that for the better conduct of the business of both banks, it is expedient that their respective businesses be merged and that such merger should occur by means of a transfer of part of the business of CKWB to HKCB. And in view of the extent of the contractual and other legal relationships affecting the conduct of the business of CKWB, it is expedient that such business be transferred by the Bill without interference with the conduct and continuity of the businesses of both banks.

5. 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 17 May 2002, 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 at the meeting of 29 May 2002.

Monetary Authority's support of the proposed merger

6. At the meeting of the LegCo Panel on Financial Affairs on 9 April 2002 ("the Panel meeting"), the Administration welcomed the introduction of the Bill and advised that the Monetary Authority ("HKMA") considered that the proposed merger would help promote stability of the banking sector. HKMA is also satisfied that the proposed merger would not adversely affect the interest of the merging bank's depositors. The representative of CKWB informed Panel Members that HKMA has given its approval under section 69 of the Banking Ordinance (Cap. 155) for CKWB to make an arrangement or enter into an agreement for the sale or disposal of all of its banking business.

Appointed day

7. The vesting would take effect on the appointed day. Under Clause 3 of the Bill, CKWB and HKCB shall give joint notice in the Gazette of the appointed day, and such notice is not subsidiary legislation. On the appointed day, without further act or deed, HKCB would succeed to part of the business of CKWB as if in all respects HKCB were the same person in law as CKWB.

8. On the appointed day, the name of CKWB would be changed to "CITIC International Financial Holdings Limited 中信國際金融控股有限公司". The name of HKCB would be changed to "CITIC Ka Wah Bank Limited 中信嘉華銀行有限公司". The banking licence of CKWB would be revoked in accordance with Part V of the Banking Ordinance on a day to be decided by HKMA and published in the Gazette. It has been the Government's policy for the banking licence to be revoked on the appointed day.

Foreign contracts or documents

9. Members of the Panel were concerned that contracts or other documents of CKWB not governed by the laws of Hong Kong may prohibit CKWB from transferring its business to HKCB. According to the LegCo Brief, CKWB will be required, as a precondition to the revocation of its banking licence under the Banking Ordinance, to satisfy HKMA that all non Hong Kong law governed, banking related properties and liabilities (not otherwise transferred by the Bill) are adequately and satisfactorily transferred on a case by case basis to HKCB. Due diligence would be carried out by Clifford Chance, solicitors for CKWB and the process is usually completed immediately before the appointed day. The Administration has confirmed that prior approval of HKMA of the appointed day must be sought, and it is the general policy for revocation of the transferring bank's banking licence to occur at the same time as the merger of its banking business. A copy of the Administration's letter is at the **Annex**.

Differences between the Bill and recently enacted bank merger ordinances

10. The Bill differs from recently enacted bank merger ordinances in the following respects :

- (a) The Bill proposes to transfer part of the business of the parent company to the subsidiary. After the appointed day, the subsidiary becomes the merged entity. Under recently enacted merger ordinances, it is usually the subsidiary that transfers its business to the parent company which would then carry on business as the merged entity.
- (b) Not all of the existing business, property, reserves and liabilities of CKWB are to be transferred. The intention is that only the banking business and related property of CKWB be transferred to HKCB. Under recently enacted merger ordinances, all businesses are to be transferred.
- (c) After the appointed day, CKWB would continue to exist as a listed company and would become a financial holding company. Under recently enacted merger ordinances, the merging entities would cease to exist or be wound up voluntarily after the merger.

Undertaking

11. Since only the banking business and related property of CKWB is intended to be transferred to HKCB, "undertaking" is defined in the Bill to mean the business and all existing property, reserves and liabilities of CKWB of whatsoever nature other than the excluded property and liabilities. Other than the usual items to be excluded, "excluded property and liabilities" also includes, subject to the agreement of HKCB, such other property and liabilities of CKWB as may be specified by way of a resolution or resolutions of the board of directors of CKWB. This follows the drafting in the Bank of China (Hong Kong) Limited (Merger) Ordinance (25 of 2001). According to Clifford Chance, it is proposed that the following would be included for exclusion :

- (a) CKWB's listing agreement with the Stock Exchange and related documentation;
- (b) CKWB's shareholdings in HKCB and in CKWB's non-banking subsidiaries;
- (c) employment contracts of staff who would remain with CKWB;
- (d) loan agreements and related security documentation in respect of non-performing loans which have been sub-participated prior to the merger;
- (e) any sub-participation agreements and enforced assets in respect of non-performing loans.

CKWB as a listed company

12. CKWB is listed on The Stock Exchange of Hong Kong Limited ("SEHK") and intends to maintain its listed status following the merger. The solicitors for CKWB confirmed that SEHK has reviewed the Bill. It is stated in the LegCo Brief that the Securities and Futures Commission has also reviewed and commented on the Bill.

Taxation

13. Clauses 8 and 9 of the Bill relate to the accounting treatment of HKCB and CKWB. Clause 9 proposes that HKCB would be treated as if it were the continuation of and the same person in law as CKWB only to the extent of the business to be vested. The Administration has confirmed that before applying the Government's policy on taxation to the Bill, they have already considered the factor that CKWB would remain under a different name after the transfer of business.

Contracts of employment and benefits

14. Clause 10 of the Bill deems for all purposes employment with HKCB and CKWB under a contract for the employment of any person by HKCB (currently 498 employees in total) to be a single continuing employment, with the exception of the directors, secretary and auditor of CKWB. According to Clifford Chance, approximately 950 out of 992 CKWB employees would become HKCB employees. The contracts of those who remain with CKWB would form part of the excluded property and liabilities. Clause 11 relates to provident fund schemes and gratuity benefits payable by HKCB and CKWB. At the Panel meeting, Members were advised that HKCB did not have plans to lay off staff after the proposed merger took effect.

Security interest

15. The remaining parts of the Bill are supplementary provisions that are similar to existing provisions in recently enacted bank merger ordinances. In particular, Clause 7(g)(v) and (vi) follows closely the relevant provisions in those ordinances to ensure that the liability of persons providing security interest to CKWB or HKCB would not be increased or expanded by virtue of the Bill unless —

- (a) the terms of such security interest expressly provide otherwise;
- (b) HKCB obtains the written consent of the persons who granted such security interest; or
- (c) such security interest arises at general law.

Personal Data (Privacy) Ordinance

16. Under Clause 7(1), it is proposed that the transfer to and vesting in HKCB of part of the business of CKWB, and any disclosure to HKCB of any information in contemplation or as a result thereof shall not amount to a breach of any duty of confidentiality to which CKWB is subject immediately before the appointed day or to a contravention by HKCB or CKWB of the Personal Data (Privacy) Ordinance (Cap. 486) or the data protection principles. At the Panel meeting, the Administration advised that legislative proposals to the Personal Data (Privacy) Ordinance would be introduced in the 2002-03 legislative session.

Public Consultation

17. No public consultation has been carried out. According to paragraph 29 of the LegCo Brief, various Government departments and statutory bodies have reviewed and commented on the Bill.

Consultation with the LegCo Panel

18. The policy aspects of the Bill were discussed at the meeting of the Panel on Financial Affairs on 9 April 2002. Clarifications of the issues raised at the Panel meeting are set out in paragraphs 6, 9, 14 and 16 above.

Conclusion

19. The legal and drafting aspects of the Bill are in order. Subject to Members' views, the Bill is ready for resumption of the Second Reading debate.

Encl

Prepared by

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29 May 2002

Annex

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LS/B/21/01-02

17 May 2002

Ms Bernice Wong
Assistant Legal Adviser
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LegCo Secretariat
8 Jackson Road
Central

Dear Ms Wong,

CITIC Ka Wah Bank Limited (Merger) Bill

Thank you for your letter of 6 May. I set out below the consolidated response of the Administration to your comments.

Bank merger

We consider that the proposed merger will provide an appropriate degree of protection to depositors in the merged institution and to depositors generally, through improving the competitiveness, cost effectiveness and operational efficiency of the CITIC Ka Wah Bank Ltd (CKWB) Group. In giving its approval for the merger, the Hong Kong Monetary Authority (HKMA) must be satisfied that the merged institutions will continue to meet with the authorisation criteria set out in the Seventh Schedule to the Banking Ordinance (Cap 155) which include, among other things, adequate capital and liquidity after the merger. In addition, CITIC will give the same level of parental support to the merged institution after the merger. The interests of depositors and potential depositors of both CKWB and The Hong Kong Chinese Bank, Ltd before and after the merger will thus be adequately safeguarded.

Revocation of the banking licence and the appointed day

We confirm that (a) paragraph 1.3 of Clifford Chance's letter of 16 April 2002 reflects the practice of the HKMA; (b) it is the general policy for the revocation of the transferring bank's banking licence to occur at the same time as the merger of its banking business; and (c) the HKMA's prior approval to the date of merger must be sought. In agreeing to the date of merger, the HKMA must be satisfied that the integration of both banks' major policies and procedures, IT systems, staff and products are completed.

Taxation

We have already considered the factor that the merged entity will remain under a different name after the transfer of undertakings. It is the Government's policy to have regard to the status of the merged entity under the operation of law when deciding whether or not the merged entity may carry forward the assessed losses of the merging entity. As the Bill deems the merged entity as the same person in law as the merging entity insofar as the transferred undertaking is concerned and if the Bill is enacted, the Government would implement the provisions in the enacted Ordinance, including allowing the merged entity, for tax assessment purpose, to carry forward any losses accumulated by merging entity, in accordance with section 19C(4) of the Inland Revenue Ordinance. The Government's policy would apply to other merger bills, if they carry similar provisions deeming the merged entity as the same person as the merging entity.

Please let me know if you have further questions.

Yours sincerely,

(Ms Kinnie Wong)
for Secretary for Financial Services