

立法會
Legislative Council

LC Paper No. CB(1) 1989/99-00
(These minutes have been seen
by the Administration and
cleared by the Chairman)

Ref: CB1/BC/13/98/2

**Bills Committee on
Securities (Margin Financing) (Amendment) Bill 1999**

**Minutes of meeting held on
Tuesday, 22 February 2000, at 10:45 am
in Conference Room A of the Legislative Council Building**

- Members present** : Hon Ronald ARCULLI, JP (Chairman)
Hon Albert HO Chun-yan
Hon Jasper TSANG Yok-sing, JP
Hon FUNG Chi-kin
- Members absent** : Hon Bernard CHAN
Hon SIN Chung-kai
- Public officers attending** : Mr Bryan CHAN
Principal Assistant Secretary for Financial Services
- Miss Hanny LAM
Assistant Secretary for Financial Services
- Mr William MADDAFORD
Senior Assistant Law Draftsman,
Department of Justice

- Attendance by invitation** : Securities and Futures Commission
- Mr Andrew PROCTER
Executive Director of Intermediaries and Investment Products
- Mr CHUNG Hing-hing
Associate Director of Licensing
- Mrs Yvonne MOK
Associate Director of Intermediaries Supervision
- Clerk in attendance** : Ms LEUNG Siu-kum
Chief Assistant Secretary (1)4
- Staff in attendance** : Mr KAU Kin-wah
Assistant Legal Adviser 6
- Ms Connie SZETO
Senior Assistant Secretary (1)1
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I Meeting with the Administration

Examination of the draft Committee Stage Amendments (CSAs) to Division 4 of the Bill

(LC Paper Nos. CB(1) 1049/99-00(01) - Legal considerations for the proposed section 121AD(3) of Division 4, CB(1) 1049/99-00(02) - Revised second draft of CSAs for Division 4)

Members studied the revised second draft CSAs for Division 4 which was tabled at the meeting.

Section 121AC

2. Members noted that the proposed section 121AC(2)(b) had been amended so that Division 4 would also apply to an agreement entered into with a registered securities margin financier (SMF) (i.e. "the provider" in Division 4) whose registration was suspended or revoked. The Division 4 would however not apply to agreements made with SMFs which did not contravene section 121C because of the operation of sections 121WA(2), 121BH(1), or 121BI.

Section 121AD

3. The Executive Director of Intermediaries and Investment Products, Securities and Futures Commission (ED/IIP(SFC)) clarified that Rider A in the revised second draft CSAs should be added under section 121AD as subsection (1A). He explained that section 121AD provided that an unregistered SMF could not enforce an agreement against its clients (i.e. "the purchasers" in Division 4). Rider A stipulated that where a SMF had its registration suspended, the agreement that was entered into before such suspension would become unenforceable against the client except those parts of the agreement relating to taking over activities as listed in Rider A.

Admin

4. On subsection (2)(b), the Assistant Legal Adviser (ALA) pointed out that the words "as a result of having transferred or parted with it" were inappropriate. He commented that compensation to be recoverable by client to any loss sustained by him should be "as a result of the SMF being unregistered". The Chairman requested the Administration to improve the drafting of the subsection in the light of ALA's comments.

5. As regards concern over subsection (3), members noted the note tabled by the Administration on the legal considerations behind the formulation of the subsection. The Principal Assistant Secretary for Financial Services (PAS/FS) said that according to the Administration's legal advice, the compensation awarded under subsection (3) was akin to damages for breach of contract under common law, which was confined to losses that were "direct" and within the "reasonable contemplation" of the parties only. Therefore, for the sake of consistency with the common law, the Administration considered the present formulation appropriate. He stressed that a disparity would be created in the law if the scope of the subsection were to be extended to enable recovery of indirect or remote losses.

Admin

6. On the revised subsection (3)(b) which provided that the client would be entitled to recover compensation if he did not know "at the time of loss arising" that the SMF was unregistered, PAS/FS explained that the present drafting would cover situations where the SMF was unregistered, under suspension, or had its licence revoked. He took note of the Chairman's suggestion that subsection (3)(b) should be put under subsection (2) which dealt with client's entitlement to recover compensation.

Admin

7. As to the new subsection (4A) (i.e. Rider B), ED/IIP(SFC) said that it was mirrored on subsection (4). Where a client was entitled to recover compensation for any loss under subsection (2), the amount of compensation had to be agreed between the client and the unregistered SMF, or on the application of either party, the amount that the Court considered just and equitable. ED/IIP(SFC) agreed to consider the Chairman's suggestion of combining subsections (4) and (4A) to improve the drafting of the provisions.

8. On the revised subsection (5), ED/IIP(SFC) said that it had been re-cast to provide the unregistered SMF with the opportunity to apply to the Court for the repayment of any money and the return of any property received by the client if the client elect not to perform the agreement. To prevent the client from getting windfall benefits, the Court would decide on the repayment terms which it considered just and equitable.

9. The Chairman expressed concern over the revised subsection (5) which might give excessive protection to the unregistered SMFs. He opined that SMFs had already been provided with avenue to the Court to seek remedy under the new subsection (4A) and section 121AE. Members noted that subsection 5 might be useful when the unregistered SMF was under bankruptcy. Under such circumstances, the liquidator taking over the SMF could apply to the Court for repayment of assets received by the client and distribute the recovered assets to creditors. Hence, it was appropriate to provide SMF with access to the Court under subsection 5.

Admin

10. The Administration noted members' suggestion of replacing the words "elects not to perform" by "did not perform" in subsection (5).

Section 121AE

11. Members noted that subsection (2) had been amended to provide both the SMF and the client with the right to apply to the Court for enforcement of the agreement. The Court had to be satisfied that the enforcement conditions stipulated in subsection (3) were met before making such order.

Admin

12. The Chairman pointed out that the enforcement condition in respect of the SMF would be that he honestly and reasonably believed that he was not contravening section 121C by making the agreement. The enforcement condition for the client on the other hand would be that he did not know that the SMF was unregistered. The Chairman suggested the Administration improve the drafting of subsection (3) by stipulating clearly the different enforcement conditions. The Administration noted the Chairman's suggestion.

13. The Administration undertook to redraft CSAs for Division 4 taking into account members' suggestions made above. The revised CSAs would be circulated to members as soon as possible. The Chairman also requested the Administration to send a copy of the revised draft to the Law Society of Hong Kong for consultation.

Admin

14. The bilingual version of the finalized CSAs to be proposed by the Administration would be circulated to members in due course. Subject to the CSAs being accepted, the Bills Committee would report to the House Committee at its meeting on 3 March 2000 recommending the resumption of the Second Reading debate on the Bill on 15 March 2000.

II Any other business

15. There being no other business, the meeting ended at 10:30 am.

Legislative Council Secretariat

2 August 2000