

LEGISLATIVE COUNCIL BRIEF

INDUSTRIAL AND COMMERCIAL BANK OF CHINA (ASIA) LIMITED (MERGER) BILL

1. INTRODUCTION

1.1 On 12 May 2005, the Acting Chief Executive granted his consent for the Industrial and Commercial Bank of China (Asia) Limited (Merger) Bill (the *Bill*) to be introduced before the Legislative Council. This Bill is introduced under Article 74 of the Basic Law by Legislative Council member, Dr. Hon. David Li Kwok-po, GBS, JP. The Financial Affairs Panel of the Legislative Council was consulted regarding the Bill on 17 December 2004, and Members supported the general objectives of the Bill.

1.2 A summary of the key provisions of the Bill is attached to this memorandum as Appendix A.

2. BACKGROUND AND PURPOSE

2.1 The Bill provides for the merger of the Hong Kong Branch of Belgian Bank (*BBHK*) with Industrial and Commercial Bank of China (Asia) Limited (*ICBC (Asia)*) (the *Merger*). Following ICBC (Asia)'s acquisition of all of the outstanding shares of Belgian Bank, effective 30 April 2004, Belgian Bank and its subsidiaries are now members of the ICBC (Asia) Group. The intention of the Merger is to allow ICBC (Asia) and BBHK to consolidate their largely complementary banking businesses in the increasingly competitive Hong Kong banking market.

2.2 In a number of jurisdictions, such as the United States, Japan and Switzerland, two banks can merge with one another by way of "universal succession". However Hong Kong company law does not have such a concept as universal succession. Accordingly bank mergers in Hong Kong may only be effected either by transfer of all property and liabilities by way of novation or assignment or by introducing a bill to the Legislative Council to effect an ordinance transferring all property and liabilities of the merging bank which are governed by Hong Kong law. Given the large number of outstanding agreements between BBHK and its customers, it is not practical to transfer such assets and liabilities by way of novation and assignment to ICBC (Asia).

3. POLICY CONSIDERATIONS

3.1 It is the Government's stated policy to support consolidation of the banking sector in Hong Kong, which should improve its competitiveness and contribute to systemic stability in the longer term. As part of this policy, the Administration has previously supported bank mergers where reasonable proposals are submitted for consolidation. This is, however, always subject to the overriding aim of promoting the stability of the banking system and providing an appropriate degree of protection to depositors in the merged institutions and to depositors generally.

3.2 The Bill has advantages for BBHK's customers, who will have the reassurance that all Hong Kong law governed property and liabilities have been properly transferred to ICBC (Asia). Such customers will also not be inconvenienced by having to sign new customer documentation. Further, the basis of the transfer of such property and liabilities between ICBC (Asia) and BBHK will be publicly known and uniform. In addition, following the merger, the consolidated surviving bank should be financially stronger, contributing to the stability of the banking sector in Hong Kong.

3.3 The Bill also has advantages for BBHK's and ICBC (Asia)'s shareholders. The two Hong Kong banks will be combined into a single bank, ICBC (Asia), facilitating economies of scale.

4. PUBLIC CONSULTATION

4.1 The Administration is in support of the Bill. The Hong Kong Monetary Authority (the *HKMA*), the Financial Services and the Treasury Bureau, the Department of Justice, the Commissioner of Inland Revenue, the Companies Registrar, the Housing Planning and Lands Bureau, the Home Affairs Bureau, the Mandatory Provident Fund Schemes Authority and the Privacy Commissioner for Personal Data have been consulted in relation to the Bill and their comments provided to date, if any, have been accommodated.

5. RESULTS OF FAP MEETING

5.1 At the Financial Affairs Panel meeting on 17 December 2004, the members noted that there was a discrepancy between the English and Chinese versions of the draft Bill. The discrepancy was rectified and a revised Chinese version of the draft Bill was circulated to members on 20 December 2004.

5.2 Members of the Financial Affairs Panel supported the general objectives of the Bill.

6. CONSULTATION WITH EMPLOYEES

6.1 The management and human resources departments of ICBC (Asia) and BBHK have consulted with the employees of both banks to gauge the employees' opinions and feelings about the Merger. The conclusion from such consultations has been that the employees of both banks are generally supportive of the Merger because it will build a bigger bank with a stronger platform. The employees are of the opinion that this will improve ICBC (Asia)'s competitive position and favour expansion, which will in turn provide more opportunities for their career advancement.

6.2 The Merger will not result in any material level of employee redundancies.

6.3 As a result of the harmonisation and integration process, synergies will be achieved that are likely to lead to a surplus of employees in certain areas. It is intended that these employees will be re-deployed to areas in the business that are experiencing a shortage in personnel.

6.4 ICBC (Asia) will provide “on-the-job” training to those employees who may not be able to take up the new jobs immediately. If necessary, ICBC (Asia) may sponsor employees to take external job-related training courses. A special task force charged with the task of coordinating this process will be established in the human resources department of ICBC (Asia). Change management programmes will be implemented to help employees adapt to the new organization and environment.

6.5 Employment matters following the Merger will follow a “business as usual” model and staffing requirements will be kept under ongoing business review, with decisions to be made as appropriate to the circumstances.

7. CONSULTATION WITH CUSTOMERS

7.1 Following the announcement of the Merger, the senior management of ICBC (Asia) and Belgian Bank have visited BBHK’s larger customers to inform them of the strategic intent of the Merger and to provide them with assurances that service levels will be maintained. The customers that were visited were generally comfortable with the Merger and some welcomed the move with an expectation that the combined organization would be able to provide them with better banking support in China. Other customers have been informed about the Merger through daily interaction in branches, business meetings, visits, and mass media reports. The feedback received by ICBC (Asia) has been very positive and encouraging.

7.2 Due to overlapping functions, it is likely that around five BBHK branches and ICBC (Asia) branches will be merged and at the same time, it is anticipated that some new branches will be opened in areas where neither BBHK nor ICBC (Asia) has a presence. The result of this should be that the total number of branches of the combined business would remain at the same level in the first 2-3 years.

8. STATUS OF BELGIAN BANK

8.1 Belgian Bank has been a wholly owned subsidiary of ICBC (Asia) since 30 April 2004. Belgian Bank is incorporated in Belgium, and the Hong Kong branch, BBHK, can trace its origins back to 1935. Historically, the substantial majority of Belgian Bank’s worldwide business has been carried out through the Hong Kong branch, BBHK. This remains the case today. Accordingly, the majority of the activities of Belgian Bank have been, and continue to be, subject to regulation by the Hong Kong Monetary Authority.

8.2 Belgian Bank’s operations in Belgium relate to a number of offshore accounts held by Belgian Bank for customers of BBHK. Belgian Bank is preparing to migrate these accounts to an overseas branch of ICBC (Asia) registered in the Cayman Islands, subject to the consent of customers. The migration of these accounts will happen independently of the Merger in consultation with the relevant authorities in Belgium.

8.3 Following the Merger and the migration of the off-shore accounts, it is intended that steps will be taken to wind-up Belgian Bank.

9. PUBLICITY

9.1 The Bill was published in the Gazette on 13 May 2005 and 20 May 2005 and notice of the Bill has been given by way of advertisements in the South China Morning Post and the Hong Kong Economic Times on 17 May 2005 and 19 May 2005. In addition, a further press release will be issued by ICBC (Asia) upon completion of the legislative process.

10. LEGISLATIVE TIMETABLE

10.1 The legislative timetable is as follows:

Financial Affairs Panel	17 December 2004
Publication in the Gazette for the first time	13 May 2005
Publication in the Gazette for the second time	20 May 2005
First Reading and adjournment of Second Reading debate	25 May 2005

11. COMMITTEE STAGE AMENDMENTS

11.1 Pursuant to Section 57 of the Rules of Procedure of the Legislative Council of the Hong Kong Special Administrative Region, certain minor amendments will be moved in respect of the Chinese language version of the Bill. These amendments reflect changes that were requested by the Department of Justice after the Bill had been submitted for publication in the Gazette and at date when it was no longer possible to amend the version of the Bill that was to be published.

11.2 Specifically, the Department of Justice requested that the translation of the term “conclusive evidence” in sections 15.(2)(d) and 16.(3) of the Chinese version of the Bill be amended to read in the same way as section 15.(1).

12. TAXATION CONSIDERATIONS

12.1 Clauses 8 and 9 of the Bill have the effect of deeming ICBC (Asia) and BBHK as one and the same as BBHK in law and allowing any profits and losses of BBHK to be treated as the profits and losses of ICBC (Asia) from the appointed day under the Bill.

12.2 In previously enacted merger bills, the Government has allowed the merged entity, for tax assessment purposes, to carry forward any losses accumulated by any of the merging entities. As BBHK does not have any accumulated losses for tax assessment purposes, the Bill should not result in any loss of Government’s revenue.

13. ECONOMIC IMPLICATIONS

13.1 The Bill has no direct implications for Government revenue.

14. ENQUIRIES

14.1 Any enquiries about this brief can be directed to Mr. Andrew Burns at the Office of Legislative Councillor Dr. Hon. David Li Kwok-po, GBS, JP at telephone number 2582 3499 or fax number 2526 1909.

Dr. Hon. David Li Kwok-po, GBS, JP

20 May 2005

APPENDIX A

Summary of the Key Provisions of the Bill

1. The purpose of the Bill is to transfer the undertakings of BBHK to ICBC (Asia). ICBC (Asia) is an authorised institution regulated by the HKMA and incorporated in Hong Kong. BBHK is an authorised institution regulated by the HKMA, and is a branch office of Belgian Bank, a company incorporated in Belgium.
2. In conjunction with the Merger pursuant to the Bill, BBHK will seek the revocation of its banking licence issued by the HKMA pursuant to the Banking Ordinance. BBHK is not listed on the Stock Exchange of Hong Kong.
3. The Bill provides for the transfer and vesting of the undertakings of BBHK to and in ICBC (Asia) on the appointed day. Except for certain excluded property, all of the business of BBHK on the appointed day will form part of the undertakings transferred to and vested in ICBC (Asia) by the Bill. Certain property (for example, Belgian Companies Code and Belgian Law documents, Companies Ordinance (Cap. 32) documents and the issued share capital) is excluded only for the purpose of complying with the Companies Ordinance (Cap. 32), the Belgian Companies Code (as amended) and the Belgian Law of 17 July 1975, and no discretion is given to ICBC (Asia) or BBHK to exclude any property or liabilities from the undertakings to be transferred and vested.
4. The key provisions of the proposed Bill will be similar to those of other bank merger bills that have been enacted in Hong Kong and are summarised in the following paragraphs.
 - (a) **Clause 3** provides that the board of directors of ICBC (Asia) may determine an appointed day upon which the Merger will take effect and that such appointed day must be notified by both ICBC (Asia) and BBHK in the Gazette.
 - (b) **Clause 4** provides that BBHK's Hong Kong banking licence will be revoked on a day determined by the HKMA and notified in the Gazette. The current intention is that this day will coincide with the appointed day upon which the Merger will take effect.
 - (c) **Clause 5** is the main transfer and vesting provision in the Bill. It provides that the undertakings of BBHK (other than the excluded property) shall transfer to and vest in ICBC (Asia) as if ICBC (Asia) were the same person in law as BBHK upon the appointed day. Where the transfer and vesting of the undertakings is situated outside of Hong Kong and is not governed by Hong Kong law, BBHK shall, if required by ICBC (Asia), take all necessary steps to secure the effective transfer and vesting of the undertakings in ICBC (Asia), and pending such transfer and vesting, BBHK shall hold any such undertakings in trust absolutely for ICBC (Asia).
 - (d) **Clause 6** deals with property that, before the Merger, is held by BBHK in a capacity as a trustee, executor, administrator or in any other fiduciary

capacity. It provides that in such cases, the relevant document should be read as if references to BBHK were references to ICBC (Asia).

- (e) **Clauses 7(a) to (k)** provide that all contracts and documents made with, given to or by or addressed to BBHK (or, where such contracts or documents form part of the undertaking of BBHK, contracts or documents made with, given to or by or addressed to Belgian Bank), other than excluded property, shall, after the Merger takes effect, be construed as if ICBC (Asia) had been the original party instead of BBHK (or Belgian Bank) and, accordingly, all references to BBHK (or Belgian Bank) must be construed as if they were to ICBC (Asia). **Clauses 7(a) to (k)** also provide for accounts, negotiable instruments, powers of attorney, security, court orders, arbitration awards and judgments to be transferred to ICBC (Asia) upon the appointed day. **Clauses 7(g)(v) and (vi)** are provisions that seek to reflect previous concerns in respect of other bank mergers expressed by Members of the Legislative Council regarding the possible increase of security or charges over customers' assets as a result of the Merger. These provisions seek to ensure that ICBC (Asia)'s existing charges and security interests will not be expanded over assets previously held by BBHK of a common customer of ICBC (Asia) and BBHK.
- (f) **Clause 7(1)** provides that the transfer of personal data from BBHK to ICBC (Asia) under the Bill shall not result in a breach of any duty of confidentiality or a contravention of the Personal Data (Privacy) Ordinance. The Privacy Commissioner may exercise in respect of ICBC (Asia) any power that he could, before the Merger, have exercised in respect of BBHK.
- (g) **Clause 8** provides for the accounting treatment of ICBC (Asia) following the Merger. It provides that the balance sheets and profit and loss accounts of BBHK and ICBC (Asia) for the accounting period of each company in which the appointed day falls shall be prepared in all respects as if the undertakings had vested in ICBC (Asia) on the first day of such accounting period of ICBC (Asia).
- (h) **Clause 9** provides for the taxation arrangements following the Merger. It also provides that only a single profits tax computation shall be prepared by ICBC (Asia) in respect of the profits and losses of BBHK and ICBC (Asia) in respect of the year of assessment for which the transfer of the undertakings takes place. **Clause 9** is intended to have similar effect as the provisions dealing with taxation matters in previous bank merger ordinances. The effect of this provision is consistent with Government policy on taxation, as stated in the context of recently enacted bank merger ordinances.
- (i) **Clause 10** provides that, in respect of all of BBHK's contracts of employment with those employees who are transferred by the Bill to ICBC (Asia) at the Merger, employment under such contract by BBHK and ICBC (Asia) shall be deemed for all purposes to be a single continuing employment. **Clause 10** also provides that no director, secretary or auditor of BBHK shall, by virtue of the Merger only, automatically become a director, secretary or auditor of ICBC (Asia).

- (j) **Clause 11** ensures that BBHK's employees who are members of BBHK's pension fund schemes shall continue to be members of these schemes after the transfer of BBHK's undertakings to ICBC (Asia). It also ensures that former employees of BBHK and existing employees of ICBC (Asia) shall continue to enjoy the same rights following the transfer as before under their respective pension schemes and that the transfer by virtue of the Bill shall not automatically bestow any additional entitlements to such employees.
- (k) **Clause 12** prevents the Merger constituting an event of default or a termination event in a contract or agreement to which BBHK or ICBC (Asia) or their respective subsidiaries is a party or, in limited circumstances, to which Belgian Bank is a party.
- (l) **Clauses 13 to 15** set out provisions dealing with evidence and the admissibility of evidence in respect of any matter for or against BBHK which, transferred by the Bill, becomes admissible in evidence after the Merger in respect of the same matter for or against ICBC (Asia), including for the purposes of the vesting, custody and control of banker's records under the Evidence Ordinance.
- (m) **Clause 16** deals with the effect of the Merger on interests in land in Hong Kong held by BBHK and provides that the vesting of BBHK's interests in land in ICBC (Asia) pursuant to the Merger does not constitute an acquisition, disposal, assignment, transfer or parting with possession under the Landlord and Tenant (Consolidation) Ordinance. **Clause 16** also provides that the vesting in ICBC (Asia) of BBHK's interests in land under the Merger will not affect or extinguish any priority under the Land Registration Ordinance. For the avoidance of doubt, the Bill stipulates that nothing in **Clause 16** exempts either ICBC (Asia) or BBHK from the provisions of the Stamp Duty Ordinance.
- (n) **Clause 17** states that nothing in the Bill shall exempt either BBHK or ICBC (Asia), or any subsidiary of BBHK or ICBC (Asia), from any of the provisions of the Banking Ordinance and other ordinances regulating the carrying on of their businesses.
- (o) **Clause 18** provides that the Bill does not prevent ICBC (Asia) from amending its memorandum and articles of association or dealing with its property or business generally. **Clause 18** also provides that nothing in the Bill prevents BBHK from altering its memorandum and articles of association or dealing with its property generally before the appointed day.
- (p) **Clause 19** provides that nothing in the Bill once enacted shall affect the rights of the Central Authorities or the Government under the Basic Law and other laws.