

立法會
Legislative Council

LC Paper No. CB(1)897/15-16
(These minutes have been seen
by the Administration)

Ref : CB1/BC/5/15/2

Bills Committee on Financial Institutions (Resolution) Bill

**Minutes of the fourth meeting on
Monday, 15 February 2016, at 8:30 am
in Conference Room 3 of the Legislative Council Complex**

- Members present** : Hon CHAN Kam-lam, SBS, JP (Chairman)
Hon Andrew LEUNG Kwan-yuen, GBS, JP
Hon Cyd HO Sau-lan, JP
Hon CHAN Kin-por, BBS, JP
Hon NG Leung-sing, SBS, JP
Hon Kenneth LEUNG
Hon Dennis KWOK
Hon Christopher CHEUNG Wah-fung, SBS, JP
Hon SIN Chung-kai, SBS, JP
- Members absent** : Hon Albert HO Chun-yan
Hon WONG Ting-kwong, SBS, JP
- Public officers attending** : Mr James H. LAU Jr., JP
Under Secretary for Financial Services & the Treasury
- Ms Polly KWOK
Principal Assistant Secretary for Financial Services &
the Treasury (Financial Services) International and
Mainland Affairs
- Ms Karen Deborah KEMP, JP
Executive Director (Banking Policy)
Hong Kong Monetary Authority

Mr Ben PLANT
Senior Manager (Banking Policy) (Resolution) 1
Hong Kong Monetary Authority

Mr PENG Si Yun, Lawrence
Senior Assistant Law Draftsman, Law Drafting
Division
Department of Justice

Mr Manuel NG
Senior Government Counsel, Law Drafting Division
Department of Justice

Mr Eugene GOYNE
Senior Director (Enforcement)
Securities and Futures Commission

Mr Tony CHAN
Ag Assistant Commissioner of Insurance (Policy and
Development)
Office of the Commissioner of Insurance

Clerk in attendance : Ms Connie SZETO
Chief Council Secretary (1)4

Staff in attendance : Mr YICK Wing-kin
Assistant Legal Adviser 8

Miss Sharon LO
Senior Council Secretary (1)9

Ms Vivian CHAN
Clerical Assistant (1)4

Action

I Meeting with the Administration

(LC Paper No. CB(1)443/15-16(03) — Letter dated 4 January 2016 from
Legal Service Division to the
Administration

LC Paper No. CB(1)545/15-16(01) — Administration's response to Legal Service Division's letter dated 4 January 2016

LC Paper No. CB(1)545/15-16(02) — Government's responses to submissions and comments given by deputations on the meeting held on 19 January 2016 - Policy Issues)

Other relevant papers

(LC Paper No. CB(3)165/15-16 — The Bill

LC Paper No. CB(1)381/15-16(01) — Marked-up copy of the Bill prepared by the Legal Service Division (Restricted to members only)

File Ref: B&M/2/1/27C — Legislative Council Brief

LC Paper No. LS15/15-16 — Legal Service Division Report

LC Paper No. CB(1)289/15-16(01) — Background brief on Financial Institutions (Resolution) Bill prepared by the Legislative Council Secretariat)

Discussion

The Bills Committee deliberated (Index of proceedings attached at **Appendix**).

Clause-by-clause examination of the Bill

2. The Bills Committee scrutinized the long title and clauses 1 to 11 of the Bill.

Admin Follow-up actions to be taken by the Administration

Within scope financial institutions

3. The Administration was requested to provide the following information:
- (a) a list of global systemically important banks;
 - (b) a list of global systemically important insurers;
 - (c) a list of non-bank non-insurer global systemically important financial institutions; and
 - (d) a list of financial market infrastructures.

General power of resolution authority

4. Clause 11 of the Bill conferred a general power on a resolution authority ("RA") to do anything that was necessary for it to do in the performance of its functions under the Ordinance. Some members were concerned that the clause would provide wide range of powers to an RA. The Administration was requested to provide information on similar provisions adopted by overseas jurisdictions in their resolution regimes, and similar provisions in other local legislation.

Drafting issue

5. In the light of a member's comment, the Administration agreed to review the Chinese rendition "解除" (e.g. replacing it by "履行") for the English expression "discharge" in clause 5(1)(b) of the Bill to better reflect the meaning of "discharge the obligations" in that context.

(Post-meeting note: The Administration's written response was issued vide LC Paper No. CB(1)609/15-16(02) on 26 February 2016.)

II Any other business

Date of next meeting

6. The Chairman reminded members that the next two meetings would be held on 29 February 2016 at 10:45 am, and 15 March 2016 at 10:45 am.

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

Council Business Division 1
Legislative Council Secretariat
10 May 2016

**Proceedings of the Bills Committee on Financial Institutions (Resolution) Bill
Fourth meeting on Monday, 15 February 2016, at 8:30 am
in Conference Room 3 of the Legislative Council Complex**

Time Marker	Speaker	Subject(s)	Action Required
000122 – 000212	Chairman	Introductory remarks	
000213 – 000258	Administration	Briefing by the Administration on its response to Legal Service Division's letter dated 4 January 2016 [LC Paper No. CB(1)545/15-16(01)]	
000259 – 000910	Chairman Assistant Legal Adviser 8 ("ALA8") Administration	<u>Basic Law issues – Article 110 of the Basic Law</u> ALA8's enquiry about whether the proposed resolution regime would be consistent with the free operation of financial business in Hong Kong as enshrined in Article 110 of the Basic Law given that the Bill would allow extensive intervention by the relevant resolution authorities ("RAs") in the operation of the within scope financial institutions ("FIs"). The Administration's response as set out in paragraphs 2 to 13 of LC Paper CB(1)545/15-16(01)	
000911 – 001444	Chairman Mr Kenneth LEUNG Administration	<u>Protection of employees' interests in resolution</u> In response to Mr LEUNG's enquiry about the arrangements for the employment contracts of pre-resolution employees and protection for employee interests during resolution, the Administration advised that – (a) under the proposed resolution regime, an RA could, in effecting a transfer of part of a failing FI's business, use a property transfer instrument to transfer employment contracts of a failing FI to an acquirer (which could be a company in the private sector but might also be a bridge institution, an asset management vehicle or a temporary public ownership company); (b) provision could be made under a property transfer instrument effecting a transfer of an employment contract such that the terms and	

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		<p>conditions of the contract would remain the same and the employees' years of services would be fully recognized; and</p> <p>(c) similar arrangements for the transfer of employment contracts had been adopted in previous bank merger ordinances introduced by private member's bills, which had proven effective in protecting the interests of employees.</p>	
001445 – 002305	<p>Chairman Mr SIN Chung-kai Administration Hong Kong Monetary Authority ("HKMA")</p>	<p><u>Clawback of remunerations</u></p> <p>Mr SIN said that during the 2008 financial crisis, a significant amount of public funds deployed for bailing failing FIs were used to pay bonus to the senior executives of the FIs. He asked how the proposed resolution regime could plug such loophole.</p> <p>The Administration and HKMA responded that –</p> <p>(a) the Bill provided an RA with power to apply to the court for a clawback order against an officer /former officer of a failing FI if he/she had acted or omitted to act intentionally, recklessly or negligently, in a way that caused or materially contributed to the FI ceasing, or being likely to cease, to be viable;</p> <p>(b) the definition of "officer" for the purposes of the clawback provisions included (i) director, shadow director, chief executive officer and deputy chief executive officer of the FI, (ii) a person who was principally responsible for the management or the control functions of the FI, and (iii) a person who had the potential to have a material impact on the risk profile of the FI. The provisions were not intended to apply to relatively junior staff, but to those whose senior/managerial positions enabled them to materially influence the strategy and risk profile of an FI; and</p> <p>(c) the remuneration subject to clawback included both fixed and variable remuneration.</p>	

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		<p><u>Resolution funding arrangements</u></p> <p>Regarding the use of public funds, the Administration explained that –</p> <ul style="list-style-type: none"> (a) one of the objectives of establishing an effective resolution regime was to reduce the risks of public funds being used to bail out failed systemically important FIs; (b) however, it was recognized that orderly resolution might not be achievable in all cases without some deployment of temporary public funding support during the initial stage; (c) before determining whether public funds would be deployed to facilitate orderly resolution, an RA must consider the extent to which (i) liabilities of the entity in resolution could be written off or converted to enable the absorption of losses and its recapitalization, (ii) assets of the entity could be sold, and (iii) private sector funding could be obtained by the entity; (d) any losses incurred as a result of public funds being deployed would be recovered by means of an ex post levy to be imposed on the within scope FIs in the same sector as the FI in resolution; (e) the Financial Secretary ("FS") would specify details for imposing the levy in a specific resolution case through regulations and the rate of the levy would be determined by resolution of the Legislative Council; and (f) the levy could be collected over a number of years to reduce the immediate impact on FIs. 	
002306 – 002927	Chairman ALA8 Administration	<p><u>Basic Law issues – Article 105 of the Basic Law</u></p> <p>ALA8 enquired about justifications for the resolution measures and instruments proposed in the Bill (e.g. clawback of remuneration of senior executives of the FI in resolution, bail-in instruments, etc.) which might deprive the right of individuals and legal persons to the acquisition, use, disposal and inheritance of</p>	

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		<p>property, and their right to compensation, as enshrined under Article 105 of the Basic Law.</p> <p>The Administration's response as set out in paragraphs 15 to 22 and paragraph 76 of LC Paper CB(1)545/15-16(01)</p>	
002928 – 003550	<p>Chairman Mr Kenneth LEUNG Mr SIN Chung-kai Administration Securities and Futures Commission ("SFC")</p>	<p><u>Mandatory Provident Fund ("MPF") Schemes and client assets</u></p> <p>Mr LEUNG and Mr SIN asked if MPF assets or other client assets held on trust by an FI would be excluded from resolution actions as such assets were not assets beneficially owned by the FI in resolution.</p> <p>The Administration and SFC said that –</p> <p>(a) as provided in clause 8(1)(c), an RA must have regard to the protection of "clients assets" to no less an extent that they would have been protected in a winding-up under the proposed resolution regime;</p> <p>(b) "clients assets" were defined in clause 3(1)(c) to include securities and other property held by an FI in the course of carrying on a business as a trustee or custodian of securities or other property for another person whether on trust or by contract; and</p> <p>(c) liabilities arising because of holding client assets were excluded from bail-in under Schedule 5 and so MPF assets falling into this definition would as such be excluded from bail-in.</p> <p>The Chairman supplemented that according to the Mandatory Provident Fund Schemes Ordinance (Cap. 485), the scheme members, instead of the trustee, were the beneficiaries of the accrued benefits held in a registered MPF scheme; and an MPF trustee was required to keep the scheme assets separate from its own assets.</p> <p>Mr SIN enquired whether there were measures under the proposed resolution regime to protect client assets from possible misappropriation by FIs.</p>	

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		SFC said that, under the existing framework for the protection of client assets, if client assets were misappropriated, relevant regulators would take actions, including assets tracing, disciplinary proceedings and prosecution as appropriate. The regime for client asset protection generally was separate to the proposed resolution regime.	
003551 – 003613	Chairman Administration	Government's responses to submissions and comments given by deputations on the meeting held on 19 January 2016 - Policy Issues [LC Paper No. CB(1)545/15-16(02)] Members did not raise questions.	
Clause-by-clause examination of the Bill			
003614 – 005819	Chairman Administration Mr SIN Chung-kai Mr Kenneth LEUNG ALA8	<p>Part 1</p> <p>Preliminary</p> <p><u>Clause 1 – Short title and commencement</u></p> <p><u>Clause 2 – Interpretation</u></p> <p>Mr SIN requested the Administration to provide the following information –</p> <p>(a) a list of global systemically important banks;</p> <p>(b) a list of global systemically important insurers;</p> <p>(c) a list of non-bank non-insurer global systemically important financial institutions; and</p> <p>(d) a list of financial market infrastructures.</p> <p>ALA8's comment that the Administration should consider amending the definition of "deputy chief executive officer" along the lines for amending the definition of "chief executive officer" as suggested in paragraph 49 of CB(1)545/15-16(01)</p>	The Administration to take action as paragraph 3 of the minutes

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		<p>The Administration said that the definitions of "chief executive officer" and "deputy chief executive officer" would be amended along the same line.</p> <p>In response to Mr LEUNG's enquiry, the Administration and HKMA said that most of the terms used and provisions in the Bill were adopted with a view to implementing the "Key Attributes of Effective Resolution Regimes for Financial Institutions" published by the Financial Stability Board, with adjustment as necessary to suit the local context. The Administration had reviewed other relevant overseas legislation to ensure consistency in approach.</p>	
005820 – 010425	Chairman Administration SFC Mr SIN Chung-kai	<p><u>Clause 3 – Interpretation: client assets</u></p> <p>In response to Mr SIN's enquiry, the Administration and SFC explained that –</p> <p>(a) the definitions of "client assets" and related terms such as "associated entity" and "excluded property" were provided in a separate section (i.e. clause 3 of the Bill) in order to facilitate readers;</p> <p>(b) assets held by trustees/custodians on behalf of their clients would also be regarded as "client assets" under the proposed resolution regime and hence would not be subjected to bail-in; and</p> <p>(c) certain types of property were not appropriate to be captured within the definition of client assets (i.e. the excluded property), such as deposits held by an authorized institution which were indeed a loan of money.</p> <p><u>Clause 4 – Objects of this Ordinance</u></p>	
010426 – 012126	Chairman Administration Mr SIN Chung-kai Ms Cyd HO	<p><u>Clause 5 – When within scope financial institution ceases to be viable</u></p> <p>Mr SIN enquired about the reason for not removing the authorization of the failing FI before initiating resolution of the FI.</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>The Administration advised –</p> <ul style="list-style-type: none"> (a) a fundamental purpose of establishing a resolution regime was to ensure continued operation of critical functions of systemically important FIs whose failure would pose significant risks to the stability and effective working of the financial system, hence resolution action had to be taken before an FI's authorization was removed (otherwise that continuity could not be achieved); (b) an RA would have to step in and take prompt actions to stabilize the failing FI in order to contain risks posed by its non-viability to the continuity of critical financial services and the stability and effective working of the wider financial system; (c) as the proposed RAs (i.e. the Monetary Authority, Insurance Authority and SFC) were at the same time the financial regulators, there would be close liaison between the relevant supervisory and resolution functions and it was unlikely that the existing financial regulators and RAs would have different views on the non-viability of the FI; and (d) RAs were required to consult FS before initiating resolution (and to seek his approval in the case of temporary public ownership). <p>In response to Ms HO's enquiry, the Administration explained that the "obligations" of an FI referred to in clause 5(1)(b) related primarily to the ability of the FI to meet its debts as they fall due. The FIs under clause 5(1)(b) would be those designated by FS as within scope FIs which were not subject to a regulatory regime and so did not require an authorization to carry on their business.</p> <p>Ms HO and the Chairman requested the Administration to review the Chinese rendition "解除" (e.g. replacing it by "履行") for the English expression "discharge" in clause 5(1)(b) to better reflect the meaning of "discharge the obligations" in that context.</p>	<p>The Administration to take action as paragraph 5 of the minutes</p>

Time Marker	Speaker	Subject(s)	Action Required
012127 – 012459	Chairman Administration Mr SIN Chung-kai	<p><u>Clause 6 – Power of Financial Secretary to designate or specify certain matters</u></p> <p>At the request of Mr SIN, the Administration explained the details of clause 6(5) as follows –</p> <p>(a) the definition of "control function" in relation to an entity provided in clause 2(1) included risk management function, financial control function, etc. Clause 6(5) aimed to provide flexibility so that FS could designate a function that was not covered in the definition of control function in clause 2(1) as a control function if it was later identified that the performance of such function could materially contribute to the non-viability of an FI;</p> <p>(b) when designating a control function, FS needed to be satisfied that the function was likely to enable the person responsible for the performance of the function to exercise a significant influence on the business carried on by the entity; and</p> <p>(c) the designation by FS under clause 6(5) would be subsidiary legislation.</p>	
012500 – 013532	Chairman Administration Mr SIN Chung-kai	<p><u>Clause 7 – Power of Financial Secretary to designate lead resolution authority</u></p> <p>In reply to Mr SIN, the Administration advised that –</p> <p>(a) an RA of a within scope FI would be its existing financial regulator, which was responsible for granting authorization to the FI to carry on its business (i.e. MA, SFC or IA);</p> <p>(b) where an FI was part of a cross-sector group (i.e. a group containing within scope FIs from more than one sector), FS might designate a Lead Resolution Authority ("LRA") to coordinate the resolution planning for and resolution of the within scope FIs in that cross-sector group; and</p>	

Time Marker	Speaker	Subject(s)	Action Required
		(c) LRA would discuss with other RAs and consult FS before initiating resolution actions.	
013533 – 015439	Chairman Administration ALA8	<p>Part 2</p> <p>Resolution Authorities</p> <p><u>Clause 8 – Resolution objectives</u></p> <p><u>Clause 9 – Role of lead resolution authority</u></p> <p>In response to ALA8's enquiry, the Administration confirmed that the written direction given by LRA under clause 9(3) had legal effect and would override the decision of other RAs and hence RAs must comply with such written direction.</p>	
015440 – 015858	Chairman Administration HKMA Mr Kenneth LEUNG Mr SIN Chung-kai	<p><u>Clause 10 – Appointment of entities to assist resolution authority</u></p> <p>In reply to Mr LEUNG, the Administration confirmed that "entities" in clause 10 included an individual, a partnership and corporate bodies.</p> <p>In response to Mr SIN, HKMA advised that RAs would conduct resolution planning and resolvability assessment for the within scope FIs. It was expected that, as this planning and assessment progressed, simulation and trial runs would be conducted to enhance an RA's ability to secure orderly resolution.</p>	
015859 – 020016	Chairman Administration Ms Cyd HO	<p><u>Clause 11 – General power of resolution authority</u></p> <p>Ms HO pointed out that clause 11 would provide wide range of powers to an RA allowing it to do anything that was necessary in the performance of its functions under the Ordinance. The Administration agreed to provide information on similar provisions adopted by overseas jurisdictions in their resolution regimes, and similar provisions in other local legislation regarding the general power of a regulator or an authority.</p>	The Administration to take action as paragraph 4 of the minutes

Time Marker	Speaker	Subject(s)	Action Required
020017 – 020103	Chairman Mr Kenneth LEUNG	Date of next meeting	

Council Business Division 1
Legislative Council Secretariat
10 May 2016