

立法會
Legislative Council

LC Paper No. CB(1)1176/15-16
(These minutes have been seen
by the Administration)

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Bills Committee on Financial Institutions (Resolution) Bill

**Minutes of the fifth meeting on
Monday, 29 February 2016, at 10:45 am
in Conference Room 2B of the Legislative Council Complex**

- Members present** : Hon CHAN Kam-lam, SBS, JP (Chairman)
Hon Albert HO Chun-yan
Hon Andrew LEUNG Kwan-yuen, GBS, JP
Hon WONG Ting-kwong, SBS, 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
- Member absent** : Hon Cyd HO Sau-lan, 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
- Miss Angora NGAI
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 Sharon CHAN
Legislative Assistant (1)4

Action

I Meeting with the Administration

Matters arising from previous meetings

(LC Paper No. CB(1)609/15-16(01) — List of follow-up actions arising from the discussion at the meeting on 15 February 2016

LC Paper No. CB(1)609/15-16(02) — Administration's response to issues raised at the meeting on 15 February 2016

LC Paper No. CB(1)609/15-16(03) — Administration's responses to clause-specific comments given by deputations at the meeting held on 19 January 2016

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)609/15-16(04) — Administration's second response to Legal Service Division's letter dated 4 January 2016)

Clause-by-clause examination of the Bill

(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

Action

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

Declaration of interest

Mr NG Leung-sing declared that he was working at one of the global systemically important banks.

Discussion

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

Clause-by-clause examination of the Bill

3. The Bills Committee scrutinized clauses 12 to 32 and clauses 152 to 169 of the Bill.

Admin Follow-up actions to be taken by the Administration

Loss-absorbing capacity requirements

4. Clause 19(5)(b) of the Bill provided that an officer of an entity committed an offence if he/she was knowingly "concerned" (涉及) in the commission of the offence by the entity under subsection (4). Some members were concerned about the broad scope of the word "concerned" (涉及) where a senior executive of the entity might become criminally liable merely by having knowledge about the commission of the offence by the entity even if he/she had not participated in the offence. The Administration was requested to respond to the above concern and provide information on similar provisions in other local legislation or examples of case law which had also adopted the word "concerned" (涉及) in similar circumstances.

Overview of the proposed resolution regime

5. The Administration was requested to illustrate by a flow chart the various procedures involved in, and actions to be taken by the resolution authority ("RA") during different stages of, the resolution process (e.g. resolution planning, applying stabilization options, etc.), and the safeguards and remedies available to entities for opposing an RA's decisions (e.g. making representations, applying for review by relevant Tribunal or applying for judicial review).

Action

Drafting issues

6. In the light of comments by the legal adviser to the Bills Committee, the Administration was requested to:

- (a) clarify whether the word "extent" in clause 28(2) of the Bill intended to specify the "scope (範圍)" or "degree (程度)" of actions an RA might apply to the holding company, and review the appropriateness of using the Chinese rendition "程度" for the word "extent"; and
- (b) consider replacing the expression "該公司" with "其控股公司" in clause 28(3)(b) in the Chinese text of the Bill to better reflect the meaning of "resolving the holding company" in that context.

(Post-meeting note: The Administration's written response was issued vide LC Paper No. CB(1)679/15-16(02) on 14 March 2016.)

II Any other business

Date of next meeting

7. The Chairman reminded members that the next two meetings would be held on 15 March 2016 at 10:45 am, and 31 March 2016 at 10:45 am respectively.

8. There being no other business, the meeting ended at 12:30 pm.

Council Business Division 1
Legislative Council Secretariat
26 August 2016

Proceedings of the Bills Committee on Financial Institutions (Resolution) Bill
Fifth meeting on Monday, 29 February 2016, at 10:45 am
in Conference Room 2B of the Legislative Council Complex

Time Marker	Speaker	Subject(s)	Action Required
000120 – 000203	Chairman	Introductory remarks	
000204 – 000335	Administration	Briefing by the Administration on its written response to the issues arising from the meeting held on 15 February 2016 [LC Paper No. CB(1)609/15-16(02)]	
000336 – 000420	Administration	Briefing by the Administration on its responses to clause-specific comments given by deputations at the meeting held on 19 January 2016 [LC Paper No. CB(1)609/15-16(03)]	
000421 – 000614	Chairman Hong Kong Monetary Authority ("HKMA") Mr SIN Chung-kai	<u>Within scope financial institutions</u> In response to Mr SIN's enquiry, HKMA advised that the Financial Stability Board ("FSB") adopted the methodology developed by the Basel Committee on Banking Supervision to identify and designate the global systemically important banks ("G-SIBs") taking into account the banks' size, substitutability, complexity, interconnectedness and cross-border activities. The group of G-SIBs would be updated annually based on new data and published by FSB each November. Furthermore, FSB had identified a group of global systemically important insurers (which was updated annually in November), pursuant to a methodology developed by the International Association of Insurance Supervisors. FSB was also working with the International Organization of Securities Commissions to develop a methodology for identifying non-bank non-insurer global systemically important financial institutions.	
000615 – 000941	Chairman Administration Assistant Legal Adviser 8 ("ALA8")	Briefing by the Administration on its second response to Legal Service Division's letter dated 4 January 2016 [LC Paper No. CB(1)609/15-16(04)] <u>Suspension of obligations</u> In response to ALA8's enquiry regarding "writ of execution", the Administration said that the	

Time Marker	Speaker	Subject(s)	Action Required
		<p>meaning of the word "proceeding" in clause 83(5) should be broad enough to cover the situation where a "writ of execution" against assets held by a financial institution ("FI") had already been issued and sealed by the relevant court when a resolution authority ("RA") exercised its power under clause 83 to temporarily suspend obligations of the FI. Under such scenario, the payment of money or delivery of any other property by the concerned FI would be suspended temporarily. The duration of such suspension was limited to no more than two business days and, upon expiration of this period, the payment or delivery must be performed as required. Hence the Administration considered it not necessary to expressly refer to writ of execution in connection with the scenario under clause 83.</p>	
000942 – 001020	Chairman Mr NG Leung-sing	<p>Declaration of interest by Mr NG</p> <p>Mr NG said that the Hong Kong Association of Banks ("HKAB") was considering making further comments on the Bill and he would pass them to the Bills Committee upon receipt from HKAB.</p> <p><i>(Post-meeting note: HKAB did not subsequently submit any further comments to the Bills Committee.)</i></p>	
Clause-by-clause examination of the Bill			
001021 – 002101	Chairman Administration HKMA Mr Kenneth LEUNG Mr SIN Chung-kai ALA8	<p>Part 3</p> <p>Powers Related to Resolution</p> <p><i>Division 1 — Preparing for Resolution</i></p> <p><i>Subdivision 1 — Resolvability Assessment and Resolution Planning</i></p> <p><u>Clause 12 – Resolvability assessment</u></p> <p><u>Clause 13 – Resolution planning</u></p> <p><i>Subdivision 2 — Removal of Impediments</i></p> <p><u>Clause 14 – Power to direct removal of impediments</u></p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>Mr LEUNG sought clarification on the definition of "impediments" in clause 14.</p> <p>HKMA replied that no definition of "impediments" was provided in the Bill as it would be difficult to foresee with certainty all possible impediments to the orderly resolution of an FI. These impediments could include structural, operational or financial impediments, which could hinder the effective implementation of the preferred resolution strategy for a within scope FI as identified by an RA during resolution planning.</p>	
002102 – 002944	<p>Chairman Administration ALA8 Mr NG Leung-sing Mr Albert HO</p>	<p><u>Clause 15 – Safeguards for entity served with notice</u></p> <p><u>Clause 16 – Offence not to comply with notice</u></p> <p>ALA8 enquired if clause 16(3), as drafted, would impose criminal liability on an officer of an FI if the officer merely had knowledge about the commission of the offence by the FI but had not participated in the offence.</p> <p>The Administration responded that under clause 16(3) an officer would commit an offence if he/she —</p> <p>(a) had authorized or permitted the commission of the offence by the FI; or</p> <p>(b) was knowingly concerned in the commission of the offence. The term "knowingly concerned" implied that the officer had actual knowledge of the commission of the offence by the FI and had actual involvement in the contravention.</p> <p>In reply to Mr NG, the Administration advised that the term "day" in clause 16(2) referred to calendar day.</p> <p>In response to Mr HO's enquiry, the Administration responded that the definitions of "officer" and "control function" were provided in clause 2.</p>	

Time Marker	Speaker	Subject(s)	Action Required
002945 – 003429	Chairman Administration Mr Albert HO Mr NG Leung-sing	<p><u>Clause 17 – Review of decisions</u></p> <p>Mr HO and Mr NG asked whether an application to the Resolvability Review Tribunal ("RRT") by an FI for reviewing an RA's decision regarding the removal of impediments operated as a stay of execution of the decision.</p> <p>The Administration confirmed that, pursuant to clause 17(5), the making of an application to RRT operated as a stay of execution on the RA's decision. Unlike an RA's decision to initiate resolution, which would be time critical and would not be subject to appeal under the Bill, an RA's decision to require an FI to remove significant impediments to its orderly resolution might not be quite so time critical and also has the potential to affect how an FI operated as a going concern. Hence such decisions were appropriate for review by RRT in circumstances where a mutually agreeable solution could not be arrived at between an RA and FI through resolution planning, resolvability assessment and the representations process under clause 15.</p> <p><u>Clause 18 – Determination of application</u></p>	
003430 – 004303	Chairman Administration HKMA Mr NG Leung-sing Mr Albert HO	<p><i>Subdivision 3 — Loss - absorbing Capacity Requirements</i></p> <p><u>Clause 19 – Loss - absorbing capacity requirements</u></p> <p>In response to Mr NG, HKMA clarified that the loss-absorbing capacity requirements to be established in the rules to be made under clause 19(1) could be applied on an unconsolidated basis to an individual entity or on a consolidated basis to two or more entities grouped together by an RA pursuant to clause 19(2).</p> <p>Mr HO expressed concern about the broad scope of the word "concerned" (涉及) in clause 19(5)(b) and requested the Administration to provide information on similar provisions in other local legislation or examples of case law which had also adopted the word "concerned" (涉及) in similar circumstances. He was of the view that the word "participated" might be more appropriate in the</p>	The Administration to take action as paragraph 4 of the minutes

Time Marker	Speaker	Subject(s)	Action Required
		<p>context of clause 19(5)(b).</p> <p>The Administration said that the term "knowingly concerned" was not defined in the Bill and the term had also been used in a number of local ordinances. According to case law, the accused could be "knowingly concerned" in the commission of an offence only if he/she had actual knowledge of the offence and had actual involvement in the contravention.</p>	
004304 – 004848	Chairman HKMA Mr Albert HO	<p><i>Division 2 — Directions</i></p> <p><u>Clause 20 – Interpretation</u></p> <p><u>Clause 21 – When powers are exercisable</u></p> <p><u>Clause 22 – Power to give directions</u></p> <p><i>Division 3 — Removal of Directors etc.</i></p> <p><u>Clause 23 – When powers are exercisable</u></p> <p><u>Clause 24 – Power to remove directors etc.</u></p> <p>In reply to Mr HO, HKMA advised that —</p> <p>(a) the power for an RA to remove a director, chief executive officer ("CEO") or deputy chief executive officer ("DCEO") of a within scope FI from his/her post was only exercisable when the FI had ceased, or was likely to cease, to be viable and its non-viability posed risks to the stability and effective working of Hong Kong's financial system (i.e. the RA was satisfied that conditions one and three for initiating resolution, under clause 25, were met by the FI);</p> <p>(b) in addition to the conditions described under (a) above having to be met, an RA might only remove the director, CEO or DCEO where also of the opinion that his/her removal from office would assist in meeting the resolution objectives (e.g. to prevent him/her from taking action which might prejudice the RA's ability to achieve orderly resolution); and</p>	

Time Marker	Speaker	Subject(s)	Action Required
		(c) the concerned director, CEO or DCEO could seek to oppose the RA's decision by applying for judicial review.	
004849 – 005306	Administration Mr Christopher CHEUNG	<p>Part 4</p> <p>Moving to Resolution</p> <p><i>Division 1 — Initiation of Resolution</i></p> <p><u>Clause 25 – Conditions for initiating resolution of financial institution</u></p> <p><u>Clause 26 – Effect on group members and jurisdictions may be considered</u></p> <p>In reply to Mr CHEUNG, the Administration confirmed that the conditions for initiating resolution would be the same no matter whether the FI was a listed company or a non-listed company.</p>	
005307 – 010102	Chairman Administration Mr NG Leung-sing	<p><u>Clause 27 – Financial Secretary to be consulted</u></p> <p>The Chairman asked whether an RA could initiate resolution of a within scope FI if the Financial Secretary ("FS") did not agree when being consulted. Mr NG asked whether the term "inform" (知會) instead of "consult" should be used in the provision if an RA was not required to obtain FS' consent for initiating the resolution.</p> <p>The Administration responded that the terms "consult" and "inform" both implied no agreement was required from FS for initiating resolution. When an RA consulted FS on a resolution action, it would set out its rationale for initiating the resolution of the relevant entity for FS's consideration, and FS could discuss with the RA on the matter.</p>	
010103 – 010822	Chairman Administration Mr Albert HO ALA8	<p><u>Clause 28 – Holding companies</u></p> <p>Mr HO asked how would an RA resolve the holding company of a within scope FI if the relevant holding company was incorporated in a foreign jurisdiction.</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>The Administration responded that —</p> <p>(a) the standards set by the "Key Attributes of Effective Resolution Regimes for Financial Institutions" ("Key Attributes") would enhance certainty in cross-border resolution. Therefore, where the jurisdiction in which the holding company was incorporated had adopted the standards of the Key Attributes in respect of "recognition" of resolution actions exercised by a foreign RA, then the exercise of the powers under clause 28 in relation to an overseas incorporated holding company could be given effect in that jurisdiction subject to the jurisdiction-specific conditions for recognition; and</p> <p>(b) as part of the resolution planning and resolvability assessment processes, an RA could identify potential impediments to orderly resolution, which might include an inability to exercise powers in relation to holding companies incorporated outside Hong Kong, and determine whether a direction needed to be given to an FI to require it to remove such impediments.</p> <p>ALA8 requested the Administration to —</p> <p>(a) clarify whether the word "extent" in clause 28(2) intended to specify the "scope (範圍)" or "degree (程度)" of actions an RA might apply to the holding company, and review the appropriateness of using the Chinese rendition "程度" for the word "extent"; and</p> <p>(b) consider replacing the expression "該公司" with "其控股公司" in clause 28(3)(b) in the Chinese text to better reflect the meaning of "resolving the holding company" in that context.</p>	<p>The Administration to take action as paragraph 6 of the minutes</p>
010823 – 011323	Chairman Administration HKMA Mr NG Leung-sing	<p><u>Clause 29 – Affiliated operational entities</u></p> <p>In response to Mr NG, HKMA explained that —</p> <p>(a) an affiliated operational entity ("AOE") in relation to a within scope FI, must be a body</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>corporate that was, or prior to the exercise of resolution powers was, a group company of the FI;</p> <p>(b) an RA might resolve an AOE only if the RA was satisfied that:</p> <ul style="list-style-type: none"> (i) conditions 1, 2 and 3 under clause 25 were met in the case of an FI; (ii) the services provided by the AOE were essential to the continued performance of the FI's critical financial functions in Hong Kong; and (iii) the orderly resolution of the FI could not be achieved by any other means, including the giving of a direction to the AOE under clause 79(3). <p>The Administration noted that, in practice, it was likely to be preferable to secure the continuity of such essential services from an AOE through a direction given under clause 79(3). However, to afford flexibility in the face of different corporate structures and operational models, there was merit in building flexibility into the regime to resolve an AOE.</p>	
011324 – 012356	Administration Chairman Mr Albert HO	<p><u>Clause 30 – Letters of mindedness</u></p> <p>In reply to Mr HO, the Administration said that an FI could make representations to an RA in relation to anything stated in the letter of mindedness within the period as specified in the letter. The FI might also apply for judicial review if it was opposed to the RA's decision to initiate resolution.</p> <p>Mr HO requested the Administration to illustrate by a flow chart the various procedures involved in, and actions to be taken by an RA during different stages of, the resolution process (e.g. resolution planning, applying stabilization options, etc.), and the safeguards and remedies available to entities for opposing the RA's decisions (e.g. making representations, applying for review by relevant Tribunal or applying for judicial review).</p>	The Administration to take action as paragraph 5 of the minutes

Time Marker	Speaker	Subject(s)	Action Required
012357 – 013504	Chairman HKMA Mr NG Leung-sing Mr Albert HO	<p><i>Division 2 — Mandatory Reduction of Capital Instruments</i></p> <p><u>Clause 31 – Mandatory write off or conversion of capital instruments</u></p> <p>In reply to Mr HO's enquiry, HKMA clarified that the capital instruments under clause 31 referred to the Additional Tier 1 capital instruments and Tier 2 capital instruments which were classified as debt instruments and defined under the Banking (Capital) Rules (Cap. 155L). The purpose of mandatory write-off or conversion of such debt instruments was, in simple terms, to remove the FI's obligation to repay the debt. These instruments were required to contain contractual write-down/conversion clauses in their terms and conditions and the purpose of clause 31 was to ensure that where these contractual provisions for write-down/conversion had not been triggered before an authorized institution's entry into resolution, the RA would be able to subject the debt instruments to loss in resolution in a manner consistent with their treatment if the contractual provisions for write-down/conversion had been exercised outside of resolution.</p> <p><u>Clause 32 – Capital reduction instruments: supplementary matters</u></p>	
013505 – 014432	Chairman Administration	<p>Part 10</p> <p>Information Gathering, Inspection and Investigation Powers</p> <p><i>Division 1 — Preliminary</i></p> <p><u>Clause 152 – Interpretation</u></p> <p><u>Clause 153 – When powers are exercisable</u></p> <p><u>Clause 154 – Authorization of persons</u></p> <p><u>Clause 155 – Appointment of investigator</u></p> <p><i>Division 2 — Information Gathering</i></p> <p><u>Clause 156 – Power to demand information, records or documents</u></p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p><u>Clause 157 – Offences in relation to section 156</u></p> <p><i>Division 3 — Inspection</i></p> <p><u>Clause 158 – Powers of inspection</u></p> <p><u>Clause 159 – Offences in relation to section 158</u></p> <p><i>Division 4 — Investigation</i></p> <p><u>Clause 160 – Powers of investigation</u></p> <p><u>Clause 161 – Powers of investigator to require production of records or documents or attendance for examination</u></p> <p><u>Clause 162 – Offences for non-compliance with requirements imposed under section 161</u></p> <p><u>Clause 163 – Use of incriminating evidence in proceedings</u></p> <p><i>Division 5 — Miscellaneous</i></p> <p><u>Clause 164 – Magistrates' warrants</u></p> <p><u>Clause 165 – Lien claimed on records or documents</u></p> <p><u>Clause 166 – Production of information in information systems etc.</u></p> <p><u>Clause 167 – Inspection of records and documents seized etc.</u></p> <p><u>Clause 168 – Destruction of documents etc.</u></p> <p><u>Clause 169 – Recovery of expenses</u></p>	
014433 – 014509	Chairman	Date of next meeting	