立法會
Legislative Council

LC Paper No. CB(1)1177/15-16
(These minutes have been seen by the Administration)

Ref : CB1/BC/5/15/2

Bills Committee on Financial Institutions (Resolution) Bill

Minutes of the sixth meeting on
Tuesday, 15 March 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 Cyd HO Sau-lan, JP Hon CHAN Kin-por, BBS, JP Hon Kenneth LEUNG Hon Dennis KWOK Hon SIN Chung-kai, SBS, JP
Members absent	**:**	Hon NG Leung-sing, SBS, JP Hon Christopher CHEUNG Wah-fung, 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 Sharon CHAN
Legislative Assistant (1)4

Action

I Meeting with the Administration

Matters arising from previous meetings

(LC Paper No. CB(1)679/15-16(01) — List of follow-up actions arising from the discussion at the meeting on 29 February 2016

LC Paper No. CB(1)679/15-16(02) — Administration's response to issues raised at the meeting on 29 February 2016

LC Paper No. CB(1)679/15-16(03) — Administration's paper on updated work plan)

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

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 clauses 33 to 73 of the Bill.

Action

Admin Follow-up actions to be taken by the Administration

Transfer under a Part 5 instrument

3. Clause 33(3) of the Bill provided that the value of any consideration due to the transferor in respect of any transfer under a Part 5 instrument must be "fair and reasonable" in the circumstances. Clauses 35 and 36 set out the requirement for a resolution authority ("RA") to make a valuation before applying a stabilization option to, or making a capital reduction instrument in respect of, a within scope financial institution ("FI"); and how the valuation was to be made. The Administration was requested to consider stating explicitly in clause 33(3) that the "fair and reasonable" consideration in the circumstances was subject to the valuation made under clauses 35 and 36, so as to enhance the clarity of the provisions.

Business reorganization plan

4. Clause 63(1) of the Bill required an RA to include in the bail-in instrument that "one or more directors of the FI" had to prepare and submit to the RA a business reorganization plan in respect of the FI. Clause 63(3) further provides that "a person" might submit or re-submit a business reorganization plan to the RA for approval. It was unclear whether the "person" referred to in clause 63(3) was the "one or more directors of the FI". To better reflect the legislative intent, the Administration was requested to consider replacing "a person" in clause 63(3) with "one or more directors of the FI".

Drafting issues

5. In the light of members' concerns, the Administration agreed to:

(a) review the Chinese rendition "內部財務調整文書" for the term "bail-in instruments" to better reflect its meaning in the context of the Bill. The Administration was also requested to provide information on the Chinese term(s) respectively adopted by the Mainland and Taiwan jurisdictions for "bail-in instruments" in similar legislation and make reference to such term(s) in reviewing the above Chinese rendition; and

(b) consider providing the long form of TPO (i.e. temporary public ownership) in the definition of "TPO company" in clause 2 of the Bill.

Action

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

(a) review the Chinese text of clause 35(2) as the phrase "如作出估值的時間，早於處置機制當局 …" seemed to have different emphasis from the English text; and

(b) review the Chinese text of clause 58(6)(a) to simplify the drafting as the first sentence (i.e. 顧及根據第 35(1)條作出的估值) might overlap with the second sentence (i.e. 顧及該項估值的出發點).

(*Post-meeting note*: The Administration's written response was issued vide LC Paper No. CB(1)724/15-16(02) on 30 March 2016.)

(At 11:02 am, noting that the Panel on Development which was concurrently holding a meeting in Conference Room 3 called for a division, the Chairman ordered that this meeting be suspended to enable members of the Bills Committee to cast a vote at the said meeting. The meeting resumed at 11:07 am.)

II Any other business

Date of next meeting

7. The Chairman reminded members that the next two meetings would be held on 31 March 2016 at 10:45 am, and 19 April 2016 at 10:45 am respectively.

8. There being no other business, the meeting ended at 12:36 pm.

Council Business Division 1
Legislative Council Secretariat
26 August 2016

Appendix

Proceedings of the Bills Committee on Financial Institutions (Resolution) Bill
Sixth meeting on Tuesday, 15 March 2016, at 10:45 am
in Conference Room 2B of the Legislative Council Complex

Time Marker	Speaker	Subject(s)	Action Required
000127 – 000237	Chairman	Introductory remarks	
000238 – 000945	Chairman Administration Mr Albert HO	Briefing by the Administration on its written response to the issues arising from the meeting held on 29 February 2016 [LC Paper No. CB(1)679/15-16(02)] Mr HO asked if the Administration would consider replacing "knowingly concerned" by "knowingly involved" in clause 19(5)(b). The Administration explained that the term "knowingly concerned" had been used in a number of ordinances for criminal offences in similar circumstances. It was preferable to use "knowingly concerned" in clause 19(5)(b) to maintain consistency for the same criminal element.	
000946 – 001221	Chairman Administration	Briefing by the Administration on the updated work plan [LC Paper No. CB(1)679/15-16(03)]	
Clause-by-clause examination of the Bill			
001222 – 003810	Chairman Administration Mr SIN Chung-kai Mr Albert HO Assistant Legal Adviser 8 ("ALA8")	**Part 5** **Resolution** ***Division 1 — Stabilization Options*** ***Subdivision 1 — Overview*** <u>Clause 33 – Stabilization options</u> <u>Clause 34 – Application of stabilization options</u> <u>Clause 35 – Valuation to be made</u> <u>Clause 36 – Nature of valuation</u> In response to Mr SIN's enquiry about how the resolution authority ("RA") could determine the	

Time Marker	Speaker	Subject(s)	Action Required
		consideration due to the transferor in respect of any transfer under a Part 5 instrument was fair and reasonable in the circumstances (i.e. clause 33(3) of the Bill), the Administration advised that — (a) pursuant to clauses 35 and 36, an RA must make a valuation before applying a stabilization option to, or making a capital reduction instrument in respect of, a within scope financial institution ("FI"); and (b) the valuation made must be based on prudent and realistic assumptions, including assumptions as to rates of default and severity of losses, and take into account (i) available information from which a market price for the assets and liabilities could be derived, if appropriate; and (ii) relevant accounting principles to the extent relevant in the making of a valuation that was suitable for the purpose. Mr SIN and the Chairman requested the Administration to consider stating explicitly in clause 33(3) that the "fair and reasonable" consideration in the circumstances was subject to the valuation made under clauses 35 and 36, so as to enhance the clarity of the provisions. Mr SIN and Mr HO asked about the RA's follow-up action if a purchaser of the failing FI disagreed with the RA's valuation on the securities or properties of the FI. The Administration advised that — (a) an RA could appoint a section 10 entity to assist in the making of a valuation, and the purchaser might appoint its own valuer as part of its own due diligence; (b) an RA would further discuss with the purchaser, as time permitted, if the latter did not agree with the valuation made by the RA, which might be made with the assistance of a section 10 entity; and (c) if a consensus on the consideration amount could not be reached between the RA and a potential purchaser within the, potentially	The Administration to take action as paragraph 3 of the minutes

Time Marker	Speaker	Subject(s)	Action Required
		very short, amount of time available, the proposed transaction might need to be abandoned and the RA might need to initiate another stabilization option (e.g. a transfer to a bridge institution). ALA8 suggested that the Administration should consider reviewing the Chinese text of clause 35(2) as the phrase "如作出估值的時間，早於處置機制當局 …" seemed to have different emphasis from the English text.	The Administration to take action as paragraph 6(a) of the minutes
003811 – 004436	Chairman Administration Mr Dennis KWOK	<u>Clause 37 – Section 10 entity may assist in making valuation</u> The Administration informed members that a Committee Stage amendment would be moved to delete clause 37(2)(b)(iii) given that the clause as drafted might effectively negate the ability of an RA to appoint a section 10 entity to assist in undertaking a pre-resolution valuation. ***Subdivision 2 — Transfer to Purchaser*** <u>Clause 38 – Application of Subdivision</u> Mr KWOK asked whether there would be a prescribed timeframe for the Financial Secretary ("FS") to cause a copy of the report submitted to him by the RA (after making a securities transfer) to be laid on the table of the Legislative Council ("LegCo"). The Administration advised that the report had to be laid on the table of LegCo by FS as soon as practicable. In response to Mr KWOK's further enquiry, the Administration said that according to section 70 of the Interpretation and General Clauses Ordinance (Cap. 1), where no time was prescribed within which anything should be done, such thing should be done without unreasonable delay. <u>Clause 39 – Transfer instruments</u> <u>Clause 40 – Report</u>	

Time Marker	Speaker	Subject(s)	Action Required
004437 – 005350	Chairman Administration Hong Kong Monetary Authority ("HKMA") Mr Kenneth LEUNG Mr SIN Chung-kai Mr Dennis KWOK	***Subdivision 3 — Transfer to Bridge Institution*** <u>Clause 41 – Application of Subdivision</u> <u>Clause 42 – Transfer instruments</u> <u>Clause 43 – Bridge institution</u> In response to Mr LEUNG, the Administration clarified that a bridge institution under clause 43 would be a newly incorporated company under the Companies Ordinance (Cap. 622) ("CO"). Mr SIN enquired about the circumstances under which a bridge institution would be wholly or partially owned by the Government. HKMA explained that — (a) a bridge institution would initially be wholly owned by the Government; (b) if bail-in was subsequently applied to recapitalize the bridge institution, shares of the bridge institution might be given to the creditors of the failing FI in return for the writing down of their claims; or (c) conceivably the shares of the bridge institution might be partially owned by the Government during a transitional period as ownership of the bridge institution was transferred in stages (although perhaps less likely, there was merit in retaining flexibility to accommodate this, given the impossibility of predicting all future resolution events). Mr KWOK sought information on the proposed management structure of the bridge institution, including the composition of the board of directors. HKMA advised that — (a) initially the directors of the bridge institution would come from either an RA or the Government; (b) the voting rights of non-Government shareholders, if any, would be suspended for a period whilst the resolution was in progress;	

Time Marker	Speaker	Subject(s)	Action Required
		(c) the articles of association would allow an RA to control the bridge institution in order to facilitate orderly resolution through a return to the private sector or, as appropriate, an orderly wind-down; (d) it was anticipated that the new shareholders of the FI would (upon any subsequent sale of the FI from the bridge institution) appoint the board of directors and amend the articles of association of the FI after taking over the FI from the bridge institution; and (e) operational arrangements regarding the bridge institution would be provided in the Code of Practice to explain how an RA would expect to exercise its powers in effecting a resolution through a transfer to a bridge institution. Mr LEUNG asked if the bridge institution would only function as a vehicle for holding the assets and liabilities of the failing FI for onward transfer to the purchaser. HKMA explained that — (a) the purpose of transferring the shares and instruments of ownership in, or assets and liabilities of, the failing FI to a bridge institution was to secure continued performance of the critical functions of the FI; (b) the bridge institution would become the holding company of the failing FI if the shares and instruments of ownership in the FI were transferred to the bridge institution by the RA; (c) it was also possible for an RA to transfer the assets and liabilities of a failing FI to a bridge institution, such that only the critical functions (e.g. deposit taking) were transferred, so that the bridge institution could take over, and continue the performance of, those functions; and (d) transfer of employees from the failing FI to the bridge institution, where required for the purpose of continuing the critical functions transferred, and the related employment arrangements, would be governed by the relevant provisions of Schedule 4 to the Bill,	

Time Marker	Speaker	Subject(s)	Action Required
		where the transfer was effected under a property transfer instrument. Clause 44 – Onward bridge institution Clause 45 – Bridge institution — onward transfer	
005351 – 011822	Chairman Administration Mr Albert HO Mr SIN Chung-kai	Clause 46 – Report Clause 47 – Winding up of bridge institution Clause 48 – Disposal of proceeds Mr HO enquired about the roles of FS under Clauses 46 and 47. The Administration explained that — (a) under clause 46 an RA must, as soon as practicable after audited financial reports were available for the year in which a transfer was first made to the bridge institution, report to FS about the activities and audited financial position of the bridge institution and the progress made in returning the bridge institution, or its business, to the private sector; (b) FS would not be restricted by the provisions of clause 46 from seeking further details and/or clarification from the RA regarding the transfer where necessary; (c) pursuant to clause 47(1), an RA must take all necessary steps to wind up a bridge institution where all, or substantially all, of its business had been transferred to a third party or where no further transfer had been made to the bridge institution within two years following the last such transfer (the "applicable post-transfer period"), and it would need to consult FS if the applicable post-transfer period needed to be extended to support specified outcomes; and (d) at an earlier stage in the process, FS would have been consulted by the RA before resolution through the use of a bridge institution was initiated. To maintain operational independence, the RA would	

Time Marker	Speaker	Subject(s)	Action Required
		make the final decision regarding the stabilization option(s) to be applied but in practice it was probably unlikely that the RA would proceed with the resolution by use of a bridge institution if FS raised significant concerns after taking into consideration the implications on financial stability and the broader economy of Hong Kong. In response to Mr SIN's enquiry regarding the use of public funds, the Administration said that — (a) an RA would consult FS about the initiation of resolution as required under clause 27. During such consultation, FS would be able to seek further details of the resolution from the RA, including any estimated amount of public funds required to support orderly resolution; and (b) the Bill was not prescriptive about the source of any public funds used (temporarily) to support resolution. The Exchange Fund could be used in accordance with the Exchange Fund Ordinance (Cap. 66) if FS (or the Monetary Authority acting under delegated authority from FS) considered it appropriate in order to maintain the stability and integrity of the monetary and financial systems of Hong Kong.	
010210 – 011310	Chairman Administration HKMA Mr SIN Chung-kai Mr Kenneth LEUNG Mr Albert HO ALA8	***Subdivision 4 — Transfer to Asset Management Vehicle*** Clause 49 – Application of Subdivision Clause 50 – Property transfer instruments Clause 51 – Asset management vehicle Clause 52 – Management of assets by asset management vehicle Clause 53 – Asset management vehicle securities transfer Clause 54 – Onward property transfer from asset management vehicle Clause 55 – Report	

Time Marker	Speaker	Subject(s)	Action Required
		Clause 56 – Disposal of proceeds ***Subdivision 5 — Bail-in*** Clause 57 – Application of Subdivision Clause 58 – Bail-in instruments Mr SIN requested the Administration to review the Chinese rendition "內部財務調整文書" for the term "bail-in instruments" to better reflect its meaning in the context of the Bill, in particular the Chinese rendition of "工具" instead of "文書" was commonly used for the term "instrument". Mr SIN and Mr LEUNG suggested the Administration to make reference to the corresponding Chinese term(s) adopted by the Mainland and Taiwan jurisdictions in the respective legislation and the accounting industry for "bail-in instruments" when reviewing the term. The Administration responded that the term "bail-in" was a new term specifically used in the context of resolution. The Administration had considered other terms like "自救" but considered that "內部財務調整" would better reflect the purpose of bail-in, i.e. the compulsory write-off and/or conversion of the liabilities of a failing FI into shares to absorb losses and recapitalize the failing FI. ALA8 pointed out that the meaning of the first sentence of the Chinese text of clause 58(6)(a) (i.e. 顧及根據第35(1)條作出的估值) might overlap with the second sentence (i.e. 顧及該項估值的出發點). The Administration explained that "顧及根據第35(1)條作出的估值" corresponded with the English text "have regard to the valuation made under section 35(1)" whereas "顧及該項估值的出發點" corresponded with "with a view to assessing the extent …". The Administration agreed to consider improving the clarity of the Chinese text of clause 58(6)(a).	The Administration to take action as paragraph 5(a) of the minutes The Administration to take action as paragraph 6(b) of the minutes

Time Marker	Speaker	Subject(s)	Action Required
		In response to Mr HO, the Administration advised that an RA would in general consider and follow the winding up hierarchy principles in order to provide certainty of treatment for creditors and to minimize the need for "no creditor worse off than in liquidation" ("NCWOL") compensation payment. However clause 58(6)(b) would allow flexibility for an RA to apply different treatment to equally ranked creditors in order to facilitate the effective execution of a resolution strategy. In such circumstances, affected eligible creditors would still be protected by the NCWOL safeguard.	
011311 – 012737	Chairman Administration HKMA Mr Kenneth LEUNG Mr Albert HO	<u>Clause 59 – Power to exclude additional liabilities</u> <u>Clause 60 – Rules relating to liabilities</u> <u>Clause 61 – Provision of bail-in instrument in relation to securities</u> <u>Clause 62 – Bail-in instrument may include directions</u> In response to Mr LEUNG, the Administration advised that — (a) clause 62 only protected the director from liability in damages when the director acted, or omitted to act, in good faith in compliance with, or in giving effect to, a direction given by an RA in a bail-in instrument; (b) the director would not be immune in respect of his/her past conduct or any other conduct which was unrelated to a direction given by an RA; (c) where the bail-in stabilization option was applied to a non-viable FI, it would likely be necessary to retain at least some of the incumbent directors to carry on the business of the failing FI following its stabilization, given the complexity and size of the operations of systemically important institutions and the directors' institutional knowledge. However, the RA could remove a director, chief executive officer or deputy chief executive officer of an FI that was	

Time Marker	Speaker	Subject(s)	Action Required
		subject to bail-in through the making of a provision in a bail-in instrument, pursuant to section 6 of Schedule 6; (d) the RA could exercise control over an FI in resolution, where appropriate, by giving directions to its directors (including pursuant to clause 62 in the case of the bail-in stabilization option being applied); and (e) it was anticipated that the shareholders of the FI, following the write-down and conversion of its liabilities, would seek to appoint qualified directors to manage the FI's business during the post-stabilization re-structuring process (including implementation of the business reorganization plan as required to be produced under clause 63). Given that a bail-in instrument could have the effect of overriding the requirements as specified under CO, Mr HO asked if the Administration would consider stating such overriding effect explicitly in the Bill. The Administration and HKMA explained that as provided in section 3(2) of Schedule 6 to the Bill, provision made in a bail-in instrument took effect despite any restriction arising under contract or legislation or in any other way.	
012738 – 013707	Chairman Administration HKMA Mr SIN Chung-kai	<u>Clause 63 – Business reorganization plans</u> <u>Clause 64 – Onward transfer of securities</u> <u>Clause 65 – Report</u> Mr SIN sought clarification on the identity of the "person (某人)" in clause 63(3). The Administration clarified that the "person" referred to "one or more directors of the FI" who was required by clause 63(1) to prepare and submit to an RA a business reorganization plan with respect to the FI in resolution. Mr SIN and the Chairman requested the Administration to consider replacing "a person" in clause 63(3) with "one or more directors of the FI" to better reflect the legislative intent.	The Administration to take action as paragraph 4 of the minutes

Time Marker	Speaker	Subject(s)	Action Required
		In reply to Mr SIN's further enquiry in relation to clause 63(4)(a), the Administration advised that conditions 1 and 2 referred to the conditions for initiating resolution in clause 25. Condition 1 was that the FI had ceased, or was likely to cease, to be viable (i.e. clause 25(2)) and condition 2 was that there was no reasonable prospect that private sector action (outside of resolution) would result in the FI becoming viable again within a reasonable period (i.e. clause 25(3)). The definitions of conditions 1, 2 and 3 were provided in clause 2 of the Bill, which in turn made reference to clause 25.	
013708 – 014234	Chairman Administration Mr Albert HO Mr SIN Chung-kai	***Subdivision 6 — Transfer to TPO Company*** Clause 66 – Application of Subdivision Clause 67 – Transfer of securities to TPO company Clause 68 – Special limitation on option In response to Mr HO's enquiry, the Administration informed that TPO was the short form for "temporary public ownership". The Administration agreed, for the purpose of clarity, to consider providing the long form of TPO in the definition of "TPO company" in the English text of clause 2.	The Administration to take action as paragraph 5(b) of the minutes
014235 – 015048	Chairman Administration Mr SIN Chung-kai Mr Albert HO	Clause 69 – TPO company Clause 70 – TPO company — onward transfer Clause 71 – Transfer instruments Clause 72 – Report Clause 73 – Disposal of proceeds Mr SIN sought details regarding the operation of the resolution funding account. The Administration responded that the details of the resolution funding account were provided in Part 12 of the Bill. In response to Mr HO's enquiry on the reasons for deploying public funds when the failing FI was	

Time Marker	Speaker	Subject(s)	Action Required
		being transferred to TPO, the Administration explained that — (a) a TPO company was a vehicle set up by the Government to give effect to the TPO stabilization option by acquiring the shares of a failing FI, and hence public funds would be required for the initial acquisition and necessary recapitalization; (b) the TPO stabilization option was intended to serve as a last resort when an RA was satisfied that none of the other stabilization options were appropriate to achieve orderly resolution (as specified in clause 68 of the Bill); (c) it was envisaged that the business of the failing FI would ultimately be returned to the private sector; and (d) any proceeds arising as a result of the disposal of a TPO company, or its business, would be paid into the resolution funding account, and any losses incurred as a result of the application of the TPO stabilization option would be recovered from the wider financial industry through an ex post resolution levy pursuant to clause 178.	
015049 – 015122	Chairman	Date of next meeting	

Council Business Division 1
Legislative Council Secretariat
26 August 2016