

**立法會**  
**Legislative Council**

LC Paper No. CB(1)1178/15-16  
(These minutes have been seen  
by the Administration)

Ref : CB1/BC/5/15/2

**Bills Committee on Financial Institutions (Resolution) Bill**

**Minutes of the seventh meeting on  
Thursday, 31 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

Ms Lisa CHEN  
Deputy Chief Counsel, Legal Services  
Securities and Futures Commission

Ms Joyce LEUNG  
Assistant Counsel, Legal Services  
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

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**I Meeting with the Administration**

Matters arising from previous meetings

(LC Paper No. CB(1)724/15-16(01) — List of follow-up actions arising from the discussion at the meeting on 15 March 2016

LC Paper No. CB(1)724/15-16(02) — Administration's response to issues raised at the meeting on 15 March 2016

LC Paper No. CB(1)724/15-16(03) — Administration's third 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

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 Schedules 3 to 5 to the Bill.

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Admin Follow-up actions to be taken by the Administration

*Schedule 3 – Securities transfer instruments*

3. Section 4(1) of Schedule 3 to the Bill provided that a transfer of securities contained in a securities transfer instrument took effect by operation of the Financial Institutions (Resolution) Ordinance ("the Ordinance"). It was noted that under the Stamp Duty Ordinance (Cap. 117), the sale and purchase of any Hong Kong stock was subject to stamp duty. The Administration was requested to clarify —

- (a) whether a transfer of Hong Kong stock made under Schedule 3 of the Ordinance was subject to stamp duty; and
- (b) if stamp duty was required to be paid, the rationale and justifications for imposing stamp duty on such a transfer which did not involve genuine trading of a company's stocks.

*Schedules 3 and 4 – Effect of a transfer instrument*

4. According to section 4(3) of Schedule 3 and section 4(3) of Schedule 4 to the Bill, a securities or property transfer instrument took effect despite any restrictions (including a restriction requiring the sanction of the Court, or the approval of a regulatory body, for a transfer) arising under contract or legislation or in any other way. Some members were concerned about the overriding power of the provisions, in particular the power to override the sanction of the court and the restrictions imposed by legislation. The Administration was requested to: (a) review the provisions to address the above concern; (b) provide information on similar provisions adopted by overseas jurisdictions in their resolution regimes; and (c) explain under what circumstances the resolution authority would exercise such overriding power.

*Schedules 3 and 4 – Removal of directors etc.*

5. Section 7(1) of Schedule 3 and section 9(1) of Schedule 4 to the Bill respectively specified that a securities transfer instrument or a property transfer instrument might revoke the appointment of a person as a director, chief executive officer or deputy chief executive officer of a prescribed entity. However, sections 7(2) and 9(2) of Schedules 3 and 4 explicitly provided that the revocation of appointment did not terminate, or affect the rights of any party to, a contract of employment or services with the prescribed entity. Members expressed grave concern that the provisions might protect the employment of the

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directors or senior officers of the failing financial institution ("FI") whose actions or omissions might have directly caused the non-viability of FI concerned. The Administration was requested to: (a) review the provisions to address members' concern; and (b) provide information on similar provisions adopted by overseas jurisdictions in their resolution regimes.

*Schedule 5 – Excluded liabilities*

6. Clause 58(4) of the Bill provided that a power to make a bail-in provision might not be exercised in respect of any excluded liability. Excluded liabilities were defined in section 2 of Schedule 5 to the Bill to include, among others, any liability that was secured (i.e. section 2(1) of Schedule 5). Some members were concerned about the broad scope of section 2(1). The Administration was requested to consider specifying clearly in section 2(1) the kinds of secured liabilities that would be excluded from bail-in.

*Drafting issue*

7. In the light of members' concerns, the Administration agreed to —
- (a) consider revising the Chinese rendition "內部財務調整文書" for the term "bail-in instruments" (e.g. replacing "調整" by "重整") to better reflect the urgency and seriousness of the situation where "bail-in instruments" would be made; and
  - (b) consider the need to set out clearly in the Chinese text of the Bill the concept of "內部財務調整文書" noting that there was no Chinese equivalent for the term in the Mainland and Taiwan jurisdictions.

*(Post-meeting note: The Administration's written response was issued vide LC Paper No. CB(1)799/15-16(02) on 15 April 2016.)*

**II Any other business**

Date of next meeting

8. The Chairman reminded members that the next two meetings would be held on 18 April 2016 at 2:30 pm, and 19 April 2016 at 10:45 am respectively.

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

Council Business Division 1  
Legislative Council Secretariat  
26 August 2016

**Proceedings of the Bills Committee on Financial Institutions (Resolution) Bill  
Seventh meeting on Thursday, 31 March 2016, at 10:45 am  
in Conference Room 2B of the Legislative Council Complex**

Time Marker	Speaker	Subject(s)	Action Required
000237 – 000416	Chairman	Introductory remarks	
000417 – 001439	Chairman Administration Mr SIN Chung-kai Mr Kenneth LEUNG Mr Andrew LEUNG Mr Albert HO	<p>Briefing by the Administration on its written response to the issues arising from the meeting held on 15 March 2016 [LC Paper No. CB(1)724/15-16(02)]</p> <p>Mr SIN suggested the Administration to consider revising the Chinese rendition "內部財務調整文書" for the term "bail-in instruments" (e.g. replacing "調整" by "重整") to better reflect the urgency and seriousness of the situation where "bail-in instruments" would be made.</p> <p>Mr Kenneth LEUNG said that from the perspective of the accounting profession, "重整" would better convey the seriousness and had a broader coverage than "調整" as it also implied debt-restructuring.</p> <p>Mr Andrew LEUNG remarked that the Chinese rendition "重整" had the meaning of "re-structuring" and might not align with the English meaning of the term "bail-in".</p> <p>Mr HO was of the view that it would be important to clearly convey the core concepts of "bail-in instruments" in the Bill, given that there was no equivalent Chinese rendition for the term in the Mainland and Taiwan jurisdictions.</p> <p>The Administration agreed to further review the Chinese rendition and consider if refinement would be necessary.</p>	The Administration to take action as paragraph 7 of the minutes
001440 – 001708	Chairman Administration Assistant Legal Adviser 8 ("ALA8")	<p>Briefing by the Administration on its third response to Legal Service Division's letter dated 4 January 2016 [LC Paper No. CB(1)724/15-16(03)]</p> <p>ALA8 agreed with the Administration's proposal to introduce a Committee Stage amendment ("CSA") in clause 104(3) to clearly reflect the</p>	

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		policy intention that a clerical error, or error arising from an accidental slip or omission, might only be corrected before a valuation decision took effect, if the correction did not alter the amount of compensation payable.	
<b>Clause-by-clause examination of the Bill</b>			
001709 – 003524	Chairman Administration Mr Kenneth LEUNG Mr SIN Chung-kai Mr Albert HO Hong Kong Monetary Authority ("HKMA")	<p><b>Schedule 3 Securities Transfer Instruments</b></p> <p>Mr LEUNG asked whether a transfer of securities (including securities listed on the Stock Exchange of Hong Kong) contained in a securities transfer instrument would be subject to stamp duty; and if so the rationale and justifications for imposing stamp duty on such a transfer which did not involve genuine trading of a stock.</p> <p>Mr HO expressed similar concern. He was of the view that no stamp duty should be required if the transfer of securities took effect by operation of law.</p> <p>The Administration responded that stamp duty was required to be paid as the transfer was regarded as a business transaction. The Administration would further discuss with the Inland Revenue Department to clarify issues relating to stamp duty on securities transfer under a securities transfer instrument.</p> <p>In reply to Mr SIN, the Administration explained that after making a securities transfer instrument, the resolution authority ("RA") must publish a copy of the instrument on its website and arrange for the prescribed entity to do the same on its own website. A notice of the making of the instrument would also be published in the Gazette and in one English language and one Chinese language newspaper.</p> <p>In response to Mr HO, the Administration advised that —</p> <p>(a) the transferee under a securities transfer instrument could be a commercial purchaser, a bridge institution or a temporary public ownership ("TPO") company, whereas the transferor could be the existing shareholders</p>	The Administration to take action as paragraph 3 of the minutes



Time Marker	Speaker	Subject(s)	Action Required
		<p>of the failing financial institution ("FI"), a bridge institution or a TPO company. The transferor and transferee in a given case would be dependent on the type of securities transfer instrument used e.g. initial instrument on initiation of resolution, supplemental, onward or reverse;</p> <p>(b) by making one or more securities transfer instruments, an RA might transfer securities from a transferor to a transferee by operation of the Financial Institutions (Resolution) Ordinance without the need to obtain consent from existing shareholders in the failed FI; and</p> <p>(c) according to general business practice, a transfer of securities would still require the consent of the existing shareholders of a transferee.</p>	
003525 – 003856	Chairman Administration Mr SIN Chung-kai	<p>Mr SIN noted that Schedule 3 to the Bill provided an express power to an RA to take certain actions through the making of a securities transfer instrument, including conversion and delisting of securities and removal of directors of a prescribed entity. He asked whether the RA would be allowed to take other actions.</p> <p>The Administration advised that as provided in section 2(1)(b) of Schedule 3, in addition to the specific powers conferred under Schedule 3, an RA could make any other provision for the purpose of, or in connection with, the transfer of securities.</p>	
003857 – 011130	Chairman Administration HKMA Mr SIN Chung-kai Mr Andrew LEUNG Mr SIN Chung-kai Mr Albert HO Mr Kenneth LEUNG Mr Dennis KWOK	<p>Mr SIN expressed grave concern that section 7(2) of Schedule 3 and section 9(2) of Schedule 4 might protect the employment of the directors or senior officers of the failing FI whose actions or omissions might have directly caused the non-viability of the concerned FI. He urged the Administration to delete the provisions.</p> <p>Mr HO and Mr KWOK expressed similar concern and enquired about the reason to protect the employment and associated benefits of the directors and senior officers concerned. They queried how the employment of the director,</p>	

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		<p>chief executive officer ("CEO") or deputy chief executive officer ("DCEO") could carry on after the revocation of their respective appointment.</p> <p>Mr Kenneth LEUNG was of the view that section 7(2) of Schedule 3 and section 9(2) of Schedule 4 were respectively in conflict with section 7(1) and section 9(1) of the same Schedules.</p> <p>The Administration and HKMA explained that —</p> <p>(a) the purpose of section 7(2) of Schedule 3 and section 9(2) of Schedule 4 was to remove any doubt about whether any revocation of a person's appointment to a post as a director, CEO or DCEO of an FI would, in and of itself, constitute a termination of his/her employment with the FI, thereby affecting his/her rights under the contract of employment or services;</p> <p>(b) the provisions under section 7(1) of Schedule 3 and section 9(1) of Schedule 4 were not designed to be exercised as a result of any considered assessment of "fault" and nor were the provisions under section 7(2) of Schedule 3 and 9(2) of Schedule 4 designed to protect the employment of the directors, CEO or DCEO of the failing FI. Whether removal from post by an RA would necessarily and invariably lead to termination of employment with the FI was a contractual matter between the relevant postholders and the FI as the employer;</p> <p>(c) the provisions would enable the RA to take prompt action to transfer the securities of the failing FI to the new owner/controller, and at the same time revoke the appointment of the top management of the failing FI, as appropriate in the context of meeting the resolution objectives, so that the new owner/controller might appoint their own directors, CEO or DCEO to manage the business transferred;</p> <p>(d) with the above provisions, the underlying employment of the directors, CEO or DCEO, who might hold other functional roles in the</p>	

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		<p>FI, would not be affected solely by the revocation of their appointment to a given post by provision made in a securities transfer instrument;</p> <p>(e) the RA and the new owner/controller of the failing FI could still terminate the employment of a director, CEO or DCEO of the failing FI, pursuant to the terms of their employment contract, including if he/she was found to have contributed to the FI's non-viability;</p> <p>(f) it was possible that as a result of the revocation of their appointment pursuant to the provisions of the Bill, the employment contract of a director, CEO or DCEO would be frustrated, and hence could be discharged on the basis that it had become illegal or impossible for the relevant person to perform the sole role for which he/she was employed; and</p> <p>(g) an RA might also seek a clawback order from the Court to recover fixed and variable remuneration from a director or "officer" (as defined in Part 8 of the Bill) of an FI if his/her actions or omissions had caused, or materially contributed to the FI ceasing, or being likely to cease, to be viable.</p> <p>Mr Andrew LEUNG noted that it was the practice of many FIs to defer the payment of the variable remuneration of their senior management for some years after the termination of the contract. He considered that section 7(2) of Schedule 3 and section 9(2) of Schedule 4 could put beyond doubt that the revocation of a person's appointment as a director, CEO or DCEO of an FI would not of itself terminate, or affect his/her rights to, a contract of employment or services. He remarked that the directors or senior officers might not necessarily contribute to the non-viability of the FI. He suggested the Administration to state clearly in section 7 of Schedule 3 and section 9 of Schedule 4 that the revocation of a person's appointment as a director, CEO or DCEO was independent from his/her employment which would be handled according to the terms and conditions of the</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>relevant employment contract.</p> <p>Members requested the Administration to: (a) review the provisions to address their above concern; and (b) provide information on similar provisions adopted by overseas jurisdictions in their resolution regimes.</p>	<p>The Administration to take action as paragraph 5 of the minutes</p>
011131 – 011256	<p>Chairman ALA8 Securities and Futures Commission ("SFC")</p>	<p>In response to ALA8's enquiry in relation to section 6(2) of Schedule 3, SFC advised that if dealings of the securities of the failing FI on the Stock Exchange of Hong Kong were suspended, the new owner/controller of the FI would be required to seek approval from SFC for resumption of trading.</p>	
011257 – 011825	<p>Chairman Administration HKMA Mr SIN Chung-kai</p>	<p>Mr SIN asked if the Chinese rendition "還原" (instead of "逆向") for the word "reverse" could better reflect the meaning of the expression "reverse securities transfer instrument" in the context of the Bill.</p> <p>The Administration and HKMA said that "逆向" could appropriately reflect the action of transferring back (partially or in whole) the transferred securities held by the original transferee to the original transferor. The term "還原", which implied restoration in entirety to the original condition, might not be applicable to cases where the transferred securities were partially transferred back to the original transferor.</p>	
011826 – 013137	<p>Chairman Administration HKMA ALA8 Mr Albert HO Mr SIN Chung-kai Mr Andrew LEUNG Mr Kenneth LEUNG</p>	<p><b>Schedule 4 Property Transfer Instruments</b></p> <p>In reply to Mr HO's enquiry regarding the overriding effect of a property transfer instrument, HKMA explained that —</p> <p>(a) the provisions aimed to provide certainty with respect to an RA's powers to effect the prompt and decisive transfer of assets, rights or liabilities of the failing FI to an acquirer under a property transfer instrument in order to meet the resolution objectives, including securing uninterrupted continuity of critical financial functions;</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>(b) arrangements for the initiation of resolution and application of a stabilization option would need to be made within an extremely compressed timeframe, most likely over a "resolution weekend", hence it might not be feasible to require the RA to identify and obtain all consents/approvals that might otherwise be needed for a transfer, without jeopardizing the resolution objectives (i.e. to secure the continuity of critical financial services at opening of business on the following Monday morning and preserve financial stability);</p> <p>(c) the provisions did not prevent any persons from seeking judicial review of the RA's decisions and actions; and</p> <p>(d) similar provisions were also adopted by overseas jurisdictions in their resolution regimes.</p> <p>Mr HO and Mr SIN expressed grave concern about the overriding power of the provisions, in particular the power to override the sanction of the court and the restrictions imposed by legislation. They requested the Administration to review the provisions.</p> <p>Mr Andrew LEUNG requested the Administration to provide information on similar provisions adopted by overseas jurisdictions in their resolution regimes and explain under what circumstances an RA would exercise such overriding power.</p> <p>Mr Kenneth LEUNG remarked that some assets transfer might require approval from the State-owned Assets Supervision and Administration Commission of the State Council and therefore the provisions might not be in line with the Basic Law.</p>	<p>The Administration to take action as paragraph 4 of the minutes</p>
<p>013138 – 013451</p>	<p>Chairman Administration HKMA Mr SIN Chung-kai Mr Albert HO</p>	<p>Mr SIN and Mr HO re-iterated their concerns about the possible effect of section 9(2) of Schedule 4 in protecting the employment of the directors, CEO or DCEO of the failing FI even if their appointments were revoked pursuant to the provisions of the Bill.</p>	

Time Marker	Speaker	Subject(s)	Action Required
013452 – 014247	Chairman HKMA Mr Albert HO	<p>In reply to Mr HO, HKMA advised that —</p> <p>(a) the intention behind a property transfer would be to move assets, rights, and liabilities to secure continuity of service. If an asset, which is a tenanted property were to be transferred, the property transfer instrument could provide for the transferee to succeed to the failing FI's role as landlord and the rights of a tenant under the lease should not be affected by the property transfer instrument; and</p> <p>(b) in the event that a licence included in a property transfer instrument conferred rights or imposed obligations, the property transfer instrument might apportion responsibility for the exercise of, or compliance with, those rights or obligations between the transferor and the transferee (e.g. sharing the obligation of payment of software licence fees).</p>	
014248 – 015125	Chairman HKMA ALA8 Mr Dennis KWOK Mr Albert HO	<p><b>Schedule 5 Excluded Liabilities</b></p> <p>In response to Mr KWOK's enquiry regarding section 2(1) of Schedule 5, HKMA explained that secured liabilities would be excluded from bail-in as security over assets would also be respected in normal insolvency proceedings. The exclusion was necessary to respect the creditor hierarchy and provide certainty in the market as to a means by which credit risk was commonly mitigated. Mr KWOK expressed concern about the broad scope of section 2(1) and requested the Administration to consider specifying clearly in section 2(1) the kinds of secured liabilities that would be excluded from bail-in.</p> <p>With regard to Mr HO's enquiry about the exclusion of unsecured short-term inter-bank liabilities from bail-in, HKMA said that the provisions aimed at reducing the potential contagion risks to the banking system.</p> <p>ALA8 asked whether contributions to a Mandatory Provident Fund ("MPF") Scheme managed by an FI under resolution would be excluded from bail-in.</p>	The Administration to take action as paragraph 6 of the minutes

<b>Time Marker</b>	<b>Speaker</b>	<b>Subject(s)</b>	<b>Action Required</b>
		HKMA responded that employees' accrued benefits under an MPF Scheme which the FI held as a trustee would be excluded from bail-in as they would be held as client assets. MPF contributions that the FI was required to pay for its employees would also be excluded from bail-in as the contributions were indeed liabilities of the FI owed in relation to an occupational pension scheme in respect of its employees or former employees (i.e. section 2(o) of Schedule 5).	
015126 – 015157	Chairman	Date of next meeting	

Council Business Division 1  
Legislative Council Secretariat  
26 August 2016