

立法會
Legislative Council

LC Paper No. CB(1)1180/15-16
(These minutes have been seen
by the Administration)

Ref : CB1/BC/5/15/2

Bills Committee on Financial Institutions (Resolution) Bill

**Minutes of the ninth meeting on
Tuesday, 19 April 2016, at 10:45 am
in Conference Room 2 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 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

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 101 to 141 of and Schedules 7 to 9 to the Bill.

Admin Follow-up actions to be taken by the Administration

Clauses 120 and 137 – Right of appeal

3. Clauses 120 and 137 respectively provided that any determination or order of the Resolvability Review Tribunal ("RRT") and the Resolution Compensation Tribunal ("RCT") was final and was not subject to appeal unless with the leave of the Court of Appeal under Clauses 122 and 139. Clauses 122(5) and 139(5) provided that the decision of the Court of Appeal as to whether or not leave to appeal to it should be granted was not subject to appeal. Some members expressed concern about the validity of Clauses 120, 122(5), 137 and 139(5) as provisions of similar nature in another Ordinance have been ruled null and void by the Court of Final Appeal before. The Administration was requested to:

- (a) review the provisions to address members' concern; and
- (b) provide information on court rulings of past cases where similar provisions were ruled null and void.

Clauses 123 and 140 – Powers of Court of Appeal

4. Clauses 123(3) and 140(3) stipulated that the Court of Appeal might make any order as to the costs of the appeal that it considered appropriate. In the light of comment of the legal adviser to the Bills Committee, the Administration was requested to clarify if the Court of Appeal allowed an appeal, whether the provisions also empowered the Court of Appeal to vary a cost order made by RRT or RCT on the case concerned.

Schedules 8 and 9 – Appointment of Tribunal chairperson

5. Sections 2 of Schedules 8 and 9 to the Bill provided that the Chief Executive ("CE") must, by notice published in the Gazette, appoint a person as the chairperson of RRT and RCT respectively. While the Bills Committee noted the Administration's policy intent that more than one RRT/RCT could operate at the same time and hence CE could appoint more than one tribunal chairperson for the purpose, the relevant provisions in Schedules 8 and 9 had not clearly reflected this intent. The Administration was requested to review the provisions concerned with reference to similar provisions for the appointment of chairperson and operation of the Board of Review (Inland Revenue Ordinance).

(Post-meeting note: The Administration's written responses were issued vide LC Paper Nos. CB(1)860/15-16(04) and CB(1)909/15-16(01) on 29 April and 13 May 2016 respectively.)

II Any other business

Date of next meeting

6. The Chairman reminded members that the next two meetings would be held on 3 May 2016 at 10:45 am, and 9 May 2016 at 10:45 am respectively.

7. There being no other business, the meeting ended at 12:18 pm.

Council Business Division 1
Legislative Council Secretariat
26 August 2016

Proceedings of the Bills Committee on Financial Institutions (Resolution) Bill
Ninth meeting on Tuesday, 19 April 2016, at 10:45 am
in Conference Room 2 of the Legislative Council Complex

Time Marker	Speaker	Subject(s)	Action Required
000538 – 000710	Chairman	Introductory remarks	
Clause-by-clause examination of the Bill			
000711 – 001623	Chairman Hong Kong Monetary Authority ("HKMA") Mr Albert HO	<p><i>Division 3 — Valuation</i></p> <p><u>Clause 101 – Role of independent valuer</u></p> <p><u>Clause 102 – Eligibility for compensation</u></p> <p><u>Clause 103 – What independent valuer must assess</u></p> <p>Schedule 7 Valuation Assumptions and Principles</p> <p>In response to Mr HO's enquiry regarding rebuttable presumption, HKMA advised that —</p> <p>(a) in making a valuation, the independent valuer would presume that the resolution treatment of a pre-resolution creditor in relation to a liability owed by the failing financial institution ("FI") to that creditor was not less favourable than the winding up treatment under the situations as described in clause 103(4) of the Bill;</p> <p>(b) there might however be unforeseen circumstances under which the resolution treatment of the pre-resolution creditor mentioned in (a) above was less favourable than the winding up treatment, hence the creditor could seek to rebut the presumption; and</p> <p>(c) where the presumption was rebutted, the pre-resolution creditor would then be eligible for "no creditor worse off than in liquidation" ("NCWOL") compensation.</p>	

Time Marker	Speaker	Subject(s)	Action Required
001624 – 002019	Chairman HKMA Mr Albert HO Assistant Legal Adviser 8 ("ALA8")	<p><u>Clause 104 – Decision of independent valuer</u></p> <p><u>Clause 105 – Regulations</u></p> <p><u>Clause 106 – Time when decision takes effect</u></p> <p>In reply to Mr HO, HKMA confirmed that the regulations made under clause 105 would be subsidiary legislation subject to the negative vetting procedure of the Legislative Council.</p>	
002020 – 002657	Chairman HKMA Mr Albert HO	<p><i>Division 4 — Review of Compensation Decision</i></p> <p><u>Clause 107 – Application to Resolution Compensation Tribunal</u></p> <p><u>Clause 108 – Determination of application</u></p> <p>Mr HO sought clarification on clause 108(6)(a) and HKMA explained that —</p> <p>(a) a NCWOL compensation valuation comprised two elements, namely: (i) pursuant to clause 103(1)(a), a hypothetical valuation of the outcome pre-resolution shareholders and creditors would have received in a winding-up of the institution; and (ii) pursuant to clause 103(1)(b), an assessment of the actual treatment pre-resolution shareholders and creditors had received in resolution;</p> <p>(b) as the valuation conducted by the independent valuer under clause 103(1)(a) was hypothetical in nature, different valuers might, justifiably, apply different models and different assumptions and hence might arrive at different compensation decisions. (The assumptions to be developed under the regulations to be made under clause 105 should serve to limit this disparity to some degree); and</p> <p>(c) consequently under clause 108(6)(a), the Resolution Compensation Tribunal ("RCT") might only vary or set aside the decision of an independent valuer if the latter was found to have acted unreasonably in arriving at his/her determination of the amount of compensation</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>payable (or not payable), did not apply the requisite assumptions and principles and the rebuttable presumption in making the valuation, and/or did not possess the required expertise, experience and resources to perform the valuation as established under Schedule 2 to the Bill.</p>	
<p>002658 – 004752</p>	<p>Chairman Administration Mr SIN Chung-kai ALA8 Mr Albert HO</p>	<p>Part 7</p> <p>Tribunals</p> <p><i>Division 1 — Resolvability Review Tribunal</i></p> <p><u>Clause 109 – Interpretation</u></p> <p><u>Clause 110 – Establishment of Resolvability Review Tribunal</u></p> <p><u>Clause 111 – Jurisdiction of Tribunal</u></p> <p><u>Clause 112 – Powers of Tribunal</u></p> <p><u>Clause 113 – Sittings of Tribunal to be held in private</u></p> <p>Mr SIN asked why private sittings were held by the Resolvability Review Tribunal ("RRT").</p> <p>ALA8 pointed out that sittings of Tribunals were usually held in public and Tribunals would hold a sitting in private if sensitive information or personal data privacy was involved in the proceedings.</p> <p>The Administration explained that —</p> <p>(a) RRT was established in order to provide an avenue of appeal for an FI, or its holding company, affected by a resolution authority ("RA")'s directions requiring the FI or holding company to take measures in relation to its structure, operation, assets, rights or liabilities with a view to removing significant impediments to resolvability (pursuant to clause 14); and</p> <p>(b) sittings of RRT would be held in private given that commercially sensitive information of the FI or holding company would be expected to</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>be considered in relation to such directions.</p> <p>In reply to Mr HO's enquiry, the Administration explained that an RA's direction to an FI to remove impediments to its resolvability (pursuant to clause 14) would be given during the pre-resolution planning stage and the FI could appeal to RRT against an RA's direction during the period, assuming a mutually agreeable solution could not be arrived at through resolution planning, resolvability assessment and the representations process pursuant to clause 15. The establishment of RRT and its proceedings would, however, not affect an RA's ability to take timely action in initiating resolution and implementing an orderly resolution of the FI where the RA was satisfied that the three conjunctive conditions for initiating resolution under clause 25 had been met.</p> <p>In response to Mr SIN's further enquiry, the Administration advised that "a person" in clause 113(5) referred to a participant in a proceeding of RRT. The term "participant" was defined in clause 113(7) to include the chairperson and ordinary members of RRT, the applicant in the proceeding and any witness, counsel, solicitor or other person involved in the proceeding, but did not include the relevant RA. An RA was subject to the secrecy requirements under clause 171. The penalties for contravening the secrecy requirements under clause 113 and clause 171 were the same.</p>	
004753 – 005059	Chairman Administration Mr Albert HO	<p><u>Clause 114 – Use of incriminating evidence required by Tribunal</u></p> <p><u>Clause 115 – Contempt dealt with by Tribunal</u></p> <p><u>Clause 116 – Costs</u></p> <p>In reply to Mr HO, the Administration confirmed that RRT adopted broadly the same principles in awarding costs as those of other Tribunals.</p>	
005100 – 010112	Chairman Administration Mr Albert HO ALA8 Mr SIN Chung-kai	<p><u>Clause 117 – Notification of determinations or orders of Tribunal</u></p> <p><u>Clause 118 – Form and proof of determinations or orders of Tribunal</u></p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p><u>Clause 119 – Application for stay of execution of determinations or orders of Tribunal</u></p> <p><u>Clause 120 – No other right of appeal</u></p> <p><u>Clause 121 – Rules by Chief Justice</u></p> <p><u>Clause 122 – Party may appeal to Court of Appeal with leave</u></p> <p>Mr HO sought clarification on clause 122. ALA8 advised that a party to a proceeding who was dissatisfied with the determination of RRT might appeal to the Court of Appeal against the determination on a question of law.</p> <p>The Administration said that an RA's direction under review by RRT was a direction given in relation to the structure, operation, assets, rights or liabilities of an FI with a view to enhancing the FI's resolvability (pursuant to clause 14). Appeal against RRT's determination where the question related wholly or partly to a question of fact in respect of RRT's determination, was not considered appropriate as RRT would be comprised of persons with specific relevant expertise and would therefore be best qualified to determine questions of fact. However, it was considered appropriate that an appeal be provided to the Court of Appeal where there was a question of law in respect of RRT's determination. The same rationale applied in the context of RCT.</p> <p>ALA8 enquired whether a party to a proceeding who was dissatisfied with the determination of RRT could apply for judicial review instead of appeal to the Court of Appeal. The Administration replied that there was nothing in the Bill to prevent this.</p> <p>Mr SIN and Mr HO expressed concern about the validity of clause 120 (i.e. any determination or order of RRT was final and was not subject to appeal) and clause 122(5) (i.e. the decision of the Court of Appeal on the grant of leave to appeal was not subject to appeal) as provisions of a similar nature in another Ordinance had been ruled null and void by the Court of Final Appeal before. They requested the Administration to review the provisions and provide information on</p>	<p>The Administration to take action as paragraph 3 of the minutes</p>

Time Marker	Speaker	Subject(s)	Action Required
		court rulings of past cases where similar provisions were ruled null and void.	
010113 – 010435	Chairman Administration ALA8	<p><u>Clause 123 – Powers of Court of Appeal</u></p> <p><u>Clause 124 – No stay of execution on appeal</u></p> <p>ALA8 sought clarification on whether clause 123 also empowered the Court of Appeal to vary a cost order made by RRT on the case concerned if the Court of Appeal allowed an appeal or varied or set aside a determination of RRT.</p>	The Administration to take action as paragraph 4 of the minutes
010436 – 011220	Chairman Administration Mr Albert HO	<p><i>Division 2 — Resolution Compensation Tribunal</i></p> <p><u>Clause 125 – Interpretation</u></p> <p><u>Clause 126 – Establishment of Resolution Compensation Tribunal</u></p> <p><u>Clause 127 – Jurisdiction of Tribunal</u></p> <p><u>Clause 128 – Powers of Tribunal</u></p> <p><u>Clause 129 – Sittings of Tribunal to be held in public</u></p> <p><u>Clause 130 – Use of incriminating evidence required by Tribunal</u></p> <p><u>Clause 131 – Contempt dealt with by Tribunal</u></p> <p><u>Clause 132 – Costs</u></p> <p><u>Clause 133 – Notification of determinations or orders of Tribunal</u></p> <p><u>Clause 134 – Form and proof of determinations or orders of Tribunal</u></p> <p>In reply to Mr HO's enquiry regarding the circumstances under which RCT would review the decision made by an independent valuer, the Administration advised that such circumstances could include where an applicant to RCT believed that the independent valuer had not applied the valuation assumptions and principles as well as the rebuttable presumption set out in the Bill, reasonably and competently in making</p>	

Time Marker	Speaker	Subject(s)	Action Required
		the valuation.	
011221 – 011343	Chairman Administration Mr SIN Chung-kai	<p><u>Clause 135 – Registration of determinations or orders made by Tribunal</u></p> <p><u>Clause 136 – Application for stay of execution of determinations or orders of Tribunal</u></p> <p><u>Clause 137 – No other right of appeal</u></p> <p><u>Clause 138 – Rules by Chief Justice</u></p> <p><u>Clause 139 – Party may appeal to Court of Appeal with leave</u></p> <p><u>Clause 140 – Powers of Court of Appeal</u></p> <p><u>Clause 141 – No stay of execution on appeal</u></p> <p>Mr SIN re-iterated his request for the Administration to look into a past court case (<i>Mok Charles v Tam Wai Ho</i> (2010) 13 HKCFAR 762) where provisions similar to clause 137 (in addition to clause 120) had been ruled null and void by the Court of Final Appeal.</p>	The Administration to take action as paragraph 3 of the minutes
011344 – 013333	Chairman Administration Mr Kenneth LEUNG ALA8 Mr Albert HO Mr SIN Chung-kai	<p>Schedule 8 Resolvability Review Tribunal</p> <p>Schedule 9 Resolution Compensation Tribunal</p> <p>Mr LEUNG asked if RRT would be established as a standing tribunal. The Administration replied that the Chief Executive ("CE") would appoint qualified persons to a tribunal panel for RRT as well as a chairperson, and the Financial Secretary would appoint two panel members to sit, as ordinary members, with the chairperson should a proceeding of RRT be initiated.</p> <p>ALA8 enquired about the procedures for the chairpersons and ordinary members of RRT to declare interests before the proceedings to prevent possible conflict of interest in their appointments and in the hearings.</p> <p>The Administration explained that declaration of interests and avoidance of conflicts of interest relating to the chairpersons and ordinary members of RRT would be dealt with by relevant</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>administrative arrangements and guidelines would be issued in this regard in the future when such need arouse.</p> <p>Mr HO asked if more than one RRT could operate at the same time and hence CE would need to appoint more than one chairperson for the purpose. The Administration replied in the affirmative.</p> <p>Mr HO was of the view that the provisions in Schedule 8 had not clearly reflected the policy intent that CE might establish additional tribunals should he consider it appropriate to do so. Mr HO and Mr LEUNG requested the Administration to review the provisions concerned with reference to similar provisions for the appointment of the chairperson and the operation of the Board of Review under the Inland Revenue Ordinance (Cap. 112).</p> <p>The Administration explained that in drafting the provisions in Schedule 8 regarding the appointment of a chairperson, it had made reference to the Securities and Futures Ordinance (Cap. 571). At members' request, the Administration agreed to review the provisions.</p>	<p>The Administration to take action as paragraph 5 of the minutes</p>
013334 – 013421	Chairman	Date of next meeting	