

立法會
Legislative Council

LC Paper No. CB(1)1181/15-16
(These minutes have been seen
by the Administration)

Ref : CB1/BC/5/15/2

Bills Committee on Financial Institutions (Resolution) Bill

**Minutes of the tenth meeting on
Tuesday, 3 May 2016, at 10:45 am
in Conference Room 3 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
- 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 Confirmation of minutes of meetings

(LC Paper No. CB(1)854/15-16 — Minutes of meeting on
5 January 2016

LC Paper No. CB(1)855/15-16 — Minutes of meeting on 19 January 2016)

The minutes of the meetings held on 5 January and 19 January 2016 were confirmed.

II Meeting with the Administration

Matters arising from previous meetings

(LC Paper No. CB(1)860/15-16(01) — Administration's second response to issues raised at the meeting on 31 March 2016

LC Paper No. CB(1)860/15-16(02) — List of follow-up actions arising from the discussion at the meeting on 18 April 2016

LC Paper No. CB(1)860/15-16(03) — List of follow-up actions arising from the discussion at the meeting on 19 April 2016

LC Paper No. CB(1)860/15-16(04) — Administration's response to issues raised at the meetings on 18 and 19 April 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

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

Clause-by-clause examination of the Bill

3. The Bills Committee scrutinized clauses 142 to 151 and 170 to 173 of the Bill.

Admin Follow-up actions to be taken by the Administration

Clauses 142 to 145 – Clawback of Remuneration

4. Clauses 142 and 143 provided that a resolution authority ("RA") might, at any time after it had initiated the resolution of a within scope financial institution ("FI"), apply to the Court for a clawback order against an officer or former officer of that institution. The controlled period for a clawback was three years immediately preceding the date on which the resolution of FI was initiated, or a further three years extended by the Court. Members had expressed grave concern about the duration of the controlled period. There were also enquiries about the operation of the controlled period with the relevant provisions in the Limitation Ordinance (Cap. 347), the operation of the clawback provisions with the relevant provisions in the Employment Ordinance (Cap. 57), and the factors the Court would take into account in making the clawback order. The Administration was requested to:

- (a) explain the rationale for setting the initial controlled period at three years, and the considerations of not providing a longer period (e.g. five years);
- (b) clarify the time limit, if any, for an RA to apply for a clawback order, including whether the RA would be subject to the Limitation Ordinance in exercising its power in this regard;
- (c) clarify whether in making a clawback order, the Court was only required to be satisfied that the acts or omission of acts of the officer concerned were made intentionally, recklessly or negligently, and had materially contributed to the ceasing of the FI or its non-viability under clause 143(2), or the Court was also required to consider the negligence and fault (including concealed fault) of the officer concerned under the Common Law;

- (d) explain whether the clawback provisions would be in conflict with the provisions in the Employment Ordinance, especially if a clawback order would override the provisions relating to the officer's entitlement to fixed remuneration (e.g. wages); and
- (e) consider some members' suggestion of empowering the RA to retain the remuneration or part of the remuneration of the officer or former officer of the FI concerned, including the retention period, the kinds of remuneration to be retained, the matters the RA should consider for the retention, etc.

5. Clause 143(3)(b) stipulated that the Court "must" take into account the financial circumstances of the officer in determining the extent to which the officer's remuneration would be covered by the clawback order. Members were concerned that the officer might conceal his/her financial circumstances through transferring his/her remuneration to a third party/outside Hong Kong. There was also concern as how the RA would recover the remuneration subject to the clawback order under clause 145. The Administration was requested to:

- (a) review the relevant provisions to address members' concerns;
- (b) provide details on the financial circumstances that the Court would take into account under clause 143(3)(b); and
- (c) consider some members' views to delete clause 143(3)(b) and 143(4) from the Bill, and the views of the legal adviser to the Bills Committee to replace the word "must" by "may" in clause 143(3) so that the Court would have discretion on whether to consider the financial circumstances of the officer.

6. Clause 144(2) provided that the making of a clawback order against an officer did not affect any criminal or civil liability incurred by the officer in relation to the FI under resolution. The Administration was requested to explain the purpose for including the provisions in the Bill, and clarify the possible impact of the clawback order on the criminal or civil liability incurred by the officer.

Clause 171 – Official secrecy

7. Clause 171 imposed secrecy requirements to any person who held or had held an office, appointment, employment or other role under the Bill. Certain disclosure gateways were provided in clause 171(3). The Administration was requested to consider a member's suggestion to exempt parties, such as

representatives of RA and Government officials (e.g. the Financial Secretary and Secretary for Financial Services and Treasury), from the secrecy requirements so that they might make public statements or answer enquiries regarding possible resolution of a distressed FI. The exemption might be necessary to prevent panic arising from rumors about the distressed FIs.

8. In the light of comments by the legal adviser to the Bills Committee, the Administration was requested to consider the need to set out clearly in clause 171(2) that the members, employees or agents of, or the consultants or advisors to, a section 10 entity or an independent valuer were also covered by the secrecy requirements.

Drafting issue

9. In the light of a member's comment, the Administration agreed to review the Chinese rendition "幕後董事" for the term "shadow director" in clause 142 making reference to the Chinese rendition adopted in the Companies Ordinance (Cap. 622).

(Post-meeting note: The Administration's written response was issued vide LC Paper No. CB(1)909/15-16(03) on 13 May 2016.)

III Any other business

Date of next meeting

10. The Chairman reminded members that the next meeting would be held on 9 May 2016 at 8:45 am.

11. There being no other business, the meeting ended at 12:41 pm.

Council Business Division 1
Legislative Council Secretariat
26 August 2016

Proceedings of the Bills Committee on Financial Institutions (Resolution) Bill
Tenth meeting on Tuesday, 3 May 2016, at 10:45 am
in Conference Room 3 of the Legislative Council Complex

Time Marker	Speaker	Subject(s)	Action Required
000355 – 000805	Chairman Mr CHAN Kin-por	Introductory remarks, confirmation of minutes and updated meeting schedule for May 2016 Mr CHAN suggested, and the Bills Committee agreed, all meetings originally scheduled at 8:30am in May would be re-scheduled to 8:45am.	
000806 – 002907	Chairman Administration Hong Kong Monetary Authority ("HKMA") Mr SIN Chung-kai	Briefing by the Administration on its written response to the issues arising from the meetings held on 18 and 19 April 2016 [LC Paper No. CB(1)860/15-16(04)] Mr SIN enquired about the action the resolution authority ("RA") would take if a financial institution ("FI") was found making "distribution payments" to its directors, senior management or employees when it had suffered deterioration in its financial condition. HKMA advised that — (a) an authorized institution ("AI") was obliged (under the Banking (Capital) Rules (Cap. 155L) and the Banking Ordinance (Cap. 155) ("BO")) to notify HKMA if its capital ratio fell below a specified buffer level and it was an offence if the AI failed to do so; (b) where an AI's capital ratio fell below this buffer level, a sliding scale of restrictions on discretionary payments, including discretionary remuneration, would come into effect pursuant to section 3F of the Banking (Capital) Rules; (c) if an AI intended to make a "distribution payment" when its capital position had deteriorated below the buffer level (i.e. within the scope permitted by the sliding scale of restrictions), it must notify HKMA one month before the distribution; and (d) HKMA might take supervisory actions, including giving directions to the AI pursuant to section 52 of BO if the conditions for doing	

Time Marker	Speaker	Subject(s)	Action Required
		<p>so as established under sections 52(1)(a) – (d) of BO had been met, which might include where an AI had failed to maintain certain level of capital as required under BO.</p> <p>Regarding some members' suggestion of empowering the RA to retain an officer's variable remuneration (e.g. bonus) for a certain period upon initiation of resolution of the FI, the Administration said that it was studying the issue and would take into account the requirements under the Basic Law and the Employment Ordinance (Cap. 57) ("EO").</p>	
002908 – 003238	Chairman Administration	<p>Briefing by the Administration on its second response to issues raised at the meeting on 31 March 2016 [LC Paper No. CB(1)860/15-16(01)]</p> <p>Members did not raise any questions.</p>	
Clause-by-clause examination of the Bill			
003239 – 012104	Chairman Administration HKMA Mr SIN Chung-kai Mr Albert HO Mr NG Leung-sing Mr Christopher CHEUNG Mr Andrew LEUNG Mr Kenneth LEUNG Assistant Legal Adviser 8 ("ALA8")	<p>Part 8</p> <p>Clawback of Remuneration</p> <p><u>Clause 142 – Interpretation</u></p> <p><u>Clause 143 – Application to Court</u></p> <p><u>Clause 144 – Clawback order</u></p> <p><u>Clause 145 – Repaid or returned remuneration</u></p> <p><u>Clause 146 – Prohibition of avoidance</u></p> <p>Mr SIN requested the Administration to explain the rationale for setting the initial controlled period at three years, and the considerations for not providing a longer period (e.g. five years).</p> <p>The Administration responded that —</p> <p>(a) it had taken into account overseas practices (including the forms of remuneration to be subject to clawback and the controlled period) when developing the clawback provisions, and sought to adopt a "middle ground";</p>	<p>The Administration to take action as paragraph 4(a) of the minutes</p>

Time Marker	Speaker	Subject(s)	Action Required
		<p>(b) the controlled period in the regimes in the United States ("US") and Singapore was two years (extendable in the case of fraud by two years in Singapore and indefinitely in the US);</p> <p>(c) any salary, remuneration or other benefits received by a director or executive officer from the FI during the 2-year period would be subject to clawback under the regime in Singapore (i.e. not just variable remuneration or bonus);</p> <p>(d) the controlled period in the regime in the United Kingdom was seven years but such power was part of a broader supervisory remuneration framework that was not specific to resolution;</p> <p>(e) the proposal in the Bill was to have a 3-year clawback period (extendable by a further 3 years in cases of dishonesty), including both fixed and variable (bonus) remuneration; and</p> <p>(f) setting a longer clawback period might disincentivize financial talents from working in Hong Kong and prompt international FIs to re-domicile their operations in Hong Kong elsewhere, thereby threatening Hong Kong's position as an international finance centre.</p> <p>In view of the Administration's response, Mr SIN said that he might consider moving a Committee Stage amendment to the definition of "controlled period" to lengthen the period from three years to five years. Mr HO also supported lengthening the controlled period to five years.</p> <p>Mr HO enquired whether the RA would be subject to the Limitation Ordinance (Cap. 347) ("LO") when applying to the Court for a clawback order. He remarked that according to LO, the limitation period was six years from the date a breach was discovered.</p> <p>The Administration advised that according to clause 143(1) of the Bill, the RA might "at any time after it had initiated the resolution of a within scope FI" apply to the Court for a clawback order. No time limit was imposed. The controlled period for a clawback would be three years</p>	<p>The Administration to take action as paragraph 4(b) of the minutes</p>

Time Marker	Speaker	Subject(s)	Action Required
		<p>immediately preceding the date on which the resolution of FI was initiated, or a further three years if extended by the Court.</p> <p>Mr HO requested the Administration to —</p> <p>(a) clarify whether in making a clawback order, the Court was only required to be satisfied that the acts or omissions to act of the officer/former officer concerned were made intentionally, recklessly or negligently, and had materially contributed to the failure of the FI or its non-viability under clause 143(2), or whether the Court was required to consider the negligence and fault (including concealed fault) of the officer/former officer concerned under the Common Law;</p> <p>(b) clarify the possible impact of the clawback order on the criminal or civil liability incurred by the officer/former officer of the FI; and</p> <p>(c) consider empowering the RA to retain the remuneration or part of the remuneration of the officer or former officer of the FI concerned, including the retention period, the kinds of remuneration to be retained, the matters the RA should consider for the retention, etc.</p> <p>Mr NG asked why "幕後董事" instead of "影子董事" was used as the Chinese rendition for the term "shadow director" in clause 142, and whether the term "幕後董事" ("shadow director") as well as its definition was adopted from the Companies Ordinance (Cap. 622) ("CO").</p> <p>The Administration said that the term "幕後董事" ("shadow director") was adopted from CO to mean a person, in accordance with whose directions or instructions, the directors or a majority of the directors of the body corporate were accustomed to act, and that the intention was to apply the same definition for the purposes of Part 8 of the Bill.</p> <p>Mr CHEUNG enquired about the reason to require that the Court "must" take into account the financial circumstances of the officer concerned when determining the extent to which</p>	<p>The Administration to take action as paragraphs 4(c), 4(e) and 6 of the minutes</p> <p>The Administration to take action as paragraph 9 of the minutes</p> <p>The Administration to take action as paragraph 5 of</p>

Time Marker	Speaker	Subject(s)	Action Required
		<p>the officer's remuneration would be covered by the clawback order (i.e. clause 143(3)(b)). He also asked what financial circumstances the Court would need to consider under clause 143(3)(b). Mr CHEUNG and the Chairman were concerned that the officer/former officer might conceal his/her financial circumstances through transferring his/her remuneration to a third party/outside Hong Kong. They questioned how the RA would recover the remuneration subject to the clawback order under clause 145 under the aforementioned circumstances or in the event that the officer/former officer was in financial hardship.</p> <p>Mr CHEUNG and Mr Andrew LEUNG suggested that the Administration should consider deleting clause 143(3)(b) and 143(4).</p> <p>ALA8 suggested to replace the word "must" by "may" in clause 143(3) so that the Court would have discretion on whether to consider the financial circumstances of the officer/former officer concerned.</p> <p>Mr Andrew LEUNG enquired about the differences between the existing clawback mechanism for the banking sector and the clawback provisions in the Bill. He cautioned that the clawback provisions might be in conflict with the provisions in EO, especially if a clawback order would override the provisions relating to the officer/former officer's entitlement to fixed remuneration (e.g. wages). Mr Kenneth LEUNG expressed a similar concern.</p> <p>HKMA explained that —</p> <p>(a) HKMA's guidelines under its Supervisory Policy Manual module "Guideline on a sound remuneration system" set out its expectations regarding AIs' remuneration frameworks, under which, AIs should, amongst other things, include in relevant contracts, provisions in respect of the deferral and claw-back of unvested variable remuneration;</p> <p>(b) an AI's variable remuneration to its officers should take into account the AI's performance over the longer term (e.g. by reference to</p>	<p>the minutes</p> <p>The Administration to take action as paragraph 4(d) of the minutes</p>

Time Marker	Speaker	Subject(s)	Action Required
		<p>financial results spanning three to five years);</p> <p>(c) under the resolution regime, an RA might apply to the Court for a clawback order, and both the fixed and variable remuneration received/entitled to be received by the officer/former officer of the FI during the controlled period could be subject to clawback; and</p> <p>(d) the repaid/returned payment would be paid into the resolution funding account.</p> <p>Mr Andrew LEUNG was of the view that the clawback regime under the Bill should be in line with those of comparable jurisdictions. Lengthening the controlled period or adopting the proposed retention power, which was not present in the resolution regimes of other major jurisdictions, might create disincentives for officers in taking up leadership positions in FIs in Hong Kong.</p> <p>In view of members' concerns and questions raised regarding the clawback mechanism, the Chairman suggested, and members agreed that the Bills Committee would re-visit Part 8 of the Bill when the Administration provided the supplementary information.</p>	
012105 – 013545	Chairman Administration Mr Albert HO	<p>Part 9</p> <p>Deferral of Certain Disclosure Requirements</p> <p><u>Clause 147 – Interpretation</u></p> <p><u>Clause 148 – Deferral of requirement to disclose inside information</u></p> <p><u>Clause 149 – Deferral of requirement to disclose interests and short positions</u></p> <p><u>Clause 150 – Suspension of dealings in securities</u></p> <p><u>Clause 151 – Suspension of certain obligations</u></p>	

Time Marker	Speaker	Subject(s)	Action Required
013546 – 015620	Chairman Administration HKMA Mr Albert HO Mr Kenneth LEUNG ALA8	<p>Part 11</p> <p>Confidentiality Requirements</p> <p><u>Clause 170 – Interpretation</u></p> <p><u>Clause 171 – Official secrecy</u></p> <p><u>Clause 172 – Confidentiality on the part of financial institutions etc.</u></p> <p><u>Clause 173 – Disclosure of information to authorities in other places</u></p> <p>Mr HO requested the Administration to consider providing disclosure gateways in the Bill to allow representatives of an RA and Government officials (e.g. the Financial Secretary and Secretary for Financial Services and Treasury) to make public statements or answer enquiries regarding possible resolution of a distressed FI. Such gateways might be necessary in preventing panic arising from rumors about the distressed FI.</p> <p>In addressing ALA8's concern regarding the secrecy requirements, the Administration agreed to consider the need to set out clearly in clause 171(2) that the members, employees or agents of, or the consultants or advisors to, a section 10 entity or an independent valuer were also covered by the secrecy requirements.</p> <p>In response to Mr LEUNG's enquiry, HKMA advised that —</p> <p>(a) an entity or person must preserve secrecy with regard to any matter that comes to his/her knowledge in the course of performing functions under, or carrying into effect, any provision of the Financial Institutions (Resolution) Ordinance;</p> <p>(b) a person who held or had held an office, appointment, employment or other role under the Bill might disclose information under the circumstances as specified in clause 171(3). Similarly, financial institutions and their group companies as well as any person who was or had been a member, officer, employee or agent of, or a consultant or advisor to, those</p>	<p>The Administration to take action as paragraph 7 of the minutes</p> <p>The Administration to take action as paragraph 8 of the minutes</p>

Time Marker	Speaker	Subject(s)	Action Required
		<p>entities might disclose information, that had come into their knowledge in the circumstances described in clause 172(1), under the circumstances specified in clause 172(3), including disclosure within the group if consent from an RA was obtained; and</p> <p>(c) in practice, it was anticipated that an FI could discuss with the RA if it was in doubt about whether any information should be treated as confidential.</p>	
015621 – 015640	Chairman	Date of next meeting	

Council Business Division 1
Legislative Council Secretariat
26 August 2016