

立法會
Legislative Council

LC Paper No. CB(1)1183/15-16
(These minutes have been seen
by the Administration)

Ref : CB1/BC/5/15/2

Bills Committee on Financial Institutions (Resolution) Bill

**Minutes of the twelfth meeting on
Monday, 16 May 2016, at 8:45 am
in Conference Room 2A 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 Christopher CHEUNG Wah-fung, SBS, JP

Members absent : Hon Cyd HO Sau-lan, JP
Hon NG Leung-sing, SBS, JP
Hon Kenneth LEUNG
Hon Dennis KWOK
Hon SIN Chung-kai, 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 Vivian CHAN
Clerical Assistant (1)4

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I Confirmation of minutes of meeting

(LC Paper No. CB(1)897/15-16 — Minutes of meeting on
15 February 2016

The minutes of the meeting held on 15 February 2016 were confirmed.

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II Meeting with the Administration

Matters arising from previous meetings

(LC Paper No. CB(1)909/15-16(01) — Administration's second response to issues raised at the meetings on 18 and 19 April 2016

LC Paper No. CB(1)909/15-16(02) — List of follow-up actions arising from the discussion at the meeting on 3 May 2016

LC Paper No. CB(1)909/15-16(03) — Administration's response to issues raised at the meeting on 3 May 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)

Consideration of Committee Stage amendments proposed by the Administration

(LC Paper No. CB(1)909/15-16(04) — First batch of draft Committee Stage amendments proposed by the Administration)

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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 146 of the Bill and completed clause-by-clause examination of the Bill.

Admin Follow-up actions to be taken by the Administration

Schedule 3 – Stamp duty exemption for securities transfer instruments

4. Members noted that the Administration planned to develop appropriate amendments to the enacted Financial Institutions (Resolution) Ordinance in a future legislative exercise to effect the stamp duty exemption policy in the context of the resolution legislative framework. The Administration was requested to give the above undertaking during the resumption of the Second Reading debate on the Bill.

Part 8 – Clawback of Remuneration

Effect of the Limitation Ordinance to clawback of remuneration

5. Section 4(1)(d) and section 4(5) of the Limitation Ordinance (Cap. 347) ("LO") respectively provided that actions to recover any sum recoverable by virtue of any Ordinance should not be brought after the expiration of 6 years and actions to recover any penalty or forfeiture, or sum by way of penalty or forfeiture recoverable by virtue of any Ordinance should not be brought after the expiration of 2 years from the date on which the cause of action accrued. In the light of comments from members and the legal adviser to the Bills Committee, the Administration was requested to clarify whether the resolution authorities ("RAs") would be subject to the time limit under section 4(1)(d) or section 4(5) of LO when applying to the Court for a clawback order against an officer or former officer of a within scope financial institution ("FI").

The need to consider the financial circumstances of the officer in making a clawback order

6. Clause 143(3)(b) provided that the Court "must" take into account the financial circumstances of the officer concerned in determining the extent to which the officer's remuneration would be covered by the clawback order. Given that the term "financial circumstances" was not defined and the factors to

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be considered by the Court were not set out in the Bill, members were concerned that the officer might abuse the provision by exaggerating his/her financial hardship, family burden, etc. to persuade the Court to reduce the amount of remuneration to be subject to the clawback order. The Administration was requested to:

- (a) review the relevant provisions to address members' concern;
- (b) re-consider deleting clause 143(3)(b) from the Bill;
- (c) consider setting out in the provision the principles such as fairness, justice and equity the Court should take into account in determining the clawback order; and
- (d) consider the views of the legal adviser to the Bills Committee to provide in clause 143(3)(b) that "the Court may consider the financial circumstances of the officer if it considers doing so is appropriate and equitable" (在合適及公平的情況下原訟法庭可考慮該人員的財務狀況).

Proposed power for the resolution authorities to retain the remuneration of the officers of the financial institutions for a certain period

7. Some members expressed grave concern about whether a clawback order would be enforceable especially when the officers were expatriates who might leave Hong Kong shortly after initiation of resolution of an FI. There was a proposal to empower the RAs to retain the remuneration of the officers for a certain period. While the amount of remuneration subject to retention might be relatively small, the proposal would send a clear message to the market that reckless and negligent behaviours of the officers causing the failure of the FI should not be tolerated. The Administration was requested to:

- (a) consider empowering RAs to retain the remuneration of the officers concerned, in particular the variable remuneration (e.g. bonus), for a certain period after initiation of resolution of an FI;
- (b) clarify whether during resolution planning, RAs could direct an FI to develop measures for retaining/deferring the payment of remuneration to the officers concerned when resolution of the FI was initiated; and
- (c) consider adding provisions in the Bill to require RAs to consult the relevant regulators shortly after initiation of resolution of an FI on

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the need to give directions to the FI for retaining the remuneration of the officers concerned.

Clause 171 – Official secrecy

8. While members noted that clause 171(3)(a) and (f) provides disclosure gateways for RAs and the Financial Secretary ("FS") to make public statements concerning the resolution of FIs, some members were concerned that such disclosure would be restrictive. The Administration was requested to consider providing explicitly in clause 171 for FS to make public statements or answer enquiries regarding the resolution of an FI taking into account public interest concern and the need to maintain financial stability.

(Post-meeting note: The Administration's written response was issued vide LC Paper No. CB(1)944/15-16(02) on 23 May 2016.)

III Any other business

Date of next meeting

9. The Chairman reminded members that the next two meetings would be held on 17 May 2016 at 4:30 pm, and 24 May 2016 at 8:45 am respectively.

10. There being no other business, the meeting ended at 10:20 am.

Council Business Division 1
Legislative Council Secretariat
26 August 2016

Proceedings of the Bills Committee on Financial Institutions (Resolution) Bill
Twelfth meeting on Monday, 16 May 2016, at 8:45 am
in Conference Room 2A of the Legislative Council Complex

| Time Marker | Speaker | Subject(s) | Action Required |
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| 000155 – 000315 | Chairman | Introductory remarks and confirmation of minutes [LC Paper No. CB(1)897/15-16] | |
| 000316 – 001520 | Chairman Administration Mr Albert HO Assistant Legal Adviser 8 ("ALA8") | <p>Briefing by the Administration on its second response to issues raised at the meetings on 18 and 19 April 2016 [LC Paper No. CB(1)909/15-16(01)]</p> <p>The Chairman noted that the Administration planned to develop appropriate amendments to the enacted Financial Institutions (Resolution) Ordinance in a future legislative exercise to effect the stamp duty exemption policy in the context of the resolution legislative framework. He requested the Administration to give the above undertaking during the resumption of the Second Reading debate on the Bill. The Administration agreed to do so.</p> <p>In reply to Mr HO's enquiry on the right of appeal under clauses 120 and 137, the Administration said that —</p> <p>(a) Whilst clauses 120 and 137 provided for determinations of the Resolvability Review Tribunal and Resolution Compensation Tribunal, respectively, to be final on questions of fact, clauses 122 and 139 provided new conditional channels of appeal by seeking leave to appeal to the Court of Appeal on a question of law in respect of such a determination;</p> <p>(b) these provisions were in line with the Basic Law and did not absolutely limit any recourse to the court for appeal or the Court of Final Appeal's power of final adjudication; and</p> <p>(c) the court ruling in the case of <i>Solicitor v The Law Society of Hong Kong and Secretary for Justice (2003) 6 HKCFAR 570</i> had been taken into consideration when reviewing these provisions.</p> | The Administration to take action as paragraph 4 of the minutes |

| Time Marker | Speaker | Subject(s) | Action Required |
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| | | <p>ALA8 advised that —</p> <p>(a) provisions similar to clauses 120, 122, 137 and 139 could also be found in section 11 of the Lands Tribunal Ordinance (Cap. 17);</p> <p>(b) according to the Administration, the above provisions in the Bill aimed to prevent the Court of Appeal and the Court of Final Appeal from being unduly burdened with unmeritorious appeals so as to enable them to focus on appeals with merits;</p> <p>(c) the above provisions in the Bill might still be subject to challenge if a person considered that he/she had the constitutional right to appeal to the Court of Appeal or the Court of Final Appeal under the Basic Law; and</p> <p>(d) if challenged, it would be for the relevant Courts to determine whether the limitation imposed and the legitimate aim mentioned in (b) above could satisfy the proportionality test in relation to limiting citizen's right which was protected by the Basic Law.</p> | |
| 001521 – 012811 | <p>Chairman Administration Hong Kong Monetary Authority ("HKMA") Mr Albert HO Mr CHAN Kin-por ALA8</p> | <p>Briefing by the Administration on its response to issues raised at the meeting on 3 May 2016 [LC Paper No. CB(1)909/15-16(03)]</p> <p><i>Clawback of remuneration</i></p> <p>Mr HO said that he was still considering the issue whether the controlled period should be lengthened, and he might move a Committee Stage amendment to the definition of "controlled period" if he ultimately considered it necessary.</p> <p>Regarding the application of the time limit specified under the Limitation Ordinance (Cap. 347) ("LO") to clawback of remuneration, Mr HO was of the view that the time limit under LO should apply to the clawback provisions in the Bill unless explicitly exempted.</p> <p>ALA8 said that section 4(1)(d) and section 4(5) of LO respectively provided that actions to recover any sum were recoverable by virtue of any Ordinance should not be brought after the</p> | <p>The Administration to take action as paragraph 5 of the minutes</p> |

| Time Marker | Speaker | Subject(s) | Action Required |
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| | | <p>expiration of 6 years and actions to recover any penalty or forfeiture, or sum by way of penalty or forfeiture recoverable by virtue of any Ordinance should not be brought after the expiration of 2 years from the date on which the cause of action accrued. He was of the view that a resolution authority ("RA") might be subject to the time limit under section 4(1)(d) or section 4(5) of LO when applying to the Court for a clawback order against an officer or former officer of a within scope financial institution ("FI").</p> <p>The Administration agreed to review section 4 of LO to clarify the issue.</p> <p>Mr CHAN was of the view that the clawback regime under the Bill should be in line with those of comparable jurisdictions, and expressed concern about the competitiveness of Hong Kong if its regime was more stringent than those of comparable jurisdictions. He agreed with the Administration that adopting the proposed retention power which was not present in the resolution regimes of other major jurisdictions and lengthening the controlled period might create disincentives for officers in taking up leadership positions within FIs in Hong Kong and FIs from doing business in Hong Kong.</p> <p><i>Proposed power for RAs to retain officers' variable remuneration</i></p> <p>Mr HO expressed grave concern about whether a clawback order was enforceable especially when the officers were expatriates who might leave Hong Kong shortly after initiation of resolution of an FI. He considered it reasonable to empower RAs to retain the remuneration, in particular the variable remuneration, of the officers for a certain period as it was likely that the poor performance of FIs' officers might have caused or materially contributed to the FIs' non-viability. While the amount of remuneration subject to retention might be relatively small, the proposal would send a clear message to the market that reckless and negligent behaviour of the officers causing the failure of the FI should not be tolerated.</p> | <p>The Administration to take action as paragraph 7(a) of the minutes</p> |

| Time Marker | Speaker | Subject(s) | Action Required |
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| | | <p>The Administration responded that under the Supervisory Policy Manual module "Guideline on a Sound Remuneration System" issued by HKMA, authorized institutions ("AIs") should devise remuneration packages that were consistent with those guidelines, which included provisions in respect of the deferral and "claw-back" of unvested variable remuneration. The Banking Capital Rules (Cap. 155L) also required AIs to restrict distributions of earnings, including discretionary bonus payments, where their capital ratio had fallen below a "buffer level". The financial regulators would commit to developing, under their existing supervisory powers, a mechanism to provide greater certainty that officers of an FI would not receive inappropriate awards of remuneration, including variable remuneration, where the institution concerned was moving towards or had entered into resolution.</p> <p>ALA8 sought clarification on whether during resolution planning, RAs could direct an FI to develop measures for retaining/deferring the payment of variable remuneration to the officers when resolution of the FI was initiated.</p> <p>The Administration and HKMA said that —</p> <p>(a) retaining/deferring the payment of remuneration of officers was not a requirement under the Key Attributes of Effective Resolution Regimes for Financial Institutions developed by the Financial Stability Board, and the Administration was not aware that such a power was present in the resolution regimes of other major jurisdictions;</p> <p>(b) RAs could deploy relevant supervisory intervention powers to stop inappropriate payment of variable remuneration to officers of the FIs where the conditions for use of those powers were met. For example, HKMA, being the regulator of AIs, had closely monitored the liquidity and capital levels of AIs, and could exercise its supervisory intervention powers under section 52 of the Banking Ordinance (Cap. 155) to direct an AI to take specified actions where the relevant conditions for doing so were met, which could include if the AI was</p> | <p>The Administration to take action as paragraph 7(b) of the minutes</p> |

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| | | <p>found unlikely to meet its financial obligations. A direction might be given under section 52 to stop inappropriate payment of variable remuneration to officers of an AI. In general, it would be anticipated that such supervisory intervention powers would be deployed before the initiation of resolution; and</p> <p>(c) according to clause 22 of the Bill, an RA could give directions to stop inappropriate payment of variable remuneration to officers of the FIs, if doing so could assist in meeting the resolution objectives and where the relevant conditions (i.e. condition 1 and condition 3 under clause 25) had been met.</p> <p>To ensure that the relevant regulators would be engaged during the process of resolution, Mr HO suggested that the Administration should consider adding provisions in the Bill to require RAs to consult the relevant regulators shortly after initiation of resolution of an FI on the need to give directions to the FI for retaining the remuneration of the officers.</p> <p><i>The need to consider the financial circumstances of the officer in making a clawback order</i></p> <p>Mr CHAN agreed with the Administration's view that the term "financial circumstances" should be given its ordinary meaning by the Court which would have the discretion to determine the factors to be taken into account when considering the "financial circumstances" of a person.</p> <p>In reply to Mr HO's enquiry, the Administration advised that the term "financial circumstances" had been used in relation to a person in other statutes (such as section 28(3) of the Ferry Services Ordinance (Cap. 104) and Section 4 of the Practising Certificate (Special Conditions) Rules (Cap. 159Y)) under which the person's financial circumstances should be considered. These statutes did not specifically define the term nor set out the factors that should be taken into account. The term "financial circumstances" in clause 143(3)(b) should be given its ordinary meaning by the Court in the context of the clawback provisions.</p> | <p>The Administration to take action as paragraph 7(c) of the minutes</p> |

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| | | <p>ALA8 remarked that as no specific definition was given to the term "financial circumstances", the Court would adopt the ordinary meaning (e.g. an officer's incomes, expenses, properties, etc.) for the term.</p> <p>Given that the term "financial circumstances" was not defined and the factors to be considered by the Court were not set out in the Bill, Mr HO was concerned that the officer may abuse the provision by exaggerating his/her financial hardship, family burden, etc. with an attempt to persuade the Court to reduce the amount of remuneration to be subject to the clawback order. He was of the view that it would be more appropriate to require the Court to apply principles such as fairness, justice and equity in determining the clawback order.</p> <p>In view of the comments and concerns expressed by Mr Ho and ALA8, the Administration agreed to further review the relevant provisions of the Bill.</p> <p><i>Official secrecy</i></p> <p>Mr HO was of the view that the disclosure gateways provided for RAs and the Financial Secretary ("FS") under clause 171(3)(a) and (f) would be restrictive. He requested the Administration to consider providing explicitly in clause 171 for FS to make public statements or answer enquiries regarding the resolution of an FI taking into account public interest concern and the need to maintain financial stability.</p> <p>The Administration responded that pursuant to clause 171(3)(f), a disclosure could be made by FS where the information was disclosed to FS by an RA, if the RA was of the opinion that such disclosure would enable or assist FS to perform his functions and the RA had consented to FS's onward disclosure of that information (pursuant to clause 171(7) of the Bill). The RA would, in considering whether to give the consent, take into account financial stability as a public interest concern so that FS might make public statements to support the resolution objectives under the Bill.</p> | <p>The Administration to take action as paragraph 6 of the minutes</p> <p>The Administration to take action as paragraph 8 of the minutes</p> |

| Time Marker | Speaker | Subject(s) | Action Required |
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| Clause-by-clause examination of the Bill | | | |
| 012812 – 013436 | Chairman Administration 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>ALA8 enquired about how the clawback order could apply to a shadow director as, in general, shadow directors would not be entitled to any remuneration from the FI concerned.</p> <p>The Administration said that the term "shadow director" was used to define 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. The definition of "shadow director" did not restrict him/her from receiving any fixed or variable remuneration from the FI.</p> | |
| 013437 – 013500 | Chairman | Date of next meeting | |