

Bills Committee on Financial Institutions (Resolution) Bill**Response to Matters Raised by Members at the Meetings
on 18 and 19 April 2016**

Further to LC Paper No. CB(1)860/15-16(04), this paper sets out the Government's response to the following issues raised by Members in relation to the Financial Institutions (Resolution) Bill (the Bill) at the Bills Committee (BC) meetings on 18 April and 19 April 2016.

Schedule 3 – Stamp duty exemption for securities transfer instruments

According to the Inland Revenue Department, any “sale or purchase” of Hong Kong stock under the securities transfer instruments (i.e. Schedule 3 to the Bill) will be subject to stamp duty under the Stamp Duty Ordinance (Cap. 117), and stamp duty exemption may be granted to the instruments on a case-by-case basis. Members are of the views that the Bill should provide certainty on stamp duty exemption for the securities transfer instruments to facilitate smooth conduct of resolution, especially for carrying out the stabilization options with transfers to a bridge institution and to a temporary public ownership which will involve government ownership. Stamp duty exemption for the instruments will be justified recognizing the purpose of the transfers is to protect financial stability and integrity of the financial system. The Administration is requested to consider and respond to members’ views.

2. We share Members' views that the resolution of a financial institution (FI) initiated under the proposed regime, as provided for in the Bill, would be an emergency measure with the objective of securing the continuity of critical financial services and protecting financial stability. Therefore, our general policy intention has been to exempt stamp duty, which would otherwise be due on any Part 5 instrument (made by a resolution authority to effect the application of a stabilization option following initiation of resolution) evidencing a transfer of securities or property, unless there are sound policy reasons not to do so.

3. Our key consideration is that resolution will only be initiated in the event that a resolution authority is satisfied that an FI has ceased, or is likely to cease, to be viable (with no reasonable prospect of recovery) and the resolution of the FI would avoid or mitigate the risks its non-viability poses to the stability and effective working of the financial system of Hong Kong, including the

continued performance of critical financial services. Hence, any stamp duty that would otherwise be levied on a Part 5 instrument does not arise from a “normal” commercial transaction but as a result of the emergency measures pursued by a resolution authority in a crisis situation.

4. In addition, a stamp duty exemption may incentivize a private sector acquirer to consider acquiring part or all of the business of the failing/failed FI to facilitate a swift transaction over a “resolution weekend”. In most circumstances, an immediate transfer to a private sector acquirer would be the preferred outcome in resolution because it minimizes the degree of Government or resolution authority intervention in the operations of a company in the private sector. Therefore, steps that can be taken to enhance the likelihood of such an outcome would be beneficial to meeting the objectives of the regime.

5. Having taken into account the above policy considerations and Members’ views expressed at the meeting on 18 April, we wish to reiterate that it is our policy intention to exempt stamp duty arising from the application of stabilization options, unless there are sound policy reasons not to do so. Our approach to implement this policy is to rely on an existing mechanism under section 52 of the Stamp Duty Ordinance (Cap. 117) (SDO) whereby the Chief Executive may exempt or remit any stamp duty after taking into account the circumstances of the case and the transfers involved.¹ The Bill was therefore developed on the basis that the Government can use the existing mechanism to provide for the exemption of stamp duty chargeable for any transfer effected under a Part 5 instrument. That said, given Members’ comments and the urgency of resolution cases to be effected over a “resolution weekend”, the Government intends to look into how to effect the stamp duty exemption policy in the context of the resolution legislative framework by developing appropriate amendments to the enacted Financial Institutions (Resolution) Ordinance in a separate legislative exercise in the future.

Clauses 120 and 137 – Right of appeal

Clauses 120 and 137 respectively provide that any determination or order of the Resolvability Review Tribunal (RRT) and the Resolution Compensation Tribunal (RCT) is final and is not subject to appeal unless with the leave of the Court of Appeal under Clauses 122 and 139. Clauses 122(5) and 139(5) provide that the decision of the Court of Appeal on the grant of leave to appeal

¹ Section 52 of SDO provides that the Chief Executive may remit or refund, wholly or in part, the stamp duty payable or paid, in respect of any instrument chargeable with stamp duty. The authority under this section has also been delegated to the Financial Secretary and the Secretary for Financial Services and the Treasury.

or otherwise by it to the applicant party is not subject to appeal. Some members express concern about the validity of Clauses 120, 122(5), 137 and 139(5) as provisions of similar nature have been ruled null and void by the court before. The Administration is 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.

6. It has been decided by the Court of Final Appeal² that having regard to the purpose of the Court of Final Appeal's establishment and the context of the hierarchy of courts, it is clear that the Court of Final Appeal's power of final adjudication, as contemplated by the Basic Law, is by its nature, a power exercisable only on appeal and indeed on final appeal. That being the nature of the power of final adjudication vested in the Court of Final Appeal by Basic Law Article 82, it is not the intent of the Basic Law to give every party to every dispute a right to have the dispute resolved by final adjudication by the Court of Final Appeal. By its very nature, the Court of Final Appeal's power of final adjudication vested by Article 82 calls for and indeed requires regulation, which may include limitation. Such limitation is permitted by implication, having regard to the nature of the power. Courts do not have inherent appellate jurisdiction. Appeals are creatures of statutes, whether they be appeals from statutory tribunals to the courts or appeals from lower courts to higher courts. The legislature in providing for appeals in statutes may limit recourse to the Court of Final Appeal for final adjudication and thus, may limit its power of final adjudication to appeals permitted by such statutes. The limitation imposed must satisfy the proportionality test.

7. Having carefully reviewed the provisions and consulted the Department of Justice, we understand that clauses 120, 122, 137 and 139 provide new conditional channels of appeal by seeking leave to appeal a determination of either the RRT or the RCT to the Court of Appeal (CoA) on a question of law. These provisions do not absolutely limit any recourse to the court for appeal or the Court of Final Appeal's power of final adjudication. According to the Department of Justice, these provisions are in line with the Basic Law. In fact, Article 82 of the Basic Law (which provides that "[t]he power of final adjudication of the Hong Kong Special Administrative Region shall be vested in the Court of Final Appeal of the Region, which may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal") is

² *Solicitor v The Law Society of Hong Kong and Secretary for Justice (2003) 6 HKCFAR 570*

arguably not engaged in the present context. We also consider that these provisions would satisfy the proportionality test (further discussed in paragraphs 12-14 below). As such, we do not consider that clauses 120, 122, 137 and 139 need to be amended.

8. In response to Members' request at the meeting on 19 April 2016, we have looked into the case of *Mok Charles v Tam Wai Ho* (2010) 13 HKCFAR 762. This is a case in which the Court decided that section 67(3) of the Legislative Council Ordinance (Cap. 542) (LCO) had limited the Court of Final Appeal's function under Article 82 of the Basic Law and hence the proportionality test was applied. To satisfy the proportionality test, the restriction or limitation must (a) pursue a legitimate aim; (b) be rationally connected to that legitimate aim; and (c) be no more than is necessary to accomplish that legitimate aim.

9. In applying the proportionality test in *Mok Charles*, Ma Chief Justice (CJ) held that the first two steps of the proportionality test were fulfilled. Further, Ma CJ noted that the speedy determination of an election petition was the aim of section 67(3) of the LCO and considered that it was a legitimate aim and that the relevant statutory provision was rationally connected to the aim. However, Ma CJ found it difficult to appreciate just why there should be an absolute bar on an appeal when comparable legislation (even within the same Ordinance) did not contain such a restriction. The Court of Final Appeal had referred to relevant provisions in the Chief Executive Election Ordinance (Cap. 569) and section 73 of the LCO which provide for a limited right of appeal from an election petition from the Court of First Instance directly to the Court of Final Appeal.

10. Having said that, it must be noted that the facts of *Mok Charles* are very different from those being considered in the present context, being appeal procedures dealing with Legislative Council and Chief Executive elections. Therefore, the difference in the appellate procedures identified within the LCO between section 67(3) and section 73 of the LCO, as well as those relevant to section 67(3) of the LCO and under the Chief Executive Election Ordinance (Cap. 569), which the Court of Final Appeal in the case of *Mok Charles* found it difficult to appreciate, does not exist in the present case. Also, the case of *Mok Charles* deals with absolute bar on an appeal and not leave to grant appeal as in the present case. It has been decided by the CoA that a provision in section 63B of the District Court Ordinance (Cap. 336) which is similar to section

122(5) and 139(5) is consistent with BL 82.³

11. As mentioned above, the provision of new conditional channels of appeals in a statute is arguably not a limitation of recourse to the Court of Final Appeal for final adjudication and it is arguable that Article 82 of the Basic Law is not engaged. However, we are satisfied that such limitation would be consistent with Article 82 of the Basic Law even if Article 82 is engaged by ensuring that it would satisfy the proportionality test for the following reasons.

12. The RRT and the RCT are newly created under the Bill. Clauses 120, 122(5), 137 and 139(5) provide for channels of appeal to the CoA on the determination made by the RRT and RCT. This serves the public interest of providing for a measure of supervision of the determinations of the two Tribunals by the higher courts. In providing that any appeal from the two tribunals to CoA is subject to the granting of leave by the CoA and that CoA's decision as to whether to grant leave is not appealable, it pursues the legitimate aim to prevent the CoA and the Court of Final Appeal from being unduly burdened with unmeritorious appeals so as to enable them to focus on appeals with merits.

13. It is noted that the Bill provides that leave to appeal may be granted in order to secure the just, expeditious and economical disposal of the appeal (clauses 122(3) and 139(3)). In the case of the RRT, the speedy removal of impediments to the orderly resolution and making of rules to prescribe loss-absorbing capacity requirements in order to prepare for the resolution may be of significance for the orderly resolution of financial institutions. In the case of the RCT, the speedy resolution of any review of an independent valuer's decision and dispute in relation to the distribution of surplus would allow the relevant parties to obtain compensation and surplus earlier without going through lengthy appeal proceeding. It would also help to lower the legal costs so as to preserve the amount of compensation and surplus available to the relevant parties after deducting the legal costs.

14. In addition, it should be noted that for the RRT, Schedule 8 to the Bill provides that a person is qualified for appointment as a panel member if the person has practical experience in the financial services sector and understands the resolution regime. As for the RCT, Schedule 9 provides that a person is qualified for appointment as a panel member if the person has relevant practical

³ *Hong Kong Housing Society and Secretary for Justice v Wong Nai Chung trading as Sun Chung Flower Shop (HCMP 880/2009)*

experience in valuation and understands the resolution regime. These criteria require that the members of both the RCT and the RRT possess the expertise to deal with the matters of fact being considered before them, leaving complicated question of laws to be reviewed by the CoA.

Clauses 123 and 140 – Powers of Court of Appeal

Clauses 123(3) and 140(3) stipulate that the Court of Appeal may make any order as to the costs of the appeal that it considers appropriate. In the light of comment of the legal adviser to the Bills Committee, the Administration is requested to clarify if the Court of Appeal allows an appeal, whether the provisions also empower the Court of Appeal to vary a cost order made by RRT or RCT on the case concerned.

15. Our policy intention is that on an appeal, the CoA may (i) make any order to costs that it considers appropriate; and (ii) where it allows an appeal (under clause 123(1)(a)) or varies or sets aside a determination of the Tribunal (under clause 123(1)(c)) include in any such order any costs to be paid by the respondent to the appellant incurred in relation to the Tribunal proceedings. We will move a Committee Stage Amendment to ensure that this policy intention is clearly reflected in clauses 123 and 140.

**Financial Services and the Treasury Bureau (Financial Services Branch)
Hong Kong Monetary Authority
Securities and Futures Commission
Office of the Commissioner of Insurance
May 2016**