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BANKING CRISES AND HONG KONG: REGULATORY MEASURES AND COMPENSATION SCHEMES (BAILOUT, DEPOSIT INSURANCE AND INSOLVENCY LAWS)



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Banking Crises and Hong Kong: Regulatory Measures and Compensation Schemes (Bailout, Deposit Insurance and Insolvency Laws)

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Executive summary

Hong Kong is renowned for the international status of its financial centre. Yet, the financial regulatory system and compensation scheme are not comprehensive enough to deal with global financial crises. This dissertation is going to examine the *ex ante* and *ex post* measures for this purpose in Hong Kong and analyze them in accordance to international standard. The research is trying to find out possible Hong Kong financial response to crises is a national one and lacks of a bank resolution regime in case of banks failure. The dissertation concludes by giving suggestions to the financial reform in respective areas and the importance of harmonious relationship between *ex ante* and *ex post* measures in providing a comprehensive regulatory and legal regime to deal with banking crises.

Table of Contents

1.	CHAPTER ONE: Introduction.....	1
2.	CHAPTER TWO: Hong Kong v. Global Financial Crises	3
2.1.	The Collapse of Internationally Active Banks such as Lehman Brothers in the US and its impact on Hong Kong Financial Markets.....	3
2.2.	Hong Kong exposure to International Banks' failures.....	8
2.2.1.	Hong Kong Insolvency Law and cases studies	9
2.2.1.1.	Bank of Credit and Commerce Hong Kong ('BCCHK').....	9
2.2.1.2.	Lehman Brothers entities in Hong Kong ('LBHK').....	11
2.2.2.	International cooperation – protocol meetings.....	12
2.2.3.	Cooperation with SFC and the LB parent company in US.....	13
3.	CHAPTER THREE: International Financial Crises and Limits of National Regulatory Measures	15
3.1.	The markets are international	15
3.2.	The contagious effect of the financial crises	17
3.2.1.	Latin American Debt crisis	17
3.2.2.	1997 Asian Financial Crisis	18
3.2.3.	2008 Global Financial Crisis.....	19
3.3.	The response to international financial crises is national response	20
3.4.	The necessity of International Corporation due to insufficient national response	22
4.	CHAPTER FOUR: The Readiness of HK Regulatory Structure to Face International Crises	25
4.1.	Overview of Hong Kong Financial Regulatory structure	25
4.2.	Regulatory Responses to the 2008 Crisis in HK: a United or Divided Response.....	27
4.2.1.	Injection of capital and related monetary policies to banking system.....	27
4.2.2.	Receiving investors complaints and investigation	28
4.2.3.	Setting up Financial Dispute Resolution Centre	29
4.2.4.	Repurchasing of the Minibonds	31
4.2.5.	Setting up Subcommittee in studying issues relating to 2008 financial crisis in Hong Kong.....	32

**Banking Crises and Hong Kong: Regulatory Measures and Compensation Schemes
(Bailout, Deposit Insurance and Insolvency Laws)**

4.3.	The Complexity of the Crises and Simplicity of Hong Kong Regulation ..	33
4.3.1.	Weakness of the Hong Kong financial regulatory system	34
4.3.1.1.	Disclosure-cum-conduct regulation regime	35
4.3.1.2.	Conduct regulation at the point of sale	35
4.4.	Hong Kong Financial Regulatory System: Fall Short of International Standard?	36
4.5.	Preventative Measures and Suggestions	38
4.5.1.	Regulatory Regime	38
4.5.2.	Conduct of Business	40
4.5.3.	Information and Disclosure.....	41
4.5.4.	Risk Assessment	43
4.5.5.	Dispute Resolution and Compensation.....	43
4.5.6.	Investor protection and education	44
4.6.	The Regulatory, Supervision and Enforcement Coordination.....	45
4.7.	International Cooperation with Regulatory Supervisors.....	47
5.	CHAPTER FIVE: The Regulatory Failures and Facing the Consequences with Compensation Schemes	49
5.1.	Bailout	50
5.2.	Deposit insurance.....	52
5.3.	Insolvency Laws	55
5.3.1.	Experience of bank failure in Hong Kong	56
5.3.2.	International Cooperation and Coordination in cross-border bank insolvency.....	57
5.3.3.	Extensive power of bank resolution to deposit insurer.....	61
5.3.4.	Key Attributes of Effective Resolution Regimes for Financial Institutions (‘Key Attribute’).....	64
5.3.4.1.	Difficulties in implementation of Key Attribute.....	65
5.3.5.	Hong Kong situation.....	66
6.	CHAPTER SIX: Conclusion	68
7.	CHAPTER SEVEN: Bibliography	71

1. CHAPTER ONE: Introduction

This paper is going to discuss the banking crises in Hong Kong. It analyses the regulatory *ex ante* measures to prevent financial failure and *ex post* compensation scheme which is comprised of bailout, deposit insurance and insolvency laws to maintain the public confidence in banks and minimize the monetary loss to the taxpayers and depositors. It is going to firstly examine the impact of global financial crises on Hong Kong and the experience in dealing with the collapse of the internationally active banks. Following that is the discussion of realizing the financial market which is becoming an international integrated market under the influence of forces of globalization whereas the financial regulation is limited to national regulation and subsequently it cannot provide a sufficient response to the global financial crises.

After understanding the global trend, it is going to analyze if Hong Kong financial regulatory structure is capable enough to resist the global financial crises by exploring its weakness and comparing its preventative and compensation measures with international standards. Suggestions on preventative measures will be given which are evidentially supported by the regulators in Hong Kong. In regard to the *ex post* measures, three types of compensation scheme, which are bailout, deposit insurance

and insolvency laws will be critically examined and analysed, for instance if Hong Kong cross-border insolvency framework meet the conditions for handling the effects of the international financial crises. The dissertation will be concluded by emphasizing the importance of harmonious relationship between ex ante and ex post measures.

2. CHAPTER TWO: Hong Kong v. Global Financial Crises

This chapter discusses the impact of the collapse of internationally active banks in Hong Kong and how Hong Kong government and legal system react to the financial crises, in particular the insolvency of internationally active banks.

2.1. The Collapse of Internationally Active Banks such as Lehman Brothers in the US and its impact on Hong Kong Financial Markets

Hong Kong has experienced twice the collapse of Internationally Active Banks. They are Bank of Credit & Commerce International ('BCCI') and Lehman Brothers Holding Limited ('LB'). Their impacts were enormous to the banking system and financial market in Hong Kong.

In July 1991, one of the substantial retail banks, Bank of Credit and Commerce Hong Kong (BCCHK) was closed.¹ BCCHK is a direct subsidiary of the BCCI and is owned

¹ Raymond Li, "Banking Problems: Hong Kong's experience in the 1980s" (1999) BIS Policy Paper, Bank for International Settlements 133

by the Government of Abu Dhabi. Around 40,000 depositors with HK\$10.85 billion in deposits were seriously affected. Numerous people conducted demonstration on the street in request for the refunds and urged Hong Kong government to bail out BCCHK. The bank failure also triggered bank run on other four banks in Hong Kong, including Standard Chartered and Citibank. A survey found out that 28% of Hong Kong interviewers had no confidence on the banking system during that time. On the other hand, such disaster negatively affected the financial market in Hong Kong. The Hang Seng Index plummeted. The Government responded by injecting \$60 million into the banking system.² After several rescue attempts had been failed due to the many unrecorded liabilities, the Hong Kong court finally ordered BCCHK to be wound up on 2 March 1992.³ Consequently, most of the depositors in BCCHK received refund almost 100% of their money in liquidation.⁴

The failure of BCCHK showed that the liquidation of retail bank did cause substantial systemic effect. For instance, bank run damages the public confidence to banks and causes financial instability. The problem was even worse when there was no deposit insurance scheme during 1991.

² Derek Roebuck, S. H. Ko, Philip Lawton, S.W. Leung, Dharendra K. Srivastava and Peter Tashjian, *Law Relating to Banking in Hong Kong* (Hong Kong University Press, 1994) 307

³ *ibid* 308-309

⁴ Hong Kong Deposit Protection Scheme, <<http://www.dps.org.hk/en/background.html>> accessed 12 August 2013

In 2008, Hong Kong encountered another internationally active bank failure which contributes to a global financial crisis. The collapse of LB triggers several impacts in Hong Kong, including the near failure of American International Group ('AIG'), substantial foreign exchange losses of CITIC Pacific, bank run on Bank of East Asia (BEA).

AIG faced the liquidity crisis when LB was bankrupt since it had sold credit protection in form of credit default swap (CDSs) on collateralized debt obligations which had decreased in value after the collapse.⁵ It also triggered the insurance policyholders of its subsidiary AIA (HK) to redeem their policies.⁶ The United States Federal Reserve Bank stepped in to prevent the collapse of AIG. Such nationalization avoided deterioration of the consequence in Hong Kong during the financial crisis.⁷

The crisis caused the dramatic decline of the Australian dollar against the US dollar in foreign exchange markets. CITIC Pacific suffered substantial loss on a structured

⁵ Morgenson, Gretchen, "Behind Insurer's Crisis, Blind Eye to a Web of Risk" (*NY Times*, 29 September 2008) <<http://www.nytimes.com/2008/09/28/business/28melt.html>> accessed 13 August 2013

⁶ Arner, Douglas W., Hsu, B.F.C. and Da Roza, Antonio M. , "Financial regulation in Hong Kong: Time for a change" (2010) 5(1) *Asian Journal Of Comparative Law* 1, 14

⁷ *ibid*

**Banking Crises and Hong Kong: Regulatory Measures and Compensation Schemes
(Bailout, Deposit Insurance and Insolvency Laws)**

derivatives contract “accumulators”.⁸ It also affected the bank run on BEA which was the Hong Kong’s fifth biggest bank during that time. The bank run began after BEA had revealed its substantial losses in equity derivatives. It was settled when HKMA announced the HKDPS will fully coverage the deposit of banks in Hong Kong.⁹

After LB filed for bankruptcy protection under Chapter 11 of US Bankruptcy Code, the Hong Kong stock market fell abruptly and Hang Seng Index fell below 16,500.¹⁰

Besides, eight LB entities in Hong Kong (‘LBHK’) were put into liquidation, including Lehman Brothers Asia Limited (‘LBAL’) which was the arranger for LB structured products sold in Hong Kong, i.e. Minibonds.¹¹ According to information of the HKMA, LB structured products were sold around HK\$20.23 billion to over 43,700 investors through retail banks, including HK\$11.2 billion in Minibonds held by about 33,600 investors.¹² They were distributed by 16 retail banks and several securities brokers.¹³

⁸ *ibid*

⁹ “HK Monetary Authority informs about changes in Deposit Protection Scheme” (*Hong Kong Financial News*, 16 September 2010)
<<http://hongkongfinancialnews.wordpress.com/2010/09/16/hk-monetary-authority-informs-about-changes-in-deposit-protection-scheme/>> accessed 10 August 2013

¹⁰ Bank of China (Hong Kong), “The Hong Kong Economy in the Shock of the Lehman Wave”, (*HKTDC Research*, 30 September 2008)
<<http://economists-pick-research.hktdc.com/business-news/article/Economic-Forum/The-Hong-Kong-Economy-in-the-Shock-of-the-Lehman-Wave/ef/en/1/X000000/1X0022P5.htm>> accessed 10 August 2013

¹¹ Legislative Council of the Hong Kong Special Administrative Region, “Report of the Subcommittee to Study Issues Arising from Lehman Brothers-related Minibonds and Structured Financial Products” (June 2012) 22 [Subcommittee Report]
<http://www.legco.gov.hk/yr08-09/english/hc/sub_com/hs01/report/hs01_rpt.htm> accessed 1 August 2013

¹² Hong Kong Monetary Authority, “Report of the Hong Kong Monetary Authority on Issues Concerning the Distribution of Structured Products connected to Lehman Group Companies” (31

Once the insolvency of the LB occurred, the Minibond-holders would only be limited to realize the collateral which could be less than the principal invested amount.

Besides the negative impact to the financial market and economy of Hong Kong after the collapse of LB, it also affected the innocent investors who were misled by the banks staff that these financial products were safe and of low risk. However, the relevant prospectuses of Minibonds and other LB structured products states that they were not suitable for all investor or inexperienced investors. Some of these products were offered by way of private placement to ensure that the purchasers were sophisticated investors with experience in these matters.¹⁴ As a consequence, the retail investors suffered tremendous loss and doubted whether sufficient regulations had been worked out in supervising the conduct of the bank advisers in selling LB Minibonds.

In short, the impact of the collapse of internationally active banks in Hong Kong affects significantly the financial market as well as the public. Bank run reflects that the public confidence towards the banking system in Hong Kong is not strong enough whenever banking crises arise. Lack of liquidity among banks is another obvious problem where

December 2008) [HKMA review report]
<http://www.hkma.gov.hk/media/eng/doc/other-information/lehman_report.pdf> accessed 1 August 2013

¹³ Subcommittee Report (n 11) para. 2.6

¹⁴ Ibid, para. 2.17

the Government has to inject substantial capital to stabilize the banking system. Most importantly, the financial regulation is not comprehensive enough to strengthen public confidence in banks when there are financial crises, including conduct of sales by bank staffs and compensation scheme in resolving banks.

2.2. Hong Kong exposure to International Banks' failures

Hong Kong does not have a resolution statutory regime or insolvency laws for International banks. BCCI and LB were liquidated under the Hong Kong Bankruptcy Ordinance (cap 6) 1931 which is based on the United Kingdom Bankruptcy Act 1914. Generally, Hong Kong courts will recognize a foreign liquidation that is granted under the law of the jurisdiction of the company's incorporation.¹⁵ Foreign companies can be wound up in Hong Kong pursuant to Section 327 of the Hong Kong Companies Ordinance ('CO') provided that a sufficient connection with the jurisdiction is shown and there is a "reasonable possibility of benefit for the creditors from winding up", the court has jurisdiction to wind up the foreign company under the common law.¹⁶

¹⁵ *Re Irish Shipping* [1985] H.K.L.R. 437, 439

¹⁶ *Re A Company* (No. 00359 of 1987) [1988] Ch. 210

2.2.1. Hong Kong Insolvency Law and cases studies

A company is allowed to be organized or restructured under section 166 of Companies Ordinance¹⁷ ('CO') in Hong Kong. When a company is under the process of bankruptcy, a liquidator will be employed and has the power to propose a compromise or arrangement between the company and its creditors or shareholders.¹⁸ However, it rarely happened in Hong Kong. The reason is that secured creditors are reluctant to modify their rights regarding the veto power over the restructuring process. More problems may appear in transnational insolvency cases. Foreign courts may refuse to recognize under S166 of CO as it might modify or discharge contracts that are governed by non-Hong Kong law. Hence, it is suggested that the scheme needs to be proposed in all affected jurisdictions.¹⁹

2.2.1.1. Bank of Credit and Commerce Hong Kong ('BCCHK')

On 8 July 1991, the Financial Secretary of Hong Kong presented a petition to wind up BCCHK. The winding up petition was filed under Section 53(1)(c)(iii) of Hong Kong

¹⁷ Cap. 32

¹⁸ Section 237 and 254 of Companies Ordinance (Cap 32)

¹⁹ Booth, C D., "The Transnational Aspects of Hong Kong Insolvency Law" (1995) 2(1) *Southwestern Journal of Law and Trade in the Americas* 46, 48-9

Banking Ordinance ('HKBO'). The Official Receiver was appointed as the provisional liquidator. On 1 September 1991, the Hong Kong Chinese Bank ('HKCB') which was a subsidiary of Indonesia's Lippo Group indicated an interest to take over BCCHK. At last, HKCB abandoned its action due to the massive unrecorded liabilities which Abu Dhabi and Hong Kong governments would not guarantee.²⁰ On March 1992, the Hong Kong High Court ordered the winding up of BCCHK.

During the winding up, a scheme of arrangement was proposed under S 166 of the CO. It was the obligation of BCCHK to pay full claims to all unsecured creditors who were owed less than HK\$100,000. The scheme was approved by creditors and was sanctioned by the Hong Kong High Court in September 1992.²¹ One year later, BCCHK was awarded judgment in New York to transfer US\$25 million to Hong Kong for distribution in the Hong Kong liquidation.²² In March 1994, BCCHK's unsecured creditors received the full payment according to the scheme while those owed more than HK\$100,000 received 64% of their claims.²³ According to Mr. Eddie Middleton, the liquidator of both BCCHK and LB in Hong Kong, the creditors of the BCCHK were

²⁰ Srivastava D.K., "The Collapse of the Bank of Credit and Commerce Hong Kong: Internal Failure or System Failure" (1991) 1 *Australian J. Corp. L.* 170-172

²¹ BCCHK Scheme of Arrangement and Attached Explanatory Statement (6 August 1992)

²² Gren Manuel, "BCCHK Wins US\$25m Cash Ruling", *South China Morning Post*, (10 September 1993)

²³ Annual Departmental Report of the Hong Kong Official Receiver 1993-1994 P. 9

paid in full by 1998.²⁴ Until 26 March 2013, all the entities of BCCL were finally dissolved.²⁵

2.2.1.2. Lehman Brothers entities in Hong Kong ('LBHK')

In September 2008, eight Hong Kong companies in the LB filed winding up petitions to the court according to Section 179(1) of the CO. Applications were also made for the appointment of provisional liquidators pursuant to Section 193 of the CO. They were approved on 17 September 2008. Winding up order was made in November 2008. Four months later, the provisional liquidators became liquidators of LB in Hong Kong. In the same month, they applied to the court in seeking the direction on the assessment of remuneration and disbursements.

The court ordered that during the provisional period, which was from their appointment to the date of appointing as liquidators, the provisional liquidators and their agents were subject to 75% of the amount sought as an interim payment while 100% of their other

²⁴ Hong Kong Institute of Certified Public Accountants, "Liquidating Lehman: How KPMG is tackling the world's largest bankruptcy" (2010) 6(5) *Driving Business Success* 26

²⁵ Andrew Bolton, "Liquidation lessons – what BCCI's wind-down tells us about the post-Lehman world" (*Legal Week*, 21 Jun 2013)
<<http://www.legalweek.com/legal-week/analysis/2275442/liquidation-lessons-what-bccis-wind-down-tells-us-about-the-postlehman-world>> accessed 5 August 2013

disbursements.²⁶ In regarding the assessment of remuneration, the court concluded that it had the inherent jurisdiction to determine the assessment of provisional liquidation throughout the periods before and after the granting of winding-up order on the basis of the Maxwell principles²⁷. The court was also empowered to appoint a suitably assessor to assist in the determination of the fees. Due to the complexity of the liquidation of LB, the court was allowed exercising its power to appoint assessor and remained the final decisions on the fees rather than Tax Registry.²⁸

2.2.2. International cooperation – protocol meetings

In May 2009, 10 Official Representatives including Hong Kong signed a Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies ('LB Protocol').²⁹ It is a nonbinding agreement which aims to share information and data, to facilitate communication, to coordinate the multiple proceedings in different countries and to find consensual and negotiated solutions to the unique problems arising from international insolvency proceedings.³⁰ The ultimate goal is to maximize efficiency

²⁶ *Lehman Brothers Securities Asia Ltd (No 2)* [2010] HKLRD 58

²⁷ *Re Peregrine Investments Holdings Ltd (No 1)*[1998] 3 HKC 1 CFI

²⁸ *Lehman Brothers Securities Asia Ltd (No 2)* [2010] HKLRD 58

²⁹ Hong Kong Institute of Certified Public Accountants, "Liquidating Lehman: How KPMG is tackling the world's largest bankruptcy" (2010) 6(5) *Driving Business Success* 25

³⁰ Cross-border Insolvency Protocol for the Lehman Brothers Group of Companies
<<http://www.globalturnaround.com/cases/Lehman%20Protocol.pdf>> accessed 6 August 2013

and minimize dispute among debtors, creditors and tribunals from the entire world.³¹

Scholar suggested that the protocol should be based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvencies as statutory solutions to international insolvency problems.³² Nonetheless, Mr. Middleton thinks that litigation was unavoidable because it was very difficult to reach a common consensus in particular to those terms that would expose risks to potential claims and liabilities to the creditors and to the court.³³ Yet, the group had come up with some huge achievements on reaching consensus on the use of Lehman's books as a basis for intercompany claims and on a valuation methodology for intercompany trades such as stock loans, over-the-counter derivatives and repos.³⁴

2.2.3. Cooperation with SFC and the LB parent company in US

Besides the international cooperation in dealing with group insolvencies, liquidators for LBHK also have to cooperate with regulators. In August 2009, the High Court ruled

³¹ Official Representatives and other Participating Affiliates Pursuant to the Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies: Report of Activities (15 January 2010) <<http://www.ekvandoorne.com/files/official-representatives-report.pdf>> accessed 6 August 2013

³² Jamie Altman, "A test case in international bankruptcy Protocols: The Lehman Brothers Insolvency" (2010-2011) 12 *San Diego Int'l L.J.* 463, 465

³³ Hong Kong Institute of Certified Public Accountants (n 29) 26

³⁴ *ibid.*

that Lehman Brothers Asia Ltd (in liquidation) must disclose records to the SFC for its investigation of the offer and marketing of Minibonds.³⁵ Due to the complexity of the corporate structure, it is necessary to settle the claims within groups. In 2011, Hong Kong liquidators for Hong Kong reached an agreement settling all intercompany claims with Lehman Brothers Holdings Inc. in the U.S.³⁶

To conclude, the collapse of BCCHK and LBHK posed significant effect in Hong Kong, such as public confidence in banks. It also reflected the incomprehensiveness of the preventative financial regulation and compensation scheme. A clear and sound bank resolution regime is not adopted. Legal areas in relation to the bank insolvency are still left to the court or legislation to solve, such as assessment of remuneration and disbursements to liquidators. Internationally active banks operate on a global basis, as well as insolvency. Hence, international cooperation is also crucial even though it is challenging and difficult.

³⁵ Securities and Futures Commission, “High Court rules Lehman Brothers must turn over documents to SFC” (Hong Kong, 21 August 2009)
<<http://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=09PR116>> accessed 14 August 2013

³⁶ Nina Mehra, “Lehman Brothers Holdings Inc. and Lehman Hong Kong Entities Reach Settlement” (3 August 2011)
<<http://eon.businesswire.com/news/eon/20110803007141/en/agreement/lehman/settlement>> accessed 14 August 2013

3. CHAPTER THREE: International Financial Crises and Limits of National Regulatory Measures

3.1. The markets are international

The financial markets are interconnected and they are easily affected by problems arise from any countries. From Latin American debt crisis in 1980s to the global financial crisis in 2008, the consequences of the crisis shows that the world markets are more interconnected and liberated than before. In Latin American debt crisis, the announcement of the declaration from Mexico of the incapability in repaying the debts triggered the proliferation of other debt crises in Latin America, such as Brazil, Venezuela, and Argentina. In 1997 Asian financial crisis, the currency crisis in Thailand spread through other Asian countries, like Indonesia, Hong Kong, Singapore. 2008 subprime mortgage crisis in US affected the financial markets around the world. Thus, financial crisis becomes more difficult to solve as it would spread speedily under the international trading markets.

Financial markets are interlocking networks that involve foreign exchange, securities, commodities and other fungible items of value at low transaction costs and at prices

that reflect supply and demand. Market can be called as the “Network Society” which functions to trade and exchange ideas, goods and services.³⁷ Under the effect of globalization, financial markets have integrated to be an international market. Any institutional failure can be seen as network failure. Any shock or negative effect quickly spread through the world through contagion. However, the relevant policy and regulations are usually national, without considering the international perspectives. In fact, the markets are interconnected and interdependence. A national crisis can transmit globally to the networked world.³⁸

Financial crises usually begin with the failure of a national market. This failure is quickly contagious to other markets or other regions in the world. In Latin American crisis in 1980s, the crisis began with the incapability of repaying the debt in Latin America region as Mexico’s default. In Asian financial crisis in 1997, the crisis began with the collapse of currency market in Thailand. In 2008 global financial crisis, the crisis was triggered by the collapse of the internationally active bank in the US. All these crises spread globally in a short time.

³⁷ Sheng, Andrew, *From Asian to global financial crisis: an Asian regulator's view of unfettered finance in the 1990s and 2000s* (Cambridge University Press, 2009) 8

³⁸ *ibid* 8-10

The crises were regionally concentrated, such as Latin America and Asian regions. They gradually became cross-regional due to the strong economic and institutional linkages among financial markets or the dramatic impact by the region with large economic power. For instance, Japan lent huge amount of loans to Latin America for their oil-exploiting business or infrastructure. Hence, Japan had a strong economic linkage with Latin America. On the other hand, Latin American debt crisis was heavily influenced by economic policies of U.S. who had the strong economic power during that time. In Asian crisis, it demonstrated the close economic linkage and interdependence among Asian countries. Therefore, 2008 crisis illustrated the world economy became an integration of world financial markets.

3.2. The contagious effect of the financial crises

3.2.1. Latin American Debt crisis

In 1980s, Latin America debt crisis resulted from the incapability of Latin America and other developing countries in repaying their huge international debts. The failure was in relation to the rapid growth in the world economy that attracted

U.S. investment in new developing countries. At the same time, the third world developing countries showed speedily growth trading in oil, material and agricultural goods. They required financial assistance in building these businesses and began to borrow large loan from international banks on capital markets. Most of the loans were sovereign and the amount became double in three years. The crisis was triggered from the increasing interest rates set by the Federal Reserve as to combat the oil-based inflation. Since their loans were linked to London Interbank Offering Rate ('LIBOR'), their debt-service costs grew dramatically. The problem spread quickly to the other countries after the Mexico's declaration of inability to repay its international debt. As a result, International Monetary Fund (IMF) and the World Bank had to intervene and rescue them.³⁹

3.2.2. 1997 Asian Financial Crisis

1997 Asian financial crisis began by the asset bubbles and the rapid grow of economy which led to increasing real estate price and conducting many foreign direct investment and public infrastructure projects. As a result, they borrowed huge amount of loans from banks. In order to control the inflation, the United States Federal Reserve raised its interest rates. Due to the fluctuation of property market in Thailand, the

³⁹ David Felix, "Latin America's Debt Crisis" (1990) 7(4) *World Policy Journal* 733

currency traders, or called speculators, started attacking the Thai baht's peg to the U.S. dollar. As Thailand has limited foreign currency reserve, the Thai Government was forced to float baht and resulting in slumping. Such devaluation spread through other Asian countries, such as Indonesia, Malaysia, Singapore, Japan, South Korea and Russia.⁴⁰ Although most of the governments of Asia had seemingly sound fiscal policies, the IMF stepped in to initiate a \$40 billion program to stabilize the currencies of South Korea, Thailand and Indonesia which economies were hit by this financial crisis.⁴¹

3.2.3. 2008 Global Financial Crisis

The latest global financial crisis happened in 2007-2008. Similar to Asian financial crisis, it began with the existence of asset bubbles, excessive lending and leverage, inadequate supervision on innovative structured products selling to investors. The formation of housing bubbles and the leverage was from the process of securitization which is the repackaging the mortgage loans bought from the mortgage issuers and becoming mortgage-backed securities (MBS) and collateralized debt obligations (CDO)

⁴⁰ *ibid* p.27-28

⁴¹ Frontline, "Timeline of the panic" (*PBS*)
<<http://www.pbs.org/wgbh/pages/frontline/shows/crash/etc/cron.html>> accessed 17 August 2013

which were sold to investors around the world. The investments were therefore leveraged up to 30 to 40 times comparing to their investment. Consequently, as the number of houses sold reached the peak and the house price dropped, many of the borrowers started defaulting on their mortgages loans. Many subprime lenders filed for bankruptcy, including Lehman Brothers. Other investment banks were either sold to other banks or bailed out by the U.S. federal government, resulting in downturns in stock markets around the world. Consequently, it affects the entire world significantly.

3.3. The response to international financial crises is national response

Despite the contagious effect to other nations or regions, the responses, whether *ex ante* preventive regulation or *ex post* compensation schemes, towards crises are different in various countries.⁴² Affected nations came out with their own bailout package by their own government and conducted relevant financial regulatory reform. Some countries sought help from international organizations.

In 2008 financial crisis, the U.S. government enacted National Economic Stabilization

⁴² Gerald Tan, *The Asian Currency Crisis* (Times academic press, 2000) 156

Act of 2008 for the purpose of collecting billions of money to purchase MBS. It acts like to bailout in the financial system. In Asian financial crisis, the affected countries sought help and borrowed loan from International Monetary Fund and the World Bank. In return, these countries were requested to adhere to strict conditions, such as cutting public spending, higher taxes and interest rates, even to close the troubled financial institutions. Despite the rigorous protests by the public, the plan turns out to be effective when the economy gradually recovered from the crisis and even growth during 2008 financial crisis.⁴³

Latin America was unable to repay the debt and therefore they turned to IMF who required Latin America to make economic reforms that favoured free-market capitalism⁴⁴ and adopted austerity plans. Even though they had caused the economy of Latin America suffered at the beginning, the recovery was significant and the economy was still growing after 2008 global financial crisis according to the World Bank report.⁴⁵

⁴³ The World Bank, "Latin America will grow in 2013 despite global crisis" (18 April 2003) <<http://www.worldbank.org/en/news/feature/2013/04/18/economia-latinoamerica-2013>> accessed 17 July 2013

⁴⁴ Manuel Pastor, "Latin America, the Debt Crisis, and the International Monetary Fund" (1989) 16(1) *Latin America's Debt and the World Economic System* 79

⁴⁵ The World Bank (n 43)

3.4. The necessity of International Corporation due to insufficient national response

From the fact that the crisis is happening one after another, it can be proved that the responses to the crises were not sufficient. The national regulatory efforts, monetary policies and bailout solutions can only settle the appearing problem nationally. It does not solve the root causes of the crises and the contagious effect it brought to the whole world.⁴⁶

In 2008 Global financial crisis, many countries adopted unilateral actions against the crisis. The government spent billions of dollars to bailout the troubled banks due to 'too big to fail' theory and purchased all the MBS from the investors for the sake of settling the problems in short term only. Despite the fact that some nations take effort in regulatory reforms which is based on international principles, it is not sufficient for only a few nations to take such reform against global financial crisis. International cooperation is required but it does not exist at the moment.

International cooperation is required to prevent financial crises in long term. IMF and the World Bank are not regarded as one of the kinds of setting model of international

⁴⁶ Douglas Arner and Jan-juy Lin, *Financial Regulation: a guide to structural reform* (Sweet & Maxwell Asia, 2003)

financial system. However, financial regulations have been developed through soft-law bodies, such as Basel Committee, International Organization of Securities Commissions (IOSCO), International Association of Insurance Supervisors ('IAIS') and financial Stability Board (FSB). However, only the members of the organizations are obliged to take the measures. Since 2008 crisis, realizing that the financial market is highly interconnected, it is necessary to set a platform to address the interdisciplinary nature of the financial crisis.⁴⁷ FSB now have to monitor the global financial stability and promote reforms. Despite the fact that it becomes a global financial regulatory group, it is still yet to include all the nations in this group.

The cross-border contagious effect can be reduced in short term by contingency monetary policy with the consultations of central banks. However, in longer run, the cooperation in G20 is not sufficient to reduce the probability of future crisis. Therefore, the international cooperation with the developing countries has to be considered. Global standards for prudential supervision and financial regulations are required. More cooperation has to be attained in order to monitor and enforce these standards in order to achieve a stable and healthy global financial market.⁴⁸

⁴⁷ Chris Brummer, "Origins of the Financial Crisis and International/ National Responses An Overview" (2010) 104 *Proceedings of the Annual Meeting (American Society of International Law)* 436

⁴⁸ Ralph C. Bryant, "International Cooperation for the financial crisis" (*Brookings*, 2 October 2008) <<http://www.brookings.edu/research/opinions/2008/10/02-financial-crisis-bryant>> accessed 18 July

International collaboration has to be achieved by gathering the nations in acting towards the same goal to solve the financial crisis internationally. Such cooperation can be emerged when the creditor countries find adequate private returns that can motivate them to take actions in crisis management.⁴⁹ The private returns can be substantial benefits to their own countries, such as the national financial stability or improving bilateral relations with trading partner. Also, it is important to note that the strong economic linkage and interdependence with other countries in trading and financial activities is also crucial in maintaining the economic stability of their own countries. As such, it creates peer pressure to other countries to solve the financial crises collectively.⁵⁰ Such practice can improve the harmonious relationship between *ex ante* and *ex post* measures on a global basis.

2013
⁴⁹ Saori N. Katada, *Banking on Stability: Japan and the Cross-Pacific Dynamics of International Financial Crisis Management* (The University of Michigan Press, 2001) 210-211
⁵⁰ *ibid* 212

4. CHAPTER FOUR: The Readiness of HK Regulatory

Structure to Face International Crises

4.1. Overview of Hong Kong Financial Regulatory structure

Hong Kong Financial Regulatory system is a sectoral structure⁵¹ which separate regulators for each financial sector. In Hong Kong, it is comprised of four major sectors. They are banking, securities, insurance and pensions. Each sector has its own supervisory body.⁵² They are Hong Kong Monetary Authority (HKMA), Securities and Futures Commission (SFC), the Office of the Commissioner of Insurance (OCI) and the Mandatory Provident Funds Schemes Authority (MPFA) respectively. However, banking regulation is institutional which all types of activities conducted by any financial intermediary are regulated by one regulator.

The financial regulation is operating under three tiers. The first tier is the Government: the Financial Secretary which is to responsible for overall policy, and the Financial

⁵¹ Arner, "Financial Regulation in Hong Kong: Time for a Change" (n 6) 1

⁵² Douglas Arner, Berry Hsu and Antonio Da Roza, "The Global Credit Crisis: Implications for Financial Regulation in Hong Kong" (*Hong Kong Lawyer*, 2009)
<<http://law.lexisnexis.com/webcenters/hk/The-Global-Credit-Crisis-Implications-for-Financial-Regulation-in-Hong-Kong>> accessed 21 July 2013

Services and the Treasury Bureau ('FSTB') is responsible for turning the strategic decision and policies into regulations for entire and individual sectors of the financial system.⁵³ The second tier is a series of regulatory bodies which each of them operates within the framework to issue relevant regulations. The third tier is composed of self-regulatory organizations (SROs) which are responsible for overseeing of the activities of their members under the supervision of relevant regulatory body. For instance, Hong Kong Exchanges and Clearing Limited which control and operate the stock and future exchange and related clearing houses, is under SFC supervision.⁵⁴

The four regulatory bodies work and supervise independently their respective sectors. Nevertheless, in order to enhance the cooperation and coordination between regulators, a Cross-Market Surveillance Committee is established to exchange market information and to formulate actions together for facilitating the supervision of the financial institutions. In 2003, it was divided into two separate committees, Financial Stability Committee and the Council of Financial Regulators. The former is to monitor the functioning of the financial system in Hong Kong and to deal with the cross-market issues and coordinating responses. The latter is to maintain the financial stability and to promote the development of financial market in Hong Kong. Additionally, Memoranda

⁵³ *ibid*

⁵⁴ *ibid*

of Understanding set out the operational framework for cooperation among regulatory bodies and SROs in examining the overlaps and gaps in their roles and responsibly in the financial system.⁵⁵

4.2. Regulatory Responses to the 2008 Crisis in HK: a United or Divided Response

4.2.1. Injection of capital and related monetary policies to banking system

Immediate response had been taken starting from 27 September 2008. HKMA injected HK\$24.8 billion actively and HK\$54.8billion passively in the banking system after the strong-side Convertibility Undertaking was triggered. From 2 October 2008 until the end of March 2009, HKMA provided liquidity assistance to licensed banks. On 14 October, the Financial Secretary announced that the guarantee repayment of all deposits held in authorized institutions in Hong Kong.

On 21 November 2008, HKMA announced the adoption of flexible approach on the capital adequacy ratio of individual banks. SFC also offered a one-off waiver of the

⁵⁵ Arner, "Financial Regulation in Hong Kong: Time for a Change" (n 6) 7-8

annual license fees from over 37 000 financial intermediaries for one year to help to relieve the cost burden on intermediaries during the financial crisis.⁵⁶ Moreover, an arrangement was made by HKMA with the People's Bank of China ('PBC') to allow Hong Kong subsidiary banks operating in the Mainland China to approach PBC if liquidity support was needed.⁵⁷ Hence, HKMA provided immediate liquidity support to the banking system in Hong Kong as well as the Hong Kong subsidiary banks in the mainland China temporary. HKMA and SFC also laid out measures that favoured banks and other financial institutions to alleviate their financial burden.

4.2.2. Receiving investors complaints and investigation

On the other hand, another phenomenon rapidly appeared in Hong Kong. A large number of complaints were received by HKMA and SFC after the collapse of Lehman Brothers in September 2008 as the investors suffered from significant losses from the purchase of Minibonds which were claimed to be misled by the staffs of the distributing banks. On 13 October 2008, HKMA had received over 9000 complaints related to

⁵⁶ Trade and Industry Department, "Measure adopted in response to the Financial Tsunami" (Paper Ref: TFEC-INFO-10, 15 June 2009)

⁵⁷ Commerce and Economic Development Bureau, Measures adopted in response to the Financial Tsunami (Paper Ref: TFEC-INFO-01 ,December 2008) 1-4

Lehman Brothers. The number was increased to 21,263 by the end of July 2012⁵⁸. SFC received 7,712 complaints against distributing banks.⁵⁹ Therefore, HKMA and SFC had to take immediate response to handle and investigate the complaints.

4.2.3. Setting up Financial Dispute Resolution Centre

On 31 October 2008, the Hong Kong International Arbitration Centre (HKIAC) was appointed by the HKMA for the Lehman Brother-related Investment Products Disputes Mediation and Arbitration Scheme (LB Mediation and Arbitration Scheme).⁶⁰ It was supported and overseen by the HKMA, the SFC and the Legislative Council. The scheme aimed to provide mediation and arbitration services to aggrieved investors in seeking financial compensation from banks. It involved 11 licensed banks and individual investors. If the mediation session was taken unsuccessfully, parties had the option of conducting a binding arbitration by HKIAC if both agreed on it.⁶¹ After a

⁵⁸ HKMA, "Complaints statistics concerning Lehman-related investment products" (26 July 2012 updated)
<<http://www.hkma.gov.hk/media/eng/doc/key-information/press-release/2012/20120727e3a1.pdf>>
accessed 22 July 2013

⁵⁹ Securities and Futures Commission, "Issue raised by the Lehmans Minibonds crisis: Report to the Financial Secretary" (December 2008) [SFC Report]
<<http://www.sfc.hk/web/doc/EN/general/general/lehman/Review%20Report/Review%20Report.pdf>>
> accessed 25 July 2013, para 17.2.1

⁶⁰ Hong Kong International Arbitration Centre, "Lehman Brothers-related Investment Products Dispute" (31 October 2008)

⁶¹ Darwazeh, Nadia, and Friven Yeoh, "Recognition and Enforcement of Awards under the New York Convention - China and Hong Kong Perspectives" (2008) 25(6) *Journal of International Arbitration* 837

year of the launch of the Scheme, 243 cases were handled by the Mediation Office. 85 mediations out of 243 cases were conducted successfully while the remaining cases were settled prior to the mediation. The settlement rate of taking part in mediation scheme was 85%.⁶²

LB Mediation and Arbitration Scheme was proven successfully of adopting mediation and arbitration in resolving commercial and financial matter and provided a useful experience regarding the future development of a financial dispute resolution mechanism. Hong Kong scholar proposed an “In-House Multi-tier Dispute Resolution System” for Hong Kong financial institutions for retail investors to seek financial redress if they had been mis-sold of financial products by banks and financial institutions.⁶³

In relation to the Review Reports of HKMA and SFC, they recommended setting up an independent dispute resolution mechanism for settling the dispute between the investors and financial institutions. After a public consultation conducted in early 2010,

⁶² Hong Kong International Arbitration Centre, "Mediation 100% Success for Lehman Brothers-Related Investment Product Cases" (19 February 2009) <http://www.hkiac.org/documents/Mediation/News/090219_LehmanUpdate_E.pdf> accessed 23 July 2013

⁶³ Shahla F. Ali, John Koon Wang Kwok, “After Lehman: International Response to Financial Disputes – A Focus on Hong Kong” (2011) 10(2) *Richmond Journal of Global Law and Business* 31, 31-32

it was announced in December 2010 that Financial Dispute Resolution Centre ('FDRC') would be established by mid 2012. FDRC is to administer a financial dispute resolution scheme for settling monetary disputes between individual investors and financial institution regulated by HKMA and SFC through mediation and arbitration.⁶⁴

4.2.4. Repurchasing of the Minibonds

Despite the losses suffered by the investors, the Financial Secretary re-affirmed and made it clear that the Government would not use public money to compensate the investors due to unfairness to taxpayers.⁶⁵ Subsequently, on 22 July 2009, SFC, HKMA and the 16 Minibonds-distributing banks jointly announced that they had reached an agreement to repurchase of Lehman Brother Minibonds from eligible customers after the collateral had been recovered.⁶⁶ On 18 July 2013, the SFC and the HKMA announced that an agreement with repurchase offer had also been reached with The Royal Bank of Scotland in relation to the sale of Lehman Brothers-related equity-linked notes to retail clients.⁶⁷ These agreements were declared to be without admission

⁶⁴ Subcommittee Report (n 11) para 6.22

⁶⁵ *ibid* para 6.5

⁶⁶ Securities and Futures Commission, "SFC, HKMA and 16 banks reach agreement on Minibonds" (22 July 2009)
<<http://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=09PR100>> accessed 25 July 2013

⁶⁷ Securities and Futures Commission, "SFC, HKMA and The Royal Bank of Scotland N.V. reach

liability. In consideration of the agreements, SFC and HKMA would discontinue its investigations into the sale and distribution of Minibonds by the Banks.⁶⁸

4.2.5. Setting up Subcommittee in studying issues relating to 2008 financial crisis in Hong Kong

The House Committee of the Legislative Council held meeting on 13 October 2008 and agreed that a subcommittee should be set up to study issues arising from Lehman Brothers Minibonds and structured financial products.⁶⁹ The authorization was delegated from section 9(1) of the Legislative Council (Powers and Privileges) Ordinance⁷⁰ to perform the function of the subcommittee. The subcommittee decided to focus its study on the regulatory issues and the practice of retail banks in the distribution of Lehman Brothers structured products.⁷¹

In short, HKMA and SFC worked closely together to respond the financial crisis in 2008 to stabilize the banking system and handling the complaints. The establishment of

agreement on Lehman Brothers-related equity-linked notes” (18 July 2013)
<<http://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=13PR66>> accessed 25 July 2013

⁶⁸ *ibid*

⁶⁹ Subcommittee Report (n 11) para 1.4

⁷⁰ Cap. 382

⁷¹ Subcommittee Report (n 11) para 1.4

sub-committee is to further investigate the regulatory issues and the cause of the mis-selling structured products to retail investors for the improvement of the Hong Kong regulatory system with recommendations. Therefore, the regulatory responses in Hong Kong could be said as unified and worked together in maintaining the financial stability.

4.3. The Complexity of the Crises and Simplicity of Hong Kong Regulation

The crises happened in Hong Kong are usually influenced by foreign countries, for instance, Asian financial crisis and the recent 2008 financial crisis. Crises are complex issue that comprise of financial market, government policy and economic condition. It is even more complex when it affects globally. Therefore, a strong regulation and good policy are required to go against the financial crises. After the 2008 financial crisis, it shows that Hong Kong financial regulatory system is still full of gaps and flaws that contribute to a strong urge for improvement and even structure reform must be considered. The subcommittee investigated the recent financial crisis and referred the Review reports from HKMA and SFC. They illustrate the weakness of the Hong Kong

financial regulatory system.

4.3.1. Weakness of the Hong Kong financial regulatory system

After the crash of 2008 financial crisis in Hong Kong, problems and weakness of the current financial regulatory system have been evolved. HKMA supervises regulated activities including securities according to the rules and requirements set by SFC.

However, HKMA does not regulate directly the relevant individual (ReIs) who is employed by banks to carry out regulated activities. Therefore, HKMA relied on banks to manage them to comply with the regulation. As a result, HKMA failed to detect early mis-selling structured products to retail investors among banks.

SFC is the regulator of the securities and futures market in Hong Kong. It does not have the power to oversee the regulated activities of banks. SFC has the power to impose disciplinary sanctions on registered institutions and ReIs for their regulated activities under the Securities and Future Ordinance ('SFO')⁷². However, HKMA is responsible for supervising banks, detecting and investigating any non-compliance. Such arrangement of regulatory powers between the two regulators is ineffective to regulate

⁷² Cap. 571

Rels and registered institutions.

4.3.1.1. Disclosure-cum-conduct regulation regime

SFC is responsible for administering the disclosure regime and ensuring the information disclosed in accordance with the requirements stated in the Third Schedule to the CO⁷³ which however provides little guidance on information disclosure on structured financial products. In addition, the quality of the information is concerned. For instance, the information of the prospectus for the Lehman Brothers structured products was not easy to understand. Moreover, it is also noted that those products were issued by making use of certain exemption under CO which did not require SFC's authorization of their documentation if it is complied with disclosure requirement, such as private placement.⁷⁴

4.3.1.2. Conduct regulation at the point of sale

According to the examination done by the Subcommittee, Several deficiencies were identified in compliance with regulatory requirements during the sale of Lehman

⁷³ Cap. 32

⁷⁴ Subcommittee Report (n 11) chapter 4

Brothers structured products. They are product due diligence, provision of staff training and guidance, knowing your clients and performing suitability assessment on customers, how the sales process was conducted by ReIs, the monitoring and internal controls put in place by RIs and their complaint-handling systems. For instance, inappropriate risk ratings to certain structured products, banks training materials containing misleading information.⁷⁵

In short, the Hong Kong financial regulation and regulatory system is far too simple than the complexity of the crises. The complexity of structured financial products requires more comprehensive regulation to monitor.

4.4. Hong Kong Financial Regulatory System: Fall Short of International Standard?

Hong Kong has an important role in the development of international financial standard. For instance, Hong Kong is a membership in the Financial Stability Forum. Hong Kong is required to keep update with the international regulatory changes as its aims to prevent further occurrence of the global financial crises. It can be suggested that Hong

⁷⁵ ibid chapter 5

Kong has met international standard where HKMA has always been keeping pace with. For instance, the Basel rules from Basel Committee on Banking Supervision. Most of the banks in Hong Kong have reached to more than the required eight percent capital ratio.⁷⁶ Recently, HKMA and SFC jointly announced their commitment to comply with the new international regulatory standards on financial market infrastructures. It includes Principles for financial market infrastructures” issued jointly by the Committee on Payment and Settlement Systems (CPSS) of the Bank for International Settlements and the International Organization of Securities Commissions (IOSCO) in April 2012.⁷⁷

On the contrary, Hong Kong financial system was vulnerable to the global financial crises from the past experience. Moreover, after the collapse of LB and the near failure of AIG, Hong Kong still lacks of a comprehensive compensation scheme, such as weakness of the deposit insurance scheme and mechanism for resolution of banks or financial groups failure.⁷⁸ Therefore, it is suggested that Hong Kong should take initiative in improving the financial regulatory system with respect to the international

⁷⁶ Hong Kong Monetary Authority, “Regulatory Framework” (Hong Kong, updated 11 April 2013) <<http://www.hkma.gov.hk/eng/key-functions/banking-stability/banking-policy-and-supervision/regulatory-framework.shtml>> accessed 26 July 2013

⁷⁷ Hong Kong Monetary Authority, “Hong Kong commits to global regulatory standards on financial market infrastructures” (Hong Kong, 28 March 2013) <<http://www.hkma.gov.hk/eng/key-information/press-releases/2013/20130328-6.shtml>> accessed 26 July 2013

⁷⁸ Arner, “Financial Regulation in Hong Kong: Time for a Change” (n 6) 35-36

standard, rather than being a reactionary approach as a result of crisis.⁷⁹ However, it can be argued that financial crises can be unpredictable. Most of the international principles and rules are established after the falls happen. Thus, it is important that regulations have to be effective and comprehensive, but not by quantity, since many regulations create complexity which might dampen the effectiveness.⁸⁰

4.5. Preventative Measures and Suggestions

The Financial Secretary requested SFC⁸¹ and HKMA⁸² to produce reports in relation to the LB incidence. The subcommittee also put forwards recommendations to address the issues. They can be classified into six categories: the regulatory regime, conduct of business, information and disclosure, risk assessment, dispute resolution and compensation mechanism, investor protection and education.⁸³

4.5.1. Regulatory Regime

HKMA recommended that the regulatory framework should be strengthened in order to

⁷⁹ Arner, D W., Hsu, Berry Fong Chung, Da Roza, Antonio M., Da Roza, Francisco A. , Johnstone, Syren and Lejot, Paul, “The Global Financial Crisis and the Future of Financial Regulation in Hong Kong” (1 February 2009) Asian Institute of International Financial Law, Working Paper No. 4, 84

⁸⁰ *ibid.*

⁸¹ SFC Report (n 59)

⁸² HKMA Report (n 12)

⁸³ Arner, “Financial Regulation in Hong Kong: Time for a Change” (n 6) 25

keep pace with the rapid increase in the variety and complexity of the investment products, which could have their origin in other jurisdictions but sold to the public in Hong Kong. It further suggested that all aspects of banks' securities business should be placed under HKMA including registration, standard-setting, supervision, investigation and sanction.⁸⁴ The coordination between HKMA and SFC should be strengthened to set consistent standards of conducts.⁸⁵

SFC observed that the institutional regulation is no longer an optimal structure. It therefore recommended the Government should consider if the present financial regulatory structure is suitable to facilitate its development and to prevent future financial crises.⁸⁶ SFC proposed "Twin Peaks" approach⁸⁷ where financial stability regulation and prudential regulation are enshrined in a single body, while another separate body is responsible for the supervision of the product disclosure and financial market conduct.⁸⁸ SFC thus recommended the Government to take a full regulatory review which has already been initiated by Financial Secretary.

⁸⁴ HKMA Report (n 12) Recommendation 4

⁸⁵ *ibid* Recommendation 9

⁸⁶ SFC Report (n 59) para. 21.3

⁸⁷ *ibid* para 4.1.2 (b)

⁸⁸ M. Taylor, *Twin Peaks: A Regulatory Structure for the New Century* (London: Centre for the Study of Financial Innovation, 1995).

4.5.2. Conduct of Business

In regarding to incident of selling Minibonds to retail investors, HKMA recommended that banks should make clearer differentiation between traditional deposit-taking activities and retail securities business. Several practical measures including the physical segregation of banks' retail securities business from ordinary banking business and from banks' insurance and other investment activities⁸⁹; be aware of the conflict of interest between the staff and customers; making clear the distinction between deposits and investments through signs and warnings; information separation between retail customers deposit and investment accounts; making use of deposit-related information to target retail customers into investment activities should be prohibited.⁹⁰

SFC had similar recommendations that the operation of banks in selling securities should be differentiated from deposit-related service.⁹¹ It further suggested in dealing with the conflict of interest between the seller and customers, any commercial benefits should be disclosed during the sales process.⁹² SFC proposed that investors' claims to collateral proceeds should have priority over the counterparty.⁹³ Such interaction

⁸⁹ HKMA Report (n 12) Recommendation 11

⁹⁰ *ibid* Recommendation 10

⁹¹ SFC Report (n 59) para. 22.5

⁹² SFC, Consultation Paper on Proposals to Enhance Protection for the Investing Public (September 2009), Part III.

⁹³ SFC Report (n 59) para 16.4

between the regulatory regime and private right remains weak.⁹⁴ SFC also

recommended offering investors with appropriate cooling off periods.⁹⁵

The Subcommittee suggested strengthen supervision of registered institutions (RIs) via

both on-site examinations and off-site surveillance⁹⁶, achieving consistency in

standards of practice among RIs by setting benchmarks on key requirements⁹⁷, raising

the minimum academic qualifications of ReIs in selling financial products to

customers⁹⁸ and to facilitate a structured sales process where requisite steps must be

completed before the transaction.⁹⁹

4.5.3. Information and Disclosure

HKMA recommended that the disclosure-based system should remain appropriate for

Hong Kong that is in line with the policy objectives.¹⁰⁰ SFC had similar approach

which recommended Hong Kong should maintain the regulatory philosophy of

⁹⁴ Arner, "Financial Regulation in Hong Kong: Time for a Change" (n 6) 27

⁹⁵ SFC Report (n 59) para 32.6

⁹⁶ Subcommittee Report (n 11) para 4.41

⁹⁷ *ibid* para 8.36

⁹⁸ *ibid* para 8.37

⁹⁹ *ibid* para 9.38

¹⁰⁰ HKMA Report (n 12) Recommendation 1,2

disclosure coupled with conduct regulation of financial intermediaries.¹⁰¹ SFC suggested that one overall disclosure standard should be established for all offering documents¹⁰², enforceable against the person responsible for the documents¹⁰³, reconsidering whether the two public offering regimes should be retained for investment products¹⁰⁴ and examining whether the existing exemptions for SFC authorization of offering documents for investments are too broad.¹⁰⁵

The Subcommittee suggested legislative amendments should be taken place in transferring the regulation of the offer of structured financial products from CO to Securities and Futures Ordinance ('SFO') in May 2011. In such improvement, SFC can issue product codes to prescribe structural requirement in accordance to the nature of the product.¹⁰⁶ In regarding to the disclosure regime, it recommended that the current disclosure regime should be given to treat customers fairly throughout the produce cycle. This approach is called "Treating Customers Fairly" which is introduced by the Financial Services Authority ('FSA') in the UK.¹⁰⁷

¹⁰¹ SFC Report (n 59) para 24.9.1

¹⁰² *ibid* para. 25.5.1

¹⁰³ *ibid* para. 25.5.2

¹⁰⁴ *ibid* para 25.6.1

¹⁰⁵ *ibid* para 25.6.2.

¹⁰⁶ Subcommittee Report (n 11) para 8.24

¹⁰⁷ *ibid* para.7.10

4.5.4. Risk Assessment

HKMA recommended that the institution should disclose the review of a higher risk rating of a product to the customers who is recommended and will purchase the product in due course.¹⁰⁸ The risk assessment is not limited to product, but also to the investors. SFC recommended reviewing the appropriate definition of “professional investors”, the minimum asset portfolio requirement and assessment criteria under the Code of Conduct.¹⁰⁹ SFC also recommended requirements for Intermediaries to adopt suitable criteria for characterizing investors to ensure the suitability of advice of investment products for investor.¹¹⁰

4.5.5. Dispute Resolution and Compensation

The Subcommittee suggested that the regulator should be vested with appropriate statutory powers to order the payment of compensation, such as compensation to aggrieved investors and consideration of disciplinary action.¹¹¹

HKMA recommended that a dispute resolution mechanism should be established for

¹⁰⁸ HKMA Report (n 12) Recommendation 14

¹⁰⁹ SFC Report (n 59) para 29.7

¹¹⁰ *ibid* para 34.3

¹¹¹ Subcommittee Report (n 11) para. 8.9

the financial industry along the lines of a financial services ombudsman.¹¹² SFC recommended that Code of Conduct should be amended to require client agreement to specify a right for clients to have their grievances resolved by a dispute resolution procedure. The government should review the need for a financial ombudsman for dispute resolution.¹¹³

4.5.6. Investor protection and education

The disclosure regime and the disclosure requirements under CO were not sufficient to protect the investors who did not obtain the key information of the financial product in assessing its risks and features. Together with the insufficient conduct regulation at the point of sale, the whole system was not comprehensive enough to protect investor.

Therefore, the Subcommittee suggested that the regulators should set some objective criteria for determining suitable category of persons in acquiring certain specified products. In other words, certain products can only be sold to the designated category of investors.¹¹⁴ For instance, the guidance issued by the National Association of Securities Dealers in US¹¹⁵ and TCF initiative of FSA in the UK¹¹⁶. Furthermore, it

¹¹² HKMA Report (n 12) Recommendation 19

¹¹³ SFC Report (n 59) para 35.3.2

¹¹⁴ Subcommittee Report (n 11) para 8.54

¹¹⁵ *ibid* para 7.34

considers that investor protection should be explicitly stated as one of the Monetary Authority's statutory functions under the Banking Ordinance.¹¹⁷

Investor education is also important to convey proper message unequivocally that investors should exercise due diligence and should not invest in products that they do not understand. SFC and HKMA post the messages online where the elderly and less educated persons might not be able to access. Therefore, it is suggested that this message should be spread out through main channels of media, such as radio and television's advertisements or programs. SFC should also publish leaflets and flyers to prospective investors.¹¹⁸

4.6. The Regulatory, Supervision and Enforcement Coordination

Regulatory measures are effective provided that the enforcement system is efficient and supervision is sufficient. A proper coordination is necessary and crucial. In Hong Kong, for the sake of increasing the linkage between regulators from various sectors, Council of Financial Regulators (CFR) and Financial Stability Committee (FSC) are established.

¹¹⁶ *ibid* para 7.11

¹¹⁷ *ibid* para 8.51

¹¹⁸ *ibid* para 7.23

CFR, which is chaired by Financial Secretary, focus on minimizing the regulatory gaps or duplications among the cross-sector regulatory matters. FSC, which is chaired by the Secretary for Financial Services and the Treasury, is responsible for the monitoring the financial system and developments.¹¹⁹

In addition, Memorandum of Understanding (MoU) was signed between regulators in order to enhance the cooperation. MoU between HKMA and SFC set out the roles and responsibilities of their major functional aspect in the regulatory regime, exchange relevant information and notification or referral of relevant matters.¹²⁰ For instance, the collaboration between HKMA and SFC in regulating all the financial institutions in carrying out regulated activities in Hong Kong. HKMA supervises of the regulated activities by banks on day-to day basis while SFC regulates the financial products and takes enforcement to any non-compliance with the statutory requirements.

Nevertheless, the present enforcement framework over the RIs's conduct of regulated activities with the exercise of regulatory powers by HKMA, MA and SFC. HKMA oversees all the activities of banks, while HKMA is vested with statutory power to

¹¹⁹ HKMA, "Cross-sector co-ordination and co-operation", Mandate and Governance of the Hong Kong Monetary Authority, Section 3, 80

¹²⁰ *ibid* 84

investigate suspected breaches of the Code of Conduct and other regulatory requirements. Yet, it does not have the power to impose sanctions on RIs. Such power is exercised by SFC under SFO after the consultation with HKMA.¹²¹ Thus, such operational complexities are not conducive to effective enforcement. The subcommittee report proposed that if the HKMA had the power in enforcing the regulatory requirements of the conduct of regulated activities, cases of mis-selling relating the Lehman-Brothers structured products to inappropriate investor could have been reduced.¹²²

4.7. International Cooperation with Regulatory Supervisors

Besides the cooperation and coordination within the regulatory sectors of Hong Kong, international cooperation with regulatory supervisors of different jurisdictions are very important in consideration of numerous foreign establishment of banks' subsidiaries and branches operating in Hong Kong. HKMA views that the supervision of foreign branches or subsidiaries is the joint responsibility between host and home supervisors according to the Basel's Committee's Core Principles for Effective Banking

¹²¹ Subcommittee Report (n 11) para 4.42

¹²² *ibid* para 8.15

Supervision.¹²³

HKMA relies heavily on the cooperation of other foreign supervisors to ensure effective consolidated supervision of banking groups. Such cooperation involves information sharing and sharing of supervisory responsibilities. The principle of consolidated supervision, as explained in “Principles for the supervision of banks’ foreign establishments”¹²⁴ set by the Basel Committee, is that parent banks and parent supervisory authorities monitor the risk exposure and capital ratio of their responsible banks and banking groups. This is based on the assumption that financial groups form a single economic entity.¹²⁵

On the other hand, the branches of foreign banks have to follow certain rules as the same as locally incorporated banks on statutory liquidity ratio, on-site examinations by HKMA. They also have to submit returns for their Hong Kong operations, but not capital-based supervisory requirement.¹²⁶

¹²³ Hong Kong Monetary Authority, “Prudential Supervision in Hong Kong” (2002) <<http://www.hkma.gov.hk/media/eng/publication-and-research/reference-materials/banking/pshk.pdf>> accessed 17 August 2013, 5.2

¹²⁴ Basel Committee on Banking Supervision, “Principles for the supervision of banks’ foreign establishments” (1983) <<http://www.bis.org/publ/bcbsec312.pdf>> accessed 17 August 2013

¹²⁵ Rose Maria Lastra, “Cross Border Bank Insolvency: Legal Implications in the case of banks operating in different jurisdiction in Latin America” (2003) *Journal of International Economic Law* 79, 93-94

¹²⁶ Hong Kong Monetary Authority, “Prudential Supervision in Hong Kong” (n 123) 5.3

5. CHAPTER FIVE: The Regulatory Failures and Facing the Consequences with Compensation Schemes

When ex-ante preventive regulatory measure cannot afford the investors and depositors protection against the crises particularly in an international context, a comprehensive ex-post compensation schemes should be worked out to act as a strong shield in maintaining the public confidence to the financial market. There has to be kind of harmony between the regulatory measures and these compensation schemes. The compensation scheme includes bailout, deposit insurance and insolvency laws.

Bailout is often used by the government as a way to save the troubled financial institution, yet it is not a long term and proper solution as it doesn't solve the root of the problem and excessive use of this scheme creates the moral hazard which can encourage the violation of banking and securities regulation. Deposit insurance scheme is to guarantee the certain amount of deposit in the banks for the sake of boosting public confidence to banks. Cross-border insolvency law is to deal with the insolvency of cross-border financial institutions without posing systematic risk on the real economy and maintaining the financial stability.

5.1. Bailout

Bailout is a kind of government intervention for assisting enterprises to overcome financial distress when it is incapable to meet its financial obligation and therefore to prevent failure in the near future.¹²⁷ It aims to save the entities or industry from collapse. It prevents bankruptcy of the enterprise which has systematic effect to the economy and society of the country. Bailout protects employees from unemployment and depositors during financial crisis. They all can benefit indirectly from the bailout.¹²⁸

However, it raises another issue of moral hazard. Since the failure is compensated financially, the incentive in avoiding crisis from happening will be reduced and makes the existence of *ex post* preventive regulatory measures absurd, unless there is a harmony between them, though in an international context it would be very difficult to have both regulation and compensation schemes in tune. Therefore, a general government intervention to bailout the problem institutions would encourage higher risk taking which creates huge losses.

¹²⁷ Cheryl D Block. "Overt and Covert Bailouts: Developing a Public Bailout Policy," (1992) 67(4) *Indiana Law Journal* 962

¹²⁸ *ibid* 955-58

The scholar suggests that a special bailout policy is necessary to balance the advantage of the bailout with a careful consideration of the consequence. A bailout policy should be developed when there is absence of crisis. Guidelines should be established as to determine in what kind of situation and appropriate time in applying bailout policy which can serve the best of the public interest.¹²⁹ On the other hand, scholars argued that government bailout was the most important cause of the crisis in 2008, rather than the bankruptcy of Lehman Brothers.¹³⁰

IMF took part in giving out bailout proposals to many countries which had financial distress. In Latin-American debt crisis, few developing countries accepted the bailout from IMF with the condition that they had to conduct economic reforms, cut expenses through austerity policy and closed down the troubled financial institutions. These mandatory reforms were regarded as inhumane which made their people suffered in the beginning of the reforms. For instance, high unemployment rate and low economic growth. Thus, only few countries received the bailout provided by IMF in Asian financial crisis. Another example is the enactment of the Emergency Economic Stabilization Act of 2008 by the U.S. government. It aims primarily in bailing out the U.S. troubled financial institutions. These responses have been criticized as an

¹²⁹ *ibid* 958-959

¹³⁰ Jeffrey A. Miron, "Bailout or Bankruptcy?" (2009) 29(1) *Cato Journal* 12

inappropriate use of taxpayer money and such bailout was not successfully preventing the contagious effect to the whole world.¹³¹ Many of the countries were seriously suffered from the collapse of the U.S. financial market. Therefore, bailout was not the best solution in resolving the crises. It does not work successfully in every crises and the side effect of moral hazard has imposed a great potential in triggering a bigger crisis in the future.

To regulate the systemic moral hazard after the bailout, scholar suggests a model of preventing risk managers from taking excessive risk during investment. It includes two ways in achieving this. All asset managers are required to put their own money at risk when making trading decisions and the managers will have legal liability to behave according to guidelines in managing risks.¹³² This approach might help in monitoring the behavior of the investment. At the same time, depositors have to be protected as to attain comprehensive measures for compensation scheme.

5.2. Deposit insurance

¹³¹ Nicole Elsasser Watson, "Government Ethics and Bailouts: The Past, Present, and Future" (2010-2011) 95 *Minn. L. Rev.* 1525

¹³² Karl S. Okamoto, "After the bailout: Regulating Systemic Moral Hazard" (2009-2010) 57 *UCLA L. Rev.* 183,185

Deposit insurance is a kind of financial safety net for depositors. It can be implicit and explicit.¹³³ Implicit deposit insurance is the unlimited use of taxpayers' money to subsidize the failed banks and hence provides implicit deposit guarantee to depositors whereas explicit deposit insurance is a scheme that provides limited coverage to the depositors.¹³⁴ The former one can be happened in assisting the insolvent institutions which are too big to fail. The latter one aims to protect small depositors from failed insolvent banks.

Explicit deposit insurance has become popular in the recent years. According to International Association of Deposit Insurers (IADI), the 2011 Annual Survey results showed that the number of countries implementing explicit deposit insurance has been increasing since 1974, from 12 in 1974 to 111 in 2011.¹³⁵

Deposit insurance aims at reinforcing the public confidence and minimizes the possibility of bank runs in order to maintain the bank stability.¹³⁶ However, the empirical results showed that the explicit deposit insurance had stabilizing effect only

¹³³ Asli Demirgüç-Kunt and Edward J. Kane, "Deposit insurance around the Globe: Where does it Work?" (2002) 16(2) *The Journal of Economic Perspectives* 175-195

¹³⁴ *ibid* 176

¹³⁵ International Association of Deposit Insurers, "2011 IADI Annual Survey Results" (2011) <<http://www.iadi.org/di.aspx?id=168>> accessed 25 July 2013

¹³⁶ Kam Hon Chu, "Deposit insurance and bank stability" (2011) 31 *Cato J.* 99

in short run. The effect would be deteriorating over time and it made no difference of whether the explicit deposit insurance is present or not in relation to the likelihood of banking crises occurred.¹³⁷ This is due to the problem of moral hazard resulting from full coverage of the insured deposit.

The coverage limit affects the effectiveness of the scheme. If the coverage limit is low, the scheme does not work effectively to prevent bank runs. If the coverage limit is high or full, the depositors will have low incentive to monitor banks while banks have high incentive to take excessive risk in investment since their deposits are guaranteed. It contributes to moral hazard. Therefore, higher the deposit insurance coverage will intensify the moral hazard problem which entails banking crises in the long run.¹³⁸ For instance, the full deposit insurance scheme in Turkey introduced in 1996, encouraged bank to behave riskier which resulted in banking crisis in 2001.¹³⁹

During the 2008 financial crisis, most of the countries raised their coverage or full deposit guarantee as a temporary measure against the financial turbulence.¹⁴⁰ Hong Kong also adopted the same measure in 2008-2010. Hong Kong Deposit Protection

¹³⁷ *ibid* 276

¹³⁸ *ibid* 112

¹³⁹ Onder, Z., and Ozyildirim, S. "Market Reactions to Risky Banks: Did Generous Deposit Guarantee Change It?" (2008) 36 *World Development* 1415-35

¹⁴⁰ *ibid* 100

Scheme (HKDPS) was introduced in 2006. In September 2008, there was a bank run happened on the Bank of East Asia. HKMA instructed HKDPS to offer full deposit insurance coverage as a temporary measure until the end of 2010. As a result, the bank run in 2008 was saved by the announcement of full deposit guarantee by the HKDPS.¹⁴¹ Subsequently, the coverage was raised from originally HK\$ 100,000 to HK\$500,000 from the beginning of 2011.¹⁴² Therefore, in order to build up market discipline, the coverage limits should be established in covering the vast majority of small depositors the large depositors have incentive to monitor the bank activities.¹⁴³

However, this measure cannot guarantee that it always works in preventing banking crisis. An effective *ex post* compensation scheme cannot be fulfilled without a sufficient liquidation regime for insolvent banks.

5.3. Insolvency Laws

A special resolution regime for banks is crucial in the long run especially in the place where it has experienced bank failure. It includes cross-border bank insolvency, deposit

¹⁴¹ *ibid* 105

¹⁴² *ibid* 104

¹⁴³ *ibid* 76

insurer's extensive power to bank resolution and adoption of Key Attributes of effective Resolution Regimes for Financial Institutions ('Key Attributes'). They are going to be further discussed after introducing the Hong Kong circumstance in resolving internationally active banks.

5.3.1. Experience of bank failure in Hong Kong

According to the details discussed in Chapter 2.2, the experience has shown that bank run occurred after the bank insolvency in Hong Kong. It reflects that the deposit insurance scheme in Hong Kong is not sufficient to respond the banking crises. Public confidence cannot be effectively protected under the present compensation scheme. Hence, a special resolution regime for banks is necessary to liquidate the troubled banks in consideration of the public interest because banks is a special institution which should be differentiated from normal corporations as they have significant impact on the socio-economic development of a society.¹⁴⁴

However, the liquidation proceedings of Hong Kong banks, either local or foreign

¹⁴⁴ Eva Hüpkes, "Insolvency – why a special regime for banks?" 3 Current Developments in Monetary and Financial Law 474 (International Monetary Fund, 2005)

subsidiaries, are in line with the ordinary companies.¹⁴⁵ They both are under the same rule stipulated in the Companies Ordinance¹⁴⁶ and the Bankruptcy Ordinance¹⁴⁷

Moreover, in consideration of a gradually high interconnected and interdependence of banking systems in the world, Hong Kong legislators should raise the awareness the importance of international cooperation by adopting a proper cross-border insolvency regimes.

5.3.2. International Cooperation and Coordination in cross-border bank insolvency

As discussed above, most of the bank's failure in Hong Kong are internationally active banks. In case of these foreign bank establishments fail, cross-border insolvency comes into consideration. However, Hong Kong does not adopt UNCITRAL Model Law on Cross-border Insolvency nor enacted any statutory provisions in recognizing the insolvency procedures commenced in foreign jurisdictions. Instead, recognition of a foreign insolvency proceeding is governed by common law.¹⁴⁸ Generally, Hong Kong court will recognize a foreign liquidation or a foreign court sanctioned restructuring

¹⁴⁵ Lastra (n 125) 81

¹⁴⁶ Cap. 32

¹⁴⁷ Cap. 6

¹⁴⁸ Clarissa Ogden, "Cross-border insolvency in Asia: the bias towards domestic creditors" (2010) *Butterworths Journal of International Banking and Financial Law* 679

arrangement and the appointment of a foreign representative of an insolvent company.

However, Hong Kong courts have discretion to refuse if such recognition of foreign insolvency would be contrary to public policy, or in breach of the rules of natural justice, or to enforce a foreign penal or revenue law.¹⁴⁹

Two approaches have been considered to enhance the cooperation and coordination different countries in handling cross-border bank insolvency. UNCITRAL Model Law on Cross-border Insolvency was considered in the Hong Kong Consultation Paper on the Winding-Up Provisions of the Companies Ordinance in 1998. It is a framework that provides recognition, the consequences of recognition, cooperation and communication between courts. It aims to facilitate the cross-border insolvencies as to harmonize the legal approaches with different jurisdictions. It is to achieve justice and fairness despite of different approaches in different national insolvency laws, for instance, equal treatment to creditors and concurrent proceedings.¹⁵⁰

Nonetheless, the Sub-committee on Insolvency in Hong Kong expressed that they should exercise it with a degree caution and wait until a mature stage that is suitable for

¹⁴⁹ *ibid* 680

¹⁵⁰ “Challenges of Cross-Border Insolvencies” (Tanner De Witt, 16th Commonwealth Law Conference, Hong Kong)
<<http://www.tannerdewitt.com/media/publications/challenges-of-cross-border-insolvencies.php>>
accessed 26 July 2013

Hong Kong.¹⁵¹ First, many jurisdictions have not adopted the Model Law. Second, even though it provides a framework, it leaves much discretion to the local court when any doubtful is raised. Different result may comes out in different courts and in different factors in common law or the Model Law. Third, the court might have the same law and rule in achieving the same purposes which are cross-border recognition and assistance. For instance, the UK has its common law and also the EU measures on the same function. Therefore, it is another question in dealing with the co-existence, such as replacement of the existing system or not.¹⁵²

Thus, Hong Kong should examine the existing system and figure out any improvement could be made through comparing it with the Model Law. Procedural justice and better communication between courts from different jurisdictions can be achieved if it is implemented through enacting legislation in regarding to the cross border insolvency rather than leaving much discretionary to the court. For instance, setting the ambit of provision of assistance.¹⁵³

¹⁵¹ *ibid*

¹⁵² Peter Arden, "Recognition and Assistance in Cross-Border Insolvency Cases" (*Hong Kong Lawyer*, 6 March 2009)
<<http://law.lexisnexis.com/webcenters/hk/Hong-Kong-Lawyer-/Recognition-and-Assistance-in-Cross-Border-Insolvency-Cases>> accessed 26 July 2013

¹⁵³ *ibid*

Another approach is suggested by Dr. Lastra, she considered the principles developed by the Basel Committee on Banking Supervision in relation to the cross-border supervision of branches and subsidiaries. She analyzed that the principles could deal with insolvency of banks which operating in different jurisdictions. According to the Basel Committee, there are two fundamental principles: no foreign banking establishment should escape supervision and the supervision should be adequate. Therefore, the host supervisors are responsible for the branches and subsidiaries of foreign banks operating in Hong Kong while the parent supervisors are responsible for the banking groups. Parent supervisors and host supervisors should inform each other in case of any serious problems arise in the subsidiaries or the parent bank. This kind of mutual co-operation between supervisory authorities should be analysed to apply in cross-border bank insolvency.¹⁵⁴

In short, Hong Kong is suggested to adopt the latter approach since it has been actively implementing Basel rules on supervising banks. It can facilitate the international cooperation between regulators from different jurisdiction on both *ex ante* and *ex post* measures.

¹⁵⁴ Lastra (n 125) 91-92

5.3.3. Extensive power of bank resolution to deposit insurer

Extending the power of deposit insurer for bank resolution is also another good way to insolvent the banks in consideration of the public interest. However, Hong Kong Deposit Protection Scheme (HKDPS) do not adopt this power. Its mandates for the HKDPS has been stated clearly in the Deposit Protection Scheme Ordinance¹⁵⁵ that Deposit Protection Scheme should generally function as a ‘paybox’ type system which mainly forces on paying out depositors claims when a bank fails. Due to its mandate, the Scheme has little role in early detection and resolution of troubled banks, but have timely intervention of them. The Board of the Scheme works closely with Hong Kong Monetary Authority (HKMA), the Hong Kong banking regulator in regarding to ensure making compensation payments to depositors in an expeditious manner.¹⁵⁶

With the increasing international banking activities in Hong Kong, in particular after collapse of Lehman Brothers in 2008, it is a suitable time for Hong Kong to make legislative reform in preventing future banking crises. Hong Kong should seek ways in enhance the mechanisms in dealing with failing or failed banks. Since deposit insurer

¹⁵⁵ Cap. 581

¹⁵⁶ Hong Kong Deposit Protection Board, “Self-assessment on compliance with the Core Principles for Effective Deposit Insurance System recommended by the Basel Committee on Banking Supervision” (2009)

will have a major impact on how the failed banks are resolved¹⁵⁷, the role of HKDPS should play a role in the resolution of failed bank by taking depositors as the priority concern. Besides acting as a guarantee to the public deposits, HKDPS should be more independent that is insulated from undue political and industry influence.¹⁵⁸

International Association of Deposit Insurance (IADI) provides guidance on enhancing the mechanism for the resolution of failed banks. The power of the deposit insurer is not only payout the deposits to the depositors in a timely and orderly way, but also the ability to intervene early for inspection of troubled banks and to conduct resolution of failed banks in appropriate approach. It also promotes a good check and balance system with other regulators. Good coordination between local regulators and cross-border authorities is necessary if it is cross-border bank insolvency.¹⁵⁹

In the U.S., the Federal Deposit Insurance Corporation ('FDIC') has been given power to address the problems of large and complex financial institutions which can pose systemic risk.¹⁶⁰ This power is come from Dodd-Frank Wall Street Reform and

¹⁵⁷ International Association of Deposit Insurers, "Guidance of Bank Resolution of bank failure" (5 December 2005) 3

¹⁵⁸ *ibid*

¹⁵⁹ *Ibid* p.37-48

¹⁶⁰ Federal Deposit Insurance Corporation and the Bank of England, "Resolving Globally Active, Systemically Important, Financial Institutions"(2012) <
<http://www.fdic.gov/about/srac/2012/gsifi.pdf> > accessed 18 August 2013, 2

Consumer Protection Act of 2010 ('Dodd-Frank Act') which greatly increases the ability of regulators to address the problems of or exercise resolution powers to the financial institutions which have significant effect to financial stability. Such strategy is to assign losses to shareholders and unsecured creditors of the holding company, and transfer sound operating subsidiaries to new solvent entities. Title I of the Dodd-Frank Act requires each large and complex financial institution to submit a resolution plan which is according to the U.S. Bankruptcy Code to FDIC and Federal Reserve. The plan is reviewed and examined. The approved plan will facilitate the exercising FDIC's resolution power to undertake an orderly resolution under bankruptcy in the event of failure.¹⁶¹

Bank resolution power is delegated to FDIC under the Title II of the Dodd-Frank Act to resolve the financial institutions which might pose systemic risk and cause financial instability. Any losses of the failed financial institutions should not be borne by taxpayers, but the senior management and shareholders. FDIC is required to carry out the resolution that is to minimize the risk of financial stability and moral hazard. Any costs in resolving the company will be recovered by the industry.¹⁶²

¹⁶¹ *ibid* 4

¹⁶² Section 204(a) of the Dodd-Frank Act, 12 U.S.C. 5384

If Hong Kong has to adopt this approach, the structural reform has to be conducted in HKDPS from its “paybox” to “non-paybox” regime.

5.3.4. Key Attributes of Effective Resolution Regimes for Financial Institutions

(‘Key Attribute’)

Key Attribute is a guideline set by Financial Stability Board (FSB) in November 2011.¹⁶³ It provides a framework for implementation of effective resolutions regime of all jurisdictions for any financial institution which is systemically significant.¹⁶⁴ It allows authorities to resolve the financial institutions in an orderly manner. The power also includes the ability to override the rights of shareholders, replace the management who is responsible for the loss. It can also transfer the critical functions of a failing firm to a bridge firm, so the critical and main function of the firm keeps operating which aims at not to affect the financial stability. Such transition is also suitable for cross-border nature of the financial institution where its subsidiaries in foreign countries are still working under control as to minimize the global systemic risk.¹⁶⁵ By

¹⁶³ Financial Stability Board, “Key Attributes of Effective Resolution Regimes for Financial Institutions”, (2011), <http://www.financialstabilityboard.org/publications/r_111104cc.pdf> accessed 15 July 2013

¹⁶⁴ Financial Stability Board, “Resolution of Systemically Important Financial Institutions – Progress Report” (2012) <https://www.financialstabilityboard.org/publications/r_121031aa.pdf> accessed 27 July 2013

¹⁶⁵ Federal Deposit Insurance Corporation and Bank of England (n 160) 2

converting the unsecured debt into equity from senior creditors of a failed company, failing financial firm will be recapitalized and thus the bailed-in creditors will become the owners of the resolved firm. As a result, such approach can maintain the financial stability without cost to taxpayers.¹⁶⁶

In addition, the Key Attribute also puts emphasis on the coordination of the cross-border resolution authorities with the consideration of the impact of their resolution actions on the financial stability of foreign jurisdictions and helps to ensure the local resolution authorities to support the resolution conducted by a foreign authority. Therefore, a close cooperation between local and foreign authorities is crucial.¹⁶⁷

5.3.4.1. Difficulties in implementation of Key Attribute

According to the peer review on resolution regimes published by FSB on 11 April 2013, some FSB jurisdictions have implemented the Key Attributes in their reforms of resolution regimes. The problem they have encountered is that the resolution

¹⁶⁶ Permanent Bureau, “Should the Permanent Bureau of the Hague Conference on Private International Law start Preliminary work on Cross-border Aspects relating to resolution?” (Netherlands, April 2013) 2-3

¹⁶⁷ *ibid*

authorities are lack of important powers in resolving systematic institutions, such as the power to bail in. In addition, they also lack of power in controlling the parent company and its subsidiaries of a failed financial institution, and the powers in resolving systematic non-bank institutions, for instance, financial market infrastructure providers. There are also insufficient procedures for giving effect to foreign resolution actions or for domestic authorities to share confidential information. Furthermore, there is a lack of power in demanding firms to make changes to their organizational and financial structures in order to facilitate the process of insolvency.¹⁶⁸

5.3.5. Hong Kong situation

Hong Kong does not adopt the UNCITRAL Model Law on Cross-border Insolvency, Key Attributes and any resolution power given to deposit insurer under HKDPS to early intervene the bank resolution and carry out resolution. Moreover, there is an absence of special resolution regime or insolvency regime for Hong Kong branches of foreign banks; they can only process their insolvency under corporate insolvency proceedings. In addition, Hong Kong regulators, MA and SFC both have the power to appoint a special manager to take over the affairs and business of a failing company in

¹⁶⁸ Financial Stability Board, “FSB publishes peer review on resolution regimes” (Press release, 11 April 2013) <http://www.financialstabilityboard.org/press/pr_130411.pdf> accessed 10 August 2013

the commencement of administrative proceedings.¹⁶⁹

Compare to the international standard of resolution regimes, Hong Kong has yet met any of them, despite the fact that it is an international financial centre which has thousands of banks dealing with millions of banking activities every day. Any collapse of foreign banks might adversely affect the stability of the Hong Kong financial system. Therefore, legislator and policymaker should raise awareness of the international compensation regimes in order to produce a comprehensive compensation system for boosting the public confidence in banks and foreign investment in Hong Kong.

¹⁶⁹ S52(1)(C) Banking Ordinance, S159(1)(b)(i) Securities and Future Ordinance

6. CHAPTER SIX: Conclusion

In conclusion, understanding the fact that regulatory response towards the global financial crises is national and insufficient; more effort has to be put on international cooperation with other international organizations, such as Basel Committee, IOSCO, IAIS and FSB to conduct regulatory reforms with international standards. Moreover, cooperation is not only among developed countries, but also developing countries. Peer pressure is beneficial in resolving the financial crisis collectively on the basis of mutual benefits they can get on each other, either in the form of private return or building up good international relationship.

In spite of the united response towards the financial crises in Hong Kong, the financial regulatory system is too simple compared to the complexity of the crises. For *ex ante* measures, the conduct of business at the point of sale has to be improved through legislations. The roles between regulators have to be clear and should work out the most effective way for enforcement. Strengthen supervision and increased coordination is necessary to detect problems, so investigations can be conducted as early as possible to undertaking proper enforcement.

For *ex post* measures, Hong Kong does not have special scheme or law in the area of cross-border bank insolvency. International cooperation between regulatory authorities is necessary. Giving extensive power to deposit insurer in resolving bank failure is one of the good suggestions to HKDPS. It motivates deposit insurer to get involve in detecting any troubled banks and carry on investigation. It is necessary to refer to the guidelines of effective bank resolution from IADI, the Key Attributes from FSB, as well as the example of Dodd Frank Act in the U.S.

By obtaining a comprehensive compensation system, Hong Kong can be prepared to against the negative influence from any banking crisis. It can also enhance the financial stability in Hong Kong. Thus, it is proposed that if a good regime of bank resolution is implemented, the perception of “too big to fail” theory can be minimized. The regime should aim at resolving the banks without affecting the banking stability and the socio-economic environment of a country while leaving the risky investors or management to take their responsibilities for the financial loss, but not the depositors and taxpayers.

Such practice is beneficial to the health of the banking system that promotes efficiency of the market and market discipline. If the troubled bank is always rescued by

government bailout, it is unfairness to taxpayers. More importantly, it may encourage moral hazard problem which levers the degree of the crises.

The harmonious relationship between regulation and compensation schemes has to be achieved in order to attain comprehensive preventive measures against banking crises.

Basel Committee on Banking Supervision set out rules in gaining mutual cooperation and coordination between local and foreign financial regulatory supervisors.

International cooperation has to be attained in supervising the international banking system and also in dealing with cross-border bank insolvency.

Hong Kong is an international financial centre with more than thousand of local and foreign banks operating and conducting banking activities. A comprehensive financial regulation and compensation scheme is utmost important since Hong Kong is renowned for her banking and finance industry. Not only does the Hong Kong public have the confidence in banking system, but also it attracts foreign banks and financial institutions station here which can boost the economy in Hong Kong.

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