

Proposals To Enhance the Financial Dispute Resolution Scheme

Consultation Paper

October 2016

**Proposals To Enhance
the Financial Dispute Resolution Scheme**

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Financial Dispute Resolution Centre

<http://www.fdrc.org.hk>

ABOUT THIS DOCUMENT

1. This paper is published by the Financial Dispute Resolution Centre (“FDRC”) to consult members of Financial Dispute Resolution Scheme (“FDRS”), market participants and interested parties on the proposals to enhance the FDRS for the benefit of the users.
2. A list of questions for consultation is set out at the end of this paper for ease of reference. Please send your comments to us on or before **31 December 2016** by one of the following means –

By mail to: Financial Dispute Resolution Centre
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Attention: Proposals to Enhance the FDRS

By fax to: (852) 2565 8662

By e-mail to: consultation@fdrc.org.hk

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ABBREVIATIONS/DEFINITIONS

Applicant	A person making or who had made an Application to the FDRC
Application	An application to the FDRC for assessing whether a Claim may be accepted under the FDRS in accordance with the ToR and Intake Criteria
Arbitrator	A person who is suitably qualified and experienced in arbitration and is appointed by the FDRC to act as an arbitrator
Claim	A claim against an FI, which the FDRC may accept for mediation / arbitration
EC	Eligible Claimant and which refers to an individual or a sole proprietor having or who had a customer relationship with an FI, or an individual or a sole proprietor who has been provided with a Financial Service (and where appropriate including a small private company defined as SE under this proposal)
FDRC	Financial Dispute Resolution Centre
FDRS	Financial Dispute Resolution Scheme
FI	Financial Institution which is a member of the FDRS
Financial Services	A financial product, service or advice about a financial product or service provided by or via an FI
FSTB	Financial Services and the Treasury Bureau of the HKSAR Government
Government	The Government of the Hong Kong Special Administrative Region
HKMA	Hong Kong Monetary Authority
Intake Criteria	FDRS Guidelines on Intake Criteria of Cases
Judiciary	The Judiciary of the Hong Kong Special Administrative Region
Mediator	A person who is suitably qualified and experienced in mediation and is appointed by the FDRC to act as a

mediator

PD31 “Practice Direction 31 on Mediation” is introduced by the Judiciary along with the implementation of the Civil Justice Reform, which has set out the procedures for encouraging parties to resolve their disputes by alternative dispute resolution in civil proceedings in the Court of First Instance and the District Court

Partnership Small-sized partnership

SE Small Enterprise

SFC Securities and Futures Commission

ToR Terms of Reference for the FDRC in relation to the FDRS

EXECUTIVE SUMMARY

1. After several years of operation since June 2012, the FDRC proposes to further enhance its services to better serve the community by improving the terms of the FDRS.
2. All proposals in this paper are arrived at after due consideration of: (a) the experience of the FDRC accumulated over the past years of operation; (b) comments from various stakeholders of the FDRS; and (c) reference to the prevailing practices at other overseas jurisdictions.
3. The FDRC proposes to enhance the service features of the FDRS on the following aspects:
 - a) To raise the maximum claimable amount from HK\$500,000 to HK\$3,000,000;
 - b) To extend the limitation period for lodging Claims from 12 months to 36 months from the date of purchase of financial instrument or the date of first knowledge of loss, whichever is the later;
 - c) To enlarge the scope of EC by incorporating SEs¹ which have/had a customer relationship with an FI; and
 - d) To accept applications of Claims which are under current court proceedings.
4. In addition to the above amendments to the existing terms of the [FDRS](#)², the FDRC proposes to deal with the following particular circumstances subject to a prior mutual agreement of the parties involved:
 - a) A financial dispute with a claimable amount in excess of the amended maximum claimable amount;
 - b) A financial dispute exceeding the amended limitation period for lodging Claims;
 - c) When there is a financial dispute between an EC and an FI, the FI may refer the financial dispute to the FDRC, subject to the consent of the EC; and
 - d) When there is a Claim by an EC against an FI, the FI with a counter-claim may lodge the counterclaim to the FDRC, subject to the consent of the EC.

¹ SE means a limited company or a partnership having an annual turnover / revenue of not more than HK\$50 million or its equivalent. If it is a subsidiary of a group or holds a subsidiary, the group's consolidated annual turnover / revenue should not exceed HK\$50 million.

² ToR is available at http://www.fdc.org.hk/en/html/aboutus/aboutus_tor.php

5. It is considered that for cases that are beyond the Intake Criteria and subject to mutual agreement, if the FDRC's rules and procedures are more flexible, there would be more room for both parties to make use of the FDRC for dispute resolution. It is thus proposed to offer two more options in (b) and (c) below, in addition to the standard FDRS rules and procedures, as follows:
 - a) Standard FDRS rules and procedures (Mediation First, Arbitration Next);
 - b) Modified FDRS rules and procedures (Mediation only); and
 - c) Modified FDRS rules and procedures (Arbitration only).
6. With the proposed amendments to the FDRS, there would be a need to revise the FDRC's fee schedule accordingly. Of particular relevance to the fees would be the claimable amounts. A revised fee scale is proposed with reference to the local market conditions and comparison with the mediation cost figures published by the Judiciary.
7. According to Section B(10) of the Intake Criteria, the FDRC shall reject an application if the subject matter of the Claim has previously been considered or excluded by the FDRC. In light of the proposed amendments above, it is proposed that all previous rejected applications could re-apply for consideration by the FDRC, if they now fall within the amended Intake Criteria.

CHAPTER 1

INTRODUCTION

- 1.1 Currently, the FDRS administered by the FDRC covers FIs authorised by the HKMA and/or licensed by the SFC, except those providing credit rating services only³. On this basis, this consultation paper sets out proposals to refine the service features and broaden the service scope of the FDRS. These proposals shall have effects on the stakeholders, including the users and parties involved in the FDRS, viz, FIs of the banking and securities sectors, Applicants, ECs, Mediators and Arbitrators, etc.
- 1.2 Established as a non-profit making company limited by guarantee with seed funding from the Government, the HKMA and the SFC, the FDRC commenced its operation on 19 June 2012. It administers the FDRS and provides a channel for the FIs and their individual customers to resolve monetary disputes by way of “Mediation First, Arbitration Next”.
- 1.3 The FDRC is committed to serving the members of the FDRS and the community under the overarching guiding principles of establishing the FDRC, viz, independence, impartiality, accessibility, efficiency, and transparency.⁴
- 1.4 The FDRC’s operations are bound by the ToR, including Annexes setting out the FDRC’s rules and processes. To achieve the above purposes, amendments to the ToR are therefore necessary.
- 1.5 According to Section 3.1 of the ToR, the FDRC’s Board of Directors shall, at all times, have power to amend the ToR following consultation with the Government. Relevant stakeholders, including the relevant industry bodies, will be consulted where appropriate.

³The question of the inclusion of the insurance sector in the FDRS would be addressed separately.

⁴ Source: Para. 5 of Section B of ToR: http://www.fdr.org.hk/en/doc/FDRC_ToR_Section_B_en.pdf#nameddest=5

CHAPTER 2

PROPOSALS ON REFINING THE SERVICE FEATURES OF THE FDRS

- 2.1 The FDRC proposes to enhance the service features of the FDRS in the following aspects:
- a) To raise the maximum claimable amount from HK\$500,000 to HK\$3,000,000;
 - b) To extend the limitation period for lodging Claims from 12 months to 36 months from the date of purchase of financial instrument or the date of first knowledge of loss, whichever is the later;
 - c) To enlarge the scope of EC by incorporating SEs which have/had a customer relationship with an FI; and
 - d) To accept applications of Claims which are under current court proceedings.

To raise the maximum claimable amount

Background

- 2.2 According to the FDRC's complaint enquiries data, exceeding the maximum claimable amount and the limitation period for lodging Claims are two major reasons for the FDRC to reject applications under the FDRS.
- 2.3 According to the existing [Intake Criteria](#)⁵, the FDRC has the jurisdiction to accept an application brought by an EC with the claimable amount not exceeding HK\$500,000 (including any interest on any amount alleged to be a loss) or the foreign currency equivalent. Under the current operation of the FDRC, a claimant lodging a Claim with a claimable amount over HK\$500,000 shall be required to sign a declaration to limit the claimable amount to HK\$500,000 if he/she wishes to pursue the mediation/ arbitration processes through the FDRC. Under such a declaration, the EC will voluntarily give up its Claim in excess of HK\$500,000 when a settlement is made during the mediation process or an arbitral award is rendered.
- 2.4 It is proposed to raise the maximum claimable amount from HK\$500,000 to HK\$3,000,000 (including any interest on any amount alleged lost) or its foreign currency equivalent. In light of the proposed increase in the maximum claimable amount, the FDRC also proposes a new fee schedule.

⁵ Intake Criteria is available at http://www.fdrc.org.hk/en/doc/FDRC_ToR_Annex_II_en.pdf

Rationale

- 2.5 According to para. 3.18 of the consultation paper on the [Proposed Establishment of an Investor Education Council and a Financial Dispute Resolution Centre](#)⁶ in 2010, the maximum claimable amount was proposed to be HK\$500,000 for the FDRS. This amount was considered to be able to cover “*over 80% of the monetary disputes handled by the HKMA and about 80% of stock investors. The maximum claimable amount could be reviewed over time.*”
- 2.6 During the last several years of operation since establishment, the FDRC has received feedback from financial consumers and other stakeholders on various occasions to raise the maximum claimable amount.
- 2.7 The FDRC proposes to raise the maximum claimable amount from HK\$500,000 to HK\$3,000,000 for the following reasons:
- a) market needs as revealed from the FDRC’s complaint data;
 - b) the proposed higher jurisdictional limits of the District Court and the Small Claims Tribunal; and
 - c) references to the prevailing practices at other overseas jurisdictions.
- 2.8 According to its complaint enquiries from 2012 to 2015, the FDRC received on average about 1,000 complaint enquiries on a yearly basis. Within this period, a total of about 270 of these complaint enquiries could not be proceeded further due to the fact that the Claims were over the maximum claimable limit. Of these 270 complaint enquiries, about 50% of them were found with the claim amounts between HK\$500,000 and HK\$1,000,000; about 25% between HK\$1,000,000 and HK\$2,000,000; about 10% between HK\$2,000,000 and HK\$3,000,000; and about 15% over HK\$3,000,000. And there were a total of 11 cases of which the ECs opted for waiving the part in excess of HK\$500,000 in order to proceed under the FDRS.
- 2.9 The financial limit for the civil jurisdiction of the District Court is under review and likely to be increased from HK\$1,000,000 to HK\$3,000,000. The Small Claims Tribunal is also proposing to increase the jurisdictional monetary limit from HK\$50,000 to HK\$75,000. One of the major reasons for the proposed increase of the above limits by the Judiciary is the changes in various economic indices and indicators such as per capita GDP, inflation rate, etc., which may lead to higher dispute amounts. For the

⁶ Consultation paper on the proposed establishment of FDRC:
http://www.fstb.gov.hk/fsb/ppr/consult/doc/consult_iec_fdrc_e.pdf

same reason, the FDRC proposes to raise the limit of its maximum claimable amount. The higher limit would allow the financial consumers and the FIs to have wider access to the mediation/ arbitration services of the FDRC. As court procedures require parties to go through mediation, the FDRC will offer a viable option, particularly given its high mediation success rate. Of the cases handled in 2015, over 80% of the cases were successfully settled through the FDRC's mediation processes. Approximately 90% of the mediation service users (which covered both parties involved in the disputes) rated FDRC's services as "Satisfactory" or above.

- 2.10 References have been made to the prevailing practice of similar organisations at other overseas jurisdictions. It is found that the current maximum claimable amount of the FDRS in Hong Kong is lower than those in Australia, Canada, and the UK. Their claim limits range from about HK\$1,500,000 to HK\$3,000,000. The USA Financial Industry Regulatory Authority has no limit in this respect. References to the overseas jurisdictions are shown at Appendix A and B.
- 2.11 The mediation and arbitration fees will be adjusted accordingly, the details of which will be discussed in Chapter 5.
- 2.12 There has been suggestion to apply two respective maximum claimable amounts for the banking and the securities industries⁷, in order to cater for their different business models. However, it was considered more tenable and practical to continue to have one maximum claimable amount for both industries on the following grounds: (i) whatever the maximum claimable amount may be, it would not result in a change of the claim amount from customers of the banking or the securities industry; and (ii) different maximum claimable amounts would create unnecessary confusion to the financial consumers as well as to the FIs, as a single maximum amount has always been applicable to both sectors since inception of the FDRS.
- 2.13 In Chapter 3, it is further proposed that the FDRC may handle cases exceeding the maximum claimable amount of HK\$3,000,000, if certain specific conditions are met.

⁷ A single maximum claimable amount of HK\$500,000 is applicable for both the banking and securities industries under the current FDRS.

Question 1:

1.1 Do you agree with the proposed amendment to raise the upper claimable limit to HK\$3,000,000? Please state your reasons.

1.2 If not, what would be your suggestion of a suitable upper claimable limit?

__HK\$1,000,000; __HK\$2,000,000; __Others (please specify) _____

Please state the reasons for your selection.

Question 2:

2.1 Do you agree that a single maximum claimable amount continues to be applicable for the banking and securities industries? If not, why?

2.2 If there are two different maximum claimable amounts, what would be your suggestion of suitable upper claimable limits for the banking and the securities industries respectively?

Please state the reasons for your suggestion.

To extend the limitation period for lodging Claims

Background

2.14 Section D 17.1.2 and Annex II B(18) of the ToR state that the FDRC should reject an application with a Claim that is made more than 12 calendar months from the date of the purchase of the financial service, or the date on which the EC first had knowledge that he/she suffered monetary loss arising out of the financial service, whichever is the later.

2.15 The FDRC's complaint enquiry data from 2012 to 2015 reveals that there is a need for extending the limitation period for lodging Claims. Overseas experience also shows that most of the countries set the limitation period for lodging claims at 6 years from the date of awareness of loss or cause of action.

Rationale

- 2.16 This amendment to ToR is proposed based on the consideration of the following factors:
- a) the potential needs as revealed by the FDRC's complaint data; and
 - b) references to the prevailing practices of overseas jurisdictions.
- 2.17 The FDRC recorded from 2012 to 2015 a yearly average of about 140 complaint enquiries with losses having occurred for more than one year. Out of these enquiries, 35% of them were within 1 to 2 years. Those over 2 years represented a higher percentage of 65% of the complaint enquiries. But there was no further breakdown of these 65% enquiries data into more detailed time bands beyond 2 years.
- 2.18 Internationally, a six-year time bar is commonly adopted as the limitation period for lodging similar claims. Jurisdictions such as the USA, the UK, Canada, Australia and Malaysia invariably set a limitation period at 6 years from the awareness of the loss or cause of action. Please see Appendix C.
- 2.19 In this proposal, the limitation period is set at 36 calendar months instead of 6 years⁸ based on the following considerations: (i) the complaint enquiry data shows that if the limitation period could be extended for 2 more years, it could allow more complaints out of the 65% portion previously rejected to be covered by the FDRS; and (ii) in light of the fact that memory usually deteriorates with the lapse of time, the information/evidence within 3 years could be more easily located or identified by both parties for submission to the FDRC for mediation/arbitration, given that many cases lodged with the FDRC were alleged to be mis-representation or mis-selling.
- 2.20 In Chapter 3, it is further proposed that the FDRC may deal with cases that exceed the 36-month limitation period under certain specific conditions.

⁸ Section 4 of Limitation Ordinance: <http://www.hklii.hk/eng/hk/legis/ord/347/s4.html>

Question 3:

3.1 Do you agree to extend the limitation period for lodging Claims to 36 months? Why or why not?

3.2 Do you have other suggestions on the limitation period?
__ 12 months; __ 24 months; __ 48 months; __ 60 months;
__ 72 months; __ Others (please specify) _____

Please explain your choice.

To enlarge the scope of ECs by incorporating small businesses**Background**

2.21 Under the current ToR, one of the Intake Criteria is that the dispute must be brought to the FDRC by an EC. The relevant provisions are stated in Paragraphs 12 and 13 of Section C of the ToR as extracted below:

12.1 (a) the dispute must be brought by an Eligible Claimant;

13.1 The following persons (known as 'Eligible Claimants') may bring a Claim before the FDRC –

(a) individuals having or who had a customer relationship with an FI or who has been provided with a Financial Service; or

(b) sole proprietors having or who had a customer relationship with an FI or who has been provided with a Financial Service.

2.22 Referring to paragraphs 32 to 34 in the [Consultation Conclusions of the Proposed Establishment of an Investor Education Council and a Financial Dispute Resolution Centre issued by the FSTB](#)⁹, it is noted that there were suggestions that the scope of the FDRC should include small businesses.

2.23 Taking into account feedback from stakeholders and overseas experiences, it is proposed that the definition of EC be extended to cover SEs which have/had a customer relationship with an FI or have been provided with a Financial Service.

Rationale

2.24 With reference to overseas experience such as the USA, the UK, Australia

⁹ Relevant consultation conclusions: http://www.fstb.gov.hk/fsb/ppr/consult/doc/consult_iec_fdrc_conclusion_e.pdf

and New Zealand, their financial ombudsmen also cover the business sector, small-sized companies in particular. In the UK, a micro-enterprise with an annual turnover of up to two million euros and fewer than ten employees is eligible for services of the UK Financial Ombudsman. In New Zealand, its Banking Ombudsman accommodates “business, trusts, partnerships and clubs”. New Zealand’s Insurance & Savings Ombudsman provides services to a “Small Business” which has no more than 19 full time employees. In Australia, its Financial Ombudsman Services consider disputes lodged by partnerships and small businesses. The latter is defined as having not more than 100 employees for manufacturing companies and not more than 20 employees for non-manufacturing companies. Please see “Who Can Complain” in Appendix A.

- 2.25 The FDRC considers that it would be reasonable to incorporate small businesses, which are financially less capable to resolve their disputes with FIs through legal proceedings. The effective and cost-efficient mediation/ arbitration services provided by the FDRC would be able to serve the needs of both the FIs and their small business customers. In fact, the regulators have noted a rising trend in complaints lodged by corporates.
- 2.26 Apart from the above reference to overseas practice in paragraph 2.24, it is noted that size tests in terms of the number of employees, turnover / revenue or assets are commonly adopted internationally to determine whether a company is a small company or not. Please refer to Appendix D.
- 2.27 On the definition of SEs for the FDRS, it is considered that it has to be simple and easily understood by the public, whilst at the same time a relatively good indicator of the business size of companies.
- 2.28 The local definitions are of particular significance:
- a) the qualifying conditions for small private companies under [Section 361 \(1\) of Companies Ordinance \(Cap. 622\)](#)¹⁰ effective in 2014, which allows such companies to have certain accounting report exemptions;
 - b) the definitions of SMEs adopted by the Hong Kong Trade and Industry Department (“TID”); and
 - c) small private companies which have borrowing relationships with Authorised Institutions in Hong Kong and are covered by the Commercial Credit Reference Agency, Hong Kong (“CCRA”).

¹⁰ Section 361 of the Companies Ordinance (Cap. 622): http://www.cr.gov.hk/en/companies_ordinance/docs/part9-e.pdf

- 2.29 Referring to paragraph 2.28(a) above, [Schedule 3 of Companies Ordinance \(Cap. 622\)](#)¹¹ sets out the specified qualifying conditions for Section 361(1) Companies Ordinance, in which any two of the following have to be satisfied:
- a) Total annual revenue of no more than HK\$100 million;
 - b) Total assets of no more than HK\$100 million at the end of the reporting period; and
 - c) No more than 100 employees.
- 2.30 The [TID](#)¹², as mentioned in paragraph 2.28(b) above, defines SMEs as those having no more than 100 employees for manufacturing companies or 50 employees for non-manufacturing companies. There were about 320,000 such SMEs in Hong Kong as reported by the TID.
- 2.31 Paragraph 2.28(c) relates to the [CCRA](#)¹³, which was established by the banking industry in Hong Kong in 2004. The credit database of CCRA covers all small private non-listed limited companies, partnerships and sole proprietorships, which have borrowing relationships with Authorised Institutions. Their annual turnover should not exceed HK\$50 million (or if it belongs to a larger group, the group's annual turnover is not larger than HK\$50 million). There were about 120,000 such small businesses (about 16% of which are sole proprietorships and partnerships) in the database of the CCRA as of 31 December 2015, as per the [HKMA 2015 Annual Report \(page 70, Credit Data Sharing\)](#).¹⁴
- 2.32 It is considered that these small private companies with an annual turnover / revenue of not more than HK\$50 million should normally not have adequate financial strength or resources to pursue costly and time consuming legal proceedings for their financial disputes with FIs. If they are covered by the FDRS, they would likely opt for the mediation/arbitration services of the FDRC.
- 2.33 In light of the above, it is proposed to define SE as a partnership or a limited company with an annual turnover / revenue¹⁵ of not more than HK\$50 million as shown in its latest financial statements. If it belongs to a

¹¹ Schedule 3 of the Companies Ordinance (Cap.622):

http://www.cr.gov.hk/en/companies_ordinance/docs/schedule3-e.pdf

¹²Source: TID's website: https://www.tid.gov.hk/english/smes_industry/smes/smes_content.html

¹³Source: CCRA's website: <http://www.dnb.com.hk/Upload/files/CCRA%20Phase%20II%20Leaflet-Eng.pdf>

¹⁴Source: HKMA 2015 Annual Report: http://www.hkma.gov.hk/media/eng/publication-and-research/annual-report/2015/ar2015_E.pdf

¹⁵Hong Kong Accounting Standard 18 – Revenue:

http://app1.hkicpa.org.hk/hksaebk/HKSA_Members_Handbook_Master/volumeII/hkas18.pdf

larger group, the consolidated turnover / revenue will be considered instead.

- 2.34 The SE, as an Applicant, will be required to provide its latest audited financial statements (if it is a limited company) or certified financial statements (if it is a partnership), or such other evidence that will enable the FDRC to be satisfied that it meets the requirements of an SE as defined above. The SE shall also file such financial information together with a declaration that it is or is not part of a larger group. The FDRC shall rely upon such evidence and declaration provided to determine if it is an SE. The SE should provide true and accurate information in its application to the FDRC. The FDRC may take such action as it thinks appropriate, in the event that the SE has provided misleading information or false declaration to the FDRC.
- 2.35 It is noted that some smaller firms in the securities industry may fall within the SE definition. These small businesses may be customers of banks or other financial institutions in the securities industry. They may have financial disputes with their FI bankers or other FIs in the securities industry, resulting from the provision of Financial Services by these FIs. For the avoidance of doubt, a small-sized FI, if it could meet an SE qualifying test, could lodge a Claim as an EC against a larger FI under the FDRS, provided that (i) the smaller FI as an EC has or had a customer relationship with the larger FI to whom a Claim is made against; (ii) the dispute is related to a Financial Service provided by the larger FI; and (iii) the dispute is of a financial / monetary nature. Having said that, the amended Intake Criteria have to be met.
- 2.36 Following the above paragraph 2.35, in a less likely scenario that if both securities firms in a financial dispute are qualified as SEs, the one filing the Claim would be the EC and the one being claimed against would be the FI, under the FDRS rules.

Question 4:

4.1 Do you agree with the proposal to extend the service scope to cover Claims from SEs (as defined in paragraph 2.33 of this Consultation Paper)? Why or why not?

4.2 Besides the proposed definition of SEs in paragraph 2.33 of this Consultation Paper, do you have any other suggestions to define the size of a small business? Please provide elaborations on your suggestions.

4.3 Do you agree that an FI qualifying as an SE could file a Claim as an EC against another FI? Please explain.

To accept applications of Claims which are under current court proceedings

Background

2.37 As stated in the current ToR, any Claim that is/has been the subject of current court proceedings shall be rejected by the FDRC. The relevant provisions are set out at :

Section C (14.4):

“The FDRC shall discontinue handling a Claim if, after the Application is lodged with the FDRC, it comes to the knowledge of the FDRC that the Claim has been the subject of court proceedings where there is a decided judgment.”

Annex II(B) (11):

“the Claim is the subject of current court proceedings (civil or criminal, including the proceedings under the Small Claims Tribunal) or has been the subject of court proceedings where there has been a decided judgment; or Note: If the claimant commences legal proceedings against the FI while the case is being processed by the FDRC and the FDRC is informed, the case will be discontinued. There is an ongoing obligation on the part of the Eligible Claimant to inform the FDRC whether any such legal proceedings against the FI in respect of the subject matter of the Eligible Dispute have been initiated.”

2.38 Due to the abovementioned provisions in the ToR, the FDRC would reject an Application which is/has been the subject of legal proceedings. Under the FDRC’s existing operational procedures, if an EC wishes to pursue the mediation/ arbitration processes at the FDRC, the EC has to withdraw the case from the Court before lodging the application with the FDRC. The FDRC has recorded one such withdrawal case so far.

2.39 It is proposed that the FDRC be allowed to intake a Claim which is under current court proceedings, in conformity with the development of the [Civil Justice Reform](#)¹⁶ commencing in 2009. One of the underlying objectives of

¹⁶ Source: <http://www.civiljustice.gov.hk/eng/home.html>

the Civil Justice Reform is to facilitate the settlement of disputes. The Judiciary has amended the Practice Direction 31 (Mediation) in August 2014 for it to take effect on 1 November 2014 and superseded the previous one effective on 1 January 2010. Against such backdrop and to enhance the FDRC as a mediation venue to facilitate dispute settlements of our stakeholders, the FDRC thus considers that it is timely to propose to deal with cases under current court proceedings.

Rationale

- 2.40 This proposal of allowing Claims which are subjects of court proceedings be brought forth to the FDRC would do away with the unnecessary procedures of withdrawing the case from the court and thus enable both FIs and ECs to deal with the case smoothly and timely.
- 2.41 The proposal will also be in line with the current court practice which encourages the parties to go for mediation (as stipulated under the [Practice Direction 31](#)¹⁷), in the course of court proceedings. PD31 applies to almost all civil proceedings in the Court of First Instance and the District Court. The Court has the duty as part of active case management to further the objective of facilitating the settlement of disputes, before or after the commencement of a court action, by encouraging the parties to use mediation procedures if the Court considers that appropriate. Hence, the FDRC could fit into the procedures by providing mediation service to the parties involved. This will facilitate both parties to meet the PD31 requirements and to have mediations and/or arbitrations conducted at the FDRC. This is also in line with the FDRC's mandate of providing "FIs and their customers with an independent and affordable avenue, as an alternative to litigation, for resolving monetary disputes" (paragraph 4.1 of the ToR).
- 2.42 Given that the maximum claimable amount is set at the upper limit of the future monetary jurisdiction of the District Court, all PD31 cases in relation to financial disputes between the FIs and the ECs which could fulfil the amended Intake Criteria may be handled by the FDRC. According to the Judiciary's [Summary of Mediation Reports](#)¹⁸, there were a total of 397 and 388 mediated cases in 2014 and 2015 respectively in the District Court; and a total of 632 and 645 mediated cases in 2014 and 2015 respectively in the Court of First Instance. There was however no information on the nature of these cases or whether they were related to financial disputes between an FI

¹⁷ Details of PD 31: <http://legalref.judiciary.gov.hk/lrs/common/pd/pdcontent.jsp?pdn=PD31.htm&lang=EN>

¹⁸ Summary of Mediation Reports: http://mediation.judiciary.gov.hk/en/figures_and_statistics.html

and its customers. As such, the number of PD31 cases that the FRDC would be able to handle could not be effectively estimated from these figures. Nevertheless, it is important that the FDRC could provide the service to the users conveniently to meet their needs in court procedures or otherwise.

- 2.43 Taking into account of the fact that legal representatives are commonly involved in PD31 cases and mediation, it is proposed that legal representatives of both parties be allowed to participate in the FDRC mediation, to be in line with market practice¹⁹. For the avoidance of doubt, other than PD31 cases, the ordinary cases under the FDRS cannot be legally represented.
- 2.44 As with other cases under the FDRS, cases under PD31 would need to follow the rule of “mediation first, arbitration next”. Hence, the EC could have a further choice of arbitration, if mediation fails.

Question 5:

5.1 Do you agree that the FDRC should deal with cases under current court proceedings without the claimant withdrawing the case from the Court? Why or why not?

5.2 For PD31 cases, do you agree that the maximum claimable amount be set at an amount in tandem with the future monetary jurisdiction of the District Court? Please give your reasons.

5.3 Do you agree that parties to the mediation in PD31 cases at the FDRC can be legally represented as elaborated in paragraph 2.43 of this Consultation Paper? Please explain.

¹⁹ Parties in the legal proceedings may or may not be legally represented. Part B of PD31 applies to proceedings in which all parties are legally represented. Part C of PD31 applies to proceedings in which one or more parties are not legally represented. Section 19 and 20 of Part C of PD31 elaborate that:

19) *On the application of a party or on its own motion, the Court may consider at a suitable stage whether mediation is appropriate, taking into account all the circumstances. The Court may seek information from the parties for this purpose, always respecting privilege.*

20) *Where the Court considers that mediation is appropriate, the Court may give directions that the parties should follow the procedure set out in Part B with any necessary modifications.*

CHAPTER 3

PROPOSALS ON BROADENING THE SERVICE SCOPE OF THE FDRS SUBJECT TO MUTUAL AGREEMENT

- 3.1 In addition to the above proposed amendments to the existing terms of the FDRS, the FDRC proposes to deal with the following particular circumstances subject to a prior mutual agreement of the parties involved:
- a) A financial dispute with a claimable amount in excess of the amended maximum claimable amount;
 - b) A financial dispute exceeding the amended limitation period for lodging Claims;
 - c) When there is a financial dispute between an EC and an FI, the FI may refer the financial dispute to the FDRC, subject to the consent of the EC.
 - d) When there is a Claim by an EC against an FI, the FI with a counterclaim may lodge the counterclaim to the FDRC, subject to the consent of the EC.
- 3.2 References are made to other overseas jurisdictions where alternative dispute resolution services with similar features are provided. New Zealand’s Banking Ombudsman can consider a complaint that would otherwise be outside its mandates if both sides agree ([Section 4, Scheme Power, Terms of Reference of the Banking Ombudsman](#)).²⁰ New Zealand’s Insurance and Financial Services Ombudsman also states that “Nothing in these Terms of Reference will prevent the Scheme from considering a Complaint, that is otherwise outside the Scheme’s jurisdiction, if the Participant consents.” ([Section 5.3 of IFSO’s Terms of Reference](#))²¹
- 3.3 Malaysia’s Securities Industry Dispute Resolution Centre (“SIDREC”) may, by agreement of the claimant and the member concerned, accept a case for mediation, which exceeds the prescribed claimable amount. ([Section 5.4 of the Terms of Reference of SIDREC](#))²²

²⁰ Terms of Reference of New Zealand Banking Ombudsman:

https://bankomb.org.nz/ckeditor_assets/attachments/306/terms_of_reference_january_2016.pdf

²¹ Terms of Reference of New Zealand Insurance and Financial Services Ombudsman :

<http://www.iombudsman.org.nz/assets/TOR-1-July-2015.pdf>

²² Terms of Reference of SIDREC: <https://sidrec.com.my/wp-content/uploads/2015/11/SIDREC.TOR-1st-Revision-Nov15.-cif-1-Dec-2015.pdf>

3.4 Hence, it would be a viable approach for the FDRC to manage cases that may not meet all the amended Intake Criteria, if both parties agree to resolve it at the FDRC.

A financial dispute with a claimable amount in excess of the proposed amended maximum claimable amount and/or beyond the amended limitation period for lodging Claims

3.5 In this proposal, a prior mutual agreement will be required from the parties involved (i.e. FIs and ECs) to lodge their application to the FDRC, if (i) the claimable amount is exceeded; and/or (ii) the limitation period for lodging Claims is breached; provided that all other amended Intake Criteria are satisfied. As stated in paragraph 2.2, exceeding the maximum claimable amount and the limitation period for lodging Claims are the two major factors for rejecting claim applications by the FDRC.

3.6 The FDRC would give due consideration to accept cases for mediation and/or arbitration under the FDRS.²³

3.7 In terms of the claimable amount, though it may exceed HK\$3,000,000, it is not expected that the claimable amount would be much higher, given that the ECs are of relatively less financial strength or operating small businesses.

3.8 Similarly for the limitation period for lodging Claims, it is not envisaged that there would be many cases falling beyond 36 calendar months. Though the FDRC is well aware of the fact that a 6-year period is commonly adopted internationally, the FDRC would prefer to respect the mutual decision (as they agree to go for mediation/arbitration at the FDRC) of the parties concerned and take into account of the following factors:

- a) It would provide more flexibility for the parties concerned;
- b) It may be difficult for the ECs to accurately ascertain the date of initial awareness of the loss; and
- c) It is the jurisdiction of the arbitrators to determine on such a time period

²³ Some factors which may result in the FDRC not accepting the application would be those as mentioned in the letter of the Hong Kong Association of Banks (“HKAB”) dated 23 July 2010 to the FSTB in its supplementary paper, viz, paragraphs 3(ii) complex or novel legal issues, (iii) multi-party claims; and (iv) precedential value or significant legal principle. And cases where allegations of fraud or criminal activities have been made, as stated in item (o), page 23, Annex I of the HKAB letter to the FSTB dated 5 May 2010.

http://www.fstb.gov.hk/fsb/ppr/consult/consult_iec_fdrc_submissions_files/organizations/Hong%20Kong%20Association%20of%20Banks.%20The.pdf

issue.

- 3.9 To provide flexibility for cases on mutual agreement basis, there would be two more options in relation to the choice of mediation/ arbitration rules and procedures, viz, (i) mediation only, and (ii) arbitration only, in addition to the standard “mediation first, arbitration next” rules. The details of which are described in Chapter 4.
- 3.10 It is proposed that the mediation / arbitration fee scale be revised, to take into account of the higher claimable amount. The details of which are described in Chapter 5.
- 3.11 Same for all cases, the FDRC shall have the sole discretion, through its vetting process, to consider and determine if a case should be accepted or not, notwithstanding that a mutual agreement has been reached between the parties involved to take their case to the FDRC.

Question 6:

Do you agree that, subject to a prior mutual agreement between an FI and a claimant, the FDRC could consider handling disputes which exceed its certain amended Intake Criteria, as specified in paragraph 3.1(a) and (b) of this Consultation Paper? Why or why not?

When there is a financial dispute between an EC and an FI, the FI may refer the financial dispute to the FDRC, subject to the consent of the EC.

- 3.12 In this proposal, an FI can lodge an application with the FDRC for a financial dispute in which an EC claims against an FI or vice versa, subject to the consent of the EC.
- 3.13 This amendment is proposed in light of suggestion raised by some FIs which would like to have such option for them to resolve financial disputes with their customers through mediation and/or arbitration, at the FDRC.
- 3.14 Based on the current ToR, the FDRC can only accept an application for mediation lodged by an EC. The FDRC cannot accept any application for mediation raised by an FI, notwithstanding that the FI may wish to resolve financial disputes with their customers through the FDRS in a timely manner.

- 3.15 In a financial dispute between EC and FI, it is proposed that the FI could take the initiative to request the EC to agree to using the FDRC's services to resolve the dispute. In this connection, the FI would be the applicant to bring to the FDRC unresolved disputes with their customers, subject to the consent of their customers. The amended Intake Criteria still have to be met, except for the maximum claimable amount and the limitation period for lodging Claims.
- 3.16 Furthermore, if the FI so wishes, it could also pay for the mediation and/or arbitration fees on behalf of their customers, to induce the other party to enter into mediation or arbitration.
- 3.17 Paragraphs 3.9, 3.10 and 3.11 above also apply in this scenario, which is on a mutual agreement basis.

When there is a Claim by an EC against an FI, the FI with a counterclaim may lodge the counterclaim to the FDRC, subject to the consent of the EC.

- 3.18 There was suggestion in the response to the Proposed Establishment of an Investor Education Council and a Financial Dispute Resolution Centre²⁴ that it should allow for counterclaims by the financial service providers. An FI may have counterclaim in relation to a "Financial Service" provided by the FI to the EC. For example, an FI may counterclaim an EC for an overdue loan arising from a forced liquidation of the EC's shares/foreign exchange margin positions, whilst the EC claimed the FI for his monetary loss from the forced liquidation, which was allegedly mishandled.
- 3.19 The FI may wish to request its customer to resolve a dispute at the FDRC with claims from either or both parties. Though the FI may be the applicant or claimant, this does not deviate from the FDRC's mandate of providing an independent, impartial, accessible, efficient and confidential platform to resolve dispute for the FIs and their customers.
- 3.20 By allowing the FI to lodge a counterclaim, with the consent of the EC, it would facilitate the FDRC to efficiently handle the dispute as the EC's Claim and the FI's counterclaim could be dealt with aggregately at the

²⁴ Source: Answers to Question 3 as specified in the relevant letter:

http://www.fstb.gov.hk/fsb/ppr/consult/consult_iec_fdrc_submissions_files/organizations/Standing%20Committee%20on%20Arbitration%20of%20the%20International%20Chamber%20of%20Commerce-Hong%20Kong,%20China.pdf

FDRC. This could save the FI instituting a separate action for the counterclaim and thus would be less costly, more efficient and more acceptable to both parties concerned.

- 3.21 Hence, it is proposed to enable FIs as applicants/claimants to bring to the FDRC unresolved disputes with their customers, subject to the consent of their customers. The amended Intake Criteria still have to be met, save for the maximum claimable amount and the limitation period for lodging Claims.
- 3.22 In both Claims and counterclaims, though the FI would be the applicant/claimant, the FI would have to pay the mediation/ arbitration fees as a member of the FDRS. Moreover, if the FI so wishes, it could also pay for the mediation and/or arbitration fees on behalf of their customers.
- 3.23 Paragraphs 3.9, 3.10 and 3.11 above also apply in this scenario, which is on mutual agreement basis.

Question 7:

7.1 Do you agree that when there is a financial dispute between an EC and an FI, the FI may refer the financial dispute to the FDRC, subject to the consent of the EC? Why or why not?

7.2 Do you agree that when there is a Claim by an EC against an FI, the FI with a counterclaim may lodge the counterclaim to the FDRC, subject to the consent of the EC? Why or why not?

7.3 Do you agree with the arrangement that the FI can pay for the mediation and/or arbitration fees for their customers if the FI so wishes? Why or why not?

CHAPTER 4

MEDIATION / ARBITRATION RULES APPLICABLE TO CASES UNDER MUTUAL AGREEMENT

- 4.1 It is considered that for cases that are beyond the Intake Criteria and subject to mutual agreement, if the FDRC's rules and procedures are more flexible, there would be more room for both parties to make use of the FDRS for dispute resolution.
- 4.2 It is thus proposed to offer two more options in (b) and (c) below, in addition to the standard FDRS rules and procedures, as follows:
- a) Standard FDRS rules and procedures (Mediation First, Arbitration Next);
 - b) Modified FDRS rules and procedures (Mediation only); and
 - c) Modified FDRS rules and procedures (Arbitration only).
- 4.3 Apart from providing flexibility, the option of "mediation only" is also to cater for PD31 cases, in which the court requires "mediation" to satisfy the requirement. In some contracts between FIs or FIs and their customers, they may be subject to arbitration provision in case of disputes. The option of "arbitration only" is to cope with this situation. On the other hand, if both parties agree to adopt mediation/ arbitration to resolve their disputes, it is considered that a choice which is specifically suitable for resolving such disputes should also be made available to them.
- 4.4 There was feedback from stakeholders that such flexibility should also be available under the existing FDRS. In fact, there were similar comments when the FDRC was established, as stated in paragraphs 43 to 48 of the [Consultation Conclusions of the Proposed Establishment of an Investor Education Council and a Financial Dispute Resolution Centre issued by the FSTB](#).²⁵ The purpose of the "mediation first, arbitration next" is to encourage settlement in the mediation stage as far as possible and if not, in the arbitration stage. In this connection, the costly and the time consuming exercise of court proceedings could be avoided, if possible. Such mechanism also applies in overseas jurisdictions. For example, Singapore's [FIDReC](#)²⁶ and Malaysia's [SIDREC](#)²⁷ work on "mediation first, adjudication

²⁵ Relevant consultation conclusions: http://www.fstb.gov.hk/fsb/ppr/consult/doc/consult_iec_fdrc_conslusion_e.pdf

²⁶ FIDReC's Dispute Resolution Process: <http://www.fidrec.com.sg/website/disputerp.html>

²⁷ SIDREC's Dispute Resolution Process as specified in Section 13 of its Terms of Reference:

<https://sidrec.com.my/wp-content/uploads/2015/11/SIDREC.TOR-1st-Revision-Nov15.-cif-1-Dec-2015.pdf>

next”. [New Zealand’s Banking Ombudsman](#) and [Insurance & Financial Services Ombudsman](#) take an approach of “negotiation, conciliation or mediation” before its decision is required.²⁸ Paragraphs 40 to 42 in the Consultation Conclusions of the Proposed Establishment of an Investor Education Council and a Financial Dispute Resolution Centre issued by the FSTB explained in more details the mandatory mediation plus arbitration model adopted by the FDRC.

Question 8:

- 8.1 Do you agree that options of “mediation only” and “arbitration only” in addition to the original “mediation first, arbitration next” be offered to the parties with mutual agreement? Please state your reasons.
- 8.2 Do you agree that such “mediation only” or “arbitration only” option should not be available for “normal” cases under the FDRS? Why or why not?

²⁸ Sources: The Terms of Reference of New Zealand Insurance and Financial Services Ombudsman: <http://www.iombudsman.org.nz/assets/TOR-1-July-2015.pdf>
New Zealand Banking Ombudsman Complaints Process Guide: <https://bankomb.org.nz/how-to-complain/complaints-process-guides>

CHAPTER 5

PROPOSED REVISED MEDIATION / ARBITRATION FEES

- 5.1 With the proposed amendments to the FDRS, there would be a need to revise the FDRC's fee schedule accordingly. Of particular relevance to the fees would be the claimable amounts.
- 5.2 A revised fee scale is proposed with reference to local market conditions²⁹ and comparison with the mediation cost figures published by the Judiciary.³⁰
- 5.3 Please refer to the original [Schedule of Fee](#) shown at [Annex I of the FDRC's ToR](#)³¹. The proposed fee has some notable features as follows:
- a) The upper limit of the lowest band is to be increased from HK\$100,000 to HK\$200,000. By raising the upper limit for the lowest band, the fees to be paid by the users of the FDRS will be kept low, and it will benefit the users;
 - b) Additional monetary bands are set for different claims up to HK\$10,000,000 to cater for situations where the services of the FDRC are required beyond the original ToR;
 - c) The mediation fee is to be capped at HK\$20,000 per case (including extended mediation time costs) for the proposed maximum claim amount. We have received views that it is beneficial for the users to know the amount to be spent in the dispute resolution processes, therefore, by capping the mediation fee at HK\$20,000 per case, it will provide certainty as to the expenses from the view point of the users;
 - d) The proposed mediation fee scale is made by reference to the reported average mediation costs per case by the Judiciary over the years from 2011 to 2015. It has been adjusted to reflect the experience of the Court-annexed mediation and also to ensure competitiveness of the services of the FDRC;
 - e) The arbitration fees are based on documents-only and in-person hearing bases, whilst the market reference is on in-person hearing basis. In

²⁹ Sources:

- a) China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center ("CIETAC Hong Kong"): <http://www.cietachk.org>
- b) International Chamber of Commerce – Hong Kong ("ICC Hong Kong"): <http://icchkcbc.org/>
- c) Hong Kong International Arbitration Centre ("HKIAC"): <http://hkiac.org/>

³⁰ Mediation Statistics are available at http://mediation.judiciary.gov.hk/en/figures_and_statistics.html

³¹ FDRS's Schedule of Fee is available at http://www.fdr.org.hk/en/doc/FDRC_ToR_Annex_I_en.pdf

relation to the arbitration fees, the market reference is made to arbitral institutional fees for commercial arbitration. It is believed that the fees proposed by the FDRC should be relatively lower than those other institutions which tend to handle more complicated cases; and

- f) For exceptional cases whose claimable amounts exceed HK\$10,000,000, the mediation/ arbitration fee could only be fairly and reasonably determined by the parties concerned and the mediator/arbitrator, having regard to the complexity of the case. For the same reason as stated in 5.3(b) above, we believe it is fair and equitable that those who seek the services of the FDRC should pay the fees which are commensurable with the services being rendered.

Question 9:

Do you agree with the proposed revised fee scale for dispute resolution services of the FDRC? Please provide your comments and/or suggestions.

Proposed Revised Mediation / Arbitration Fee Schedule

HK\$	Eligible Claimant	Financial Institution
Making Enquiries	Free of charge	Free of charge
Filing an Application Form	\$200	Not Applicable (\$200 as applicant or claimant)
Mediation Specified Mediation Time (4 hours) Amount of Claim: <ul style="list-style-type: none"> • Less than \$200,000 • Between \$200,000 and \$1,000,000 • Between \$1,000,001 and \$3,000,000 • Between \$3,000,001 and \$10,000,000 	Per Case \$1,000 \$2,000 \$2,500 \$3,000	Per Case \$5,000 \$10,000 \$12,500 \$15,000
Extended Mediation Time Amount of Claim: <ul style="list-style-type: none"> • Less than \$200,000 • Between \$200,000 and \$1,000,000 • Between \$1,000,001 and \$3,000,000 • Between \$3,000,001 and \$10,000,000 	Per hour or part thereof \$750 \$1,500 for cases over \$200,000 to \$10,000,000 (see also note 1)	Per hour or part thereof \$750 \$1,500 for cases over \$200,000 to \$10,000,000 (see also note 1)
Notes: (1) Total mediation costs (including extended mediation time costs to be shared equally by EC and FI) are capped at \$20,000 for cases up to \$3,000,000 and at \$30,000 for cases up to \$10,000,000. (2) Fees for cases above \$10,000,000 to be agreed amongst the parties and the mediator.		

Arbitration	Per Case	Per Case
Documents-only		
• Up to \$1,000,000	\$5,000	\$20,000
• Between \$1,000,001 and \$2,000,000	\$7,000	\$28,000
• Between \$2,000,001 and \$3,000,000	\$9,000	\$36,000
• Between \$3,000,001 and \$10,000,000	\$9,000 + 0.10% of claimable amount over \$3,000,000	\$36,000 + 0.40% of claimable amount over \$3,000,000
In-person hearing (in addition to the fees payable for documents-only Arbitration)	Per Arbitrator	Per Arbitrator
• Up to \$1,000,000	\$12,500	\$12,500
• Between \$1,000,001 and \$2,000,000	\$15,000	\$15,000
• Between \$2,000,001 and \$3,000,000	\$17,500	\$17,500
• Between \$3,000,001 and \$10,000,000	\$17,500 + 0.5% of claimable amount over \$3,000,000	\$17,500 + 0.5% of claimable amount over \$3,000,000
Note: Fees for cases above \$10,000,000 to be agreed amongst the parties and the arbitrator.		

Comparison of mediation/ arbitration costs under the current and proposed ToR

HK\$	Eligible Claimant (Proposed)	Financial Institution (Proposed)	Eligible Claimant (Current)	Financial Institution (Current)
Making Enquiries	Nil	Nil	Nil	Nil
Filing an Application Form	\$200	Not Applicable (\$200 as applicant or claimant)	\$200	Not Applicable
Mediation Specified Mediation Time (4 hours)	Per Case	Per Case	Per Case	Per Case
Amount of Claim:				
• Less than \$100,000	\$1,000	\$5,000	\$1,000	\$5,000
• Between \$100,000 and \$199,999	\$1,000	\$5,000	\$2,000	\$10,000
• Between \$200,000 and \$500,000	\$2,000	\$10,000	\$2,000	\$10,000
(Proposed new claimable range)				
• Between \$500,001 and \$1,000,000	\$2,000	\$10,000		
• Between \$1,000,001 and \$3,000,000	\$2,500	\$12,500		
• Between \$3,000,001 and \$10,000,000	\$3,000	\$15,000		
Extended Mediation Time	Per hour or part thereof	Per hour or part thereof	Per hour or part thereof	Per hour or part thereof
Amount of Claim:				
• Less than \$100,000	\$750	\$750	\$750	\$750
• Between \$100,000 and \$199,999	\$750	\$750	\$1,500	\$1,500
• Between \$200,000 and \$500,000	\$1,500	\$1,500	\$1,500	\$1,500

(Proposed new claimable range)				
• Between \$500,001 and \$1,000,000	\$1,500	\$1,500		
• Between \$1,000,001 and \$3,000,000	\$1,500	\$1,500		
• Between \$3,000,001 and \$10,000,000	\$1,500	\$1,500		
<p>Notes:</p> <p>(3) Total mediation costs (including extended mediation time costs to be shared equally by EC and FI) are capped at \$20,000 for cases up to \$3,000,000 and at \$30,000 for cases up to \$10,000,000.</p> <p>(4) Fees for cases above \$10,000,000 to be agreed amongst the parties and the mediator.</p>				
Arbitration Documents-only	Per Case	Per Case	Per Case	Per Case
• Up to \$500,000	\$5,000	\$20,000	\$5,000	\$20,000
(Proposed new claimable range)				
• Between \$500,001 and \$1,000,000	\$5,000	\$20,000		
• Between \$1,000,001 and \$2,000,000	\$7,000	\$28,000		
• Between \$2,000,001 and \$3,000,000	\$9,000	\$36,000		
• Between \$3,000,001 and \$10,000,000	\$9,000 + 0.10% of claimable amount over \$3,000,000	\$36,000 + 0.40% of claimable amount over \$3,000,000		

In-person hearing (in addition to the fees payable for documents-only Arbitration)	Per Arbitrator	Per Arbitrator	Per Arbitrator	Per Arbitrator
• Up to \$500,000	\$12,500	\$12,500	\$12,500	\$12,500
(Proposed new claimable range)				
• Between \$500,001 and \$1,000,000	\$12,500	\$12,500		
• Between \$1,000,001 and \$2,000,000	\$15,000	\$15,000		
• Between \$2,000,001 and \$3,000,000	\$17,500	\$17,500		
• Between \$3,000,001 and \$10,000,000	\$17,500 + 0.5% of claimable amount over \$3,000,000	\$17,500 + 0.5% of claimable amount over \$3,000,000		
Note: Fees for cases above \$10,000,000 to be agreed amongst the parties and the arbitrator.				

CHAPTER 6

RETROSPECTIVE EFFECTS OF THE PROPOSED AMENDMENTS

- 6.1 It is noted that there were applications rejected by the FDRC in the past years due to the fact that they could not meet the Intake Criteria in one way or another.
- 6.2 According to Section B (10) of the Intake Criteria, the FDRC shall reject an application if the subject matter of the Claim has previously been considered or excluded by the FDRC.
- 6.3 In light of the proposed amendments above, it is proposed that all previous rejected applications could re-apply for consideration by the FDRC, if they now fall within the amended Intake Criteria.

Question 10:

Do you agree that the FDRC could re-consider the rejected applications if they now fall within the amended Intake Criteria? Why or why not? Please give your reasons.

Financial Dispute Resolution Schemes in Overseas Jurisdictions

	United States	Canada	United Kingdom
Body	Financial Industry Regulatory Authority (“FINRA”)	Ombudsman for Banking Services and Investments (“OBSI”)	Financial Ombudsman Service (“FOS”)
Website	http://www.finra.org/	https://www.obsi.ca/en/home	http://financial-ombudsman.org.uk/
Year of Establishment	2007 by consolidation of a self-regulatory organisation of securities dealers and some operations of the New York Stock Exchange	Established in 1996 as the Canadian Banking Ombudsman and changed name to OBSI in 2002	2001 by consolidating the complaints handling and ombudsman services formerly provided by eight statutory and voluntary schemes
Who Can Complain	<ul style="list-style-type: none"> • Cases with investors: Individual investors, securities firms and employees of securities firms; • Cases with industry parties: cases between brokerage firms, between brokers, and between or among brokerage firms and brokers. 	A Customer is an individual who, or small business that, applied for or received a Financial Service from a Participating Firm.	<ul style="list-style-type: none"> • A person that is a consumer; • A micro-enterprise (an annual turnover of up to two million euros and fewer than ten employees); • A charity (an annual income of less than £1 million); • A trustee of a trust which has a net asset value of less than £1 million).
Can FIs Apply for the Services	Mediation - voluntary process	N/A	No

Financial Dispute Resolution Schemes in Overseas Jurisdictions

	United States	Canada	United Kingdom
Cases under Current Legal Proceedings	N/A	Do not handle matters that have already been through a court of law, tribunal or arbitrator, or any independent dispute resolution body. And where OBSI has been informed that those proceedings have concluded with a binding decision or finding on the merits of the complaint.	No if the court has already made a decision.
Maximum Claimable Amount	None	CAD 350,000	£150,000 It is possible that the amount involved could be more than £150,000 if FOS were to uphold the complaint in claimant's favour.
Limitation Period for Claims	Within 6 years of the occurrence or event giving rise to the course of action	Complaints have to be filed within 6 years of when the consumer knew or should have known of the problem or issue giving rise to the Complaint.	(1) Within 6 months after the date on which the respondent replied to the complainant; and (2) Less than: (a) 6 years after the event complained of; or (if later) (b) 3 years from the date on which the complainant became aware of loss.

Financial Dispute Resolution Schemes in Overseas Jurisdictions

	United States	Canada	United Kingdom
Mutual Agreement for Cases Beyond Scope of Service	Mediation - voluntary process	N/A	N/A

Financial Dispute Resolution Schemes in Overseas Jurisdictions

	Australia	New Zealand	New Zealand
Body	Financial Ombudsman Service Australia (“FOS”)	Banking Ombudsman	Insurance & Financial Services Ombudsman (“IFSO”)
Website	https://www.fos.org.au/	https://www.bankomb.org.nz/	http://www.ifso.nz/
Year of Establishment	2008 by merger of sector specific dispute resolution schemes covering banking, insurance and investments	1992	1995
Who Can Complain	<p>Individuals, partnerships, corporate trustees, small businesses, clubs or incorporated associations, body corporates of strata titles and policy holders of a group life or group general insurance policies.</p> <p>“Small Business” means a business that, at the time of the act or omission by the Financial Services Provider that gave rise to the Dispute:</p> <p>(a) if the business is or includes the manufacture of goods: had less than 100 employees; or</p> <p>(b) otherwise: had less than 20 employees.</p>	<p>Anyone can use the Scheme as long as their bank is a scheme participant. Businesses, trusts, partnerships and clubs can use the Scheme as well as individuals.</p>	<p>Customers of Participants (FIs):</p> <ol style="list-style-type: none"> (1) a person or group of persons; (2) the trustees of a family trust including a corporate trustee; (3) a club or an incorporated society; (4) a unit title body corporate or a body corporate of a company title building which is occupied for residential or Small Business purposes; (5) a Small Business. (“Small Business” means a business that has no more than 19 full-time equivalent employees;)

Financial Dispute Resolution Schemes in Overseas Jurisdictions

	Australia	New Zealand	New Zealand
Can FIs Apply for the Services	N/A	The bank could ask the scheme to consider the complaint	N/A
Cases under Current Legal Proceedings	When the Applicant has lodged a dispute with FOS, the Financial Service Provider must not instigate legal proceedings against the Applicant.	No. The scheme must stop considering a complaint once either side begins legal proceedings.	<ul style="list-style-type: none"> • No if the complaint is the subject of proceedings in another forum; • No, the Scheme must cease considering the complaint if the complainant brings the case to court.
Maximum Claimable Amount	A compensation “cap” is AUD 500,000.	NZD200,000	NZD200,000
Limitation Period for Lodging Claims	<ul style="list-style-type: none"> • Within 6 years of the date of awareness of the loss; and • 2 years from the date of the financial services provider's final response <p>FOS may consider a dispute lodged after either of these time limits.</p>	<ul style="list-style-type: none"> • Within 3 months of the bank’s notification • Where the issue happened no more than 6 years, unless claimant could not reasonably have become aware of it sooner 	<ul style="list-style-type: none"> • Within 3 months (or a longer period agreed to by the Participant) of the date the participant’s written reply; • IFSO will not consider if the complaint is more than 6 years since the matter was first the subject of a formal Complaint by the Complainant to the Participant
Mutual Agreement for Cases Beyond Scope of Service	N/A	The scheme can consider a complaint that would otherwise be outside its rules if both sides agree.	If the participant (FI) consents

Financial Dispute Resolution Schemes in Overseas Jurisdictions

	Malaysia	Malaysia	Singapore	Taiwan
Body	Securities Industry Dispute Resolution Centre ("SIDREC")	Financial Mediation Bureau ("FMB")	Financial Industry Disputes Resolution Centre ("FIDReC")	Financial Ombudsman Institution ("FOI")
Website	https://sidrec.com.my/	http://www.fmb.org.my/en/	http://www.fidrec.com.sg/website/index.html	https://www.foi.org.tw/Default.aspx?Lang=2&Role=1
Year of Establishment	2011	Incorporated in 2004 Commenced operation in 2005	2005 by merger of a consumer mediation unit and an insurance dispute resolution organization.	2012
Who Can Complain	(1) individual investors; or (2) proprietors of a sole proprietorship having a dealing or transaction relating to capital market products or services involving a member	Financial Consumers: (a) Individual; (b) Body corporate	(1) Individuals; (2) Sole proprietors; (3) A person who has a beneficial interest in specific activity; (4) A trustee or personal representative; (5) An insured; or (6) Such third parties as are entitled to bring a claim under an insurance contract extending the relevant third-party coverage.	"Financial consumer" which refers to parties that receive financial products or services provided by a financial services enterprise; except (a) qualified institutional investors; or (b) natural persons or juristic persons with a prescribed level of financial capacity or professional expertise

Financial Dispute Resolution Schemes in Overseas Jurisdictions

	Malaysia	Malaysia	Singapore	Taiwan
Can FIs Apply for the Services	N/A	N/A	N/A	N/A
Cases under Current Legal Proceedings	<p>Disputes would be excluded if they have been referred by the Claimant or the Member to a court or arbitration and the case –</p> <p>(a) has been decided in the court or arbitration; or</p> <p>(b) is pending in the court or arbitration unless the matter is stayed for the purposes of referral of the dispute to SIDREC</p>	<p>Cannot be the subject of proceedings in or decision of any court of law (or arbitration)</p>	<p>Cases which have been subjected to a court hearing and for which a court judgment and / or order has been passed cannot not be brought to FIDReC.</p>	<p>Not to take an application that a final and irrevocable court judgment has been rendered on the subject, or a mediation, ombudsman, compromise, conciliation, or arbitration procedure has resulted in a successful resolution of the matter.</p>

Financial Dispute Resolution Schemes in Overseas Jurisdictions

	Malaysia	Malaysia	Singapore	Taiwan
Maximum Claimable Amount	<p>MYR250,000</p> <p>*Claim exceeds the limit can be handled by SIDREC if both complainant and member so wish to use the service.</p>	<p><u>Banking products and services:</u></p> <ul style="list-style-type: none"> • All claims: MYR100,000 • specific fraud cases: MYR 25,000 <p><u>Insurance/Takaful Product and Services:</u></p> <ul style="list-style-type: none"> • Life/Family Takaful: MYR 100,000 • Motor & Fire Insurance/Takaful: MYR 200,000 • Third-Party Property Damage: MYR 5,000 • Other General Insurance/Takaful: MYR 100,000 	<ul style="list-style-type: none"> • Insurance companies: SGD100,000; • Banks, capital market: SGD50,000 	<p><u>Banking and Securities:</u></p> <ul style="list-style-type: none"> • investment products and services: NTD 1 million; • non-investment products and services: NTD 100,000; <p><u>Insurance:</u></p> <ul style="list-style-type: none"> • Insurance products and services: NTD1,000,000; • Medical insurance: NTD100,000

Financial Dispute Resolution Schemes in Overseas Jurisdictions

	Malaysia	Malaysia	Singapore	Taiwan
Limitation Period for Claims	<p>A. Within 180 days from the date of receiving of the member's final reply</p> <p>B. Notwithstanding the above, having regards to the 6-year limitation period imposed by the Limitation Act</p>	<ul style="list-style-type: none"> • within 6 months from the date of receiving final decision from financial institution; and • must not be brought after the expiration of 6 years from the date on which the cause of action accrued 	6 months after the financial institution's reply	within 60 days of receiving notification from financial institution
Mutual Agreement for Cases Beyond Scope of Service	Only for the cases beyond claimable limit	If financial institutions agree, cases exceeding 6 months from FI reply can bring to the mediator.	N/A	N/A

**Financial Dispute Resolution Schemes in Overseas Jurisdictions
(Maximum Claimable Amount only)**

Jurisdictions	Organisations	Maximum Claimable Amount	Maximum Claimable Amount (in HKD equivalent)
USA	Financial Industry Regulatory Authority (“FINRA”)	No set limit	No set limit
Canada	Ombudsman for Banking Services and Investment (“OBSI”)	CAD350,000	~HK\$2,000,000
UK	Financial Ombudsman Service (“FOS”)	GBP150,000	~HK\$1,500,000
Australia	Financial Ombudsman Service (“FOS”)	AUD500,000	~HK\$3,000,000
New Zealand	Banking Ombudsman / Insurance & Financial Services Ombudsman (“IFSO”)	NZD200,000	~HK\$1,000,000
Singapore	Financial Industry Dispute Resolution Centre (“FIDReC”)	SGD100,000	~HK\$600,000
Malaysia	Financial Mediation Bureau (“FMB”) / Securities Industry Dispute Resolution Centre (“SIDREC”)	MYR250,000	~HK\$500,000
Taiwan	Financial Ombudsman Institutions (“FOI”)	NTD1,000,000	~HK\$250,000

**Financial Dispute Resolution Schemes in Overseas Jurisdictions
(Limitation Period Only)**

Jurisdictions	Organisations	Limitation Period
USA	Financial Industry Regulatory Authority (“FINRA”)	Within 6 years of the occurrence or event giving rise to the cause of action
Canada	Ombudsman for Banking Services and Investment (“OBSI”)	Complaints have to be filed within 6 years of when the consumer knew of the problem or issue giving rise to the Complaint
UK	Financial Ombudsman Service (“FOS”)	Within 6 months of final reply from financial institution, and within 6 years from complaint or (if later) within 3 years of awareness of loss
Australia	Financial Ombudsman Service (“FOS”)	Within 6 years from awareness of loss and within 2 years of final reply from financial institution *FOS may consider a dispute lodged after either of these time limits.
New Zealand	Banking Ombudsman / Insurance & Financial Services Ombudsman (“ISO”)	Within 3 months of final reply from financial institution and happened no more than 6 years
Singapore	Financial Industry Dispute Resolution Centre (“FIDReC”)	Within 6 months of final reply from financial institution
Malaysia	Financial Mediation Bureau (“FMB”) / Securities Industry Dispute Resolution Centre (“SIDREC”)	Within 180 days from the date of receiving of the final reply from financial institution and within 6 years of cause of action
Taiwan	Financial Ombudsman Institution (“FOI”)	Within 60 days of final reply from financial institution

International Reference on the Definitions of Small Businesses

A. European Commission

The European Commission determines small and medium-sized enterprises (“SMEs”) by the following major factors³²:

- a) **staff headcount**; and
- b) either **turnover** or **balance sheet total**.

Company category	Staff headcount	Turnover	Balance sheet total
Medium-sized	< 250	≤ € 50 m	≤ € 43 m
Small-sized	< 50	≤ € 10 m	≤ € 10 m
Micro-sized	< 10	≤ € 2 m	≤ € 2 m

These ceilings apply to the figures for individual firms only. A firm that is part of larger group may need to include staff headcount/turnover/balance sheet data from that group too.

B. United Kingdom

In the United Kingdom, Section 350 of the Companies Act of 2014³³ states that a company is "small" if it satisfies the following criteria:

- a turnover of not more than £8.8 million;
- a balance sheet total of not more than £4.4 million; and
- not more than 50 employees.

C. United States

In the United States, the legal definition of a small business³⁴ is determined by the U.S. Small Business Administration (“SBA”), which sets the criteria to be used by the SBA in making small business determinations.

³² Source: http://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition/index_en.htm

³³ Source: <https://www.cro.ie/annual-return/financial-statements-requirements/small-company>

³⁴ Source: <https://www.sba.gov/contracting/getting-started-contractor/qualifying-small-business>

Criteria set by the SBA in determining the definition of a small business includes the number of workers employed or annual receipts. The following criteria are used by the SBA to define a small business:

- Manufacturing: Maximum number of employees may range from 500 to 1500;
- Wholesaling: Maximum number of employees may range from 100 to 500;
- Services: Annual receipts may not exceed US\$2.5 to US\$21.5 million;
- Retailing: Annual receipts may not exceed US\$5.0 to US\$21.0 million;
- General and Heavy Construction: Annual receipts may not exceed US\$13.5 to US\$17 million;
- Special Trade Construction: Annual receipts may not exceed US\$7 million; and
- Agriculture: Annual receipts may not exceed US\$0.5 to US\$9.0 million.

D. Australia

In Australia, small business is defined differently by regulators in Australia depending on the laws they administer.

Australian Securities and Investment Commission (“ASIC”) regulates many businesses that are 'small proprietary companies', which means a company with two out of these three characteristics:³⁵

- a) an annual revenue of less than AUD 25 million;
- b) fewer than 50 employees at the end of the financial year; and
- c) consolidated gross assets of less than AUD 12.5 million at the end of the financial year.

The Australian Taxation Office (“ATO”) defines a small business as one that has annual revenue turnover (excluding GST) of less than AUD 2 million. Fair Work Australia (“FWA”) defines a small business as one that has less than 15 employees.

³⁵ Source: <http://asic.gov.au/for-business/your-business/small-business/small-business-overview/small-business-what-is-small-business/>

Despite these differences, many regulators have informally adopted the definition of “small business” used by the Australian Bureau of Statistics (“ABS”), which is a business that employs fewer than 20 people.

LIST OF QUESTIONS FOR CONSULTATION

Question 1 1.1 Do you agree with the proposed amendment to raise the upper claimable limit to HK\$3,000,000? Please state your reasons.

1.2 If not, what would be your suggestion of a suitable upper claimable limit?

HK\$1,000,000; HK\$2,000,000; Others (please specify) _____

Please state the reasons for your selection.

Question 2 2.1 Do you agree that a single maximum claimable amount continues to be applicable for the banking and the securities industries? If not, why?

2.2 If there are two different maximum claimable amounts, what would be your suggestion of suitable upper claimable limits for the banking and securities industries respectively?

Please state the reasons for your suggestion.

Question 3 3.1 Do you agree to extend the limitation period for lodging Claims to 36 months? Why or why not?

3.2 Do you have other suggestions?

12 months; 24 months; 48 months; 60 months;

72 months; Others (please specify) _____

Please explain your choice.

Question 4 4.1 Do you agree with the proposal to extend the service scope to cover Claims from SEs (as defined in paragraph 2.33 of this Consultation Paper)? Why or why not?

4.2 Besides the proposed definition of SEs in paragraph 2.33 of this Consultation Paper, do you have any other suggestions to define the size of a small business? Please provide elaborations on your suggestions.

4.3 Do you agree that an FI qualifying as an SE could file a Claim as an

EC against another FI? Please explain.

- Question 5**
- 5.1 Do you agree that the FDRC should deal with cases under current court proceedings without the claimant withdrawing the case from the Court? Why or why not?
 - 5.2 For PD31 cases, do you agree that the maximum claimable amount be set at an amount in tandem with the future monetary jurisdiction of the District Court? Please give your reasons.
 - 5.3 Do you agree that parties to the mediation in PD31 cases at the FDRC can be legally represented as elaborated in paragraph 2.43 of this Consultation Paper? Please explain.

- Question 6**
- Do you agree that, subject to a prior mutual agreement between an FI and a claimant, the FDRC could consider handling disputes which exceed its certain amended Intake Criteria as specified in paragraph 3.1(a) and (b) of this Consultation Paper? Why or why not?

- Question 7**
- 7.1 Do you agree that when there is a financial dispute between an EC and an FI, the FI may refer the financial dispute to the FDRC, subject to the consent of the EC? Why or why not?
 - 7.2 Do you agree that when there is a Claim by an EC against an FI, the FI with a counterclaim may lodge the counterclaim to the FDRC, subject to the consent of the EC? Why or why not?
 - 7.3 Do you agree with the arrangement that the FI can pay for the mediation and/or arbitration fees for their customers if the FI so wishes? Why or why not?

- Question 8**
- 8.1 Do you agree that options of “mediation only” and “arbitration only” in addition to the original “mediation first, arbitration next” be offered to the parties with mutual agreement? Please state your reasons.
 - 8.2 Do you agree that such “mediation only” or “arbitration only” option should not be available for “normal” cases under the FDRS? Why or why not?

- Question 9**
- Do you agree with the proposed revised fee scale for dispute resolution services of the FDRC? Please provide your comments and/or suggestions.

Question 10 Do you agree that the FDRC could re-consider the rejected applications if they now fall within the amended Intake Criteria? Why or why not? Please give your reasons.

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