

# **Proposals to Enhance the Financial Dispute Resolution Scheme**

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## **Consultation Conclusions**

**August 2017**

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

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**Financial Dispute Resolution Centre**

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## **FOREWORD BY THE CHAIRMAN**

It has been five years since the Financial Dispute Resolution Centre (“FDRC”) started its operations in June 2012. The Board has embraced its vision and mission and constantly reviewed its operations and consulted our stakeholders to enhance its services, so that the FDRC service could well serve the community and the FDRC resources could be efficiently utilised. The Board, based on views and comments received from stakeholders and a comprehensive review of the operations and international practices, has proposed to enhance its services and published a consultation paper last October to consult the public on its proposed enhancements.

There are two broad categories of service enhancements. The first category involves expanding the Intake Criteria of the Term of Reference to (i) raise the maximum claimable amount; (ii) extend the limitation period; (iii) enlarge the scope to eligible claimants to cover small enterprises; and (iv) accept applications of claims which are under current court proceedings.

The second category enables the parties involved to mutually agree to refer claims that exceed the amended Intake Criteria in terms of maximum claimable amount and/or the limitation period to the FDRC. Further, if the Eligible Claimant (“EC”) agrees, the Financial Institution (“FI”) may refer the financial dispute and lodge a counterclaim to the FDRC. On the basis of mutual agreement for cases exceeding the amended Intake Criteria, the parties could opt for “mediation first, arbitration next”, “mediation only” or “arbitration only” approach in dispute resolution at the FDRC.

In light of the above amendments, there are related changes in the fee, procedures and the implementation issue.

From the consultation responses, we are pleased to learn that many support our proposals and we have received constructive comments from a wide spectrum of respondents. In particular, we have received the views from the banking and the securities industries, which we will address in our consultation conclusion attached. Taking into account all the views and with further deliberations, we have adopted most of the proposals, with some necessary revisions.

With the implementation of these comments, the FDRC would be able to provide our enhanced services to the users in a more flexible way to cater to their needs and at the same time better utilise our resources, so as to achieve the FDRC’s mission and vision and benefit the community at large.

Prof. Teresa Cheng Yeuk-wah, GBS, SC, JP  
Chairman of the Board

## **BACKGROUND**

1. On 3 October 2016, the FDRC launched a 3-month public consultation on the proposed enhancement to the terms of the Financial Dispute Resolution Scheme (“FDRS”). The consultation exercise ended on 31 December 2016.

## **OUTCOME OF CONSULTATION**

2. We have received a total of 32 written submissions from 7 industry associations representing the financial institutions and/or individuals from the financial services industries, 2 institutions of consumer protection and investor education, 8 relevant professional bodies and government department, 4 chambers of commerce, 5 individuals and 6 other organisations, with some of them reaching us after the end of the consultation period. A list of the respondents is shown at Appendix.
3. Their views are reflected in this document. Copies of submissions received are available at the FDRC website at [http://www.fdrc.org.hk/en/html/publications/publications\\_consultation.php](http://www.fdrc.org.hk/en/html/publications/publications_consultation.php).
4. In finalising the proposals, we also held discussions or clarified with some of the respondents about their submissions. We have incorporated their views into these Consultation Conclusions as appropriate.

## **General Comments**

5. The responses we received reflected various perspectives on the proposals themselves. These ranged from “agree” to “disagree” responses to particular proposals, to requests for further explanations, to suggestions for alternative approaches with rationales.
6. In general, the banking sector and the securities sector would like to maintain the status quo. The other respondents including the Department of Justice (“DoJ”), the Consumer Council, the Investor Education Centre, major chambers of commerce, relevant professional bodies, etc. are generally supportive of the proposed enhancements. Their views are elaborated below.

## **PART I : AMENDMENTS TO MAJOR TERMS OF THE FDRS**

7. The four major amendments to the service scope of the FDRS as elaborated in Sections (A) to (D) below will enable FIs and their clients (now including small companies) to bring claims to the FDRC with a higher maximum claimable amount within an extended limitation period. Furthermore, the FDRC would be able to accept claims subject to court proceedings if there is a stay of the court proceedings with the consent of the parties or a proper notification to the court.

### **(A) Maximum Claimable Amount**

8. We proposed to raise the maximum claimable amount from HK\$500,000 to HK\$3,000,000 and asked for an alternative amount, if there were further suggestions. (Consultation Questions Q1.1 and Q1.2)

### **Respondents' views**

9. Most of the respondents other than the industry associations from the banking and securities sectors generally supported raising of the maximum claimable amount for the following reasons: (a) it would increase the accessibility of the FDRC's mediation / arbitration services, which are cost-effective and efficient, to the financial consumers and the financial institutions; (b) it would better accommodate the public's needs, as supported by the FDRC data and economic indices; and (c) it would be consistent with the prevailing practices in overseas jurisdictions and the proposed revision to the jurisdictional limit of the District Court.
10. Most of the industry associations in the securities sector were concerned about the potential abuse of the FDRC's services. The raising of the claimable amount may thus increase their business risks, in particular for the local brokerage firms, which have been operating in difficult and competitive environment.
11. The majority of banks preferred no change. The DTCA and the HKAB maintained that:
  - a) The majority of cases did not exceed the current claimable limit, which is already higher than the average claimable limit for other Asian jurisdictions, such as Singapore.
  - b) Claims exceeding HK\$500,000, usually involve more complex investment products and/or factual matrix, are well covered by the jurisdiction of and more suitable to be tried in the District Court and the Court of First Instance.

- c) The nature of the civil proceedings brought in the District Court and the Court of First Instance vary significantly, some of which are clearly not suitable for mediation.
  - d) Given a claimant is only required to pay a very small fee for lodging a claim with the FDRC, the process can be easily abused.
  - e) The current operating costs of the FDRC are high despite the relatively modest operation. The proposed amendment will inevitably increase its workload and require additional resources and hence raise its operating costs further. The extra funding required will eventually have to be borne by the parties using the FDRC.
12. As to suggestions for an acceptable maximum claimable amount, a securities association considered that HK\$1,000,000 would be more appropriate. To increase it to HK\$3,000,000 would encourage abuse. A couple of respondents recommended HK\$2,000,000 as it would be more in line with overseas jurisdictions.

## **Our Response**

13. The major objective of the proposals is to enhance the FDRC's services to better serve the community by providing an independent and efficient alternative avenue to the parties in dispute to resolve their problems. This alternative avenue should be accessible when the parties so wish to use it. Raising the upper claimable limit can enhance the accessibility of the parties in dispute to the FDRC's services.
14. The enquiries statistics of the FDRC supported the increase in maximum claimable amount, which would be more in line with Hong Kong being an international financial centre, when compared with comparably regulated jurisdictions such as the US, the UK, Australia and New Zealand as well as some Asian jurisdictions. We note that in Singapore, FIDReC's insurance claim limit of SGD100,000 (about HK\$600,000 equiv.) is higher than that of the Hong Kong, though its non-insurance limit is lower at SGD50,000. However, both limits were set in 2005, when the FIDReC of Singapore was established. In its 10<sup>th</sup> year anniversary in 2015, FIDReC reviewed the claim limits and announced in 2016 that it would double its non-insurance related claim amount from SGD50,000 to SGD100,000 <sup>1</sup> (about HK\$600,000 equiv.) effective January 2017, in the same amount as the insurance related claim limit, to help more consumers and the financial industry in the event of disputes. After the increase of the maximum claim that could be made to FIDReC, both its insurance or non-insurance related

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<sup>1</sup> FIDReC announcement to increase the non-insurance claim amount  
[http://www.fidrec.com.sg/website/press\\_release/Press%20Release%20dated%2021%20Dec%202016.pdf](http://www.fidrec.com.sg/website/press_release/Press%20Release%20dated%2021%20Dec%202016.pdf)

claims limits are higher than the current maximum claimable amount of Hong Kong.

15. Mediation and arbitration are well-established alternative dispute resolution processes to deal with financial disputes of varying claim amounts. The amount does not render a case more or less suitable for litigation. Even if the matter has been brought to court, under the Civil Justice Reform of Hong Kong adopted in 2010, parties are encouraged to mediate first as directed under Practice Direction 31 (“PD31”) for cases in the District Court and the Court of First Instance. The DoJ has produced mediation statistics supporting the conclusion that mediation is an effective and efficient alternative dispute resolution process to court litigation.<sup>2</sup> The FDRC specifically deals with financial disputes under the FDRS, with the mediation success rate of about 80% and the user’s satisfaction rate of about 90%. This is because the mediators or arbitrators on the FDRC panel have considerable experience in mediation/arbitration and possess financial and product knowledge and are fully competent in handling financial disputes, regardless of complexity and amount.
  
16. As to the concern of abuse of the FDRS, the FDRC would like to put forward the following points:
  - a) The FDRC is mindful of the potential for abuse and follows stringent vetting procedures to evaluate each received application carefully and objectively according to the Intake Criteria of the ToR. This will screen out frivolous or vexatious claims and prevent abuse of the FDRS; and
  - b) In the Users’ Feedback Forum held in December 2016, attended by the FIs which have used our services, they acknowledged that the FDRC’s intake process is strict and has been administered so as to reject irrelevant cases. They added that they did not see any incidents of abuse during the past few years of operation.
  
17. Regarding the concern of the increase in operating costs as a result of more caseload, the FDRC anticipates that the increase would be moderate and its existing setup should be able to take on the increased caseload, with the current operating costs remaining largely unchanged. Any further cost increase would be marginal and largely in variable rather than fixed costs, which is more easily controlled. It is also worth mentioning that the current operating costs of the FDRC have been significantly lowered through a series of cost controls and productivity enhancements under a

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<sup>2</sup> Mediation settlement rates in both courts are 60-64% in 2016  
[http://mediation.judiciary.gov.hk/en/figures\\_and\\_statistics.html](http://mediation.judiciary.gov.hk/en/figures_and_statistics.html)



lean organisational structure. The total expenditure was about HK\$15 million in 2016, further reduced from about HK\$18 million in 2015 and HK\$24 million in 2014.

18. It is noted that there is an overwhelming support for an increase in the maximum claimable amount from most of the respondents in the community. Whilst the increased claim limit for cases to be heard by the District Court and the timing of its implementation are yet to be confirmed, it is noted that the Insurance Claims Complaints Bureau (“ICCB”) in Hong Kong has raised its claim amount from HK\$800,000 to HK\$1,000,000<sup>3</sup> in January 2016 to cope with the increased claim amount. From the FDRC’s enquiries statistics, it is also apparent that the HK\$1,000,000 amount would account for about 50% of the 270 complaint enquiries that exceed the current claim limit of HK\$500,000 between 2012 to 2015. Hence, having considered all the views and concerns received, the FDRC proposes to raise the maximum claimable amount from HK\$500,000 to a measured amount of HK\$1,000,000 instead of the proposed HK\$3,000,000.

*A single maximum claimable amount for the banking and the securities sectors*

19. We asked if a single maximum claimable amount should continue to be applied to the banking and the securities sectors and if not, any suggested amounts. (Consultation Questions Q2.1 and Q2.2)

**Respondents’ Views**

20. One respondent held that given the growing similarity of financial products offered by the banking and the securities industries, there is no cogent justification for setting two different claimable amounts. Another respondent added that further studies and research were warranted to explore the possibilities of separate claimable amounts for the two industries.
21. On the whole, the respondents agreed that a single maximum claimable amount should continue to be applicable, with some of them agreeing on the basis that the maximum claimable amount should remain unchanged at HK\$500,000. It was generally agreed that one amount would avoid confusion to the users.

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<sup>3</sup> [http://www.iccb.org.hk/en\\_mediarelease\\_20151217.html](http://www.iccb.org.hk/en_mediarelease_20151217.html)

## **Our Response**

22. We agree that one single maximum claimable amount would avoid confusion to both FIs and ECs. Furthermore, given a relatively low maximum claimable amount of HK\$1,000,000 as now revised, the need for two separate maximum claimable amounts for the banking and the securities industries is much reduced. Hence, we consider that one single maximum claimable amount should continue to be applied.

### **(B) Limitation Period**

23. We proposed to extend the limitation period for lodging Claims from 12 months to 36 months. We further asked for suggestion of a suitable period, if 36 months was not acceptable. (Consultation Questions Q3.1 and Q3.2)

## **Respondents' Views**

24. Quite a number of respondents including the DoJ, the Investor Education Centre, major chambers of commerce, professional mediation bodies, individuals and some organisational respondents agreed with the proposal to extend the limitation period to 36 months, as it appears to be appropriate and reasonable and more claimants could have better accessibility to the FDRC's service.
25. A number of other respondents including the Consumer Council, the Hong Kong Bar Association ("Bar Association"), The Law Society of Hong Kong ("Law Society"), some professional bodies, etc. considered that the limitation period should be longer and up to six years, which is consistent with the prescribed period under the Limitation Ordinance (Cap. 347) and in line with the international standards. It was suggested that to further develop the FDRC into an effective dispute resolution mechanism as an alternative to the courts, a more reasonable approach is to extend the limitation period in tandem with the current limitation period for legal actions in relation to contracts or torts in Hong Kong.
26. There were divergent views in the securities sector. Several respondents insisted on the limitation period of 12 months, given that memory generally deteriorates with the lapse of time and enquiries of over 12 months may not result in claims or the enquirers may already have lodged their complaints to the SFC. A few respondents proposed to raise the limitation period to 24 months, as this would be in line with the current securities regulation requiring contract notes and other documents to be kept for 24 months. Some other respondents agreed to extend the limitation period to 36 months to avoid lengthy and costly litigation process.

27. The banking sector maintained that the limitation period for lodging Claims should be kept at 12 months for the following reasons:
- a) The current limitation period is either in line with or in excess of those of other Asian jurisdictions.
  - b) It is rare for claims to be made after the current limitation period of 12 months. In any event, such claims may be brought to the civil courts to seek judgments.
  - c) If the limitation period is extended to 36 months, claimants would likely wait longer before they lodge their claims. Due to a longer lapse of time, it would be more difficult for the parties to recall the material facts of the case.
  - d) The current operating costs of the FDRC are high despite the relatively modest operation. The proposed amendment will inevitably increase its workload and require an improvement of its expertise and hence raise its operating costs further. There is concern that any extra funding required eventually will have to be borne by the parties using the FDRC.

### **Our Response**

28. Under the current ToR, the 12-month limitation period of the FDRS starts from the date of first knowledge of loss or the date of purchase of the financial product/services, whichever is the later. If the claimant remains dissatisfied with the final reply from the FI or receives no final reply at all from the FI 60 days after a complaint is made to the FI, he may file the claim with the FDRC within the 12-month period from the date of first knowledge of loss.
29. The limitation periods of similar schemes in Singapore, Malaysia and Taiwan set their start date invariably by referring to the date of the final reply from the FI, and would end 60 days to 180 days from the FI's final reply date. Hence, it is difficult to compare the duration of the limitation period of the FDRC with those of the mentioned Asian jurisdictions.
30. For countries such as UK and Australia, the period for the knowledge of loss ranges from 3 years (UK) to 6 years (Australia & New Zealand), which is longer than the current one year limitation period in Hong Kong.
31. It is not uncommon that claims may have to be made beyond the 12-month period. The limitation period has been another major reason for the FDRC to refuse acceptance of claims under the current ToR. The FDRC's enquiry data over 2012 to 2015 showed that there was an annual average of 140 cases with the limitation period exceeding 1 year (Paragraph 2.17 of

the Consultation Paper). Though these cases may be brought to the courts, there is no reason why the FDRC should not extend its services to the FIs and their clients to resolve disputes under the FDRS.

32. The concern of banks in the increased operating costs of the FDRC has been responded to. (See paragraph 17 above.)
33. It is appreciated that there would be increasing difficulties in recalling the material facts of the case due to a longer lapse of time, if the limitation period is extended to 36 months. It is also noted that under the current securities regulations, contract notes as well as other records and documents are required to be kept for a period of 24 months.
34. Having considered all the views and comments provided, we consider that a 24-month limitation period is more appropriate and should be adopted by the FDRC.

### **(C) Small Enterprises as Eligible Claimants**

35. We proposed to enlarge the scope of the definition of ECs to include Small Enterprises (“SEs”) and asked for any alternative suggestions, if applicable, to define SEs. (Consultation Questions Q4.1 and Q4.2)

### **Respondents’ Views**

36. The four chambers of commerce, viz, Hong Kong General Chamber of Commerce (“HKGCC”), Hong Kong Chinese Chamber of Commerce (“HKCCC”), Hong Kong General Chamber of Small and Medium Business (“HKGCSME”) and the Federation of Hong Kong Industries (“FHKI”), welcomed this proposal, as it would provide more support to small businesses in Hong Kong.
37. The DoJ, professional bodies, individual and other organisational respondents, etc. also supported this proposal, as they see a need to provide small companies, which have less financial means, with an affordable and effective dispute resolution service.
38. Some respondents from the securities sector agreed to cover small businesses, whilst the others would like the FDRC to continue focusing on personal disputes, as the SEs’ disputes are generally of different nature and it may occupy the resources of the FDRC and increase its operating costs.
39. The banking sector did not agree to extend the service scope to cover the SEs. It was considered that the FDRC should continue to focus on retail

customers who are less sophisticated and have fewer financial resources, who thus have a greater need for access to a low cost and speedy dispute resolution service.

40. The proposed SE definition of HK\$50 million annual turnover is generally agreeable to the chambers of commerce. There were suggestions to refine the definition however. The FHKI would like to use the definition of “small private companies” under the Companies Ordinance (Cap. 622), namely companies with not more than HK\$100 million annual turnover/assets and 100 employees. Some respondents suggested adding one or more of the following additional criteria, which are:
  - a) Number of employees, in line with international practice;
  - b) Profitability;
  - c) Not more than EUR10 million annual turnover/assets and less than 50 employees (European Commission’s definition for small companies); and
  - d) Total asset threshold of not more than HK\$50 million, to limit the asset size of SEs to those which may face a disadvantage when it comes to litigations with financial institutions.

## **Our Response**

41. The strong support from most of the respondents is noted, as there is a need in the market for small companies to use mediation/arbitration to resolve disputes with their FIs. Similar schemes in jurisdictions such as the UK, Canada, Australia, New Zealand, and Malaysia also deal with small companies. In fact, as said in paragraph 2.25 of the Consultation Paper, the regulators in Hong Kong have noted a rising trend in complaints lodged by corporates.
42. These corporates may well be corporate banking customers instead of retail banking customers. We recognise that, if the FDRS is extended to small enterprises, there may be a need for banks to cope with the changes and modify their operating procedures accordingly. We are also aware that there may be a need to deal with compliance issues of these corporates, which should not be much different from those of individual claimants that the FDRC is currently dealing with.
43. Whilst small enterprises may have better financial positions than individuals or sole proprietors, they are likely to possess less experience in financial products and not be as financially sophisticated as the FIs. Whilst we should not extend our services to affluent investors, a proper and

narrow definition of SEs may enable the FDRC to provide its services to the right claimants and hence optimise the use of the FDRC resources.

44. In the light of the comments above and the constructive recommendations relating to the definition of SEs, we propose that an eligible SE, which is a limited company or a partnership, has to meet all of the following requirements as per its latest financial statement. If the SE is a subsidiary or a holding company of a group, the group's consolidated figures will be used instead.
- a) SE's or its group's annual turnover is not more than HK\$50 million;
  - b) SE's or its group's gross asset is not more than HK\$50 million; and
  - c) SE's or its group's employee number in Hong Kong is not more than 50.

#### *FIs with SEs status*

45. We proposed that an FI qualifying as an SE could file a Claim as an EC against another FI. (Consultation Question Q4.3)

#### **Respondents' Views**

46. Many respondents including the DoJ, professional bodies, individual and other organisational respondents agreed that the small FIs should be eligible to use the FDRS, if they could meet the SE definition. One respondent opined that the level of complexity of claims may be increased and such disputes should be heard by a specialist panel of mediators and arbitrators who have a good understanding of the relevant industry practice.
47. A securities association submitted that small FIs do have professional knowledge and they should be treated on an equal basis with the other FIs under the FDRS. Another securities association argued that this is outside the scope of the FDRS and the FIs should be able to commence legal proceedings or apply to other mediation centres to resolve their disputes.
48. The banking sector disagreed with this proposal for reasons as set out in paragraph 39.

#### **Our Response**

49. We agree that all SEs should be treated equally and the smaller FIs qualifying as SEs should not be precluded from the FDRS merely because they are FIs. The suggestion of equal sharing of fee could be accepted based on the reason provided. We also consider that our well-experienced

panel mediators and arbitrators are highly competent to handle such disputes. Hence, this proposal is adopted, subject to a condition that the relevant mediation/arbitration fees will be equally shared between the FI qualifying as an SE and the other FI.

#### **(D) Accepting Cases under Court Proceedings**

50. We proposed that the FDRC could deal with cases under current court proceedings without the claimant withdrawing the case from the Court. (Consultation Question Q5.1)

#### **Respondents' Views**

51. Most of the respondents supported the proposal to enable the FDRC to deal with cases subject to on-going court proceedings without the claimant withdrawing the case from the court. It could encourage litigants to save the time and costs that may be incurred in withdrawing the case from the court.
52. The DoJ supported this proposal, which is consistent with: (a) the Government's initiative to promote the use of mediation and arbitration to resolve disputes; (b) the objectives of Civil Justice Reform and PD31, namely to facilitate settlement of disputes and to encourage parties to resolve their disputes through alternative dispute resolution procedures; and (c) the aim of saving court resources so that cases can be dealt with more efficiently. The DoJ also suggested that consideration should also be given to the proper disposal of the court proceedings such as whether there should be a stay of the court proceedings by consent of the parties or a proper notification to the court should be given. Possible practical problems may occur when multiple parties are involved in "parallel proceedings" i.e. resolution process administered by the FDRC and legal proceedings before courts, should also be addressed. The Law Society pointed out the reasons in support of the parallel proceedings are that a serial process can cause injustice as it means that the claimant needs to exhaust one process before taking that to the next and that it could render the potential claim to be time-barred. The Bar Association supported that the parties should be allowed to refer the dispute to the FDRC, whether there is or is not current court proceeding or whether the on-going case in issue is withdrawn or not.
53. The securities industry has split views. Whilst some agreed it would remove unnecessary procedures and conform to the Civil Justice Reform, others disagreed as the FDRC should cater to mediation cases and not cases already subject to legal proceedings.

54. The banking sector did not agree with this proposal with the rationale being:
- a) Under the current scheme, claimants are already able to refer their claims to the FDRC before they commence legal proceedings. Permitting them to refer the matter to the FDRC after they have commenced legal proceedings without first withdrawing their claims would result in duplication and potentially abuse of resources.
  - b) If the parties to the proceedings genuinely wish to attempt mediation, they would be able to do so using the well-established mediation process (see PD31). This process has been in place for more than 7 years and legal practitioners are well aware of and familiar with the requirements and procedures. There is no reason why the parties would need to refer the matter to the FDRC given the equally effective mediation process under PD31, particularly considering that most if not all of the mediators on the FDRC panel are also on the panels of other bodies such as HKIAC.

### **Our Response**

55. For PD31 cases to be accepted under the FDRS, they have to fall within our amended Intake Criteria and subject to vetting procedures. And in light of the PD31 requirement, if the parties agree to mediate at the FDRC, the FDRC finds no reason to refuse this. The question of abuse does not arise.
56. We recognise the issue of “parallel proceedings”. We will accept the DoJ’s proposal to require the stay of court proceedings by consent of the parties or at least proper notification to the court, to avoid duplication.
57. We recognise that the PD31 has been in operations for seven years, and that there are available mediators in the community. However, we would like to point out the following distinguishing features of the FDRC services:
- a) The FDRC panel of mediators are well trained with specific knowledge in financial products and industry;
  - b) The FDRC provides a unique and well administered mediation services (as distinct from ad hoc mediation in the market). The FDRC’s case officers arrange information bundles and provide administrative support to the mediator. To the parties, the case officers will provide a selection of well-experienced mediators, briefing sessions on the mediation process and arrange pre-mediation and mediation meetings at the FDRC offices.
  - c) A high percentage of about 90% of our users have rated the FDRC services as “satisfactory” or above; and



- d) The success rate of mediation cases has been maintained at a satisfactory level of about 80%.
58. This proposal is widely supported by many of our respondents as stated in paragraph 51 above, as this will save time and costs by waiving the unnecessary procedures of withdrawing the case from the court. The current court proceedings will be stayed or at least the court will have to be properly notified to address proper disposal of court proceedings (see paragraph 56). As the proposal facilitates the mediation process and does not affect the rights and obligations of the parties involved, this proposal will be adopted.

*To set the maximum claimable amount same as future monetary jurisdiction of the District Court for PD31 cases*

59. We proposed that for PD31 cases, the maximum claimable amount be the same as the future monetary jurisdiction of the District Court. (Consultation Question Q5.2)

**Respondents' Views**

60. Many of the respondents agreed that it should be in line with the future monetary jurisdiction of the District Court and avoid confusion and discrepancy between the FDRC and the District Court.
61. The securities sector has diverse views on the proposal. Some respondents gave their support for matching with the future monetary jurisdiction limit of the District Court up to HK\$3,000,000, whilst others were only agreeable to a lower amount of up to the current District Court limit of HK\$1,000,000. And there is a view that there should not be distinction between PD31 and non-PD31 cases. An association disagreed with the proposal for the reason that the FDRC and the Court are different in nature and status.
62. The banking sector did not agree that PD31 cases should be referred to the FDRC for reasons set out in paragraph 54 above. In any event, they did not agree that the maximum claimable amount should be increased from the current HK\$500,000.

## **Our Response**

63. As stated in paragraph 18 above, the maximum claimable amount would be reduced from the proposed HK\$3,000,000 to a lower level of HK\$1,000,000. Given also that the future limit of the District Court is not yet known for its amount and the timing, we will set the maximum claimable amount for PD31 cases at HK\$1,000,000 at this stage, to correspond with the current District Court limit and to avoid confusion.

### *To allow legal representatives in PD31 cases*

64. We proposed that parties to the mediation in PD31 cases at the FDRC can be legally represented. (Consultation Question Q5.3)

## **Respondents' Views**

65. Most of the respondents including the DoJ, legal and mediation/arbitration professional bodies, a majority of the securities associations, etc. agreed with the proposal. It was considered that legal representatives are commonly involved in court proceedings under PD31 and parties in PD31 cases at the FDRC should have the option to be legally represented.
66. The Consumer Council however noted that under the FDRS, parties are not permitted to have legal representatives to participate in the mediation, to ensure a low-cost ADR process for the general public. And given the inequality of resources between an EC and an FI, if the FI would instruct lawyers to join the FDRC mediation, this may cause prejudice to the EC if he has no resources to engage lawyers in the mediation. The principle should be equally applicable to PD31 cases.
67. The banking sector did not agree that PD31 cases should be referred to the FDRC, for reasons set out in paragraph 54 above.

## **Our Response**

68. Pursuant to Clauses 19 and 20, Part C of PD31 (as quoted in footnote 19 of paragraph 2.43 in the Consultation Paper), mediation can be conducted with or without legal representatives from both or either party, at the choice of the parties involved and as the Court shall decide if mediation is appropriate. Part C of PD31 applies to proceedings in which one or more parties are not legally represented. Clause 19 and 20 are :

*“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.”*

69. If an EC decides to bring the case to court, he should have given due consideration to the legal representative issue. It serves no extra purpose for the FDRC to introduce additional condition than are required by PD31 on the legal representative issue. After all, the purpose of this proposal is to facilitate both parties to engage the services of the FDRC in the PD31 process.
70. Taking into account the supporting views and the practice that legal representatives are allowed under PD31, we would adopt this proposal to facilitate the parties to use the FDRC services.

### **Part I Conclusion**

- A. The maximum claimable amount under the FDRS will be increased from HK\$500,000 to HK\$1,000,000. (Consultation Question Q1)
- B. A single maximum claimable amount will continue to be applicable for the banking and the securities industries. (Consultation Question Q2)
- C. The limitation period for lodging Claims will be extended from 12 months to 24 months from the date of purchase of financial instrument or the date of first knowledge of loss, whichever is the later. (Consultation Question Q3)
- D. The definition of SEs will be refined as follows:  
(Consultation Questions Q4.1 & Q4.2)

An SE, which is a limited company or a partnership, has to meet all of the following requirements as per its latest financial statement. If the SE is a subsidiary or a holding company of a group, the group's consolidated figures will be used instead.

- a) SE's or its group's annual turnover is not more than HK\$50 million;
- b) SE's or its group's gross asset is not more than HK\$50 million;

and

- c) SE's or its group's employee number in Hong Kong is not more than 50.
  
- E. Small FIs qualifying as SEs may file claims as ECs, but the mediation/arbitration fee will be shared equally by the SE and the other FI. (Consultation Question Q4.3)
  
- F. The FDRC will be able to deal with cases which are under current court proceedings without the claimant withdrawing the case from the court. (Consultation Question Q5.1)
  
- G. The maximum claimable amount for PD31 cases will be HK\$1,000,000. (Consultation Question Q5.2)
  
- H. Parties to the PD31 cases at the FDRC may be legally represented. (Consultation Question Q5.3)

## **PART II : EXTENSION OF THE FDRC SERVICES BASED ON MUTUAL AGREEMENT**

71. The following proposals are to cater for cases that exceed the amended Intake Criteria, after the amendments in Part I are effected. Further, the FI may refer the dispute and its counterclaim, if any, to the FDRC. For the above cases which exceed the amended Intake Criteria, if the parties involved have mutually agreed to have such disputes to be resolved at the FDRC, the FDRC would be prepared to accommodate their needs and provide the parties concerned a choice of dispute resolution process, i.e., “mediation first, arbitration next”, “mediation only” or “arbitration only”, at their discretion. The proposal is aimed at better utilising the FDRC resources and benefiting the community at large.

### **(E) Mutual Agreement for Cases Exceeding Amended Intake Criteria**

#### *To accept financial disputes exceeding certain of its amended Intake Criteria subject to mutual agreement*

72. We proposed that the FDRC could consider handling disputes which exceed certain of the amended Intake Criteria, i.e., maximum claimable amount and the limitation period, if both parties agree. (Consultation Question Q6)

### **Respondents’ Views**

73. There was general support from the respondents, as the proposal provides flexibility to cater for cases exceeding the amended Intake Criteria and the parties’ agreement ought to be respected.
74. The DoJ and legal/mediation professional bodies such as the Bar Association, Joint Mediation Helpline Office (“JMHO”) and Hong Kong Mediation Centre (“HKMC”) commented that the resources of the FDRC should be reserved for claimants who have relatively limited financial means. To address this concern, it was suggested that there should be a separate fee schedule for those cases outside the amended Intake Criteria, or alternatively there could be a trial period for those cases exceeding HK\$3,000,000, to avoid possible abuse of resources by more financially able parties.
75. A legal firm respondent was concerned that an FI may feel pressured into accepting an EC’s request to a mutual agreement because of the fear of any adverse inference that may be drawn by the regulators.

76. Majority of the securities associations supported the proposal, as it is based on mutual consent and enables the FDRC to act as the channel to resolve the dispute.
77. The banking sector did not agree that the Intake Criteria specified in paragraph 3.1(a) [maximum claimable amount] and (b) [the limitation period] should be amended. Therefore, they did not agree that the FDRC should consider claims that exceed its service scope as proposed.

## **Our Response**

78. As explained in Part I paragraph 57, the FDRC mediation is a useful value-added service and effective in resolving disputes. Hence, it is proposed to make better use of such resources, so that the FDRC could help resolve disputes between FIs and their clients, even if their cases may fall beyond the amended Intake Criteria under two scenarios, i.e., exceeding the amended claimable amount and/or the extended limitation period. It is noted that the maximum claimable amount is now reduced to HK\$1,000,000 from HK\$3,000,000 and the limitation period is also shortened to 24 months from 36 months.
79. In setting the fee for cases within or beyond the amended Intake Criteria, reference has been made to the fees in the market and the published mediated costs of the District Court and the Court of First Instance. Factors such as fee competitiveness and use of resources have been taken into consideration. And the fee is usually dependent on the claim amount instead of the limitation period.
80. There was some speculation on the consideration of an FI in relation to an EC's request for consent. We are not in a position to comment on such speculation.
81. Having considered the respondents' views and taking into account the revised lower maximum claimable amount of HK\$1,000,000 and the use of the FDRC administered services/resources (see paragraph 57(b)), we propose to adopt the proposal subject to a slight fee adjustment and an introduction of the FDRC administrative fee for cases beyond HK\$1,000,000. For the sake of clarity, two fee schedules, i.e., "Fees for cases within the amended Intake Criteria", and "Fees for cases beyond the amended Intake Criteria and/or under mutual agreement" are set out in paragraph 136 with explanation stated in paragraphs 131 to 135.

## **(F) FI to Refer Dispute to the FDRC with the EC's Consent**

### *To accept financial disputes lodged by the FIs*

82. We proposed 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. (Consultation Question Q7.1)

### **Respondents' Views**

83. There was general support for this proposal from most of the respondents including a number of securities associations and the professional bodies, as this proposal enables the parties to use mediation which is effective and less costly and allows the FI to initiate mediation. There was general agreement that this allows flexibility and is fair to the FI so that they could initiate mediation to resolve financial disputes.

84. The Consumer Council proposed that, in order not to prejudice the interests of the EC, measures should be put in place to ensure that informed prior consent from the EC is obtained in a fair and just manner. The Bar Association similarly suggested reviewing the case logistics and operations management of seeking the EC's consent in this regard.

85. The banking sector did not agree with the proposal. The rationale being:

- a) FIs have well-established complaint handling procedures. They are also highly regulated and are subject to the requirements of the SFC and the HKMA to resolve complaints in a timely and appropriate manner and, failing resolution, they are obliged to inform Claimants of their right to refer the dispute to the FDRC.
- b) Removing the EC's consent requirement would assist in bringing the dispute to an end more effectively and efficiently.

### **Our Response**

86. In response to the suggestion by some FIs, the FDRC proposes a choice be given to the FIs that, if they consider it appropriate to act proactively to bring the claimant to mediate at the FDRC, the FDRC would be ready to assist both parties.

87. It is noted that there are suggestions to waive the need for EC consent. However, as the underlying principle of the proposal is mutual agreement, this will seriously undermine this principle and would not be conducive to bringing the parties together to resolve dispute.

88. Moreover, as pointed out by the Consumer Council as well as the Bar Association, an informed consent from the EC and proper operations procedures are necessary for such purpose. The FDRC will establish the necessary procedures in relation to obtaining the consent of the EC, which may seek legal advice if necessary.
89. Given that the proposal is to facilitate and offer flexibility to FIs which may wish to bring their clients (with clients' agreement) to the FDRC for resolving financial disputes between them, we consider that the proposal is beneficial to both parties and should be adopted.

*To accept counterclaims lodged by the FIs subject to the consent of the EC*

90. We proposed 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. (Consultation Question Q7.2)

**Respondents' Views**

91. There was overwhelming support from the respondents for this proposal. It would increase efficiency, flexibility, save time and costs, by combining claims and counterclaims.
92. The DoJ suggested devising and publishing clear pre-set criteria for determining what constitutes a "counterclaim". The Bar Association proposed to have a set of intake criteria established for the counterclaim to avoid the FDRC taking on cases beyond financial disputes and suggested an adjusted fee for such cases to avoid possible misuses of publicly funded resources to assist the FI's counterclaim or the EC's defence of it. JMHO held that, if using the standard fee schedule, the total amount of claims and counter-claims should not exceed the upper claimable limit (i.e. HK\$3,000,000).
93. Same as paragraph 84, the Consumer Council advised that measures should be in place to ensure that the consent from the EC is an informed one and is obtained in a fair and just manner.
94. A legal firm respondent recommended that the ToR should be amended so that there would be no need to have EC's consent (as the EC may decline), to make it more cost effective and in the interests of both parties to have the claim and counterclaim resolved together at the FDRC.



95. The majority of the securities associations agreed that it is more efficient and less costly to handle the claim and counter-claim together, and both FI and EC should be treated fairly by the FDRC.
96. The banking sector agreed that an FI should be allowed to lodge a counterclaim to the FDRC but such right should not be subject to the consent of the EC because:
  - a) It would save time and costs for both sides.
  - b) This should save the FI from commencing separate legal proceedings in court against the EC which may result in duplication of work and resources.

### **Our Response**

97. We will establish the definition of and the intake criteria for counterclaim, as recommended by the DoJ and the Bar Association.
98. In line with market practice, the claim and the counterclaim amount will be aggregated in determining the fee according to the fee table, which is on an escalating scale. JMHO suggested that the claim and the counterclaim amount combined could not exceed the maximum claimable amount of HK\$3,000,000, if using the standard fee table. We consider that, firstly, the maximum claimable amount of HK\$3,000,000 is for an individual claim. The suggestion of JMHO would effectively be a reduction of the maximum claimable amount for an individual claim, which undermines the enhancement of the service scope to meet the needs of the users. Secondly, the fee is already on an escalating scale, though it could slightly be increased to deal more with the use of resources. See paragraph immediately below.
99. As stated in paragraphs 79 & 81, we propose to increase the fee for cases above HK\$1,000,000 (i.e. beyond the amended Intake Criteria), taking into account the increasing use of resources and the administered services provided by the FDRC. More details are available in paragraphs 131 to 136.
100. As to the consent of the EC, and as concluded in paragraphs 87 & 88 above, it is necessary for the FI to obtain the EC consent. Same as that in paragraph 88 above, procedures will be in place in relation to seeking the EC's consent.
101. Given the support from most of the respondents, and the benefits to the parties, this proposal will be adopted.

To provide that FIs can pay fees for ECs

102. We proposed that the FI can pay the mediation and/or arbitration fees for their customers if the FI so wishes. (Consultation Question Q7.3)

**Respondents' Views**

103. There were many positive views about this, as it would provide the FI an option to invite the EC to the mediation/arbitration at the FDRC. JMHO agreed that the FI could choose to pay the mediation and/or arbitration fees for their customers with the consent of both the FI and EC. The experience of HKMC was that the parties concerned can negotiate the sharing ratio of the fee. The Law Society opined that provided that the mediators and/or arbitrators sign a declaration of impartiality and are members of the FDRC's panel, it should not matter who pays the mediation and/or arbitration fees. If the FI's customers agree to this, the FI should be free to pay such fees. The process should remain the same, irrespective of who pays. The Bar Association also held that it should be subject to the informed consent of the other side and with regard to the importance of independence and neutrality of the whole process. The Consumer Council also agreed to this proposal, provided that the FI should not impose any unfair/unfavourable condition on the customers in return for agreeing to pay the mediation and/or arbitration fees for its customers. International Chamber of Commerce ("ICC") expressed the concern that, even if the FI is prepared to pay for the fee, this may be seen as a conflict and/or prejudicial to the judgement of the ECs.

104. Two securities associations agreed with this proposal, but suggested it should be done on a voluntary basis by the FI and not because of pressure from the regulators. A security association however considered that the FI may be compelled to pay for various reasons and that each party should pay its own costs.

105. The banking sector did not agree with this proposal on the basis that:

- a) Claimants' monetary contribution to the cost of resolving the FDRC claims is already significantly less than FIs'. The proposal may risk abuse by claimants.
- b) Requiring monetary contribution by claimants ensures that they carefully think through their claims before lodging them.

## **Our Response**

106. This proposal is to provide an option (rather than an obligation) for the FIs, if they think appropriate, to pay the mediation and/or arbitration fees for their customers. It was suggested by some FIs that, in certain circumstances, they may pay the fees for the EC in order to encourage the EC to enter into the FDRC dispute resolution process.
107. In our proposal, it is entirely voluntary for the FI to pay the fees for the EC. The payment by the FI is unconditional and would not be subject to any unfair or unfavourable condition on the EC. Furthermore, as the fees are directly collected and paid by the FDRC to the mediators and/or arbitrators, FIs are not involved in the fee negotiation or payment process and the mediators/arbitrators have no knowledge of who contributed their fees, therefore there is no issue of impartiality as a result.
108. However, having considered the above concerns and technical complications raised by some of the respondents, we think that it is unnecessary to change the current practice for the time being whereby the EC's fee must be paid by the EC, although it is possible that the FI may reimburse the EC if it so chooses. That is a matter for negotiation between the parties. Hence, this proposal will not be adopted.

### **(G) Flexibility of Mediation/Arbitration Combination on Mutual Agreement Basis**

*To provide “mediation only” option and “arbitration only” option for cases subject to mutual agreement*

109. We proposed that the option of “mediation only” and “arbitration only” in addition to the original “mediation first, arbitration next” be offered to the parties for cases with mutual agreement. (Consultation Question Q8.1)

### **Respondents' Views**

110. Quite a number of respondents including Chinese Securities Association, Hong Kong Securities Association, Hong Kong Securities Professionals Association, Hong Kong Securities and Futures Employee Union, Institute of Securities Dealers, Hong Kong Society of Financial Planners, Hong Kong General Chamber of Commerce, Hong Kong Chinese Chamber of Commerce, DoJ, Bar Association, ICC, JMHO, etc. welcomed this proposal, as it provides flexibility in dealing with individual cases and could cater for different circumstances. The DoJ supported that this may be helpful where contracts between FIs and their customers are subject to

arbitration clauses in case of dispute. The option of “mediation only” could be offered to the parties with mutual agreements to cater for PD31 cases. The FDRC would provide an option to ECs to refer their disputes thus giving them a fast, efficient and court free procedure to have their disputes resolved. If mediation fails, the parties may resume the litigation. After all, both arbitration and mediation are consensual proceedings.

111. The Institute of Financial Planners of Hong Kong (“IFPHK”) agreed to the increasing flexibility with regard to the procedures available. It however added that the proposal deviates from the mission of the FDRC, therefore, the FDRC may wish to set some pre-conditions before taking on the modified FDRS rules and procedures, such as some form of mediation prior to using the modified FDRS procedure (arbitration only). For similar reason, the Bar Association thought that the relevant fees should be adjusted for such cases to avoid possible misuse of publicly funded resources.
112. HKMC disagreed as the original purpose of the FDRC is to provide parties an option to arbitrate when mediation has failed to settle the dispute. The claimants may not have enough professional ADR knowledge to critically judge which service is most suitable for them, thus making uninformed decisions, which may lead to complications.
113. The Consumer Council has concern that "Mediation only" or "Arbitration only" would compromise the merits of the "Mediation First, Arbitration Next" approach, which is an efficient and effective process to resolve disputes and is in line with the international practices under which the EC is the one who decides whether to arbitrate the dispute after exhausting the process of mediation. With the "arbitration only" approach available, the parties may be discouraged from conducting mediation which is a less costly ADR process. The Consumer Council is of the view that the existing approach of "Mediation First, Arbitration Next", instead of "Mediation only" or "Arbitration only", should be applied to cases that are beyond the Intake Criteria and submitted to the FDRC by mutual agreement. For the same reason, the options of "Mediation only" or "Arbitration only" should not be available for "usual" cases under the FDRS.
114. The banking sector did not agree with this proposal. It said that arbitration is a more formal process and is more expensive. In line with the objective of effective dispute resolution, parties should attempt mediation first.

## **Our Response**

115. This proposal applies only to cases that have exceeded the amended Intake Criteria and that both parties have mutually agreed to engage in the alternative dispute process at the FDRC. Depending on the circumstances of the case, it may warrant “mediation only” or “arbitration only”, which is common in the market. If both parties agree to resolve a dispute through arbitration, there is no reason why they should not be free to choose to do so. The FDRC provides the necessary support and administration to facilitate the choice of the parties, in line with market practice. Except for this category of cases, under the amended Intake Criteria (“usual cases”), “mediation first, arbitration next” will be followed.
116. On the fee issue, it has been discussed in paragraphs 79 & 81 and will be further elaborated in paragraphs 131 to 136.
117. In relation to the EC’s informed consent, as articulated in paragraphs 88 & 100, the FDRC will have procedures in place to address the concerns.
118. All in all, it is considered that the FDRC should facilitate such dispute resolution process and this proposal should be adopted accordingly.

### *To restrict “mediation first, arbitration next” for “usual” cases*

119. We proposed that the “mediation only” and “arbitration only” options should not be available to the “usual” cases under the FDRS. (Consultation Question Q8.2)

## **Respondents’ Views**

120. A number of respondents including the Consumer Council, JMHO, individuals and other organisations agreed that the “mediation only” and “arbitration only” options should not be available for “usual” cases under the FDRS, as the usual process could encourage settlement in the mediation stage and also promote mediation in Hong Kong.
121. There are also quite a number of other respondents in the securities sector and the professional body category which accepted that the two options should also be made available to parties “usual” cases for flexibility reason and also because the parties should be free to agree on the procedure to be followed in the dispute resolution process under the “party autonomy” principle. The DoJ also considered that, in principle, there seems to be little reason to limit the “mediation only” or “arbitration only” option to a particular category of cases only.

122. The banking sector considered that parties should attempt mediation first.

### **Our Response**

123. As mentioned in paragraph 115, “mediation only” and “arbitration only” flexibility is available for cases that exceed the amended Intake Criteria. For “usual” cases, the principle of “mediation first, arbitration next” should continue to be applied, as it is a measure that has been functioning well. The rationale for “mediation first, arbitration next” is that cases can be resolved more efficiently if the cheaper and more informal dispute resolution methods are attempted first. Moreover, it is in line with the international practice of similar mechanisms. Hence, this proposal will be adopted.

### **PART II Conclusions**

- I. The FDRC may handle a financial dispute with a claimable amount in excess of the amended maximum claimable amount and/or exceeding the amended limitation period for lodging Claims, subject to prior mutual agreement of the parties involved. (Consultation Question Q6)
- J. When there is a financial dispute between an EC and an FI, the FI may lodge the financial dispute to the FDRC, subject to the consent of the EC. (Consultation Question Q7.1)
- K. When there is a claim by an EC against an FI, the FI will have a right to lodge a counter-claim against the EC to the FDRC, subject to the consent of the EC. (Consultation Question Q7.2)
- L. The proposal that the FI can pay for the mediation and/or arbitration fee for their customer will NOT be adopted. (Consultation Question Q7.3)
- M. In addition to the standard FDRS rules and procedures (Mediation First, Arbitration Next), the FDRC will offer two more options below for cases exceeding the amended Intake Criteria and subject to mutual agreement. (Consultation Question Q8.1)
  - a) Modified FDRS rules and procedures (Mediation only); and
  - b) Modified FDRS rules and procedures (Arbitration only).
- N. Cases falling within the amended Intake Criteria will follow “mediation first, arbitration next”. (Consultation Question Q8.2)

## **PART III: FEES, IMPLEMENTATION & INFORMATION REPORTING**

124. With the amendments, there will be some related changes in the fees to match with the use of resources and the implementation of the amendments. The concern of information reporting to the regulators is also addressed.

### **(H) Proposed Revised Mediation/Arbitration Fees**

125. We proposed that a revised set of fee scale to match with the proposed increase in the maximum claimable amount be provided for the dispute resolution services of the FDRC. (Consultation Question Q9)

### **Respondents' Views**

126. A number of the respondents supported the revised fee schedule, as it was considered competitive, reasonable and affordable.

127. The Investor Education Centre recommended that the FDRC should consider fee affordability so as to ensure that the fee level is fairly and reasonably determined and would take into consideration members in different segments of the community, especially the more vulnerable groups of financial consumers. The Consumer Council raised similar comments and suggested a fee waiver mechanism or some kind of financial assistance should be considered if an EC cannot afford to pay.

128. The Chinese Chamber of Commerce proposed that, in order to attract more SEs to use the mediation service, the FDRC should provide more privileges, including lowering the fees or even providing services to the ECs free of charge. Businesses should also be given the right to choose the mediator from the FDRC's or other lists in order to increase the flexibility of the use of mediation service.

129. Hong Kong Securities Professionals Association ("HKSPA") commented that the fee schedule of up to HK\$10,000,000 claim amount is too high and should be not more than HK\$5,000,000. The Institute of Securities Dealers ("ISD") maintained that the maximum claimable amount should be kept at HK\$500,000 and the fees remain the same.

130. The banking sector considered that, to encourage more FIs to use the FDRC's service, there is room to reduce the fee payable by FIs.

## **Our Response**

131. The FDRC is administering a dispute resolution process for FIs and their clients to resolve financial disputes under the user-pay principle. Nothing is said in its mission, vision or mandate that the FDRC could provide services on a gratuitous basis. Hence it is not feasible to grant any fee waiver, despite the relatively small amount of fee payable by the EC. It has to be noted the FDRC is not self-sufficient financially and is relying on funding from the Government and the Regulators for the time being. In all, the FDRC cannot subsidise either party by offering a fee waiver.
132. As to the reduction of fee payable by FIs or ECs, it has to be explained that currently cases under HK\$100,000 are mediated by our in-house mediator at a low fee of HK\$6,000 per session. The fee is considered affordable for the parties. Cases between HK\$100,000 and HK\$500,000 are conducted by our panel mediators, who are all well experienced mediators and whose hourly rates range from HK\$2,000 to HK\$3,000 or above. Most of the cases were concluded within the 4 hours specified mediation time, with a lump sum mediation fee of HK\$12,000. It was proposed in the Consultation Paper that the same fee of HK\$12,000 be applicable to cases for a higher limit up to HK\$1,000,000, which is effectively a fee reduction for the parties. At this fee scale, even if the FI has to pay a higher fee in portion than the EC, the amount payable by the FI is still competitive and represents good value for money, given the value-added services provided by the FDRC. Hence, there is no room for a fee reduction for either party.
133. For cases exceeding HK\$1,000,000, the mediation or the arbitration is also conducted by our panel mediator/arbitrator. As we propose to lower the maximum claimable amount from HK\$3,000,000 to HK\$1,000,000 (see paragraph 18), and given the issue of use of resources, etc., we have thus reviewed the mediation fee and proposed to revise the fee slightly upwards with finer breakdown of the fee structure into more monetary bands.
134. Further, due to the administrative services rendered by the FDRC (see paragraph 57(b)), we propose to deduct certain administrative costs of HK\$1,000 to HK\$5,000 from the fee payable to the mediator/arbitrator for cases over HK\$1,000,000, in recognition of the use of FDRC resources (See also paragraph 81).
135. On the other hand, it was proposed in the Consultation Paper to elevate the in-house mediation amount from HK\$100,000 to HK\$200,000. This may however demand more staff resources in the FDRC and result in increased operating costs. Given the concern from the industry about the costs of the



FDRC, the in-house mediation limit shall be kept at HK\$100,000 for the time being. The revised fee table will be adjusted accordingly.

136. To sum up, we have incorporated the proposed changes in the two fee tables below, viz., Table A for cases within the amended Intake Criteria and Table B for cases beyond the amended Intake Criteria and/or under mutual agreement. Compared with the Consultation Paper, the amendments are:
- a) breaking down the monetary bands between HK\$1,000,000 to HK\$10,000,000 into more intervals and increasing the fee slightly;
  - b) deducting an administrative fee in the range of HK\$1,000 to HK\$5,000 from the mediation and arbitration fee to the mediator/arbitrator for cases over HK\$1,000,000;
  - c) keeping the in-house mediation limit at an amount under HK\$100,000;
  - d) determining the fee with reference to the aggregated claim and the counterclaim amount on a combined case; and
  - e) Small FIs qualifying as SEs may file claim as ECs, but the mediation/arbitration fee will be shared equally by the SE and the other FI.

<b>Table A: Revised Fee Scale</b> (For cases within the amended Intake Criteria)		
<b>HK\$</b>	<b>Eligible Claimant</b>	<b>Financial Institution</b>
Making Enquiries	Free of charge	Free of charge
Filing an Application Form	\$200	Not Applicable
<b>Mediation</b> Specified Mediation Time (4 hours) Amount of claim: <ul style="list-style-type: none"> <li>• Less than \$100,000</li> <li>• Between \$100,000 and \$1,000,000</li> </ul>	Per Case  \$1,000 \$2,000	Per Case  \$5,000 \$10,000
<b>Extended Mediation Time</b> Amount of claim: <ul style="list-style-type: none"> <li>• Less than \$100,000</li> <li>• Between \$100,000 and \$1,000,000</li> </ul>	Per hour or part thereof  \$750 \$1,500	Per hour or part thereof  \$750 \$1,500
<i>Notes</i> 1. Total mediation costs (including extended mediation time costs to be shared equally by EC and FI) are capped at \$20,000. 2. Small FIs qualifying as SEs may file claim as EC, but the mediation /arbitration fee will be shared equally by the SE and the other FI.		
<b>Arbitration</b> Documents-only <ul style="list-style-type: none"> <li>• Up to \$1,000,000</li> </ul> <b>In-person hearing</b> (in addition to the fees payable for documents-only Arbitration) <ul style="list-style-type: none"> <li>• Up to \$1,000,000</li> </ul>	Per Case  \$5,000  Per Arbitrator  \$12,500	Per Case  \$20,000  Per Arbitrator  \$12,500

**Table B : Revised Fee Scale**  
**(For cases beyond the amended Intake Criteria and/or under mutual agreement)**

<b>HKS</b>	<b>Eligible Claimant</b>	<b>Financial Institution</b>
Making Enquiries	Free of charge	Free of charge
Filing an Application Form	\$200	\$200
<b>Mediation</b> Specified Mediation Time (4 hours) Amount of claim/counterclaim (in total):	Per Case	Per Case
<ul style="list-style-type: none"> <li>• Less than \$100,000</li> <li>• Between \$100,000 and \$1,000,000</li> <li>• Between \$1,000,001 and \$2,000,000</li> <li>• Between \$2,000,001 and \$3,000,000</li> <li>• Between \$3,000,001 and \$5,000,000</li> <li>• Between \$5,000,001 and \$10,000,000</li> </ul>	<ul style="list-style-type: none"> <li>\$1,000</li> <li>\$2,000</li> <li>\$2,500</li> <li>\$3,000</li> <li>\$3,500</li> <li>\$4,000</li> </ul>	<ul style="list-style-type: none"> <li>\$5,000</li> <li>\$10,000</li> <li>\$12,500</li> <li>\$15,000</li> <li>\$17,500</li> <li>\$20,000</li> </ul>
<b>Extended Mediation Time</b> Amount of claim/counterclaim (in total):	Per hour or part thereof	Per hour or part thereof
<ul style="list-style-type: none"> <li>• Less than \$100,000</li> <li>• Between \$100,000 and \$10,000,000</li> </ul>	<ul style="list-style-type: none"> <li>\$750</li> <li>\$1,500</li> </ul>	<ul style="list-style-type: none"> <li>\$750</li> <li>\$1,500</li> </ul>

*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, the mediator and the FDRC.
3. Claim and counterclaim amount on a combined case will be aggregated for fee calculation purpose.
4. The FDRC will deduct administrative fee of \$1,000, \$1,500, \$2,000, \$2,500 respectively from the total fee to the mediator, for the monetary bands over \$1,000,000.
5. Small FIs qualifying as SEs may file claim as EC, but the mediation fee will be shared equally by the SE and the other FI.

<b>Arbitration</b>	<b>Per Case</b>	<b>Per Case</b>
<b>Documents-only</b>		
• 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
<b>In-person hearing (in addition to the fees payable for documents-only Arbitration)</b>	<b>Per Arbitrator</b>	<b>Per Arbitrator</b>
• 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

*Notes:*

1. Fees for cases above \$10,000,000 to be agreed amongst the parties, the arbitrator and the FDRC.
2. Claim and counterclaim amount on a combined case will be aggregated for fee calculation purpose.
3. The FDRC will deduct administrative fee of \$3,000, \$4,000 and \$5,000 respectively from the total fee to the arbitrators, for the monetary bands over \$1,000,000.
4. Small FIs qualifying as SEs may file claim as EC, but the arbitration fee will be shared equally by the SE and the other FI.

## **(I) Retrospective Effects of the Proposed Amendments**

### *To consider rejected applications*

137. We proposed that the FDRC could re-consider previously rejected applications if they now fall within the amended Intake Criteria. (Consultation Question Q10)

### **Respondents' Views**

138. Many respondents from a broad spectrum agreed with this proposal. They include the DoJ, the Consumer Council, professional bodies, chambers of commerce, individuals and other organisations, based on fairness to all claimants and the consideration that more people in need could benefit. It is considered that the previously rejected applicants whose financial disputes with FIs have not yet been resolved may have been deterred from seeking redress through litigation due to the potentially significant financial implication and/or complicated procedures. They should be given another chance to be reconsidered for using the more cost-effective and efficient services of the FDRC.

139. Some respondents such as the ICC, IFPHK and the HKGCC cautioned that this might lead to a wave of complaints being resurrected, which could tax the capabilities of the FDRC. There should also be proper vetting to minimise the frivolous and vexatious cases.

140. The Institute of Securities Dealers disagreed with the FDRC accepting rejected cases (which could be many), as this would add to the operational burden of smaller brokers. A security firm respondent also proposed that the enhanced FDRS shall only be applicable to prospective cases to help provide certainty of claims for all parties.

141. The banking sector did not agree that the FDRC should be allowed to re-consider rejected applications for the following reasons:

- a) Such proposal entails the re-opening of cases thus eroding the principle of finality and certainty which is particularly important in dispute resolution.
- b) The ability to make retrospective action may result in vexatious/frivolous claims.
- c) This may result in an obligation on the FIs to inform the rejected claimants of this right. There is also too much uncertainty around the rights of past claimants who did not bring claims in the past as they did not fall within the original intake criteria.

## Our Response

142. According to the FDRC records, there were only a total of 6 rejected cases from 2012 to 2015. Based on maximum claimable amount of HK\$1,000,000 and extended limitation period of 24 months, these cases will remain ineligible under the amended Intake Criteria.
143. Secondly, there has been no frivolous claim that cannot be screened out by the stringent case intake process, in which the claimant is required to substantiate his loss, amongst other things. The vetting will remain robust, notwithstanding the widened scope of the amended Intake Criteria.
144. Thirdly, it is not anticipated that there would be many cases that would emerge or re-emerge after implementation of the widened Intake Criteria. Statistics as mentioned in paragraphs 2.8 of the Consultation Paper showed that there were 270 complaint enquiries over the three and a half years from 2012 to 2015, in which 50% were within HK\$1,000,000. Paragraph 2.17 of the Consultation Paper indicated that there were on average 140 complaint enquiries per year whose limitation period exceeded 1 year, and 35% of which were within 2 years. By experience, not many of these complaint enquiries would eventually result in applications and then cases after vetting.
145. We understand the uncertainties and concerns of the respondents. And, as analysed above, whilst there will be no previously rejected cases, some of the previous enquiries could result in new claims if the expanded criteria are applied to them. We therefore would revise the proposal and provide that the amended ToR will be implemented from a specified date but only claims with date of first knowledge of loss occurring on or after the specified date will be subject to the amended ToR. The revised implementation rule of the amended ToR is:
- a) All claims whose date of first knowledge of loss by the EC falling on or after the effective date of the amended ToR shall be subject to the amended ToR; and
  - b) All claims whose date of first knowledge of loss by the EC falling before the effective date of the amended ToR shall be subject to the original ToR.

## **(J) Other Issue**

### *Information Reporting to the Regulators*

146. In addition to providing monthly reports on an anonymous basis about the number and types of disputes handled by the FDRC (“Monthly Reports”), the current practice is that the FDRC would provide information on individual cases to the HKMA and the SFC (“Regulators”) such as application form (provided the applicant agrees), copies of agreements to mediate, mediation certificates or notices to arbitrate, as well as any consequent mediated settlement agreements or arbitral awards, etc., with reference to paragraphs 23.1, 23.2 and 23.3 of the FDRC’s Term of Reference (“Case Information”).

### **Respondents’ Views**

147. The securities industry in particular has concern that the SFC may, after learning the Case Information provided by the FDRC, look into the case and take possible follow-up actions. This may discourage them from using the FDRC’s services. They understand however that, if the information relates to systemic risk, the Regulators have to be informed.

### **Our Response**

148. It is noted that, in many of these cases, the claimants may have complained to the Regulators. As such, and in order to streamline the operations of the FDRC, it has been agreed with the Regulators that the FDRC would stop providing Case Information to the Regulators.

149. The FDRC would continue to provide the Regulators with Monthly Reports. The FDRC would also submit to the Regulators such information within its knowledge relating to systemic issues and/or suspected serious misconduct and the Regulators may request the FDRC to provide information that is reasonably required for discharging their statutory functions. The FDRC would like to point out that the Regulators have not requested the FDRC to provide any further case details so far.

### **PART III Conclusions**

- O. The revised fee scale as those proposed in the Consultation Paper is adopted with certain revisions to the fee scale as set out in the revised fee tables. (Consultation Question Q9)
  
- P. The implementation of the amended ToR will be as follows: (Consultation Question Q10)
  - a) All claims whose date of first knowledge of loss by the EC falling on or after the effective date of the amended ToR shall be subject to the amended ToR; and
  - b) All claims whose date of first knowledge of loss by the EC falling before the effective date of the amended ToR shall be subject to the original ToR.
  
- Q. Other Issue: The FDRC would stop providing the Regulators with the Case Information as stated in paragraphs 23.1, 23.2 and 23.3 of the FDRC's Term of Reference.



## OVERALL CONCLUSIONS

150. The establishment of the FDRC is a significant measure to enhance investor protection, which is crucial to the sustained development of the financial markets in Hong Kong. It is believed that the proposed refinements to the FDRS would reinforce the function of the FDRC as an avenue through which monetary disputes between financial consumers and financial institutions are resolved.
151. We have adopted a balanced approach in arriving at our conclusions. For the purpose of better serving the community, we propose to adopt a number of proposals recommended in the Consultation Paper, with some modifications and amendments after taking into consideration the opinions of various stakeholders during the consultation process. The following is a summary of the proposals that we will adopt to enhance the FDRS:

### **PART I**

- A. The maximum claimable amount under the FDRS will be increased from HK\$500,000 to HK\$1,000,000. (Consultation Question Q1)
- B. A single maximum claimable amount will continue to be applicable for the banking and the securities industries. (Consultation Question Q2)
- C. The limitation period for lodging Claims will be extended from 12 months to 24 months from the date of purchase of financial instrument or the date of first knowledge of loss, whichever is the later. (Consultation Question Q3)
- D. The definition of SEs will be refined as follows:  
(Consultation Questions Q4.1 & Q4.2)

An SE, which is a limited company or a partnership, has to meet all of the following requirements as per its latest financial statement. If the SE is a subsidiary or a holding company of a group, the group's consolidated figures will be used instead.

- a) SE's or its group's annual turnover is not more than HK\$50 million;
- b) SE's or its group's gross asset is not more than HK\$50 million; and
- c) SE's or its group's employee number in Hong Kong is not more than 50.

- E. Small FIs qualifying as SEs may file claim as ECs, but the mediation/arbitration fee will be shared equally by the SE and the other FI. (Consultation Question Q4.3)
- F. The FDRC could deal with cases which are under current court proceedings without the claimant withdrawing the case from the court. (Consultation Question Q5.1)
- G. The maximum claimable amount for PD31 cases is HK\$1,000,000. (Consultation Question Q5.2)
- H. Parties to the PD31 cases at the FDRC can be legally represented. (Consultation Question Q5.3)

## **PART II**

- I. The FDRC may handle a financial dispute with a claimable amount in excess of the amended maximum claimable amount and/or exceeding the amended limitation period for lodging Claims, subject to prior mutual agreement of the parties involved. (Consultation Question Q6)
- J. When there is a financial dispute between an EC and an FI, the FI may lodge the financial dispute to the FDRC, subject to the consent of the EC. (Consultation Question Q7.1)
- K. When there is a claim by an EC against an FI, the FI will have a right to lodge a counter-claim against the EC to the FDRC, subject to the consent of the EC. (Consultation Question Q7.2)
- L. The proposal that FI can pay for the mediation and/or arbitration fee for their customer will NOT be adopted. (Consultation Question Q7.3)
- M. In addition to the standard FDRS rules and procedures (Mediation First, Arbitration Next), the FDRC will offer two more options below for cases exceeding the amended Intake Criteria and subject to mutual agreement. (Consultation Question Q8.1)
  - a) Modified FDRS rules and procedures (Mediation only); and
  - b) Modified FDRS rules and procedures (Arbitration only).
- N. Cases falling within the amended Intake Criteria will follow “mediation first, arbitration next”. (Consultation Question Q8.2)

### **PART III**

- O. The revised fee scale as those proposed in the Consultation Paper is adopted with certain revisions to the fee scale as set out in the revised fee tables. (Consultation Question Q9)
- P. The implementation of the amended ToR will be as follows: (Consultation Question Q10)
- a) All claims whose date of first knowledge of loss by the EC falling on or after the effective date of the amended ToR shall be subject to the amended ToR; and
  - b) All claims whose date of first knowledge of loss by the EC falling before the effective date of the amended ToR shall be subject to the original ToR.
- Q. Other Issue: The FDRC would stop providing the Regulators with the Case Information as stated in paragraphs 23.1, 23.2 and 23.3 of the FDRC's Term of Reference.

### **WAY FORWARD**

152. The ToR will be revised in accordance with the conclusions of this paper. There may be certain re-organization of the current ToR to improve its readability and operational guidelines to supplement the ToR may be included, as necessary.
153. The amended ToR is expected to take effect from 1 January 2018, except for the implementation of the terms in relation to Small Enterprises, which will be effective from 1 July 2018. This would allow more time for Financial Institutions to prepare for the implementation, in particular for those terms regarding Small Enterprises.
154. The amended ToR will be posted on to the FDRC website and all stakeholders and respondents will be notified of the changes and the implementation time accordingly.

**List of Respondents**

<b>Industry Associations – Banking and Securities</b>	
	<b><u>Banking</u></b>
1.	DTC Association, The (“DTCA”)
2.	Hong Kong Association of Banks (“HKAB”)
	<b><u>Securities</u></b>
3.	Chinese Securities Association of Hong Kong (“CSHK”)
4.	Hong Kong Securities Association Limited (“HKSA”)
5.	Hong Kong Securities & Futures Employees Union (“HKSFEU”)
6.	Hong Kong Securities Professionals Association (“HKSPA”)
7.	Institute of Securities Dealers (“ISD”)
<b>Chambers of Commerce</b>	
8.	The Chinese General Chamber of Commerce (“CGCC”)
9.	Federation of Hong Kong Industries (“FHKI”)
10.	Hong Kong General Chamber of Commerce (“HKGCC”)
11.	Hong Kong General Chamber of Small and Medium Business (“HKGCSME”)
<b>Consumer Protection / Education</b>	
12.	Consumer Council (“CC”)
13.	Investor Education Centre (“IEC”)

<b>Government</b>	
14.	Department of Justice – Joint Dispute Resolution Strategy Office (“DoJ”)
<b>Professional Bodies - <u>Financial Services</u></b>	
15.	Hong Kong Society of Financial Analysts (“HKSFA”)
16.	Institute of Financial Planners of Hong Kong (“IFPHK”)
<b>Professional Bodies - <u>Legal, Mediation and Arbitration</u></b>	
17.	Hong Kong Bar Association (“Bar Association”)
18.	Hong Kong Mediation Centre (“HKMC”)
19.	International Chamber of Commerce – HK Arbitration & ADR Committee (“ICC”)
20.	Joint Mediation Helpline Office (“JMHO”)
21.	The Law Society of Hong Kong (“Law Society”)
<b>Individuals</b>	
22.	Mr Nicholas CHENG
23.	Dr Billy Mak
24.	Mr YEUNG Man-sing
25.	Anonymous Individual 1
26.	Anonymous Individual 2

<b>Other Organisations</b>	
27.	Clifford Chance
28.	Conflict Change Consulting Limited
29.	Interactive Brokers Hong Kong Limited
30.	Serica Partners Asia Ltd
31.	Anonymous Organisation 1
32.	Anonymous Organisation 2

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