

HONG KONG BAR ASSOCIATION

Comments on Proposals to Enhance the Financial Dispute Resolution Scheme Consultation Paper

1. The Financial Dispute Resolution Centre (“**FDRC**”) has invited the Hong Kong Bar Association (“**HKBA**”) to give its views on FDRC’s Proposal to Enhance the Financial Dispute Resolution Scheme (“**FDRS**”) Consultation Paper published in October 2016 (the “**2016 Consultation Paper**”). This paper sets out the views of HKBA.
2. From time to time, references will be made to the Proposed Establishment of an Investor Education Council and a Financial Dispute Resolution Centre Consultation Paper published by the Financial Services and The Treasury Bureau dated February 2010 (the “**2010 Consultation Paper**”)¹.
3. The proposals in the 2016 Consultation Paper are on the following aspects²:
 - 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 eligible claimant (“**EC**”) by incorporating small enterprises which have/had a customer

¹http://www.gov.hk/en/residents/government/publication/consultation/docs/2010/consult_iec_fdrc_e.pdf

² 2016 Consultation Paper, Executive Summary §§3 to 7

relationship with a financial institution which is a member of FDRS (“FI”);

- d. to accept applications of claims which are under current court proceedings;
- e. to deal with certain specific categories of financial disputes where there is a prior mutual agreement of the parties involved;
- f. to offer mediation only and arbitration only options;
- g. to revise the FDRC’s fee scale; and
- h. to allow re-application by previous rejected applicants if they fall within the amended intake criteria.

4. When established, one of the objectives of the FDRS was “to help consumers settle monetary disputes quickly by an independent and affordable procedure”³ As stated in the 2010 Consultation Paper, the three guiding principles under which the FDRS has been set up are that:-

- a. it should enable financial disputes to be resolved by way of quick and simple alternative dispute resolution;
- b. it should enable the parties to settle their disputes by way of conciliation or mediation; and
- c. it should allow unsettled disputes to be adjudicated by a panel, being one with a power to order compensation.

5. The proposals in the 2016 Consultation Paper are to “refine service features and broaden the service scope of the FDRS”.

³ 2010 Consultation Paper Part II §2.18

6. The proposals in the 2016 Consultation Paper are therefore viewed with reference to the guiding principles and objectives adopted for the FDRS when the FRDC was first set up.
7. In general, the HKBA welcomes the proposals under consultation and sees that, subject to the comments further detailed herein, they do help improve the FDRS and hence enhance the services by the FDRC to better serve the community.

Raising the Maximum Claimable Amount

8. The FDRC proposes to raise the maximum claimable amount from HK\$500,000 to HK\$3,000,000 and its reasons are as follows: (i) market needs as revealed from the complaint enquiries received by FDRC which showed that 27% of them could not be proceeded further as their claims were over the present maximum claimable amount; (ii) the proposed increase of the financial limit of the District Court of Hong Kong from HK\$1,000,000 to HK\$3,000,000; and (iii) reference to prevailing practice in Australia, Canada, UK and US.⁴
9. HKBA is, in principle, in support of an increase of the maximum claimable amount provided that after the increase, the objectives of providing a quick, efficient and affordable means of resolving financial disputes can still be maintained. As to the proposed ceiling amount of HK\$3,000,000, the HKBA believes that this should be reviewed or further researched as to its sufficiency or otherwise after the taking into account of the views expressed in this consultation.

⁴ 2016 Consultation Paper §2.7, §2.8

10. Question 1.1 “Do you agree with the proposed amendment to raise the upper claimable limit to HK\$3,000,000? Please state your reasons.” and Question 1.2 “If not, what would be your suggestion of a suitable upper claimable limit? HK\$1,000,000; HK\$2,000,000; Others”

For the reasons set out above, the HKBA welcomes an increase and considers that the proposed amendment to raise the upper claimable limit to HK\$3,000,000 can be further reviewed/researched.

11. Questions 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?” and Question 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.”

For the purpose of user-friendliness and for the avoidance of complications, the HKBA agrees that a simple maximum claimable amount should be continued.

Extending Limitation Period for Lodging Claims

12. The proposal to extend the limitation period for lodging claims requires a more coherent and principled explanation.

13. Question 3.1 “Do you agree to extend the limitation period for lodging Claims to 36 months? Why or why not?” and Question 3.2 “Do you have other suggestions? 12 months; 24 months; 48 months; 60 months; 72 months; Other.”

As long as the expediency of the resolution of claims and the operation of the scheme are not otherwise materially compromised, The HKBA is in general support of the extension of the limitation period for lodging Claims to 36 months or to 72 months, barring any operational and financial constraints, the HKBA is of the view that the limitation period may be set in line with the statutory limitation period of 72 months.

Enlarging the Scope of the Eligible Claimants by Incorporating Small Businesses

14. Question 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?”

The HKBA in general supports the extension of the service scope of the FDRS to cover small enterprises as proposed. More training and safeguards in this regard may be considered appropriate to ensure the proper and informed use of the FDRS by those newly proposed users.

15. Question 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.”

An additional requirement as to the total assets of no more than HK\$50 million may be added to the definition of small businesses. The additional definitional requirements will further narrow the financial strength of the business, which will be eligible to rely on the services of FDRC. It excludes a typical ‘cash cow’ business which sits on substantial assets accumulated over time whilst generating a regular cash income with a revenue which is unlikely to materially increase over time. The purpose of such additional requirement is to limit the services to be rendered to those businesses who genuinely face a disadvantage when it comes to litigation with financial institutions. Without the additional requirements, it would mean that hypothetically, for a cash cow business that has HK\$100 million of total assets whilst generating less than HK\$50 million of annual revenue would be funded by the government in resolving its financial disputes. In practice, this information will also be shown in their latest financial statements with minimal administrative costs.

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

While the HKBA notes that the fees payable by each of them may be different when they take part as a claimant or a respondent, the HKBA in general agrees to the proposal.

17. Question 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?” and Question 5.2 “For PD 31 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.” and Question 5.3 “Do you agree that parties to the mediation in PD31 cases at the FDRC can be legally represented as elaborated in paragraph 2.34 of this Consultation Paper? Please explain.”

As to the issues concerning Questions 5.1 to 5.3, the HKBA is of the following views:-

- a. The HKBA believes that the FDRS should only intake cases in compliance with its terms of reference;

As a paramount principle, for respecting party autonomy, when a case can be otherwise brought within the scope of the services of the FDRS, the HKBA sees that the parties should be allowed, if so chosen to go through the FDRS dispute resolution process(es), to refer the dispute to the FDRS, whether there is or is not current court proceedings or whether the ongoing case in issue is withdrawn or not.

- b. The proposal to ‘do away with the unnecessary procedures of withdrawing the case from the court’ can result in the

multiplicity of proceedings, should the parties opt to arbitrate the case under the FDRC; and

- c. If with the maximum claimable amount increased, there will surely be cases within the jurisdiction of the Court of First Instance that come within the scope of services of the FDRS. As such, the issues of legal representation (and legal costs) will become more relevant. The HKBA takes the view that, to retain the quick and simple nature of the FDRS, legal representation may also be considered for cases above a certain amount.

Handling Disputes Exceeding FDRC's Intake Criteria

18. 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 and Why not?”

The proposal appears to run contrary to the rationale of setting up the FDRS and the establishment of FDRC. It begs the question of why public fund should be expended on financing litigations if, based on the Intake Criteria, the dispute is not one where perceived financial disadvantage does not exist. Having said these, for respecting parties' autonomy, the HKBA sees no objection to this in principle but takes the view that the relevant fees involved shall be adjusted / tailor-made for such cases to avoid possible misuse of publicly funded resources.

As to the limitation period, the HKBA repeats its earlier response in relation to the setting of limitation period for eligible claims under FDRS in general.

Referring to FDRC by FI

19. Question 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?”

Consensus of both parties is essential in a mediation or arbitration. Under the current proposal, the lodging of application by an FI is subject to the consent of the eligible claimants.

In this regard, there is of course a need to review the roles of the FDRC in such cases, the logistics involved in the case intake and management, and the basis and power of FDRC before the EC offers his /her consent in this regard. Indeed, the FIs can always propose the option to the eligible claimant for his/her agreement even under the current regime.

While not objecting to the proposal as such, the HKBA sees this more as a matter of case logistics and operation management.

20. Question 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?”

The HKBA is in support of the proposal for all the relevant and financial disputes to be resolved together, if possible, at the same forum. The HKBA agrees to the inclusion of counterclaim by the FI, subject to the following:-

- (i) the EC so consents;
- (ii) there should be intake criteria spelt out for the counterclaim as well to avoid the situation of the FDRC taking on cases beyond financial disputes; and
- (iii) the relevant fees involved may be adjusted / tailor-made for such cases to avoid possible misuse of publicly funded resources as aforesaid, such that the FDRC would not in effect be or seen to be financing or assisting the FI's counterclaim or the EC's defence of it.

21. Question 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?”

Subject to the informed consent of the other side and the importance of independence and neutrality of the whole process, the HKBA sees no objection to the proposal to allow the FI to pay for the mediation and/or arbitration fees for their customers, after the disputes have arisen.

Mediation Only and Arbitration Only Options

22. Questions 8.1 “Do you agree that the 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.” and Question 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?’”

As said, the proposals appear to run contrary to the rationale of setting up the FDRS and the establishment of FDRC. For respecting parties’ autonomy, the HKBA sees no objection to these in principle but, as said, takes the view that the relevant fees involved shall be adjusted / tailor-made for such cases to avoid possible misuse of publicly funded resources.

Also, the HKBA sees that the unique position and advantage of the FDRS lie at providing economical, efficient and *final* resolution of financial disputes after the case has been taken up by the FDRC once and for all. For ‘Mediation Only’ option, it fails to enable to fully resolve their disputes should mediation fails. For ‘Arbitration Only’ option, it takes away the benefit of mediation and an early settlement. As to the need of the parties who intend to attempt only mediation or arbitration, there are other mediators, arbitrators and relevant institutions in the market providing these services.

Revising Fee Schedule

23. 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.”

Subject to what has been said about, the HKBA does not have any particular preference or comments on the amounts in the fee schedule, save that:-

- a. First, for the purpose of attracting and maintaining a group of experienced mediators and arbitrators to FDRC panel, the relevant fees for the cases at the higher end should be increased or kept in line with the market practice; and
- b. Second, if the financial institutions are allowed to make a counterclaim or if the FDRS is allowed to take on cases beyond the Intake Criteria, the relevant fees therefore incurred should be in line with market practice.

Retrospective Effect

24. 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?”

The HKBA is in general in support of the retrospective effects of the proposed amendments made. This proposal enables eligible parties an opportunity to use the service of FDRC if they so wish.

Dated the 12th January 2017