
From:
Sent: Wednesday, January 11, 2017 4:18 PM
To:
Cc:
Subject: RE: FDRC Consultation On Service Enhancement

Dear Anthony,

As the chair of the ICC Committee on Arbitration and ADR, your consultation paper have been passed to our members for their review and comments. I have also reviewed the consultation paper in detail. We note your explanatory notes for each of the questions raised which are summarized on pages 47 – 49. We shall deal with each of your questions raised in the consultation paper below, adopting your paragraph numbering.

Question 1:

- 1.1 We consider that raising the existing limit from HK\$500,000 to HK\$3,000,000 is a good proposal amendment. The difficulty has always been what is an appropriate limit and there is no correct answer in this respect. Under the court system in Hong Kong, anything below HK\$1,000,000 is within the jurisdiction of the District Court. Anything above, the High Court has that jurisdiction but that does not mean that the High Court cannot have jurisdiction of the lower court. In this respect, we consider FDRC should have full discretion to take on matters above HK\$3,000,000 if the parties are in agreement to do so.
- 1.2 Not applicable.

Question 2:

- 2.1 We consider a single maximum claimable amount should continue to be applicable. But there should be a discretion for the FDRC to accept a higher claimable amount.
- 2.2 If there are two different maximum claimable amounts, we consider whether FDRC should follow the court system in that the first maximum claimable amount is HK\$1,000,000 and the second maximum claimable amount is HK\$3,000,000. That said, we consider that there is no particular need for two different maximum claimable amounts otherwise this will significantly increase the administrative costs and workload of FDRC with, possibly, two sets of different rules.

Question 3:

- 3.1 Yes. Extending the time limitation is recommended. In light of the class of ECs, a longer limitation period is preferred.
- 3.2 We consider 36 months should be an acceptable limitation period. Similar to the claimable amount, there are no set rules as to whether 36 months is in fact better than 48 months or vice versa. There are many international conventions using 12 months or 24 months as a contractual time limit. Given the class of ECs involved, 36 months appears to be a good limitation period.

Question 4:

- 4.1 Yes, the service scope should cover claims from SEs. Given FDRC's nature, the broader the service scope of FDRC to cover whatsoever claims, the better it is. It provides an alternative ways to the judicial system to settle the dispute.
- 4.2 We consider the existing proposal in the Consultation Paper is acceptable.
- 4.3 Yes, we agree that an FI qualifying as a SE can file a claim as an EC against another FI. There is no reason why an FI qualifying as a SE cannot also be an EC.

Question 5:

- 5.1 Yes but only to the extent that on mediation. FDRC can play a specific role in facilitating mediation between the ECs and the FIs. This is in line with PD31 and FDRC, with its specialization, can play an important role in facilitating mediation in this respect.
- 5.2 No comment.
- 5.3 The parties can be legally represented but given the nature of mediation, it should be the parties who decide whether they require legal representation.

Question 6:

We agree that FDRC can handle disputes which exceed the Intake Criteria subject to the parties agreeing to this. In fact, FDRC should have the final absolute discretion on this issue, if the parties choose to use FDRC to handle their disputes.

Question 7:

- 7.1 Yes, if the parties both agree.
- 7.2 Yes. The counterclaim is part and parcel of the claim by an EC. There should be no reason

why a FI cannot submit their counterclaim in the same “proceedings”.

- 7.3 We disagree with the arrangement. There is a saying that “justice needs to be done and seen to be done”. Even if a FI is prepared to pay for the mediation and/or arbitration fees, this may be seen as a conflict and/or prejudicial to the judgment of the ECs.

Question 8:

- 8.1 We agree with having “mediation first, arbitration next” (Med-Arb), “mediation only” and/or “arbitration only” being offered to the parties with mutual agreement. We suggest that FDRC should be flexible in facilitating the parties to settle the disputes in whatsoever ways. But once the arbitration process is commenced, the parties must agree that they will not proceed with legal proceedings even if the arbitration award is not accepted by one of the parties.

- 8.2 No, the “mediation only” and “arbitration only” option should be applicable to all cases.

Question 9:

No comment.

Question 10:

Although it is not unusual that any amendments to laws and/or rules do have retroactive effect, this undoubtedly will create extra administration burden on costs and workload on the part of FDRC. Further, what if an EC has already commenced proceedings against FI on another forum? In such situation, should FDRC take on these cases? In light of the heavy administration burden and potential difficulties involved, we consider that these amendments do not have retroactive effect.

We hope ICC has provided FDRC with some meaningful comments. If you have any queries, please do not hesitate to contact us.

Yours sincerely,

Ronald Sum
Chairman
ICC-HK Arbitration and ADR Committee