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6 January 2017

Dear Sirs

Consultation Paper on Proposals to Enhance the Financial Dispute Resolution Scheme ("Consultation Paper")

1. We refer to the telephone conversations between your Ms Virginia Siu and our Mr William Wong on 30 December 2016, in which we were allowed an extension of time to submit our comments on the Consultation Paper. We are grateful for the extension.

2. We welcome the opportunity to comment on the Consultation Paper.

3. This letter contains comments by Clifford Chance on the proposals contained within the Consultation Paper and adopts the defined terms used therein (unless otherwise stated).

Chapter 2: Proposals on refining the service features of the FDRS

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.

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 (please specify)

4. We do not agree with the proposed amendment to raise the upper claimable limit to HK$3,000,000. We believe that HK$1,000,000 represents a more appropriate figure which is also in line with the current financial limit for the civil jurisdiction of the District Court.

5. Paragraph 2.9 of the Consultation Paper states that the financial limit for the civil jurisdiction of the District Court is *"under review"* and *"likely to be increased"*. We are not aware of any firm timetable by the Judiciary to raise the limit. Nevertheless, we believe it would make sense for the jurisdictional limit of the FDRS to go in tandem with that of the financial limit for the civil jurisdiction of the District Court, rather than to pre-empt it.

6. Further, as noted in paragraph 2.8 of the Consultation Paper, approximately 50% of the 270 complaints rejected between 2012 and 2015 were in the range between HK$500,000 and HK$1,000,000. Raising the limit to HK$1,000,000 would already significantly expand the FDRC's case load, whilst respecting the jurisdiction of the High Court to hear claims above this increased limit.

7. For completeness, we also note that paragraph 2.10 and Appendix B of the Consultation Paper refer to the prevailing jurisdictional limits in other overseas jurisdictions. Whilst they may be considered as reference, we caution against placing much value on them given that different jurisdictions are inherently subject to different local conditions and circumstances.

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

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.

8. We do not see how the differences in the business models of the banking and securities industries (which have not been identified in the Consultation Paper) may justify different maximum claimable amounts. We agree that there should be a single maximum claimable limit that applies to both the banking and securities industries.

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

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

9. We understand the rationale for, and have no objection to, this proposal.

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?

10. We understand the rationale for, and have no objection to, this proposal.

11. We regularly advise FIs in their disputes with customers. The observation about a rising trend in complaints lodged by corporates noted in paragraph 2.25 of the Consultation Paper is consistent with our experience.

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.

12. We have no particular comments in respect of this proposal.

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.

13. We understand the rationale for, and have no objection to, this proposal.

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?

14. In making this proposal, the FDRC appears to have proceeded on the basis that a mediation under the auspices of the FDRC is similar to, and therefore can serve as a good substitute for, a mediation that parties in civil litigation may arrange themselves in discharging the obligations under PN31.

15. One important distinction between the two should be borne in mind: unlike a mediation arranged by the parties to a civil litigation, a mediation under the auspices of the FDRC is compulsory for FIs authorised by the HKMA and/or licensed by the SFC by virtue of their membership in the FDRS. It is one of the reasons why under the current ToR, a claim which is the subject of current court proceedings is rejected

by the FDRC unless the court claim is withdrawn – allowing a claimant to request a mediation at the FDRC and at the same time maintain a live claim in court against the FI is contrary to the FDRC's mandate of providing "*an alternative to litigation*".

16. Further, under the current regime, if the mediation at the FDRC fails and the EC chooses to proceed to arbitration, the FI is bound to agree and the outcome of that arbitration is final. In those circumstances, allowing the EC to not withdraw the court proceedings on the same matter would undermine the finality of the FDRC arbitration and result in parallel proceedings in relation to the same subject matter.

17. In light of the above, we consider that a claimant should only be allowed to compel the FI to participate in a mediation at the FDRC if it withdraws the case from Court.

18. If the claimant wishes to mediate and maintain the court case at the same time, it may seek to arrange mediation with the FI as usual in civil proceedings and the other relevant considerations (such as the cost consequence that may arise from a party's unreasonable refusal to mediate) would follow. During this process, we consider that it should be open to the parties to choose the FDRC at the agreed mediation avenue, in which case the procedural requirement for the claimant withdrawing the case from Court can be waived. In such circumstances, parties may choose the "mediation only" option which has been proposed as an additional option in the Consultation Paper to avoid the undesirable consequences highlighted in paragraph 16 above.

19. On a related note, it is our understanding that the FDRC would not intake a claim which has already been the subject matter of court proceedings and decided by the Court. We believe that also means that a claim which has been decided but is under appeal will not be accepted by the FDRC. We would be grateful if the FDRC would indicate in its consultation conclusions if our understanding is not correct.

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

20. We believe that for PD31 cases, the maximum claimable amount should be set at an amount in tandem with the financial limit for the civil jurisdiction of the District Court, for reasons set out in the response to Questions 1.1 and 1.2.

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 2.43 of this Consultation Paper? Please explain.

21. We understand the rationale for, and have no objection to, this proposal.

Chapter 3: Proposals on broadening the service scope of the FDRS subject to mutual agreement

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

22. According to paragraph 12.6 of the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission (the **"SFC Code of Conduct"**), licensed or registered persons are required to *"render all reasonable assistance to the FDRS"*.

23. If an EC requests referring a claim to the FDRC when the claim amount is in excess of the proposed amended maximum claimable amount and/or it is beyond the amended limitation period, it is unclear whether paragraph 12.6 of the Code of Conduct creates a regulatory requirement or expectation on the part of the FI to agree. The FI may feel pressured into doing so for fearing that an adverse inference would be drawn by the regulatory authorities if it rejects the EC's request.

24. Unless the relevant regulatory authorities (the SFC and the HKMA) have given an assurance that an FI is not expected to provide any justification and no adverse inference would be drawn against the FI in declining such request, we would oppose this proposal.

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?

25. On the basis that the relevant regulatory authorities (the SFC and the HKMA) have given an assurance that an FI is not expected to provide any justification and no adverse inference would be drawn against the FI if it decides not to refer a financial dispute to the FDRC, we have no objection to this proposal.

26. The Consultation Paper does not state the reason for requiring consent of the EC. We believe it is because only FIs are members of the FDRS. We would be grateful for clarification from the FDRC if there are other reasons.

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?

27. We agree with the observations in paragraph 3.20 of the Consultation Paper and this proposal. Nevertheless we are concerned that if consent from the EC is required, the EC may decline (for whatever reason), thereby defeating the purpose of the proposal.

28. If consent from the EC is required only because the FDRS has no jurisdiction over them (see paragraph 25 above), we recommend that the ToR be amended so that an EC also consents to the FI lodging a counterclaim when the EC decides to use the service at the FDRC (and we agree with paragraph 3.21 of the Consultation Paper that the FI's counterclaim should still meet the amended Intake Criteria still have to be met, save for the maximum claimable amount and the limitation period for lodging Claims). We see no unfairness or prejudice to the EC in this recommendation because it would be more cost-effective and in the interests of both parties to have the FI's counterclaim and the EC's claim which arise from the same fact pattern mediated at the same time at the FDRC.

29. We also consider that in implementing this proposal, it should be made clear that an FI is not expected to provide any justification and no adverse inference would be drawn against the FI if it decides not to refer a counterclaim to the FDRC.

30. Separately, we consider that if mediation of the EC's claim and the FI's counterclaim is unsuccessful, the FI should have the option (but is not compelled) to elect to proceed to arbitration in respect of the counterclaim and no consent from the EC is required. This is reciprocal to the EC's current right to elect to proceed to a mandatory arbitration at the FDRC after an unsuccessful mediation. We believe there is no unfair prejudice in this arrangement and it is in line with the underlying objective of resolving disputes in a timely and efficient manner.

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?

31. We have no particular comments in respect of this proposal.

Chapter 4: Mediation/Arbitration rules applicable to cases under mutual agreement

Question 8.1: Do you agree that options of "mediation only" and "arbitration only" in addition to the original "mediation first, arbitration next" be offered to the parties with mutual agreement? Please state your reasons.

32. In theory, we have no objection to the option of "mediation only" if the relevant regulatory authorities (the SFC and the HKMA) have given an assurance that an FI is not expected to provide any justification and no adverse inference would be drawn against the FI if it does not agree to this option. However, we query the practical significance of this option –save for the circumstances referred to in paragraph 18 above, there appears little (or no) incentive for ECs to elect the "mediation only" option at the outset when they can elect to not proceed with arbitration after the mediation under the current "mediation first, arbitration next" regime.

33. In respect of the option of "arbitration only", we have no objection if the relevant regulatory authorities (the SFC and the HKMA) have given an assurance that an FI is not expected to provide any justification and no adverse inference would be drawn against the FI if it does not agree to this option.

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?

34. We assume that "normal" cases refer to cases which fall within the Intake Criteria. We do not see the need for treating such "normal" cases differently in terms of the availability of the "mediation only" and "arbitration only" options.

Chapter 5: Proposed revised mediation/ arbitration fees

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.

35. We have no particular comments in respect of this proposal.

Chapter 6: Retrospective effects of the proposed amendments

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

36. We understand the rationale behind this proposal.

37. Nevertheless, we are of the view that there should not be an automatic re-consideration of all rejected applications and that the FDRC should re-consider a rejected application only if the applicant formally re-applies.

38. Further, we consider that a previously rejected application should only be re-considered if the claim has not been settled between the parties or decided by Court. For a rejected application where legal proceedings have already been commenced (but no decision has been made by the Court yet), in line with our response to Question 5.1 we consider that the claimant is required to withdraw any court or arbitration proceedings before it is allowed to re-apply for the services of the FDRC.

Should the FDRC wish to discuss any of our comments please do not hesitate to contact Donna Wacker, Edward Johnson, William Wong and Kelly Chan of this firm.

Yours faithfully

Clifford Chance