

## **Section D: Process of the FDRS**

### **Part I – Initial Process**

#### **15. Initial requirements**

- 15.1 For a Customer Claim, an EC should have already filed his Written Complaint with the relevant FI in the first instance to give the FI an opportunity to resolve any disputes directly with him before going to the FDRC.
- 15.2 An EC should only file an Application with the FDRC if –
- (a) he has filed a Written Complaint to the relevant FI and received a Final Written Reply to the Written Complaint issued by the FI; or
  - (b) it has been more than 60 days from the date he filed the Written Complaint with the relevant FI and has not received a Final Written Reply from the relevant FI.
- 15.3 An FI should only file an Application with the FDRC if its relevant EC consents.

#### **16. Initial enquiries**

- 16.1 Initial enquiries can be made by members of the FDRS and the public to the FDRC in person, by phone, fax, letter or email. FDRC staff will assist with the enquiries, explain the scope of the FDRS, and provide information on available channels for taking forward their enquiries.

#### **17. Filing of applications**

##### ***17.1 Submission of FDRS Application Form***

- 17.1.1 To submit an Application, an Applicant should fill in the *FDRS Application Form* set out in Annex III, clearly listing out the issues in dispute and the amount of monetary loss suffered, as well as attaching the relevant correspondence with the relevant Party. The *FDRS Application Form* may be amended by the FDRC as and when required.
- 17.1.2 An Application to the FDRC can only be made by the EC or FI in accordance with the Intake Criteria set out in Annex II.
- 17.1.3 An Applicant shall pay an application fee to the FDRC upon submission of the *FDRS Application Form*.
- 17.1.4 The Applicant may give consent to the FDRC for the information provided in the *FDRS Application Form* to be shared with the relevant Party, and for the FDRC to use the information for research, evaluation or educational purposes without revealing, or being likely to reveal, directly or indirectly, the identity of the Applicant.

#### **18. Role of the Case Officers**

### ***18.1 Acknowledgement of receipt***

18.1.1 Upon receipt of the *FDRS Application Form* and the application fee, the FDRC shall issue an acknowledgement of receipt to the Applicant.

### ***18.2 Vetting by Case Officers***

18.2.1 The Case Officer assigned may require an Applicant to provide further information that is considered necessary to assess whether the Application fulfils the conditions as an Eligible Dispute. The Applicant must comply with the request within the timeframe specified by the FDRC.

18.2.2 The Case Officer shall consider, having regard to the Intake Criteria set out in Annex II and with due reference to the definitions of Eligible Disputes, ECs and FIs, whether to accept or reject the Application.

### ***18.3 Procedures for accepting or rejecting an Application***

18.3.1 If the Case Officer decides to accept or reject an Application based on Paragraphs 12 to 14 and the Intake Criteria set out in Annex II, he will advise the Applicant and the FI, and where appropriate, any other parties that are involved in and have been informed about the Application.

18.3.2 If the Applicant objects to the decision made by the Case Officer, the Applicant can make written representations to the FDRC within 21 days from the date of receipt of the Case Officer's decision.

18.3.3 A senior staff member within the FDRC shall review the decision of the Case Officer to accept or reject any Application where necessary.

18.3.4 For the avoidance of doubt, all decisions made by the senior staff member shall be final and conclusive and shall not be challenged by the Applicant or the other party.

### ***18.4 Acceptance of cases***

18.4.1 A Claim shall be referred to Mediation and/or Arbitration, where appropriate, upon acceptance by the FDRC and the Parties shall be notified in due course. For a Claim which is accepted by the FDRC as a Standard Eligible Dispute, it shall proceed in accordance with the sequence "Mediation First, Arbitration Next". For a Claim which is accepted by the FDRC as an Extended Eligible Dispute, it may be referred either to "Mediation First, Arbitration Next", "Mediation Only" or "Arbitration Only", provided that the Parties have given their signed consent (in the form set out at Annex X).

18.4.2 Upon acceptance of an Application, the FDRC may require a Party to an Eligible Dispute to do anything else that the FDRC consider may assist the conduct of Mediation and/or Arbitration. This may include requiring a Party to an Eligible Dispute to attend a pre-mediation session, provide a translator at his own cost or provide further information except where the Party satisfies the FDRC that –

(a) to provide the information would breach a Court order;

- (b) to provide the information would breach a duty of confidentiality to a third party and, despite all reasonable endeavours, the third party's consent to the disclosure of the information has not been obtained;
- (c) to provide the information would prejudice an ongoing investigation by the police, the Regulators or other law enforcement agencies, and, despite all reasonable endeavours, the consent to the disclosure of the information has not been obtained;
- (d) the information does not exist or no longer exists or is not within the Party's reasonable possession or control; or
- (e) the information is irrelevant to the Eligible Dispute.

Notwithstanding the aforesaid, nothing in these Terms of Reference shall prejudice any Party's right against self-incrimination or to claim legal professional privilege.

18.4.3 A Party to an Eligible Dispute must comply with such a request under Paragraph 18.4.2 within the timeframe specified by the FDRC.

18.4.4 Nothing in these Terms of Reference or elsewhere restricts the FDRC's ability to give any Party an extension of time to comply with its obligations under Paragraph 18.4.2 (even if the original period, or the period as extended, has ended) should the FDRC consider this appropriate.

## **Part II – Dispute Resolution Process**

### **19. Mediation**

#### **19.1 General**

19.1.1 FDRC shall be the sole authority to set up and maintain a List of Mediators for the provision of mediation services under the FDRS and shall have the power to remove at its sole discretion any Mediator from the List of Mediators who fails to adhere to these Terms of Reference and/or the *FDRS Mediation and Arbitration Rules* and/or *Ethics Codes for FDRC Mediators and Arbitrators* set out in Annexes IV and V respectively.

19.1.2 The ECs and the FIs shall pay to the FDRC the fees so prescribed in Annex I before commencement of Mediation.

19.1.3 Subject to Paragraph 19.9, the substantive mediation meeting shall not, unless otherwise agreed by the Parties, the Mediator and the FDRC, exceed the Specified Mediation Time.

#### **19.2 Mediation Rules**

19.2.1 Rules relating to the appointment of Mediators, roles of Mediators and the Parties, Mediation, termination of Mediation, confidentiality and language of mediation, are set out in Rule 2 of the *FDRS Mediation and Arbitration Rules* in Annex IV.

#### **19.3 Agreement to Mediate**

19.3.1 The Mediator shall ensure that the Parties sign an *Agreement to Mediate* prior to the substantive mediation session between the Parties. The *Agreement to Mediate* between the Mediator and the Parties shall be in the form prescribed in Annex VI.

19.3.2 The Mediator shall send a copy of the *Agreement to Mediate* to the FDRC.

#### **19.4 *Duties and obligation of Mediators***

19.4.1 The Mediator shall assist the Parties to the Eligible Dispute to do any or all of the following –

- (a) identify the issues in dispute;
- (b) explore each Party's needs and interests;
- (c) explore and generate options;
- (d) communicate with one another;
- (e) reach an agreement regarding the resolution of the whole, or part, of the Eligible Dispute;
- (f) draw up a valid agreement setting out what the Parties have agreed to resolve the Eligible Dispute; and
- (g) abide by the *FDRS Mediation and Arbitration Rules* set out in Annex IV and practice notes issued by the FDRC from time to time.

19.4.2 The Mediator shall commence the mediation session within 21 days from the date of his appointment, unless otherwise directed by the FDRC in writing.

#### **19.5 *Power and jurisdiction of Mediators***

19.5.1 The Mediator may request the Parties to provide all relevant data, information and materials relating to and necessary for the Mediations, except where the Party satisfies the Mediator that –

- (a) to provide the information would breach a Court order;
- (b) to provide the information would breach a duty of confidentiality to a third party and, despite all reasonable endeavours, the third party's consent to the disclosure of the information has not been obtained;
- (c) to provide the information would prejudice an ongoing investigation by the police, the Regulators or other law enforcement agencies, and, despite all reasonable endeavours, the consent to the disclosure of the information has not been obtained;
- (d) the information does not exist or no longer exists or is not within the Party's reasonable possession or control; or

(e) the information is irrelevant to the Eligible Dispute.

Notwithstanding the aforesaid, nothing in these Terms of Reference shall prejudice any Party's right against self-incrimination or to claim legal professional privilege.

19.5.2 The Mediator shall have no power to adjudicate or make any binding decisions on the substance of the dispute.

19.5.3 The Mediator may only mediate the Eligible Dispute with a view to reaching a settlement between the Parties. The Mediator has no power to make any monetary awards or impose any penalties on the Parties.

#### **19.6 Training and qualifications of Mediators**

19.6.1 The Mediator should be impartial and have the necessary knowledge to enable him to deal with financial disputes.

19.6.2 Training on knowledge and skills to handle financial disputes are required of a Mediator.

19.6.3 The FDRC has the authority to decide what training, attributes and qualifications are required for its Mediators upon admission and renewal to the List of Mediators on a continuing basis.

#### **19.7 Responsibilities of FIs and ECs**

19.7.1 The Parties shall participate in the Mediation in good faith and give full cooperation and assistance to the Mediator to enable the Mediation to proceed and be concluded in a timely manner.

#### **19.8 Termination of Mediation**

19.8.1 An EC may, at any time after the Mediation has started, submit a written notification to the Mediator to terminate the Mediation.

19.8.2 The Mediator, after consultation with the Parties, may give a written advice to terminate the Mediation if it is in the Mediator's opinion that further attempts to resolve the disputes by Mediation are no longer practicable according to the *Ethics Codes for FDRC Mediators and Arbitrators* set out in Annex V.

19.8.3 In the event the Mediation is terminated, the Mediator shall report the termination to FDRC in the form of a *Mediation Certificate* set out in Annex IX. The Parties agree that a copy of the form shall be kept by the FDRC.

#### **19.9 Extended Mediation Time**

19.9.1 The Mediator may conclude the Mediation after completion of the Specified Mediation Time, regardless of whether or not any *Mediated Settlement Agreement* has been reached.

19.9.2 Subject to the agreement by the Parties, the Mediator and the FDRC, the Specified Mediation Time may be extended to any such duration as may be necessary for the resolution of the Eligible Dispute. Any extra charges shall be calculated on the basis set

out in the *Schedule of Fees* in Annex I and must be paid to the FDRC before the subsequent mediation session.

#### **19.10 Mediation settlement**

- 19.10.1 A sample of a *Mediated Settlement Agreement* is provided at Annex VIII. Parties may add terms which are not inconsistent with the existing clauses of the sample *Mediated Settlement Agreement* and shall not delete any clause from the same.
- 19.10.2 The Mediator shall send a copy of the *Mediated Settlement Agreement* to the FDRC, otherwise it should be kept confidential and should not be disclosed to any third party. Subject to Paragraph 19.10.3, Mediators and/or the Parties shall not use the information contained in the *Mediated Settlement Agreement* for purposes other than those necessary for the enforcement of the terms therein.
- 19.10.3 All information contained in the *Mediated Settlement Agreement* may only be used by the FDRC for research, evaluation or educational purposes without revealing, or being likely to reveal, directly or indirectly, the identity of the Parties involved.
- 19.10.4 Upon conclusion of the Mediation, with or without a *Mediated Settlement Agreement*, the Mediator shall report the outcome of the Mediation to the FDRC in the form of a *Mediation Certificate* set out in Annex IX.
- 19.10.5 For the avoidance of doubt, the outcome of the Mediation, whether or not recorded in a *Mediated Settlement Agreement*, shall not be used to establish liability or fault of any kind against the Parties beyond the enforcement value of the *Mediated Settlement Agreement*.

#### **19.11 Referral to arbitration**

- 19.11.1 For “Mediation First, Arbitration Next” and “Arbitration Only”, the Parties agree that any dispute, controversy or claim arising out of or relating to an Eligible Dispute shall, upon written request from the Claimant, be resolved by Arbitration administered by the FDRC in accordance with the *FDRS Mediation and Arbitration Rules*:-
- (a) the number of arbitrators shall be one only and this arbitrator shall be selected from the FDRC List of Arbitrators;
  - (b) where necessary, the FDRC shall act as the appointing authority, and shall appoint a single arbitrator from the FDRC List of Arbitrators which the Parties herewith agree as the basis for the appointment of the arbitrator;
  - (c) the place of Arbitration shall be in Hong Kong; and
  - (d) the Arbitration shall be conducted in such language(s) as the Arbitrator sees fit.
- 19.11.2 For “Mediation First, Arbitration Next”, the Claimant shall file the written request for Arbitration with FDRC within 60 days from the date of the *Mediation Certificate* if it is unresolved by Mediation. Upon receipt of the written request, the FDRC should inform the Respondent to prepare for the Arbitration. Late request will not be accepted.

## **20. Arbitration**

### **20.1 General**

- 20.1.1 FDRC shall be the sole authority to set up and maintain a List of Arbitrators for the provision of arbitration services under the FDRS and shall have the power to remove at its sole discretion any Arbitrator who fails to adhere to these Terms of Reference and/or the *FDRS Mediation and Arbitration Rules* and/or *Ethics Codes for FDRC Mediators and Arbitrators* set out in Annexes IV and V respectively from the List of Arbitrators.
- 20.1.2 The Parties shall pay to the FDRC the fees so prescribed in Annex I before commencement of the Arbitration.

### **20.2 Arbitration Rules**

- 20.2.1 Arbitration should commence on a “documents-only” basis in which the Arbitrator should decide the Eligible Dispute on the basis of documents submitted and evidence provided. Where necessary, the Arbitrator at his sole discretion may seek further information or clarification from the Parties.
- 20.2.2 Under exceptional circumstances, the Arbitrator can call for in-person formal hearings if the Arbitrator determines that such hearings are necessary for deciding the award and both Parties are willing to take on and agree to pay the related expenses and fees. Such extra expenses and fees incurred shall be shared equally between the Parties set out in the *Schedule of Fees* in Annex I.
- 20.2.3 The contents of the Arbitration Ordinance (Chapter 609) provide the legislative support for the Arbitration procedures under the FDRS. The Appointment of an Arbitrator and the Arbitration procedures are set out in detail under Rule 3 of the *FDRS Mediation and Arbitration Rules* in Annex IV.

### **20.3 Duties and obligation of Arbitrator**

- 20.3.1 The Arbitrator shall –
- (a) facilitate a fair and speedy resolution of the Eligible Dispute without incurring unnecessary expenses;
  - (b) act fairly and impartially;
  - (c) give both Parties a reasonable opportunity to present their cases;
  - (d) adopt a procedure appropriate to the circumstances of a particular case to avoid unnecessary delay and expense;
  - (e) abide by the *FDRS Mediation and Arbitration Rules* as well as the *Ethics Codes for FDRC Mediators and Arbitrators* set out in Annexes IV and V respectively; and
  - (f) conduct the Arbitration in accordance with the Arbitration Ordinance (Chapter 609) other than sections 32 and 33.

20.3.2 The Arbitrator shall, unless otherwise reasonably extended by the Arbitrator, with the consent of the FDRC or the Parties, render an Arbitral Award within one month of the receipt of the last document in case of documents-only arbitration, or the holding of the in-person hearing whichever is later.

#### **20.4 Power and jurisdiction of Arbitrator**

20.4.1 The Arbitrator shall apply the governing law of the contract to determine the substantive issues in a contract claim and make an award in accordance with the Arbitration Ordinance (Chapter 609) other than sections 32 and 33.

20.4.2 The Arbitrator shall have the power:-

- (a) to make monetary awards –
  - (i) subject to the Maximum Claimable Amount for each individual claim which has been accepted as a Standard Eligible Dispute;
  - (ii) subject to the amount of each individual claim (inclusive of interest) which has been accepted as an Extended Eligible Dispute;
  - (iii) with order as to costs in relation to Arbitrations where each individual claim has been accepted as an Extended Eligible Dispute;
  - (iv) with no order as to costs in relation to Arbitrations where each individual claim has been accepted as a Standard Eligible Dispute and the Parties shall bear their own costs;
- (b) to conduct such enquiries as may appear to the Arbitrator to be necessary or expedient;
- (c) to order the Parties to make any property or thing available for inspection, in their presence, by the Arbitrator;
- (d) to order any Party to produce to the Arbitrator, and to the other Parties for inspection, and to supply copies of any documents or classes of documents in their possession, custody or power, except where the Party satisfies the Arbitrator that –
  - (i) to provide the information would breach a Court order;
  - (ii) to provide the information would breach a duty of confidentiality to a third party and, despite all reasonable endeavours, the third party's consent to the disclosure of the information has not been obtained;
  - (iii) to provide the information would prejudice an ongoing investigation by the police, the Regulators or other law enforcement agencies, and, despite all reasonable endeavours, the consent to the disclosure of the information has not been obtained;
  - (iv) the information does not exist or no longer exists or is not within the Party's reasonable possession or control; or



- (v) the information is irrelevant to the Eligible Dispute.

Notwithstanding the aforesaid, nothing in these Terms of Reference shall prejudice any Party's right against self-incrimination or to claim legal professional privilege;

- (e) to receive and take into account such written or oral evidence as he shall determine to be relevant and shall not be bound by the rules of evidence; and/or
- (f) to proceed with the Arbitration and make an award notwithstanding the failure or refusal of any of the Parties to comply with these Terms of Reference or with the FDRS Mediation and Arbitration Rules or with the Arbitrator's written orders or written directions, or to exercise its right to present its case, but only after giving the Parties written notice that he intends to do so.

## **20.5 Training and qualifications of Arbitrator**

- 20.5.1 The Arbitrator should be independent and impartial and have the necessary knowledge to enable him to deal with financial disputes.
- 20.5.2 Training on knowledge and skills to handle financial disputes are required as a pre-condition of an Arbitrator.
- 20.5.3 The FDRC has the authority to decide what training, attributes and qualifications are required for its Arbitrators upon admission and renewal to the List of Arbitrators on a continuing basis.

## **20.6 Responsibilities of FI and EC**

- 20.6.1 The Parties shall give full cooperation and assistance to the Arbitrator to enable the Arbitration to proceed and be concluded within the timeframe specified in Paragraph 20.3.2.

## **20.7 Termination of Arbitration**

- 20.7.1 The Claimant may at any time after the Arbitration has started, submit a written notification to the Arbitrator via the FDRC to terminate the Arbitration.
- 20.7.2 The Arbitrator via the FDRC, after consultation with the Parties, may give a written advice to terminate the Arbitration if the Arbitrator's opinion is that further attempt to resolve the dispute by Arbitration is no longer practicable.

## **20.8 Arbitral Awards**

- 20.8.1 Subject to Rule 3.12.1 of the *FDRS Mediation and Arbitration Rules* set out in Annex IV, the Arbitral Award shall be final and binding on the Parties, and not subject to review other than on point of law.
- 20.8.2 If the Eligible Dispute is determined in favour of the Claimant by an Arbitrator, the

determination may include a monetary award against the Respondent of such amount as the Arbitrator considers fair compensation for any monetary loss suffered by the Claimant, and shall not include punitive or aggravated damages.

- 20.8.3 The maximum total monetary value (excluding costs) of the award for a Claim must not –
- (a) exceed the Maximum Claimable Amount for each individual claim of a Standard Eligible Dispute; or
  - (b) exceed the claimable amount (inclusive of interest) for each individual claim of an Extended Eligible Dispute.
- 20.8.4 For the purposes of awards made by the Arbitrator, monetary loss may include consequential loss.
- 20.8.5 A monetary award rendered in accordance with this Paragraph can be recovered or enforced through the Courts as a contractual debt.
- 20.8.6 Where the Arbitrator makes an award with respect to the Eligible Dispute, the Parties are bound by such award. If there are any disputes as to the terms of the award, the Arbitrator's decision shall be final and conclusive.
- 20.8.7 The Arbitrator shall send a copy of the Arbitral Award to the FDRC.
- 20.8.8 The Arbitration proceedings are private and confidential and therefore, the Arbitrator's decision is not a binding legal precedent.