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9 December 2016

By post and email: consultation@fdrc.org.hk

Professor Teresa Cheng Yeuk-wah GBS, SC, JP
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Dear Professor Cheng

Consultation on Proposals to Enhance the Financial Dispute Resolution Scheme

Thank you for your letter of 3 October 2016 inviting the Association's comments on the subject.

Please find our comments in the enclosed Annex for your consideration.

Should you have any questions, please contact

Yours sincerely

Doris Ma
Secretary

Enc.

Chairman Standard Chartered Bank (Hong Kong) Ltd
Vice Chairman Bank of China (Hong Kong) Ltd
The Hongkong and Shanghai Banking Corporation Ltd
Secretary Doris Ma

主席 渣打銀行（香港）有限公司
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秘書 馬卓筠

**HKAB'S RESPONSE TO THE CONSULTATION PAPER ON
PROPOSALS TO ENHANCE THE FINANCIAL DISPUTE RESOLUTION SCHEME ("FDRS")**

Questions	Response
1. Question 1	
1.1 Do you agree with the proposed amendment to raise the upper claimable limit to HK\$3,000,000? Please state your reasons.	<p>We do not agree with the proposed amendment to raise the upper claimable limit to HK\$3 million, the rationale being:</p> <ol style="list-style-type: none"> 1. The majority of cases do not exceed the current claimable limit, which is already higher than the average claimable limit for other Asian jurisdictions. The higher limit imposed by Singapore's Financial Industry Disputes Resolution Centre applies solely to insurance-related claims whereas less than 15% of total enquiries lodged with the FDRC in 2015 were related to insurance products. 2. Claims exceeding HK\$500,000, which 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. Legal practitioners are fully aware of their duty to advise clients to use alternative dispute resolution procedure in civil proceedings and are familiar with the mediation process. 3. 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. It is therefore meaningless to compare the mediation success rate between these cases and those handled by the FDRC. 4. Given a claimant is only required to pay a very small fee for lodging a claim in the FRDC, the process can be easily abused – the claimant may use it as a means to “test” his/her case or to fish for evidence for use in the Court proceedings. 5. The current operating costs of the FDRC are high despite the relatively modest operation. The proposed amendment will inevitably increase its workload and upscale its expertise and hence its operating costs further. We are concerned that the extra funding required will eventually

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	have to be borne by the parties using the FDRC.
<p>1.2 If not, what would be your suggestion of a suitable upper claimable limit?</p> <p>HK\$1,000,000</p> <p>HK\$2,000,000; Others (please specify)</p> <p>Please state the reasons for your selection.</p>	<p>For reasons set out in our response to 1.1 above, we consider that the current claimable limit (i.e.HK\$500,000) should be maintained.</p>
<p>2. Question 2</p>	
<p>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?</p>	<p>We agree that a single maximum claimable amount should continue to be applicable as it narrows the gap between Hong Kong and other Asia Pacific countries and it avoids confusion and argument between the Claimant and the FI.</p>
<p>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?</p> <p>Please state the reasons for your suggestion.</p>	<p>See response to 2.1 above.</p>
<p>3. Question 3</p>	
<p>3.1 Do you agree to extend the limitation period for lodging Claims to 36 months? Why or why not?</p>	<p>We do not agree that the limitation period for lodging Claims should be extended to 36 months. The rationale being:</p> <ol style="list-style-type: none"> 1. The current limitation period is either in line with or in excess of those applicable in other Asian jurisdictions. 2. It is rare for claims to be brought after the current 12 months' limitation period. In any event, such claims may be brought in the civil courts. 3. If the limitation period is extended to 36 months, claimants would likely wait longer before they

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	<p>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.</p> <p>4. The current operating costs of the FDRC are high despite the relatively modest operation. The proposed amendment will inevitably increase its workload and upscale its expertise and hence its operating costs further. We are concerned that the extra funding required will eventually have to be borne by the parties using the FDRC.</p>
<p>3.2 Do you have other suggestions?</p> <p>12 months; 24 months; 48 months; 60 months; 72 months; Others (please specify).</p> <p>Please explain your choice.</p>	<p>For the reasons set out in response to 3.1, we consider that the current limitation period (i.e. 12 months) should be maintained.</p>
<p>4. Question 4</p>	
<p>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?</p>	<p>We do not agree to extending the service scope to cover Claims from SEs. Instead, the FDRC should continue to focus on retail customers who are less sophisticated and have fewer financial resources, thus having a greater need for access to a low cost and speedy dispute resolution service.</p>
<p>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.</p>	<p>Not applicable. Please see response to 4.1 above.</p>
<p>4.3 Do you agree that an FI qualifying as an SE could file a Claim as an EC against another FI? Please explain.</p>	<p>Not applicable. Please see response to 4.1 above.</p>
<p>5. Question 5</p>	
<p>5.1 Do you agree that the FDRC should deal with cases under current court proceedings without the</p>	<p>We do not agree with this proposal, the rationale being:</p>

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<p>claimant withdrawing the case from the Court? Why or why not?</p>	<ol style="list-style-type: none"> 1. 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. 2. 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 Practice Direction 31). 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's.
<p>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.</p>	<p>We do not agree that that PD31 cases should be referred to the FDRC: see our response to 5.1 above. In any event, for the reasons set out in our response to 1.1 above, we do not agree that the maximum claimable amount should be increased from the current HK\$500,000.</p>
<p>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.</p>	<p>We do not agree that that PD31 cases should be referred to the FDRC: see our response to 5.1 above.</p>
<p>6. Question 6</p>	
<p>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?</p>	<p>For the reasons set out in our response to 1.1 and 3.1 above, we do not agree that the Intake Criteria specified in paragraph 3.1(a) and (b) should be amended. Therefore, we do not agree that the FDRC should consider claims that exceed its service scope as proposed.</p>
<p>7. Question 7</p>	
<p>7.1 Do you agree that when there is a financial dispute between an EC and an FI, the FI may refer the</p>	<p>We do not agree with the proposal. The rationale being:</p> <ol style="list-style-type: none"> 1. FIs have well-established complaint handling procedures. They are also highly regulated and

Questions	Response
<p>financial dispute to the FDRC, subject to the consent of the EC? Why or why not?</p>	<p>are subject to the requirements of the SFC and 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.</p> <p>2. Removing the EC's consent requirement would assist in bringing the dispute to an end more effectively and efficiently.</p>
<p>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?</p>	<p>We agree that an FI should be allowed to file a counterclaim to the FDRC but such right should not be subject to the consent of the EC because:</p> <p>1. It would save time and costs for both sides.</p> <p>2. This should save the FI from commencing separate legal proceedings in court against the EC which may result in duplication of work and resources.</p>
<p>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?</p>	<p>We do not agree with this proposal on the basis that:</p> <p>1. Claimants' monetary contribution to the cost of resolving FDRC claims is already significantly less than FIs'. The proposal may risk abuse by claimants.</p> <p>2. Requiring monetary contribution by claimants ensures that they carefully think through their claims before lodging them.</p>
<p>8. Question 8</p>	
<p>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.</p>	<p>We do not agree with the proposal. Arbitration is a more formal process and is more expensive. In line with the objective of effective dispute resolution, parties should attempt mediation first.</p>
<p>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?</p>	<p>We consider that parties should attempt mediation first.</p>

Questions	Response
9. Question 9	
Do you agree with the proposed revised fee scale for dispute resolution services of the FDRRC? Please provide your comments and/or suggestions.	Given our position that the FDRRC service scope should not be amended (see our response to 1.1 and 3.1 above), this question is not applicable. As an incentive to encourage more FIs to use the FDRRC service, we consider there is room to reduce the fee payable by FIs.
10. Question 10	
Do you agree that the FDRRC could re-consider the rejected applications if they now fall within the amended Intake Criteria? Why or why not? Please give your reasons.	As noted in our response to 1.1 and 3.1 above, we do not agree that there should be any change to the Intake Criteria. In any event, we do not agree that the FDRRC should be allowed to re-consider rejected applications. Our rationale being: <ol style="list-style-type: none">1. Such proposal entails the re-opening of cases thus eroding the principle of finality and certainty which is particularly important in dispute resolution.2. The ability to make retrospective action may result in vexatious/frivolous claims.3. This may result in an obligation on FIs to inform 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 not fall within the original intake criteria.