



CONSULTATION ON PROPOSALS TO ENHANCE THE FINANCIAL DISPUTE RESOLUTION SCHEME (“FDRS”)

SUBMISSIONS

I. Introduction

The Law Society of Hong Kong (“**Law Society**”) is invited to consider and give its views on a consultation paper published by the Financial Dispute Resolution Centre (“**FDRC**”) in October 2016 proposing to improve the terms of the FDRS (“**Consultation Paper**”). In general, the Law Society considers the proposals set out in the Consultation Paper to be conducive to providing more options for dispute resolution. That should in turn reduce the time and costs incurred court litigation.

At the end of the Consultation Paper FDRC lists ten questions in question-and-answer format for consultation. The Law Society has considered those and shall set out its views and comments in this submission. Unless otherwise stated, the Law Society adopts the definitions set out in the Consultation Paper, some of which are repeated in the submission below in order to avoid frequent cross-referencing.

II. Proposals Enhance The Financial Dispute Resolution Scheme

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.

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) ____

Please state the reasons for your selection.

Law Society’s Response:

1. The Law Society agrees with the proposed amendment to raise the upper claimable limit to HK\$3,000,000. The objective of the FDRS is “to provide consumers with an alternative avenue which is independent and affordable for resolving monetary disputes”. Based on the complaint enquiries received by the FDRC from 2012 to 2015, certain cases could not be proceeded because the claim amount exceeded the maximum claimable limit. This is contrary to the objective of the FDRS. The upper claimable limit should be adjusted to reflect market needs and prevailing practices in other overseas jurisdictions. It should also be brought in line with the monetary jurisdictional limits of the District Court.

Question 2:

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

2.2 If there are two different maximum claimable amounts, what would be your suggestion of suitable upper claimable limits for the banking and the securities industries respectively?

Please state the reasons for your suggestion.

Law Society’s Response:

2. The Law Society considers a single maximum claimable amount continues to be applicable for the banking and the securities industries. This is because of the overlap between the industries and they are often referred to hand in hand. To have two different maximum claimable amounts would cause confusion to the public and could result in unnecessary disputes.

Question 3:

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

3.2 Do you have other suggestions on the limitation period?
__12 months; __24 months; __48 months; __ 60 months; __72 months; __Others
(please specify) _____

Please explain your choice.

Law Society's Response:

3. The Law Society considers the limitation period for lodging Claims should be consistent with the general state of the laws of Hong Kong and the provisions under the Limitation Ordinance (Cap. 347). It would also be in line with international standards.

Question 4:

4.1 Do you agree with the proposal to extend the service scope to cover Claims from SEs¹ (as defined in paragraph 2.33 of this Consultation Paper)? Why or why not?

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.

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

Law Society's Response:

- 4.1. The Law Society agrees with the proposal to extend the service scope to cover claims from SEs as this would benefit all stakeholders and promote the resolution of disputes in a more simple and straightforward manner.
- 4.2. The Law Society has no comment for now on the proposed definition of SEs in paragraph 2.33 of the Consultation Paper, but would suggest that the FDRC should consider also offering its services to enterprises and corporations which are less financially capable, notwithstanding the definition. The scheme should have certain flexibility.

¹ SEs = Small Enterprises

- 4.3. The Law Society agrees that an FI² qualifying as an SE could file a Claim as an EC³ against another FI. The spirit of the FDRC should be to provide options to the public at large and to make dispute resolution more easily accessible. Limitations should therefore be kept to a minimum.

Question 5:

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?

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.

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.

Law Society's Response:

- 5.1. The Law Society takes the view that the FDRC should allow parallel proceedings i.e. cases under the current court proceedings could be taken up by the FDRC without the claimant withdrawing the case from the Court. The reasons in support of allowing the parallel proceedings are that
- (a) a serial process⁴ can cause injustice as it means that the claimant needs to exhaust one process before taking that to the next; and
 - (b) a serial process could also render the potential claim to be time-barred.

² FI = Financial Institution which is a member of the FDRS

³ EC = Eligible Claimant and which refers to an individual or a sole proprietor having or who had a customer relationship with an FI, or an individual or a sole proprietor who has been provided with a Financial Service (and where appropriate including a small private company defined as SE under this proposal)

⁴ i.e. if an EC wishes to pursue the mediation/arbitration process at the FDRC, the EC has to withdraw the case from the Court before lodging the application with the FDRC (paragraph 2.38 of Consultation Paper

Thus it is not necessary to require an EC to withdraw his case from the Court if he decides to file an application to the FDRC for *mediation service*. Additionally, we reckon that mediation is a voluntary process where an EC must not be subject to unreasonable limitation on his access to the Court for justice.

If an EC intends to file an application to the FDRC for *arbitration service*, the Law Society considers that the general practice of the Court to *stay* a proceeding for arbitration should be applicable. It allows the Court to maintain a supervisory role on the arbitration without having any influence on the arbitration proceeding. Again there is no need for the EC to withdraw his proceedings.

Some members however caution that parallel proceedings between litigation and mediation/arbitration may increase the overall costs in the disposal of the issues in disputes.

- 5.2 There should be no maximum claimable amount for PD 31 cases given the unlimited jurisdiction of the court.
- 5.3 Parties to a mediation in PD31 cases at the FDRC should have the option to be legally represented. The attitude to the FDRC should be to maximize the options available to the parties while affording due process.

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?

Law Society's Response:

- 6. The Law Society understands that the “amended Intake Criteria as specified in paragraph 3.1(a) and 3.1(b)” refer to the following criteria:
 - a) a claimable amount in excess of the amended maximum claimable amount;
 - b) the amended limitation period for lodging Claims.

The Law Society agrees that subject to a prior mutual agreement between an FI and a claimant, the FDRC could consider handling disputes which exceed the above amended Intake Criteria insofar as the claimable amount is concerned, because the parties' agreement ought to be respected. As for the limitation period, there is no point for the parties to agree to mediate/arbitrate a case after expiry of the Limitation Period. That could only be window dressing, and would on the other hand cause chaos, if one party thinks it can keep going to a forum after a limitation period has expired. The Law Society repeats the comments in paragraph 3 above and further refers to the observations in paragraph 10 below.

Question 7:

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?

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?

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?

Law Society's Response:

7.1 Subject to our views set out in the Responses to Question 5.1 above, the Law Society in general agrees that when there is a financial dispute between an EC and an FI, with the consent of the EC, the FI may refer the financial dispute to the FDRC. This is because of the agreement of both parties which ought to be respected.

7.2 Some members consider that when there is a Claim by an EC against an FI, subject to certain conditions (i.e. the counterclaim arises from the same contract or factual matrix), the FI with a counterclaim should be entitled to lodge it with the FDRC with the consent of the EC. The aim is to promote efficiency and cost efficacy and minimise duplicity of proceedings where appropriate.

- 7.3 Provided the mediators and/or arbitrators sign a declaration of impartiality and are members of the FDRC's panel, it should not matter who pays for the mediation and/or arbitration fees. If the FI's customers agree to this, the FI should be free to pay for such fees. The process should remain the same irrespective of who pays.

Question 8:

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.

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?

Law Society's Response:

8.1 The Law Society agrees 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. The ability for the parties to elect either option or both will increase the accessibility of the FDRS.

8.2 The Law Society does not agree that such "mediation only" or "arbitration only" option should not be available for "normal" cases under the FDRS. This would add an unnecessary layer of complication. The FDRS should promote party autonomy.

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.

Law Society's Response:

9 The Law Society does not have any particular comments and/or suggestions in relation to the proposed revised fee scale for dispute resolution services of the FDRC. It queries the need for a distinction

between fees in a documents only arbitration and an in-person hearing as procedurally, the only difference is whether a hearing is conducted. Simplicity is key and this is typically achieved by adopting a streamlined approach.

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.

Law Society's Response:

- 10 The Law Society agrees that the FDRC could re-consider the rejected applications if they now fall within the amended Intake Criteria. This is provided the Claims fall within the limitation period. Increasing the accessibility of the FDRS and allowing the public to have alternatives for dispute resolution would be a positive development.

Other Comments:

11. According to the FDRC, all FIs which are authorised by the Hong Kong Monetary Authority or licensed by/registered with the Securities and Futures Commission, except those institutions which only provide credit rating services, are required to join the FDRS as members who are obligated to enter into mediation and/or arbitration in respect of any Eligible Dispute.
12. The Law Society considers the FDRS consists of a mandatory element for which all FIs are bound to enter into mediation and arbitration in respect of any Eligible Dispute. Therefore, it is important that all panel mediators and panel arbitrators of the FDRC are able to provide appropriate services to the parties in order to protect the interests and rights of the parties which would safeguard the access to justice and the rule of law.
13. Moreover, having considered the proposed increase in the claimable limits under the FDRS and the potential effects to the parties, the Law Society suggests that the FDRC to consider to review the admission requirements

to its Panel of Mediators and Panel of Arbitrators (by way of public consultation), particularly if there will be arbitration and particularly if the FI may insist on going to FDRC.

The Law Society of Hong Kong
29 December 2016