By email
consultation@fdrc.gov.hk

22 December 2016

Dear Sirs

Re: Proposals To Enhance the Financial Dispute Resolution Scheme Consultation Paper

In order to provide a meaningful service to the financial industry and financial consumers, the FDRC must adapt its scope and practice to meet the needs of Hong Kong.

As a solicitor who worked in the financial industry for fourteen years and who now teaches financial dispute resolution, I have reviewed and discussed FDRC practice in the context of global practice but with special attention to our specific Hong Kong circumstances. Returning to the stated aims in establishing the FDRC, Hong Kong needs to have a robust system, which confirms its place as a global financial centre.

Responses to Consultation Paper

Question 1

1.1 Yes, I agree that the claimable limit should be raised to HKD3million. The original claimable limit of HKD500,000 is too low. When originally set by reference to the majority of claims that were filed with the Lehman Minibond Scheme (HKMA / HKIAC) this limit was too low. Each year in the annual report, the FDRC has disclosed that a claim size in excess of HKD500,000 has been one of the main reasons for applicants failing to meet the Intake Criteria. Linking the claim size to the limit in the District Court is an appropriate means of ensuring sufficient size of claim for most disputes.

Question 2

2.1 Yes, I agree that a single limit for both banking and financial disputes is appropriate. Multiple limits would lead to confusion and at the current stage of development in Hong Kong; clarity should be a priority goal. The need for education for consumers and the industry about the FDRC process remains one of the top priorities for the FDRC in Hong Kong. Providing clear information should be one of the goals of the FDRC and a single limit is a way of meeting this need.

In addition, a single limit is consistent with global practice.

Question 3

3.1 Yes, I agree that the limitation period should be extended, however I think this should be to 6 years.

3.2 There is no logical reason to differentiate the FDRC limit from the limitation period for civil claims. The concerns around memory also exist for civil claims, which may be litigated or resolved through ADR. Given that the mediation process does not require the parties to meet any evidential burden, there is no reason why the concerns about memory deterioration should be a basis to decrease the limitation period below 6 years. If the aim of the FDRC is to provide financial consumers and the financial industry with an efficient means of resolving disputes, there is no justification why parties beyond the three-year period should be denied this route to resolution.

Question 4

4.1 Yes, I agree

4.2 No

4.3 Yes, I agree that should be possible, however, the level of complexity of claim may be increased. In relation to such FI to FI disputes, I would recommend that these are heard by a specialist panel of neutrals.

Within the FINRA structure, neutrals are identified as being either public or non-public (i.e. associated with the financial services industry). For example, in relation to disputes between brokerage firms, FINRA provides for non-public arbitrators only. This ensures that the neutral has a good understanding of the context of industry practice. As the FDRC seeks to increase the potential complexity of cases, I would recommend that a similar public and non-public panel of mediators and arbitrators should be formed to ensure that neutrals are both subject matter and process experts.

Question 5

5.1 No, I do not agree that cases should proceed along parallel lines. For parties who have commenced litigation, it can be difficult to engage in mediation appropriately. In particular, the strategies and mind-set required to run a successful litigation are typically not supportive of a constructive mediation process. The FDRC is not merely an alternative to PD31 mediation, but exists as a separate and specific process. The FDRC has been tailored to meet the needs of financial consumers and the financial industry, it should exist as a separate and distinct process. If consumers avail themselves of the assistance of the FDRC then they should make a clear choice. They will still be able to proceed to litigation if they are unable to achieve resolution with the FDRC.

5.2 and 5.3 I do not agree that parties proceeding through the courts with PD31 should conjoin these processes with the FDRC.

Question 6

Although the question is framed as a ‘mutual agreement’, such pre-dispute clauses are typically contained in standard form contracts with which consumers are unfamiliar and which are not subject to negotiation. Given the nature of standard form

agreements, there is little to indicate that a conscious and negotiated agreement would occur in such circumstances. When contract formation is occurring, it is unlikely that a consumer will be able to give appropriate consideration to dispute resolution processes

In the United States, there is a significant body of research which considers the impact of such pre-dispute agreements for FIRNA arbitration on dispute outcomes for consumers (see *Mandatory Predispute Consumer Arbitration, Structural Bias, and Incentivising Procedural Safeguards*, Southwestern Law Review (2012) Vol. 42, p.187, Nancy A. Welsh). Within the FINRA system, the default process is arbitration, whereas mediation must be sought by mutual agreement only (see *Securities Mediation: Dispute Resolution for the Individual Investor*, Ohio State Journal in Dispute Resolution (2006) Vol 21, p.329 Jill I. Gross).

The FDRC was conceived in the aftermath of the Lehman mini-bond crisis to provide a 'simple [and] consumer friendly' (Issues Raised by the Lehman Minibonds crisis – Report to the Financial Secretary 2008 SFC) process for achieving dispute resolution. From my perspective, the key is that the FDRC was conceived as providing a choice for consumers to what were perceived as inadequate means of redress. For consumers, whose claims are in excess of the claimable limits and outside the time limitation they will still have the option of pursing civil remedies, but they should have the ability to make a conscious choice.

Question 7

7.1 Yes, I agree that this may provide a suitable means for resolving such disputes.

7.2 Yes, I agree that if a claim is being processed by the FDRC, then all matters relevant to the claim, including any related counterclaim relevant to the same subject matter should be considered. Given that the EC may not consent, the counterclaim should be assessed by the relevant neutral.

For the purposes of mediation, a mediator should seek to address all the issues in dispute to ensure a durable solution. Indeed, although partial settlements are possible, the aims of mediation are to achieve a full and 'durable solution'.

For the purposes of arbitration, such addition of a counterclaim could be an issue for the arbitrator's determination.

7.3 Given the uneven distribution of resources between the majority of EC and FI, this seems like an appropriate solution.

Question 8

8.1 and 8.2 I do not agree that arbitration only should be possible subject to mutual agreement by the parties. The Hong Kong Government has supported a mediate first, arbitrate next policy. The reasons to encourage parties to achieve a collaborative resolution are many and the risk is that by providing an arbitration only option, the benefits of finality and certainty may be valued above the benefits of mediation.

In accordance with the comments above (see Question 6), it is unlikely that consumers will give sufficient consideration or have sufficient information to make an informed choice at the point of contract formation.

Question 9

I have no specific comments on the fee scale.

Question 10

Yes, I agree that rule changes in relation to an amended Intake Criteria should be available to rejected applications by EC.

Additional Comments and Recommendations

A. 4-hour limitation on mediation / documents only arbitration

As the nature of the disputes is likely to increase in complexity (e.g. increased value / longer time since dispute arose / addition of counterclaim), it will be advisable to provide for additional processes to take this into account.

For example, a standard four-hour mediation will be insufficient to deal with such matters and a revised process should be considered to allow sufficient mediation time for greater complexity. Such a process could be either provided for in the rules, for example, if the mediator certifies that a matter is of special complexity then the mediation time could be extended to 8 hours.

In relation to arbitrations, an arbitrator could make the sole determination that such a dispute is not appropriate for documents only and such determination could be advised to the parties prior to the commence of the arbitration itself. If the parties agree then the arbitration could proceed via a hearing.

Such additional processes would ensure that more complex matters could be mediated / arbitrated appropriately and that the relevant neutral is able to discharge their professional obligations to the parties and the FDRC.

B. Public / Non-Public Panel Recommendation

As an overall comment, I applaud the intention of the FDRC to increase their remit, however, I do have concerns. It is simplistic to consider only limitations such as time period and claimable amount. In addition, the nature and complexity of disputes should be considered. It seems likely that increasing the claimable amount, the range of possible claimants and the time period, will also increase the complexity of the disputes. In addition to changing intake criteria, I think that the FDRC also needs to review the nature of the panel of mediators and arbitrators.

As stated above, I would recommend that a public and non-public panel of mediators and arbitrators should be formed to ensure that neutrals are both subject

matter and process experts (similar to that used by FINRA). This provides a suitable panel to mediate or arbitrate more complex matters between FIs and also provides a more sophisticated panel structure to meet the increasingly complex needs of financial disputes in Hong Kong.

Yours faithfully

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