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23 December 2016

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Hong Kong

Dear Professor Cheng,

**Re: Consultation on
"Proposals to Enhance the Financial Dispute Resolution Scheme"**

Thank you for your letter dated 3 October addressed to the Council Chairman inviting views from the Consumer Council on the captioned consultation.

Attached please find the submission from the Council for consideration of the FDRC.

Should you have any queries on the issue, please feel free to contact

Yours sincerely,

Gilly Wong
Chief Executive
Consumer Council

Encl.

Submissions on Proposals To Enhance The Financial Dispute Resolution Scheme

The Consumer Council (“**Council**”) welcomes the opportunity to comment on the Consultation Paper on Proposals To Enhance the Financial Dispute Resolution Scheme (“**Consultation Paper**”), issued by the Financial Dispute Resolution Centre in October 2016.

2. We set out below our views to the questions raised in the Consultation Paper that have direct implications to the interests of consumers. Unless otherwise stated, we shall adopt the same abbreviations/definitions as in the Consultation Paper.

Question 1:	Do you agree with the proposed amendment to raise the upper claimable limit to HK\$3,000,000? Please state your reasons.
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3. The Council supports providing more cost-effective and time-efficient options of alternative dispute resolution (“**ADR**”) process to enhance consumers’ right to redress. We therefore agree with the proposed amendment to raise the upper claimable limit to HK\$3,000,000, which would allow more consumers aggrieved by financial services to make use of the service of the FDRC. The Council further considers that it is crucial for the Intake Criteria to be reviewed from time to time so as to ensure the FDRS could adjust the upper claimable limit according to market development.

Question 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?
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?

4. The Council supports that a single maximum claimable amount continues to be applicable for the banking and securities industries. Solely based on the available information in the Consultation Paper, we cannot see what benefit and value it could bring to consumers by setting two different maximum claimable amounts.

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?

5. The objective of the FDRS is to provide consumers with an alternative avenue which is independent and affordable for resolving monetary disputes with financial institutions amicably and in a timely manner by way of “mediation first and arbitration next”. While the Consultation Paper states that the extension for 2 more years could allow more complaints out of the 65% portion previously rejected to be covered by the FDRS, we wonder why the limitation period would not be extended further to let even more complainants in. It further states that many cases lodged with the FDRC were alleged to be misrepresentation or mis-selling and it seems to suggest that the lapse of time may give rise to evidentiary difficulties. Be it as it may, the access of complainants, in particular whose allegations related to matters other than misrepresentation or mis-selling, should not be restricted by a time limit of just 36 months. To make FDRC an effective dispute resolution forum alternative to court, a more reasonable approach is to extend the limitation period in tandem with the current limitation period for legal actions founded on contract or tort in Hong Kong. In other words, within the limitation period under legal proceedings, a complainant is always given the choice to resort to ADR provided by FDRC. Indeed, such a practice is commonly adopted internationally by financial dispute resolution schemes as stated in the Consultation Paper exemplified by some major jurisdictions.

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 the Consultation Paper)? Why or Why not?
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.
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.

6. Given that the proposed extension of service scope appears to have no direct implication to the interests of consumers, the Council does not comment on Questions 4.1-4.3.

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?
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7. As expressed above, the Council supports the use of ADR to resolve consumer disputes instead of costly litigation. On this basis, we agree that FDRC should be able to deal with cases under current court proceedings without the claimant withdrawing the case from the court. It could encourage litigants to explore ADR by saving the time and cost that may be incurred in withdrawing the case from the court.

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.
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8. The Council agrees that the maximum claimable amount be set at an amount in tandem with the future monetary jurisdiction of the District Court since setting a different ceiling for PD31 cases would create unnecessary confusion. We also fail to see the need to draw a distinction between PD31 cases and non-PD31 cases in formulating the Intake Criteria.

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.
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9. The Council notes that under the FDRS, parties cannot be legally represented in the mediation and “document-only” arbitration. We believe this is one of the very crucial features of the FDRS which was designed to ensure a low-cost ADR process for the general public and any deviation from the same should be fully justified. As a matter of principle, the reasons for not permitting legal representatives to participate in the mediation are equally applicable to PD31 cases. Based on the available information in the Consultation Paper, we fail to see why the mere presence of court proceedings, without more, is a valid ground for departing from the general rule that parties are not allowed to be legally represented in the mediation.

10. The Council is aware that it may be common for parties to be legally represented in PD31 cases. But it does not follow that legal representatives

should be permitted to *participate* in the mediation. That said, parties are always free to seek legal advice if and when necessary.

11. Given the inequality of resources between an EC and an FI, it is anticipated that the FI would instruct lawyers to join the FDRC mediation (if so permitted). This may cause prejudice to the EC if he/she has no resources to engage lawyers in the mediation.

12. By reason of the aforesaid, the Council has reservation in allowing legal representatives of either party to participate in the FDRC mediation.

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?
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13. The Council welcomes the proposal and considers that it may provide additional flexibility to cater for cases exceeding the amended Intake Criteria.

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?
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14. We understand that the proposal may be intended to meet the wish of the FIs to resolve financial disputes with their customers through the FDRS in a timely manner. However it is noted that majority of financial dispute resolution schemes in overseas jurisdictions, including the UK, Canada, Australia and Singapore, referred to in the Consultation Paper do not provide for applications from FIs to use the service, Serious consideration should be given to whether the proposal may prejudice the interests of the EC notwithstanding that prior consent of the EC is required. If it is decided after prudent assessment that the proposal be implemented, measures should be in place to ensure that informed consent from EC is obtained in a fair and just manner.

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?
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15. The Council appreciates the benefits in terms of time and costs brought to the parties by resolving an EC's claim and an FI's counterclaim (if any) in one go, given particularly that the recoverable legal costs of arbitration under the FDRS is capped, and separate ADR process or even lawsuit dealing with the FI's claim can be dispensed with. That said, measures should be in place to ensure that the consent from the EC be an informed one obtained in a fair and just 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?
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16. Provided that the FI should not impose any unfair/unfavourable condition on the customers in return for agreeing to pay for the mediation and/or arbitration fees, the Council welcomes the proposal.

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.
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?

17. Presumably, the questions are posed for cases that are beyond the Intake Criteria and subject to mutual agreement. It is beyond doubt that the additional procedural options, i.e. "Mediation only" and "Arbitration only", could give more room for the parties to make use of FDRS for dispute resolution according to their own wishes and thereby encourage the use of FDRC. However, we are very much concerned that "Mediation only" or "Arbitration only" would compromise the merits of the "Mediation First, Arbitration Next" approach in terms of cost-effectiveness and customer relationship. The introduction of the existing FDRS was thoroughly considered by the Administration in its consultation in 2010. It was concluded, and the Council also agreed, that "Mediation first, Arbitration next" is an efficient and effective process to resolve disputes and is in line with international practices.

18. Besides, if the parties opt for the "Mediation only" approach but fail to reach a settlement after mediation, whether the dispute may be referred to arbitration

will depend on whether the parties can then reach a mutual consent to arbitrate. This is different from the current “Mediation First, Arbitration Next” approach under which the EC is the one who decides whether to arbitrate the dispute after exhausting the process of mediation.

19. On the other hand, with the “arbitration only” approach available, the parties may be discouraged from conducting mediation which is a less costly ADR process. It is suggested in paragraph 4.3 of the Consultation Paper that the option of “Arbitration only” is to cope with the arbitration provision in some contracts between FIs or FIs and their customers. It is doubtful whether the mere presence of arbitration provision in a contract is a legal bar for the parties to use mediation to resolve their dispute (if they so wish).

20. In the premises, we are of the view that the existing approach of “Mediation First, Arbitration Next”, instead of “Mediation only” or “Arbitration only”, should apply to cases that are beyond the Intake Criteria and submitted to the FDRC by mutual agreement.

21. *A fortiori*, the options of “Mediation only” or “Arbitration only” should not be available for “normal” cases under the FDRS.

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.
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22. The revision of the fee scale does not obviate our concern that any charges for mediation or arbitration under the FDRS may pose an economic disincentive to those vulnerable consumers who do not have sufficient means. The Council suggests that a fee waiver mechanism or some kinds of financial assistance should be considered if an EC cannot afford to pay.

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.
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23. We agree that retrospective effect be given to the proposed amended Intake Criteria. We consider that the previously rejected applicants whose financial disputes with FIs have not yet been resolved may have been deterred from seeking redress through litigation due to its potentially significant financial

implication and/or complicated procedures. They should be given a chance to be reconsidered for using the more cost-effective and efficient services of the FDRC. To implement this, transparent and effective procedures have to be established.

Conclusion

24. The Council acknowledges all proposals in the Consultation Paper are intended to further enhance FDRC services to better serve the community by improving the terms of the FDRS. While we are in principle supportive of the objective of the proposals, we invite FDRC to give serious consideration to the issues we highlighted in this submission.

Consumer Council
December 2016