

**IFPHK's Response to the Consultation Paper of the
Proposals to Enhance the Financial Dispute Resolution
Scheme by the Financial Dispute Resolution Centre**

December 2016

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IFPHK's Profile

Background

The Institute of Financial Planners of Hong Kong ("IFPHK") was established in June 2000 as a non-profit organization for the fast-growing financial industry. It aims to be recognized in the region as the premier professional body representing those financial planners that uphold the highest standards for the benefit of the public.

The IFPHK is the sole licensing body in Hong Kong authorized by Financial Planning Standards Board Limited to grant the much-coveted and internationally-recognized CFP^{CM} Certification and AFPTM Certification to qualified financial planning professionals in Hong Kong and Macau.

It represents more than 6,800 financial planning practitioners in Hong Kong from such diverse professional backgrounds as banking, insurance, independent financial advisory, stockbroking, accounting, and legal services.

Currently there are more than 147,000 CFP certificants in 25 countries/regions; the majority of these professionals are in the U.S., Canada, China, Australia and Japan, with more than 4,800 CFP certificants in Hong Kong.

CFP^{CM}, CERTIFIED FINANCIAL PLANNER^{CM}, ,  CERTIFIED FINANCIAL PLANNERTM, AFPTM, ASSOCIATE FINANCIAL PLANNERTM,  **AFP** and  **ASSOCIATE FINANCIAL PLANNER**[®] are certification marks and/or trademarks owned outside the U.S. by Financial Planning Standards Board Ltd. The Institute of Financial Planners of Hong Kong is the marks licensing authority for the CFP marks and AFP marks in Hong Kong and Macau, through agreement with FPSB.

IFPHK's interest in this consultation

The mission and vision of the IFPHK is to promote the importance of financial planning. Financial planning refers to the process of setting, planning, achieving and reviewing life goals through proper management of finances¹.

The global financial crisis and the subsequent investor complaints against the sales and marketing activities of financial institutions increased awareness in the lack of affordable dispute resolution channels in Hong Kong. Notwithstanding the power of the Securities and Futures Commission (the "SFC") and the Hong Kong Monetary Authority (the "HKMA") to investigate complaints and take disciplinary action against intermediaries pursuant to section 196 of the Securities and Futures Ordinance ("SFO"), consumers cannot directly seek redress or direct compensation from the regulators. On 9 February 2010, the Government launched a public consultation on the proposed establishment of an Investor Education Council and a Financial Dispute Resolution Centre ("FDRC") in Hong Kong. The IFPHK provided its response to the Consultation Paper that confirmed the need to improve the existing financial dispute resolution mechanisms available to Hong Kong consumers. The hope is this will enable them to receive a

¹ www.fpsb.org

more efficient and less time-consuming recourse to any unfavorable consumer experience. The FDRC was established in November 2011 to administer an accessible, efficient and transparent Financial Dispute Resolution Scheme (“FDRS”) whereby independent and impartial mediators will provide mediation services to resolve monetary disputes between individual consumers and financial institutions.

Since the IFPHK is the leading professional body for the welfare of the financial planning industry, we have been active in responding to policy changes that will affect the industry or the financial system as a whole. Here is a summary of the IFPHK’s Consultation Paper responses that are relevant to the financial disputes redress mechanisms or financial resolution regime as a whole.

Proposed Establishment of an Investor Education Council and a Financial Dispute Resolution Centre	Financial Services and Treasury Bureau	May 2010
Securities and Futures (Amendment) Bill 2011 - Establishment of an Investor Education Council	Bills Committee on Securities and Futures	October 2011
Securities and Futures Commission’s Consultation Document on the Proposals to amend the Code of Conduct in relation to the establishment of the Financial Dispute Resolution Centre and the enhancement of the regulatory framework	Securities and Futures Commission	January 2012
Consultation Document on Hong Kong’s Financial Competency Framework	Investor Education Centre	September 2015
Consultation Document on Hong Kong Strategy for Financial Literacy	Investor Education Centre	October 2015

IFPHK’s representation

The IFPHK was founded by 30 members (the “Founding Members”) in order to raise the standards of financial planners and highlight the importance of sound financial planning advice.

The IFPHK currently has 40 Corporate Members including banks, independent financial advisors, insurance companies, and securities brokerages. With its Corporate Members providing a full spectrum of client services and products, the IFPHK is well positioned to understand the needs, concerns and aspirations of the financial planning community.

Executive Summary

The Financial Dispute Resolution Centre (“FDRC”) issued the Consultation Document (the “Consultation Paper”) in October 2016 and invited comments from the public on the enhancements to the Financial Dispute Resolution Scheme (“FDRS”). The Consultation period ended on 31 December 2016. The IFPHK supports the establishment of the FDRC to further enhance consumer protection by providing more accessible and affordable alternative dispute resolution channels.

In addition, the Lehman Brothers Mini-Bond issue reflects the lack of dispute resolution services available in Hong Kong, especially one that facilitates a fast-track process to settle complaints. Regarding demands for mediation or arbitration, the Government established the FDRC in 2012 as an alternative to costly and protracted litigation. It was established to ensure an effective process was available for resolving monetary disputes between an investor and a financial institution in a speedy, affordable, independent and impartial way. All licensed or registered persons regulated by the SFC or the HKMA are required to comply with the FDRS and be bound by its process. The primary regulatory objective remains that licensed and registered persons should seek to resolve complaints internally. If a complaint or dispute fails to be resolved internally, a licensed or registered person should inform clients of the right to make a complaint to the FDRC. Since its establishment, the utilization of the FDRS has been low. According to its complaint enquiries from 2012 to 2015, the FDRC received on average about 1,000 complaint enquiries. Awareness of the benefits of the alternative dispute resolution mechanism remains low for consumers.

The IFPHK’s submission responding to this Consultation Paper is based on the following principles:

1. *Aligning with international best practices*

The financial crisis alerted the public the need to improve the financial dispute resolution mechanisms available to Hong Kong consumers and thereby enable them to receive a more efficient and less time-consuming recourse to any unfavorable consumer experience. Similar agencies are established in other financial centers like the Financial Ombudsman Service in Australia and the United Kingdom, Financial Industry Disputes Resolution Center in Singapore and Financial Industry Regulatory Authority in the United States. With Hong Kong being behind the curve in establishing a permanent and independent mechanism to settle financial disputes between financial service providers and consumers, the FDRC was established in 2011.

2. *Enhancing consumer protection*

As financial products get more complex and sophisticated, it is of utmost importance that investors/consumers are provided with proper and adequate protection under a sound and effective regulatory system. The IFPHK supports a regulatory system which would facilitate delivering better financial products and services to the benefit of members of the public, as well as protecting them. Hence, the effectiveness of consumer protection and a healthy balance of robust regulations and market development are the IFPHK’s areas of focus. The IFPHK strongly believes that consumers have rights. They have the right to redress. To echo

the principle of protecting consumers, the IFPHK has supported the setting-up of the FDRC and the sustainable development of the FDRS.

3. *Fostering mediation and arbitration practices*

Mediation² and arbitration³ are not uncommon in Hong Kong, especially in the construction industry. However, the developments that have made mediation an integral part of the dispute resolution landscape only took place in the past decade⁴. In response to the Lehman Brothers Minibond Saga, the Government has increasingly employed Alternative Dispute Resolution (“ADR”) mechanisms to address consumer complaints. The FDRC has been established to administer an **accessible, efficient and transparent** FDRS whereby **independent and impartial** mediators will provide mediation services to resolve monetary disputes between individual consumers and financial institutions. The FDRC provides a cost-efficient and time-saving alternative to litigation and financial instrument investors, and the usage of mediation and arbitration services is expected to be popularized in solving financial disputes in Hong Kong. In previous years, the Government had supported various initiatives in developing the mediation industry. The Mediation Ordinance came into operation in January 2013, which provides a regulatory framework for the conduct of mediation by seeking out certain standards expected of a mediator. In August 2016, the Consumer Council advocated for establishing a consumer dispute resolution centre. It said the potential demand for such an adjudicative option for resolving consumer disputes is substantial. Despite all efforts, awareness of the benefits of the alternative dispute resolution mechanism remains low for individual consumers. In light of the above, we think there is an acute need to strengthen and promote ADR mechanisms to them through enhancing the FDRS and public education.

Based on the above principles, the IFPHK supports the proposals of expanding the FDRS’ scope mainly on the following areas:

- To raise the maximum claimable limit to match the future jurisdiction limit of the District Court
- To extend the limitation period for lodging claims to 36 months
- To provide more flexibility to eligible claimants (“EC”s) and financial institutions (“FI”s) so as to allow them to exceed the intake criteria under mutual agreement and allow the FIs to refer a financial dispute to the FDRC
- The Modified FDRS rules and procedure (Mediation only) and Modified FDRS rules and procedure (Arbitration only)
- The proposed fee schedule
- To reconsider and reassess the rejected applications based on the amended intake criteria

Whilst the IFPHK agrees to expand the FDRS’ scope to PD31 cases, further clarification is needed regarding whether PD31 cases are required to follow the “mediation first, arbitration next” procedure. If the arbitration procedure is taken on, the ECs of PD31 cases need to be informed earlier for the requirement of withdrawing their court cases.

² Mediation is a process of settling disputes through discussion sessions between involved parties under the presence of a neutral third party. Mediators are not given any power to impose a settlement for the disputes. Instead, they act as a shuttle diplomat by encouraging the disputing parties to discuss, and helping them filter out their emotional elements. (Source: Trade and Development Council website)

³ The Hong Kong International Arbitration Centre was established in 1985. Arbitration is a legal process through which awards are issued to the disputing parties by arbitrators rather than the court. The Hong Kong Arbitration Ordinance is widely recognized as one of the most advanced arbitration statutes in the world. (Source: Trade and Development Council website)

⁴ Rimsky Yuen, Keynote address by SJ at Asia Pacific International Mediation Summit in India, 15 February 2015

Notwithstanding our general support, the IFPHK has reservations on the proposals to include small businesses into the FDRS' scope as it deviates from the FDRC's mission to provide independent and impartial dispute resolution between individual consumers and financial institutions in Hong Kong. Moreover, the decision-making for an individual is different from that for a company, and small enterprises already have available channels for redress, so the priority of the FDRC should remain to protect individual consumers.

To conclude, confidence and proper utilization by the users and general public are the cornerstones for success of the FDRC and the popularization of ADR mechanisms to resolve financial disputes. More education, guidance and promotion from the government and professional bodies on the ADR mechanisms and their benefits are necessary. Proven success stories can be showcased so as to build confidence in using the ADR mechanisms to resolve financial disputes.⁵ Thus, the enhancement of the FDRS' scope must be complemented by an effective promotion campaign. In this regard, the FDRC could work closely with the Investor Education Centre to enhance the awareness of the new scheme.

⁵ Banking Today, New Era in Financial Dispute Resolution, Jul-Aug 2011

The FDRC Consultation

The Financial Dispute Resolution Centre (“FDRC”) launched a consultation in October to significantly enhance the Financial Dispute Resolution Scheme (“FDRS”). The Consultation period ended on 31 December 2016.

The proposals, which will bring the FDRS more into line with financial dispute resolution schemes in other jurisdictions, can be summarized as follows:

- To raise the maximum claimable amount from HK\$500,000 to HK\$3,000,000;
- To extend the limitation period for lodging claims from 12 months to 36 months from the date of purchase of the financial instrument or the date of first knowledge of loss, whichever is the later;
- To enlarge the scope of “eligible claimants” (“EC”s) by incorporating “small enterprises” (“SE”s) which have/had a customer relationship with a financial institution (“FI”);
- To accept applications for claims which are under current court proceedings; and
- To provide for the FDRC to deal with the following cases subject to prior agreement between the parties:
 - A financial dispute with a claimable amount in excess of the amended maximum claimable amount;
 - A financial dispute exceeding the amended limitation period for lodging claims;
 - Where 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; and
 - Where 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.

In cases that are beyond the Intake Criteria and subject to mutual agreement, the FDRC also proposes to offer “mediation only” or “arbitration only” options in addition to the original two-stage mechanism of “mediation first, arbitration next”. With the proposed amendments to the FDRS, there would be a need to revise the FDRC’s fee schedule. In light of the proposed amendments, the FDRC also proposes that all previously rejected applications could reapply for consideration by the FDRC if they now fall within the amended Intake Criteria.

The Consultation Paper contains six chapters and ten questions. Chapters in the Consultation Paper are as follows:

Chapter 1 – Introduction

Chapter 2 – Proposals on refining the service features of the FDRS

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.

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 banking and the securities industries respectively? Please state the reasons.

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.

Question 4

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?

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.

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.

Chapter 3 – Proposals on broadening the service scope of the FDRS subject to mutual agreement

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?

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?

Chapter 4 – Mediation / Arbitration rules applicable to cases under mutual agreement

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” options should not be available for “normal” cases under the FDRS? Why or why not?

Chapter 5 – Proposed revised mediation / arbitration fees

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.

Chapter 6 – Retrospective effects of the proposed amendments

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.

IFPHK's Submission

The views expressed in this submission paper are not necessarily summaries of the views taken from the industry. They may have undergone more independent and critical analysis and consideration by the IFPHK as a professional body. As a result, not all the views collected by the IFPHK are recorded in this submission paper and neither have all the views expressed in this submission paper been directly endorsed by those industry representatives or members consulted.

Our Principles

The IFPHK's submission is based upon the following principles that we consider important for the financial disputes redress mechanism and financial resolution system:

Aligning with international best practices

Globalization and financial market integration have increased rapidly in the past decade. As an international financial centre, Hong Kong is not immune from international financial market and regulatory development. This has been illustrated by the recent financial crisis where problems originating in one country quickly spread across the globe.

The financial crisis alerted the public to the need to improve the existing financial dispute resolution mechanisms available to Hong Kong consumers and thereby enable them to receive a more efficient and less time-consuming recourse to any unfavorable consumer experience. Similar agencies are established in other financial centers like the Financial Ombudsman Service in Australia and the United Kingdom, Financial Industry Disputes Resolution Center in Singapore and Financial Industry Regulatory Authority in the United States. With Hong Kong being behind the curve in establishing a permanent and independent mechanism to settle financial disputes between financial service providers and consumers, the FDRC was established in 2011.

The IFPHK regards that the reputation of the financial planning industry has once again been unfairly tarnished after the financial crisis due to varying standards of sales practice and professionalism. The FDRC now provides a cost-effective and time-saving financial dispute resolution avenue for the financial sector and the public. With the services provided, Hong Kong will continue to excel in its status as an international financial centre.

Enhancing consumer protection

As financial products get more complex and sophisticated, it is of utmost importance that investors/consumers are provided with proper and adequate protection under a sound and effective regulatory system. The IFPHK supports a regulatory system which would facilitate delivering better financial products and services to the benefit of members of the public, as well as protecting them. Hence, the effectiveness of consumer protection and a healthy balance of robust regulations and market development are the IFPHK's areas of focus.

The IFPHK strongly believes that consumers have rights. Among other things, they have the right to be heard, the right to be informed, the right to choose and the right to redress. The regulatory burden is to balance these rights with the need for financial institutions to innovate and grow.⁶ To echo the principle of protecting consumers, the IFPHK supported the setting-up of the FDRC. The

⁶ Alliance for Financial Inclusion, Policy Note Consumer Protection Leveling the playing field in financial inclusion, 2010

setting-up of the FDRC is in line with the requirements of Principle 9 of the G20 High-level Principles on Financial Consumer Protection which addresses the rights of Consumers. Principle 9 on Complaints Handling and Redress includes:

1. Consumers to have access to adequate complaints handling and redress mechanisms that are accessible, affordable, independent, fair, accountable, timely and efficient.
2. Not to impose unreasonable cost, delays or burdens on consumers.

The IFPHK also believes that financial practitioners have a duty to protect consumers. Financial institutions that embrace transparency, redress and financial education promote financial inclusion and expand the market. Financial institutions that understand the potential of financial inclusion recognize that in the long term it is in their best interest to foster fair and equitable business practices as part of good governance and brand building which will promote good returns for the institutions and consumers⁷.

At present, all licensed or registered persons regulated by the SFC or the HKMA are required to comply with the FDRC Scheme (“FDRS”) and be bound by its process. The primary regulatory objective remains that licensed and registered persons should seek to resolve complaints internally. If a complaint or dispute fails to be resolved internally, a licensed or registered person should inform clients of the right to make a complaint to the FDRC. In July 2015, the SFC reprimanded and fined The Pride Fund Management Limited (“Pride Fund Management”) \$400,000 over its failure to enter into mediation with an eligible claimant under the FDRS administered by the FDRC.

Fostering mediation and arbitration practices

The advantages of Alternative Dispute Resolution (“ADR”) are increasingly recognized by the global community. Growth in the use and popularity of ADR as a means of resolving commercial disputes is a tribute to a growing recognition that it provides a flexible and effective alternative to costly and time-consuming litigation. Hong Kong is a prime venue for commercial dispute resolution through arbitration and mediation, given its mature and well-developed legal system and the existence of a large pool of experienced professionals. Mediation⁸ and arbitration⁹ are not uncommon in Hong Kong especially in the construction industry. However, the developments that have made mediation an integral part of the dispute resolution landscape only took place in the past decade¹⁰.

In response to the Lehman Brothers Minibond Saga, the Government has increasingly employed ADR mechanisms to address consumer complaints. The Hong Kong Monetary Authority (the “HKMA”) facilitated the establishment of a Lehman-Brothers related Investment Products Dispute Mediation Scheme (the “Scheme”). Under the Scheme, mediation and arbitration services were

⁷ Alliance for Financial Inclusion, Policy Note Consumer Protection Leveling the playing field in financial inclusion, 2010

⁸ Mediation is a process of settling disputes through discussion sessions between involved parties under the presence of a neutral third party. Mediators are not given any power to impose a settlement for the disputes. Instead, they act as a shuttle diplomat by encouraging the disputing parties to discuss, and helping them filter out their emotional elements. (Source: Trade and Development Council website)

⁹ The Hong Kong International Arbitration Centre was established in 1985. Arbitration is a legal process through which awards are issued to the disputing parties by arbitrators rather than the court. The Hong Kong Arbitration Ordinance is widely recognized as one of the most advanced arbitration statutes in the world. (Source: Trade and Development Council website)

¹⁰ Rimsky Yuen, Keynote address by SJ at Asia Pacific International Mediation Summit in India, 15 February 2015

provided to aggrieved investors seeking financial redress from the bank. For unsuccessful mediations, parties had the option of proceeding to binding arbitration conducted by the Hong Kong International Arbitration Council. Established in November 2011 as a non-profit making company limited by guarantee, the FDRC is a leading financial mediation service provider in Hong Kong. It administers an **accessible, efficient and transparent** FDRS whereby **independent** and **impartial** mediators will provide mediation services to resolve monetary disputes between individual consumers and financial institutions. The FDRC provide a cost-efficient and time-saving alternative to litigation and financial instrument investors, the usage of mediation and arbitration services is expected to be popularized in solving financial disputes in Hong Kong.

In previous years, the Government had supported various initiatives in developing the mediation industry. The Mediation Ordinance came into operation in January 2013, which provides a regulatory framework for the conduct of mediation by seeking out certain standards expected of a mediator. In August 2016, the Consumer Council advocated for establishing a consumer dispute resolution centre. It said the potential demand for such an adjudicative option for resolving consumer disputes is substantial. The Mediation Ordinance encourages the use of mediation by ensuring confidentiality, while at the same time preserving the flexibility of the mediation process¹¹.

Since its establishment, the utilization of the FDRS remains low. According to its complaint enquiries from 2012 to 2015, the FDRC received on average about 1,000 complaint enquiries. Awareness of the benefits of ADR mechanisms remains low for consumers. In light of protecting consumers, we think there is an acute need to strengthen and promote ADR mechanisms to them through enhancing the FDRS and public education.

Chapter 2 – Proposals on refining the service features of the FDRS

To raise the maximum claimable amount

The FDRC proposes to raise the maximum claimable amount from HK\$500,000 to HK\$3,000,000. According to the existing Intake Criteria, the FDRC has the jurisdiction to accept an application brought by an EC with the claimable amount not exceeding HK\$500,000. For a claim with a claimable amount over HK\$500,000, the claimant is required to sign a declaration to limit the claimable amount to HK\$500,000 if the claimant wishes to pursue the mediation or arbitration processes through the FDRC. The FDRC proposes to raise the maximum claimable amount for the following reasons:

- a) Market needs as revealed from the FDRC's complaint data
According to its complaint enquiries from 2012 to 2015, 270 out of the 1,000 complaint enquiries that the FDRC received could not proceed further due to the fact that the Claims were over the maximum claimable limit. Of these 270 complaint enquiries, about 50% had claim amounts between HK\$500,000 and HK\$1,000,000; about 25% between HK\$1,000,000 and HK\$2,000,000; about 10% between HK\$2,000,000 and HK\$3,000,000; and about 15% over HK\$3,000,000.
- b) The proposed higher jurisdictional limits of the District Court and the Small Claims Tribunal

¹¹ Rimsky Yuen, Keynote address by SJ at Asia Pacific International Mediation Summit in India, 15 February 2015

The financial limit for the civil jurisdiction of the District Court is under review and likely to be increased from HK\$1,000,000 to HK\$3,000,000. The Small Claims Tribunal is also proposing to increase the jurisdictional monetary limit from HK\$50,000 to HK\$75,000.

- c) References to the prevailing practices at other overseas jurisdictions
The current maximum claimable amount of the FDRS in Hong Kong is lower than those in Australia, Canada and the UK. The Financial Industry Regulatory Authority in the US has no limit in this respect.

There has been suggestion to apply two respective maximum claimable amounts for the banking and the securities industries, in order to cater for their different business models.

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.

IFPHK's Response to Question 1.1 to 1.2

Established in November 2011 as a non-profit making company limited by guarantee, the Financial Dispute Resolution Centre ("FDRC") administers an **accessible, efficient and transparent** Financial Dispute Resolution Scheme ("FDRS") whereby **independent and impartial** mediators will provide mediation services to resolve monetary disputes between individual consumers and financial institutions. Since its establishment, the utilization of the FDRS remains low. According to the Consultation Document regarding its complaint enquiries from 2012 to 2015, the FDRC received on average about 1,000 complaint enquiries. In conclusion, the utilization of the FDRS is low and consumer awareness of the benefit of ADR mechanisms is still inadequate.

Increasing the maximum claimable amount will put the FDRS on a similar footing to the schemes in the UK, Australia and Canada. The proposals also reflect the increasing complexity in financial products leading to higher value claims and a greater need for customers to have recourse to a quick, affordable and independent means of resolving disputes.¹²

In order to expand the scope of the FDRS and to increase the utilization rate, we agree with the proposal to raise the maximum claimable amount to the extent it aligns with the future monetary jurisdiction of the District Court. Our principle is that the maximum claimable amount shall not exceed the jurisdiction limit of the District Court. Therefore, the IFPHK agrees to raise the amount to between HK\$1 million to HK\$3 million. If the future jurisdiction

¹² Herbert Smith Freehills, Investor Protection in the Spotlight: Proposals to Significantly Enhance the Financial Dispute Resolution Scheme, 19 October 2016.

limit of the District Court is equal to or greater than HK\$3 million, the maximum claimable amount of the FDRS can be set at HK\$3 million. If the jurisdiction limit of the District Court is under HK\$3 million, the IFPHK suggests that the maximum claimable amount should be aligned with the new jurisdiction limit of the District Court.

Another way to expand the scope of the FDRS is to expand the membership base, which the IFPHK advocated for in a previous consultation paper submission that suggested including insurance plans in the FDRS. Since the FDRC did not cover insurance intermediaries, consumers who seek advice on insurance products need to go through different complaint procedures, depending through which distribution channels these products are sold. Such inconsistencies are inconvenient and confusing for consumers. We understand it is the insurance industry's preference not to join the FDRC. To better protect investors and ensure a consistent consumer experience, the IIA, as the only insurance regulator, might consider joining the FDRC and extending the scope of the FDRC to insurance sales and marketing activities.

The merger of different schemes is another way to increase the use of the FDRC or mediation as a whole. Examples of successful merges that have taken place between different ADR schemes covering different industry sectors under a single institution were found in the Financial Ombudsman Service of Australia and the Financial Industry Disputes Resolution Centre of Singapore. In the United Kingdom, a robust coordinating and quality assurance body supervises over a number of different sector-specific ADR schemes¹³.

Confidence and utilization by the users and general public are the cornerstones for the success of the FDRC and the popularization of ADR mechanisms to resolve financial disputes. More education, guidance and promotion from the government and professional bodies on the ADR mechanisms and their benefits are necessary for consumers, banks and financial institutions, and dispute-resolution practitioners. Proven success stories can be showcased so as to build confidence in using the ADR mechanisms to resolve financial disputes.¹⁴ The enhancement of the FDRS' scope must be complemented by an effective promotion campaign. In this regard, the FDRC may work closely with the Investor Education Centre to enhance the awareness of the new scheme.

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?

IFPHK's Response to Question 2.1 to 2.2

¹³ Consumer Council, Advocating for Establishing a "Consumer Dispute Resolution Centre" to achieve triple wins in consumer dispute resolution for Hong Kong, August 2016

¹⁴ Banking Today, New Era in Financial Dispute Resolution, Jul-Aug 2011

The IFPHK prefers to apply a consistent amount to the banking and securities industry. Nonetheless, the IFPHK agrees that further studies and research are warranted to explore the possibilities of separate claimable amounts for the two industries. In Singapore, there are separate claim limits for the banking and finance industry and the insurance industry. At this stage, the IFPHK considers that it is appropriate to apply a consistent amount to the banking and securities industry. If insurance plans are added to the FDRS in the future, differences in the maximum claimable amounts would be valid as they would recognize the differences in the nature of the financial products.

To extend the limitation period for lodging Claims

The FDRC currently rejects an application with a Claim that is made more than 12 calendar months from the date of the purchase of the financial service, or the date on which the EC first had knowledge that he/she suffered monetary loss arising out of the financial service, whichever is later. The FDRC's complaint enquiry data from 2012 to 2015 reveals that there is a need for extending the limitation period for lodging Claims. Overseas, most countries set the limitation period for lodging claims at 6 years from the date of awareness of loss or cause of action. The FDRC recorded from 2012 to 2015 a yearly average of about 140 complaint enquiries with losses having occurred for more than one year. Of these, 35% occurred within 1 to 2 years while 65% occurred over 2 years earlier. As such, it is proposed that the limitation period for lodging Claims be set at 36 calendar months.

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.

IFPHK's Response to Question 3.1 to 3.2

The limitation period of 12 calendar months is short and inadequate compared to other major financial centers. To enhance consumer protection and boost the use of ADR mechanisms, the IFPHK regards the proposal of 36 months as reasonable.

To enlarge the scope of ECs by incorporating small businesses

At present, one of the Intake Criteria is that the dispute must be brought to the FDRC by an EC. Taken into account feedback from stakeholders and overseas experiences, it is proposed that the definition of EC be extended to cover SEs which have/had a customer relationship with an FI or have been provided with a Financial Service. The financial ombudsmen of overseas countries such as the USA, the UK, Australia and New Zealand also cover the business sector, small-sized companies in particular.

Thus, the FDRC considers that it would be reasonable to incorporate small businesses, which are financially less capable to resolve their disputes with FIs through legal proceedings. The effective and cost-efficient mediation/arbitration services provided by the FDRC would be able to serve the needs of both the FIs and their small business customers. Regarding the definition of SEs for the FDRS, it is considered that it has to be simple and easily understood by the public, whilst at the same time a relatively good indicator of the company's business size. There are a number of local references which include the qualifying conditions for small private companies under Section 361 of the Companies Ordinance (Cap. 622), the definitions of SMEs adopted by the Hong Kong Trade and Industry Department ("TID"); and small private companies which have borrowing relationships with Authorised Institutions in Hong Kong and are covered by the Commercial Credit Reference Agency, Hong Kong.

In light of the above, it is proposed to define an SE as a partnership or a limited company with an annual turnover / revenue of not more than HK\$50 million as shown in its latest financial statements. If it belongs to a larger group, the consolidated turnover / revenue will be considered instead. A small-sized FI, if it could meet an SE qualifying test, could lodge a Claim as an EC against a larger FI under the FDRS.

Question 4

- 4.1 Do you agree with the proposal to extend the service scope to cover Claims from SEs (as designed 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.

IFPHK's Response to Question 4.1 to 4.3

The IFPHK has reservations on this proposal as it deviates from the FDRC's mission. The mission of the FDRC is to provide independent and impartial "Mediation First, Arbitration Next" processes of dispute resolution to facilitate the resolution of monetary disputes between individual customers and financial institutions in Hong Kong. It is mainly set up to protect individual consumers' rights. To allow small business to qualify as ECs, the FDRC moves from protecting consumers to resolving small-enterprise disputes.

Besides, the decision-making of an individual is different from that of a company, and we feel that priority should be given to protect individual consumers rather than to provide an avenue for small enterprises to resolve disputes given that these companies already have other ADR channels available.

To accept applications of Claims which are under current court proceedings

At present, any claim that is/has been the subject of current court proceedings shall be rejected by the FDRC. The FDRC would reject an Application which is/has been the subject of legal proceedings. Under the FDRC's existing operational procedures, if an EC wishes to pursue the mediation/arbitration processes at the FDRC, the EC has to withdraw the case from the Court before lodging the application with the FDRC.

It is proposed that the FDRC be allowed to intake a Claim which is under current court proceedings, in conformity with the development of the Civil Justice Reform commencing in 2009. One of the underlying objectives of the Civil Justice Reform is to facilitate the settlement of disputes. This proposal of allowing Claims which are subjects of court proceedings be brought forth to the FDRC would do away with the unnecessary procedures of withdrawing the case from the court and thus enable both FIs and ECs to deal with the case smoothly and in a timely manner. The proposal will also be in line with the current court practice, which encourages the parties to go for mediation (as stipulated under Practice Direction 31), in the course of court proceedings. Given that the maximum claimable amount is set at the upper limit of the future monetary jurisdiction of the District Court, all PD31 cases in relation to financial disputes between the FIs and the ECs which could fulfill the amended Intake Criteria may be handled by the FDRC.

Taking into account the fact that legal representatives are commonly involved in PD31 cases and mediation, it is proposed that legal representatives of both parties be allowed to participate in the FDRC mediation, to be in line with market practice. For avoidance of doubt, other than PD31 cases, the ordinary cases under the FDRS cannot be legally represented.

Question 5

- 5.1 Do you agree that the FDRC should deal with cases under current court proceedings without 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.

IFPHK's Response to Question 5.1 to 5.3

Consistent with the legal reform, the IFPHK agrees to expand the scope to qualify PD31 cases into the FDRS. We also have no objections on having legal representatives for PD31 cases.

Regardless of our support, the IFPHK would like the FDRC to make further clarification of the procedure for PD31 cases. Paragraph 2.44 of the Consultation Paper stated that:

"As with other cases under the FDRS, cases under PD31 would need to follow the rule of "mediation first, arbitration next". Hence, the EC could have a further choice of arbitration, if mediation fails."

We also noted from PD31 paragraph 3 that:

“ADR means a process whereby the parties agree to appoint a third party to assist them to settle or resolve their dispute. Settlement negotiations between the parties do not amount to ADR. A common mode of ADR is mediation. This PD applies to mediation. Where the parties are engaged in arbitration proceedings, the court proceedings would be stayed and this PD would not apply to such proceedings.”

If PD31 cases would not apply once the EC takes on arbitration proceedings and which may require the EC to withdraw from court proceedings, the FDRC has to make this known to the EC prior to the taking on of the FDRS procedure.

Chapter 3 – Proposals on broadening the service scope of the FDRS subject to mutual agreement

The FDRC also proposes to deal with the following particular circumstances subject to a prior mutual agreement of the parties involved:

- a) A financial dispute with a claimable amount in excess of the amended maximum claimable amount;
- b) A financial dispute exceeding the amended limitation period for lodging Claims;
- c) 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.
- d) 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.

The proposals have references to other overseas jurisdictions where alternative dispute resolution services with similar features are provided.

A financial dispute with a claimable amount in excess of the proposed amended maximum claimable amount and/or beyond the amended limitation period for lodging Claims

In this proposal, a prior mutual agreement will be required from the parties involved (i.e. FIs and ECs) to lodge their application to the FDRC, if (i) the claimable amount is exceeded; and/or (ii) the limitation period for lodging Claims is breached; provided that all other amended Intake Criteria are satisfied. The FDRC would give due consideration to accept cases for mediation and/or arbitration under the FDRS. It is not expected that the claimable amount would be much higher than the maximum claimable amount, given that the ECs are of relatively less financial strength or operating small businesses. Similarly for the limitation period for lodging Claims, it is not envisaged that there would be many cases falling beyond 36 calendar months. Though the FDRC is well aware of the fact that a 6-year period is commonly adopted internationally, the FDRC would prefer to respect the mutual decision.

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?

IFPHK's Response to Question 6

In view of protecting customers, the IFPHK agrees with providing more flexibility to all parties.

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.

In this proposal, an FI can lodge an application with the FDRC for a financial dispute in which an EC claims against an FI or vice versa, subject to the consent of the EC. At present, the FDRC can only accept an application for mediation lodged by an EC. The FDRC cannot accept any application for mediation raised by an FI, notwithstanding that the FI may wish to resolve financial disputes with their customers through the FDRS in a timely manner. Furthermore, if the FI so wishes, it could also pay for the mediation and/or arbitration fees on behalf of their customers, to induce the other party to enter into mediation or arbitration.

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.

The FI may wish to request its customer to resolve a dispute at the FDRC with claims from either or both parties. Though the FI may be the applicant or claimant, this does not deviate from the FDRC's mandate of providing an independent, impartial, accessible, efficient and confidential platform to resolve disputes between the FIs and their customers. By allowing the FI to lodge a counterclaim, with the consent of the EC, it would facilitate the FDRC to efficiently handle the dispute, as the EC's Claim and the FI's counterclaim could be dealt with aggregately at the FDRC. In both Claims and counterclaims, though the FI would be the applicant/claimant, the FI would have to pay the mediation/arbitration fees as a member of the FDRS.

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?

IFPHK's Response to Question 7.1 to 7.3

In view of protecting customers, the IFPHK agrees with providing more flexibility to allow an FI to initiate mediation.

Chapter 4 – Mediation / Arbitration rules applicable to cases under mutual agreement

It is proposed to offer two more options in (b) and (c) below, in addition to the standard FDRS rules and procedures, as follows:

- a) Standard FDRS rules and procedures (Mediation First, Arbitration Next);
- b) Modified FDRS rules and procedures (Mediation only); and
- c) Modified FDRS rules and procedures (Arbitration only).

Since its inception, there has been feedback from stakeholders that such flexibility should also be available under the existing FDRS. The purpose of “mediation first, arbitration next” is to encourage settlement in the mediation stage as far as possible, and if not, then in the arbitration stage. The costly and time-consuming exercise of court proceedings could then be avoided, if possible.

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” options should not be available for “normal” cases under the FDRS? Why or why not?

IFPHK’s Response to Question 8.1 to 8.2

In order to expand the scope of the FDRS and enhance the utilization of the FDRC, the IFPHK agrees with increasing flexibility with regard to the procedures available. However, the IFPHK would like to point out that the proposal deviates from the mission of the FDRC, therefore, the FDRC may wish to set some pre-conditions before taking on the modified FDRS rules and procedures. For instance, they might take on some form of mediation prior to using the modified FDRS procedure (arbitration only).

Chapter 5 – Proposed revised mediation / arbitration fees

With the proposed amendments to the FDRS, a revised fee scale is proposed with reference to local market conditions and in comparison with the mediation cost figures published by the Judiciary. The proposed fee has some notable features as follows:

- The upper limit of the lowest band is to be increased from HK\$100,000 to HK\$200,000.
- Additional monetary bands are set for different claims up to HK\$10,000,000.
- The mediation fee is to be capped at HK\$20,000 per case.
- The proposed mediation fee scale is made by reference to the reported average mediation costs per case by the Judiciary over the years from 2011 to 2015.
- The arbitration fees are based on a documents-only and in-person hearing basis, whilst the market reference is based on an in-person hearing basis.
- For exceptional cases whose claimable amounts exceed HK\$10,000,000, the mediation/arbitration fee could only be fairly and reasonably determined by the parties concerned and the mediator/arbitrator, having regard to the complexity of the case.

Question 9

Do you agree with the proposed revised fee scale for the dispute resolution services of the FDRC?
Please provide your comments and/or suggestions.

IFPHK's Response to Question 9

In our previous consultation paper submission, we said that we are concerned that this proposed fee structure is not at a sufficiently high enough level to prohibit unwarranted consumer claims and the potential abuse of the system. From the references to the previous years, it is evident that the lower charges to consumers did not lead to the abuse of the system.

The IFPHK has no further comments on the revised fee schedule.

Chapter 6 – Retrospective effects of the proposed amendments

In light of the proposed amendments above, it is proposed that all previous rejected applications could re-apply for consideration by the FDRC, if they now fall within the amended Intake Criteria.

Question 10

Do you agree that the FDRC could re-consider the rejected applications if they now fall within the amended Intake Criteria?

IFPHK's Response to Question 10

Based on fairness, the IFPHK agrees that the FDRC could re-consider and re-assess the rejected applications. Nevertheless, the FDRC has to be aware that the proposals have a significant retrospective impact in that the FDRC proposes that all previous applications could re-apply for consideration if they now fall within the amended Intake Criteria. This might lead to a wave of complaints being resurrected.