

# **Amendments to the Terms of Reference of the Financial Dispute Resolution Centre**

## **COMMENTS FROM HONG KONG BAR ASSOCIATION**

1. The Hong Kong Bar Association (“the HKBA”) is invited to comment on the amendments to the Terms of Reference (“ToR”) of the Financial Dispute Resolution Centre (“the FDRC”).

### **Preamble**

2. The HKBA notes that the amendments the ToR are to allow for disciplinary proceedings against mediators and arbitrators under the Financial Dispute Resolution Scheme (“the FDRS”).
3. The HKBA sees that a transparent and accessible channel of redress is essential in today’s provisions of professional services. For cases utilizing services under the FDRS, this may help generate credibility and accountability, as well as raising and developing overall professional standard and mode of conduct.
4. In many of the situations, confidentiality in arbitration and particularly in mediation is a vital key of the success of these dispute resolution mechanisms. As

such, a proper balance should certainly be maintained.

5. Subject to the comments set out below, the HKBA supports in principle the proposed changes to cater for the disciplinary proceedings of mediators / arbitrators who are on the FDRC List of Mediators / List of Arbitrators.
6. The HKBA believes that such changes are conducive to enhancing transparency and accessibility for the handling of possible complaints against mediators / arbitrators that may arise in the course of providing mediation / arbitration.

### **The Proposed Amendments**

#### ***The ToR***

7. In relation to the ToR, the HKBA notes that the amendments are the addition of paragraphs 23.4, 23.5 and 23.10 to the proposed ToR and that there are associated amendments to cater for them at paragraphs 23.6 to 23.9 and 25.1 thereof.
8. As regards paragraph 23.9 of the proposed ToR, the amended version reads:

*“23.9 The Parties shall not call the Mediator, Arbitrator or the FDRC (or any of its employee, officer or representative) as a witness, consultant, mediator, arbitrator or expert in any legal or any subsequent proceedings (excluding, for avoidance of doubt, the FDRC disciplinary proceedings) relating to the Eligible Dispute. [Underlined Added]”*

9. Presumably, the FDRC disciplinary proceedings will be made by a party or the parties against the Mediator / Arbitrator. The HKBA is of the view that this paragraph should be reworded so as to clarify that the Mediator / Arbitrator should not be compelled to appear as a witness or be otherwise called in as a consultant, mediator, arbitrator or expert, even in such FDRC disciplinary proceedings.
10. On the other hand, it would be sensible to extend the likewise limitations under paragraph 23.9 of the proposed ToR to those involved in the FDRC disciplinary proceedings to be called as a witness, consultant, mediator, arbitrator or expert in any other legal or subsequent proceedings.
11. Likewise, consideration should be given to extend paragraph 25.1 of the ToR to cover possible claims against those involved in the FDRC disciplinary proceedings, who may not be falling within the

descriptions as “...*the FDRC, its officers, employees and representatives...*”.

***The Mediation and Arbitration Rules***

12. As regards the corresponding amendments to the FDRS Mediation and Arbitration Rules (“the Rules”), the HKBA notes that these are the addition of paragraphs 2.5.4, 2.5.7, 2.5.8 and 3.11.3 and the associated amendments to cater for them at paragraphs 2.5.5, 2.5.6 and 3.11.1 of the Rules at Annex IV of the proposed ToR.
  
13. Along the same vein as to paragraphs 23.9 & 25.1 of the ToR, consideration should be given to cater for the above in the proposed paragraphs 2.5.7 & 2.5.8 of the Rules.

***The Agreement to Mediate***

14. For the reasons aforesaid, consideration should likewise be given to cater for the above in the proposed clauses 12(e) and 28 of the Agreement to Mediate at Annex VI of the proposed ToR.

Hong Kong Bar Association

27 August 2014