

# **The Financial Dispute Resolution Centre (“FDRC”)**

## ***Amendments to the FDRC Terms of Reference to Allow for Disciplinary Proceedings***

### ***Consultation Document***

#### **Part I – Background**

##### ***Terms of Reference***

1.1 The Financial Dispute Resolution Centre (“FDRC”) was set up in November 2011 as a non-profit making company limited by guarantee. It is an independent and impartial organisation administering the Financial Dispute Resolution Scheme (“FDRS”), which requires financial institutions who are its members to resolve monetary disputes with their customers through mediation and arbitration.

1.2 FDRC’s operations are governed by its Terms of Reference (“ToR”). These Terms of Reference including its Annexes set out the FDRC’s rules and processes, such as:

- who is eligible to lodge a dispute;
- the types of disputes that we can consider;
- how we resolve disputes;
- services that we provide;
- confidentiality; and
- rights and obligations of FDRC, Eligible Claimant and the financial institution.

The ToR is binding upon Eligible Claimants whose cases have been accepted and members of the FDRS, primarily Financial Institutions (“FI”) as defined under Paragraph 2, Section A of the ToR. It is also binding upon Mediators and Arbitrators on the FDRC List of Arbitrators and FDRC List of Mediators.

1.3 According to the ToR, the FDRC Board of Directors shall, at all times, have power to amend these ToR following consultation with the Government. Relevant stakeholders, including the relevant industry bodies, will be consulted where appropriate.

### ***Confidentiality under the FDRS***

1.4 According to the current ToR<sup>1</sup>, except for the exemptions set out under paragraphs 23.1, 23.2, and 23.3<sup>2</sup>, all communications in the mediation/arbitration process is considered confidential and the parties involved are not allowed to divulge the content of the communication to any third party, irrespective of the aims and objectives of the disclosure. The relevant paragraphs covering confidentiality of the FDRS are extracted below:

*23.1 The FDRS Application Form may be sent to the HKMA and/or SFC by the FDRC if the Applicant consents.*

*23.2 A copy of the following documents shall be sent to the HKMA and/or the SFC by the FDRC on behalf of the Parties and the Mediator:-*

- (a) the Agreement to Mediate as set out in Annex VI;*
- (b) the Mediated Settlement Agreement (if any) in the form set out in Annex VIII;*
- (c) the Mediation Certificate in the form set out in Annex IX;*

*Where the documents are sent by the FDRC on behalf of the FIs, the relevant FI shall be notified.*

*23.3 A copy of the following documents in an Arbitration shall be sent to the HKMA and/or the SFC by the FDRC on behalf of the Parties and the Arbitrator:-*

- (a) the Notice to Arbitrate; and*

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<sup>1</sup> Paragraph 20.8.8, Section D of the ToR, Paragraph 23, Section E of the ToR, Rules 2.5 of the FDRS Mediation and Arbitration Rules (Annex IV of the ToR), Clause 4 of the Ethics Code for FDRC Mediators (Annex V of the ToR), Clause 11 - 16 of the Agreement to Mediate (Annex VI of the ToR), and the Confidentiality Agreement (Annex VII of the ToR).

<sup>2</sup> Similar provisions in Rules 2.5.1, 2.5.2, 2.5.3 and 3.11.2 in Annex IV, Clause 12 in Annex VI and Annex VII.

*(b) the Arbitral Award.*

*Where the documents are sent by the FDRC on behalf of the FIs, the relevant FI shall be notified.*

*23.4 Subject to Paragraphs 23.1, 23.2 and 23.3 and save as shall be required under any written law, regulations, or an order of court, or as necessary to implement and enforce any Mediated Settlement Agreement or Arbitral Award, all persons involved in the Mediation and/or Arbitration process shall keep confidential and shall not disclose or divulge (whether expressly or impliedly) to any third party:-*

- (a) the matters that transpired in the course of the Mediation and/or Arbitration process;*
- (b) any views expressed, or suggestions or proposals for settlement made by any Party for the resolution of the dispute in the course of the Mediation and/or Arbitration process;*
- (c) proposals suggested by the Mediators and/or Arbitrators;*
- (d) all materials made available and communication made during the Mediation and/or Arbitration process; and/or*
- (e) all materials, information, correspondence (including emails), issues/matters discussed, proposals and counterproposals produced for or arising in relation to the Mediation and/or Arbitration process, including but not limited to any Mediated Settlement Agreement (and the substance and/or terms thereof) or Arbitral Award, except as directly necessary to implement and enforce any such settlement agreement or award.*

*Nothing in this Paragraph shall prevent an FI from disclosing any such information to the Regulators or law enforcement agencies in compliance with any regulatory or statutory requirement(s). The fact that the Mediation and/or Arbitration process has occurred, is continuing or has concluded shall not be considered confidential.*

*23.5 Save as shall be required under any written law, regulations or an order of court, all materials made available, documents or other information produced for or arising in relation to the Mediation and/or Arbitration process shall be privileged and shall not be admissible as evidence or discoverable in any proceedings connected with the Eligible Dispute, unless such documents would have in any event been admissible or discoverable in such proceedings.*

*23.6 The FDRC shall have the right to make observations, including the right to appoint observer(s) to attend and/or observe any Mediation conducted under these Terms of Reference. The Parties and the Mediator shall be notified in writing of any such observation. Observer(s) shall comply with Rule 2.5 of the FDRS Mediation and Arbitration Rules as if he was a Party or a Mediator to the Mediation and sign the Confidentiality Agreement set out in Annex VII of the Terms of Reference.*

*23.7 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 relating to the Eligible Dispute.*

*23.8 The Parties' obligation of confidentiality is not affected by, and would continue with full force and effect after the conclusion of the Mediation and/or Arbitration processes.*

*23.9 The FI shall ensure that all its officers, representatives and/or agents comply with Paragraph 23.*

*23.10 The Parties hereby expressly acknowledge and agree that any breach and/or contravention of this confidentiality rule constitutes a loss which cannot be reasonably or adequately compensated in damages. The Parties expressly agree that in the event of any such breach and/or contravention, the FDRC and/or the innocent Party shall be entitled to the remedy of injunction in addition to any other remedy available at law or in equity. The FDRC and/or the innocent Party shall also be entitled to recovery of legal costs on a full indemnity basis from the Party in breach. Additionally, the FDRC reserves the right at its full discretion, to discontinue the Mediation/Arbitration process with immediate effect.*

1.5 Similar provisions covering confidentiality can be found in Rules 2.5 & 3.11 Annex IV, Clause 4 and Rule Two Annex V, Clause 11 - 16 Annex VI, and Annex VII of the ToR; these confidentiality clauses prohibits disclosure of mediation/arbitration communication to any third party.

## ***Mediation Communication under the Ordinance***

1.6 Under the Mediation Ordinance (Cap. 620), mediation communication is confidential and should not be disclosed. The Ordinance allows for exceptions, among which include where disclosure is made with the consent from each of the parties and the mediator or with the leave of court<sup>3</sup>.

1.7 The present ToR of the FDRC does not ask the parties to FDRC mediation for consent to disclose information in the event of a complaint against a mediator and/or an arbitrator. Against this background and with the Mediation Ordinance, parties are not allowed to disclose mediation communication even in the event of a complaint and the FDRC could not handle a complaint against a mediator involved without leave from court as the content of the complaint would be treated as confidential information.

## ***Principle of Natural Justice***

1.8 The opportunity to be heard by an impartial decision maker is at the heart of the rules of natural justice and procedural fairness. The rules of natural justice should apply whenever the rights, property or legitimate expectations of an individual are affected by a decision.

1.9 Decisions in the context of the management of alleged misconduct are administrative decisions that may clearly affect the rights or legitimate expectations of the Eligible Claimants, Financial Institutions, FDRC Mediators<sup>4</sup> and FDRC Arbitrators under the FDRS and therefore the rules of natural justice and procedural fairness should be applicable to the FDRS process.

## ***Complaints against Mediators***

1.10 For a complainant to make a complaint against a mediator (including the FDRC's in-house mediator(s)) under the FDRS, the complainant would need to state the matter complained about and the substance of the complaint could involve confidential information from the mediation and any disclosure of this information could be a breach of the confidentiality requirements under the ToR. For the FDRC to handle a complaint of this nature, the FDRC would need to either obtain

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<sup>3</sup> Section 8, Mediation Ordinance, Cap 620.

<sup>4</sup> FDRC Mediators includes the in-house mediator(s) of the FDRC for the purpose of this consultation exercise.

consent from the parties involved (the Eligible Claimant, the FI and the Mediator) or seek leave from court.

1.11 Accessibility and transparency have always been two of the major Guiding Principles for the FDRC. While challenges against mediators / arbitrators are covered under Annex IV and Annex VI of the FDRC ToR, the complaint process and how the complaint would be handled are not covered in the ToR. In this connection, the FDRC Board, since its inception in April 2012, has been considering the establishment of an independent mechanism to handle possible complaints that may arise in the course of providing mediation and arbitration services.

1.12 Reference is made to the complaint handling procedures of other service providers in Hong Kong, such the Hong Kong Law Society, which have established complaint handling procedures and mechanisms. After careful consideration of various complaint handling mechanisms and the procedures required, the FDRC is of the opinion that the most cost-effective and direct manner that would enable the FDRC to handle the confidentiality issues involved in complaints is to make minor amendments to the FDRC ToR.

### ***Consultation***

1.13 This consultation document sets out the proposed amendments to the FDRC ToR. In drawing up the proposals, due regard has been paid to maintaining a high level of protection for confidentiality of mediation communication and to avoid the creation of unnecessary barriers to the course of natural justice. The purpose of the consultation is to engage industries' representatives of the financial institutions as defined under the FDRC ToR, mediators and arbitrators on the FDRC List of Mediators / FDRC List of Arbitrators and the general public and to solicit views on the proposed amendments.

## **Part II – Benefits of the Amendments to the ToR**

2.1 Amendments to the FDRC ToR are helpful as they directly and efficiently communicated how a complaint against mediators would be handled under the FDRS, what would happen in the event of a complaint and how the complaint would be dealt with. Stating clearly this information in the ToR would provide the users of the FDRC's services assurance of the service quality.

2.2 Since the FDRC is established under the guiding principles of accessibility and transparency, it is important for the FDRC to bring to the parties awareness of the complaint handling procedures and amendments to the ToR would be an open and transparent way to communicate this information.

2.3 Provision of a channel for seeking redress is central to any service provision and an established principle of procedural fairness. Amending the ToR would allow the parties to mediation to lodge complaints to the FDRC without the fear of breaching the confidentiality requirements under the Mediation Ordinance and the FDRC Agreement to Mediate. It is believed that greater creditability, accountability and transparency on the part of the FDRC could be demonstrated to the public through the provision of a transparent and thorough service provision mechanism.

2.4 Mediators and arbitrators on the FDRC List of Mediators/Arbitrators are providing services to the FDRC and parties to a mediation/arbitration as independent contractors. Certainty in service terms, possible consequences and procedural fairness is important for any contractors in the provision of service. If the FDRC is to retain high caliber mediators/arbitrators, it is important that the FDRC's service terms be reasonable and on par with what is being offered in the market. At present, mediators and arbitrators are required to abide by the FDRC ToR in their service agreements and amending the ToR would be the most open and effective way in communicating to the mediators and arbitrators how mediation/arbitration communications would be dealt with in their provision of the mediation and arbitration service.

2.5 It would be time consuming and costly if the FDRC has to obtain consent from all parties to the mediation for disclosure for use of mediation communication in any complaint against mediators. It is even more expensive if the FDRC has to apply to Court for leave if all parties to the mediation do not give consent to the disclosure of mediation communications. To save operational cost and time in handling any complaints against mediators and/or arbitrators, amending the

Agreement to Mediate (Annex VI of the ToR) and similar provisions in the ToR would be the most straight-forward and economical way to handle confidentiality issues in handling complaints to the FDRC.

## **Part III – Amendments Proposed**

### ***Section E of the ToR – Miscellaneous***

3.1 It is proposed that Section E of the ToR be amended to allow for transmission of relevant mediation communications to the FDRC Disciplinary Committee, the FDRC Disciplinary Tribunal, the prosecutor in relation to the complaint and any person appointed by the FDRC to conduct investigation, a mediator or potential mediators whom the FDRC may approach for resolving dispute in connection with the complaint. It is proposed that the following changes be made to Section E of the ToR.

The following paragraphs be added as Paragraph 23.4, 23.5 and 23.10 of the ToR:

- 23.4 The Parties and the Mediator agree that all materials made available, documents or other information produced for or arising in relation to the Mediation, issues/matters discussed, proposals and counterproposal produced for or arising in relation to the Mediation or anything said or done for the purpose of or in the course of the Mediation may be disclosed to the FDRC and to be further transmitted to the FDRC Disciplinary Committee and/or Disciplinary Tribunal and/or other delegated members as the FDRC thinks fit solely for the purpose of establishing or disputing an allegation or complaint of misconduct made against the Mediator or admission as evidence in the FDRC disciplinary proceedings.*
- 23.5 The Parties and the Arbitrator agree that all materials made available, documents or other information produced for or arising in relation to the Arbitration, issues/matters discussed, proposals and counterproposal produced for or arising in relation to the Arbitration or anything said or done for the purpose of or in the course of the Arbitration may be disclosed to the FDRC and to be further transmitted to the FDRC Disciplinary Committee and/or Disciplinary Tribunal and/or other delegated members as the FDRC thinks fit solely for the purpose of establishing or disputing an allegation or complaint of misconduct made against the Arbitrator or admission as evidence in the FDRC disciplinary proceedings.*
- 23.10 No statements or comments, whether written or oral, made or used by the Parties or their representatives or the Mediator within the*

*Mediation shall be relied upon to found or maintain any action for defamation, libel, slander or any related complaint (excluding, for the avoidance of doubt, the FDRC disciplinary proceedings).*

The following paragraphs be re-numbered and amended to accommodate the changes in relation to paragraphs 23.4, 23.5 and 23.10.

Paragraph 23.4 be renumber 23.6 and amended as:

23.6 *Subject to Paragraphs 23.1, 23.2, 23.3, 23.4 and 23.5 and save as shall be required under any written law, regulations, or an order of court, or as necessary to implement and enforce any Mediated Settlement Agreement or Arbitral Award, all persons involved in the Mediation and/or Arbitration process shall keep confidential and shall not disclose or divulge (whether expressly or impliedly) to any third party:-*

- (a) the matters that transpired in the course of the Mediation and/or Arbitration process;*
- (b) any views expressed, or suggestions or proposals for settlement made by any Party for the resolution of the dispute in the course of the Mediation and/or Arbitration process;*
- (c) proposals suggested by the Mediators and/or Arbitrators;*
- (d) all materials made available and communication made during the Mediation and/or Arbitration process; and/or*
- (e) all materials, information, correspondence (including emails), issues/matters discussed, proposals and counterproposals produced for or arising in relation to the Mediation and/or Arbitration process, including but not limited to any Mediated Settlement Agreement (and the substance and/or terms thereof) or Arbitral Award, except as directly necessary to implement and enforce any such settlement agreement or award.*

*Nothing in this Paragraph shall prevent an FI from disclosing any such information to the Regulators or law enforcement agencies in*

*compliance with any regulatory or statutory requirement(s). The fact that the Mediation and/or Arbitration process has occurred, is continuing or has concluded shall not be considered confidential.*

Paragraph 23.5 be renumbered 23.7 and amended as:

*23.7 Subject to Paragraphs 23.1, 23.2, 23.3, 23.4 and 23.5, and save as shall be required under any written law, regulations or an order of court, all materials made available, documents or other information produced for or arising in relation to the Mediation and/or Arbitration process shall be privileged and shall not be admissible as evidence or discoverable in any proceedings connected with the Eligible Dispute, unless such documents would have in any event been admissible or discoverable in such proceedings.*

Paragraph 23.6 be renumbered 23.8 and amended as:

*23.8 The FDRC shall have the right to make observations, including the right to appoint observer(s) to attend and/or observe any Mediation conducted under these Terms of Reference. The Parties and the Mediator shall be notified in writing of any such observation. Observer(s) shall comply with Paragraph 23 as if he was a Party or a Mediator to the Mediation and sign the Confidentiality Agreement set out in Annex VII of the Terms of Reference.*

Paragraph 23.7 be renumbered 23.9 and amended as:

*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.*

Paragraphs 23.8, 23.9 and 23.10 be renumbered as paragraphs 23.11, 23.12 and 23.13.

Paragraph 25.1 be amended as:

*25.1 Applicants, Eligible Claimants, FIs and their Representatives shall not make any claim whatsoever against the FDRC, its officers, employees and representatives, Mediators or Arbitrators (save for the consequences of fraud or dishonesty), including but not limited to any claim for any matter in connection with or in relation to –*

- (a) any and all the services provided by the FDRC (or any of its officers, employees or representatives);*
- (b) any Mediation, Arbitration or other processes of the FDRC;*
- (c) any disciplinary proceedings of the FDRC;*
- (d) the Eligible Disputes lodged by the Eligible Claimants;*
- (e) the Claims made by the Eligible Claimants;*
- (f) the Applications made by the Applicants;*
- (g) any settlements entered into between the Eligible Claimants and FIs and/or any Representative of the FIs;*
- (h) any settlement agreements executed by the Eligible Claimants and the FIs and/or any Representative of the FIs;*
- (i) any act done in order to comply with such legal or regulatory requirement imposed by the HKMA and the SFC or any other Government agency; and/or*
- (j) any act done in compliance with any provision of any written law of Hong Kong.*

## ***Annex IV of the ToR – FDRS Mediation and Arbitration Rules***

3.2 It is also proposed that the confidentiality provisions under Rule 2.5 and Rule 3.11 of the FDRS Mediation and Arbitration Rules (Annex IV of the ToR) be amended to allow for transmission of mediation communication to the FDRC Disciplinary Committee, the FDRC Disciplinary Tribunal, the prosecutor in relation to the complaint and any person appointed by the FDRC to conduct investigation, a mediator or potential mediators whom the FDRC may approach for resolving dispute in connection with the complaint. It is proposed that the following changes be made to Annex IV of the ToR.

The following paragraphs be added as Paragraph 2.5.4, 2.5.7, 2.5.8 and 3.11.3 of the ToR:

*2.5.4 The Parties and the Mediator agree that all materials made available, documents or other information produced for or arising in relation to the Mediation, issues/matters discussed, proposals and counterproposal produced for or arising in relation to the Mediation or anything said or done for the purpose of or in the course of the Mediation may be disclosed to the FDRC and to be further transmitted to the FDRC Disciplinary Committee and/or Disciplinary Tribunal and/or other delegated members as the FDRC thinks fit solely for the purpose of establishing or disputing an allegation or complaint of misconduct made against the Mediator or admission as evidence in the FDRC disciplinary proceedings.*

*2.5.7 The Parties shall not call the Mediator or the FDRC (or any of its employees, officers or representatives) as a witness, consultant, mediator, arbitrator or expert in any subsequent proceedings (excluding, for avoidance of doubt, the FDRC disciplinary proceedings) relating to the Eligible Dispute.*

*2.5.8 No statements or comments, whether written or oral, made or used by the Parties or their representatives or the Mediator within the Mediation shall be relied upon to found or maintain any action for defamation, libel, slander or any related complaint (excluding, for the avoidance of doubt, the FDRC disciplinary proceedings).*

*3.11.3 The Parties and the Arbitrator agree that all materials made available, documents or other information produced for or arising in relation to*

*the Arbitration, issues/matters discussed, proposals and counterproposal produced for or arising in relation to the Arbitration or anything said or done for the purpose of or in the course of the Arbitration may be disclosed to the FDRC and to be further transmitted to the FDRC Disciplinary Committee and/or Disciplinary Tribunal and/or other delegated members as the FDRC thinks fit solely for the purpose of establishing or disputing an allegation or complaint of misconduct made against the Arbitrator or admission as evidence in the FDRC disciplinary proceedings.*

Paragraph 2.5.4 be renumbered 2.5.5 and amended as:

*2.5.5 Subject to Rules 2.5.1, 2.5.2, 2.5.3 and 2.5.4, and save as shall be required under any written law, regulation or an order of court, or as necessary to implement and enforce any Mediated Settlement Agreement, all persons involved in the Mediation process shall keep confidential and not disclose or divulge (whether expressly or impliedly) to any third party: –*

- (i) the matters that transpired in the course of the Mediation;*
- (ii) any views expressed, or suggestions or proposals for settlement made by any Party for the resolution of the dispute in the course of the Mediation;*
- (iii) proposals suggested by the Mediators;*
- (iv) all materials made available and communication made during the Mediation; and/or*
- (v) all materials, information, correspondence (including emails), issues/matters discussed, proposals and counterproposals produced for or arising in relation to the Mediation including but not limited to any Mediated Settlement Agreement (and the substance and/or terms thereof) except as directly necessary to implement and enforce any such settlement agreement.*

*Nothing in this Rule shall prevent an FI from disclosing any such information to the Regulators or law enforcement agencies in compliance*

*with any regulatory or statutory requirement(s). The fact that the Mediation has occurred, is continuing or has concluded shall not be considered confidential.*

Paragraph 2.5.5 be renumbered 2.5.6 and amended as:

*2.5.6 Subject to Rules 2.5.1, 2.5.2, 2.5.3 and 2.5.4, and save as shall be required under any written law, regulations or an order of court, all materials made available, documents or other information produced for or arising in relation to the Mediation shall be privileged and shall not be admissible as evidence or discoverable in any proceedings connected with the Eligible Dispute, unless such documents would have in any event been admissible or discoverable in such proceedings.*

Paragraph 2.5.6, 2.5.7, 2.5.8, 2.5.9, 2.5.10 be renumbered 2.5.9, 2.5.10, 2.5.11, 2.5.12, and 2.5.13.

Paragraph 3.11.1 be amended as:

*3.11.1 Subject to Rules 3.11.2 and 3.11.3, the Parties and the Arbitrator agree not to disclose, transmit, introduce or otherwise use any documents, communications, opinions, suggestions, proposals, offers, or admissions, or other information obtained or disclosed during the Arbitration by the Parties or the Arbitrator as evidence in any judicial proceedings, other arbitrations or proceedings (excluding, for avoidance of doubt, the FDRC disciplinary proceedings), unless agreed in writing by the Arbitrator and the Parties to the Arbitration or compelled by law. The fact that Arbitration has occurred, is continuing, or has concluded shall not be considered confidential.*

## *Annex V of the ToR – Ethics Code for FDRC Mediators*

3.3 The confidentiality provisions under Clause 4 of the Ethics Code for FDRC Mediators (Annex V of the FDRC ToR) is suggested to be amended to reflect the changes made to the Confidentiality provisions under the Agreement to Mediate. It is proposed that the following changes be made to Annex V of the ToR.

Paragraph 4 be amended as:

### **4. Confidentiality**

- (a) *The Mediator shall keep confidential all information, arising out of or in connection with the Mediation, unless and to the extent compelled by law or public policy grounds or required under Clause 12 of the Agreement to Mediate in Annex VI.*
- (b) *Any information disclosed in confidence to the Mediator by one of the Parties shall not be disclosed to the other Party without prior permission.*
- (c) *Paragraphs 4(a) and 4(b) shall not apply if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimize the danger of injury to a person or of serious harm to the well-being of a child.*
- (d) *The Mediator shall inform the Parties of the degree to which communications connected with the mediation process shall be confidential, including any special confidentiality which attaches to private meeting.*
- (e) *The Mediator shall ensure all legal advisors, experts and attendees who are not Parties to the Eligible Dispute sign a separate Confidentiality Agreement in the form prescribed by the FDRC in Annex VII of the Terms of Reference.*

## *Annex VI of the ToR – Agreement to Mediate*

3.4 It is suggested that the confidentiality provisions under Clauses 12 and 28 of the Agreement to Mediate (Annex VI of the FDRC ToR) to be amended to allow for transmission of mediation communication to the FDRC Disciplinary Committee, the FDRC Disciplinary Tribunal, the prosecutor in relation to the complaint and any person appointed by the FDRC to conduct investigation, a mediator or potential mediators whom the FDRC may approach for resolving dispute in connection with the complaint. It is proposed that the following changes be made to Clause 12 of the Agreement to Mediate (Annex VI of the ToR).

The following paragraph be added as Clause 12(b) of the Agreement to Mediate (Annex VI of the FDRC ToR):

*12(b) The Parties and the Mediator agree that all materials made available, documents or other information produced for or arising in relation to the Mediation, issues/matters discussed, proposals and counterproposal produced for or arising in relation to the Mediation or anything said or done for the purpose of or in the course of the Mediation may be disclosed to the FDRC and to be further transmitted to the FDRC Disciplinary Committee and/or Disciplinary Tribunal and/or other delegated members as the FDRC thinks fit solely for the purpose of establishing or disputing an allegation or complaint of misconduct made against the Mediator or admission as evidence in the FDRC disciplinary proceedings.*

Clause 12(b) be renumbered 12(c) and amended as:

*12(c) Subject to Clauses 12(a) and 12(b), and save as shall be required under any written law, regulation or an order of court, or as necessary to implement and enforce any settlement agreement, all persons involved in the Mediation process shall keep confidential and not disclose or divulge (whether expressly or impliedly) to any third party: –*

*(i) the matters that transpired in the course of the Mediation;*

- (ii) *any views expressed, or suggestions or proposals for settlement made by any Party for the resolution of the dispute in the course of the Mediation;*
- (iii) *proposals suggested by the Mediators;*
- (iv) *all materials made available and communication made during the Mediation; and/or*
- (v) *all materials, information, correspondence (including emails), issues/matters discussed, proposals and counterproposals produced for or arising in relation to the Mediation including but not limited to any Mediated Settlement Agreement (and the substance and/or terms thereof) except as directly necessary to implement and enforce any such settlement agreement.*

Clause 12(c) be renumbered 12(d) and amended as:

- 12(d) Subject to Clauses 12(a) and 12(b), and save as shall be required under any written law, regulations or an order of court, all materials made available, documents or other information produced for or arising in relation to the Mediation shall be privileged and shall not be admissible as evidence or discoverable in any proceedings connected with the Eligible Dispute, unless such documents would have in any event been admissible or discoverable in such proceedings.*

Clause 12(d) be renumbered 12(e) and amended as:

- 12(e) The Parties shall not call the Mediator or the FDRC (or any of its employee, officer or representative) as a witness, consultant, mediator, arbitrator or expert in any subsequent proceedings (excluding, for avoidance of doubt, the FDRC disciplinary proceedings) relating to the Eligible Dispute.*

Clause 12(e), 12(f), 12(g) be renumbered as 12(f), 12(g), and 12(h).

Clause 28 be amended as:

28. *No statements or comments, whether written or oral, made or used by the Parties or their representatives or the Mediator within the mediation shall be relied upon to found or maintain any action for defamation, libel, slander or any related complaint (excluding, for the avoidance of doubt, FDRC disciplinary proceedings), and this document may be pleaded as a bar to any such action.*

### ***Annex VII of the ToR – Confidentiality Agreement***

3.5 It is suggested that the main body of the confidentiality agreement be amended to reflect the changes in the confidentiality requirements in the Agreement to Mediate and the extracts of the Agreement be amended according to the suggestions proposed above under Annex VI Agreement to Mediate. It is proposed that the following changes be made to the body of the Confidentiality Agreement (Annex VII of the ToR).

*In consideration of my being permitted to attend / give advice or opinion for the Mediation between \_\_\_\_\_ (Party A) and \_\_\_\_\_ (Party B), I agree to be personally bound by the confidentiality provisions (Clauses 11-16) and Clause 28 of the Agreement to Mediate\* signed by the Parties on \_\_\_\_\_ (Date) as if I was a Party to the Mediation and undertake to the Parties and the Mediator that I will not disclose or use any information relating to the Mediation nor act as a witness in any subsequent proceedings.*

*\*Extracts of Clauses 11-16 and Clause 28 be amended as suggested in Annex VI Agreement to Mediate above.*

## *Other Ancillary Changes*

3.6 To tally with the changes suggested above, it is proposed that amendments be made to paragraph 20.8.8 of the FDRC ToR to avoid confusion as to the interpretation of the private and confidential nature of arbitration proceedings. It is proposed that paragraph 20.8.8 be amended as follows:

*20.8.8 The Arbitration proceedings are private and confidential (save as to the FDRC disciplinary proceedings) and therefore, the Arbitrator's decision is not a binding legal precedent.*

4. The ToR of the FDRC is available online at [www.fdrc.org.hk](http://www.fdrc.org.hk).

## **Part IV – Invitation of Comments**

### *Timetable*

5.1 In accordance with paragraph 3.1 of the ToR and after taking into consideration of the views and comments of industries' representative and the other relevant stakeholders, the FDRC intends to finalize the operation and implementation framework of the amendments to the ToR by late 2014. The FDRC shall publish the result of the consultation on its website at [www.fdrc.org.hk](http://www.fdrc.org.hk).

### *Invitation of Comments*

5.2. Views and comments are invited on the proposed changes to the FDRC ToR on or before 31 August 2014.

FDRC  
July 2014