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Bills Committee on Mediation Bill  
Legislative Council Secretariat  
Legislative Council Complex  
1 Legislative Council Road  
Central  
Hong Kong

Dear Sirs

### **Mediation Bill**

We refer to LC Paper No. CB(2)894/11-12(01) which contains the Administration's responses (Administration's Responses) to the submission of the Hong Kong Association of Banks (HKAB) to the Bills Committee on the Mediation Bill dated 20 January 2012 (First HKAB Submission). We have reviewed the Administration's Responses and would like to provide further comments on a few provisions of the Mediation Bill which remain to be of significant concerns to HKAB and its members.

Of remaining foremost concern to HKAB and its members is that the Mediation Bill, if enacted in its current form, would cover mediation cases which will be handled by the Financial Dispute Resolution Centre Limited (FDRC), which is being set up by the Government and is expected to be operational later this year. We believe that the Administration's Responses, reproduced below, have not adequately addressed our concerns.

*The mediation and conciliation processes currently specified in Schedule 1 to the Bill are self-contained statutory schemes. We understand that the proposed ToR [Terms of Reference] and MAR [Mediation and Arbitration Rules] of the FDRC are administrative in nature. If the FDRC proposes to use mediation as defined in clause 4 of the Bill, it would be regulated by the provisions of the Bill (if enacted).*

In our view, the FDRC is not administrative in nature but more of a quasi-statutory scheme in that:

*Chairman* The Hongkong and Shanghai Banking Corporation Ltd  
*Vice Chairmen* Bank of China (Hong Kong) Ltd  
Standard Chartered Bank (Hong Kong) Ltd  
*Secretary* Ronie Mak

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副主席 中國銀行（香港）有限公司  
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秘書 麥依敏



- (i) All HKAB members must be members of the FDRC and abide by its rules. The FDRC rules will be compulsorily imposed on the HKAB members and enforced by the Hong Kong Monetary Authority as a licensing condition. An HKAB member found to be in breach of the licensing condition would face severe consequences. In particular, under section 16(8) of the Banking Ordinance, every director, every chief executive and every manager of a licensed institution which contravenes any condition attached under the licence commits an offence and is liable to a fine.
- (ii) Many HKAB members are also regulated by the Securities and Futures Commission (SFC) in the conduct of securities business, and in that capacity, they must also become members of the FDRC and abide by its rules under the Code of Conduct for Persons Licensed by or Registered with the SFC (Code of Conduct). Again, there could be potential severe consequences for an HKAB member found to be in breach of the Code of Conduct. The SFC will be guided by the Code of Conduct in considering whether a licensed or registered person satisfies the requirement that it is fit and proper to remain licensed or registered. Where there is information suggesting otherwise, the SFC may conduct an investigation under section 182(1)(e) of the Securities and Futures Ordinance.
- (iii) An HKAB member does not have a choice whether to enter into mediation and arbitration where the case is accepted by the FDRC. This is fundamentally different from the voluntary and consensual approach adopted generally for mediation.
- (iv) The FDRC is a self-contained scheme in that the organization is regulated by a board which will include representatives from the Government and financial regulators, including the HKMA and the SFC. The board will ensure that the FDRC has sound corporate governance and that it follows stringent criteria in the intake, mediation and arbitration of cases. Accordingly, mediations conducted under the FDRC will be fundamentally different from the voluntary mediations covered by the Mediation Bill, and more akin to the self-contained statutory schemes listed in Schedule 1 to the Mediation Bill. Confidentiality is a key element driving the setup of the scheme. This set-up is crucial in ensuring the process is robust and highly credible to the parties involved in the process.

On the above basis, we reiterate that the FDRC should be allowed to apply its own rules in conducting mediation, rather than being constrained by the proposed mediation legislation which is more applicable to voluntary mediation generally. In particular, we are concerned about the broad scope of the disclosure of media communication in section 8 of the Mediation Bill, for a number of reasons set out in the First HKAB Submission.

In the context of mediation conducted by the FDRC, in order to enable the parties to benefit from the confidential nature of such resolution channel, we believe that the fact that a mediation has occurred or is continuing should remain confidential, not to mention that the details disclosed by the parties during the mediation should be kept confidential.



It is entirely inappropriate to allow disclosure at any stage of the mediation unless mutually agreed by the parties to the mediation and the mediator. The “threat” of potential disclosure, for example, for research and educational purposes (see section 8(2)(e)), which are subject to interpretation but are not defined in the Bill, without the agreement of the parties concerned would not only inhibit the parties from speaking freely and frankly but might also create unnecessary expectations on the outcome of a mediation even if the identities of the parties are not revealed.

We note from the Administration’s Responses that Australia and the State of Oregon, United States have similar statutory exceptions for disclosure of mediation communication for research purposes. The fact that this exception is not widely adopted in other jurisdictions suggests the inherent danger in identity leakage. We would invite the Administration to explain the reason why this ground of disclosure is not adopted in other major jurisdictions, whether there is any negative experience of Australia and the State of Oregon in allowing such disclosure, and whether both jurisdictions have any safeguards in place (e.g. disclosure will be granted only with the consent of the parties involved and after the conclusion of the mediation).

In closing, we would like to register again our members’ concerns over the proposed inclusion of the FDRC in the draft Mediation Bill and the wide scope of disclosure grounds which do not require the consent of the parties concerned. Accordingly, we hope that the Bills Committee would give further consideration to the matters raised in this submission. Should more information be required, please contact the Secretariat (Ms Grace Law at 2521 1880).

Yours faithfully

A handwritten signature in black ink, appearing to be 'Ronie Mak', is positioned above the typed name.

Ronie Mak  
Secretary

c.c. FSTB (Attn: Ms Julia Leung)  
HKMA (Attn: Ms Meena Datwani)  
SFC (Attn: Mr Jimmy Chan)