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AFTER LEHMAN: INTERNATIONAL RESPONSE TO FINANCIAL DISPUTES — A FOCUS ON HONG KONG

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ABSTRACT

Recent global financial dislocation has provided an impetus for examining effective avenues for the resolution of financial disputes. Hong Kong, like many financial centers throughout the world, has been directly affected by the collapse of Lehman Brothers. Its response to the collapse has included a creative mix of regulatory strengthening and government sponsored mediation and arbitration. Each of these alternative mechanisms of resolution provides a useful case study of the prospects of the use of ADR in response to financial crises. The efficacy of such interventions will be reviewed and options for the future development of a multi-tier dispute resolution system in Hong Kong will be explored.

I. INTRODUCTION: ALTERNATIVE DISPUTE RESOLUTION IN HONG KONG'S COMMERCIAL MARKETS

Hong Kong has long been a favored venue for international business transactions given its comprehensive legal regime, stable financial environment, and geographic position as a gateway to mainland China.[1] However, with increased business and investment opportunities, the need for an effective system of dispute resolution has become clear.[2] In recent years, a growing number of disputants

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[1] About Hong Kong, http://www.hkiac.org/show_content.php?article_id=393 (last visited Feb. 12, 2011).

[2] Andrew Kwok-Nang Li, Chief Justice, Speech at the Hong Kong Mediation Conference (Nov. 30, 2007), *available at* http://www.info.gov.hk/gia/general/200711/30/P200711300131.htm.

are turning to alternative dispute resolution mechanisms to resolve their financial disputes.[3] This is largely due to the significant financial incentives of choosing mediation or arbitration over litigation. While dissatisfaction with the cost of litigation is certainly one of the primary drivers of this change, the dramatic increase in financial disputes and resulting pressures on the formal court system has encouraged the development of a growing number of alternative routes for dispute resolution in the East Asian region.[4]

Mediation in Hong Kong Commercial Markets

With the establishment of the Hong Kong International Arbitration Centre in 1985, local and overseas disputing parties have successfully resolved a growing number of disputes through both arbitration and mediation.[5] The recent Civil Justice Reform of 2009 has further encouraged the development of alternative dispute resolution in Hong Kong.[6] With the implementation of its Practice Direction on Mediation (known as "PD 31") on January 1, 2010, the Hong Kong Court amplified its efforts to familiarize parties and their legal advisors with the mechanics of the Court's mediation regime.[7] It is particularly noteworthy that one of the new case management powers granted to the Court includes the making of an adverse costs order against a party where there has been an unreasonable refusal to mediate.[8]

Hong Kong has incorporated the approach to mediation as defined in the UNCITRAL Model Law on International Commercial Conciliation (2002). According to Article 1, mediation is defined as a process "whereby parties request a third person or persons . . . to assist them in their attempt to reach an amicable settlement of their dispute

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[3] *Id.*

[4] Michael J. Moser & Yeoh Friven, *Choosing an Arbitral Institution in Cross Border Commercial Arbitration*, *in* BUSNESS DISPUTES IN CHINA 23 (Michael J. Moser ed., 2d ed. 2009).

[5] About the HKIAC, http://www.hkiac.org/show_content.php?article_id=392 (last visited Feb. 12, 2011).

[6] Gary Seib, *Civil Justice Reform Update: Alternative Dispute Resolution and Mediation*, http://www.bakermckenzie.com/RRGoverningHongKongReformsMay09/ (last visited Feb. 12, 2011).

[7] For a better understanding of the Practice Direction 31 and the recent Civil Justice Reforms 2009, see H.K. JUDICIARY, CIVIL JUSTICE REFORMS – PRACTICE DIRECTION, *available at* http://legalref.judiciary.gov.hk/doc/whats_new/prac_dir/html/PD31.pdf.

[8] Angus Ross & Amanda Seto, *Can You Afford Not to Mediate*?, ALLEN & OVERY: AREAS OF EXPERTISE (Feb. 1, 2010), *available at* http://www.allenovery.com/AOWEB/AreasOfExpertise/Editorial.aspx?contentTypeID=1&itemID=54689&prefLangID=410.

arising out of or relating to a contractual or legal relationship."[9] It must be noted that, in theory, a mediator will not evaluate the substance of a dispute and has no authority to impose a solution upon the parties to the dispute. Mediation is considered a consensual and confidential process conducted without prejudice.[10]

The first two parts of this paper, following a discussion of alternative dispute resolution in the Hong Kong commercial context, will present a brief overview of the collapse of Lehman Brothers Group. Building on this background, the paper will then focus on Hong Kong's experience of using mediation to resolve disputes between investors of Lehman Brothers' minibonds and banks as product distributors and recommend some areas for further reform. The concept of a "multi-tier dispute resolution system" in Hong Kong financial institutions will be discussed, and issues related to its design it will be examined.

II. Overview of the Lehman Brothers Minibonds Collapse

Lehman Brothers Holdings Inc. (LBHI) filed for bankruptcy protection under Chapter 11 of the US Bankruptcy Code on 15 September 2008.[11] Subsequently, eight Lehman companies were put into liquidation in Hong Kong, including Lehman Brothers Asia Limited (LBAL).[12] The global financial crisis that led to the collapse of Lehman, the fourth largest investment bank on Wall Street, has been described as a "once-in-a-century" event.[13] Hong Kong, as an international financial centre, has not escaped Lehman's collapse entirely unscathed.[14] Although Hong Kong banks have weathered the financial storm well in comparison with peers in the United States and Europe, the immediate focus of public inquiry quickly shifted from

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[9] United Nations Comm'n on Int'l Trade Law, UNICITRAL Model Law on International Commercial Conciliations with Guide to Enactment 18 (2002), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf.

[10] Alabama State Bar, Mediation: Another Method for Resolving Disputes (2007), http://www.alabar.org/brochures/mediation.pdf.

[11] Press Release, Lehman Brothers, Lehman Brothers Holdings Inc. Announces that it Intends to File Chapter 11 Bankruptcy Petition, (Sept. 15, 2008), *available at* http://www.lehman.com/press/pdf_2008/091508_lbhi_chapter11_announces.pdf.

[12] KPMG, Hong Kong Incorporated Entities (2010), http://www.kpmg.com.cn/en/about/KPMG_news/Lehman_updates/Lehman_updates.html?TopMenuOn=4&LeftMenuOn=5&NoChinese=1.

[13] H.K. Monetary Auth., Report of the Hong Kong Monetary Authority on Issues Concerning the Distribution of Structured Products Connected to Lehman Group Companies, (Oct. 26, 2009), *available at* www.info.gov.hk/hkma/eng/new/lehman/lehman_report.pdf [hereinafter HKMA].

[14] *Id.*

large corporations to individual affected investors.[15] Determining how best to investigate, resolve, and in some circumstances, provide compensation to investors for financial losses resulting from the fraudulent or negligent selling of minibonds by respective banks became the focus of public inquiry.[16] In order to provide background on Hong Kong's unique financial mediation scheme, the next section will focus on the nature of the financial products know in Hong Kong as "minibonds."

What Are Minibonds?

Minibonds are structured derivative products linked to the credit of certain specific reference entities that usually are well-known companies.[17] The term "mini" is indicates these bonds are sold in smaller minimum denominations (as low as HK$40,000 in certain cases – approximately US$5,000) which makes them affordable to amateur investors.[18] In return for the "investment," the investors are paid both interest and a redemption payout at maturity linked to the credit of the reference entities.[19] Such structured products are commonly sold to institutional investors who are more familiar with the securities risks involved with this type of investment.[20] However, as evidenced in the Lehman Brothers incident, some structured products were sold to amateur investors, and in Hong Kong, Lehman Brothers' minibonds were actively distributed as retail products to lay consumers since 2003.[21]

Lehman Brothers' Minibonds – How Do They Work?

As discussed above, credit-linked minibonds are connected to the credit of specified reference entities. In the case of Lehman Brothers' minibonds, the investment products were linked to the insolvent United States investment bank Lehman Brothers Holdings ("LBH") and issued by Pacific International Finance (the issuer).[22] Lehman Brothers Asia (the arranger) arranged for the minibonds to be distributed by retail banks to retail investors in Hong Kong.[23] The proceeds

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[15] *Id.*
[16] *Id.*
[17] FRESHFIELDS BRUCKHAUS DERINGER, AN OVERVIEW OF THE LEHMAN BROTHERS MINIBONDS SAGA (2008), *available at* http://www.freshfields.com/publications/pdfs/2008/dec08/24820.pdf [hereinafter FRESHFIELDS].
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] FRESHFIELDS, *supra* note 17.
[23] *Id.*

of the sale of these minibonds were then used by the issuer to purchase certain US-dollar-denominated underlying assets (the collateral) selected by the arranger on behalf of the issuer.[24] The complication of this arrangement arose from the swap agreement that the issuer entered with Lehman Special Financing by which the issuer would pay Lehman Special Financing a sum equal to the interest and other income it received for the collateral.[25] Simultaneously, Lehman Special Financing paid the issuer fixed payments equal to the interest due on the minibonds, which were then handed down to individual investors.[26]

Two interrelated reasons explain why LBH ultimately became the primary beneficiary of this investment arrangement. Based on the sale and purchase agreement of the minibonds, retail investors had to bear the entire risk of default when *any* of the reference entities suffered from certain credit events (bankruptcy, failure to make payments on specified indebtedness, or restructuring of specified indebtedness).[27] Therefore, while LBH was only obliged to pay minibond investors a fixed return for their investment (around 5.1%), it used invested funds to invest in high risk instruments or collateralized debt obligations with the potential for returns far in excess of its fixed return obligations, while placing all investment risk on the minibond investors.[28] Therefore, when the market was doing well, LBH was able to make significant profits from its high-risk investments after deducting the fixed 5.1% return. On the other hand, if and when its reference entities collapsed, Lehman, under the minibonds sale and purchase agreement, would be able to first compensate itself for financial losses while retail investors would ultimately be made to bear the entire loss.[29]

In fact, when LBH and Lehman Special Financing filed for bankruptcy under Chapter 11 Bankruptcy in the U.S. on September 15, 2008 and October 3, 2008, respectively, this constituted an event of default under the swap agreement, entitling the issuer to terminate said agreement.[30] Because of the termination of the swap agreement, minibonds were redeemed early.[31] While the reference entities themselves did not suffer a "credit event" upon termination of the swap agreement and due to Lehman's insolvency, holders of the minibonds were exposed to (1) the credit risk of Lehman Special Financing as a

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[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] FRESHFIELDS, *supra* note 17.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] Id.

swap counterparty and (2) the market value of the collateral, which was sold to redeem the minibonds.[32] When Lehman Special Financing, a key member of the swap agreement, collapsed, the market value of the collateral connected with Lehman immediately plunged to a record low.[33] This, of course, negatively affected the value of the minibonds.[34]

Investigations Conducted by Hong Kong's Financial Regulatory Bodies

Following the collapse of Lehman Brothers, Hong Kong's Securities and Futures Commission ("SFC") received complaints from investors regarding alleged mis-selling practices by Hong Kong banks.[35] According to the SFC's October 2008 Enforcement Reporter, mis-selling is broadly categorized into two classes.[36] "First, an investor may be given materially wrong information about a financial product, leading him to make an investment decision that he would not have made if the correct information had been provided. The second type occurs when an investor invests in a product that is not suitable given his financial position, investment objectives, expectations and risk tolerance level."[37] In Hong Kong, thousands of Lehman Brothers minibond holders claimed that they bought the minibonds after being assured by banks that they were low-risk products, only to see the value plunge after LBH and its subsidiaries declared bankruptcy in September 2008.[38]

The Securities and Futures Ordinance[39] and the Banking Ordinance[40] both place particular emphasis on the importance of protecting investors and minimizing regulatory overlap and costs. Under the present framework, the SFC[41] is the "lead regulator" for the securities industry,[42] while the Hong Kong Monetary Authority ("HKMA")[43] acts

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[32] FRESHFIELDS, *supra* note 17.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *What Have We Been Doing?,* SEC. AND FUTURE COMMISSION ENFORCEMENT REP. Oct. 2008, at 1-2, *available at* http://www.sfc.hk/sfc/doc/EN/speeches/public/enforcement/08/oct_08.pdf [hereinafter ENFORCEMENT REPORTER].
[37] FRESHFIELDS, *supra* note 17, at 3.
[38] *Id.*
[39] Securities and Futures Ordinance, (2003) Cap. 571 (H.K.).
[40] Banking Ordinance, (1997) Cap. 155, (H.K.).
[41] For a better understanding on the operations of Securities and Futures Commission, see Securities and Futures Commission, www.sfc.hk/.
[42] HKMA, *supra* note 13, at 26.
[43] For a better understanding on the operations of Hong Kong Monetary Authority, *see* Hong Kong Monetary Authority, www.info.gov.hk/hkma/.

as the "frontline supervisor" for registered institutions.[44] When an entity applies to become a registered institution, the HKMA advises the SFC on whether the institution is fit and proper to carry on the regulated activities for which it seeks registration.[45] After registration, the registered institution is supervised by the HKMA and is subject to the relevant regulatory requirements issued by the SFC and the HKMA.[46] To facilitate more effective co-operation, the HKMA and the SFC have a Memorandum of Understanding setting out their respective roles and responsibilities.[47] (Appendix One of this report contains a table illustrating a brief guide to the division of responsibilities between the HKMA and the SFC.)

In terms of banking oversight, the HKMA has 140 supervisory staff in its Banking Supervision Department ("BSD") to monitor the daily operations of the banks.[48] Given the financial fallout resulting from the mis-selling practices adopted by various banks in Hong Kong, the SFC and HKMA have undergone extensive internal overhaul to reform their regulatory regime and establish new mechanisms to better safeguard the future interests of investors.[49] According to a report by the HKMA concerning issues surrounding the Lehman Group Companies, a few pragmatic recommendations have been put forward, among which include the following:

1. Recommendation 3 - Public education campaigns regarding policy objectives should be periodically undertaken, focusing particularly on the responsibilities of investors, intermediaries and regulators.[50]

2. Recommendation 4 – The regulatory framework should be strengthened to take into account the growth in the volume and complexity of investment products sold to the retail public by Authorized Institutions ("AIs") and the change in public expectations and risk tolerance by investors particularly in the light of the Lehman episode.[51]

3. Recommendation 5 – "Health-warnings" should be attached to retail structured products with embedded derivatives or to retail derivative products generally.[52]

4. Recommendation 6 – Uniform disclosure formats such as simple "product key facts statements" and "sales key facts statements" should

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[44] HKMA, *supra* note 13, at 26.
[45] *Id.*
[46] *Id.*
[47] *Id.* at 27.
[48] *Id.* at 29.
[49] HKMA, *supra* note 13, at 29.
[50] *Id.* at 62.
[51] *Id.* at 62.
[52] *Id.* at 64.

be required to be produced in respect of such products (and indeed other retail investment products).[53]

5. Recommendation 7 – Consideration should be given as to whether there should be restrictions on the use of gifts as a marketing tool to promote financial products to investors.[54]

6. Recommendation 9 – The HKMA recommends strengthening the coordination between the HKMA and the SFC, with the aim of setting broadly consistent standards of conduct.[55]

7. Recommendation 13 – The regulatory requirements at point of sale should be reviewed with a view to introducing mandatory requirements for the audio-recording of the sales process and ancillary arrangements.[56]

8. Recommendation 16 – The regulatory requirements at point of sale should be reviewed with a view to introducing mandatory requirements for the imposition of a cooling-off period between the provision of disclosure documents and the closing of the sale. Consideration should be given to allowing waivers of the cooling-off period subject to certain safeguards.[57]

In addition to the recommendations above, the report also suggested implementing a "mystery shopper" program, where designated investigative investment shoppers seek information on investment products from selected bank branches and monitor the type and quality of information and advice provided by the relevant retail banks.[58]

Finally as part of its overall oversight efforts, the HKMA facilitated the establishment of a Lehman Brothers-Related Investment Products Dispute Mediation Scheme, examined in detail in the following section.[59]

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[53] *Id.* at 64.

[54] HKMA, *supra* note 13, at 65.

[55] *Id.* at 69.

[56] *Id.* at 74.

[57] *Id.* at 79.

[58] *Id.* at 77-78. The mystery shopper program has recently been put into place in Hong Kong.

[59] HKMA, *supra* note 13, at at 6.

III. Remedies Available to Investors and the Process Leading to Lehman Brothers-Related Investment Products Dispute Mediation and Arbitration Scheme ("Lehman Brothers Mediation Scheme")[60]

Since September 2008, thousands of Lehman Brothers minibonds holders in Hong Kong have filed complaints alleging that they purchased failed minibonds after being assured by their banks they were low-risk products.[61] The SFC and the HKMA investigations continue to examine allegations of mis-selling by Hong Kong Banks[62] and investigate internal regulations and sale procedures of banks in relation to the Lehman Brothers minibonds. Simultaneously, individual investors have three primary avenues to seek redress: i) litigation, ii) settlement through established third-party institutions, and iii) alternative dispute resolution, which will all be examined in greater detail below.

A. Litigation

1. Small Claims Tribunal

Investors whose claims do not exceed HK$50,000 (US$6400) have the option of bringing their case to a Small Claims Tribunal ("SCT") where investors can address the tribunal independently without the need to hire counsel. The upside of resolving disputes through a SCT is the possibility of reaching speedy results with little to no legal cost.

Following the collapse of Lehman Brothers, a group of 135 investors sought to recover their investment losses through SCTs.[63] It took three months for the adjudicators of the SCTs to hear all cases. Following the hearings, the adjudicators concluded that the claims should be referred to the Hong Kong District Court. The adjudicators believed that jurisdiction transfer was appropriate because the allegations involved claims of banks' liability and introduced new and com-

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[60] H.K. Monetary Auth., Lehman Brothers-Related Investment Products Dispute Mediation and Arbitration Scheme, *available at* http://www.info.gov.hk/hkma/eng/new/lehman/lehman_dispute_f.htm. [hereinafter Lehman Brothers Mediation Scheme].

[61] Freshfields, *supra* note 17, at 3. *See also* Susan Field v. Barber Asia Ltd., [2004] 3 H.K.L.R.D. 871 (C.F.I.) (discussing common law tortuous liability and the duty of financial advisors to their clients).

[62] Press Release, Legislative Council Secretariat of Hong Kong, LegCo to Debate Assisting the Victims of the Lehman Brothers Incident (Oct. 20, 2008), *available at* http://www.info.gov.hk/gia/general/200810/20/P200810200198.htm.

[63] *See* Financial Services and the Treasury Bureau, Proposed Establishment of an Investor Education Council and a Financial Dispute Resolution Centre, CB(1)1127/09-10(01) (February 2010).

plex legal theories.[64] The adjudicators understood their decisions may be used to determine the liability of the banks in future cases. As there was no precedent lending guidance to the SCTs, the adjudicators considered it best if higher courts heard the cases.[65]

As a result of the SCTs decisions, many investors decided to drop their cases due to the high probability of appeal and the prospect of having to bear not only their own legal costs but those of the banks as well.[66]

2. Litigation

Individuals who invested in failed minibonds also had the option of pursuing litigation, yet few elected to do so in the immediate aftermath of the collapse. The most apparent reason why investors did not choose to bring their case for litigation largely centered on the high costs of litigation. As mentioned in the previous section, the chance of appeal was extremely high. If the court found in favor of the banks, the investors would not only have to pay their own legal costs, but those of the banks' as well.[67] Such daunting consequences deterred many investors from even attempting litigation. Furthermore, whether the banks were legally at fault was a question of fact that remained to be determined by the regulatory bodies. Some observers noted that a leading case on common law tortious liability, *Field v. Barber Asia,*[68] could be examined to consider whether Lehman Brothers investors could recover damages for allegedly mis-selling the

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[64] *Id.*

[65] Chan Bing Woon & Tan Khain Sein Oscar, *How Mediation Can Help Corporations Survive the Recession*, AMA Conference (2009), *available at* http://www.asianmediationassociation.org/conference/pdf/AMA%20Conference%202009%20-%20How%20Mediation%20Can%20Help%20Corporations%20Survive%20Recession%20by%20Chan%20Bing%20Woon.pdf.

[66] *Id.*

[67] *Id.*

[68] Field v. Barber Asia Ltd., Court of First Instance of Hong Kong (HCA 7119/2000, June 17, 2003), *available at* http://www.hklii.org/cgi-hklii/disp.pl/hk/jud/eng/hkcfi/2003/HCA007119_2000-24179.html. "Ms[.] Field's complaint is that she was an inexperienced investor, and from the outset made it clear to Mr[.] Barber that she wanted to invest her savings, which represented substantially all of her capital, in a conservative way. . . . Notwithstanding this, Mr[.] Barber advised her to enter into an investment structure which was unsuitable for her and inconsistent with her objectives, in that it involved risk of a significant loss of her capital, without explaining to her the nature of the risk involved." Unfortunately for Ms. Field, as the yen strengthened, her corresponding liabilities increased causing her to suffer a loss. The court found that Mr. Barber had been negligent in advising Ms. Field because he failed to heed her stated desire to adopt a conservative investment strategy and to warn her of the existence and nature of the risk involved and, as such, breached its duty of care to Ms. Field.

minibonds or whether they made their investment decisions with their eyes open. Since the SFC and HKMA have yet to conclude their investigation, litigation against participating banks would have been considered hasty.

3. Class Action in the United States

Because class action lawsuits are not yet available in Hong Kong,[69] seven plaintiffs from Hong Kong and the United States filed a class action in the United States, contending that HSBC (USA) had failed to protect the interest of its investors by redeeming its collateral (i.e. securities held by both HSBC and the Bank of New York Mellon Corp.) and therefore breached its duties as a trustee. It is estimated that the waiting time for trial will be three years, and eighteen percent of any potential remedy will be deducted to cover legal fees.[70]

B. Settlement Through Established Third-Party Institutions in Hong Kong

1. The Securities and Futures Commission and Hong Kong Monetary Authority

The SFC and HKMA play an important role in regulating financial institutions in Hong Kong and investigating possible wrongdoings on the part of the banking industry.[71] Notwithstanding the power of the SFC and HKMA to investigate complaints and take disciplinary action against intermediaries pursuant to section 196 of the Securities and Futures Ordinance (Chap. 571),[72] individuals cannot directly seek redress or compensation from these institutions. Rather, complainants should clarify their allegations and collect background information for HKMA so that it may conduct a proper assessment on the regulated entity.[73] While the HKMA, upon consultation with the

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[69] A proposal for a class action led by Mr. Anthony Neoh, SC is currently being considered by the Hong Kong courts. *See* Anthony Neoh, SC, *Class Actions: Consultation Paper*, The Law Reform Commission of Hong Kong, *available at* http://www.hkreform.gov/hk.en/docs.classactions_e.pdf.

[70] Woon & Oscar, *supra* note 65, at 6.

[71] *See* H.K. MONETARY AUTH., BANKING SECURITIES ENFORCEMENT PROCESS, INVESTIGATORY AND DISCIPLINARY PROCESSES (LEHMAN-RELATED PRODUCTS) (2009), *available at* http://www.info.gov.hk/hkma/eng/new/lehman/enforcement_process.pdf [hereinafter HKMA LEHMAN].

[72] Section 196 of the Securities and Futures Ordinance (Chap. 571) discusses the disciplinary action with respect to registered institutions that can be initiated by the Securities and Futures Commission (SFC). Securities and Futures Ordinance, Chap. 571, §196, *available at* http://www.hklii.org/hk/legis/en/ord/571/s196.html [hereinafter SFO].

[73] HKMA LEHMAN, *supra* note 71.

SFC, can implement disciplinary sanctions and even de-list a registered entity,[74] it provides no commercial incentive for complainants to invest personal time and resources in pursuit of regulatory sanctions.

A recent proposal currently being considered seeks to expand the SFC and HKMA's scope of power in order to allow these institutions to provide compensation to aggrieved investors.[75] The benefit of this proposal is three-fold. While it would offer an additional route of redress for future investors, it would also provide greater financial incentives for investors to assist the SFC and HKMA based on the possibility of receiving compensation. Finally, this proposal would draw on the already robust investigatory and regulatory framework of the SFC and HKMA.[76]

2. Financial Ombudsman Service in Hong Kong

There is currently no financial ombudsman service in Hong Kong. However, consultations on the establishment of such an institution are currently underway.[77] Based on the experience of other countries, these dispute resolution mechanisms should provide low cost and useful investigatory and resolution services to customers and market participants in the financial sector.

The United Kingdom established a Financial Ombudsman Service that handles disputes in the financial sector and provides free and independent dispute resolution services to consumers.[78] According to the UK Service, consumers retain their right to go to court if they are not satisfied with the Ombudsman's decision.[79] If the decision is accepted, then it is binding on both the consumer and the financial institution.[80] However, the Ombudsman does not have the power to punish or fine financial institutions for non-compliance with decisions. Therefore, it remains the role of the court to impose legal sanctions for any subsequent misconduct following the settlement decision.[81] This practice is similar to the approach used in mediation. Once a mediator assists parties in formulating a legally-binding agreement, it lies with the court to sanction parties for failure to honor the agreement.

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[74] SFO, *supra* note 72.

[75] HKMA, *supra* note 13, at 79-80.

[76] *Id*.

[77] *Financial Ombudsman Consultation to Launch*, (May 23, 2009), *available at* http://archive.news.gov.hk/isd/ebulletin/en/category/businessandfinance/090523/html/090523en03002.htm [hereinafter *Financial Ombudsman*].

[78] HKMA, *supra* note 13, at 80.

[79] *Id*. .

[80] *Id*. at 79-80.

[81] *Id*.

Between April 1, 2007 and March 31, 2008, the Financial Ombudsman Service in the United Kingdom resolved 99,699 cases.[82] In Singapore, 417 cases were resolved via Ombudsman services between July 1, 2007 and June 30, 2008. According to statistics, ninety-two percent of the UK cases were resolved by mediation or recommended settlements, and eighty-three percent of the Singaporean cases were resolved by mediation.[83]

A similar independent body in Hong Kong could provide an efficient means to adjudicate or settle disputes and shift some of the administrative burden away from the SFC and HKMA. If a Financial Ombudsman Service is to be launched in Hong Kong, it must draft and implement an effective roadmap outlining the distribution of work among the SFC, HKMA, Hong Kong Mediation Council ("HKMC"), and the Hong Kong International Arbitration Centre ("HKIAC"). Another possible approach may be to increase the scope of power currently enjoyed by the HKIAC and allow it to fully adjudicate or settle disputes based on the results of investigation conducted by HKMA and SFC.

Implementing a Financial Ombudsman Service or widening the power of HKMA or HKIAC appear to be beneficial approaches to the resolution of financial disputes given experience gained in the UK and Singapore. The recent proposal to develop a Financial Ombudsman Service in Hong Kong reflects a growing need to enhance financial-system management and provide greater avenues for the use of appropriate methods of dispute resolution in Hong Kong's dynamic financial sector.[84]

3. The "Buy-Back" Proposal

On October 6, 2008, the Hong Kong government proposed a "buy-back" option, offering consumers the option of re-selling their Lehman Brothers minibonds.[85] This proposal was subsequently agreed to by the Hong Kong Association of Banks (HKAB).[86] Unfortunately, the proposal failed after Lehman's United States counsel issued a cease-and-desist order to HSBC Hong Kong, as a result of the automatic stay imposed by Lehman's United States bankruptcy filings.[87]

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[82] *Id.*

[83] HKMA, *supra* note 13, at 79-80.

[84] *Financial Ombudsman*, *supra* note 77.

[85] *Banks to Buy Back Lehman Mini-bonds*, THE STANDARD, October 17, 2008, *available at* http://thestandard.com.hk/breaking_news_detail.asp?id=8097.

[86] *Id.*

[87] FRESHFIELDS, *supra* note 17, at 3.

C. Alternative Dispute Resolution

1. Direct Settlement Negotiation

Given the significant obstacles to pursuing claims through the six possible remedies listed above — either due to high cost (i.e. small claims tribunal or litigation) or unavailability (i.e. class action in Hong Kong, direct compensation from the SFC and the HKMA, Financial Ombudsman Service, or the "Buy-Back" proposal) — Hong Kong investors have largely attempted to directly approach banks for settlement negotiations.[88]

Hong Kong banks have proactively identified and settled some individual cases to reduce the likelihood of successful suits against them.[89] Unfortunately for aggrieved investors who lack the resources to litigate or who have weaker claims, banks have generally refused negotiation. In other words, while direct settlement negotiation may be the most "cost-effective" way to seek compensation, retail banks, without external pressure and influence, are seldom willing to negotiate with investors seeking settlement.

2. Lehman Brothers-Related Investment Products Dispute Mediation and Arbitration Scheme

On October 31, 2008, the HKMA appointed the HKIAC to be the service provider for the Lehman Brothers-Related Investment Products Disputes Mediation and Arbitration Scheme ("IPDMAS").[90] Under this Scheme mediation and arbitration services are provided to aggrieved investors seeking financial redress from banks. With strong support and oversight by the HKMA, the SFC and the Legislative Council, the Scheme successfully launched in October 2008.[91]

According to the requirements of the program, only a specific group of investors are eligible for the mediation and arbitration scheme. According to the HKMA, a qualified candidate is one that has:

> 1. MADE A COMPLAINT TO THE HKMA against a bank that has sold him/her a Lehman-Brothers-related product (not exclusive of mini-bonds), and
> 2. The HKMA has COMPLETED ITS REVIEW of the complaint, and

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[88] Woon & Oscar, *supra* note 65, at 4.

[89] *Id.*

[90] Press Release, H. K. Int'l Arb. Ctr., Lehman Brothers-related Investment Products Dispute, October 31, 2008, http://www.info.gov.hk/hkma/eng/new/lehman/faq_b.htm [hereinafter LEHMAN DISPUTE RELEASE].

[91] *Id.*

> 3. EITHER the HKMA has referred the complaint to the SFC for it to decide whether to take any further action, OR a finding (of fault) against a relevant individual or executive officer has been confirmed by either the HKMA or the SFC.[92]

Only individuals meeting the above requirements are eligible for the HKMA sponsored mediation arrangements. For eligible disputants, the HKMA pays the relevant mediation fees and banks are required to support the Scheme.[93] Whether the bank ultimately agrees to mediate depends on the circumstances of the case. The principle of voluntariness applies in all cases. If both parties agree to settle, they have the option of signing a legally binding agreement enforceable by the court.[94]

According to information provided by the HKIAC,[95] the HKMA-sponsored mediation settlement amounts ranged from between HK$40,000 to over HK$5 million (US$5000 to $650,000). The parties involved included eleven licensed banks in Hong Kong and individual investors. All of the mediation sessions, which took place within one week of the appointment of the mediators, were concluded within the time limit provided under the rules, which was not to exceed five hours.[96] While some have questioned the short mediation duration, post-mediation interviews indicated parties were satisfied with the usefulness of the mediation process and the professional performance of the mediators.[97]

For unsuccessful mediations, parties had the option of proceeding to binding arbitration conducted by the HKIAC.[98] Therefore, *if* a bank was willing to arbitrate the matter with an investor after a failed mediation attempt, then the subsequent arbitration decision would be legally binding on both parties. However, because the arbitration process was optional, and because the sales and purchase agreements concluded between banks and Lehman Brothers mini-bond holders did

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[92] *Id.*

[93] *Id.*

[94] Oscar Tan, *There's More to Mediation than Talking*, THE STANDARD, October 22, 2008.

[95] Press Release, Hong Kong International Arbitration Centre, Mediation 100% Success for Lehman Brothers-Related Investment Product Cases (Feb. 19, 2009), *available at* http://www.hkiac.org/documents/Mediation/News/090219_Lehman Update_E.pdf [hereinafter Mediation Success Release].

[96] *Id.*

[97] *Id.*

[98] Nadia Darwazeh & Friven Yeoh. *Recognition and Enforcement of Awards Under the New York Convention - China and Hong Kong Perspectives*, 25.6 J. INT'L ARB. 837, 837-56.

not include relevant arbitration clauses, few banks were willing to proceed with this option.

Key Features of the Mediation Scheme

Several key features of the mediation scheme stand out and deserve additional focus.[99] These features include the active use of a mediation "hotline," pre-mediation briefings, and a mediation scheme office. First, a special hotline was set up to handle all enquiries in relation to the Scheme. The hotline is considered a vital channel for banks and investors to initiate mediation.[100] Hotline staff members were trained in basic mediation skills and provided with adequate knowledge to discern whether mediation should be made available to the parties concerned. The success of the hotline indicates that mediation schemes must not only be concerned with mediator abilities, but with pre-mediation educational processes as well.

Second, pre-mediation briefings were conducted with individual banks and investors during which a practicing mediator would discuss the suitability of mediation with regard to a given case.[101] Since only a maximum of five hours were allocated for each mediation, the HKIAC made use of pre-mediation sessions to allow disputants to make informed decisions as to participation in the mediation session.[102] Since most of the investors did not have prior experience in mediation or formal negotiation, preparation meetings were conducted to familiarize them with the mediation process.[103]

Finally, the HKIAC also set up a Scheme Office to collect confidential and privileged information from disputants. Banks often had concerns regarding risk management, minimizing negative publicity and strengthening client relationships, while investors often had concerns beyond immediate financial losses. With clear guidelines and background information collected by the Scheme Office, designated mediators were equipped with a greater understanding of the underlying needs and interests of the parties involved.[104]

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[99] Woon & Oscar, *supra* note 65.

[100] *Id*.

[101] *Id*.

[102] Press Release, H.K. Monetary Auth., HKMA Announces Mediation & Arbitration Services for Lehman Brothers-Related Cases, (Oct. 31, 2008).

[103] Jody Sin, *Mediation Tips*, MEDIATE.COM.HK. (Jan. 10, 2010), http://www.mediate.com.hk/index.php?option=com_content&task=view&id=260&Itemid=1.

[104] *Id*.

Interim Result of the Scheme

In November 2009, more than a year after the launch of the Lehman Mediation Scheme, an interim report was conducted[105] which indicated that a total of 334 cases were referred to the SFC by the HKMA, and around 243 cases were handled by the Scheme Mediation Office. Of the 243 cases, eighty-five mediations were conducted successfully while the remaining cases were settled prior to the mediation sessions. For those who actually engaged in the Mediation Scheme, the settlement rate was eighty-five percent.[106]

Drawing on the lessons learned from the Mediation Scheme, the next section will explore the prospects for the development of an In-House Multi-Tier Dispute Resolution System for Hong Kong Financial Institutions.

IV. Reflection on the Lehman Brothers Mediation Scheme and the Implementation of an In-House Multi-Tier Dispute Resolution System for Hong Kong Financial Institutions

Presently, members of the Hong Kong public and government are considering whether Hong Kong should implement a compulsory in-house multi-tier dispute resolution system for financial institutions in the region. In examining this question, reference will be made to the successful use of a multi-tier dispute resolution system by the Hong Kong International Airport project a decade ago.[107]

Lessons Learned from the Existing Lehman Mediation Scheme

The Lehman Mediation Scheme provides a helpful illustration of how mediation and arbitration can be used to resolve financial disputes in Hong Kong. Given the recent Civil Justice Reform of 2009, which emphasizes case management and the use of Alternative Dispute Resolution,[108] this Scheme was supported not only by the HKIAC and HKMA but fully backed by the HKSAR Government and the Judiciary. Although judges and practitioners have historically acknowledged the benefits of mediation in some landmark cases,[109] mediation has always been perceived as largely restricted to family matters. It

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[105] Mediation Success Release, *supra* note 95.
[106] *Id.*
[107] *See generally* R.H. Hasson et. al., Controlling the Costs of Conflict: How to Design a System for Your Organization (1998).
[108] *See generally* H.K. Gov't Info. Ctr., Civil Justice Reform 2009 – Publications and Video, *available at* www.civiljustice.gov.hk/eng/publication.html.
[109] Ken To, *CJR Watch: A Personal Notebook on the CJR Development*, http://cjrwatch.com/ (referencing some recent Hong Kong decisions on mediation).

was not until the successful operation of the Lehman Brothers Mediation Scheme that the applicability of mediation and arbitration in resolving commercial and financial matters received widespread attention.

The Lehman Mediation Scheme was successful because of its incorporation of the unique characteristics and needs of aggrieved investors. Pre-mediation meetings[110] were held to familiarize investors with mediation procedures.[111] In addition, the HKMA and SFC provided strong support in gathering background information while the HKIAC provided the dispute resolution platform, all of which were critical to the success of the Scheme.

In looking toward the potential future development of a financial dispute resolution body in Hong Kong,[112] the following lessons learned from the Lehman Mediation Scheme should be taken into account when designing such a system.

Observation #1: Expanding the Eligibility Test for Mediation and Arbitration Services

Expanding the criteria, which defines eligible participants, is one area of potential improvement on the Lehman Mediation Scheme. As defined by the Scheme, only Lehman minibond investors whose claims were approved by the HKMA and whose claims did not involve complex questions of liability were eligible.[113]

Honorable Justice Fung, in the case of *Leung Catherine v. Tary Limited*, commented on the need to expand the scope of mediation to handle complex questions of liability. In that case, solicitors for one of the defendants refused mediation settlement attempts because the issue of legal liability was in dispute.[114] In response, Justice Fung explained that:

> [T]o say that mediation is not suitable because the issue of liability is in dispute is yet again a Catch-22. It begs the question of what mediation is, *to wit*, without prejudice negotiations assisted by a neutral third party to resolve disputes. Courts in England as well as in Hong Kong have observed that skilled mediators are able to achieve results satisfactory to both parties in many

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[110] *See generally* Woon & Oscar, *supra* note 65.
[111] *See* Sin, *supra* note 103.
[112] Gary Soo, *Hong Kong International Arbitration Centre Year-End Reprt for 2009 from the Secretariat* (2009), *available at* http://www.hkiac.org/newspdf/HKIAC_Year_End_Report_for_2009_from_Secretariat.pdf.
[113] *See* To, *supra* note 109.
[114] *Leung Catherine v. Tary Ltd., [2009] H.K.E.C. 1669* (unrep., *H.C.P.I. 805/2007)*.

> cases quite beyond the power of lawyers and courts to achieve.[115]

In light of such observations, expanding the scope of mediation to include not only simple but also more complex cases involving issues of liability deserves further investigation.

Observation #2: Need for a Clear Dispute Resolution Roadmap[116]

In the few weeks after the Lehman Brothers' Group filed for bankruptcy, their minibond holders filed complaints with the HKMA and SFC against their retail banks on allegations of mis-selling.[117] After the Mediation Scheme was established, investors began to have a clear idea of how to seek compensation. This experience indicates that a clear picture of the avenues of redress at the outset of any financial relationship[118] will provide investors with a clear roadmap for resolution.[119]

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[115] *Id*. (citing Dunnett v. Railtrack Plc*.,* [2002] 1 W.L.R. 2434 (C.A.); Supply Chain & Logistics Tech. Ltd. v. NEC Hong Kong Ltd*.,* [2009] H.K.C.U. 123 (C.A.) (unrep. 1939/2006)).

[116] *See* Norbet Horn, Professor, University of Cologne, Remarks at the University of Hong Kong (Apr. 15, 2010) (emphasizing "form requirements for arbitration clauses with customers" for banks to customers (B2C Transactions)). *See also* NORBET HORN, *Arbitration of Banking and Finance Disputes in Germany*, *in* ARBITRATION IN GERMANY: THE MODEL LAW IN PRACTICE, at 919-33 (Kroll et al. eds., 2007).

[117] *See* Siu Beatrice, *Minibond Investors Fear Move Spells End for Claims,* THE STANDARD, Mar. 24, 2009, *available at* http://www.thestandard.com.hk/news_detail.asp?we_cat=4&art_id=79983&sid=23204415&con_type=1&d_str=20090324&fc=1.

[118] For example, a dispute resolution clause might include the following language: "In the event a dispute shall arise between the parties to this sales and purchase agreement of Lehman Brother's minibonds, it is hereby agreed that the dispute shall be referred to the Hong Kong International Arbitration Centre for arbitration in accordance with the applicable HKIAC Administered Arbitration Rules. The arbitrator's decision shall be final and legally binding and judgment may be entered thereon. Each party shall be responsible for its share of the arbitration fees in accordance with the applicable Rules of Arbitration. In the event a party fails to proceed with arbitration, unsuccessfully challenges the arbitrator's award, or fails to comply with the arbitrator's award, the other party is entitled to costs of suit, including a reasonable attorney's fee for having to compel arbitration or defend or enforce the award."

[119] *See Dunnett, supra* note 115; *Supply Chain & Logistics Technology Ltd*., *supra* note 115.

Observation #3: Protecting Investors in Post-Mediation Procedures

Under the Mediation Scheme, banks are under no obligation to pursue settlement beyond mediation.[120] One method of addressing this gap is to make arbitration available to investors in the event that mediation is not successful. The following section looks in greater detail at the design of a multi-tier dispute resolution system modeled after the structure adopted by the Hong Kong Chek Lap Kok International Airport.[121]

Multi-Tier Dispute Resolution System

The use of a multi-tiered system of alternative dispute resolution is frequently credited with the "on-time and under-budget" completion of the Chek Lap Kok airport. Given its sheer magnitude and the fact that the project involved more than twelve different construction companies, the Hong Kong government used a carefully crafted mix of alternative dispute resolution methods to resolve a wide range of problems that could well have delayed, significantly increased the cost of, or even prevented completion of this vast undertaking. Clause 92 of the airport construction agreement outlined in significant detail the Hong Kong government's approach to the resolution of airport construction related disputes.[122]

The first formal step envisaged by Clause 92 is known as a "decision" of the engineer.[123] Clause 92(3)(a) provides that this decision be given within 28 days of service of the notice of dispute. This type of resolution is aimed at resolving disputes between employer and contractor. In this step, the engineer acts as a neutral party empowered to exercise discretion and solve *practical* construction-related problems. The engineer's decision is subject to the oversight by the HKSAR government. If the government has an objection to the decision, then the dispute is removed from the engineer's jurisdiction and proceeds to the next tier of resolution.[124]

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[120] LEHMAN BROTHERS MEDIATION SCHEME, *supra* note 60.

[121] Mark Wilson, *Hong Kong's New Airport and the Resolution of Disputes*, 25 HONG KONG L.J. 363 (1995).

[122] *Id.*

[123] *Id.*

[124] *Id.* Clause 2(1)(b) of the airport agreement provides that:"Before carrying out [any duty or exercising any authority conferred by the contract] the Engineer may be required under the terms of his appointment by the Employer to obtain confirmation that the Employer has no objection to the Engineer's proposed course of action and, in the event of an objection, to act in accordance with the Employer's direction. . . ." *Id*.

The second formal step is mediation.[125] Under Clause 92 of the agreement, if either party is dissatisfied with the decision of the engineer, then that party may serve on the other a "request for mediation." This must be done within 28 days of receiving the engineer's decision. Under Rule 3.2 of the Mediation Rules,[126] a valid request for mediation must include (1) a brief explanation of the nature of the dispute, the amount (if any) in dispute, and the relief sought, and (2) nomination of a proposed mediator with an indication of his fee and other conditions of such appointment. If the other party agrees to mediation, then the nominated mediator will take charge of the procedure.[127] If the other party disagrees with mediation and persists with the engineer's decision, then according to Clause 92, the parties can proceed to the next tier of resolution.[128]

The third tier of this multi-tier dispute resolution model rests on the selection of either adjudication or arbitration.[129] In the Hong Kong International Airport model, adjudication is only available when the dispute involved simple monetary claims and the claimant desired a speedy outcome.[130] Arbitration, on the other hand, was available when the dispute involved a complex legal or design issue.[131]

Under the rules,[132] if the parties select arbitration, a notice of arbitration must be sent in time to satisfy the ninety-day time limit.

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[125] *Id.*

[126] Airport Core Programme Mediation Rules (1992).

[127] Wilson, *supra* note 121. Rule 5.2 provides: "Subject to Rule 7 in the absence of service of a notice of objection in accordance with rule 5.1 [i.e. within seven days of service of the request for mediation] the person nominated in the request for mediation shall be deemed to be acceptable to the party receiving a request for mediation." Id.

[128] LEHMAN BROTHERS MEDIATION SCHEME, *supra* note 60. Refusal or failure to respond to a request for mediation cannot be used by its recipient as a tactic to block the appointment of a mediator. In such a case the mediation procedure will run its course with no long-term detriment to the claimant.

[129] *Id.*

[130] *Id.* Under Clause 92(7)(a), following an unsuccessful mediation (or an unsuccessful attempt to initiate mediation), the dispute may be referred to either adjudication or arbitration. Interestingly, the sub-clause states that either party may make the choice. A potential problem that arises out of clause 92(7) is that a party, by acting quickly, could spuriously refer the dispute to arbitration in order to temporarily hijack the contractor's hopes of earlier relief through adjudication. In response, some have suggested that the election between adjudication and arbitration be best reserved to the claimant – the party which initiated the unsuccessful mediation.

[131] *Id.*

[132] For a quick reference of the rules, *see* Hong Kong International Arbitration Centre, http://www.hkiac.org/content.php. *See also* Airport Core Programme Mediation Rules (1992).

The respondent must send a "Response" to the claimant within twenty-eight days of receipt of the notice 'for the purposes of facilitating the choice of the arbitrator'.[133] Article 3.3 of the Arbitration Rules also envisages the appointment of an arbitrator by agreement of the parties within forty-two days after service of the notice of arbitration; if they fail to do so, either party is given the option of approaching the HKIAC to make the appointment.[134]

Developing an "In-House Multi-tier Dispute Resolution System" for Hong Kong Financial Institutions

A "multi-tier dispute resolution system" offers an avenue of recourse for retail investors who purchase faulty investment products through the banks and individual investment institutions. The design of such a dispute resolution system would require direct input from the HKSAR Government, the HKMA, SFC, and retail banks. The table below represents a diagram of how such a multi-tier dispute resolution framework might be structured:

[133] *Id*.
[134] Airport Core Programme Arbitration Rules (1992).

Tier	Type(s)	Party-in-charge	Details
First	Expert's decision	HKMA	• The HKMA expert would be empowered to discern whether the banks have used any mis-selling techniques[135] • Claimants must notify the HKMA within thirty days after becoming aware of the mis-selling practice. • The HKMA would investigate the matter and provide an expert decision on the bank's liability within sixty days of the complaint.[136] • The banks would be required to initiate negotiations with investors within seven days of the findings. If the negotiations fail, investors may proceed to the next tier of resolution.
Second	Mediation	Nominated mediator or Hong Kong Financial Dispute Resolution Centre	Following the negotiation stage,[137] both parties must agree on the selection of a mediator within thirty days. If the parties fail to select a mediator, the HKFDRC may select a mediator on behalf of both parties. If a settlement is reached, both parties may sign an agreement to make it legally binding.
Third	Adjudication/ Arbitration	Adjudicators or arbitrators arranged by the Hong Kong Financial Dispute Resolution Centre	• The claimant may select whether to proceed with adjudication or arbitration within sixty days from the date of a *failed* mediation.[138] • Both parties must agree on the selection of an adjudicator. If both parties fail to agree, the HKFDRC may select an adjudicator for the parties. • The selection of arbitration and adoption of arbitration rules must be agreed upon by both parties. If the parties fail to agree, the decision must be referred to the HKFDRC.

In order for such a dispute resolution process to take effect, a "multi-tier dispute resolution clause" must be inserted into a bank's investment product Sales and Purchase Agreement. The Hong Kong government, through the Hong Kong Monetary Authority and the Se-

[135] This is similar to "Engineer's decision" of the Chek Lap Kok Airport model.

[136] The bank should also try their best to investigate the matter in a speedy manner, as timing is the key in financial disputes.

[137] The deadline is seven days after the report of finding by HKMA.

[138] The original claimant would enjoy sixty days to elect whether to undergo adjudication or arbitration *after* the failed attempt of mediation (either failed attempt in its real sense or if either party does not agree to mediation).

curities and Futures Commission, can oversee the inclusion of such clauses in banks Sales and Purchase Agreements with investors.

The focus of such a "multi-tier dispute resolution framework" would be to target mis-selling techniques employed by banks and investment institutions. Given such a focus, the claimant must initiate dispute resolution within thirty days[139] of actual knowledge that he/she has been led to make an investment decision that he would not have otherwise made or invest in a product that is not suitable given his financial position, investment objectives, expectations and risk tolerance level.[140] If the claimant becomes aware of the bank's mis-selling but continues with the investment decision hoping to gain from this *mistake*, then he proceeds at his own risk because he has made such an investment decision with his eyes open.

Within thirty days, the investor must notify the HKMA of any alleged mis-selling. The HKMA would then investigate the matter in order to discern whether the claimant made the investment decision with his eyes open or was misled into purchasing the investment product.[141] The HKMA would then prepare an experts report within sixty days of the complaint, and determine the question of the bank's liability. Following the conclusion of such a report, the banks would then initiate negotiations with affected investors within seven days. The HKMA and SFC may reserve the right to penalize banks for inappropriate investment sales techniques.

If the bank fails to approach the claimant for direct negotiations before the deadline, then the claimant may nominate a mediator within thirty days. The mediator must be agreed to by all parties. If the parties fail to agree on a mediator, then the Hong Kong Financial Dispute Resolution Centre ("HKFDRC") may select a mediator on behalf of all parties. A pre-mediation meeting hosted by the HKFDRC covering issues such as the process of mediation and the type of information to prepare for the session would be a useful preliminary step prior to the initiation of the mediation session.[142]

If the mediation does not result in a settlement agreement, then the claimant may choose whether to initiate adjudication or arbi-

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[139] "Within thirty days of their acquisition of the knowledge" means that the claimant may not take advantage of the situation by only complaining when the investment decision results in a financial loss. Therefore, the burden is on the claimant to complain to the rightful authority within thirty days of becoming aware of the misconduct of the investment institution.

[140] ENFORCEMENT REPORTER, *supra* note 36.

[141] *See Barber Asia, supra* note 61 (analyzing common law tortuous liability).

[142] Sin, *supra note* 103. The author is grateful to Ms. Jody Sin for her very helpful tips for potential parties of mediation.

tration within sixty days of the *failed* mediation.[143] The claimant may nominate the adjudicator (or arbitrator) and select the rules appropriate for the proceeding. In both cases, both parties must agree on the selection. If the parties fail to reach an agreement, the HKFDRC may make the selection for the parties.

V. Conclusion: Future of Financial Dispute Resolution in Hong Kong

The collapse of the Lehman Brothers Group, the fourth largest investment bank on Wall Street,[144] has led to greater awareness of the insufficient protection against mis-selling techniques of various financial institutions. The implementation of the Lehman Brothers' Mediation Scheme by the HKSAR Government and the Judiciary, has provided a useful base of experience from which to glean insights regarding the development of a financial dispute resolution mechanism. An "in-house multi-tier dispute resolution system" drawing on the experience of both the Lehman Brothers' Mediation Scheme and the Hong Kong International Airport's multi-tier dispute resolution system sets out a potential framework for future investors to seek compensation from negligent financial institutions[145] first by an expert's decision, then mediation, followed by adjudication or arbitration. It is hoped that such a dispute resolution system developed for Hong Kong financial institutions will assist in preventing costly and lengthy lawsuits and assist affected investors in seeking redress in the face of misselling practices.

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[143] The idea is to prevent powerful financial corporations to select arbitration so as to deter investors from further proceeding with the dispute.

[144] HKMA, *supra* note 13.

[145] Woon & Oscar, *supra* note 65.

APPENDIX ONE[146]

Division of regulatory responsibilities for Authorized Institutions' ("AIs") securities business under the Memorandum of Understanding between the HKMA and the SFC		
	HKMA	**SFC**
Registration		
Institutional registration	•To consider applications for Registration by AIs for carrying out regulated activities •To advise the SFC on whether the applicant is fit and proper to be registered	•To grant, or refuse to grant, Registration to AIs to carry out regulated activities •To maintain a register of institutions (including details of executive officers) and to make the register available for public inspection
Executive officers	•To give, or refuse to give, consent to individuals to act as executive officers of registered institutions	•The public register maintained by the SFC should include details of the executive officers of registered institutions
Relevant individuals	•To maintain a register of relevant individuals (including executive officers) and to make the register available for public inspection	
Regulatory and supervisory processes		
Developing rules, codes, and guidelines	•Responsible for establishing guidelines under the Business Ordinance •To consult the SFC in the event that such guidelines apply to registered institutions	•Responsible for drafting rules and publishing codes and guidelines under the SF0 •To consult the HKMA in the event that such rules, codes, and guidelines apply to AIs by reason of their being registered institutions
Exercising Supervisory functions	•The frontline supervisor of registered institutions •Responsible for the day-to-day supervision of registered institutions	•To consult the HKMA before exercising its powers of supervision under s.180 of the SF0 in relation to an AI
Complaints		
Complaint referral	To refer complaints to the SFC whenever such complaints relate to matters that can be investigated by the SFC under s.182 of the SF0 or market misconduct.	•To refer to the HKMA complaints concerning any registered institution, or any of its executive officers or managers.

[146] HKMA, *supra* note 13.

Division of regulatory responsibilities for Authorized Institutions ("AIs") securities business under the Memorandum of Understanding between the HKMA and the SFC		
	HKMA	**SFC**
Investigation		
Conduct of investigations	For potential disciplinary cases: •to open a case for investigation •to notify the SFC •to keep the SFC informed of the progress •to forward to the SFC a copy of the investigation report, together with the HKMA's findings •to report any relevant matter to the SFC before completing the investigation where appropriate	•To consult the HKMA before exercising its power to initiate an investigation under s.182(1)(e) of the SFO •To share the findings of its investigation with the HKMA
Disciplinary action		
Consultation prior to disciplinary action	To consult the SFC before exercising its power to: • withdraw or suspend consent given to executive officers of registered institutions	To consult the HKMA before exercising its power to: •suspend or revoke an institution's registration •reprimand, fine, or issue a prohibition against a registered institution, any of its executive officers, managers or staff
Appeals		
Conducting appeals	•To conduct appeals of HKMA decisions •To consult the SFC during the course of an appeal where appropriate	•To conduct appeal of SFC decisions •To consult the HKMA during the course of an appeal where appropriate