

Office of the Telecommunications Authority

Consultation Paper on the Customer Complaint Settlement Scheme

8 June 2010

Introduction

This consultation paper reports on the outcome of the Pilot Programme of the Customer Complaint Settlement Scheme (CCSS) conducted by the Office of the Telecommunications Authority (OFTA) during the period from September 2008 to February 2010. This paper also seeks the views of the public and the industry on issues relating to the implementation of the CCSS in Hong Kong on a long term and sustainable basis.

2. For the avoidance of doubt, the views expressed in this consultation paper are the preliminary views of the Telecommunications Authority (TA) on the subject matters for the purpose of discussion and consultation only. Nothing in this consultation paper represents or constitutes any decision made by the TA and the consultation contemplated by this consultation paper is without prejudice to the exercise of the TA's power under the Telecommunications Ordinance (Cap. 106) (Ordinance) or any subsidiary legislation.

Background

3. With all sectors of the telecommunications industry in Hong Kong liberalised and open to competition, consumers and businesses are able to enjoy the fruits of market liberalisation - more choices of service providers, a wide range of innovative services and competitive prices. However, we also witness upsurge in the number of disputes between the service providers and consumers.

4. Under section 7M of the Ordinance, the TA may regulate and take enforcement action against misleading and deceptive conduct of the operators. Many disputes between the customers and the service providers however concern the contractual terms or pricing and do not necessarily involve such misconduct of the service providers. Currently, the parties will have to resort to the court including the Small Claims

Tribunal to seek resolution of intractable contractual disputes if they are unable to reach agreement through negotiations.

5. OFTA, as the regulator of the telecommunications services in Hong Kong, has taken a number of initiatives in recent years to ensure that interests of the consumers and users of telecommunications services are reasonably protected. In particular, OFTA imposed a new special condition (SC)¹ in the Unified Carrier Licence (UCL) in August 2008 under which the TA may issue code of practice (CoP) in relation to the contracting requirements including, amongst others, the requirement on the submission of consumer complaints to an independent resolution scheme.

Alternative Dispute Resolution (ADR)

6. With a view to providing a more effective means of resolving contractual disputes between operators and their customers outside the judicial system, OFTA proposed in 2007 the setting up of a voluntary alternative dispute resolution (ADR) scheme for the telecommunications industry. An effective ADR scheme can offer the parties a quick and economical way to resolve disputes with less legal formality and obviate need for expensive legal cost. The idea was based on similar schemes in force in overseas economies (such as Australia, the United Kingdom and New Zealand) for resolving contractual disputes in relation to telecommunications or communications services.

7. These overseas schemes share some common features. Firstly, they are set up independently from the operation of the industry regulators. Secondly, the schemes are funded by the industry. Thirdly, only disputes which have come to a deadlock would be submitted for adjudication. In other words, the customers must first approach their service providers to resolve their disputes. Fourthly, decisions of the adjudicators are binding on the service providers but not on the customers.

8. ADR schemes for resolving customer disputes generally dispense with overly legalistic procedures. Given the industry-specific characteristics, the adjudicators would have in-depth knowledge and understanding of the nature of disputes and concerns of the customers. All these elements facilitate efficient and effective

¹ Special Condition 36 of the Unified Carrier Licence states that a licensee shall comply with the code of practice issued by the TA in respect of the requirements to apply in the contracting of telecommunications services to customers, and such requirements include the format and terms and conditions of the service contracts and the submission of consumer disputes for handling under an independent dispute resolution scheme which may be approved by the TA.

resolution of disputes. In the wider context, an effective complaint handling procedure is an integral part of a dispute resolution scheme which can significantly improve business relationships between the service providers and their customers, reduce the number of unresolved or deadlocked disputes, and enable the industry to become more self-reliant and regulating. This consultation paper is not however concerned with the internal complaint handling procedure of individual service providers. The focus of this consultation paper is on the proposed ADR scheme dealing with contractual disputes arising from communications contracts which cannot be resolved by the internal complaint handling procedure of the service provider.

9. The idea of an industry-specific ADR scheme to resolve disputes between customers and service providers is not new in Hong Kong. For the Hong Kong insurance industry for instance, the Insurance Claims Complaints Bureau (ICCB) was incorporated in February 1990. The ICCB, financed by its members who are insurance companies in Hong Kong, provides free of charge service to complainants. The Insurance Claims Complaints Panel under the ICCB provides independent and impartial adjudication of complaints between insurers and their policyholders. The decisions of the Panel are binding on its members, without any right of appeal. However, if the complainants do not accept the Panel's decisions, they are free to seek legal redress.

10. In October 2008, the Hong Kong Monetary Authority asked the Hong Kong International Arbitration Centre (HKIAC) to draw up a Lehman Brothers-Related Investment Products Dispute Mediation and Arbitration Scheme for providing a platform to resolve disputes between investors and banks. In their report submitted to the Financial Secretary in December 2008 on issues arising from the Lehman-Brothers-related products, the Securities and Futures Commission and the Hong Kong Monetary Authority recommended the Government to consider the establishment of a dispute resolution mechanism for the financial industry in Hong Kong. Following this recommendation, the Financial Services and the Treasury Bureau (FSTB) issued a consultation paper in February 2010 on the proposed establishment of an Investor Education Council and a Financial Dispute Resolution Centre (FDRC)² to operate a Financial Dispute Resolution Scheme (FDRS).

11. For litigation in court, the Civil Justice Reform in 2009 imposed the need for all parties to consider ADR as a means of settling dispute rather than automatically proceeding to litigation. To implement the Reform, the Judiciary issued a new

² http://www.fstb.gov.hk/fsb/ppr/consult/doc/consult_iec_fdrc_e.pdf

Practice Direction on Mediation³ which came into force on 1 January 2010. According to this new Practice Direction, parties shall consider mediation as a suitable ADR method so as to avoid expense, time and uncertainty involved in litigation. A Mediation Information Office (IMO) was set up in the High Court Building to serve the parties in court, assist the parties to understand the nature of mediation and how it will help the litigants resolve their disputes, and facilitate them to seek mediation from the professional bodies. As referred by the IMO, there are 8 recognised bodies providing mediation services. The “Report of the Working Group on Mediation” issued by the Department of Justice in February 2010 has also mapped out the plans on employing mediation more effectively and extensively for handling disputes in Hong Kong.

12. All these developments advocate the use of ADR in lieu of litigation in court to resolve disputes between parties.

CCSS Pilot Programme

13. In September 2007, OFTA conducted an industry workshop to explain the proposed ADR scheme. After the workshop, some service providers expressed interest to participate in the scheme. The proposed scheme was then put in place on a trial basis. With the assistance of HKIAC, which provided the adjudication services free of charge, OFTA conducted the CCSS pilot programme (Pilot Programme) for a period of 18 months from September 2008 to February 2010. The purpose of the Pilot Programme was to test the practicality of the procedures and the efficacy of the concept of a CCSS under local Hong Kong conditions. Given this objective, the Pilot Programme was purposely operated on a limited scale and cases were referred to the programme by the participating operators with the consent of the customers concerned. Cases referred to the Pilot Programme are those that have come to a deadlock i.e. the service provider and the customer cannot resolve the matter by themselves through negotiations. OFTA contributed staff and other resources to administer the Pilot Programme. A report (Report) summarizing the outcome of the Pilot Programme and the feedback of the participants, including the participating operators and customers, is published in the web site of OFTA⁴.

Modus Operandi

³ PD 31 Practice Direction on Mediation - <http://www.civiljustice.gov.hk/eng/pd.html>

⁴ <http://www.ofta.gov.hk/>

14. The Pilot Programme follows a two-stage approach. The first stage is concerned with **mediation**. As soon as a customer complaint is referred to the programme, OFTA staff would collect information from the operator and the customer relating to the issues under dispute. With a view to assisting the parties to reach a mutually acceptable agreement to resolve their dispute, OFTA staff would attempt to conduct mediation between the parties. If mediation does not result in a settlement, the case would proceed to the second stage for **adjudication**.

15. When a case is referred for adjudication, the HKIAC would assign an adjudicator to handle the case. The panel of adjudicators comprise lawyers, engineers, surveyors and other professionals with dispute-resolution training, skills and experience. Before an adjudicator formally takes up a case, he or she is required to sign a statement of independence and his or her curriculum vitae would be passed to the participating operator and the customer for consideration and acceptance.

16. Both parties may make one round of submission. The customer would set out his case by completing a standard claim form. The operator would then submit its response in a standard reply form. Relevant supporting documents would be attached to the forms submitted by the parties. If needed, the adjudicator might request further information and clarifications from either side. Save for exceptional matters, no in-person hearing would be conducted in any adjudication. The adjudication would be conducted in either Chinese or English, subject to the preference of language as indicated by the customers. No legal representation for the customer or operator is allowed. If the adjudicator requires expert advice or translation service, the consent of OFTA has to be sought. The adjudicators shall keep confidential the matters concerning the adjudication of individual cases.

17. The adjudicator would consider the claims and evidence based on the documents and materials submitted by the operator and the customer. As soon as practicable, the adjudicator would make an independent decision with one of the following outcomes: (a) a conclusion that the customer's case has no merit; or (b) a requirement that the operator shall waive charges, pay compensation, make refund payments, take certain practical action to resume or provide services to the customer, terminate the service contract without imposing early termination charges, or apologise to the customer. The limit of awarding compensation or refund, or waiving charges, is set at HK\$10,000.

18. The adjudicator may review his or her own decision upon the request of the customer or the operator, on the grounds of unfairness of the decision, a failure to examine the evidence or an inaccurate interpretation of the law. On receipt of a request for review, the adjudicator would decide whether there is a need to review the decision. Where a review should be conducted, the adjudicator might either affirm the original decision, or replace the original decision with a new decision in full or in part. Other than the review, there is no other appeal mechanism. The operator has to comply with the adjudicator's decision after the customer has indicated acceptance of the decision. In case the customer does not accept the decision and after a review (if any), the case would be closed and the customer is free to seek separate legal redress.

Outcome of the Pilot Programme

19. 18 cases were handled under the Pilot Programme, involving such communications services as fixed line, mobile (including roaming and data services), broadband internet, IDD, pay TV and other value-added services. The issues in dispute were generally over the billing of these services. Of the 18 cases handled under the Pilot Programme, six cases have been resolved during the mediation stage, 11 adjudicated and completed, while 1 case is still pending review. Among the 11 adjudicated cases, the adjudicators have ruled in favour of the operators in four cases, the customers in five cases, and shared responsibilities in two.

20. Two participating operators have indicated that they would refer cases to the CCSS in future, although they have not commented on the applicable fees. They generally favoured paper hearing adopted by Pilot Programme because their staff were too busy to attend oral hearing. There were also comments that before reaching a decision, the adjudicator should provide an opportunity for the relevant party to comment on or explain important evidence that the adjudicator considered prejudicial to that party's case⁵.

21. The feedback from the customers participating in the Pilot Programme is that they would refer their future disputes against operators to the CCSS (please refer to paragraph 36 of the Report). When asked whether they would be willing to pay a case fee when lodging their cases, most replied positively while a few respondents considered that the operators should shoulder the fee. The TA is encouraged by the outcome and the feedback, which fully vindicate the usefulness of conducting the Pilot

⁵ According to the Adjudication Rules, the adjudicator may seek further information, statement or documents from the parties.

Programme. Certain salient issues raised by the participants of the Pilot Programme will be further discussed in this consultation paper and form part of this consultation exercise.

Salient Issues of a Long Term and Sustainable CCSS

22. Drawing on the experience of the Pilot Programme, the TA would like to seek the views from the public and the industry on the following salient issues relating to the implementation of a CCSS on a long term and sustainable basis.

(I) Basic Features of an effective CCSS

23. Taking into account the outcome of the Pilot Programme and similar practices in overseas economies and other sectors locally, the TA considers that an effective ADR scheme should possess the following basic features⁶:

- (a) it should be cost-effective, user friendly and flexible;
- (b) it should aim to resolve customer disputes in a timely manner. This would require a clear set of procedures and allow for an early resolution of the dispute through an internal complaint handling procedure of the service provider or an independent referee; and
- (c) it must be fair and seen to be fair at all times. To achieve this, the independence, knowledge and quality of the referee is very important, in order that the parties' rights and duties during the dispute resolution process can be safeguarded.

Question 1: Do you agree the above features and objectives are essential to an effective ADR scheme? Do you think there are any other features and objectives which are important for the future CCSS? If yes, please elaborate.

(II) Should the future CCSS be a voluntary scheme or should it be made

⁶ The United Nations Guidelines for Consumer Protection (“UN Guidelines”) developed by the United Nations Conference on Trade and Development (“UNCTAD”), call on governments to “establish or maintain legal and/or administrative measures to enable consumers or, as appropriate, relevant organisations to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible”.

mandatory?

24. At the time when the Pilot Programme was launched, there was no specific licence condition in the relevant licences for provision of public telecommunications services requiring the submission of customer contractual disputes to a resolution scheme. The Pilot Programme was therefore conducted on a voluntary basis. In his Statement “Licensing Framework for Unified Carrier Licence” of 9 May 2008 (UCL Statement), the TA specified the special licence conditions that would be attached to the UCL created under the amended Telecommunications (Carrier Licences) Regulation, Cap 106V. Special condition (SC) 36 requires the licensee to comply with the CoP issued by the TA in respect of the requirements to apply in the contracting of telecommunications services to customers, and such requirements include the format and terms and conditions of the service contracts and the submission of consumer disputes for handling under an independent dispute resolution scheme which might be approved by the TA.

25. The addition of a similar SC to the Service-Based-Operators (SBO) licences was implemented pursuant to the TA Statement “Review of the Public Non-Exclusive Telecommunications Service and Services-Based Operator Licensing Regimes” issued on 19 October 2009. The imposition of such a SC in the relevant licences marked a significant step towards the setting up of an industry-wide consumer protection scheme in the telecommunications industry.

26. While SC 36 under the UCL provides a formal framework for handling contractual disputes between operators and customers, the UCL Statement makes it clear that the industry would be encouraged to continue tackling these issues voluntarily. A self-regulatory regime driven and supported by the industry which is operating efficiently and effectively will obviate the need for the TA to issue any CoP under the UCL or SBO to mandate an ADR scheme for the industry.

27. There are recent examples of voluntary self-regulation schemes by the industry to deal with customer dispute issues. For instance, in response to public concern relating to content service delivered through short or multimedia messaging services, OFTA has worked closely with the industry on a self-regulatory scheme for the chargeable mobile content services. This results in the promulgation of the “Code for the Provision of Chargeable Mobile Content Services” by the Communications Association of Hong Kong on 8 January 2010.

28. While the effectiveness of the above self-regulatory scheme has still to be assessed, the TA, having regard to the far from enthusiastic participation of the industry in the Pilot Programme, is not optimistic that a similar self-regulatory scheme will work for the CCSS on a sustainable basis in the longer term. It was only with tremendous efforts of the Government that three service providers have volunteered to join the Pilot Programme. Such a low rate of participation is not conducive to the development of an industry-wide ADR scheme for telecommunications services. The TA no longer considers it appropriate to opt for a light-handed approach for the CCSS and is inclined to invoke the newly added SC 36 of the relevant licences to mandate operators to participate in the future CCSS.

Question 2: Do you have any comments on whether the CCSS should be implemented on a voluntary or mandatory basis? Please elaborate. If you are a service provider, you are welcome to state whether you intend to join a voluntary scheme.

(III) Role of OFTA and the CCSS Organisation

29. The functions of the TA, as supported by OFTA, are stipulated in the Ordinance. As a regulator of the telecommunications industry, the TA has the power to conduct investigations and to sanction a licensee in breach of the statute and licence conditions in accordance with the Ordinance. This power is distinguishable from the power of an adjudicator who is to decide on individual case or claim on the basis of its merits, with the underlying causes not necessarily connecting to any alleged breach of statute or licence conditions under the Ordinance.

30. While the TA has taken the initiative to introduce the Pilot Programme, it has not been the TA's intention to play an active part in the resolution process of the individual cases. Irrespective of whether a voluntary or a mandatory approach is adopted, for any ADR scheme to succeed, the support of the industry as well as the consumers is instrumental. In order to ensure that the scheme is fair and seen to be fair, it has to be run by an entity that is independent of the industry, the regulator and organisations that champion the consumer interests.

31. In the FDRS consultation paper issued by FSTB, it was emphasised that there should be distinction of powers between the regulators (SFC and HKMA) and the proposed FDRC. Although the Board of Directors of FDRC will be appointed by the

Government, the Board will be broadly based with representative of the major stakeholders and well-regarded community personalities equipped with knowledge of financial services and consumer protection. Noticeably the regulators and other government officials are not included in the list of proposed board members.

32. In UK, according to the Communications Act 2003, the statutory role of the Office of Communications (OFCOM) with regard to such scheme is that it must be satisfied that the approved procedures or schemes (a) are administered by independent person, (b) are easy to use, transparent and effective, (c) ensure that all relevant service providers and customers can use the procedures or schemes, (d) ensure that all necessary information can be obtained, (e) include provision on award of compensation, (f) enable the award to be enforceable. OFCOM only approves schemes of resolution organizations which will be responsible for their own operation and is not involved in the day-to-day operation of the schemes. In addition, OFCOM may give approval subject to conditions and may at any time withdraw the approval or modify the conditions.

33. Drawing reference from the UK experience, the TA proposes for the future CCSS to enjoy fuller independence and accordingly OFTA's involvement in the day-to-day operation of the scheme should be kept to the minimum needed for a smooth transition and continuing operation. The TA would retain some degree of control by incorporating appropriate terms in an agreement or undertaking to be entered into with the future scheme provider(s) and by setting appropriate criteria or rules for selection of or compliance by the scheme providers if more than one scheme is to be approved.

34. If there are contractual disputes involving allegations about misconduct on the part of the operators, e.g. misleading advertising or deceptive selling activities in possible contravention of section 7M of the Ordinance, the dispute to that extent will fall within the jurisdiction and power of the TA which cannot be delegated to external organizations. While the customers may or may not choose to pursue the section 7M claims, OFTA will reserve the power to conduct investigations under the Ordinance especially if there is a pattern of systematic regulatory breaches. OFTA and the appointed ADR organisation will have to work out the arrangement such as the prioritising and division of labour in their respective roles so that resources will be allocated more efficiently for cases that deserve regulatory attention while the appointed ADR organisation could expeditiously discharge its functions without unreasonably prejudicing the consumer's choice of avenue and overburdening and

prejudicing an operator's interests.

35. As the establishment of an effective ADR scheme is crucial, the TA would like to hear from the public and industry on their thoughts about the corporate governance issues related to appointed ADR organisation which is entrusted to administer the future CCSS, and its relationship with OFTA and the industry.

Question 3: Do you have any comments on the roles of OFTA and the selected ADR organisation(s) in the implementation of the CCSS? In particular, do you agree that the appointed ADR organisation(s) has to be independent but subject to certain degree of monitoring control by the TA? Please elaborate.

(IV) Scope of the scheme

36. To test the robustness of the voluntary scheme, the Pilot Programme did not clearly define the scope of service types that might be subject to the ADR mechanism. Participating operators might submit cases concerning content or TV services for adjudication. If the scheme remains a voluntary one, the TA does not consider it necessary to confine the scope of complaints to licensable services. A wider scope can benefit more customers.

37. However, if the future CCSS is to be mandated under SC 36 of the UCL, then the fact that the TA does not have jurisdiction over content and TV services would imply that the scheme would not be available to these services. Under such circumstances, to enable more customers to benefit from the CCSS, the TA proposes to permit service providers to declare voluntarily to subject all or certain types of their contracts relating to content and TV services to the mandatory CCSS. Customers of such declared type of contracts may then submit their cases to the CCSS if they so wish.

38. For the above reasons, the TA proposes that the scope of service under the CCSS needs not be confined to licensable services i.e. it can also cover other unlicensable services but this will be at the sole discretion of the content and TV service providers.

Question 4: Do you have any comments on the scope of the CCSS and these proposed arrangements?

(V) *The mode of the Long Term CCSS*

39. ADR is the umbrella term covering a range of resolution method (other than court litigation) including arbitration, adjudication, mediation and conciliation. The Pilot Programme essentially adopts a hybrid approach, viz. informal mediation plus adjudication for resolving disputes between the operators and the customers. While the responses from the participants of the Pilot Programme are generally positive, the TA does not rule out the possibility of adopting other mode(s) of ADR for the long term CCSS and would like to seek further views from the public and the industry in this regard. Various modes of ADR are discussed in the paragraphs below.

40. *Arbitration* : Arbitration process is governed by the Arbitration Ordinance. It is a legal process whereby the disputes are heard and decided by individual arbitrator or panel of arbitrators who are appointed or selected by a specified body under agreement between the concerned parties. Arbitration procedures are similar to court procedures, although hearing is conducted in private as against court hearing which is generally conducted in public. Like a judge, an arbitrator applies the laws to determine the substantive issues in dispute and issues decision by way of award which is binding on both sides and enforceable as if it is a court judgment. Arbitration is commonly used for resolving international shipping dispute and construction dispute.

41. *Adjudication* : In a wider sense, adjudication includes arbitration, litigation and other process whereby an adjudicator will apply legal principles and issue a decision which seeks to establish liability or fault. For the purpose of this paper, adjudication refers to the adjudication process other than arbitration and litigation. Adjudication process is governed by the particular rules of the scheme while adjudicators may be a designated person or appointed by agreement of the parties. Unlike litigation or arbitration, oral hearing may not be required in adjudication. Depending on the particular rules, the adjudicator's decision may be binding on one side or both. Although the adjudicator's decision is not enforceable as a court judgment, non-compliance with the adjudicator's decision may constitute a breach of the underlying contract between the parties. The Pilot Programme adopted adjudication in the second stage as the final means of dispute resolution.

42. *Mediation* : Mediation is not an adjudication process. Mediator may be a designated person or appointed by agreement of the parties. As an impartial person, a

mediator assists the parties to communicate, explores the parties' interests and facilitates the parties in resolving the problem. Mediation is not concerned with attributing blame. Rather, it helps the parties negotiate and find a solution that they can accept and compromise. Mediation process is governed by the rules of the scheme and no decision will be issued by the mediator, although he may make a recommendation to help resolve the difference between the parties. Until a settlement agreement is signed by the parties after mediation, the mediator's recommendation is not binding on the parties. Since the process is not legally binding, either party can walk out from the mediation proceeding at any stage without incurring liability. But once the settlement agreement is duly signed by the parties, it may be enforced in court as a valid contract governed by ordinary principles of contract law. The Pilot Programme adopted informal mediation at the first stage to help settle the dispute.

43. *Conciliation* The term "conciliation" is sometimes used interchangeably with "mediation". In both mediation literature and statutory provisions in Hong Kong, this is often a source of confusion as the terms are used in variable ways. "Conciliation" may be used to refer to a dispute resolution process that is provided for, or required by, specific rules or regulations with the conciliators specially trained and employed to suit the specific need of the scheme. Some may also expect a conciliator to play a more active role (e.g. more proactive in rendering an opinion) than a mediator. To avoid confusion, this paper will refer only to "mediation" as generally understood with necessary elaboration in the particular context of discussion.

44. In considering the future mode of operation of the CCSS, the TA does not lean towards arbitration. Arbitration is commonly used for resolving construction, insurance or international shipping dispute, involving huge sum of money in dispute or requiring specialised knowledge on the part of the arbitrator. Given the scale of dispute and the need to follow the applicable procedures in statute including the Arbitration Ordinance, the parties often instruct legal representatives to present the case and attend hearing before arbitration panel. The legal costs incurred in arbitration may be quite substantial, if not more than litigation. With these considerations in mind, it does not seem appropriate to use arbitration for consumer dispute cases, where the amount involved is usually small, the issues are generally concerning the billing aspect which do not require specialized knowledge as such to resolve.

45. Next, we look at mediation, and adjudication. The Pilot Programme adopted a hybrid approach i.e. informal mediation plus adjudication. Mediation in the first stage was performed over the phone by OFTA staff as the administrator of the scheme

without separate meetings with the parties as would normally be held in a formal mediation.

46. As can be seen from the results of the Pilot Programme, mediation has the following practical benefits.

- (a) It is relatively simple and flexible. Apart from the fact that the mediator does not need to apply fixed principles of laws, a mediation process may offer the parties a more relaxing and conciliatory environment for parties' to negotiate and narrow their differences.
- (b) It is relatively quick. The mediator does not need to go into every detail of the evidence and document or to write a lengthy decision. Some of the decisions issued in the adjudicated cases in the Pilot Programme were more than 20 pages long. On the other hand, there were cases where the parties could reach settlement just after a few telephone calls by the mediation staff of OFTA.
- (c) The cost of mediation is less than adjudication especially if the parties involved can reasonably agree to settle during the early stage of the process. This is all the more important and relevant given the amount involved in communications dispute is not large. Of course, mediation will probably require more office space for conducting individual meetings but the cost can be controlled by setting appropriate time limit for the mediation meeting.

The TA also notes that there are potentially more organizations providing mediation services than those which are capable of offering adjudication service.

47. If mediation is to be adopted, there can be further sub-options:

- (a) One-stage informal mediation – This will be conducted over the phone by general staff, who is usually not a specialist. The costs will be lower as compared to the other sub-options, but it should also be less effective due to the absence of a specialist mediator. It is also doubtful whether any organization specialising in ADR will be interested in taking up the task;
- (b) One-stage formal mediation – This will be conducted by trained mediator accredited by the ADR organization. There will probably be mediation

meeting and the costs will be higher than (a);

- (c) Two-stage mediation – This is a combination of (a) and (b). While the administration staff will try to mediate between the parties, unresolved cases will go to the next stage for formal mediation by the accredited mediator. Depending on how successful the first-stage informal mediation is, the costs in this sub-option may be more or less than (c).

48. A pitfall of the mediation model is that it cannot accommodate situations where mediation fails to resolve a dispute between the service provider and customer. If no settlement agreement can be reached after mediation, the only recourse available to the parties is to bring their case before the Small Claims Tribunal. A two-stage model of using mediation plus adjudication such as the one being adopted for the Pilot Programme may be a solution. In the Pilot Programme, when mediation fails, the case is referred for adjudication. The advantage of this two-stage approach is that the parties may enjoy the combined benefits of mediation and adjudication. Resolution of disputes can be sped up as relatively straightforward cases can be resolved at an early stage thereby limiting the number of cases going to the second stage, which requires more effort, time and costs. In the Pilot Programme, six out of 18 cases (i.e. one third of all cases) could be resolved at the mediation stage.

49. Having considered the above matters, the TA proposes two options below for the future CCSS:

- (a) Informal mediation plus adjudication, which was the approach adopted for the Pilot Programme; or
- (b) Pure mediation without adjudication.

Question 5: Do you have any preference for or comments on the form of ADR to be adopted for the future CCSS? Please elaborate.

(VI) Funding Arrangement

50. The services under the Pilot Programme were provided free-of-charge by HKIAC and their adjudicators, but this cannot be a sustainable arrangement in the long term. For the future CCSS, it has to be put on a sound financial basis in order to be

sustainable. One of the basic requirements for a successful ADR is that it cannot be overly expensive for access by consumers (see paragraph 23 and footnote 6 of this consultation paper). Also, having regard to overseas practices and similar schemes in the local insurance and financial sectors, the TA expects that the funding for the long term CCSS will have to be borne by the industry primarily. The funding will be used to cover the fixed costs (e.g. for administrative staff and rental of office) as well as variable costs which vary according to the number of cases to be handled. If necessary, OFTA would consider making a one-off contribution for the initial setting up costs or part thereof so as to kick start the initiative.

51. The TA believes that ADR mechanism is for the benefit of both the industry and the consumers and so it is reasonable for customers to also pay a fee for taking part in the CCSS. Requiring a customer to pay a reasonable amount of fee will also minimize submission of wholly unmeritorious claim and possible abuses. These suggestions are consistent with overseas practice, the FDRS consultation and the feedback from the participants of the Pilot Programme.

Question 6: Do you agree that both the industry and customers shall bear the on-going cost for the future CCSS and that the industry should bear the substantial part of the fees?

(VII) Quota of cases to be handled

52. OFTA received a total of 4,016 consumer complaints in 2009. Upon receiving the consent of the complainants, OFTA will then refer the complaints to the concerned operators with a view that they can reach a settlement with the complainants. While more than half of the complaints referred in such a manner can be resolved by the parties themselves, much would depend on the nature and complexities of each complaint as well as the effectiveness of internal complaint handling procedure of the concerned operators. There would still be a large number of customers who would not be satisfied with this process, and they are potential parties to seek redress of their grievance through the CCSS. In order that the future CCSS can be operated efficiently and effectively, particularly upon its launch of service in the initial years, the TA has to ensure that the scheme would not be overloaded with too many cases. As such, he would propose to set an annual quota of cases that would be handled under the scheme, at least for the first three years of its operation.

53. By setting an annual quota, the scheme can be kept to a manageable scale capable of being supported by the industry and handled by the organization appointed to administer the CCSS. To ensure that the cases will spread evenly throughout the year, the TA proposes a monthly quota of 85 cases for the first year. This translates into a total of 1020 cases for the first year. Unused quota in a particular month can be carried forward to the next month. This quota will be reviewed for the second and third year having regard to the actual operation of the CCSS and the views of the industry and the public.

Question 7: Do you agree that a quota should be set for the CCSS? If yes, what should be the appropriate quota?

(VIII) Fee Level

54. If a two-stage model of the Pilot Programme is adopted for the future CCSS, the TA would propose for the fees to be collected at two different stages, i.e. (a) the informal mediation and (b) the adjudication.

55. Since it is impracticable to impose fees for enquiry service, the TA suggests that the first-stage fee be imposed when the claim is accepted for process by the scheme administrator. Customers participating in the Pilot Programme were asked whether they would be willing to pay a case fee when lodging their cases to the future scheme (please refer to paragraph 36 of the Report). Most of them replied positively while a few respondents considered that the operators should shoulder the case fee. Some indicated that a fee of less than \$100 reasonable while some considered that the case fee should depend on the disputed amount. One customer regarded that charging the customer at administration cost would be reasonable. A number of adjudicators participating in the Pilot Programme also considered that the long-term CCSS scheme should impose a fee on the party who lodged the case, as this will help screen out potential abuses. (please refer to paragraph 27 of the Report). However, given that the subscription price for telecommunications service is of relatively low amounts, it would not be proportionate to require the customer to pay a high fee in order to have his/her complaint adjudicated. The TA therefore proposes that it is reasonable to require the customer to bear a nominal application fee of \$100.

56. On the basis that 1,000 cases will go to the first stage per year, OFTA estimates that the scheme will require an annual budget of about \$1,200,000. In accordance

with the international best practice, and following the principle of cost causality, the TA is of the view that the operators should be required to pay for the relevant cost incurred by the CCSS in processing the complaints against the services which they provide. This is a fair arrangement and should encourage operators to provide quality service with low complaint rate. Assuming that 1,000 cases are handled per year, the case fee would be \$1,200. This first-stage fee will cover all costs and expenses for the administrative service and service associated with the first-stage mediation.

57. Since adjudication of contractual dispute requires application of contract law and evidence law, it is sensible to appoint properly qualified person to be the adjudicators. To ensure the quality of the scheme, the TA believes a fee of \$4,000 - \$8,000 per case is a reasonable amount. This fee will cover all costs and expenses for the services including all administrative work provided by the scheme during the second stage. For the second-stage adjudication work, the TA proposes that an indicative fee of \$4,000 - \$8,000 per case will be charged to the operators. The exact fee level is subject to further negotiations with the eligible organizations. It is also proposed that the customers shall pay \$100 or 5% of the disputed amount, whichever is higher.

58. In the Pilot Programme, OFTA had assessed the adjudicators' decisions and considered that their work were of extremely good quality. If the parties request for review of the adjudicator's decision, the TA considers it reasonable for the requesting party to pay a review fee. The TA proposes that, depending on who makes the review request, the customer should pay \$200 whereas the operator should pay \$2,000.

59. If it is decided to adopt mediation for the CCSS, the fees will depend on whether a one-stage or two-stage mediation model will be adopted. Assuming that a two-stage mediation model is adopted, the fee structure would be similar to that described above except that there will not be any review fee. Depending on the circumstances, the amount of work of mediation may be less than adjudication. This is because the mediator will not be required to prepare a written decision. He also has no need to go into every detail of the evidence as would be required by an adjudicator for the purpose of adjudication. On the other hand, there may be extra cost incurred for renting a meeting room for conducting the mediation sessions. For the purpose of this consultation paper, the TA proposes an indicative case fee of \$4,000 for mediation that would be payable by the operator, but this would be subject to further negotiations with the appointed organization (see table below). This fee will cover all the costs and expenses for the services including all administrative work provided by the mediation

scheme.

60. The following tables summarize the fees proposal :

Two-Stage Model: Informal Mediation plus Adjudication

	<u>Customer</u>	<u>Operator</u>
Application Fee	\$100	
First Stage Fee (covering informal mediation and incidental services)		\$1,200 per case
Second Stage Fee (covering adjudication and incidental services)	\$100 or 5% of the disputed amount, whichever is higher	\$4,000 - \$8,000 per case
Review Fee (paid by party who made the request)	\$200	\$2,000

Two-Stage Model: Informal Mediation plus Formal Mediation

	<u>Customer</u>	<u>Operator</u>
Application Fee	\$100	
First Stage Fee (covering informal mediation and incidental services / costs)		\$1,200 per case
Second Stage Fee (covering formal mediation and incidental services / costs)	\$100 or 5% of the disputed amount, whichever is higher	\$4,000 per case

61. In proposing the above fees, the TA has drawn reference to the operation of the Pilot Programme and consulted resolution organizations providing ADR services in the market. The TA has also made reference to the level of fees proposed in the FDRS consultation paper. Given the amount involved in disputes concerning telecommunications is typically substantially lower, the TA considers it reasonable that the fees payable for the CCSS services should be less than that payable for the FDRS, but should not be set too low to assure a reasonable quality of service .

Question 8: Do you have any view on the above fee proposals? Please give supporting reasons for your views.

(IX) Binding nature of Decision

62. Under the Pilot Programme, decisions of the adjudicators are only binding on the operators participating in the adjudication. Customers who are not satisfied with the adjudicator's decisions may still lodge a fresh claim in the Small Claims Tribunal. Thus, even if the operator has a very strong case, no binding decision against the customer can be secured as the customer may choose not to accept the outcome. Meanwhile, the operators have devoted considerable time, efforts and resources for participation in the process. This would not be just and fair to the operator and it would be a waste, if not abuse, of the ADR mechanism, which seeks to resolve dispute impartially by a speedy and effective means. Upon review, the TA considers that this arrangement has to be revisited in the long term CCSS, if it is decided to adopt a two-stage Informal Mediation plus Adjudication model for its future operation.

63. There was a suggestion that a customer would be worse off if an adjudicator's decision is made binding on him. The TA does not agree with such a view. There is no clear evidence or suggestion that consumers in Hong Kong, but for the existence of ADR mechanism, would tend to resort to other forms of legal channels to seek remedies against their service providers. In fact, there may be cases which fall outside the jurisdiction of the Small Claims Tribunal but which can be competently handled by the CCSS. Examples are contractual disputes which concern service quality and which have nothing to do with billing disputes or monetary claim.

64. The TA believes that in choosing to lodge his complaint with the CCSS, a customer has consciously made a choice to resort to ADR mechanism. He may

choose not to join the scheme, or he may choose to withdraw at any stage from the scheme before the adjudicator makes the final and binding decision. In TA's view, the two-staged model should have provided sufficient protection to a participating customer. The TA also believes that the parties ought to have a reasonable degree of trust and confidence in the CCSS and the independence and impartiality of the adjudicators. The TA therefore considers a binding decision on both sides (rather than on the operators alone) would seem in the context of the CCSS to be a more balanced and reasonable arrangement. It is also conducive for achieving expeditious and efficient disposal of contractual disputes.

65. If mediation is adopted as the ADR method for final resolution of dispute in the future CCSS, the issue under concern will not arise because the recommendation of the mediator is non-binding until the parties sign a settlement agreement adopting the recommendation which shall become binding on both parties under contract law.

Question 9: do you have any comments on whether the adjudicators' decision should be binding on the operators only or both parties?

(X) *Interest of the Disputed Amount*

66. One adjudicator taking part in the Pilot Programme was of the view that the long-term CCSS scheme should consider awarding interest of the disputed amount to the party whose payment was withheld as a result of the dispute (please refer to paragraph 28 of the Report). Paragraph 22 of the Report also relays the observation made by the administration staff that "customers were generally eager to lodge their claims with the Pilot Programme because they understood that if they did so, the operator would suspend the debt collection till the adjudicator's final decision was made". However, once the claim was lodged, the customers showed laxity in complying with the follow-up steps. Thus it took on average 67 days for a customer to complete his consent form and claim form after he lodged his claim. To exercise some discipline on the part of the complaining customers, the TA would propose that, as a matter of principle, interest should be awarded to the party whose payment was withheld as a result of the dispute, if the outcome of the adjudication is in its favour. If this proposal is adopted, then whether interest would be awarded and the exact amount of interest to be awarded would be decided on a case by case basis by the adjudicator.

67. Normally the party whose payment was withheld as a result of a dispute lodged under the CCSS should be the operator. In the same paragraph of the Report, it was also pointed out that it took an operator 40 days on average to file its response after the administration staff received the customer's submission. In deciding the amount of the interest to be awarded, the adjudicator should also have regard to the delay caused by the operator.

Question 10: Do you have any comments on the proposal to award interest to party whose payment was held as a result of the dispute?

Way Forward

68. The TA has an open-mind to the issues raised in this consultation paper, and the options are offered to facilitate discussion. He would welcome the industry and the community to come forward with views, comments on the questions mentioned above, and on the options with supporting reasons. Depending on the result of the consultation, OFTA will invite or liaise with eligible ADR organization(s) to submit formal proposals for the future implementation of the CCSS.

69. All representations, comments and suggestions should be made in writing, and should reach OFTA, preferably in electronic form, on or before **8 September 2010**. The TA reserves the right to publish all views and comments as well as the identity of the source. Any part of the submissions, which is considered commercially confidential, should be clearly marked. The TA would take such markings into account in making his decision as to whether to disclose such information or not. Submission should be addressed to:

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213 Queen's Road East
Wanchai, Hong Kong
(Attention: Legal Adviser 3)
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Office of the Telecommunications Authority
8 June 2010