

**For discussion
on 14 June 2010**

**Legislative Council Panel
on Information Technology and Broadcasting**

Report on the Customer Complaint Settlement Scheme (CCSS)

Purpose

In June 2009, we briefed Members on the progress of a pilot programme for the CCSS (Pilot Programme) administered by the Office of Telecommunications Authority (OFTA). This Pilot Programme ended in February 2010¹. This paper seeks Members' views on the proposed way forward.

Background

2. 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 an upsurge in the number of disputes between the service providers and consumers. The number of complaints received by OFTA against telecommunications services over the past three years is set out below -

Year	No. of Complaints
2007	4,629
2008	4,317
2009	4,016

3. Currently, the operator and the complainant 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.

¹ From February 2010, the Pilot Programme did not accept any new cases but continued to process uncompleted cases accepted before February 2010.

4. 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.

CCSS Pilot Programme

5. With the assistance of Hong Kong International Arbitration Centre (HKIAC), which provided the adjudication services free of charge, OFTA conducted the 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 and the efficacy 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 were those that had come to a deadlock, whereby the customer and the operator were unable to resolve matters between themselves through negotiations.

6. The Pilot Programme followed a two-stage approach. The first stage was mediation. As soon as a customer's complaint was referred to the programme, OFTA staff would collect from the operator and the customer information 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 did not result in a settlement, the case would proceed to the second stage for adjudication.

7. When a case was referred for adjudication, the HKIAC would assign an adjudicator to handle it. The panel of adjudicators comprised lawyers, engineers, surveyors and other professionals with dispute-resolution training, skills and experience. 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 had no merit; or (b) a requirement that the operator should waive charges, pay compensation, make refund payments, take certain practical action, etc..

8. The adjudicator might 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. The operator had to comply with the adjudicator's decision after the customer had indicated acceptance of the decision. In case the customer did not accept the decision and after a review (if any), the case would be closed and the customer was free to seek separate legal redress.

Outcome of the Pilot Programme

9. OFTA has published a report² summarizing the outcome of the Pilot Programme and the feedback of the participants, including the participating operators and customers. 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, six cases had been resolved during the mediation stage, 11 adjudicated and completed, while one case was still pending review. Among the 11 adjudicated cases, the adjudicators had ruled in favour of the operators in four cases, the customers in five, and shared responsibilities in two.

10. A summary of the 18 cases is at the Appendix. Cases adjudicated under the Pilot Programme have achieved a fairly balanced outcome: it was not mainly the customer or the operator who was culpable - both parties could be at fault in disputes arising from a contractual relationship.

11. Three operators have participated in the Pilot Programme. Two 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

² The report is available at <http://www.ofta.gov.hk/en/report-paper-guide/report/other.html>.

adopted by the Pilot Programme because their staff were too busy to attend oral hearing.

12. Customers participating in the Pilot Programme commented that they would refer their future disputes against operators to the CCSS. 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.

Consultation on the Salient Issues of a Long Term and Sustainable CCSS

13. The Telecommunications Authority (TA) is encouraged by the outcome and the feedback, which fully vindicate the usefulness of conducting the Pilot Programme. Drawing on the experience of the Pilot Programme, the TA has issued a consultation paper³ on 8 June 2010 to seek the views and comments of the public and the industry on a number of salient issues relating to the possible long term implementation of CCSS on a sustainable basis. The consultation will last for three months. A summary of these issues are discussed in the paragraphs below.

(I) Basic Features of an effective CCSS

14. Taking into account the outcome of the Pilot Programme and similar practices in overseas economies and other local sectors, the TA considers that an effective ADR scheme should possess the following basic features: (a) it should be cost-effective, user friendly and flexible; (b) it should aim to resolve customer disputes in a timely manner; and (c) it must be fair at all times.

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

15. Having regard to the far from enthusiastic participation of the industry in the Pilot Programme, the TA is not optimistic that a self-regulatory scheme will work for the CCSS on a sustainable basis in the longer term. It was only with substantial efforts of the Government that three service providers had volunteered

³ The consultation paper is available at <http://www.ofta.gov.hk/en/report-paper-guide/paper/consultation/progress.html>.

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 does not consider it appropriate to opt for a light-handed approach for this case and is inclined to invoke the condition of the relevant licences to mandate operators to participate in the future CCSS.

(III) Role of OFTA and the CCSS Organisation

16. As the 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 Telecommunications Ordinance (Ordinance). This power is distinguishable from the power of an adjudicator, who is to decide on a case or a claim on the basis of its merits, with the underlying causes not necessarily linked to any alleged breach of statute or licence conditions. Drawing reference from the UK experiences, the TA is of the view that the future CCSS should operate on a fully independent basis and OFTA's involvement in the day-to-day operation of the scheme should be kept to the minimum. 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 compliance by the scheme providers, if more than one scheme is to be approved.

(IV) Scope of the scheme

17. 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. However, if the future CCSS is to be mandated under the relevant licence condition, then the fact that the TA does not have jurisdiction over content and TV services would imply that the scheme may not be available to these services. 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.

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

18. The experience in the Pilot Programme is that mediation has the practical benefits of being relatively simple, flexible and quick. The cost of mediation is less than that for adjudication, especially if the parties involved can reasonably agree to settle during the early stage of the process. 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. Having considered the pros and cons of various ADR mechanisms, and taking into account experiences in the Pilot Programme, the TA proposes two options which are considered to be more cost-effective and accessible by both the operators and the customers for the future operation of the CCSS: (a) Informal mediation plus adjudication, the approach adopted in the Pilot Programme; or (b) pure mediation without adjudication, which is likely to solicit the participation of mediation service providers and is encouraged by the court.

(VI) *Funding Arrangement*

19. The services under the Pilot Programme were provided free-of-charge by HKIAC and their adjudicators. This cannot be a sustainable arrangement for the long term implementation of the CCSS. For the future CCSS, it has to be put on a sound financial basis. 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. If necessary, OFTA would consider making a one-off contribution for the initial setting up costs or parts thereof so as to kick start the initiative. The TA believes that ADR is for the benefit of both the industry and the customers and so it is reasonable for customers to pay a reasonable amount of fee for taking part in the CCSS. Requiring a customer to pay a reasonable amount of fee will also minimise submission of wholly unmeritorious claim and possible abuse.

(VII) *Quota of cases to be handled*

20. 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 cases⁴. As such, the TA 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. 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 year⁵ operation.

(VIII) Fees Level

21. For indicative purpose, the TA proposes the following level of fees⁶.

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 makes the request)	\$200	\$2,000

⁴ OFTA received a total of 4,016 consumer complaints in 2009. OFTA would refer the complaints to the concerned operators with a view that they may reach a settlement with the complainants. The experience of OFTA indicates that about half of the complaints referred in such a manner could be resolved by the parties themselves.

⁶ 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 per annum.

Model: Pure Mediation (under a two-stage approach)

	<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

In proposing the above fees, the TA has drawn reference from the operation of the Pilot Programme and consulted organizations providing ADR services in the market. The TA has also made reference to the level of fees proposed in the consultation paper issued by the Financial Services and the Treasury Bureau (FSTB) in February 2010 on the proposed establishment of an Investor Education Council and a Financial Dispute Resolution Centre (FDRC)⁷. Given the amount involved in disputes concerning telecommunications services is typically and substantially lower, the TA considers it reasonable that the fees payable for the CCSS services should be less than that payable for the FDRC services, but should not be set too low in order to ensure a reasonable quality of service.

(IX) Binding nature of Decision

22. 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 with 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, effort 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

⁷ The relevant fee schedule for the FDRC is at http://www.fstb.gov.hk/fsb/ppr/consult/doc/consult_iec_fdrc_e.pdf.

means. 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.

(X) Interest on Disputed Amount

23. It was observed in the Pilot Programme 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. Some laxity was observed on the complainant's behaviour during the information-collection stage that followed. To exercise some discipline on the complainants, the TA has proposed that, as a matter of principle, interest should be awarded to the party whose payment was withheld as a result of the dispute - usually the operator, 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. In deciding the amount of the interest to be awarded, the adjudicator should also have regard to the delay caused by the operators in the adjudication process.

Way Forward

24. The TA has an open mind on the issues raised and the options are offered to facilitate discussion.. The TA would also welcome the industry and the community to come forward with other options with supporting reasons. Taking into account the outcome of the consultation, OFTA will invite or liaise with eligible ADR organization(s) to submit formal proposals for the future implementation of the CCSS.

25. Members are invited to give their comments on the proposed way forward for the CCSS.

Office of the Telecommunications Authority
June 2010

APPENDIX

Summary of the 18 cases submitted to the CCSS pilot programme

Case No.	Case finished at stage of			Review requested by Company	Review requested by Customer	Adjudicator rejected request to review decision	Adjudicator's decision ⁸			Decision accepted by the customer
	Mediation	Adjudication	Review of Decision				in favour of the company	in favour of the customer	both parties bear some responsibilities	
1			X		X				X	
2			X		X	X		X		X
3			X		X		X			
4			X	X		X		X		X
5			X		X	X			X	X
6			X	X	X		X			
7, 12 & 13	X									
8			X	X		X		X		X
9		X						X		X
10			X		X		X			
11			X		X	X	X			
14			X	X				X		X
15 - 17	X									
18	Case still in review									
<i>Total</i>	6	1	10	4	7	5	4	5	2	6

⁸ Of the 5 cases where the adjudicators agreed to review the decision, 4 were affirmed after review while 1 decision was varied (but not reversed) as to the amount payable.
[Note: There is still one outstanding case pending review]