Consultation Document on

THE TELECOMMUNICATIONS AND SUBSCRIPTION TV MEDIATION-ADJUDICATION SCHEME

Submitted by

Singapore Institute of Arbitrators

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TABLE OF CONTENTS

Statement of Interest

The Singapore Institute of Arbitrators ("**SIArb**") is an independent professional body established in 1981 with almost 1,000 members. The Institute focuses on promoting the settlement of disputes by arbitration and other alternative dispute resolution processes and on professional training and development in these fields. The Institute also provides opportunities for the discussion, interaction and sharing of experiences between our members and dispute resolution specialists from other institutions in the region. Accordingly, we hope to harness our expertise in the realm of alternative dispute resolution processes to fine tune this scheme from a dispute resolution perspective.

Summary of major points

- SIArb wishes to comment on the questions set out at Sections 2 ("**The Dispute Resolution Process**"), 3 ("**Eligible Customers**"), 6 ("**Eligible Complaint Issues**"), and 7 ("**Funding of Scheme & Fee Structure**") of the Consultation Paper issued by the Info-Comm Media Development Authority ("**IMDA**") dated 17 January 2018 (the "**Paper**").

- In terms of the Dispute Resolution Process, we make the following key points:
    - We support the proposal to adopt mediation as the first stage of the dispute resolution process.
    - In the interests of finality and expediency, the second stage of the process should culminate in a decision that is binding on the Disputing Parties, instead of giving the consumer the option not to accept the decision.
    - Instead of adjudication, we propose arbitration as the manner of dispute resolution for the second stage. An arbitrator's award will be final and binding on the parties, and may be enforced if necessary (e.g. where there is no voluntary compliance). There are also limited grounds on which parties may appeal the arbitrator's decision, and this adds to the finality of the process.
    - The arbitration process can be carried out expediently within relatively short timelines. It is feasible for the IMDA to work with an ADR operator to appoint an arbitrator within 21 days of the Disputing Parties initiating the arbitration procedure. We suggest that a period of at least 4 to 6 weeks be allowed for the arbitrator to issue his/her award. We support the concept of a documents-based process and the arbitrator can decide the issues solely on a review of the documents. To provide flexibility, we suggest that the arbitrator have the discretion to call for a hearing if oral evidence or clarifications become necessary.
    - We support the proposal for the service of a "notice of intention to mediate", but would suggest that a longer period of time be allowed for the Service Provider to informally engage with the consumer to try and resolve the dispute before escalating it through the process under the Scheme.
    - It may be desirable to provide consumers with an option not to go through with mediation and proceed to the second stage of the process under the Scheme.

- In terms of Eligible Customer Issues, we make the following key points:
    - We agree that Small Business Customers should be allowed to avail themselves of the process under the Scheme. In addition to the criteria set out in the current proposed definition of "Small Business Customers", we suggest that the IMDA also takes into account the size of the contracts and payments that are made by these Small Business Customers to the Service Provider each year. The definition of eligible “Small Business Customers” should exclude businesses which are significant customers of the Service Providers and

would thereby have sufficient bargaining power to deal with the Service Providers in the normal course of business.
    - All consumers should be allowed to appoint authorized representatives, including lawyers if necessary.

- In terms of Eligible Complaint Issues, we make the following key points:
    - We agree that the Scheme should only be limited to issues that can be resolved through service recovery efforts or compensation (whether monetary or in kind).
    - In relation to the proposed categories of claims that fall beyond the scope of the Scheme, we suggest that the meaning of "*frivolous or vexatious claims*" be further clarified and explained.

- In terms of Funding of Scheme & Fee Structure Issues, we make the following key points:
    - We agree that a co-payment mode should be adopted.
    - We view the proposed 10:90 split in favour of the consumer as an appropriate one.

Specific Comments

Section 2: The Dispute Resolution Process

Question 1:

Comments on IMDA's proposed two-step Mediation Adjudication process under the Telecommunication and Subscription TV Mediation - Adjudication Scheme (the "Scheme"), and whether this process will achieve the policy objectives of providing the Disputing Parties with a resolution in an effective manner.

As the Paper correctly observes, many overseas and local alternative dispute resolution schemes adopt a two-stage process, with mediation as the first phase and adjudication or arbitration as the second phase. Mediation sets out to achieve an amicable resolution that is mutually acceptable to parties, and if the matter cannot be settled despite mediation, adjudication or arbitration is often taken as a second step to ensure finality for the Disputing Parties at the end of the dispute resolution process.

In respect of this two-stage process, SIArb supports the proposal to adopt mediation as the first stage of the dispute resolution process. Mediation is an effective means of dispute resolution, where parties can explore mutually acceptable solutions that serve to preserve the relationship between the parties.

If a dispute cannot be resolved through mediation, IMDA's proposed dispute resolution process adopts adjudication as the second stage of the process. Under the proposed Scheme, if the dispute is not resolved through mediation, an adjudicator will be appointed within 21 days, and will issue his/her decision within 10 days from the date of the appointment following a review of the relevant documents. The adjudicator's decision will be binding on the Service Provider if the consumer agrees with the decision. In respect of this second stage of the dispute resolution process, we would like to make the following suggestions for IMDA's consideration:

- In order for the Dispute Resolution Scheme to be effective and expedient, any decision that is made at the second stage of the dispute resolution process should be binding on all Disputing Parties. This ensures finality for the Disputing Parties at the end of the process, which is one of the objectives of the present Scheme. If one party is entitled to choose not to abide by the decision made at the end of the second stage of the process, the Disputing Parties will need to go through a further protracted process before the dispute is eventually resolved. This is not a desirable outcome. It is stated in the Paper that the adjudicator's decision will only bind parties if the consumer agrees. We can expect that consumers who are dissatisfied with the adjudicator's decision may avail themselves of other dispute resolution mechanisms after going through the two-stage process, thereby prolonging the entire dispute resolution process. If we expect that majority of claims that will be referred to this scheme are unlikely to be substantial or complex, it would be in the interest of the Disputing Parties and the IMDA to implement a mechanism that will assist in bringing about a swift and expedient final resolution of these disputes.

- While the IMDA may be seeking to help balance the disparity between the relative bargaining power of the Disputing Parties by allowing consumers to choose if they wish to be bound by the decision of the adjudicator, such a balance can be achieved in other ways. One such way is through the allocation of fees to participate in the Scheme, as discussed in Section 7 below.

- Adjudication is a quick method of settling disputes on an interim basis, but an adjudication determination is binding and enforceable only pending the final determination of the dispute by

litigation in court or arbitration or other dispute resolution proceedings.[1] Given the nature of the process, Disputing Parties who go through the adjudication process will not be assured of finality, since neither party is precluded from seeking another resolution of the same dispute, this time by litigation in court or by arbitration. This may result in a multiplicity of proceedings which is not in the interest of the Disputing Parties, especially the consumer.

- In the interests of finality, IMDA may wish to consider arbitration as the second stage of the dispute resolution mechanism. Arbitration may similarly be conducted through a "documents-only" process, where an arbitrator decides the issues through a review of the documents, without the need for an oral hearing. An arbitrator's award will be binding on *both* parties and is final, and may be enforced if necessary (e.g. where there is no voluntary compliance). There are also limited grounds at law on which to appeal the arbitrator's decision.

- The arbitration process can also be expedited and the IMDA can prescribe relatively short timelines for the appointment of an arbitrator and for the arbitrator to issue his/her award. The IMDA can work with an ADR operator to appoint an arbitrator within 21 days of the Disputing Parties initiating the arbitration procedure. As to the time for an arbitrator to provide his or her award, we suggest that a period of at least 4 to 6 weeks be allowed, so that the arbitrator may have sufficient time to review the documents and provide a decision.

Question 2:

Do you think that it is necessary to serve a "notice of intention to mediate" so that it is demonstrated that the Disputing Parties have exhausted all available options before starting mediation proceedings? What are your views on the 14 calendar days required? Is it too long, too short or sufficient?

We support the requirement for consumers who choose to resolve their dispute through the Scheme to serve a "notice of intention to mediate" before initiating the process under the Scheme. This will provide an opportunity for an informal resolution of the matter between the consumer and the relevant Service Provider before the matter escalates.

It may be counterproductive for consumers to be able to refer disputes to a formal dispute resolution process without giving the Service Providers an opportunity to informally resolve the dispute. Given the increased costs and decreased flexibility associated with a formal dispute resolution scheme such as this, recourse to it should be one of last resort. We further note that formal dispute resolution schemes are typically meant to supplement, and not supplant, informal dispute settlement mechanisms.

There are two ways to give the Service Provider such notice. The first approach is to require the passage of a specified period of time from the date a complaint was first made to the Service Provider. We note that this is the approach adopted by schemes in Australia, Hong Kong, and the United Kingdom.[2] For example, the OS Communications Scheme in the United Kingdom may only be initiated eight weeks after a complaint was first made to the Service Provider.[3]

The alternative approach is to require the consumer to give formal notice of its intention to initiate the scheme. While this approach is more cumbersome in the sense that it requires a second step by

[1] Lexis, Practical Guidance - Asia Portal, Singapore, "*Differences between adjudication and other types of dispute resolution*" (http://hk.lexiscn.com/asiapg/articles/differences-between-adjudication-and-other-types-of-dispute-resolution.html)
[2] See Li, Grace, "*A comparative study of the communications consumer dispute resolution schemes in the UK and Australia*" [2014] UTSLRS 32; (2014) 19(2) Media and Arts Law Review 151.
[3] See Ombudsman Services: Communications - Raising a company complaint < https://www.ombudsman-services.org/sectors/communications/raising-a-company-complaint>.

the consumer, it provides greater clarity because it provides definite notice of the consumer's intention to initiate the formal dispute resolution process and eliminates any ambiguity surrounding the question of when a complaint was first initiated. Given the certainty this brings, we support this approach. However, to ensure that the serving of this notice is not too cumbersome for the consumer, we suggest the creation of an online facility that is able to create standard forms that would automatically be sent to the Service Providers once the consumer has entered the particulars of the dispute(s) at hand.

IMDA may consider a slightly longer period of time to allow Service Providers more time to engage with the consumers informally before embarking on the formal process under the Scheme. We suggest a period of 21 to 28 calendar days, considering that Service Providers may have limited resources and considerable caseload. They may also need time to go through the necessary internal processes to reach a decision in certain cases.

To provide flexibility, the Scheme can also provide the option for parties to consent to the initiation of the process under the Scheme before the prescribed period is up, should they decide that all informal channels have been exhausted prior to the end of the prescribed period of time.

Question 3:

Do you agree that a documents-based adjudication is more efficient for the Disputing Parties, or do you have any suggestions to enhance the adjudication stage?

For the reasons stated in our response to Question 1 above, SIArb supports arbitration, instead of adjudication, as the second stage of the dispute resolution mechanism. However, in the case of either arbitration or adjudication, we are generally in agreement with the concept of documents-based arbitration or adjudication, given that this saves costs and because disputes under this scheme are unlikely to be very complex. To provide flexibility, the adjudicator/arbitrator appointed may be given the discretion to call for a hearing should he/she consider oral evidence or clarifications to be necessary.

Question 4:

What are your views on giving consumer the option to choose whether to accept an adjudication decision for it to be binding on the Disputing Parties? Do you think that this would help to achieve faster resolution of disputes?

As explained in our response to Question 1 above, we are of the view that the consumer should not be given the option to choose whether to accept the decision of the adjudicator/arbitrator.

The mediation stage already exists as a non-binding option for both parties; it would not be in the interests of finality and expediency if the second stage of the process under the Scheme is also potentially non-binding for the Disputing Parties at the choice of the consumer.

Question 5:

Do you think consumers should be given the option to go straight to adjudication, without requiring the Disputing Parties to go through mediation first?

It may be desirable to provide consumers with an option to go straight to adjudication/arbitration for these reasons:

- The process of mediation may not be suitable for resolving all disputes. We refer to Assistant Professor Dorcas Quek-Anderson's article stating that mediation is not suitable in instances where, *inter alia,* the disputants are unwilling to participate in good faith.[4]
- Consumers are required to inform the Service Providers before the process under the Scheme may be invoked. As such, there would already be some form of prior negotiation and dialogue between the parties prior to initiation of this Scheme. Thus, if the consumer is of the opinion that further discussions between the parties would be unproductive, there is no reason why the consumer should be disallowed from dispensing with the mediation process; and
- We note that other similar consumer dispute resolution schemes do not provide for compulsory mediation. For example, the Council for Estate Agencies' Dispute Resolution Scheme allows for the consumer to waive the mediation process.[5]

Section 3: Eligible Customers

Question 6:

Do you agree that apart from Individual Consumers, it is beneficial to include Small Business Customers as Eligible Customers under the Scheme? Why do you think so?

We agree that it is beneficial to include Small Business Customers as Eligible Customers under the Scheme, for the reasons articulated in paragraph 3.2 of the Paper. Small Business Customers may have limited bargaining power and therefore face similar difficulties as individual consumers when faced with disputes with Service Providers.

Question 7:

Whether the current definition of Small Business Customer is appropriate

We have no objections to the current definition of Small Business Customers, being those that employ 10 workers or less, and register a revenue of $1 million or less in a year, that have a direct billing relationship with the Service Providers either on a recurring or once-off basis for telecommunication or subscription TV services. However, as an additional criterion, IMDA may also wish to prescribe criteria with reference to the amount that a Small Business Customer pays to the Service Providers per year. Eligible Small Business Customers should exclude businesses which are significant customers of the Service Providers who thereby have sufficient bargaining power to deal with the Service Providers in the normal course of business. IMDA may also wish to consider allowing the administrators of the Scheme the discretion to admit companies that do not fall within the definition on a case by case basis.

Other comments - Appointment of authorised representatives

We note IMDA's comments that "certain groups of consumers" may appoint an authorized representative to attend or submit arguments on their behalf throughout the dispute resolution process. Reference was made, in particular, to the elderly, who may not be comfortable going through the dispute resolution process.

If the Scheme envisages that only certain groups of consumers may appoint authorized representatives, further guidance will need to be provided as to the consumers that will be so entitled to avoid ambiguity. It should also be clarified if such "authorized representatives" would include lawyers engaged by the respective parties.

[4] See Dorcas Quek-Anderson, "*When to turn to mediation in telco disputes*", *The Straits Times*, 5 September 2016 <http://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=3710&context=sol_research>.
[5] See The Third Schedule of the Estate Agents (Dispute Resolution Schemes) Regulations 2011

On this point, our suggestion is that there be no restrictions as to the appointment of authorized representatives, who may be lawyers engaged by the Disputing Parties if they so choose. Service Providers may be represented by in-house legal counsel, and it is only fair that consumers or Small Business Customers be entitled to engage lawyers to represent them if they want to and are able to do so. This will also have the effect of distinguishing the process under the Scheme from the Small Claims Tribunal. Consumers and Small Business Customers have the option to choose the mechanism that they are more comfortable with.

Section 6: Eligible Complaint Issues

Question 11:

Do you agree that Eligible Complaint Issues ought to be limited to issues that can be resolved through service recovery efforts, or compensated in kind or monetary terms? Why do you think so?

We agree that the Scheme should only be limited to issues that can be resolved through service recovery efforts or compensation (whether monetary or in kind), and should not address issues which may implicate policy or third-party interests.

Question 12:

What do you think are other complaint issues that should be included and/or excluded from the scope of issues that are eligible under the Scheme? Why do you think so?

We note that one of the categories of cases excluded in the definition of Eligible Complaint Issues relates to cases that are considered by the ADR Operator to be frivolous or vexatious. We suggest that further guidance be provided as to what is "frivolous and vexatious", with relevant examples, so that Disputing Parties appreciate the concepts and refrain from bringing such claims. It may also be easier for the ADR Operator to justify excluding a claim on this basis if required to do so.

Section 7: Funding of Scheme & Fee Structure

Question 13:

Do you agree that IMDA should adopt a co-payment model so that the Scheme can be self-sustainable? Why do you think so?

We agree that a co-payment model should be adopted. One benefit is that the Scheme can be self-sustainable through such a model. It may also have the effect of discouraging parties from bringing unmeritorious claims, which they may otherwise do if the Scheme was completely free. A co-payment model may, to a certain extent, militate against possible abuse of the Scheme.

Question 14:

What are your views on the fee ratio of 10:90 in favour of the Eligible Customers to help balance the disparity in the respective bargaining power of the Disputing Parties?

We are of the view that the proposed fee ratio and the estimated fees (starting from $10 for mediation and $50 for adjudication) are fair and equitable, given the likely resources and bargaining positions of the Disputing Parties.

Conclusion

As dispute resolution practitioners, we welcome the IMDA's proposal to introduce further alternative dispute resolution schemes to better serve the public. We trust that the above comments would prove useful to the IMDA in undertaking further review of the proposed Telecommunications and Subscription TV Mediation-Adjudication Scheme. We would be pleased to discuss our submission further with the IMDA if necessary.

Please also note that whilst the content of this consultation document reflects the views of the Council of the Singapore Institute of Arbitrators, it does not necessarily reflect the views of the firms each of the individual Council Members belongs to.