

## **Advocating for Establishing a “Consumer Dispute Resolution Centre” to achieve triple wins in consumer dispute resolution for Hong Kong**

The study by the Consumer Council shows that there is a remarkable potential demand for resolving consumer disputes by arbitration. In view of the fact that mediation and arbitration in Hong Kong are well-developed, the Council suggests introducing a cost-effective alternative dispute mechanism with the establishment of a **Consumer Dispute Resolution Centre (CDRC)** that funded by the Government to ensure the principles of fairness and justice are observed in managing every case for dispute resolution.

The Council proposes that the CDRC would provide preliminary legal advice to consumers and adopt the approach of "Mediation First, Arbitration Next" to offer consumers and traders a mechanism for resolving consumer disputes in a manner more efficient and cost-effective than litigation, while rendering legally binding agreement or decision. Another benefit of the new mechanism is to support relieving the caseload of the court, serve the interests of justice and foster a "Triple Win Situation" for consumers, traders and the Government.

Under the legal framework in Hong Kong, consumers and traders may through consensual process resolve their disputes. Such process includes negotiation between the parties directly and through a third party such as the Council. In the past 3 years, the Council received about 30,000 complaints annually arising from consumer transactions under different categories. Over 70% of the complaints were resolved by conciliation. Consumers of the unresolved cases would be left little choice, either merely give up their claims or make recourse to legal proceedings for resolving disputes.

Currently, the jurisdiction limit of the Small Claims Tribunal is \$50,000. According to statistics of 2015, the average waiting time for the first hearing is 1 month, which would be followed by trial with a ruling several months later. Apart from the application fee of \$20 to \$120, consumers bear no cost for legal service as legal representation is not allowed. On the other hand, a claim over \$50,000 would be dealt with by the District Court. It is difficult to estimate the legal cost to be incurred in the proceedings by consumer, which may include the legal cost of the trader in case a consumer loses the case.

If a consumer dispute has to be resolved through litigation, both the consumer and the trader have to face the lengthy process and the high cost of litigation. Even consumers who benefit from legal assistance or are willing to bear the legal costs, they still have to tackle the complicated legal procedure and pressure involved. Furthermore, the disclosure of case information may put the trader's reputation and customer relationship at risk. Lawsuits resolving consumer disputes

may also dilute the resources of judiciary for other cases. As a result, they would incessantly increase the total social costs in dealing with court litigation.

In devising the model for alternative dispute resolution, the Council has drawn reference from overseas experience. Currently, there are two main types, schemes funded by the Government and by the industry. For examples, in the United Kingdom and Australia, under the user-pay principle, there are schemes with statutory backup funded and operated by the industry. However, the experience in Canada shows that industry-funded model could affect fairness and impartiality as exemplified by the problem of repeat player effect as a result of frequent appointment of the same batch of arbitrators who tend to side with the trader. The experience of Portugal shows that scheme supported by the Government may ensure fairness, justice and independence. The Council believes that although a government-funded model would incur public resources, an impartial mechanism would give confidence to consumers and traders and reduce the litigation costs to society as a whole in the long term. Therefore, such a model is well deserved to be supported by stakeholders including the Government.

The Council considers that Hong Kong has a sound legal framework with adequate supply of highly competent professionals. Government policies in recent years also strongly support mediation and arbitration, forming favourable conditions for extending the use of arbitration from resolving commercial disputes to general consumer disputes. The Council presents the following 9 recommendations.

**1. “Mediation First, Arbitration Next” Approach**

CDRC shall attempt to resolve consumer disputes by mediation before engaging in arbitration, so that parties could better assess the merits of their own cases and carefully consider whether they should come to settlement or proceed to arbitration. Even if mediation fails, it could streamline the process of arbitration.

**2. Government as Funding Source**

The Council recommends the Government to fund the initial set up and recurrent operation expenses of the CDRC. Without infringing the principle of independence and fairness, this funding model is to be reviewed after 5 years of operation to include funding from the industry so as to lower the burden of public fund.

**3. Free services for consumers**

Consumers should enjoy free services from the CDRC, including the provision of preliminary legal advice before mediation, mediation services, and subject to merits test, arbitration service and legal representation during arbitration.

**4. Traders’ participation**

Traders’ who joined CDRC must deal with consumer disputes on the request of consumers in accordance with the ADR procedures provided by CDRC. Only participating traders can display a logo indicating that independent, impartial and affordable ADR procedures provided by the

CDRC is readily available to consumers should they have any dispute with them. This could enhance consumer confidence to the participating traders.

**5. Ensuring impartiality, independence and transparency**

To ensure impartiality and independence, the Council recommends the responsible mediators and arbitrators shall disclose any actual or potential conflict of interests, and be appointed upon parties' mutual agreement. Also, the CDRC should be governed by a well-balanced Board appointed by the Government. In addition, the CDRC should accept no sponsorship and it should provide full and accurate information on the progress of cases and how it could assist to resolve consumer disputes etc.

**6. Maximum claimable amount is \$200,000**

Although more people could be benefited from a higher monetary claimable limit, it will also increase the burden on public fund. Having balanced the competing interests among consumers, traders and the society, the Council considers a cap of \$200,000 could not only cover in general most of the consumer complaints received by the Council, but also claims which fall outside the jurisdiction of the Small Claim Tribunal (\$50,000), and thereby reducing the case load of the District Court. Currently, 97% of the consumer disputes handled by the Council are below \$50,000, introducing the ADR procedures provided by the CDRC would help reduce the pressure of the courts in handling consumer disputes.

**7. Simplified procedures to save cost**

The Council considers that arbitration procedures should be as simple and cost effective as possible, and the recoverable legal costs should also be limited so as to reduce overall cost of arbitration. Cost saving measures should also be employed without compromising the principle of fairness, such as "document only" arbitration for simple cases; "guillotine" or "chess clock" procedures to fix a reasonable and realistic time for oral hearing; imposing time limits for oral submissions etc.

Further, CDRC should bear the costs of appeal for consumers but it would be subject to another merits test if the appeal is to be lodged by consumers as the losing party.

**8. Referral mechanism**

A proper referral mechanism should be in place for the Council and the Judiciary to refer suitable consumer disputes to the CDRC. With such collaboration, the goal is to reduce the case load of Small Claims Tribunal and District Court, and enhance better allocation of resources to other adversarial cases.

**9. Merger of the existing consumer dispute resolution schemes**

At present, there are industry specific consumer dispute resolution schemes in finance and insurance industries to resolve sector specific complaints. The Council recommends to study the feasibility of merging the existing dispute resolution schemes into CDRC, which may optimize cost effectiveness through resource sharing.

Chairman of the Legal Protection Committee of the Council, Mr Samuel Chan, Barrister said “By this in-depth study, the Council recommends the introduction of a brand new CDRC, operating under the “Mediation First, Arbitration Next” mechanism, as an effective platform to facilitate dialogue between consumers and traders in resolving their disputes, reducing the chance of going to court and lowering litigation burden on the society. The Council hopes that all stakeholders could support the proposal and actively participate in and discuss the way forward in strengthening the consumer dispute resolution channels and mechanism.”

Issued by  
Consumer Council  
31 August 2016

# Executive Summary

## Introduction

In Hong Kong, litigation is in most cases the only option for consumers in dispute with traders who fail to reach a settlement and want to further pursue their claims; or who want a legally binding decision on the question of “who is right or who is wrong”.

The other options for similar redress with a legally binding decision, namely arbitration and adjudication are predominately used to resolve commercial disputes. The applications of arbitration and adjudication to consumer dispute resolution are basically confined to the finance and insurance industries with the schemes respectively operated by the Financial Dispute Resolution Centre and the Insurance Claims Complaints Bureau.

As far as litigation is concerned, while most consumer disputes involve modest amount of money, the likelihood of prolonged time consumed and delay, mental and physical strain and high legal costs and complicated legal procedures may deter aggrieved consumers from resorting to legal action.

Legal assistance rendered by various public funded schemes such as Legal Aid and Consumer Legal Action Fund may to a certain extent mitigate the disincentives. But it benefits only a small number of aggrieved consumers since it is limited in scope and subject to stringent eligibility requirements.

In this premise, consumer redress would be better facilitated, if a cost-effective and time-efficient adjudicative option other than litigation is available in general to aggrieved consumers who are minded to have their disputes with traders resolved with a binding decision on merits.

## Potential Demand for Alternative Consumer Adjudicative Process

The Report finds that the potential demand for such an adjudicative option for resolving consumer disputes is substantial.

It is reflected by the average number of unresolved complaints cases handled by the Consumer Council (“the Council”), which amounts to approximately 5,000 per annum. These cases fall into different sectors such as beauty services, decoration and renovation services. Apart from that, there are other unresolved cases handled through different means of alternative dispute resolution (“ADR” i.e. procedures for resolving disputes by means other than litigation), such as direct negotiation and mediation by other organizations. What cannot be overlooked is that there are also

consumers who intend to seek a binding adjudication rather than a commercial settlement which, though also legally binding, does not address the issue of merits.

## Definition of Consumer

The Council takes the view that an adjudicative model for resolving consumer disputes in an inexpensive, efficient and effective manner should be accessible to classes of person who can reasonably be considered as consumers. As such, the notion of "consumer" adopted in this Report is broader than those found in some pieces of consumer protection legislation in Hong Kong. It is defined as:

*"A party to a contract (including an individual, corporation and business) relating to goods, services, immovable properties, financial products or services ("commodities") ordinarily supplied by a trader for private use, consumption or benefit who neither make the contract in the course of a business nor holds himself out as doing so; or a third party to any of the contracts mentioned above acting in relation to the commodities for a purpose outside his business, trade or profession and receiving benefit from the contract either directly or indirectly."*

## Terms of Reference

In the search of such an adjudicative option, the Council has identified arbitration as a subject of study. This Report considers and studies the role of arbitration in the regime of ADR for consumer protection in Hong Kong and makes suitable recommendations generally.

## Proposed Adjudicative ADR Model

Having compared arbitration with adjudication, the Council concludes that a new adjudicative ADR model should be developed on the basis of arbitration. It follows that the application of arbitration, currently used for commercial disputes, should be extended to resolving general consumer disputes, so as to cater for the need of consumers who would like to seek a binding decision and/or legal redress against traders, but are deterred by the disincentives for litigation.

This Report opines that consumer arbitration should not be a stand-alone procedure. Interplay between arbitration and other ADR processes has been considered. It is concluded that the use of arbitration in conjunction with mediation would be preferable. Such a model would offer the parties a chance to make recourse to a consensual process more likely to be cost-effective and capable of maintaining amicable relationship before going for an adjudicative process that may be contentious and more costly.

## Readiness in Applying Arbitration in Conjunction with Mediation to Consumer Disputes

The local ADR landscape in terms of infrastructure, culture and environment are all ready for introducing consumer arbitration.

Arbitration has been well developed and continues to evolve within a robust infrastructure supported by a sound legal framework, abundant and effective professional manpower, and proactive government promotion and encouragement. Mediation is also in a dynamic and robust development under the encouragement and promotion of the Administration and the Judiciary. This Report opines that a fertile breeding ground is in place for such a “med-arb” model to take root.

## Learning From Different ADR Models for Consumers in Other Jurisdictions

In formulating the attributes of this model, this Report examines the approaches adopted by other jurisdictions in resolving consumer disputes. The research finds that an interplay between different ADR processes, namely conciliation, mediation, adjudication and arbitration is common, although there may be some variance amongst the jurisdictions in terms of relevant legal definitions and formality of procedure. As a whole, in all examples found, the parties are generally given the chance to settle through a consensual process before an adjudicative process is invoked.

Funding and support of ADR schemes in other jurisdictions vary. It can be through the government, as in the case of Portugal, which may ensure fairness, independence, impartiality and neutrality. Industry funding is also found, by way of membership schemes, under the principle of “user pays” with statutory backup to the effect that traders are mandated to join the schemes, such as those found in the financial sector in Australia and the United Kingdom.

The experience of the industry-funded consumer arbitration schemes in Canada, with no government involvement, demonstrates the risk of domination and control by traders which can impair the impartiality and neutrality of such a scheme. Undue advantages can also be taken by some traders as a result of the “repeat player effect” found, for example, in an ADR scheme in Quebec, Canada, where traders continually found themselves before the same arbitrators, and thereby acquired knowledge of different arbitrators’ tendencies, and chose the arbitrator who is likely to be most favourable to them.

Examples of mergers that have taken place between different ADR schemes, covering different industry sectors, under a single institution were found in the Financial Ombudsman Service of Australia and the Financial Industry Disputes Resolution Centre Singapore.

In addition, the Report identifies a model in the United Kingdom that features a robust coordinating and quality assurance body sitting in supervision above a number of different sector specific ADR schemes.

## Looking Forward

This Report concludes that an institutionalized consumer dispute resolution process using arbitration in conjunction with mediation, compatible to the local context and the current ADR regime, should be introduced with a view to giving consumers of Hong Kong a feasible and practical choice to resolve their disputes with traders without resorting to legal proceedings.

This model will provide a dispute resolution process cheaper and quicker than litigation. It also enables consumers to rid themselves of tremendous physical and psychological strains resulted from the lengthiness, costliness and uncertainty of legal action. For traders, apart from saving time and costs which may otherwise be incurred by litigation, confidentiality of the dispute resolution may help them preserve goodwill while maintaining harmonious customer relationship.

At a macro level, such a model may help alleviate the caseload of court; and improve social harmony by promoting meaningful direct dialogue opportunity between the parties and alleviating acceleration of anger and mutual mistrust during litigation antagonism. This could in turn enhance the business and consumption environment in a virtuous cycle and achieve social and economic values which cannot be evaluated or assessed in monetary terms.

This Report makes the following recommendations:

### *Recommendation 1*

The Administration should consider establishing or supporting the establishment of a "Consumer Dispute Resolution Centre" to provide the service of "Mediation First, Arbitration Next" to consumer and business in resolving their disputes.

Through an attempt of mediation before arbitration, the parties could better assess the merits of their own cases and the other's, and carefully consider whether it will be in their interest to pursue further to arbitration or to come to settlement terms. Even if the mediation fails, this approach streamlines the process of arbitration, as parties at the stage of mediation would gain mutual understanding of one another's position and the issues in dispute through the assistance of a neutral mediator. In such case, the process of arbitration can be conducted in a more efficient and effective manner.

### *Recommendation 2*

The funding of the Consumer Dispute Resolution Centre for covering the costs incurred from its initial set up and recurrent operation should be supported by the Government with effective cost control measures. The recurrent operation include items such as the provision of preliminary legal advice to consumers at the pre-mediation stage, services for mediation and arbitration and legal representation for consumers during arbitration and subsequent appeal. The funding model is to be reviewed after 5 years of operation to see if the Government's financial support should continue or if it should be gradually transformed into an industry funding model.

### *Recommendation 3*

The Consumer Dispute Resolution Centre should be an affordable avenue for consumers to resolve their disputes with traders. Consumers should be charged no fees for the services of the Consumer Dispute Resolution Centre, including the provision of preliminary legal advice at the pre-mediation stage, services for mediation and subject to merits test, arbitration services and legal representation during arbitration. The purpose of the merit test is to assess whether it is in the interest of the consumer complainant to pursue arbitration so that resources are allocated to cases truly warrant arbitration.

### *Recommendation 4*

Traders' who joined the Consumer Dispute Resolution Centre must deal with consumer disputes on the request of consumers in accordance with the ADR procedures provided by the Centre.

Only participating traders can display a logo indicating that independent, impartial and affordable ADR procedures provided by the Consumer Dispute Resolution Centre is readily available to consumers should they have any dispute with them.

### *Recommendation 5*

The Consumer Dispute Resolution Centre shall be impartial, independent, and transparent to ensure fairness.

Measures are proposed to implement these principles, such as mutual agreement on the choice of mediators and arbitrators, disclosure of any actual or potential conflict of interests by the mediators or arbitrators, discontinuation of dispute resolution process upon objection and valid justification by a party, non-acceptance of any sponsorship by the Centre which should be governed by a fairly-balanced Board appointed by the Government, provision of full and accurate information on

all the procedures and relevant fees involved, timely update of the progress of handling, assistance available and possible solutions for resolving disputes.

#### *Recommendation 6*

The claimable amount handled by the Consumer Dispute Resolution Centre should be capped at HK\$200,000. From the experience of the Council, the region under such upper monetary limit has already covered most of the consumer complaints. It would allow aggrieved consumers and the opponent traders whose claim amounts falling beyond the jurisdiction limit of the Small Claims Tribunal (HK\$50,000), but are not so substantial as to warrant them to spend significant legal costs for proceedings at the District Court, to use the ADR mechanism provided by the Consumer Dispute Resolution Centre. Of course, more people would be benefited from the Consumer Dispute Resolution Centre services if the monetary limit moves upward. However, as the institution is proposed to be public funded, a raise of the limit would mean increase of cost to be borne by the public. Having balanced the competing interests between consumers, traders and society, this Report opines that HK\$200,000 is the appropriate cap.

#### *Recommendation 7*

The Consumer Dispute Resolution Centre should be underpinned by panels of mediators and arbitrators from diverse disciplines. The arbitration proceedings should be as simple and cost-effective as possible and the legal costs recoverable should be limited so as to minimize the costs for arbitration.

The Consumer Dispute Resolution Centre may employ cost-saving techniques without compromising the principle of fairness, such as “documents-only” arbitration for simple cases; “guillotine” or “chess clock” procedures that fix a reasonable or realistic time for oral hearing; imposing time limits on presentations by the parties at hearing; and capping the recoverable costs of proceedings to a specified amount. Appeal should only be allowed on very limited grounds, mainly on point of law. The costs of appeal should be borne by the CDRC for consumers but it would be subject to another merits test if the appeal is to be lodged by consumers as the losing party.

It should also stipulate its own mediation and arbitration rules to simplify the procedure on (i) the appointment of mediator and arbitrator; (ii) the mediation and arbitration process; (iii) the process and requirements for “documents-only” arbitration and “in-person hearing” arbitration, so that any mediation and arbitration could be conducted in a simple, fast, efficient and effective manner.

### *Recommendation 8*

There should be in place mechanisms for the Council and the Judiciary to refer suitable consumer disputes to the Consumer Dispute Resolution Centre.

Such referral mechanisms would facilitate an efficient dispute resolution network for consumers and traders in dispute. Also, it may reduce the caseload of the Small Claims Tribunal and the District Court and enhance better allocation of resources to other adversarial cases.

### *Recommendation 9*

Merger of the existing consumer dispute resolution schemes into the Consumer Dispute Resolution Centre may optimize cost-effectiveness through resource sharing.

However, given the existing consumer dispute resolution schemes are intrinsically distinct from one another, the consolidation of these schemes may be controversial. Further, operational and administrative difficulties and complications arising from the merger which could be hefty are anticipated.

That said, in shaping the future development of the ADR landscape of Hong Kong, it is worth considering the feasibility and potential impact of the merger.

### **Closing Remark**

As a closing remark, this Report is intended to mark the beginning of dialogues amongst stakeholders including consumers, traders, the Government, ADR organizations and the Council with a view to achieving a better dispute resolution regime for consumers and traders in Hong Kong. The Council looks forward to exchanging views on the subject and serious consideration by the Government which is expected to play a vital role in the proposed Consumer Dispute Resolution Centre.



# The Role of **Consumer Arbitration**

in the Alternative Dispute  
Resolution Regime  
for Consumer Protection

**消費爭議仲裁機制**  
研究報告



消費者委員會  
CONSUMER COUNCIL

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## Abbreviation

Defined Terms	Abbreviation Definition
ADR	Alternative Dispute Resolution
ASIC	Australian Securities and Investments Commission
BMS	Free Mediation Service Pilot Scheme for Building Management
CAMVAP	Canadian Motor Vehicle Arbitration Plan
CASE	Consumers Association of Singapore
CCSS	Customer Complaint Settlement Scheme
CDRC	Consumer Dispute Resolution Centre
CDSC	Consumer Dispute Settlement Commission
CJs	Community Justice Centres
CJR	Civil Justice Reform
CMU	Consumer Mediation Unit
CTSI	Chartered Trading Standards Institute
CLAF	Consumer Legal Action Fund
Council	Consumer Council
DRA	Dispute Resolution Advisor
EOC	Equal Opportunities Commission
FAA	Federal Arbitration Act
FCA	Financial Conduct Authority
FDRC	Financial Dispute Resolution Centre
FIDReC	Financial Industry Disputes Resolution Centre
FOS	Financial Ombudsman Service
HKFI	Hong Kong Federation of Insurers
HKMA	Hong Kong Monetary Authority
HKMAAL	Hong Kong Mediation Accreditation Association Limited
ICCB	Insurance Claims Complaints Bureau
IDRO	Insurance Disputes Resolution Organization
IOSs	Industry Ombudsman Schemes
JMHO	Joint Mediation Helpline Office
KCA	Korea Consumer Agency
OLAS	Ordinary Legal Aid Scheme
PCPD	Privacy Commissioner for Personal Data
ROS	Retail Ombudsman Scheme
SCT	Small Claims Tribunal
SFC	Securities and Futures Commission
SLAS	Supplementary Legal Aid Scheme
TDO	Trade Descriptions Ordinance (Cap. 362)
TIO	Telecommunications Industry Ombudsman

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### *Recommendation 5*

The Consumer Dispute Resolution Centre shall be impartial, independent, and transparent to ensure fairness.

Measures are proposed to implement these principles, such as mutual agreement on the choice of mediators and arbitrators, disclosure of any actual or potential conflict of interests by the mediators or arbitrators, discontinuation of dispute resolution process upon objection and valid justification by a party, non-acceptance of any sponsorship by the Centre which should be governed by a fairly-balanced Board appointed by the Government, provision of full and accurate information on

all the procedures and relevant fees involved, timely update of the progress of handling, assistance available and possible solutions for resolving disputes.

#### *Recommendation 6*

The claimable amount handled by the Consumer Dispute Resolution Centre should be capped at HK\$200,000. From the experience of the Council, the region under such upper monetary limit has already covered most of the consumer complaints. It would allow aggrieved consumers and the opponent traders whose claim amounts falling beyond the jurisdiction limit of the Small Claims Tribunal (HK\$50,000), but are not so substantial as to warrant them to spend significant legal costs for proceedings at the District Court, to use the ADR mechanism provided by the Consumer Dispute Resolution Centre. Of course, more people would be benefited from the Consumer Dispute Resolution Centre services if the monetary limit moves upward. However, as the institution is proposed to be public funded, a raise of the limit would mean increase of cost to be borne by the public. Having balanced the competing interests between consumers, traders and society, this Report opines that HK\$200,000 is the appropriate cap.

#### *Recommendation 7*

The Consumer Dispute Resolution Centre should be underpinned by panels of mediators and arbitrators from diverse disciplines. The arbitration proceedings should be as simple and cost-effective as possible and the legal costs recoverable should be limited so as to minimize the costs for arbitration.

The Consumer Dispute Resolution Centre may employ cost-saving techniques without compromising the principle of fairness, such as “documents-only” arbitration for simple cases; “guillotine” or “chess clock” procedures that fix a reasonable or realistic time for oral hearing; imposing time limits on presentations by the parties at hearing; and capping the recoverable costs of proceedings to a specified amount. Appeal should only be allowed on very limited grounds, mainly on point of law. The costs of appeal should be borne by the CDRC for consumers but it would be subject to another merits test if the appeal is to be lodged by consumers as the losing party.

It should also stipulate its own mediation and arbitration rules to simplify the procedure on (i) the appointment of mediator and arbitrator; (ii) the mediation and arbitration process; (iii) the process and requirements for “documents-only” arbitration and “in-person hearing” arbitration, so that any mediation and arbitration could be conducted in a simple, fast, efficient and effective manner.

### *Recommendation 8*

There should be in place mechanisms for the Council and the Judiciary to refer suitable consumer disputes to the Consumer Dispute Resolution Centre.

Such referral mechanisms would facilitate an efficient dispute resolution network for consumers and traders in dispute. Also, it may reduce the caseload of the Small Claims Tribunal and the District Court and enhance better allocation of resources to other adversarial cases.

### *Recommendation 9*

Merger of the existing consumer dispute resolution schemes into the Consumer Dispute Resolution Centre may optimize cost-effectiveness through resource sharing.

However, given the existing consumer dispute resolution schemes are intrinsically distinct from one another, the consolidation of these schemes may be controversial. Further, operational and administrative difficulties and complications arising from the merger which could be hefty are anticipated.

That said, in shaping the future development of the ADR landscape of Hong Kong, it is worth considering the feasibility and potential impact of the merger.

### **Closing Remark**

As a closing remark, this Report is intended to mark the beginning of dialogues amongst stakeholders including consumers, traders, the Government, ADR organizations and the Council with a view to achieving a better dispute resolution regime for consumers and traders in Hong Kong. The Council looks forward to exchanging views on the subject and serious consideration by the Government which is expected to play a vital role in the proposed Consumer Dispute Resolution Centre.

# 摘要

## 引言

在香港，未能與商戶就消費糾紛達成和解，而欲再作追討；或意圖在“誰是誰非”的問題上取得具有法律約束力裁決的消費者，在大多數的情況下只能訴諸訴訟。

其他同樣給予具有法律約束力裁決的方案，即仲裁及審裁，現時主要用於解決商業糾紛。解決消費糾紛方面，仲裁及審裁基本上分別只應用於金融業和保險業，相關計劃由金融糾紛調解中心和保險索償投訴局運作。

大多數消費糾紛涉及的金額非常有限，若以訴訟解決，當中所需時間可能甚為漫長，或甚至會遭延誤，亦會給身心帶來壓力，加上高昂的法律費用及複雜的法律程序等，這些問題都可能會使受屈消費者卻步於法庭門前。

以公帑資助的法律支援計劃，例如法律援助及消費者訴訟基金，雖在某程度上可減輕上述妨礙訴諸法庭的因素之影響，但這些計劃都有其局限性，並設有嚴謹的資格審批程序。故此，僅少數的消費者能獲得有關的援助。

由此觀之，若在訴訟以外，有一個具成本和時間效益，而其決定亦具約束力的裁決機制，讓有意就理據方面尋求裁決的受屈消費者解決他們與商戶的消費糾紛，將有效加強消費者尋求補償的途徑。

## 以裁決程序解決消費爭議的潛在需求

本報告認為，消費者對這個裁決機制的潛在需求是龐大的。

這反映於消費者委員會平均每年未能解決的大約 5,000 宗投訴個案。這些個案屬於不同的範疇，如美容服務、家居裝修服務等。此外，亦有其他循訴訟以外的爭議解決方式，如直接與商戶協商，或透過其他機構調解，但不獲解決的個案。同時，不容忽視的是有一些消費者純粹希望尋求具法律約束力的裁決，而非以和解方式解決消費糾紛，儘管和解協議亦具法律約束力，但它並不能解決消費糾紛中“誰是誰非”的問題。

## “消費者”的定義

消委會認為，一個具成本和時間效益的裁決程序模式，以解決消費糾紛，應為所有可合理地被視為消費者的人士而設。因此，本報告裡“消費者”一詞的概念比一般與消費者保障有關的香港法例所定義的更為廣泛。在本報告中，“消費者”的定義為：

“與商戶通常供應作私人使用、耗用或獲益的貨品、服務、不動產、金融產品或服務(“商品”)有關的合約中的立約方(包括個人、公司和企業),而該合約方並非在業務運作中訂立合約,亦沒有顯示自己是如此行事;或上述商品供應的任何合約中的第三方,其行事的主要目的並不關乎其商業、業務或專業,但從合約中直接或間接獲取利益。”

## 研究範圍

在尋索上述的裁決機制中,消委會選擇以仲裁為研究的主體。本報告審視仲裁在替代訴訟糾紛解決方案(“Alternative Dispute Resolution”,即訴訟以外爭議解決方式)的領域中,在香港的消費者權益保障方面所扮演的角色,並作出合適的建議。

## 在訴訟以外建議的裁決程序方案

在比較仲裁與審裁兩種方案後,消委會認為一種嶄新及具裁決性的替代訴訟糾紛解決方案應以仲裁為基礎。仲裁的應用應由目前只限於商業糾紛擴展至普遍的消費糾紛,以滿足一些希望尋求具有約束力的裁決及/或濟助,但因訴訟所涉時間、費用等問題,而放棄訴諸法庭的消費者之需求。

報告認為在解決消費糾紛的過程中,消費者仲裁不應被視為一項單獨運作的程序。研究探討了仲裁及其他替代訴訟糾紛解決方案之間的相互作用,結論是,結合仲裁和調解的模式最為可取。這模式讓雙方在訴諸具爭辯性及成本較高的裁決程序之前,可嘗試以更具成本效益和較能維持良好關係的協商程序去解決糾紛。

## 在處理消費糾紛上,仲裁配合調解的應用已準備就緒

香港在替代訴訟糾紛解決方面的基礎設施、文化和環境均已準備就緒,可隨時引入仲裁解決消費糾紛。

香港在健全的法律框架、充足和高效的專業人才、積極的政府推動和鼓勵等條件支持下,建立了一個穩固的基礎架構,讓仲裁得到良好及持續的發展。同時,調解亦在政府與司法機構的鼓勵和促進下成長。報告認為香港存在良好的客觀條件,讓仲裁配合調解的消費糾紛解決模式得以扎根。

## 參考其他國家地區為消費者而設的替代訴訟糾紛解決模式的經驗

在構想這模式的特點時,本報告參考了一些國家和地區所採用的消費糾紛解決模式;發現雖然不同的替代訴訟糾紛解決方案,包括調停、調解、審裁和仲裁,在不同地方的相關法律定義和程序上略有不同,但是他們之間的相互協調和運用是普遍的;而且,爭議雙方一般在使用裁決程序解決爭議之前,都有機會透過協商形式來解決糾紛。

不同國家及地區為替代訴訟糾紛解決方案提供的資助和支持不盡相同。葡萄牙的經驗是可透過政府資助，以確保有關機構公平、獨立、公正和中立。而業界資助是另一形式。透過會員制度和“用者自付”的原則推行，但通常這種模式備有法規支持，規定有關商戶必須參與，例子包括澳洲和英國的金融業所實行的模式。

加拿大有一些由業界資助而沒有政府參與的消費仲裁計劃，顯示存在由商戶支配和控制，以致削弱其公正性和中立性的風險。一些商戶可通過“重複參與者效應”在仲裁過程中獲取不當的優勢，例如在加拿大的魁北克省的一個替代訴訟糾紛解決計劃下，商戶所涉的消費糾紛重複由同一批的仲裁員處理，從中他們可了解到那些仲裁員的傾向，因此可選擇最有利於他們的仲裁員去處理糾紛。

不同行業的替代訴訟糾紛解決計劃的合併，可見於澳洲的金融申訴專員服務和新加坡的金融爭議調解中心。

此外，英國設有一所機構，監督、協調若干特定行業的替代訴訟糾紛解決計劃，以保證其服務的質素。

## 展望將來

本報告認為，香港應推行一個切合本地情況和配合現存替代訴訟糾紛解決領域，以仲裁配合調解的制度化機制，為消費者提供切實可行的途徑，解決他們與商戶之間的爭議，而毋須訴諸訴訟。

這種模式將為消費者提供一種比訴訟便宜和迅速的爭議解決程序，亦能為他們除去訴訟為身心帶來鉅大的壓力。對商戶而言，除了可節省訴訟所花的時間和金錢外，這模式亦可助他們維持和諧的客戶關係和商譽。

從宏觀的角度來看，這個模式有助減低法院處理案件的數量，增加爭議雙方直接對話的機會，避免他們因訴訟而產生的敵意和猜疑，促進社會和諧；在這良性循環中，營商及消費環境會得以改善，並帶來非金錢可衡量的社會和經濟效益。

本報告提出以下建議：

### 建議一

政府應考慮成立或支持成立一所“消費爭議解決中心”，提供“先調解，後仲裁”的服務予消費者及商戶，以解決他們之間的爭議。

在仲裁之前先行調解，雙方將更能評估各自的理據及仔細考慮應否在這階段和解或進入仲裁階段。即使調解不成，這程序亦有助理順仲裁的過程，因為透過中立調解員的協助，雙方將更能了解各自的立場和爭議議題的重點。這樣，仲裁程序可更切實有效地進行。

## 建議二

由政府出資資助消費爭議解決中心的成立及營運；資助涵蓋開辦成本及經常性的營運開支，但須配以有效的方案以控制成本。經常性的營運開支包括調解前向消費者提供初步法律諮詢服務、調解服務、仲裁服務以及在仲裁過程及其後的上訴中的法律代表服務。有關的資助安排將於計劃推行的 5 年後作出檢討，以審視應否繼續由政府提供資金，或逐漸轉變為由業界資助。

## 建議三

為免消費者負擔不來而未能使用消費爭議解決中心的服務，中心應提供免費服務予消費者。這些服務包括調解前的初步法律諮詢服務、調解服務、以及在通過案情審查後的仲裁服務，及在仲裁過程中的法律代表服務。案情審查的目的在於評估進行仲裁是否切合有關消費者的利益，這樣可使資源用於值得以仲裁解決糾紛的個案。

## 建議四

參與計劃的商戶須應消費者的要求，按照消費爭議解決中心的解決爭議程序處理糾紛。同時，只有加入計劃的商戶才可展示有關計劃的標誌，顯示他們的顧客可藉中心提供的獨立、公正和負擔得來的程序，去解決他們之間的糾紛。

## 建議五

消費爭議解決中心應該是公正、獨立和具透明度，以確保公平。

中心應設立一些措施去實踐上述原則，例如，調解員及仲裁員應由雙方同意選出；調解員或仲裁員應披露任何實際或潛在的利益衝突；爭議解決程序應在一方反對和在給予充分理由的情況下中止；消費爭議解決中心不應接受任何形式的贊助；消費爭議解決中心應由政府委任，來自各界別的人士均衡參與的管理委員會管轄。此外，消費爭議解決中心應就其程序及相關費用、案件處理的進展及就如何協助解決消費糾紛等，提供全面而準確的信息。

## 建議六

消費爭議解決中心處理的消費糾紛，索賠金額的上限應訂定為港幣\$ 200,000 元。根據消委會的經驗，上述的上限設定已涵蓋大部分消委會收到的消費者投訴；亦讓那些索賠金額超過小額錢債審裁處的管轄範圍（港幣\$50,000 元）但不值得耗費於區域法院提起訴訟的消費者透過消費爭議解決中心來解決爭議。雖然較高的索賠金額能使更多的消費者受惠，但公帑的負擔亦會隨之增加。考慮到消委會的經驗，及平衡消費者、商戶和社會之間的利益，消委會相信港幣\$ 200,000 元是合適的上限。

## 建議七

消費爭議解決中心應由兩組來自不同行業的仲裁員和調解員組成的小組支援。仲裁程序應盡可能簡化及具成本效益，可追討的法律費用亦應受限制，以減低相關的仲裁費用。

消費爭議解決中心應在不影響公平性的原則下採用節約成本的方法，如簡單案件以“文件仲裁”(“documents-only”)、處理訂定口頭聽證合理時間的“中止辯論以付裁決法”(“guillotine”)或“國際象棋程序”(“chess clock”)，為口頭聆訊設定合理和實際的時限、限制雙方在聆訊中的發言時間、將可收回的仲裁費用設置上限，及只容許持有非常有限的理由(主要涉及法律觀點)的個案提出上訴等。消費爭議解決中心應為消費者承擔上訴的訟費；但如果上訴由消費者作為仲裁的敗方提出，消費者必須先通過另一次案情審查，才可獲支付訟費的協助。

消費爭議解決中心應訂定調解和仲裁規則，以簡化(一)調解員和仲裁員的任命程序；(二)調解和仲裁程序；(三)“文件仲裁”和“面對面聽證仲裁”的程序和要求，從而使調解和仲裁能在簡單、快捷、高效率和有實效的情況下進行。

## 建議八

消委會和司法機構應設立機制，以轉介合適的消費糾紛個案予消費爭議解決中心跟進處理。

這轉介機制將有助建構一個有效的爭議解決系統，使小額錢債審裁處及區域法院的工作量得以減輕，從而使社會資源可更有效地分配到其他訟案。

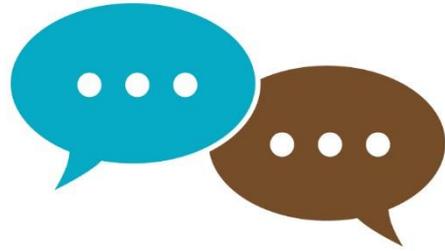
## 建議九

現存於個別行業的消費爭議解決機制如合併歸入建議的消費爭議解決中心，通過資源共享，可優化成本效益。

然而，由於該等消費爭議解決機制在性質上截然不同，合併可能會引起爭議。再者，任何合併均可能產生操作及管理上的困難和涉及複雜問題。雖然如此，當規劃香港替代訴訟糾紛解決機制的未來發展時，合併的可行性及其潛在影響是值得考慮的。

## 結語

消委會希望藉此報告在消費者、商戶、政府、替代訴訟糾紛解決機構和消委會等相關持份者之間，為香港消費者和商戶建立一個更佳的消費糾紛解決機制開展對話。消委會冀盼與各方就有關議題交換意見，亦冀望政府能認真考慮本報告的各項建議，它在建議中的消費爭議解決中心扮演重要的角色。



# Chapter 1

## Introduction

### *Key Points*

- Right to redress is one of the widely recognized basic consumer rights.
- Consumers may prefer a binding decision on merits for their disputes with traders.
- Consumer disputes in most cases involve a modest amount of money which does not warrant pursuit of legal action.
- Consumer redress would be better facilitated if a cost-effective and time-efficient ADR option is available in general to aggrieved consumers who are minded to have their disputes with traders resolved with a binding decision on the merits; or through adjudicative process as a last resort upon failure of settlement.
- In the search for an appropriate ADR option, arbitration has been identified by the Council as the subject of study in this Report.
- This Report therefore considers and studies the role of Consumer Arbitration in the Alternative Disputes Resolution Regime for Consumer Protection in Hong Kong and makes suitable recommendations generally.

## 1.1. Background

In Hong Kong, to resolve their disputes with traders, aggrieved consumers in general would tend to make recourse to consensual ADR processes<sup>1</sup>, such as direct negotiation on their own with traders, conciliation by the Council and mediation through mediation organizations, for a settlement rather than a determination of merits or liability. However, some aggrieved consumers may prefer a binding decision on the merits of the dispute at its early stage or when an attempt to settle through consensual ADR process falls through.

Arbitration and adjudication are adjudicative ADR processes that would result in such a binding decision on merits. However, the applications of arbitration and adjudication to consumer dispute resolution are basically confined to the finance and insurance industries with the schemes respectively operated by the Financial Dispute Resolution Centre and Insurance Claims Complaints Bureau. In most other consumer disputes such a binding decision can only be obtained through litigation. The alternative options of dispute resolution open to consumers in Hong Kong are illustrated in Appendix 1.

The right to redress is one of the most widely recognized basic consumer rights. Consumer disputes in most cases involve modest amount of money which does not warrant the pursuit of legal action. Consumer redress would be better facilitated therefore, if a cost-effective and time-efficient ADR option is available in general to aggrieved consumers who are minded to have their disputes with traders resolved with a binding decision on the merits.

In the search for such an ADR option, arbitration has been identified by the Council as the main subject of study in this Report. The feasibility and suitability of extending the use of arbitration to general consumer dispute resolution is examined and recommendations are made with a view to promoting public discussion on the way forward.

## 1.2. Terms of Reference

The Terms of Reference of this Report are:

“To consider and study the role of Consumer Arbitration in the Alternative Disputes Resolution Regime for Consumer Protection in Hong Kong and to make suitable recommendations generally.”

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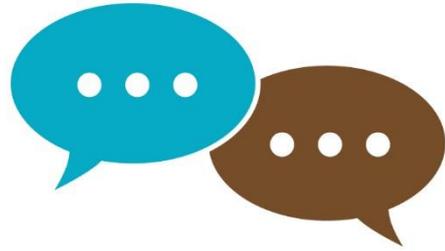
<sup>1</sup> Alternative Dispute Resolution processes can be broadly defined as dispute resolution processes other than court proceedings, including direct negotiation, conciliation, mediation, adjudication and arbitration.

### 1.3. Methodology

This Report is approached in the following manner:

- (a) The study begins with delineation of its scope by defining the term “consumer” referred to in this Report.
- (b) The issue of whether there is a genuine need for extending the use of arbitration to general consumer disputes is examined on the basis of the potential demand by consumers for an adjudicative ADR process. Such a demand is reflected partly by the number of unresolved cases handled by the Council, and partly by the fact that there are aggrieved consumers who would prefer an adjudicative process for a binding decision rather than a consensual process for a settlement.
- (c) Reference is also taken to the current status of the ADR regime of Hong Kong.
- (d) The issue is further examined by assessing the cost-effectiveness of litigation in resolving consumer disputes.
- (e) In examining whether arbitration is more effective than adjudication as an alternative to litigation for a binding decision on consumer dispute, a comparison is drawn between the two.
- (f) Feasibility and suitability of consumer arbitration are assessed by referring to the attributes of certain categories of complaint cases handled by the Council.
- (g) The interplay between arbitration and other ADR processes is examined with a view to optimizing the combined use of a consensual process with an adjudicative process.
- (h) The study also looks into both the local ADR landscape in assessing the readiness of introducing and developing consumer arbitration and mediation in Hong Kong and the ADR landscapes of foreign jurisdictions which may give insights into the consumer arbitration model operated in conjunction with mediation in contemplation.
- (i) The Report concludes with recommendations, for public discussion, regarding the establishment of a consumer arbitration mechanism operated in conjunction with mediation.
- (j) Most of the figures and statistics set out and applied in this Report were elicited from the Council’s database and the information readily available to the public from the publications of different organizations referred to in this Report.

Unless the context otherwise requires, words importing the singular shall include the plural and vice versa, and words importing the masculine gender shall include the feminine gender.



## Chapter 2

### Definition of Consumer

#### ***Key Points***

- A definition of “consumer” serves to delineate the scope of consumer arbitration to be studied in this Report.
- The term “consumer” or “dealing as consumer” has been defined in some pieces of consumer protection legislation in Hong Kong.
- Given that any consumer ADR model is intended to resolve consumer disputes in an inexpensive, efficient and effective manner, it should be accessible to classes of person who can reasonably be considered as consumers.
- “Consumer” referred to in this Report includes not only the purchaser of a commodity (including goods, services, immovable properties, and financial products and services), but also business and corporation, buyer on a sale of auction and buyer by competitive tender for goods or services for private use, consumption or benefit; and persons who are acting in relation to the commodities for a purpose outside his business, trade and profession.

## 2.1. Statutory Meanings

A definition of “consumer” serves to delineate the scope of the subject to be studied in this Report, namely consumer arbitration. The meaning of “consumer” is not defined under the Consumer Council Ordinance (Cap. 216). Nevertheless, the term “consumer” or “dealing as consumer” has been defined in some pieces of consumer protection legislation in Hong Kong, such as the Unconscionable Contracts Ordinance (Cap. 458), the Control of Exemption Clauses Ordinance (Cap. 71), the Sale of Goods Ordinance (Cap. 26), the Supply of Services (Implied Terms) Ordinance (Cap. 457) and the Trade Descriptions Ordinance (Cap. 362) (“TDO”).

It is provided in the first 4 ordinances that a party to a contract “deals as consumer” in relation to another party if:

- (a) he neither makes the contract in the course of a business nor holds himself out as doing so;
- (b) the other party does make the contract in the course of a business; and
- (c) the goods passing or services provided under or in pursuance of the contract are of a type ordinarily supplied or provided for private use, consumption or benefit.<sup>2</sup>

They refer to “consumer” as a party to a contract. This seems to suggest that a consumer may be a natural person, a corporation or a business.

“Consumer” is defined in the TDO as “an individual who, in relation to a commercial practice, is acting, or purporting to act, primarily for purposes that are unrelated to the person’s trade or business”.<sup>3</sup>

Different from the first 4 ordinances, a “consumer” under the TDO is confined to an individual and excludes a corporation or business entering into a transaction, even if it is for private use, purpose or benefit.

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<sup>2</sup> Section 3 of the Unconscionable Contracts Ordinance (Cap. 458), section 4 of the Control of Exemption Clauses Ordinance (Cap. 71), section 2A of the Sale of Goods Ordinance (Cap. 26), and section 4 of the Supply of Services (Implied Terms) Ordinance (Cap. 457)

<sup>3</sup> Section 2 of the Trade Descriptions Ordinance (Cap. 362)

## 2.2. Scope of Consumers

### 2.2.1. Business and Corporation

Under the first 4 ordinances, the definition of “dealing as consumer” is made in the context of a contract between a consumer and a trader. On the other hand, a “consumer” under the TDO is defined in the context of a commercial practice<sup>4</sup> engaged in by a trader in relation to a consumer regardless of whether a contract has been made between a consumer and a trader. Consumer disputes, from the experience of the Council, in many instances arise out of contracts for the supply of goods, services or real property. And, there have been cases where people who lacked bargaining power did the purchase in the name of a company merely for their own private use, purpose or benefit. We are of the view that the notion of “consumer” adopted in the Report should be broadly drawn in alignment with the definition of “dealing as consumer” in the first 4 ordinances so that purchasers of this kind can have access to the ADR process of consumer arbitration.

### 2.2.2. Buyer on a Sale of Auction or by Competitive Tender

It is stated clearly in the first 3 ordinances that a buyer on a sale of auction or by competitive tender shall not be regarded as “dealing as consumer”.<sup>5</sup> Nonetheless, online auctions have increasingly become a popular form of shopping among consumers, alongside the rapid development of mobile information technology. If the statutory definition is followed, purchasers of consumer goods or services at an online auction, who may constitute a significant portion of online shoppers, will be denied access to consumer arbitration. As such, the definition of “consumer” in this Report covers a buyer on a sale of auction or by competitive tender for goods or services for private use, consumption or benefit.

### 2.2.3. Third party to Consumer Contract

In the abovementioned ordinances, “consumer” and a party “dealing as consumer” are placed mainly in a context of contractual relationship. However, a person who is not a party to the contract for the purchase of goods or service may suffer damage or injury due to deficiency of the goods or service resulting from negligence, or

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<sup>4</sup> “Commercial practice” is defined under section 2 of the Trade Descriptions Ordinance (Cap. 362) as “any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader which is directly connected with the promotion of a product to consumers or the sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product”.

<sup>5</sup> Section 3 of the Unconscionable Contracts Ordinance (Cap. 458), section 4 of the Control of Exemption Clauses Ordinance (Cap. 71), and section 2A of the Sale of Goods Ordinance (Cap. 26)

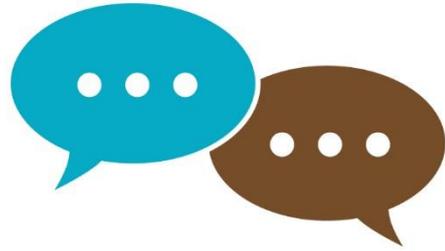
misrepresentation of a manufacturer or supplier of goods or service provider. For example, a man sustained injuries in an explosion of a defective electric appliance bought by his father.

There may be a situation where the party to the contract (the father in the above example) is not available for pursuit of a claim for breach of contract. The injured (the son in the example) will therefore have to sue on his own in tort. The onus is on the injured to prove all the elements of negligence or misrepresentation. It may be a formidable and expensive task given the complexities and technicalities involved. This type of case may be resolved in a more cost-effective manner by means of ADR suggested in this Report. It follows therefore, that a "consumer" referred to in this Report should include persons who are acting in relation to the commodities for a purpose outside his business, trade and profession.

### **2.3. Definition of Consumer**

Any consumer ADR model should be accessible to all classes of person who can reasonably be considered as consumers. Accordingly, the notion of "consumer" adopted in this Report is broader than those found in the above ordinances. It is defined for the purpose of this Report as:

*"A party to a contract (including an individual, corporation and business) relating to goods, services, immovable properties, or financial products or services ("commodities") ordinarily supplied by a trader for private use, consumption or benefit who neither makes the contract in the course of a business nor holds himself out as doing so; or a third party to any of the contracts mentioned above acting in relation to the commodities for a purpose outside his business, trade or profession and receiving benefit from the contract either directly or indirectly."*



## Chapter 3

### Potential Demand for Adjudicative Process

#### ***Key Points***

- Despite their strengths, consensual processes cannot resolve all consumer disputes.
- The Council's complaint data during 2011-2015 shows that at least around 5,000 consumer complaints had been left unresolved each year. They represent part of the potential demand for adjudicative processes to resolve consumer disputes.
- This pool of aggrieved consumers would find litigation expensive, lengthy and cumbersome, and the resources expended disproportionate to their claims.
- Current ADR techniques do not meet the demand of consumers who are minded to have their disputes with traders adjudicated with a binding decision.
- Only a limited number of aggrieved consumers can have access to legal assistance, which is subject to stringent tests and requirements.
- An inexpensive, expeditious and effective adjudicative option other than litigation should be put in place to meet the demand of aggrieved consumers.

### **3.1. Need for Consumer Arbitration**

To assess the role of arbitration in the local ADR regime, the most basic issue of this Report lies in how far consumer arbitration as an adjudicative process leading to a binding decision is needed in Hong Kong for resolving consumer disputes. In examining this issue, it is necessary and practical for us to:

- (a) have an overview of the current ADR regime in resolving consumer disputes;
- (b) gauge the potential demand for an adjudicative process as a means to resolve consumer disputes. The statistics of the Council relating to consumer complaints would shed light on this issue; and
- (c) examine whether litigation is a cost-effective means to resolve consumer disputes and an adjudicative process that consumers in general prefer.

### **3.2. Current ADR Regime for Consumer Disputes**

When having disputes with traders, in usual cases consumers would first make recourse to consensual processes, such as direct negotiation, conciliation or mediation, to resolve such disputes.

#### **3.2.1. Direct Negotiation**

When in dispute, a consumer will generally communicate directly with the trader about the issue, which would be followed by negotiation between the parties. Direct negotiation is flexible and informal without any specific procedure. It usually involves back-and-forth communication between the parties with an objective to work out a solution. Usually, unless the claim in question is quite substantial, a consumer would not hire a lawyer and there would not be any neutral third party to adjudicate the process. Direct negotiation would also, in most cases, be quick and inexpensive. The settlement agreement made as a result of negotiation is enforceable a contract.

From the Council's experience, it appears that most consumers like to settle their disputes with traders through negotiation. It is not uncommon that before filing a complaint with the Council, consumers have sought to negotiate with traders for a settlement but it has been in vain, as a result of deadlock in the negotiation or the traders' attitude.

In a Public Opinion Survey carried out by the Council in 2015,<sup>6</sup> when asked what they would do where disputes with traders over goods and services supplied were left unresolved after negotiation, only 6% of the respondents indicated that they would resort to legal proceedings; 39% indicated that they would continue to act on their own, while 43% would seek help from organizations. Amongst the latter 81% indicated that they would seek assistance from the Council. It can be therefore be inferred that most people would prefer ADR processes to litigation; and the Council is the most favoured channel for resolving consumer complaints.

### 3.2.2. Conciliation for Consumer Disputes

Conciliation is generally understood as a voluntary process to reach a settlement, participated by parties to a dispute with the assistance of an independent third party. When compared with mediation, conciliation is less formal and more flexible. Free conciliation services are rendered by the following statutory bodies to settle consumer disputes within their purviews.

#### 3.2.2.1. Conciliation by Consumer Council

Conciliation is primarily adopted by the Council in handling consumer complaints. The Complaints Officer would assist the complainant and the trader to present their views regarding the dispute with relevant facts, understand the position of each other, identify the issues in dispute and develop options and terms of settlement. In discharging his statutory duty to protect consumers, the Complaint Officer would give advice to the complainant and conduct the conciliation process in a fair manner.

The Complaints Officer, as a conciliator, plays no determinative role regarding the content of the dispute and the outcome of the resolution. Agreements reached through conciliation can be enforced as contract. While most complainants request damages or a refund, some may also seek an apology, changes of trade policies and practices, and a review of work procedures. In 2015, the Council conciliated a total of 13,988 consumer complaints and settled 10,240 of them, with a resolution rate of 73%.

#### 3.2.2.2. Conciliation by the Equal Opportunities Commission

A consumer who is aggrieved by a trader's conduct allegedly violating the anti-discrimination legislation regarding sex, race, family status or disability may file complaint with the Equal Opportunities Commission ("EOC").<sup>7</sup>

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<sup>6</sup> It was a survey conducted by ORC International with a sample size of 1,523 Hong Kong residents aged from 15, who have lived in Hong Kong for at least 5 years via online, face-to-face interview and telephone.

<sup>7</sup> Equal Opportunities Commission, "*What is EOC*"; available at: <http://www.eoc.org.hk/eoc/graphicsfolder/showcontent.aspx?content=our%20work-what%20is%20eoc>

As required by law<sup>8</sup>, the EOC shall endeavor by conciliation to effect a settlement of the dispute to which a complaint filed with it relates, apart from investigating into the complaint, unless it exercises its discretion to discontinue the investigation. It is conducted in an independent and impartial manner. Upon reaching a settlement, the parties would sign an agreement which is legally binding. Conciliation settlement can be in the form of apology, changes of policies and practices, review of work procedures, re-instatement, and monetary settlement.<sup>9</sup> From 1 January 2016 to 30 June 2016, the EOC conciliated a total of 91 discriminatory complaints and settled 62 of them, with a resolution rate of 68.13%.<sup>10</sup>

### 3.2.2.3. Conciliation by the Privacy Commissioner for Personal Data

Conciliation is also employed by the Privacy Commissioner for Personal Data (“PCPD”) in handling complaints relating to personal data privacy. A consumer aggrieved by a trader’s breach of the Personal Data (Privacy) Ordinance (Cap. 486) as a data user may file a complaint with the PCPD. It is a practice that before the PCPD invokes its general powers of investigation, preliminary enquiries are normally carried out, during which the PCPD may conduct conciliation to see whether the case can be resolved without a formal investigation.<sup>11</sup> The conciliation process is voluntary and free of charge; and all information gathered in the conciliation process is kept confidential and is not made available to court proceedings. According to the statistics provided by the PCPD, of the 2,013 cases completed during 2015-16, 243 cases were resolved through conciliation, with a conciliation rate of 12%.

### 3.2.3. Mediation for Consumer Disputes

Mediation closely resembles conciliation. It is also a voluntary, non-binding and private dispute resolution process in which an independent neutral person facilitates an outcome through communication with the disputants. Before the passage of the Mediation Ordinance (Cap. 620), both the terms “mediation” and “conciliation” were occasionally used interchangeably. Upon the passage of the Ordinance, “mediation” is given a statutory meaning making it distinguishable from conciliation as a formalized and structured consensual process. The role of mediator is also well-defined.

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<sup>8</sup> Section 84(3) of the Sex Discrimination Ordinance (Cap. 480), section 80(3) of the Disability Discrimination Ordinance (Cap. 487), section 62(3) of the Family Status Discrimination Ordinance (Cap. 527), and section 78(3) of the Race Discrimination Ordinance (Cap. 602)

<sup>9</sup> Equal Opportunities Commission, “*What is Conciliation*”, available at: <http://www.eoc.org.hk/eoc/graphicsfolder/showcontent.aspx?content=about%20conciliation>

<sup>10</sup> Equal Opportunities Commission, “*Statistics on Enquiries, Complaints and Legal Assistance for the Period of 1 January 2016 to 30 June 2016*”, available at: <http://www.eoc.org.hk/EOC/GraphicsFolder/InforCenter/Papers/StatisticContent.aspx?ItemID=13832#5>

<sup>11</sup> Office of the Privacy Commissioner for Personal Data, “*Complaint Handling Policy*”, available at: [https://www.pcpd.org.hk/english/complaints/policy/complaint\\_policy.html](https://www.pcpd.org.hk/english/complaints/policy/complaint_policy.html)

“Mediation” is defined under the Ordinance as “a structured process comprising one or more sessions”, which engages “impartial individuals”, who “without adjudicating a dispute or any aspect of it, assist the parties to the dispute to do any or all of the following:

- (a) identify the issues in dispute;
- (b) explore and generate options;
- (c) communicate with one another;
- (d) reach an agreement regarding the resolution of the whole, or part, of the dispute.”<sup>12</sup>

An agreement to mediate in writing is also required for the application of the Mediation Ordinance.<sup>13</sup> The protection of confidential nature of the mediation communications is also clearly spelt out in the Ordinance.<sup>14</sup>

According to the statistics of the Joint Mediation Helpline Office (“JMHO”), the 4 most common types of disputes handled in 2015 related to business/partnership (20.3%), ownership of property (15.3%), banking and finance (10.2%) and inheritance (8.5%). In addition, 50.8% of disputes involved dispute amount of HK\$500,000 or below.

#### 3.2.4. Mediation by the Customer Complaint Settlement Scheme

Whilst there is no specific mechanism of mediation for general consumer disputes, mediation is employed by the Customer Complaint Settlement Scheme (“CCSS”) set up under the Communications Association of Hong Kong which comprises all major telecommunications service providers in Hong Kong. CCSS helps resolve billing disputes between telecommunications service providers and their customers through a mediation service provided by independent and trained mediators, via meeting or telephone communications, with a view to settling the whole or part of the dispute.<sup>15</sup> To be eligible for acceptance under the Scheme, the amount of dispute must not be less than HK\$300. The customer complainant has to pay HK\$100 non-refundable service fee for using the mediation service under the Scheme.<sup>16</sup> In 2014-16, among the 132 cases referred to the CCSS for the provision of a mediation service, 126 cases were settled with a resolution rate of 95%, one case could not be finalized and the remaining case was under processing as of 15 June 2016.<sup>17</sup>

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<sup>12</sup> Section 4 of the Mediation Ordinance (Cap. 620)

<sup>13</sup> Section 5(1) of the Mediation Ordinance (Cap. 620)

<sup>14</sup> Section 8 of the Mediation Ordinance (Cap. 620)

<sup>15</sup> Office of the Communications Authority, “Customer Complaint Settlement Scheme for the Telecommunications Industry”, available at: [http://www.ofca.gov.hk/mobile/en/consumer\\_focus/fix\\_telecom/ccss/index.html](http://www.ofca.gov.hk/mobile/en/consumer_focus/fix_telecom/ccss/index.html)

<sup>16</sup> Office of the Communications Authority, *A Guide to Application to the Customer Complaint Settlement Scheme for the Telecommunications Industry*, available at: [http://www.ofca.gov.hk/filemanager/ofca/en/content\\_793/ccss\\_guide.pdf](http://www.ofca.gov.hk/filemanager/ofca/en/content_793/ccss_guide.pdf)

<sup>17</sup> Office of the Communications Authority, *Customer Complaint Settlement Scheme Annual Report 2014-16*, available at: <http://ccss.cahk.hk/en/pdf/2014%20-%202016%20Annual%20Report%2020160718.pdf>

### 3.2.5. Mediation by the Free Mediation Service Pilot Scheme for Building Management

Mediation is also adopted by the Home Affairs Department in collaboration with the Hong Kong Mediation Centre and the Hong Kong Mediation Council to launch a Free Mediation Service Pilot Scheme for Building Management (“BMS”). Starting from March 2015, BMS helps owners and owners’ corporations resolve disputes on management and maintenance work, with assistance from volunteer mediators to provide free professional mediation services. A total of 150 accredited and professional mediators participate in the BMS to provide a maximum of 15 hours free professional mediation services.<sup>18</sup>

### 3.2.6. Mediation by the Financial Dispute Resolution Centre

Mediation has become an integral part of the dispute resolution process of the FDRC (the “Mediation First, Arbitration Next” procedure) in resolving disputes arising from financial services between individuals and sole proprietors and their financial institutions. Further details of the procedure are given in paragraph 4.3.6.1 of this Report.

### 3.2.7. Strengths of Conciliation and Mediation in Consumer Dispute Resolution

From the above examples, it can be seen that conciliation and mediation are the dominant techniques for consumer dispute resolution in the current local ADR landscape. Both of them share the following strengths:

- (a) Procedures of conciliation and mediation are simple and informal when compared to legal proceedings. Therefore, a negotiated outcome can be arrived at in a more expeditious manner than in the case of legal proceedings;
- (b) In most cases, conciliation and mediation are less costly than legal action. As far as consumer disputes are concerned, the consumer complainants and the traders under complaint are not required to pay any fee for conciliation by the Council, the EOC and the PCPD; and for mediation by the BMS;
- (c) With the assistance of the conciliator or mediator, the parties may listen and appreciate the underlying interests and concerns of each other and reach an amicable settlement;
- (d) The parties to the dispute participate in the conciliation or mediation on voluntary basis; and develop the terms of settlement through consensus. It is more likely therefore, that their relation can be preserved than might be the case where the dispute is resolved through an adjudicative process;

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<sup>18</sup> Home Affairs Department, “Free Mediation Service Pilot Scheme for Building Management”, available at: [http://www.buildingmgt.gov.hk/en/whats\\_new/2\\_14.htm](http://www.buildingmgt.gov.hk/en/whats_new/2_14.htm)

- (e) It is also more likely that conciliation and mediation would enable a negotiated outcome to suit the best interests of the parties rather than a decision imposed through an adjudicative process;
- (f) When compared with litigation, both conciliation and mediation are flexible in terms of timing, formality and procedure; and therefore can be conducted in a timely and cost-efficient manner;
- (g) They are solution-oriented. Their efficiency would not be compromised by contention over the issue of who is right or wrong; and
- (h) The communications of conciliation and mediation are kept contained. Confidentiality is a principle that appeals to the parties who intend to privately seek a practical solution to a dispute.

Notwithstanding the strengths of mediation and conciliation, the outcome of such consensual processes depends on the agreement of both parties. A consumer who fails to reach a settlement with a trader may think of the adjudicative process as another means of seeking redress.

### **3.3. Potential Demand for Adjudicative Process**

Apart from those consumers who fail to settle their disputes with traders through conciliation or mediation, the following classes of consumers may also resort to an adjudicative process to resolve their disputes:

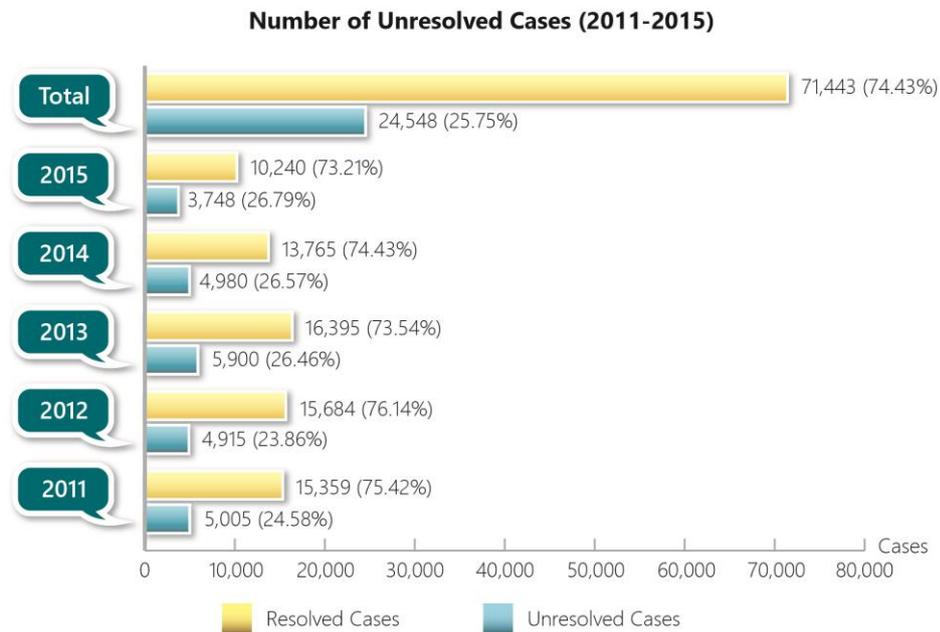
- (a) Consumers who failed to negotiate with traders for a settlement of the disputes, however, for certain reasons do not make recourse to conciliation or mediation; and
- (b) Consumers who in the first instance contemplate having their disputes adjudicated without recourse to conciliation or mediation.

Although it is difficult to quantify the total potential demand by consumers for adjudicative processes, it is reasonable to say that the number of complaints unresolved by the Council would represent part of such potential demand.

#### **3.3.1. Number of Unresolved Cases in Conciliation**

During the period 2011-2015, the Council handled a total of 95,991 complaint cases by conciliation with pursuable grounds, and out of which the Council settled 71,443 cases (74.43%), leaving 24,548 cases (25.57%) unresolved. The percentage of unresolved cases during the period fluctuated from 23.86% to 26.79%; with on average, about 5,000 unresolved cases per year.

Set out below are the statistics on the number of unresolved complaints made to the Council for the period 2011-2015.

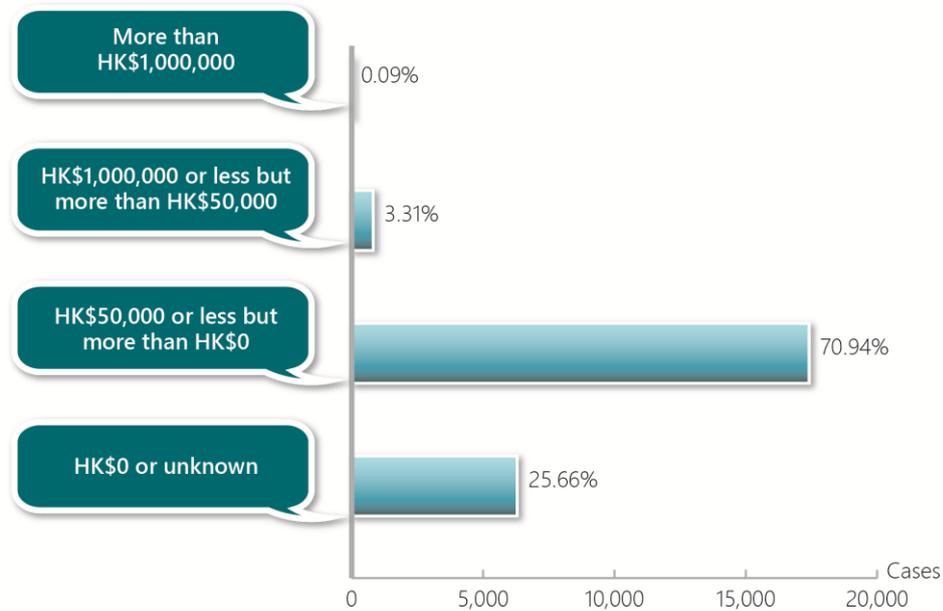


### 3.3.2. Amount Involved in Unresolved Disputes

The courts and tribunals in Hong Kong impose jurisdiction limits in hearing civil claims. For instance, the Small Claims Tribunal (“SCT”) hears civil claims up to HK\$50,000; whereas the District Court hears claims between HK\$50,000 and HK\$1,000,000; and the Court of First Instance of the High Court hears claims above HK\$1,000,000.

The Council’s statistics from 2011-2015 show that 6,300 cases or 25.66% of total unresolved cases neither involved any monetary claim nor recorded any amount in dispute. On the other hand, 17,414 cases or 70.94% of the total unresolved cases involved an amount in dispute at or below HK\$50,000. The former category included cases where consumers asked for non-monetary relief, such as formal apology or explanation from traders, and demanded improvement in services or trade practices. The latter category would seem to fall within the jurisdiction of SCT. These two categories account for a total of 23,714 cases or 96.6% of the total unresolved cases.

### Amount Involved in Unresolved Cases (2011-2015)



## 3.4. Whether Litigation is a Cost-effective Means to Resolve Consumer Disputes

For most consumer claims, it appears that litigation is the only adjudicative process available. However, it is generally not a cost-effective means for resolving consumer disputes, especially those involving insubstantial amounts.

Depending on the amount of claim, aggrieved consumers may claim redress against traders at different levels of courts in Hong Kong, namely, the SCT, the District Court and the Court of First Instance. The legal proceedings at different levels have different implications on resources to be spent by the parties in terms of time and money.

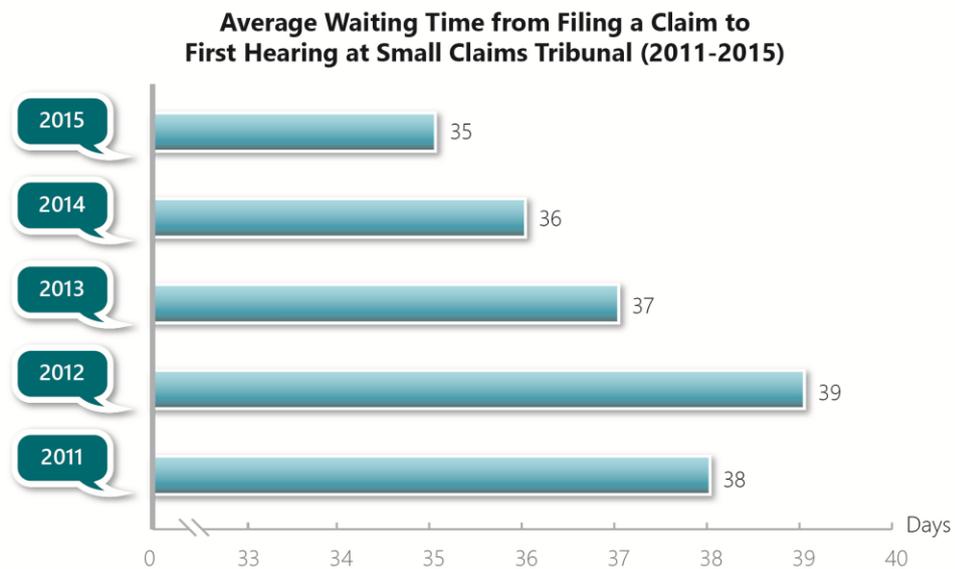
### 3.4.1. Proceedings in the Small Claims Tribunal

The SCT hears and adjudicates civil disputes up to HK\$50,000. Hearings are conducted in a relatively informal manner. No legal representation is allowed. According to the Judiciary, the main types of claims handled by the SCT are: (i) debts; (ii) service charges; (iii) damage to property; (iv) goods sold; and (v) consumer claims.<sup>19</sup> The SCT is a relatively inexpensive and simple forum for consumers to seek redress when compared with other levels of courts in Hong Kong. That said, a consumer claimant would have to spend considerable time and may expose himself to additional costs incurred in cases where the opponent trader loses the case and appeals to the Court of First Instance; or even further as the case may be.

<sup>19</sup> The Judiciary, "Small Claims Tribunal", available at: [http://www.judiciary.gov.hk/en/crt\\_services/pphlt/html/sc.htm](http://www.judiciary.gov.hk/en/crt_services/pphlt/html/sc.htm)

### 3.4.1.1. Lengthy Proceedings

The average time from filing a claim to the first hearing in the SCT was slightly over 1 month during the period of 2011-2015.<sup>20</sup> It is important to note that the waiting time was calculated only up to the first hearing, where the presiding officer would make some prima facie observation and persuade parties to reach settlement, but would not hear the case for adjudication. There are no statistics on the average time from the first hearing to the conclusion of a case and delivery of judgment. Nevertheless, the Judiciary advises claimants on its website that civil litigation in the SCT may be a long-drawn out battle, which will take months before the case is set down for trial and the SCT passes judgment.<sup>21</sup>



### 3.4.1.2. Cost Implication

As seen from the table below, depending on the complaint amount, the cost for filing a claim with the SCT ranges from HK\$20 to HK\$120. Since legal representation is not allowed, no legal fees would be involved in the proceedings, save and except the cost that may be incurred where a party seeks legal advice from lawyer or in some limited circumstances, the case is transferred to the District Court.

<sup>20</sup> Hong Kong Judiciary Annual Reports 2011-2015

<sup>21</sup> *Supra* Note 19

Filing of Claim/Counterclaim and Summons	HK\$
- where the claim does not exceed \$3,000	20
- where the claim exceeds \$3,000 but does not exceed \$17,000	40
- where the claim exceeds \$17,000 but does not exceed \$33,000	70
- where the claim exceeds \$33,000 but does not exceed \$50,000	120
Summons and copy, including service, each witness	33
Application for review	61
Application for leave to appeal	61

Litigation in the SCT can be considered a low-cost exercise. However, a consumer who has won in the SCT may expose himself to the risk of incurring substantial legal costs, and sustaining enormous physical and mental strains in resisting any appeal filed by the trader at the Court of First Instance and as the case may be, further at the Court of Appeal. Such a risk may be more obvious where the opponent is a financially powerful corporation.

Any party who is aggrieved by a decision of the SCT may apply to the Court of First Instance for leave to appeal on any ground involving a question of law or on the ground that the claim was outside the jurisdiction of the SCT.<sup>22</sup> If leave is granted, the appeal will be heard in the Court of First Instance.<sup>23</sup> A party aggrieved by a decision of the Court of First Instance may apply for leave to appeal to the Court of Appeal which may grant the leave if it considers that a question of law of general public importance is involved. The appeal will be heard in the Court of Appeal.<sup>24</sup>

Legal representation is allowed in the appellant courts and the proceedings would tend to be costly. Should the consumer claimant lose the proceedings, he would normally have to pay the majority of the legal costs incurred by opponent. In such a case, when encountering an appeal, a winning consumer litigant may be caught in a dilemma in that on the one hand he would be upset by not resisting the appeal; while on the other hand if the consumer resists the appeal, he has to prepare himself for the substantial legal costs to be incurred in the proceedings. In particular, if the consumer chooses to retain legal representation, the costs may not be fully covered from the other side even if he successfully resists the appeal. Moreover, even if the consumer wins, he may be subject to further appeal and further legal costs. Should the consumer persist and finally win, it is usually the case that he would not be able to recover all the costs incurred. Moreover, if the consumer loses, he will normally have to pay the majority of the costs incurred by the other party (in addition to the costs he incurred).

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<sup>22</sup> Section 28(1) of the Small Claims Tribunal Ordinance (Cap. 338)

<sup>23</sup> Section 29 of the Small Claims Tribunal Ordinance (Cap. 338)

<sup>24</sup> Sections 29A and 29B of the Small Claims Tribunal Ordinance (Cap. 338)

### 3.4.2. Proceedings in the District Court and the Court of First Instance

An aggrieved consumer whose claim exceeds HK\$50,000 but not more than HK\$1 million may institute proceedings in the District Court;<sup>25</sup> whereas if his claim exceeds HK\$1 million he may institute proceedings in the Court of First Instance.<sup>26</sup>

Unlike the SCT, legal representatives are allowed in the courts. Litigation in the District Court and the Court of First Instance has always been regarded as cumbersome, lengthy and costly. The Civil Justice Reform (“CJR”) in 2009 invoked a series of changes in the practices and procedures in the District Court and the High Court. The changes are aimed at, among other things, increasing the cost-effectiveness of practice and procedure in relation to civil proceedings before the courts; ensuring that a case is dealt with as expeditiously as is reasonably practicable; and promoting a sense of reasonable proportion and procedural economy in the conduct of proceedings.<sup>27</sup> For instance, the Court proactively controls the case progress up to trial by measures, such as giving directions on the timetable of steps to be taken up to the date of trial or calling a case management conference, setting milestone dates for a pre-trial review, the trial or the period in which a trial is to take place which may only be varied with permission of the Court in exceptional circumstances,<sup>28</sup> and streamlining the process for interlocutory applications and interlocutory appeals.<sup>29</sup>

In order to achieve a just legal system, there is a need to strike a balance between fairness and efficiency. Litigants under legal proceedings which are adversarial in nature, with a number of procedural safeguards for fairness and justice, would tend to incur substantial costs and expend considerable time and resources. The waiting time for a final decision can also be phenomenally lengthy. For instance, for a civil case in the Fixture List of the District Court, it took 99 days in 2014 and 101 days in 2015 from date of listing to hearing;<sup>30</sup> and for a High Court Action case in the Court of First Instance, it took 261 days in 2013, 193 days in 2014 and 140 days in 2015 from application to fix date to hearing,<sup>31</sup> bearing in mind that normally a considerable

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<sup>25</sup> The Judiciary, “*The District Court*”, available at: [http://www.judiciary.gov.hk/en/crt\\_services/ppht/html/dc.htm](http://www.judiciary.gov.hk/en/crt_services/ppht/html/dc.htm)

<sup>26</sup> If a claim is for an amount that exceeds HK\$1 million, the excess can be abandoned to bring the claim within the jurisdiction of the District Court, since litigation costs are generally lower than those of the Court of First Instance.

<sup>27</sup> Civil Justice Reform, available at: <http://www.civiljustice.gov.hk/eng/home.html>

<sup>28</sup> Order 25 of the Rules of the High Court (Cap. 4A), Order 25 of the Rules of the District Court (Cap. 336H) and Practice Direction 5.2 on Case Management

<sup>29</sup> Orders 32 & 58 of the Rules of the High Court (Cap. 4A), Orders 32 & 58 of the Rules of the District Court (Cap. 336H) and Practice Direction 5.4

<sup>30</sup> Hong Kong Judiciary Annual Reports 2014 & 2015, Tables: Average Waiting Time for Cases in the District Court

<sup>31</sup> Hong Kong Judiciary Annual Reports 2013, 2014 & 2015, Tables: Average Waiting Time for Cases in the High Court

period of time has been taken prior to the listing or application to fix a date. Apart from the congestion of court lists or strain on judicial resources, the proceedings may be prolonged as a result of the tactics of the litigants. The longer the time to complete the proceedings, the more the stress sustained by the consumer litigant who can be haunted by the uncertainty of the outcome and the risk of cost liabilities.

On its website, the Judiciary alerts the public to the unavoidable element of hostility; the uncertain chance of success; the prolonged time consumed; the inevitable mental and physical strain; the escalated legal costs; the complicated legal procedures involved in litigation. Therefore, legal action should always be thought of as a last resort. Even where settlement cannot be reached, it may still not be worthwhile to begin an action.<sup>32</sup>

### 3.4.3. Legal Assistance to Consumers

The cost implication in pursuing lawsuit is a critical disincentive to consumers, especially those who are not affluent, to seek redress through legal action. The situation can only be mitigated to a limited extent by legal assistance which is available only to eligible litigants.

#### 3.4.3.1. Legal Aid

In Hong Kong, the Legal Aid Department of the Government offers a wide scope of legal assistance under the Ordinary Legal Aid Scheme ("OLAS") and the Supplementary Legal Aid Scheme ("SLAS").<sup>33</sup> However, the legal assistance given in the form of legal representation by solicitors and, if necessary, barristers is limited to legal proceedings in the District Court, the Court of First Instance, the Court of Appeal and the Court of Final Appeal but not those in the SCT, of which 70.94% of the total number of unresolved cases handled by the Council during 2011-2015 as mentioned above would have fallen.

An aggrieved consumer may apply for legal assistance under the OLAS, if his claim involves breach of contract, traffic accident claims, tenancy dispute, professional negligence, monetary disputes over derivatives of securities, currency futures or other futures contracts when fraud, misrepresentation or deception is involved in respect of the sale. To successfully apply for legal aid under the OLAS, apart from passing the merits test, an applicant must satisfy the means test of an upper financial resources limit of HK\$290,380.

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<sup>32</sup> The Judiciary, *"The High Court"*, available at: [http://www.judiciary.gov.hk/en/crt\\_services/pphl/html/hc.htm](http://www.judiciary.gov.hk/en/crt_services/pphl/html/hc.htm)

<sup>33</sup> Legal Aid Department, *"Guide to Legal Aid Services in Hong Kong"*, available at: [http://www.lad.gov.hk/eng/documents/ppr/publication/guide\\_to\\_legal\\_aid\\_services\\_in\\_hongkong\(e\)\\_lowr.pdf](http://www.lad.gov.hk/eng/documents/ppr/publication/guide_to_legal_aid_services_in_hongkong(e)_lowr.pdf)

If the applicant can pass the merits test but fails to meet the means test of the OLAS, he may resort to the SLAS which sets the financial resources limit between HK\$290,380 and HK\$1,451,900, if his claim involves personal injuries or death, medical, dental or legal professional negligence, or against any of the following professions: certified public accountants, registered architects, registered professional engineers, registered professional surveyors, registered professional planners, authorized land surveyors, registered landscape architects and estate agents; negligence claims against insurers or their intermediaries in respect of the taking out of the personal insurance products; and monetary claims against vendors in the sale of completed or uncompleted first-hand residential properties, where the claim is likely to exceed HK\$60,000.

It must be noted that the merits test is by no means a relaxed one. The Director of Legal Aid must be satisfied that the case or defence has a reasonable chance of success. In addition, the Director of Legal Aid must also be satisfied that it is reasonable that the applicant should be granted legal aid. Even if the applicant has a prospect of success, the Director of Legal Aid may refuse legal aid in cases where he would be unable to enforce a judgment; or no reasonable person would spend money to retain a lawyer to deal with the case due to its nature or the fact that only a trivial advantage would be gained from it. As for cases where the benefits to be obtained cannot be measured in purely monetary terms (apart from objectively and carefully assessing whether the likely benefit will be sufficient to cover the costs that may be incurred in the proceedings) the Director of Legal Aid will also give due weight to the importance of the case to the applicant.<sup>34</sup>

Moreover, under both the OLAS and the SLAS a legal aided litigant is subject to a contribution payable by him. Aided persons under the OLAS whose financial resources are assessed at between HK\$36,297.51 and HK\$290,380.00 are required to make a contribution on a sliding scale ranging from HK\$726 to HK\$72,595, whereas aided persons under the SLAS are required to pay a non-refundable application fee.

In addition, under the SLAS, the aided person will also be required to pay all legal costs expended on his behalf (including costs which cannot be recovered from the opposite party) out of the damages recovered. If the assisted action is unsuccessful, the interim contribution paid will be used towards the payment of legal costs incurred for his claim and will not be refunded unless there is a surplus after payment of such costs. From January to March 2016, the Legal Aid granted a total of 1,684 Legal Aid Certificates to civil claim applicants, in which 756 of them relates to personal injury claims, 749 relates to matrimonial claims, 9 relates to wages claim and 170 of them relates to other claims.<sup>35</sup>

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<sup>34</sup> Legal Aid Department, "FAQ", available at: <http://www.lad.gov.hk/eng/las/faq.html>

<sup>35</sup> Legal Aid Department, "Statistics", available at: [http://www.lad.gov.hk/eng/statistics/cer\\_ci.html](http://www.lad.gov.hk/eng/statistics/cer_ci.html)

### 3.4.3.2. *Consumer Legal Action Fund*

Aggrieved consumers who are not eligible for Legal Aid may consider submitting an application to the Consumer Legal Action Fund (“CLAF”) for legal assistance. The CLAF is a trust fund set up with the Government funding in 1994 to give greater consumer access to legal remedies by providing financial support and legal assistance.<sup>36</sup> It aims to give easier consumer access to legal remedies by providing financial support and legal assistance for the benefit of consumers.

The Council is the trustee of the CLAF and is responsible, through a Board of Administrators, for the overall administration and investment of the CLAF. The Board is underpinned by a Management Committee, which is responsible for advising on the eligibility and merits of applications seeking assistance from the CLAF. Legal assistance may be in the form of advice, assistance and representation by a solicitor and counsel. Applications seeking assistance under the CLAF are required to exhaust all other means of dispute resolution such as conciliation and mediation. Therefore, legal assistance does not cover assisting the applicant in mediation as part of the litigation process.

Unlike the Legal Aid, applicants under the CLAF need not undergo a mandatory means test in order to qualify for assistance. To optimize the use of the limited resources granted by the Government to the CLAF<sup>37</sup> and attain its social purposes, the CLAF will take a holistic approach by considering all relevant factors, including the chance of success of the matter, the size of the group of consumers involved, whether there is any significant consumer interest involved, the publicity value of the matter, the financial burden of the CLAF, and the applicant’s financial resources, in deciding whether to accept or reject an application.

There is a non-refundable application fee payable at the time of application. If the case falls within the jurisdiction limit of the SCT, the application fee is HK\$100. If the case falls within the jurisdiction limit of the District Court or the Court of First Instance, the application fee is HK\$1,000.

The CLAF will be responsible for paying all costs and expenses once assistance is granted to the applicant. For a successful case where the consumer has obtained compensation, either through court adjudication or out of court settlement, the assisted consumer will need to make a contribution to the CLAF, which is in general

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<sup>36</sup> Consumer Council, “*Consumer Legal Action Fund*”, available at: [https://www.consumer.org.hk/sites/consumer/files/claf\\_en.pdf](https://www.consumer.org.hk/sites/consumer/files/claf_en.pdf)

<sup>37</sup> The Government granted a sum of HK\$10 million as initial capital to the CLAF. Additional capital amounting to HK\$10 million was further injected by the HKSAR to the fund on 6 September 2010, increasing the capital to HK\$20 million. The balance of the CLAF was about HK\$12,370,000 as of 30 September 2015.

10% of the benefit value received; subject to a cap of 25% for cases in the SCT and 50% for all other matters. From 30 November 1994 to 31 March 2016, the CLAF granted assistance to 699 applications and declined 423 applications.

### 3.4.3.3. *Legal Assistance offered by the Equal Opportunities Commission and Privacy Commissioner for Personal Data*

If a consumer is aggrieved by a conduct of a trader contravening the Equal Opportunities legislations, he may apply to the EOC for assistance. Upon recommendation of the EOC lawyer, the EOC Legal and Complaints Committee will decide whether assistance should be granted, taking into account a number of factors, including whether the case raises a question of principle; whether the case is so complex that it is unreasonable to expect persons to deal with them unaided; strength of evidence and likelihood of success; and whether the case can set an important legal precedent.<sup>38</sup>

Assistance offered by the EOC may include giving legal advice about the strengths and weaknesses of the case, arranging for the EOC lawyers to act as legal representatives, and arranging for either the EOC lawyers or external lawyers to appear in court for an aggrieved consumer if legal proceedings are commenced.

The EOC will normally pay the cost incurred by the EOC for the assisted litigant. However, in the event that the court awards an order against the assisted litigant, he has to bear the same because the legal assistance may not cover his liability to pay the other party's costs.

A consumer who suffers damage by reason of a contravention of a requirement under the Personal Data (Privacy) Ordinance by a trader as a data user may be entitled to compensation from that data user for that damage.<sup>39</sup> He may apply to the PCPD for legal assistance.<sup>40</sup> In assessing the application, similar factors to those in the EOC will be considered by the PCPD.

The legal assistance may take the form of legal advice, mediation and legal representation to the assisted person in court, including any steps preliminary or

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<sup>38</sup> Equal Opportunities Commission, *"Information Note on Legal Assistance from the EOC"*, available at: <http://www.eoc.org.hk/EOC/Upload/UserFiles/File/legalAssistance/legalAss2013E.pdf>

<sup>39</sup> Section 66 of the Personal Data (Privacy) Ordinance (Cap. 486)

<sup>40</sup> Section 66B of the Personal Data (Privacy) Ordinance (Cap. 486) provides that the Commissioner may grant legal assistance to a data subject who suffers damage by a contravention of the Personal Data (Privacy) Ordinance.

incidental to any proceedings, or in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings.<sup>41</sup>

The PCPD will normally bear the costs of providing legal assistance, except cost liability arising from an adverse costs order due to an assisted litigant's unreasonable behavior.

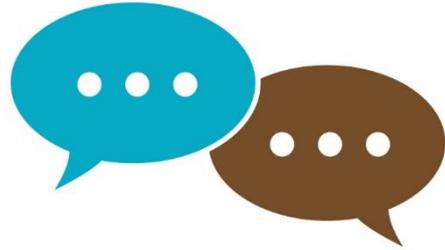
If the assisted person is successful in his claim and recovers the related costs and expenses, the PCPD has a first charge on such costs or expenses payable by other persons to the assisted person.

### 3.5. Conclusion

As shown in the Council's complaint data during 2011-2015, it is estimated that at least around 5,000 consumer complaints would be left unresolved each year. It can be concluded that these unresolved cases form part of the potential demand for adjudicative processes to resolve consumer disputes, and such potential demand is enormous. This pool of aggrieved consumers would find litigation expensive, lengthy and cumbersome and disproportionate to their claims. Although they may seek legal assistance from the Legal Aid Schemes, the CLAF, the EOC or the PCPD respectively, all these legal assistance schemes are publicly funded, and their applications are subject to stringent tests. It follows that only a limited number of aggrieved consumers can have access to legal assistance. An inexpensive, expeditious and effective adjudicative option would therefore satisfy a potentially substantial demand by aggrieved consumers who are outside the safety net of legal assistance.

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<sup>41</sup> Personal Data (Privacy) Commission, "Legal Assistance for Civil Claims under the Personal Data (Privacy) Ordinance", available at: [http://www.pcpd.org.hk/english/publications/files/legal\\_assistance\\_e.pdf](http://www.pcpd.org.hk/english/publications/files/legal_assistance_e.pdf)



## Chapter 4

### Options of Adjudicative Process and their Application in Hong Kong

#### ***Key Points***

- Consumers who have failed to reach a settlement through consensual process or who are determined to obtain an impartial, binding and final decision on disputes would need an adjudicative option that is cheaper, quicker and more convenient than litigation.
- In Hong Kong, arbitration is predominantly used for settling business-to-business disputes. On the other hand, adjudication is employed in the construction industry as an interim dispute resolution process and by the Insurance Claims Complaints Bureau in resolving consumer disputes arising from insurance contracts.
- An adjudicative ADR process for consumer disputes should be developed on the basis of arbitration.
- The application of arbitration should be extended to resolving general consumer disputes for consumers who would like to seek a binding decision and/or legal redress against traders.
- Arbitration when applied to consumer dispute resolution should not be a stand-alone procedure and the use of arbitration in conjunction with mediation would be preferable.
- Such a model would offer the parties a chance to have recourse to a consensual process more likely to be cost effective and capable of maintaining an amicable relationship.

## 4.1. Adjudication

It is quite clear from the preceding Chapter that litigation is not an option preferred by consumers and most would prefer an adjudicative option that is cheaper, quicker and more convenient.

Adjudication can be defined as a process where a neutral third party gives a decision which is binding on the parties in dispute unless or until it is revised in arbitration or litigation. It is not commonly used in Hong Kong as a dispute resolution means, but does exist. For example, it is employed in the construction industry as an interim dispute resolution process before arbitration at the end of a contract.<sup>42</sup> The majority of construction contracts in Hong Kong allow post-completion arbitration as a means of ADR. With regard to public works contracts, voluntary adjudication is an additional option to voluntary mediation before parties in dispute go for arbitration.<sup>43</sup> Adjudication is also recommended as one of the 5 dispute resolution methods that should be provided in a construction contract for the contracting parties to choose.<sup>44</sup> The decision of an adjudicator is binding only in the interim. In other words, it is not final and can be challenged in a post-completion arbitration.<sup>45</sup>

Adjudication is also applied in resolving consumer disputes arising from insurance contracts by the Insurance Claims Complaints Bureau ("ICCB").

### 4.1.1. Adjudication by the Insurance Claims Complaints Bureau

Established in February 1990, the ICCB is a self-regulatory initiative implemented by the insurance industry to resolve consumer complaints on insurance matters.<sup>46</sup> The ICCB handles insurance complaints arising from all types of personal insurance policies.

The ICCB resolves claims between consumers and their insurers by way of independent and impartial adjudication through its Complaints Panel which handles complaints either from policyholders themselves or their beneficiaries and rightful claimants against the insurers.<sup>47</sup> The Complaints Panel is an independent body led

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<sup>42</sup> Clause 1.1 of the Hong Kong Standard Dispute Resolution Clause 2015, Hong Kong Construction Arbitration Centre Limited

<sup>43</sup> Construction Industry Council, *Reference Materials for Application of Dispute Resolution in Construction Contracts*, August 2015, p.17

<sup>44</sup> *Ibid.* The 5 dispute resolution methods are (i) mediation, (ii) adjudication, (iii) independent expert certifier review, (iv) expert determination and (v) short form arbitration.

<sup>45</sup> *Supra* Note 43 p.24

<sup>46</sup> The Insurance Claims Complaints Bureau, *About the ICCB*, available at: [http://www.iccb.org.hk/en\\_introduction.htm](http://www.iccb.org.hk/en_introduction.htm)

<sup>47</sup> The Insurance Claims Complaints Bureau, *Introduction*, available at: [http://www.iccb.org.hk/en\\_complainsintroduction.htm](http://www.iccb.org.hk/en_complainsintroduction.htm)

by a chairman appointed with the prior consent of the Secretary for Financial Services and the Treasury. The Complaints Panel's decisions are binding on insurers who are members of the ICCB, without any right of appeal. However, if complainants find the Complaints Panel's decision unacceptable, they are free to seek legal redress, because their legal rights are not affected by any decision of the Complaints Panel. The Office of the Commissioner of Insurance also maintains a monitoring role to ensure that complaints are properly handled.<sup>48</sup>

If an insurance claim dispute involves a financial institution which is one authorized by the Hong Kong Monetary Authority ("HKMA") or licensed by or registered with the Securities and Futures Commission ("SFC"), consumers may also resort to the FDRC for dispute resolution through mediation or, failing which, arbitration.<sup>49</sup>

The Complaints Panel, in making its ruling, shall have regard to and act in conformity with the terms of the relevant policy, general principles of good insurance practice, any applicable rule of law or judicial authority; and any codes and guidelines issued from time to time by the Hong Kong Federation of Insurers ("HKFI") or the ICCB. In other words, the Complaints Panel, in making a ruling, can look beyond the strict interpretation of policy terms as far as good insurance practice is concerned. The Complaints Panel also relies heavily on the expected standards set out in the Code of Conduct for Insurers published by the HKFI. In order to achieve what would be a fair and reasonable solution to the complainant, the Complaints Panel will carefully consider the merits of each case before making a ruling.<sup>50</sup>

Any complaint received by the ICCB shall be screened to ensure there is some substance in the complaint, and that the complaint falls within the terms of reference of the ICCB. Then, the ICCB shall refer the complaint to the member for a reply. Unless the member settles the complaint, or the complaint is determined to be groundless, the ICCB shall pass the complaint to 3 honorary secretaries for their opinions in accordance with the rules, practice and procedures regarding the handling of complaints determined by the Complaints Panel. Following receipt of the advisory reports from the honorary secretaries in relation to any complaint, the ICCB shall refer any recommendation for settlement to the member under complaint for consideration.<sup>51</sup>

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<sup>48</sup> Para. 14, LC Paper No. CB(2)1237/12-13(02) on Institutional Framework for the Governance and Operation of the Health Protection Scheme

<sup>49</sup> *Ibid.*, para. 13.

<sup>50</sup> The Insurance Claims Complaints Bureau, "*Powers of the Complaint Panel*", available at: [http://www.iccb.org.hk/en\\_powercomplaints.htm](http://www.iccb.org.hk/en_powercomplaints.htm)

<sup>51</sup> The Insurance Claims Complaints Bureau, "*Complaints Handling Procedures*", available at: [http://www.iccb.org.hk/en\\_complaintshandling.htm](http://www.iccb.org.hk/en_complaintshandling.htm)

Unless the member settles the complaint at this stage, the ICCB shall pass the complaint together with the advisory reports of the honorary secretaries to the Complaints Panel for final determination. Following any meeting or hearing of a complaint, the Complaints Panel may, upon resolution by the members of the Complaints Panel, facilitate the satisfactory settlement or withdrawal of the complaint by making an award against the member against whom the complaint is made, or making a recommendation, or dismissing the complaint.

The ICCB provides free of charge adjudication services to complainants, and is solely financed by the insurance industry. The Complaints Panel's jurisdiction limit in adjudicating a dispute is HK\$1,000,000. The ICCB will accept complaints from all policyholders regardless of their country of residence. If an insured holds multiple policies, the aggregate amount of the individual claims involved should not exceed HK\$1,000,000 should the causes of the claim rejection be identical or similar. As regards long-tail and periodic claims, the total claim amount, calculated up to a period of 5 years, should not exceed HK\$1,000,000.<sup>52</sup>

In 2015, amongst the various types of personal insurance products examined, hospitalization/medical and travel insurance policies constituted the 2 largest groups of claim disputes. There were 49 cases presented to the Complaints Panel for deliberation. The Complaints Panel ruled in favour of the complainants in 2 cases and upheld the insurer's decision in 47 cases. In total, 56 complainants received an aggregate of HK\$2.75 million claims compensation from insurance companies either through settlement or award by the Complaints Panel.<sup>53</sup>

To summarize, the key features of the adjudicative process of the Complaints Panel are stated as follows:

- (a) It is conducted under an industry-specific adjudication scheme backed by a solid self-regulatory framework;
- (b) It is conducted by a designated body, namely the Complaints Panel which is not subject to the agreement of the parties;
- (c) It is funded by the industry;
- (d) All complaints are screened before being handled;
- (e) It is free of charge;
- (f) Jurisdictional limit is set in terms of the amount of money claimed;

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<sup>52</sup> The Insurance Claims Complaints Bureau, "*Terms of Reference*", available at: [http://www.iccb.org.hk/en\\_termofreference.htm](http://www.iccb.org.hk/en_termofreference.htm)

<sup>53</sup> The Insurance Claims Complaints Bureau, "*Statistics*", available at: [http://www.iccb.org.hk/en\\_statistics.htm](http://www.iccb.org.hk/en_statistics.htm)

- (g) Pre-adjudication settlement is encouraged, but mediation is not formally a part of the process; and
- (h) The adjudication decision is binding on the insurer but not the consumer, who may resort to legal action if he is not satisfied with the outcome.

## 4.2. Arbitration

Arbitration, which is more formal than the process of adjudication is primarily used in Hong Kong as a means to resolve commercial and construction disputes.

Arbitration is a private and confidential process which can provide parties with a relatively fast, final and binding resolution of a dispute. Arbitration is normally conducted in accordance with the terms of an arbitration agreement between the parties and the Arbitration Ordinance (Cap. 609), the object of the latter is to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense.<sup>54</sup>

Arbitration as an option of adjudicative process has the following advantages:

- (a) The parties to the dispute may choose and agree on the neutral third party, i.e., the arbitrators, whom they have confidence in terms of expertise, impartiality and fairness. Such autonomy is not catered for in the court system;
- (b) The arbitral decision or award is final and binding unless the parties have opted to confer the right to challenge on the ground of serious irregularities or appeal on question of law by express provisions in the arbitration agreement.<sup>55</sup> There is no general right of appeal against the merits of an award.<sup>56</sup> A party can seek redress against an award only in the limited circumstances set out in section 81 of the Arbitration Ordinance, such as where a party to the arbitration agreement was under some incapacity, and the award is in conflict with the public interest. This would ease the concern of consumers over the possibility of multiple interlocutory proceedings or appeal which are resource demanding;
- (c) Arbitration is conducted in a manner that is less formal and more flexible than court proceedings. The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.<sup>57</sup> It echoes with the principles set out in section 3 of the Arbitration Ordinance that the parties to a dispute should be free to agree on how the dispute

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<sup>54</sup> Section 3(1) of the Arbitration Ordinance (Cap. 609)

<sup>55</sup> Section 99 and Schedule 2 of the Arbitration Ordinance (Cap. 609)

<sup>56</sup> Section 81(3) of the Arbitration Ordinance (Cap. 609)

<sup>57</sup> Section 47 of the Arbitration Ordinance (Cap. 609)

should be resolved subject to the observance of safeguards that are necessary in the public interest, and that the court should interfere in the arbitration of a dispute only as expressly provided for in the Arbitration Ordinance.<sup>58</sup> A self-customized and simplified procedure by the parties may help save time and cost.

- (d) Impartiality and fairness of arbitral proceedings are secured expressly by section 46 of the Arbitration Ordinance which provides that the parties must be treated with equality; and when conducting arbitral proceedings or exercising any of the powers conferred by the Arbitration Ordinance or by the parties, the arbitral tribunal is required:
  - (i) to be independent;
  - (ii) to act fairly and impartially as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents; and
  - (iii) to use procedures that are appropriate to the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for resolving the dispute to which the arbitral proceedings relate.
- (e) Unless otherwise agreed, an arbitral tribunal can award the same remedy or relief as that ordered by Hong Kong courts;<sup>59</sup>
- (f) Confidentiality is maintained. Arbitration is not open to public scrutiny like disputes in court, and the hearings and awards are kept private and confidential, which helps preserve positive relationships; and
- (g) Cross-border enforceability is another advantage of arbitration. By virtue of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention), awards made in Hong Kong are enforceable in more than 140 jurisdictions. Moreover, through the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region (Arrangement), awards made in Hong Kong can be enforced in Mainland China.

### 4.3. Suitability of Arbitration to Consumer Disputes

Arbitration may be able to satisfy those consumers who want a final and binding decision on factual questions or issues of liability which cannot be obtained from either conciliation or mediation. The role of conciliator or mediator is to facilitate negotiation

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<sup>58</sup> The Arbitration Ordinance contains relatively few provisions that cannot be excluded by the parties such as the requirement for the arbitration agreement to be in writing (Section 19 of the Arbitration Ordinance), the competence of the arbitral tribunal to rule on its own jurisdiction (Section 34 of the Arbitration Ordinance), the requirement for arbitrator on equality, fairness and impartiality (Section 46 of the Arbitration Ordinance), the court's power to extend agreed time limits to commence arbitral proceedings, or to commence any other dispute resolution procedure that must be exhausted before arbitral proceedings can be commenced (Section 58 of the Arbitration Ordinance).

<sup>59</sup> Section 70 of the Arbitration Ordinance (Cap. 609)

in the consensual process. He has no power to investigate into the case and can only make recommendations which are not binding to the parties; and a settlement agreement of conciliation or mediation can only be enforced as a legally binding contract and does not have as much legal force as an arbitral award or a court order.

The procedural advantage of arbitration over legal proceedings for being less formal and more flexible would meet the need of consumers who want speedy and less costly resolution. Arbitration is particularly suitable for resolution of those consumer disputes involving factual questions of a technical nature or interpretation of contract terms, for which the parties can select professionals having the relevant expertise and experience as arbitrators with a view to resolving the disputes in a quick and efficient manner. These kinds of cases include the following:

#### 4.3.1. Beauty Services

From the Council's data, it was not uncommon that complainants in this sector allegedly sustained personal injuries during beauty treatments, which in some cases involved high risk medical procedures such as laser/intense pulsed light therapy, plastic surgery and aesthetic medicine injections. Other unresolved cases related to disputes over authenticity of claims made by the traders and effectiveness of treatment.

**Number of Unresolved Complaints concerning Beauty Services during 2011-2015**

	2011-2015	2011	2012	2013	2014	2015
Beauty Services	1,190	226	251	260	256	197

**Amount of Unresolved Complaints concerning Beauty Services during 2011-2015**

	2011-2015	2011	2012	2013	2014	2015
HK\$0 or unknown *	156	27	30	36	41	22
HK\$50,000 or less but more than HK\$0	918	181	197	204	188	148
HK\$1,000,000 or less but more than HK\$50,000	114	17	24	20	26	27
More than HK\$1,000,000	2	1	0	0	1	0
Total	1,190	226	251	260	256	197

\* Some consumers may claim for non-monetary relief such as formal apology or service improvement while some may not be able to quantify their claims by the time of making the complaint.

In South Korea, this type of complaint is addressed by the Medical Dispute Mediation and Arbitration Agency that resolves disputes between aggrieved consumers and medical practitioners with a panel by "mediation" or arbitration, which comprises a judge, a public prosecutor or qualified attorney-at-law, a public health or medical professional, a person recommended by non-government organizations having good

knowledge of consumer rights and interests, and an academic from a research institute or university who is not a public health or medical professional.<sup>60</sup>

#### 4.3.2. Electronic Devices and Electrical Appliances

There have been unresolved complaints concerning the quality of electronic devices such as smartphones, computers, waterproof digital cameras, and electrical appliances, such as air conditioners, washing machines and refrigerators, in terms of performance, durability and advertising claims. Technical issues are often involved and specific expertise is necessary to understand the problem at hand, which can only be provided by experts in the relevant field. In the absence of this expertise the dispute often remains deadlocked.

**Number of Unresolved Complaints concerning Electronic Devices and Electrical Appliances during 2011-2015**

	2011-2015	2011	2012	2013	2014	2015
Telecommunication Equipment	1,958	303	459	507	401	288
Computer Products	982	198	197	277	181	129
Electrical Appliances	1,484	264	320	339	321	240
Total	4,424	765	976	1,123	903	657

**Amount of Unresolved Complaints concerning Electronic Devices and Electrical Appliances during 2011-2015**

	2011-2015	2011	2012	2013	2014	2015
HK\$0 or unknown*	857	176	206	214	155	106
HK\$50,000 or less but more than HK\$0	3,554	586	768	907	745	548
HK\$1,000,000 or less but more than HK\$50,000	13	3	2	2	3	3
More than HK\$1,000,000	0	0	0	0	0	0
Total	4,424	765	976	1,123	903	657

\* Some consumers may claim for non-monetary relief such as formal apology or service improvement while some may not be able to quantify their claims by the time of making the complaint.

#### 4.3.3. Decoration/Renovation Services

There have also been unresolved complaints by applicants to the CLAF against contractors of home renovations for delay in completion and quality of work. The cases are often related to problems found in workmanship, factual questions of

<sup>60</sup> According to a Research Report on Regulation of Aesthetic Practices in Selected Places conducted by the Research Office, Information Services Division, Legislative Council Secretariat dated 28 November 2014, a Medical Dispute Mediation and Arbitration Agency was set up in South Korea to provide mediation service between aggrieved consumers and medical practitioners. Since its establishment in 2012, over 2,200 mediation requests involving different kinds of medical matters have been received, of which 42% have been settled successfully, involving compensation claims of 123 billion Korean won (which is equivalent to around HK\$873 million). They would come up with a legally binding mediation result within 90 days.

whether the projects have been completed or live up to professional standards. For instance, a dispute arose as to whether the cracks found in a kitchen countertop were caused by misuse of the consumer or inherent defects of the countertop materials.

In these cases, where conciliation has failed, the complainants would not accept the traders' explanations even if they were purportedly made on the basis of relevant professional knowledge and experience. To pursue claims arising from this kind of dispute through legal proceedings would be costly and lengthy as it may involve expert evidence to support or rebut arguments on numerous factual issues. It is more likely that parties in these types of dispute would agree to submit themselves to adjudication by an independent and impartial arbitrator or panel of arbitrators equipped with relevant professional experience and knowledge.

**Number of Unresolved Complaints concerning Decoration/Renovation Services during 2011-2015**

	2011-2015	2011	2012	2013	2014	2015
Decoration/Renovation Services	481	123	86	97	104	71

**Amount of Unresolved Complaints concerning Decoration/Renovation Services during 2011-2015**

	2011-2015	2011	2012	2013	2014	2015
HK\$0 or unknown*	64	17	14	12	14	7
HK\$50,000 or less but more than HK\$0	210	54	34	45	47	30
HK\$1,000,000 or less but more than HK\$50,000	207	52	38	40	43	34
More than HK\$1,000,000	0	0	0	0	0	0
Total	481	123	86	97	104	71

\* Some consumers may claim for non-monetary relief such as formal apology or service improvement while some may not be able to quantify their claims by the time of making the complaint.

#### 4.3.4. Bank and Financial Services

Unresolved complaints regarding bank and financial services often relate to representations made by sales representatives selling financial products. Deadlock usually arises during conciliation due to disputes over the content and/or interpretation of the representations made during sales process and traders' strict reliance on the standard terms of the contract concerned, such as the 'entire agreement' clause.

Usually in such cases, the amount involved is relatively substantial. The parties to dispute who have failed to settle, may wish to resolve the deadlock through an adjudicative process in lieu of court proceedings, for an authoritative ruling on the merits.

**Number of Unresolved Complaints concerning Bank and Financial Services during 2011-2015**

	2011-2015	2011	2012	2013	2014	2015
Bank and Financial Services	488	68	84	119	103	114

**Amount of Unresolved Complaints concerning Bank and Financial Services during 2011-2015**

	2011-2015	2011	2012	2013	2014	2015
HK\$0 or unknown*	206	32	42	53	43	36
HK\$50,000 or less but more than HK\$0	191	29	33	45	38	46
HK\$1,000,000 or less but more than HK\$50,000	86	6	9	18	21	32
More than HK\$1,000,000	5	1	0	3	1	0
Total	488	68	84	119	103	114

\* Some consumers may claim for non-monetary relief such as formal apology or service improvement while some may not be able to quantify their claims by the time of making the complaint.

#### 4.3.5. Properties

Property owners may encounter disputes with their owners' corporation and/or the management committee that involve interpretation of the Building Management Ordinance and the deed of mutual covenant, the powers and responsibilities of owners' corporation, and the apportionment of building maintenance fee and management fee. These issues are highly technical. An impartial and independent arbitrator or panel of arbitrators with relevant professional knowledge and expertise in the property and conveyancing sectors could adjudicate on the disputes in a relatively quick and efficient manner.

**Number of Unresolved Complaints concerning Properties during 2011-2015**

	2011-2015	2011	2012	2013	2014	2015
Properties	115	39	19	13	20	24

**Amount of Unresolved Complaints concerning Properties during 2011-2015**

	2011-2015	2011	2012	2013	2014	2015
HK\$0 or unknown*	56	20	7	7	7	15
HK\$50,000 or less but more than HK\$0	31	11	7	3	4	6
HK\$1,000,000 or less but more than HK\$50,000	17	4	2	2	6	3
More than HK\$1,000,000	11	4	3	1	3	0
Total	115	39	19	13	20	24

\* Some consumers may claim for non-monetary relief such as formal apology or service improvement while some may not be able to quantify their claims by the time of making the complaint.

## 4.3.6. Current Use of Arbitration in Consumer Dispute Resolution

### 4.3.6.1. Arbitration by the Financial Dispute Resolution Centre

Notwithstanding that arbitration would be an efficient adjudicative option for resolving consumer disputes, its application is basically limited to the disputes involving monetary loss up to HK\$500,000 between consumers and financial institutions handled by the FDRC.

The objective of the FDRC is to provide an independent and affordable avenue as an alternative to litigation in resolving such monetary disputes.<sup>61</sup>

It is an independent and impartial organization administering the Financial Dispute Resolution Scheme which requires financial institutions who are its members to resolve monetary disputes with consumers by way of a one-stop dispute resolution service of “mediation first, arbitration next”. All the financial institutions authorized by the HKMA or licensed by the SFC, except for credit rating services, are members of the Scheme. In the first three years of its establishment in 2011, the FDRC was jointly funded by the Government, the HKMA and the SFC. With effect from 1 January 2015, the FDRC is funded by the financial institutions as part of the financial industry’s commitment to the general public to resolve disputes in a fair and efficient manner.<sup>62</sup> The service is supported by a list of mediators and a list of arbitrators. The mediation and arbitration processes are administered by trained case officers.<sup>63</sup>

The claimant is required to pay an application fee and the case officer will verify if the application is within the terms of reference of the FDRC. If the answer is in the affirmative, mediation will be arranged for the claimant and the member financial institution. Mediation fees are required. If the dispute cannot be settled by mediation, the claimant may decide to proceed to arbitration upon payment of arbitration fees. The arbitrator will make a final and binding arbitral award which can only be appealed on a point of law.<sup>64</sup>

The fee chargeable for the mediation service of the FDRC ranges from HK\$1,000 to HK\$5,000 and from HK\$2,000 to HK\$10,000 for eligible claimant and financial institution respectively; and the fee chargeable for the arbitration service ranges from

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<sup>61</sup> Para. 4.1 of the Terms of Reference of the Financial Dispute Resolution Centre, available at [http://www.fdr.org.hk/en/doc/FDRC\\_ToR\\_Section\\_B\\_en.pdf#nameddest=8](http://www.fdr.org.hk/en/doc/FDRC_ToR_Section_B_en.pdf#nameddest=8)

<sup>62</sup> *Ibid.*, Paras.8.2-8.3

<sup>63</sup> Factsheet on the Financial Dispute Resolution Centre, available at: [http://www.fdr.org.hk/en/doc/FDRC\\_Consumer\\_FactSheet\\_1\\_en.pdf](http://www.fdr.org.hk/en/doc/FDRC_Consumer_FactSheet_1_en.pdf)

<sup>64</sup> See the definition of “arbitral award” under and Clause 3.12.1 of the Financial Dispute Resolution Scheme Mediation and Arbitration Rules, Financial Dispute Resolution Centre, February 2014.

HK\$5,000 to HK\$12,500 and from HK\$12,500 to HK\$20,000 for eligible claimant and financial institution respectively.<sup>65</sup>

#### 4.3.7. Application of Arbitration to General Consumer Disputes

Although the application of arbitration to consumer disputes is basically limited to the financial industry, it has marked a significant step to extend the application of arbitration from the sphere of commerce to the sphere of consumer redress and can therefore be accepted as a relevant precedent to extend it even further to cover general consumer disputes. The potentially substantial demand for adjudicative process as shown in Chapter 3 could be seen as further justifying such an extension.

#### 4.3.8. Costs of Arbitration

Notwithstanding all its advantages, it is fair to say that arbitration could be expensive, and in some cases could be even more expensive than court proceedings. Perhaps, this explains why arbitration is generally not used for resolving consumer disputes. As pointed out by the Third Party Funding for Arbitration Sub-committee of the Law Reform Commission, the amount of costs that parties must incur to conduct arbitration varies from case to case. There is no set guidance as to the amount each arbitration will cost each party. The costs of arbitration are dependent on a number of variable factors, including but not limited to the following:

- (a) the amount in dispute;
- (b) the fees of the solicitors and barristers whom the party instructs;
- (c) the length and complexity of the procedural timetable set by the arbitral tribunal;
- (d) the complexity and number of the legal and factual issues in dispute, which will require commensurate work by the parties' counsel to put forward in legal submissions;
- (e) whether experts are required (and the fees that they charge);
- (f) the fees of the arbitral tribunal (which vary either due to the set fees charged by each arbitral institution, or the fees of each arbitrator as agreed to be paid by the parties, i.e., not against a set scale);
- (g) the administrative and registration fees of an arbitral institution if it is an institutional arbitration;
- (h) the amount of documentation that is required to be reviewed and produced in the arbitration, and the cost of the solicitor's fees and/or the technical tools (i.e. specialized document review IT programs) to review that documentation;

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<sup>65</sup> The Financial Dispute Resolution Centre, "Fees", available at: [http://www.fdrc.org.hk/en/html/resolvingdisputes/resolvingdisputes\\_scheduleoffees.php](http://www.fdrc.org.hk/en/html/resolvingdisputes/resolvingdisputes_scheduleoffees.php)

- (i) the costs of holding a hearing, including the cost of hiring facilities in which to hold the hearing, the cost of accommodation and transport for the arbitral tribunal as well as counsel. A hearing is also a cost intensive phase in relation to legal representation fees incurred by the parties; and
- (j) the costs of enforcing an arbitral award, or applying to a court to challenge or set aside the arbitral award.<sup>66</sup>

Moreover, the Third Party Funding for Arbitration Sub-committee of the Law Reform Commission observed that arbitration is becoming increasingly expensive and parties to arbitration may need access to third party funding to bring a claim or counterclaim.<sup>67</sup> This can be one of the reasons why so far the use of arbitration is largely confined to high value business disputes such as those arising from building, construction and shipping contracts.

In this premise, it will not be practicable to transplant arbitration rules used in commercial sector to a consumer dispute resolution mechanism. Most consumer disputes, as shown in the Council's statistics, involve a modest amount of money. Arbitration process designed for consumer disputes should avoid the risk of having the costs incurred outweigh the claim at stake. To make arbitration a viable form of consumer dispute resolution, apart from leveraging its advantages mentioned above, the costs to be borne by the parties should be kept to a level that they would find it an attractive means to resolve their disputes. It appears that most consumer disputes involve relatively simple questions of fact and issues of law. A set of effective cost controlled arbitration rules specifically designed for general consumer disputes would not compromise procedural fairness, but would rather ensure an organized, economical and expeditious dispute resolution process. Recommendations in this regard will be given in Chapter 7.

#### **4.4. Interplay between Arbitration and other ADR Processes for Resolving Consumer Disputes**

Apart from cost control measures, to ensure greater efficiency in terms of time and money, the possibility of achieving resolution through an interplay between arbitration and other ADR processes should be looked into.

##### **4.4.1. Arbitration and Mediation**

According to the Council's statistics, from 2011 to 2015, 25.66% of the total unresolved cases neither involved any monetary claim nor recorded any amount in

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<sup>66</sup> Para.2.46 of the Consultation Paper on Third Party Funding for Arbitration, Third Party Funding for Arbitration Subcommittee of the Law Reform Commission, October 2015

<sup>67</sup> *Ibid.*, Para.5.6.

dispute. For this kind of disputes, consumers may wish to seek for non-monetary redress such as an apology, a change of trade policies or practices, or a review of work procedure. Mediation, which seeks to have a dispute settled in an amicable manner, would possibly better serve such a need of consumers, and could help preserve the relationship between consumers and traders at the same time.

If a dispute can be resolved by settlement at the pre-arbitral stage or even during the arbitration process before it concludes, time and money would be saved for both parties.

The interplay between mediation and arbitration has been exemplified by the Medical Dispute Mediation and Arbitration Agency of South Korea and the Hong Kong FDRC which makes mediation a mandatory process of dispute resolution under its "Mediation First, Arbitration Next" procedure. Even though a consensual process is not incorporated in the ICCB adjudication mechanism as seen in paragraph 4.1.1 of this Report, members of ICCB are also encouraged to settle with the complainants. Further examples of interplay between arbitration and mediation in foreign ADR mechanisms will be discussed in Chapter 6 of this Report.

In Hong Kong, interplay between arbitration and mediation is also facilitated by section 33 of the Arbitration Ordinance. This provides that if the parties consent in writing, and so long as none of them withdraws consent in writing, an arbitrator may act as a mediator after the arbitral proceedings have commenced. If an arbitrator acts as a mediator, the arbitral proceedings must be stayed to facilitate the conduct of the mediation proceedings. In addition, no objection may be made against the conduct of the arbitral proceedings by an arbitrator solely on the ground that the arbitrator had acted previously as a mediator.

The inclusion of mediation as part of an ADR scheme in conjunction with arbitration would serve the need of consumers better than a unitary arbitration scheme. In the process of arbitration, either or all parties to the dispute may subsequently change their attitude and become more receptive to a fresh attempt for settlement.

#### 4.4.2. Mediation and Conciliation

Notwithstanding the similarities in terms of benefits of conciliation and mediation, there are some differences which suggest that mediation may have some distinct advantages over conciliation. First, although both of them are relatively informal in terms of procedures when compared with court proceedings or other adjudicative processes, mediation is a structural process that is more focused and coherent while conciliation is an unstructured process. Mediation is supported by robust legal and institutionalized infrastructures developed within the legal framework of the Mediation Ordinance. Specifically, mediation is underpinned by professional

support in training and accreditation for mediators by respective mediation organizations which also stipulate rules and codes as operational and ethical guidance for members. Quality of mediation service is further ensured by the Hong Kong Mediation Accreditation Association Limited (“HKMAAL”), a non-statutory industry-led accreditation body for mediators, which formulates accreditation standards and training requirements for mediators with a view to maintaining and unifying the standards of mediators and ensuring the professionalism of mediators in Hong Kong. On the other hand, conciliation lacks such support.

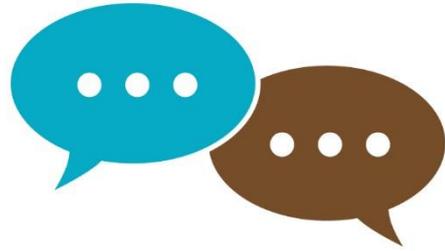
Accordingly, if a consensual process is to be introduced as part of a consumer dispute resolution mechanism in conjunction with arbitration, mediation should be chosen as the more suitable option over conciliation.

#### **4.4.3. Adjudication and Arbitration**

Unlike an arbitral award, an adjudicator’s decision is not final. As mentioned above, in the case of adjudication in the construction industry, it is binding in the interim and can be challenged by post-completion arbitration. In the ICCB adjudication, the complainant may seek legal redress if he is not satisfied with the decision of the adjudicator. To place adjudication as an interim process before arbitration would therefore seem to unnecessarily prolong a dispute resolution process and incur further costs. If the intention of the parties to a consumer dispute is to seek a quick, final and binding decision, arbitration should take precedence.

#### **4.5. Conclusion**

Arbitration in Hong Kong is recognized as a preferable means of dispute resolution to litigation as it has been widely used over an extended period of time in the commercial and construction sectors and since 2011 used in resolving consumer disputes with financial institutions. On the other hand, the use of adjudication is quite limited without as much support in terms of policy and infrastructure. Extending the process of arbitration in conjunction with mediation for consumer disputes from a sectoral level to a more comprehensive one, deserves serious consideration.



## Chapter 5

### Readiness in Applying Arbitration in Conjunction with Mediation in Consumer Disputes

#### ***Key Points***

- Arbitration has been well developed and continues to evolve within a robust infrastructure supported by a sound legal framework, abundant and effective professional manpower, and proactive government promotion and encouragement.
- Mediation is also in a dynamic and robust stage of development under the encouragement and promotion of the Administration and the Judiciary.
- A fertile breeding ground would appear to be in place for a general scheme of consumer arbitration in conjunction with mediation model to take root.

As analyzed in Chapter 4, a model embodying the interplay between arbitration and mediation, as a matter of principle, would be a preferable tool for general consumer dispute resolution. The practical issue that comes next would be the viability of putting such a model in reality. To address this issue, we will assess the readiness in applying this model in the local ADR landscape.

## 5.1. Government Promotion of ADR and Implementation of Pro-ADR Policy

There have been criticisms that the civil justice system is too slow, too expensive, too complex and too susceptible to abuse.<sup>68</sup> The Judiciary's encouragement and facilitation of ADR has become one of the notable features of the CJR that came into effect in 2009 after a nine-year-review on the Rules of the High Court by a Working Party appointed by the then Chief Justice. A key objective of the CJR is to enhance the efficiency of case management in courts by encouraging litigants to engage in ADR processes such as mediation out of court; "to facilitate the settlement of disputes" and "to ensure that a case is dealt with as expeditiously as is reasonably practicable".<sup>69</sup> The Court is required to further the underlying objectives by actively managing cases, which include encouraging the parties to use an alternative dispute resolution procedure if the Court considers that appropriate, and facilitating the use of such a procedure.<sup>70</sup>

Against this background, the Practice Direction on Mediation (PD 31) which was made effective from 1 January 2010 and other Practice Directions on mediation concerning specific areas such as building management, personal injuries actions, family, shareholders and winding up disputes were issued, setting out a mechanism to facilitate dialogue between parties on mediation.

The Mediation Information Office at the High Court Building assists the parties/litigants in court to understand the nature of mediation and how it will help the litigants resolve their disputes; and facilitate them to seek mediation from professional bodies. The Judiciary's initiatives also extend to sector-specific mediation. A Building Management Mediation Co-ordinator's Office has been set up in the Lands Tribunal to facilitate mediation between parties in disputes arising from building management. Also, a Mediation Co-ordinator's Office in the Family Court building assists couples to resolve their disputes through mediation. Both Offices provide assistance free of charge by way of information session followed by pre-mediation consultation with the parties with a view to facilitating mediation between them.

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<sup>68</sup> Para. 1.7 of the Report of The Working Group on Mediation, Department of Justice, February 2010

<sup>69</sup> Order 1A, rule 1 of the Rules of the High Court (Cap. 4A)

<sup>70</sup> Order 1A, rule 4 of the Rules of the High Court (Cap. 4A)

The Judiciary's initiative to encourage and facilitate ADR is complemented by the efforts of the Administration in promoting mediation. A Working Group on Mediation was set up in 2008 to review the current development of mediation and provision of mediation services in Hong Kong, following the Policy Address of 2007-2008 which mapped out plans to employ mediation more extensively and effectively in Hong Kong in handling higher-end commercial disputes and relatively small scale local disputes.

The Working Group published its Report in February 2010 with a number of recommendations. The initiatives have been driven by a Task Force and then a Steering Committee on Mediation to oversee the regulatory framework, address matters concerning accreditation and training standards of mediators, and conduct publicity and public education.

As a result of the efforts of the Administration and the stakeholders, the Mediation Ordinance was enacted in mid-2012, which has since come into operation on 1 January 2013. The Mediation Ordinance provides a legislative framework for the conduct of mediation in Hong Kong, to promote, encourage and facilitate the resolution of disputes by mediation; and to protect the confidential nature of mediation communications while retaining flexibility of the conduct and future development of mediation.

To gain public confidence on mediation, an industry-led body known as the HKMAAL was set up in 2012 with the mission:

- (a) to set standards for accredited mediators, supervisors, assessors, trainers, coaches and other professionals involved in mediation in Hong Kong, and to accredit them on satisfying the requisite standards;
- (b) to set standards for relevant mediation training courses in Hong Kong, and to approve them on satisfying the requisite standards; and
- (c) to promote a culture of best practice and professionalism in mediation.

The Department of Justice has also launched a "Mediate First" Pledge. This is a statement of policy aimed at encouraging greater use of mediation as a flexible, creative and constructive approach in resolving commercial disputes. In the absence of dispute resolution provisions in the contract, the "Mediate First" Pledge articulates the intent of the disputants to resolve conflicts in amicable and constructive ways that produce mutually-determined resolutions while controlling risks, expenditures and time consumed. Signing the "Mediate First" Pledge signifies the willingness to approach the resolution of disputes by mediation before pursuing litigation. As of 2

February 2016, 359 companies or organizations or associations have signed the "Mediation First" Pledge.<sup>71</sup>

A number of publicity and public education initiatives have been conducted by the Steering Committee on Mediation, including a programme of promoting the "Mediate First" Pledge amongst companies and trade organizations whereby signing the Pledge signifies their willingness to approach the resolution of disputes by mediation before pursuing litigation, the conducting of mediation seminars and conferences and the publication of announcements in the public interest on TV and radio.

Apart from the establishment of the industry-led body HKMAAL mentioned above, the JMHO is another good example of the collaboration between professional bodies and mediation organizations. The JMHO is a non-profit-making organization jointly founded by the Hong Kong Mediation Council, the Hong Kong Bar Association, the Law Society of Hong Kong, the Chartered Institute of Arbitrators (East Asia Branch), the Hong Kong Institute of Arbitrators, the Hong Kong Institute of Architects, the Hong Kong Institute of Surveyors and the Hong Kong Mediation Centre in 2010. It provides mediator referral services to parties who require mediation services.

The Government is clearly determined therefore to promote Hong Kong's mediation services, and has attached great importance to working closely with mediation bodies and other stakeholders, as well as fostering a favourable environment for mediation and enhancing the requisite infrastructure.<sup>72</sup> In addition, mediation is being implemented actively in a cost-effective manner at the District Court and the Court of First Instance.

### 5.1.1. The District Court

From the mediation reports filed by litigants in the District Court in 2014,<sup>73</sup> it is noted that 1,479 cases attempted mediation during the year.<sup>74</sup> Out of the mediated cases, 45% had resulted in agreements. In addition, 1,078 reported cases did not go through mediation because they were settled on their own motions through case management procedures.

Regarding the costs incurred in the mediated cases, they are, on average HK\$12,900 per case/HK\$3,000 per hour for a case with full agreement; HK\$14,500 per

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<sup>71</sup> Department of Justice, "*Mediate First*" Pledge Signees", available at: <http://www.doj.gov.hk/mediatefirst/chi/pdf/pledgeSigneec.pdf>

<sup>72</sup> Press Release, Government determined to promote mediation services, 11 March 2015, available at: <http://www.info.gov.hk/gia/general/201503/11/P201503110916.htm>

<sup>73</sup> Statistics on the First Six Years' Implementation of the Civil Justice Reform from 2 April 2009 to 31 March 2015, available at: [http://www.civiljustice.gov.hk/eng/implement/Note\\_on\\_CJR%20April%202009%20to%2031%20March%202015.pdf](http://www.civiljustice.gov.hk/eng/implement/Note_on_CJR%20April%202009%20to%2031%20March%202015.pdf)

<sup>74</sup> It only refers to the number of cases with mediation reports/letters filed with filing date falls in 2014.

case/HK\$2,200 per hour for a case with partial agreement and HK\$10,500 per case/HK\$3,100 per hour for a case without agreement.

Out of the mediated cases, it took, on average, 4 hours to reach a full agreement, 7 hours to reach a partial agreement and 4 hours to reach no agreement. It is unclear why it takes shorter time to reach a full agreement than a partial agreement, but generally the time required to reach full/partial agreement between the parties depends on many factors, such as timing of mediation, skill of the mediator, complexity of the matter, and the eagerness of each party to settle.

### 5.1.2. The Court of First Instance

Amongst the cases for which mediation reports were filed by litigants in the Court of First Instance in 2014,<sup>75</sup> 805 cases attempted mediation<sup>76</sup> and 48% had resulted in agreements. In addition, 172 reported cases did not go through mediation because the parties settled through case management procedures.

Regarding the cost of mediated cases, they were, on average HK\$18,400 per case/HK\$3,800 per hour for a case with full agreement; HK\$11,000 per case/HK\$2,400 per hour for a case with partial agreement and HK\$17,400 per case/HK\$4,200 per hour for a case without agreement.

Out of the mediated cases, it took, on average, 5 hours to reach a full agreement, 5 hours to reach a partial agreement and 4 hours to reach no agreement.

It has to be emphasized that the above figures only reflect part of the picture on the implementation of mediation in the court system. The reasons are that: (a) only those mediation reports filed with a filing date falling within the reporting period were included; and (b) some cases might have resorted to mediation but without proceeding further.

### 5.1.3. Mediation and Arbitration Centres

There are mediation and arbitration centres which provide mediation and arbitration services in Hong Kong for dispute resolution, such as the JMHO, the Hong Kong Mediation Centre, and the Hong Kong International Arbitration Centre. None of them are providing exclusive service for resolving consumer disputes.

Mediation has been used in a broad range of disputes as shown in the categories of cases handled by the JMHO. According to the information provided by the JMHO,

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<sup>75</sup> *Supra* Note 73

<sup>76</sup> It only refers to the number of cases with mediation reports/letters filed with filing date falls in 2014.

it processed 59 cases in 2015. The cases fell in the following categories: business/partnership (12), title of property (10), finance/banking (6), inheritance (5), debt (4), tenancy agreement (4), construction/decoration (3), goods and services (3), defamation (3), personal injury and death (2), professional negligence (2), insurance (2), employment/remuneration (1), building management (1), and damage to property (1).

Between 2012 and May 2015, the Hong Kong Mediation Centre handled 62 mediation cases which fell within the categories of business, contracts, water seepage, personal injury and death, neighbourhood disputes, employment, tenancy, adverse possession, shareholders' disputes, construction, building management, workplace conflicts and defamation.<sup>77</sup>

During the same period, the Hong Kong International Arbitration Centre handled a total of 74 mediation cases which were categorized as family, business, personal injury and death, construction and tenancy.

There are also schemes providing mediation/conciliation services for a wide range of matters, such as the Pilot Mediation Scheme in Support of Property Owners Affected by Compulsory Sale under the Land (Compulsory Sale for Redevelopment) Ordinance, conciliation by the EOC for disputes arising under its purview, mediation of the Ombudsman as a means to resolve complaints that involved no or little maladministration but the complainant felt genuinely aggrieved. The FDRC provides a one-stop, independent and affordable avenue for consumers to solve monetary disputes between financial service providers and consumers, the District Building Management Liaison Teams of the Home Affairs Department which assists owners to resolve disputes of building management through enhancement of communication and mediation services.

From the above, it can be seen that mediation is in a state of dynamic and robust development under the encouragement and promotion of the Judiciary and the Administration.

## **5.2. Government and Judiciary Support for Arbitration**

Indeed, the Government has attached phenomenal importance to the development of arbitration. Arbitration receives supports from the Government and the court.

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<sup>77</sup> Written Reply by the Secretary for Justice, Mr. Rimsy Yuen, SC, in the Legislative Council to a question by the Hon Tam Yiu-chung, 10 June 2015, available at: <http://www.info.gov.hk/gia/general/201506/10/P201506100381.htm>

In the Budget Speech on 26 February 2014, the Financial Secretary stated that “Government has all along been actively promoting Hong Kong’s legal and arbitration services, and making its best efforts to advocate and develop mediation services, with a view to enhancing Hong Kong’s position as an international legal and dispute resolution services centre in the Asia-Pacific region.”<sup>78</sup>

Hong Kong courts adopt a pro-arbitration approach in relation to commercial dispute resolution. Where parties have agreed to settle their disputes through arbitration, the courts will stay the court proceedings in favour of arbitration and will respect the wide discretion of arbitrators and the flexibility of the arbitral process.<sup>79</sup>

As of February 2016,<sup>80</sup> there were 380 persons on the Panel of Arbitrators and 140 persons on the List of Arbitrators. Arbitration is further reinforced by a strong legal profession. As at August 2015, there were over 1,300 practising barristers, 8,400 practising solicitors and close to 1,300 registered foreign lawyers in Hong Kong; a total of 850 local law firms, 78 registered foreign law firms and 134 sets of barristers’ chambers.<sup>81</sup> Apart from the lawyers, professionals in diverse disciplines, such as engineers, architects, surveyors, accountants, bankers also underpin the arbitration proceedings as arbitrators or counsel for parties or expert witnesses.

The legal framework for arbitration has been made more user-friendly. The Arbitration Ordinance eliminates the distinction between domestic and international arbitration and provides a unitary regime based on the latest version of the Model Law on International Commercial Arbitration the United Nations Commission on International Trade Law, which is well understood by the international arbitration community. To fit in with local requirements, a number of modifications and additions are also made to this internationally recognized arbitration framework. This approach aligns Hong Kong’s arbitration regime more closely to international practice.

The home-grown Hong Kong International Arbitration Centre has earned international recognition. It was assessed as one of the most preferred arbitral institutions. Moreover, Hong Kong is one of the 5 most preferred and widely used

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<sup>78</sup> Para. 97 of the 2014-15 Budget, Budget Speech, available at: <http://www.budget.gov.hk/2014/eng/budget24.html>

<sup>79</sup> Press Release, SG’s speech at seminar on “Hong Kong – An International Hub for Legal & Arbitration Services” in Yangon, Myanmar on 29 August 2014, available at: <http://www.info.gov.hk/gia/general/201408/29/P201408290681.htm>

<sup>80</sup> HKTDC, “Arbitration and Mediation Industry in Hong Kong”, 29 March 2016, available at: <http://hong-kong-economy-research.hktdc.com/business-news/article/Hong-Kong-Industry-Profiles/Arbitration-and-Mediation-Industry-in-Hong-kong/hkip/en/1/1X000000/1X006N9U.htm>

<sup>81</sup> Para. 11 of the Speech by Mr. Wesley Wong, SC, Solicitor General, Department of Justice at the 2015 (4th) Annual Conference of In-house Lawyers on 4 September 2015 organized by the Law Society In-house Lawyers Committee, available at: <http://www.doj.gov.hk/eng/public/pdf/2015/lo20150907e.pdf>

seats of arbitration among London, Paris, Singapore and Geneva on the basis of its reputation and recognition.<sup>82</sup>

In December 2014, the Department of Justice set up the Advisory Committee on Promotion of Arbitration to facilitate the overall co-ordination and strategic planning for the future development and promotion of arbitration services.<sup>83</sup>

### 5.3. Apology Legislation

The Steering Committee on Mediation conducted two rounds of public consultation on the enactment of 'apology' legislation in Hong Kong in June 2015 and February 2016 respectively. The proposed legislation is to remove the reasons for reluctance by parties in making apologies, thereby changing culture and increasing the chances of apologies being offered to aggrieved parties. The measures will hopefully prevent the escalation of disputes and facilitate amicable settlement of disputes.

### 5.4. Third Party Funding for Arbitration

The Third Party Funding for Arbitration Sub-committee of the Law Reform Commission in a consultation paper published in October 2015 recommended amongst other things that third party funding for arbitration taking place in Hong Kong should be permitted under Hong Kong law.<sup>84</sup> It would make arbitration a more accessible option of dispute resolution.

### 5.5. Conclusion

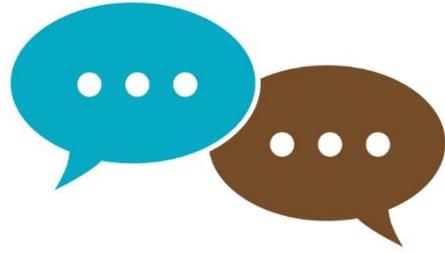
The current ADR landscape of Hong Kong is thriving under the support of the courts and the Government. It is underpinned by a highly sophisticated and evolving legal framework with abundant supply of professionals from diverse disciplines, and a cultural shift to ADR for dispute resolution. Accordingly, there is a fertile breeding ground for developing a scheme of arbitration in conjunction with mediation being applied to general consumer disputes.

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<sup>82</sup> School of International Arbitration, Queen Mary University of London and White & Case LLP, 2015 International Arbitration Survey: *"Improvements and Innovations in International Arbitration"*, available at: <http://www.arbitration.qmul.ac.uk/docs/164761.pdf>

<sup>83</sup> Press Release, Government sets up Advisory Committee on Promotion of Arbitration, 18 December 2014, available at: <http://www.info.gov.hk/gia/general/201412/18/P201412180576.htm>

<sup>84</sup> A Third Party Funding refers to a contract that the Third Party Funder will pay for the Funded Party's costs of arbitration or litigation proceedings in return for a percentage of the judgment or Award or some other financial benefit from any proceeds recovered by the Funded Party from such funded proceedings. If there is no recovery from the proceedings, the Third Party Funder will not receive any repayment or return on the Funds it has advanced to the Funded Party.



## Chapter 6

### Learning From Different ADR Models for Consumers in Other Jurisdictions

#### *Key Points*

- The approaches adopted by other jurisdictions in resolving consumer disputes have been reviewed to see what we can learn from them for identifying the suitable way forward for Hong Kong.
- As a whole, parties are generally given the chance to settle through a consensual process before an adjudicative process is invoked.
- Funding and support of ADR schemes in other jurisdiction varies. It can be through the government, as the experience of Portugal shows. Industry funding also exists, but usually with statutory backup to the effect that traders are mandated to join; such as those found in the financial sector in Australia and the United Kingdom.
- The experience of industry-funded consumer arbitration schemes in Canada, with no government involvement, demonstrates the risk of domination and control by traders which can impair the fundamental need for impartiality and neutrality of a scheme.
- Examples of mergers that have taken place between different ADR schemes, under a single institution were found in the Financial Ombudsman Service of Australia and the Financial Industry disputes Resolution Centre Singapore.
- In addition, a model was identified in the United Kingdom that featured a robust coordinating and quality assurance body that sat in supervision above different sector specific ADR schemes.

Consumer arbitration and mediation as found in other jurisdictions may throw light on the modelling of consumer arbitration in Hong Kong. This Chapter examines the role of arbitration and other ADR processes in resolving consumer disputes in some common law jurisdictions, including Australia, Canada, Singapore and the United Kingdom; and some civil law jurisdictions, including Portugal, Macao and South Korea. The issue arising from the application of consumer arbitration and different ADR models in other jurisdictions, such as the United States and European Union, namely the use of pre-dispute arbitration clause in consumer contracts, from the perspective of consumer protection is also considered.

## 6.1. Common Law Jurisdictions

### 6.1.1. Australia

Each of the 6 states in Australia, namely, New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia, has its own state constitution and consumer ADR regime. The federal and state governments of Australia share jurisdiction over consumer law and policy, resulting in diversity in redress mechanisms for consumers.<sup>85</sup>

Consumer ADR in Australia is considered as complex and fragmented.<sup>86</sup> While a comprehensive review of the system for consumer ADR in Australia is beyond the scope of this Report, major organizations providing ADR services to consumers there; in particular, Industry Ombudsman Schemes (“IOSs”) will be discussed. Also examined are Community Justice Centres (“CJCs”), which are available in different states. It appears that arbitration is rarely used by consumers and there is no established mechanism or system of consumer arbitration exclusive for all consumer disputes in Australia.

#### 6.1.1.1. Industry Ombudsman Schemes

The IOSs in Australia are independent consumer ADR schemes that provide external avenues to resolve complaints that consumers cannot resolve with service providers. The IOSs are industry-specific and have been set up in major industries, such as the Telecommunications Industry Ombudsman (“TIO”) for the telecommunications sector and Financial Ombudsman Service (“FOS”) for the banking, insurance and financial services sector.

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<sup>85</sup> Nottage, Luke R, “The New Australian Consumer Law: What about Consumer ADR” *QUT Law and Justice Journal* 9.2 (2010) p.176

<sup>86</sup> *Ibid*, p.177

### 6.1.1.2. Telecommunications Industry Ombudsman

Established in 1993 under the Telecommunications Act 1991 (Cth), the TIO deals with complaints about telephone and internet services that consumers have been unable to resolve with their provider. The TIO is a national service for personal and small business consumers in Australia. The services provided by the TIO are free to consumers.<sup>87</sup>

The TIO scheme is an industry-funded ombudsman service scheme run by the TIO Limited, a public company overseen by a Board of Directors and funded by its members. The TIO Limited is independent of the telecommunications industry, the government and customer organizations. Its income is generated solely from telecommunications companies who are charged fees for receiving and handling complaints from their customers. Therefore, the funding system acts as an incentive for service providers to keep complaints made to the TIO to a minimum.

Participation in the TIO by companies is a legislative requirement under the Telecommunications (Consumer Protection and Standards) Act 1999 for those licensed as a telecommunications carrier.<sup>88</sup> The TIO handles disputes in the telecommunications sector between consumers and telecommunication service providers by conciliation and decision similar to adjudication.

The TIO handles complaints at 4 different levels. At Level 1, the complainant is referred to a contact nominated by the provider to give the provider another chance to resolve the dispute with the complainant. At Level 2, the complaint is conciliated to facilitate a resolution agreed by the consumer and provider. At Level 3 and Level 4, the complaint is investigated by the TIO to establish the facts, assess and decide the resolution for the parties. The major difference is the amount in dispute. Level 3, deals with disputes below AUD\$1,200 while Level 4 deals with anything over this amount and where the matter is complex. The purpose of separating complaints into 4 levels is to ensure fair charge to companies as each progressive level requires more time and resources.<sup>89</sup>

It should be noted that according to the terms of reference of the TIO, when deciding the resolution of a complaint, the TIO can also recommend a service provider to take further action. For each complaint, the total value to be decided and further action to be recommended must not exceed AUD\$100,000. However, the service provider is not obliged to accept the recommendation and the

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<sup>87</sup> The Telecommunications Industry Ombudsman, *"About Us"*, available at: <http://www.tio.com.au/about-us>

<sup>88</sup> Section 128 of the Telecommunications (Consumer Protection and Standards) Act 1999

<sup>89</sup> The Telecommunications Industry Ombudsman, *"Standard Resolution and Outcome"*, available at: <http://www.tio.com.au/about-us/policies-and-procedures/standard-resolution-methods-and-outcomes#Referral>

consumer cannot complain on this. In such case, the consumer may still need to pursue court action for proper redress.

On the other hand, after investigation, the TIO may proceed to issue a determination which is a decision a telecommunications service provider must legally implement.<sup>90</sup> The TIO makes it easier for consumers to settle their complaints with traders after initial investigation by the TIO through relaying oral evidence from one side to another. This is done because of the perceived risk of escalation into a determination binding on the traders but not on the consumers, and the fact that such determinations generally do not have to be based strictly on law, but also on codes and other standards of industry practices.<sup>91</sup>

### 6.1.1.3. *Financial Ombudsman Service*

The FOS was established on 1 July 2008 by way of a company limited by guarantee. It was formed by the merger of the Banking and Financial Services Ombudsman, the Insurance Ombudsman Service Limited and the Financial Industry Complaints Service, all of which were industry self-regulatory bodies.<sup>92</sup>

In Australia, every business with an Australian financial services licence or credit licence must be a member of an external dispute resolution scheme approved by the Australian Securities and Investments Commission ("ASIC"). Over the years, the ASIC has approved a total of 8 external dispute resolution schemes.<sup>93</sup> Approved by the ASIC as one of the external dispute resolution schemes under the Corporations Act and the National Consumer Credit Protection Act, the FOS seeks to resolve disputes between financial services providers and their customers by way of conciliation and determination similar to adjudication. It deals with banking, credit and insurance complaints. The service is free to consumers. The FOS operates by way of a membership scheme where members who are financial services providers have chosen the FOS as their external dispute resolution scheme. The FOS is funded by its members and the funding comes from case fees and annual membership fees. The Terms of Reference governs the operation of the FOS, which sets out the rules and processes including the types of disputes the FOS can consider, the dispute resolution processes and the remedies and limits the FOS can award. The Terms of

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<sup>90</sup> Telecommunications Industry Ombudsman, "*Determinations*", available at: <https://www.tio.com.au/publications/determinations>

<sup>91</sup> *Supra* Note 85 p.191

<sup>92</sup> Media Release, Financial Ombudsman Service, "*New National Financial Services Ombudsman Launched*", 10 July 2008, available at: <http://www.fos.org.au/public/download/?id=3027&sstat=341803>

<sup>93</sup> Australian Securities and Investment Commission, "*ASIC approved dispute resolution schemes*", available at: <http://asic.gov.au/regulatory-resources/financial-services/dispute-resolution/asic-approved-dispute-resolution-schemes/>

Reference is published and updated periodically. According to the most recent Terms of Reference released on 1 January 2015, the maximum value the FOS may decide is AUD\$309,000 except for some life insurance and other insurance claims where the limits are set at other respective lesser amounts.<sup>94</sup>

There are 3 main stages in the dispute resolution process under the scheme of the FOS. At stage 1, it is called registration and referral. The FOS will refer the dispute to the financial services provider and request it to give a response to the applicant. During this period, the financial services provider may seek to resolve the dispute directly with the applicant. If the dispute is not resolved, it will proceed to stage 2 for case management. The dispute will be investigated and reviewed by the FOS and the applicant and the financial services provider will be contacted to clarify the issues and/or to provide any further information. At this stage the case may be resolved by a negotiation or a conciliation conference.

If the case cannot be resolved by conciliation, at stage 3 an Ombudsman or a panel of members based on their respective qualifications and experience will be appointed to make decisions on the merits of the disputes. There is no appeal or review process. The determination is a final decision but an applicant has the right to reject it. If the applicant accepts the determination, it is binding on both parties. If the applicant does not accept it, the applicant may take any other actions against the services provider, including litigation. The services provider cannot reject and must implement the determination if it is accepted by the applicant.<sup>95</sup>

#### 6.1.1.4. *Community Justice Centres*

The establishment of the CJs is regarded as a major development in the history of ADR in Australia. The CJs have been established throughout Australia since the 1980s. For instance, in New South Wales, they have provided mediation and conflict management services. They are funded and supported by the government, and are free to consumers.<sup>96</sup>

The jurisdiction of the CJs is not limited to disputes between consumers and businesses, although a significant proportion of mediations do fall into this category, such as consumer credit disputes. However, the CJs' annual reports and other publically available data are not disaggregated, making it difficult to determine what proportion involves particular types of consumer and other disputes.<sup>97</sup>

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<sup>94</sup> Financial Ombudsman Services Australia, "*Terms of Reference*", available at: <http://fos.org.au/custom/files/docs/fos-terms-of-reference-1-january-2010-as-amended-1-january-2015.pdf>

<sup>95</sup> *Ibid.*

<sup>96</sup> *Supra* Note 85 p.180

<sup>97</sup> *Supra* Note 85 p.189

#### 6.1.1.5. *Consumer Arbitration in Australia?*

According to Professor Luke Nottage, consumers in Australia can agree to arbitrate disputes when concluding underlying contracts with firms, or even after a dispute has arisen, but this has remained rare. One problem may be the lack of expertise or training on the part of arbitrators and/or arbitral institutions in dealing with features more specific to consumer disputes. Another barrier is that privately-supplied arbitration remains quite time-consuming and costly. Such concerns have, since the 1980s, led to greater privately-provided mediation of commercial disputes. However, the costs involved are almost always too high for consumers involved in disputes with business, especially when various forms of government-supported mediation are provided for free, and at low cost through the small claims courts.<sup>98</sup>

In summary, currently there is no established mechanism of a general scheme of consumer arbitration in Australia. The ADR schemes that exist are sector-specific, operate independently and mainly adopt a hybrid of conciliation, mediation and adjudication. Hong Kong at present shares similar situation where industry specific dispute resolution schemes operate separately.

#### 6.1.2. *Canada*

Like Australia, there is no established general scheme of consumer arbitration for resolving consumer disputes in Canada, although some private organizations focusing on commercial arbitration will also offer arbitration services to consumers.

Consumer arbitration is therefore available only in a few sectors. These are private funded and government supervised sector specific consumer arbitration programmes, such as the Canadian Motor Vehicle Arbitration Plan ("CAMVAP") and the Guarantee Plan for New Residential Buildings.

##### 6.1.2.1. *Canadian Motor Vehicle Arbitration Plan*

The CAMVAP is a cross Canada programme that arbitrates disputes between auto manufacturers and consumers on vehicle manufacturing defects and manufacturer's warranties on new vehicles. This programme offers consumers a quick alternative to court proceedings. The CAMVAP stipulates that a hearing date must be scheduled by the provincial administrator within 50 days following the arbitration application, and that an arbitral award must be rendered within 14 days following the hearing.<sup>99</sup>

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<sup>98</sup> *Ibid.*

<sup>99</sup> Canadian Motor Vehicle Arbitration Plan, "FAQ", available at: <http://www.camvap.ca/faq/>

The plan is funded by the industry and free to consumers. However, costs incurred by witnesses, legal fees (if the consumer is represented by legal counsel) as well as witness summons fees are all charged to the consumer.<sup>100</sup> Statistics on decisions rendered are published annually on the CAMVAP website for consumers to access information concerning prior decisions in similar disputes.

Because this is not a mandatory arbitration programme for consumers, they retain the right to go to court rather than arbitration, although the CAMVAP's arbitral awards are final, effective and binding on the parties. Both parties can bring legal representation to the arbitration process at their own expense. The CAMVAP may provide eligible consumers with financial assistance under the CAMVAP legal assistance program to retain legal representation at the CAMVAP's expense.<sup>101</sup>

The CAMVAP arbitration system increases consumer access to justice by providing a fast and less costly means to resolution. Nevertheless, it is noted that there have been some criticisms about the neutrality or impartiality and knowledge or competency of the arbitrators.<sup>102</sup> This serves as a reminder for us when considering a consumer arbitration model in Hong Kong. Impartiality and competency of arbitrators and the arbitral institution are foremost important factors that must be taken into account.

#### 6.1.2.2. *The Guarantee Plan for New Residential Buildings*

There are various arbitration programs regarding disputes related to the guarantee of new residential buildings that have been established across Canada.<sup>103</sup>

The majority of new residential building guarantees offer dispute resolution services, from mediation to arbitration. For example, Quebec has established a voluntary arbitration system for new residential building guarantees,<sup>104</sup> and has adopted a regulation which makes a guarantee plan mandatory for certain new buildings. The plan is managed by a government body, which authorizes certain corporations to act as administrators of the arbitration program. Under the guarantee plan, a homebuyer may file a claim with the plan administrator. The consumers or contractors against whom the administrator might render an unfavourable decision may submit the dispute to mediation or arbitration.

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<sup>100</sup> Me Yannick Labelle, "CONSUMER ARBITRATION: A Fair and Effective Process?" Project Final Report (2009) Union des consommateurs, p.34

<sup>101</sup> Canadian Motor Vehicle Arbitration Plan, "*Consumer Legal Assistance Program*", available at: [http://www.camvap.ca/wp-content/uploads/Legal\\_Assistance\\_Program\\_ENG.pdf](http://www.camvap.ca/wp-content/uploads/Legal_Assistance_Program_ENG.pdf)

<sup>102</sup> See, for instance, Automobile Protection Association, "*Advice for consumers planning to use CAMVAP*", available at: <http://www.apa.ca/readarticle.asp?id=240>

<sup>103</sup> *Supra* Note 100 p.36

<sup>104</sup> *Ibid.*

Like the CAMVAP, the arbitration is free to consumer but only at the application stage only. There are fees for expert intervention, which is almost indispensable, are charged to the consumer, until, if he wins his case, the arbitrator orders the administrator's reimbursement of part of those fees.

Similar to the CAMVAP, decisions rendered are published annually in a compendium of arbitration decisions. The transparency of programs through publication of statistics or even arbitration decisions strengthens the trust of consumers in the arbitration.<sup>105</sup> On the other hand, businesses might lose the protection of confidentiality, which is one of the main features of and greatest advantages offered to businesses by arbitration.

It has been observed that the greatest shortcoming of the Guarantee Plan is related to the "repeat player effect". Since there are only a few centres in Quebec arbitrating disputes related to the Guarantee Plan, the companies that continually find themselves before the same arbitrators, acquire a knowledge of the arbitrators' tendencies, and can choose the arbitrator who is likely to be most favourable to them. While there is already an imbalance of power between the consumers and companies, this is an additional undue advantage enjoyed by the latter. The fact that consumers are intimidated by this process, which greatly resembles the legal process, and with which they are less familiar than the companies, adds to this imbalance.<sup>106</sup>

### 6.1.3. Singapore

Singapore has a non-governmental organization called the Consumers Association of Singapore ("CASE") serving as consumer interest advocate, and a consumer ADR centre, called Financial Industry Disputes Resolution Centre ("FIDReC") serving for the financial sector. Like the jurisdictions reviewed above, there is no established general mechanism for consumer arbitration in Singapore.

#### 6.1.3.1. Consumers Association of Singapore

The CASE is a non-profit and non-governmental organization that is committed towards protecting consumer interest through information and education and promoting a fair and ethical trade practices environment. As regards dispute resolution, the CASE provides conciliation and mediation services to consumer.<sup>107</sup>

Unlike Hong Kong where the Consumer Council provides a free of charge conciliation service to consumers, the CASE will charge consumers for providing

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<sup>105</sup> *Supra* Note 100 pp.37 & 39

<sup>106</sup> *Supra* Note 100 p.38

<sup>107</sup> Consumers Association of Singapore, "*Introduction*", available at: <https://www.case.org.sg>

conciliation and mediation services. There is a membership scheme available for consumers. At the stage of conciliation, if a consumer does not register as a member, an administrative fee of S\$10.70 will be charged and the CASE will only help the consumer draft a letter to the retailer to express the consumer's concerns and expected outcome. The consumer will have to deliver the letter personally and no follow-up action will be taken by the CASE.

Only if a consumer registers as a member of the CASE will they take follow-up action for the consumer to work towards an amicable resolution. The membership fees are charged under different types. For example, a life member fee is S\$428 while an annual membership fee is S\$26.75 per person. There are also special rates for family and student memberships. Administrative charges for follow up action also apply which depend on the amount of the claims, ranging from S\$10.70 to S\$53.50.

Should the matter reach a stalemate after conciliation, the CASE will advise the consumer of the available options, such as mediation, going to the Small Claims Tribunal or other legal options. The mediation service is purely on invitational and voluntary basis. If the parties agree to proceed, mediation fees will first be collected from both parties and the mediation will then be scheduled. The CASE will provide a mediation session up to 2 hours. Only the main parties involved can attend the mediation. The fees for mediation in general range from S\$16.05 to S\$428, depending on the amount of claims and whether the participant is a member or non-member.

It is worth mentioning that CASE mediators are volunteers and are from a wide array of professions; the purpose of which is to ensure that the mediators have no vested interest in the dispute resolution process.

The conciliation service provided by the CASE is very similar to the service provided by the Council in Hong Kong, save that the service provided in Hong Kong is free; whereas consumers receiving mediation service provided by the CASE are charged.

### **6.1.3.2. *Financial Industry Disputes Resolution Centre***

The FIDReC is an independent and impartial institution specializing in the resolution of disputes between financial institutions and consumers. The FIDReC provides an affordable and accessible one-stop avenue for consumers who do not have the resources to go to court or who do not want to pay hefty legal fees to resolve their disputes with financial institutions. It also streamlines the dispute resolution processes across the entire financial sector of Singapore.<sup>108</sup>

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<sup>108</sup> Financial Industry Disputes Resolution Centre, "Processes", available at: <http://www.fidrec.com.sg>

The FIDReC subsumed the work of 2 sector specific ADR schemes, namely, the Consumer Mediation Unit (“CMU”) of the Association of Banks in Singapore which mediated complaints from dissatisfied consumers against their banks, and the Insurance Disputes Resolution Organization (“IDRO”) which handled disputes arising from insurance policy covers.

In May 2004, the Monetary Authority of Singapore formed an Integration Steering Committee to facilitate the move towards an integrated dispute resolution scheme for the financial sector. The Committee decided, in the spirit of starting things afresh, that the scheme would have a new corporation and brand identity, which would be set up as an independent company limited by guarantee, under the name of the FIDReC. To minimize disruption to the operations of the former schemes, the Committee adopted a phased approach towards integration with physical relocation of the CMU and the IDRO, and full integration of the back-office occurring in the final phase. The FIDReC was officially launched on 31 August 2005.

The FIDReC is staffed by full-time employees familiar with the relevant laws and practices. The centre was initiated by the financial sector to make its services more professional, transparent, customer focused and service oriented.

The dispute resolution process of the FIDReC comprises of 2 stages: Mediation and Adjudication. At Stage 1, when a complaint is received, the FIDReC mediates disputes between the parties, and the consumers and the financial institutions are encouraged to resolve the disputes in an amicable and fair manner. At Stage 2, where the dispute is not settled by mediation, the case is heard and adjudicated by a FIDReC Adjudicator or a Panel of Adjudicators. The decisions are made by recognized private industry and legal professionals, although they also bear some similarities to an ombudsman model in that decisions are rendered without prejudice to the claimant’s right to resort to litigation.<sup>109</sup>

Mediation is free of charge for consumer, whereas the consumer pays S\$250 and the Financial Institution pays S\$500, being adjudication fee per claim, for adjudication.

The experience of Singapore shows that an integrated scheme is feasible and may provide consumers with a one-stop, independent and affordable avenue for resolving disputes with their financial institutions. It would also appear to be more cost-effective by leveraging off the resources of existing schemes rather than establishing a new scheme for capital markets, given the relatively small number of complaints in the capital markets sector.<sup>110</sup> Although the merger of the ADR schemes in Singapore is

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<sup>109</sup> *Ibid.*

<sup>110</sup> Monetary Authority of Singapore, Policy Consultation on the financial Industry Disputes Resolution Centre (2004) p.2

limited to the financial and insurance sectors, it does shed light on consideration of any potential integration of the existing sectoral ADR mechanisms in Hong Kong.

#### 6.1.4. The United Kingdom

The United Kingdom has several established and recognized ADR schemes available to consumers. For example, the Ombudsman Services established in regulated sectors including the Financial Ombudsman Service (“FOS”), which deals with a huge volume of disputes in financial matters, and the Retail Ombudsman Scheme (“ROS”) for dealing with consumer retail disputes. Voluntary schemes also operate in some other sectors such as glazing installers and these are often linked to trade associations. In addition, there are several small independent bodies which offer mediation services to consumers often at a local level.<sup>111</sup>

##### 6.1.4.1. Industry Ombudsman Service

Ombudsman exists in many sectors in the UK to deal with complaints from public bodies services to private sectors. Ombudsman is designed to provide protection for individuals where there is a substantial imbalance of power. Initially, this imbalance was between the citizens and the state but as the institutions have developed, they have embraced other sectors.

The services provided by ombudsman are free of charge, and are thus accessible to individuals who could not afford to pursue their complaints through the courts. The cost of their services is normally met by a charge to the bodies in their jurisdiction. Ombudsman is committed to achieve redress for the individual, and undertake investigation into complaints. They are neutral arbiters and not advocates nor consumer champions. They normally ask the body concerned and the complainant to try to resolve complaints before commencing an investigation. If the disputes could not be resolved, formal investigations would be conducted.

Ombudsmen usually have the power to make recommendations which are binding on the bodies in their jurisdiction unless successfully challenged through the court. Most are established by, or as a result of, statute, and the relevant industry or sector is obliged to participate in the scheme.

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<sup>111</sup> Department for Business, Innovation and Skills, *Alternative Dispute Resolution for Consumers: Government response to the consultation on implementing the Alternative Dispute Resolution Directive and the Online Dispute Resolution Regulation* (2014) p.9

#### 6.1.4.2. *Financial Ombudsman Service*

The FOS is neither a government department nor agency but rather an ombudsman which is independent from those whom the ombudsman has the power to investigate and meets the criteria set out by the British and Irish Ombudsman Association. Businesses that are regulated by the Financial Conduct Authority ("FCA") are automatically covered by the ombudsman service. These mainly include banks, insurance companies and financial firms. Complaints it examines therefore mostly involve financial products and services.

The service is free of charge to all consumers and it operates as a hybrid of conciliation, mediation and adjudication. Consumers are first encouraged by the FOS to give the business a chance to respond to the complaint. The business has 8 weeks to resolve the complaint, failing which the complainant may bring it to the FOS within 6 months. The FOS will appoint an adjudicator to look at the case and its circumstances, listen to both sides, weigh up the facts and suggest a compromise in appropriate cases. If the complaint remains unresolved, a more formal approach will be taken. The adjudicator working on the case could have more questions for both the consumer and the business, and may ask for further documents and information. When there is an answer, the adjudicator will inform both parties and set out how the complaint should be resolved. If either party does not accept what the adjudicator says, either one can ask for an appeal. The case will then be reviewed by an ombudsman. An ombudsman will make a formal decision on a case which is final and this is the end of the process. If the consumer accepts the decision, it is binding on the business and is enforceable in court. If the consumer does not accept it, he may take the dispute to the court instead. The jurisdiction limit is £150,000.

The FOS is funded by statutory levies and case fees paid by financial businesses regulated by the FCA. Consumers do not pay to bring a complaint to the ombudsman. The FOS receives no government funding. All businesses covered by the ombudsman service pay a levy to the FOS.<sup>112</sup>

The usage of the FOS in the UK is high and it has now replaced the courts as the primary forum for the resolution of disputes between consumers and firms.<sup>113</sup> It is particularly well-suited to resolution of disputes between firms and vulnerable consumers for a number of reasons: it is free for the consumers to use; it adopts an inquisitorial rather than adversarial approach to fact finding; the use of lawyers is

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<sup>112</sup> Financial Ombudsman Service, *"FAQs, Information for Researchers"*, available at: <http://www.financial-ombudsman.org.uk/faq/research.htm>

<sup>113</sup> Cartwright, Peter, *"The Vulnerable Consumer of Financial Services: Law, Policy and Regulation"*, (2011) p.14

positively discouraged; and it has significant discretion in decision-making, taking into account the relevant law, regulations, regulators' rules and guidance and standards, relevant codes of practice and, where appropriate, good industry practice at the relevant time.<sup>114</sup> However, it also has its critics. More recently there has been a call for more transparency and consistency in decisions. In response, the FOS replied that it attaches considerable importance to being an appropriately open and transparent organization, and has already published extensive information about what it does and how it operates on its website.<sup>115</sup>

#### 6.1.4.3. *Retail Ombudsmen Scheme*

The ROS is an independent not for profit and impartial organization that specializes in resolving consumer disputes. It is authorized by the UK government to operate as an ombudsman as well as being authorized under the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 to deal with a wide range of disputes including disputes with retailers where goods or services are purchased in-store, and disputes with retailers where goods or services are purchased online. The service is free for consumers.<sup>116</sup>

It facilitates dispute resolution in this way. Once the ROS obtains all of the relevant information and supporting documentation from consumers and the retailers, the complaint handler will initially attempt to make a recommendation to resolve the dispute informally. If it proves unsuccessful, the ROS will issue a final determination, which may direct the retailers to take certain steps such as providing a refund or exchange or issuing a formal apology, or it may direct the retailers to pay financial award by way of compensation up to £25,000 for proven financial loss where appropriate and applicable. Consumers are not bound by the final determination and may take the complaint further to court. If the retailer is a member of the ROS, it will be contractually obligated to implement the final determination.

#### 6.1.4.4. *The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulation 2015*

The EU Directive 2013/11/EU on ADR for consumer disputes marks a milestone in the ADR development of the region. It requires its member states to ensure that all consumer sectors have access to ADR bodies that have been audited against its quality criteria to protect consumer interests. As a result, the requirements of the

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<sup>114</sup> *Ibid.*

<sup>115</sup> Financial Ombudsman Service, "Policy Statement on Transparency", available at: <http://www.financial-ombudsman.org.uk/publications/policy-statements/transparency.html>

<sup>116</sup> Retail Ombudsman Scheme, "About Us", available at: <http://www.theretailombudsman.org.uk/about-us/>

Directive were implemented into UK law by The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulation 2015.

Starting from October 2015, the new regulation requires traders, once they fail to resolve a dispute with a consumer through their own efforts, to point the consumer to a certified ADR scheme, relevant to their sector and the nature of the specified complaint. Nothing requires the traders to actually use the ADR body although they are encouraged to do so.

The Chartered Trading Standards Institute (“CTSI”) acts on behalf of the Secretary of State as the competent authority under the Regulation to ensure each ADR body meets the quality criteria provided by the Regulation for all consumer sectors other than those regulated by other competent authorities, such as the Financial Conduct Authority (in relation to the FOS). The role of the CTSI covers the auditing of ADR bodies and creating and hosting a website publishing details of all approved ADR bodies. The CTSI itself, does not handle consumer complaints.

The new regulation enhances the rights of consumers by developing a better coordinated and quality assured consumer ADR regime. The reform of the consumer ADR landscape has given greater clarity and transparency for consumers with regard to where they can turn to for help and advice in resolving disputes, and signifies a global trend in the institutional development of consumer ADR schemes.

## **6.2. Pre-dispute Arbitration Clause**

Under pre-dispute arbitration clauses, a consumer is effectually mandated to waive the right to pursue a claim in court and have any dispute with a trader handled through binding arbitration. The treatment of pre-dispute arbitration clauses in consumer contracts differs greatly between the United States and the EU (including the United Kingdom).

### **6.2.1. The United States**

In the United States, pre-dispute arbitration clauses in consumer contracts are commonly found and generally enforceable, even if they provide for binding arbitration and result in unfairness to a consumer. The Federal Arbitration Act (“FAA”) overturned the common law hostility towards arbitration by making pre-dispute arbitration agreements “valid, irrevocable, and enforceable”, without distinguishing between business contracts and consumer contracts. This has been reinforced through a number of United States’ Supreme Court cases where challenges to pre-dispute arbitration clauses in consumer contracts have been rejected. One case

stated that "Congress, when enacting [the FAA], had the needs of consumers, as well as others, in mind".<sup>117</sup>

## 6.2.2. The European Union and the United Kingdom

In the United Kingdom, the Arbitration Act of 1996 precludes enforcement of all arbitration agreement if the pecuniary remedy is less than £5,000. This law applied to both pre- and post-dispute agreements as a means for preserving access to English small claims proceedings.

In fact, as one of the member countries in the European Union, by implementing the Act, UK is following a practice according to Article 3(1) of the EU Directive 13/93 which stipulates that "a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer". Annex 1(q) of the EU Directive 13/93 further states that it is unfair to exclude or hinder a consumer's right to take legal action or exercise any other legal remedy, particularly by requiring a consumer to take disputes exclusively to arbitration not covered by legal provisions; and unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

According to Guidance on the unfair terms provisions in the UK Consumer Rights Act 2015 issued by the Competition & Markets Authority, which assumed many of the functions of the previous Office of Fair Trading (dissolved in 2014), if any arbitration clause is to be used with consumers, it must be free from the element of compulsion. This is seen as necessary to meet the requirement of fairness even if it relates to claims higher than £5,000. With a view to ensuring that it complies with the requirements of fairness, an arbitration or other ADR clause should, for example, make clear that consumers have a free choice, when a dispute arises, as to whether to go to ADR or not.

Consumers in Hong Kong are statutorily protected from being exploited by the use of unfair pre-dispute arbitration clauses in consumer contracts. Section 15 of the Control of Exemption Clauses Ordinance (Cap. 71) provides that save and except the contracts set out in Schedule 1 thereof (e.g. contract of insurance and contract relating to transfer of interests of land) an arbitration agreement can only be enforced against a consumer if (1) there is written consent by the consumer after the differences arise or (2) the consumer himself has had recourse to arbitration in pursuance of the such agreement. In any event, consumers should be given a right

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<sup>117</sup> Drahozal, Christopher R. and Friel, Raymond, Consumer Arbitration in the European Union and the United States, North Carolina Journal of International Law and Commercial Regulation, Vol.28, 357 (2003), pp.374-375

to choose the proper venue for dispute resolution and seek proper redress. After all, fairness is the most important cornerstone in any consumer transactions and for resolving dispute arising therefrom.

## 6.3. Civil Law Jurisdictions

### 6.3.1. Portugal

Portugal is another example of a country putting in place the EU's endeavours in promoting and developing consumer ADR.

Portugal has 7 arbitration centres which handle consumer disputes with regional coverage in Lisbon, Oporto, Coimbra, Braga, Vale do Ave, Algarve and Madeira, and 2 specialized arbitration centres with national coverage responsible for disputes related to the motor vehicle sector and to the insurance sector.<sup>118</sup>

#### 6.3.1.1. *EU Directive: Portuguese Law No.144/15*

Similar to the UK, and in compliance with the latest EU Directive on consumer ADR, under the Portuguese Law No.144/15, a consumer arbitration network has been implemented to ensure that the existing arbitration centres share common information systems and procedures. In addition, a certification process was created with a national list of all Portuguese ADR entities responsible for resolving consumer disputes, in order to control the established legal quality requirements. All consumer arbitration centres and all consumer ADR entities must be registered with the network and on the list. The Portuguese Directorate-General of Consumer is the body in charge of monitoring the network and certifying the ADR entities.

In Portugal, the establishment of the arbitration centres is authorized by the Minister of Justice, and their administration is supported by the Alternative Dispute Resolution Office. Since 2011, disputes related to essential public services such as water, electricity, gas, transport, and communications are subject to a unilateral compulsory arbitration system. Arbitration is mandatory for traders but remains voluntary for consumers.<sup>119</sup>

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<sup>118</sup> Cátia Marques Cebola, Research Centre on Legal Studies-CIEJ, ESTG, Polytechnic Institute of Leiria, Portugal, "The Transformation of Consumer Dispute Resolution in the EU" (2015)

<sup>119</sup> *Ibid.*

### 6.3.1.2. Portuguese Consumer Arbitration Centres

The creation of consumer arbitration centres is governed by the Voluntary Arbitration Act (Law No.31/86). Its primary goal is to promote the resolution of small consumer disputes and to handle claims by means of information, mediation, conciliation and arbitration.<sup>120</sup>

In terms of the funding model, the arbitration centres in Portugal are non-profit associations, co-financed both by the Ministry of Justice and by their associate bodies. Business financing of arbitration centres is rejected in Portugal in order to protect the transparency and independence of the centres and to avoid consumer doubts about the neutrality of awards.<sup>121</sup>

The arbitration centres hear disputes involving the acquisition of goods and services of less than €5,000. Legal service and the arbitration tribunal are the 2 essential services offered by the centres.<sup>122</sup>

Legal services are provided by full-time legal officers, who directly meet with consumers seeking help from the centres. Once the legal officers have taken cognizance of the dispute, they advise and inform the consumers of their rights and recourses and guide them regarding their eventual claim, which will begin by submitting the dispute to an alternative dispute-resolution process. The process is voluntary for consumers but mandatory for all traders who subscribe to the centre's services. At this stage, a mediation session is conducted with the trader. If the parties fail to arrive at settlement, the case will be forwarded to the conciliation stage.

Conciliation is conducted by legal officers in the arbitration centres. If the conciliation process still fails to reach agreement, parties may submit their disputes to the Arbitration Tribunal for adjudication by a single arbitrator, who is also a magistrate named by the Superior Judicial Council. Arbitration by a magistrate increases the tribunal's independence and impartiality and strengthens the parties' trust in the system. The arbitrator-judge renders arbitral decisions depending on laws or on fairness grounds. The arbitration centres' arbitral decisions are published annually. It is not mandatory for parties to be represented by counsel, so that dispute-related costs can be kept as low as possible. Arbitration decisions also have the same value as decisions by a court of first instance, and are enforceable without the need of being certified.

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<sup>120</sup> *Supra* Note 100 p.54

<sup>121</sup> *Supra* Note 118

<sup>122</sup> *Supra* Note 100 p.54

Traders who fully subscribe to these services can use the arbitration centres' logo on their premises and their names are entered on a published list. Using the logo assures consumers that in case of dispute, the trader will agree to submit to the services provided by the centres.

According to the experience of Portugal, the success of the arbitration centres depends fundamentally on upholding the following principles or essential guarantees for justice: equality, independence and impartiality, transparency, legality, effectiveness and fairness. These attributes must be observed when considering any ADR model including consumer arbitration in Hong Kong.

## 6.3.2. Macao

### 6.3.2.1. *Macao Consumer Arbitration Centre*

As a former Portuguese colony, Macao has adopted a consumer arbitration system which is very similar to that of its former sovereign state. There is also a Consumer Arbitration Centre in Macao which aims to resolve consumer disputes occurring in the territory of Macao through the provision of intermediary services, mediation services and arbitration for cases in which the claims involved do not exceed MOP50,000.<sup>123</sup>

The Arbitration Centre operates under the auspices of Macao Consumer Council as a government body. It is situated and operates inside the head office of the Council. The Council can appoint an experienced officer and/or staff who are specialized in mediation to provide appropriate legal advice to both parties. The arbitrator is a judiciary magistrate acting as a part-time "Arbitration Judge".

### 6.3.2.2. *Macao Consumer Council*

Similar to the Hong Kong Consumer Council, the Macao Consumer Council will first assist consumers to resolve their disputes through negotiation with traders by way of conciliation. If the conciliation fails, and if the party being complained of is an "Adherent" or "Certified Shop" of the Arbitration Centre, the disputes can be submitted to the Arbitration Centre for adjudication; if so agreed by the complainant. If the party being complained of is not an adherent of the Arbitration Centre but prefers to resolve the dispute through the Arbitration Mechanism, the trader may temporarily join the mechanism and start the procedure for mediation and arbitration; if so agreed by the consumer. The services provided by the Centre are free of charge to both parties. Parties are not obliged to appoint a lawyer, and they may defend themselves and their interests in the dispute.

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<sup>123</sup> Macao Consumer Council, "*Mediation and Arbitration of Consumer Dispute*", available at: <http://www.consumer.gov.mo/CAC/apply.aspx?lang=en>

The Centre adopts the procedure of “mediation first, arbitration next” for resolving disputes between consumers and traders. Mediation agreements ratified by the Arbitration Judge and an “arbitration judgment” that is delivered have the same legal status and effect as a judiciary court order.

### 6.3.3. South Korea

#### 6.3.3.1. Korea Consumer Agency

The Korea Consumer Agency (“KCA”) is a government organization established in July 1987 based on the Consumer Protection Act. Its founding principle is to protect consumer rights and interests, to promote a rational consumption life and to contribute to the sound development of the nation’s economy.<sup>124</sup>

There is a Consumer Counseling Team under the KCA which provides counseling and handles complaints related to various fields such as automobile, daily articles, housing and facilities, publications, service, agriculture, textile, finance and insurance, law and medicine.

Redress is provided based on recommended conciliation between parties involved in the dispute in accordance with the Compensation Criteria for Consumers’ Damages. If parties fail to reach an agreement through conciliation, the case will be referred to the Consumer Dispute Settlement Commission (“CDSC”) for a “mediation” decision.

The KCA operates the CDSC in accordance with Article 60 of the Framework Act on Consumers, which is a quasi-judicial authority that reviews consumer dispute cases and makes settlement decisions or mediation decisions.

The CDSC receives evidence and relevant data from the consumer and business and fairly handles the dispute by referencing test/inspection results or expert committee’s opinions. The Committee is comprised of 30 experts in the field of law, medicine, automobile, insurance and product liability, and representatives of consumer and business organizations who are appointed by the Chairman of Korea Fair Trade Commission on the recommendation of the KCA President.

If both parties accept the mediation decision by the CDSC, it has the same judicial effect as the court of law (a final ruling under the Civil Procedure Act). If one or both parties do not accept the decision, civil suits can be filed. In case businesses fail to comply, the KCA assists consumers in filing civil suits through the Legal Assistance

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<sup>124</sup> Korea Consumer Agency, “*Purpose of Establishment*”, available at: <http://english.kca.go.kr>

Group. The Legal Assistance Group is comprised of 20 incumbent attorneys from the metropolitan and rural area.

While the conciliation process in KCA may be similar to what we conduct in Hong Kong and other jurisdictions under review, the process of arriving at a mediation decision is more akin to what is commonly accepted for adjudication or arbitration than to mediation.

#### 6.3.3.2. *Medical Dispute Mediation and Arbitration Agency*

The Korean Medical Dispute Mediation and Arbitration Agency is a designated dispute resolution mechanism for consumer disputes arising from medical services. The “mediation” process like that of KCA may lead to a “mediation decision” through a process that is more adjudicative than consensual. The legal effect of both the “mediation decision” and “arbitration decision” are as good as a court decision.<sup>125</sup>

### 6.4. Observations

The landscapes of consumer ADR vary amongst different jurisdictions. Nevertheless, we notice the interplay between different ADR techniques namely, conciliation, mediation, adjudication and arbitration in these jurisdictions, although there may be some variance in terms of definition and formality. In any event, various ADR methods or processes are being used interchangeably.

In some jurisdictions, arbitration is adopted in some or even all sectors for consumer cases, such as the CAMVAP in Canada and the Consumer Arbitration Centres in Portugal and Macao. The Ombudsman system is widely used in common law jurisdictions, as demonstrated by Australia and the United Kingdom, which focus on conciliation and adjudication. In any event, we see the value of consumer arbitration in resolving dispute of consumer cases, as supported by the experience in some jurisdictions. Set out below are our observations of the abovementioned ADR landscapes of other jurisdictions which are relevant to our consideration of establishing an institutionalized consumer arbitration model in Hong Kong.

#### 6.4.1. Operation model

In most of the ADR schemes of the jurisdictions mentioned above, an adjudicative process is not stand-alone but complemented by other ADR processes. The parties are typically given the chance to resolve their dispute via a consensual process before

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<sup>125</sup> Korea Medical Dispute Mediation and Arbitration Agency, “*Medical Dispute Mediation and Arbitration*”, available at: [https://www.k-medi.or.kr/eng/contents/medi\\_arbitration.jsp](https://www.k-medi.or.kr/eng/contents/medi_arbitration.jsp)

a more formal procedure, is invoked. It appears that a hybrid model composing mediation and arbitration services is the preferred option in most jurisdictions.

#### 6.4.2. Funding

Funding and support by the government, as the experience of Portugal shows, may ensure fairness, independence, impartiality and neutrality of the ADR body. They are all cornerstones for the justice of any redress system. Industry funding by way of membership schemes, and the principle of “user pays” are possible but usually there is statutory backup to the effect that the traders are mandated to join the scheme, such as those found in the financial sector in Australia and the United Kingdom. The experience of the industry-funded consumer arbitration schemes in Canada alerts us of the risk of domination and control by traders and thereby impairing the fundamental justice of impartiality and neutrality of the scheme, which has to be avoided. Funding by the government could avoid such problem.

#### 6.4.3. Balancing the Inequality of Bargaining Power between Consumers and Businesses

There is an inherent inequality of bargaining power between consumers and businesses. In that regard, consumers constantly and consistently find themselves in a markedly weaker position than the businesses, in terms of, amongst others, the extent of financial backup and the familiarity to the means of dispute resolution, in availing themselves of the best remedies available to them. To redress or at least mitigate the imbalance some of the above jurisdictions have taken the following measures.

##### 6.4.3.1. *Free to Consumers*

Proportionality between costs and value of a claim is often an issue. Therefore, free adjudication and other ADR services are found in Australia and the United Kingdom for different types of ombudsman schemes and the consumer arbitration centres in Portugal and Macao.

Charging no fee will be a strong incentive for consumers to submit their claims to a consumer arbitration scheme and make use of the cost-effective procedures of it. The recourse to arbitration or other ADR processes would also benefit the traders who can save or dispense with the time and costs to be expended in lawsuit.

##### 6.4.3.2. *Repeat Player Effect*

The repeat player effect as explained above and illustrated by the implementation of the arbitration program under the Guarantee Plan for New Residential Buildings

in Quebec of Canada, may prejudice the rights and interest of consumers. It should be avoided. This problem can be resolved by abundant supply of quality and impartial arbitrators and mediators specializing in handling consumer disputes in different specific sectors. As mentioned in Chapter 5, Hong Kong's ADR landscape is supported by a large and diverse pool of highly qualified professionals. Repeat player effect should not be an issue. To further eliminate such risk, for the ADR model that we would propose to introduce to Hong Kong in the next Chapter, in addition to arbitrators and mediators in current practice, attempts can be made to invite retired professionals with relevant qualifications, such as judges, lawyers, accountants, engineers, surveyors and medical doctors to join the panels of arbitrators and mediators as well. Their respectable backgrounds will gain trust, reliability and confidence from both the traders and consumers.

#### 6.4.4. Participation

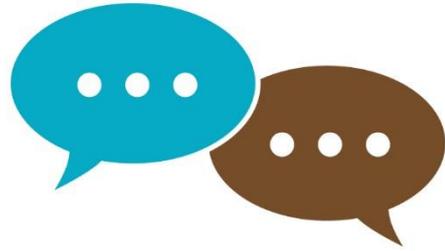
Pre-dispute arbitration clause has been criticized as impairing consumer interest, as it denies consumers' access to justice via court. It would not be an issue for most consumer contracts in Hong Kong because such a clause is generally not enforceable by virtue of section 15 of the Control of Exemption Clauses Ordinance, except for those contracts set out in Schedule 1 thereof.

On the other hand, pre-dispute arrangements to oblige or encourage traders to participate in the arbitration/ADR processes under the dispute resolution scheme upon the request of consumers to whom they have dispute would be critical to the success of the scheme. Such arrangement can be made as a legislative or licensing requirement, which seems to be suitable for industry with modest number of members and under specific regulatory or legislative control, such as insurance and finance. For general consumer goods and services, it appears that the membership model of Macao on voluntary basis driven by recognition and encouragement is more appropriate.

#### 6.4.5. Merger and Integration of existing Industry ADR schemes

Mergers between different ADR schemes can enhance cost-effectiveness as a result of sharing common resources and providing a one-stop convenient dispute resolution service to consumers. The FOS in Australia and the FIDReC in Singapore are good examples; although the mergers concerned took place between related sectors.

An alternative to mergers can also be achieved by creating an umbrella body sitting above a number of sector specific ADR schemes. The coordinating and quality assurance body, known as the "competent authority" scheme in the UK under the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulation 2015, is one example.



## Chapter 7

### Conclusions and Recommendations

#### ***Key Points***

- An institutionalized consumer dispute resolution process using arbitration in conjunction with mediation, compatible to the local context and the current ADR regime, should be introduced with a view to giving consumers in Hong Kong a feasible and practical choice to resolve their disputes with traders without resorting to legal proceedings.
- This model will provide a dispute resolution process cheaper and quicker than litigation removing the strains that can result from the lengthiness, costliness and uncertainty of legal action. For traders, apart from saving time and costs which may otherwise be incurred by litigation, confidentiality of the dispute resolution may help them preserve goodwill while maintaining harmonious customer relationship.
- At a macro level, such a model may help alleviate the caseload of the court system; and improve social harmony by promoting meaningful direct dialogue and alleviating mistrust during litigation antagonism. This could in turn enhance the business and consumption environment in a virtuous cycle and achieve social and economic values which cannot be evaluated or assessed in monetary terms.

## 7.1. Conclusions

The analysis of the Council's statistics and complaint cases indicates that there are a considerable number of cases which are left unsettled each year after attempts at conciliation have failed and where adjudication is a potential solution. Moreover, it is highly likely that those complaints constitute only part of the potential demand for adjudicative processes for consumer to trader disputes in Hong Kong.

Adjudicative processes to resolve consumer disputes are available in the insurance industry through the ICCB and the financial sector through the FDRC. Other sectorial dispute resolution mechanisms such as those related to telecommunications services provide only a mediation service. In all other cases where a trader is unwilling to resolve a dispute the only recourse available is to take legal action; which most consumers are either unable or unwilling to take for a number of reasons as explained previously in this Report.

The preferred avenue for consumers who wish to have their disputes with traders taken further is to have an independent, impartial, easily accessible, expeditious and affordable dispute-resolution channel with the power to make a binding decision analogous to a judgment in a court.

To cater for this need, the Council considers that the availability of ADR for consumers in Hong Kong has to evolve beyond what is currently available. Hong Kong is a renowned international arbitration centre and arbitration has been well developed and continues to evolve within a robust infrastructure supported by a sound legal framework, abundant and effective professional manpower, and proactive Government promotion and encouragement. Likewise, mediation is also rapidly developed and actively encouraged and promoted by the Government and Judiciary, and implemented in some major sectors of the economy.

Hong Kong is therefore well placed to consider developing a more encompassing form of general consumer arbitration in conjunction with mediation that gives all consumers a feasible and practical choice to resolve their disputes with traders without resorting to legal proceedings.

## 7.2. Recommendations

Accordingly, the Council sets out the following recommendations for public discussion and consideration:

### 7.2.1. Recommendation 1

The Administration should consider establishing or supporting the establishment of a “Consumer Dispute Resolution Centre” to provide arbitration and mediation services to consumers and business in resolving their disputes.

The Council is of the view that consumer arbitration should be institutionalized by setting up an organization to administer and promote consumer arbitration and mediation. The Council recommends the Administration should consider establishing or supporting the establishment of a “Consumer Dispute Resolution Centre” (“CDRC”) to provide arbitration and mediation services, in order to give consumers and traders more choices in resolving their disputes and to avoid court litigation.<sup>126</sup>

The CDRC should be a convenient and accessible one-stop ADR services centre for all consumers and traders in all sectors. Given its cross sectoral nature and the resources implication, it is appropriate that the CDRC should be established and supported by the Government. The involvement of the Government will provide confidence in the CDRC for both consumers and traders who could trust it to be neutral, impartial and credible.

While it might be suggested that mediation provided by the CDRC duplicates the conciliation procedures undertaken by the Council, mediation in the CDRC would be regarded as a final consensual attempt before arbitration is invoked; an avenue unavailable to the Council.

Another concern might be that the confidential nature of consumer arbitration will allow trade malpractices to avoid public scrutiny and court sanctions. However, confidentiality of arbitration is an inducement to traders who care about their reputation and there may be consumers who wish to have their privacy preserved. In any event, the Council could invoke the “name and shame” mechanism to alert consumers of the unscrupulous sales tactics and may refer dubious cases to the Customs and Excise Department or police for investigation or prosecution. Alternatively, there could be regular publication of cases resolved by mediation and arbitration by the CDRC without disclosing the names of the consumers and the traders involved, which would serve to alert public of unscrupulous trade practices.

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<sup>126</sup> Depending on the funding model and other relevant factors in defining the nature of the CDRC, the Administration may consider whether the CDRC should be a “public body” under section 2 of the Prevention of Bribery Ordinance (Cap. 201) and whether it should be included in Schedule 1 to The Ombudsman Ordinance (Cap. 397) and be subject to the provisions of the Ordinance.

### 7.2.1.1. *Approach – Mediation First, Arbitration Next*

The CDRC should be operated in a cost-effective manner, especially where it is funded by the Government or the industry. To achieve the objective of cost-effectiveness, the more economical and expeditious means of resolution, i.e., mediation should be exhausted before the less economical and expeditious means, namely arbitration is invoked. It is proposed therefore that the mechanism should adopt the approach of “Mediation First, Arbitration Next”, similar to the Consumer Arbitration Centres in Portugal and Macao, and the FDRC in Hong Kong.

A recommended consumer dispute handling process for the CDRC is illustrated in Appendix 2.

### 7.2.2. Recommendation 2

Funding for the Consumer Dispute Resolution Centre including recurrent operating costs should be supported by the Government with effective cost control measures. The recurrent operation should include items such as the provision of preliminary legal advice to consumers at the pre-mediation stage, services for mediation and arbitration and legal representation for consumers during arbitration and subsequent appeal. The funding model should be reviewed after 5 years of operation to see if the Government’s financial support should continue or if it should be gradually transformed into an industry funding model. In this regard, in addition to the actual development of the model, reference could be made to overseas experiences, such as the financial dispute resolution schemes in Australia, Singapore and the UK. In any event, the funding model should not compromise the basic values of neutrality and impartiality, which are cornerstone for the success of the proposed institutionalized scheme or model.

Realistically, an affordable avenue for resolving disputes with traders can only be achieved with resource funding supported either by the Government or by the traders.

However, the Council is mindful of the fact that an industry-funded ADR scheme would risk compromising neutrality and impartiality.

Given that consumer mediation and arbitration is an adequate alternative to court proceedings and may bring about a reduction in the caseloads of the SCT and the District Court, and the use of funds for the Legal Aid Schemes, there may well be cost saving benefits that arise from adopting the recommended model.

The Council also recommends that funding should be reviewed after 5 years of operation, to see if the CDRC has been developed to such a stage that financial support could be contributed by business through levying reasonable participation fees.

It is difficult at this primary stage to estimate the funding requirements. However, funding made available for other ADR schemes could be used as a reference, i.e., the initial funding provided by the Government, HKMA and SFC for the FDRC was HK\$35,000,000 per year for the first 3 years from 1 January 2012 to 31 December 2014, and its expenditures for the year 2013 and 2014 were HK\$24,273,071 and HK\$24,054,734 respectively.<sup>127</sup>

#### 7.2.2.1. *Cost Control Measures*

Measures that may serve to control costs for the operation of the CDRC can be found in the following:

- (a) The approach of “Mediation First, Arbitration Next” seeks to avoid complaints progressing towards more costly forms of resolution;
- (b) Free preliminary legal advice to consumers should be provided to ensure that only appropriate cases would proceed within the CDRC process; together with a merits test for (i) conducting arbitration after unsuccessful mediation (see Recommendation 3 below) and (ii) appeal against arbitral award by consumers as losing party (see Recommendation 7 below);
- (c) Capping the claimable amount handled by the CDRC at HK\$200,000 (see Recommendation 6 below); and
- (d) Lowering the costs of arbitration by simplifying the arbitration process and limiting the legal costs recoverable (see Recommendation 7 below).

#### 7.2.3. **Recommendation 3**

**Consumers should be charged no fees for the services of the Consumer Dispute Resolution Centre, including the provision of preliminary legal advice at the pre-mediation stage, services rendered for mediation and subject to merits test, arbitration services and legal representation during arbitration.**

The Council proposes that:

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<sup>127</sup> Financial Dispute Resolution Centre Annual Reports 2013/2014 and 2014/15

*7.2.3.1. Free preliminary legal advice at the pre-mediation stage should be provided to consumers and the costs of which should be borne by the CDRC*

Free preliminary legal advice should be given to consumers to identify and clarify the issues of their cases, giving them a better understanding of the merits and whether to proceed with mediation or reconcile with the trader.

Free preliminary legal advice may also serve to save the operational costs of the CDRC as it will help ensure that resources are allocated to the cases that clearly require the services of the CDRC.

*7.2.3.2. Mediator services should be free to consumers and the costs should be borne by the CDRC*

The claim amounts in most consumer disputes are of modest value, and in order to encourage consumers to use the services of the CDRC and alleviate the caseload of the SCT and the District Court, the CDRC should charge no fee for providing mediation services. Arbitration services should also be free but subject to merits test.

*7.2.3.3. No legal representation be allowed at the stage of mediation, and therefore no legal fee is to be incurred*

Consumers and traders should be given equal standing during the process of mediation. It is recommended that no legal representation be allowed during consumer mediation to minimize the disparity between consumers and traders in terms of both bargaining power and economic position. The prohibition will also be an effective cost control measure as legal cost can be dispensed with.

*7.2.3.4. Subject to merits test, arbitration services and legal representation during arbitration should be provided free of charge to consumers. The costs of arbitration, including fees for arbitrator and legal representation and the liability to pay the legal costs of the opponent in case a consumer loses the case, be borne by the CDRC*

In general, consumers would not be able to conduct arbitration on their own as the procedures are complicated to a layman. However, it would be expensive and disproportionate to their claim to engage legal representation. Without legal representation, consumers would find themselves vulnerable when confronting the traders in a formal setting who are more likely to have resources to hire legal services. To address the inequality of power legal representation should be provided by the CDRC to consumers free of charge, subject to merits test.

A merits test should be conducted by the legal staff of the CDRC to determine whether an unsuccessful mediation case is suitable and has sufficient merits for resolving by arbitration. The merits test should be conducted in accordance with a prescribed list of factors made known to the public to enshrine the principle of transparency. The merits test adopted by the Legal Aid Department may serve as a reference.

#### 7.2.4. Recommendation 4

**Traders' who joined the CDRC must deal with consumer disputes on the request of consumers in accordance with the ADR procedures provided by the CDRC.**

With the support of the Government, the CDRC should work with sector specific trade associations and leading local businesses for gaining their support. Trade associations could be encouraged to stipulate a clause in their own industry codes of practice providing that it is mandatory for their members to join the CDRC and advise their customers of that fact.

Only participating traders can display a logo indicating that ADR procedures provided by the CDRC are available to consumers should they have any dispute with them. Similar practice is found in the "certified shop" in Macao or "Quality Tourism Services Scheme" implemented by the Tourism Board in Hong Kong, as recognition and encouragement of traders' participation.

It is anticipated that as the CDRC matures, it will build credibility thereby giving trade associations an incentive to provide for mandatory participation in their codes of practice.

Moreover, as more traders display a CDRC logo those who are not joining, and cannot display the logo might find that this is acting as a disincentive for consumers to deal with them. Market forces could then come into play, making participation in the CDRC a commercial imperative.

#### 7.2.5. Recommendation 5

**The Consumer Dispute Resolution Centre shall be impartial, independent, and transparent to ensure fairness.**

### *7.2.5.1. Impartiality*

Impartiality, independence, transparency and fairness are the cornerstones of any ADR process. The choice of mediators and arbitrators should be mutually agreed between the parties and attempts at avoiding the “repeat player effect” should be put in place. Mediators and arbitrators should sign a declaration of interest to disclose any actual or potential bias or personal interest, or any past or present relationship with the parties, so that there is no perceived or actual conflict of interest. The disclosure obligation should continue throughout the period of appointment and such information should be communicated to the parties. Upon objection and valid justification by a party to the dispute resolution process, the service of the mediators and arbitrators should be discontinued by the CDRC and such information should be communicated to the other party forthwith. Such right of objection could only be exercised by the parties once during the ADR process to avoid abuse and to protect the party in a disadvantageous position during the course of the process.

### *7.2.5.2. Independence*

The CDRC should be independent of both consumers and business, and not be sponsored or supported in any manner by either side. Therefore, funding by the Government is essential. The Council considers that a management board be set up to put in place checks and balances for monitoring the operation of CDRC and ensuring its dispute resolution procedures are conducted in an independent, fair and impartial manner. The board members including its chairman should be appointed by the Government. The composition should be fairly-balanced with representatives from different sectors, including professionals, dispute resolution service providers, consumers and businesses.

### *7.2.5.3. Transparency*

Transparency should be provided, giving consumers and traders a full and accurate picture on all the procedures and relevant fees involved; the progress of complaints handling; any assistance available; and possible solutions for resolving disputes. Transparency should also apply to discovery at the preliminary stage and disclosure of arguments during arbitration hearing where the parties should be given the opportunity to present all their views and are informed about the arguments of the other party.

To strike a balance between transparency and confidentiality it is proposed that relevant statistics and case information of the CDRC should be accessible to the public in an anonymous manner. Traders may benefit from the disclosure as it could help them identify patterns of behavior or structural flaws and provide a feedback

loop to both businesses and consumers who may adjust their operation or behavior in light of the information.

#### 7.2.6. Recommendation 6

##### **The claimable amount handled by the Consumer Dispute Resolution Centre should be capped at HK\$200,000.**

In view of the fact that the amount of claims handled by other redress mechanisms of the SCT, the FDRC, the ICCB, and the CCSS are capped, the Council recommends that the claimable amount handled by the CDRC should also be capped, with an upper limit of HK\$200,000. From the experience of the Council, the region under such upper monetary limit has already covered most of the consumer complaints, and allows aggrieved consumers and the opponent traders whose claim amounts falling beyond the jurisdiction limit of the SCT (HK\$50,000)<sup>128</sup>, but are not so substantial as to warrant them to spend significant legal costs for proceedings at the District Court. Having regard to the need to balance the competing interests between consumers, traders and government funding, we are of the view that HK\$200,000 is the most appropriate cap.

This upper monetary limit could be reviewed after 3 years from the inception of the CDRC in light of the caseload of the CDRC and other circumstantial changes to see if it should be adjusted.

#### 7.2.7. Recommendation 7

##### **The Consumer Dispute Resolution Centre should be underpinned by panels of mediators and arbitrators from diverse disciplines. The arbitration proceedings should be as simple and cost-effective as possible and the legal costs recoverable should be limited so as to minimize the costs for arbitration.**

Since the scope of consumer disputes to be handled by the CDRC will be extremely broad, persons from diverse disciplines will be required as expert witnesses, mediators and arbitrators. The Council is confident that the CDRC will have such support under the existing well-established and evolving ADR framework with abundant supply of mediators and arbitrators who may serve the CDRC appreciating its social significance, or the benefit for career development. As regards

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<sup>128</sup> This is currently under review by the Judiciary and it is recommended, *inter alia*, that the amount should be increased to HK\$75,000.

the remuneration for arbitrators and mediators, it is proposed that they could be rewarded by the CDRC on an honorarium basis, similar and with reference to the remuneration for non-official members of different advisory and statutory bodies set up by the Government.

Some cost-saving techniques could be employed without compromising the principle of fairness, such as “documents-only” arbitration for simple cases; “guillotine” or “chess clock” procedures that fix a reasonable or realistic time for oral hearing; imposing time limits on presentations by the parties at hearing. As it is suggested that legal representation should be allowed for arbitration and given that traders might retain lawyers to represent them, the issue then arises as to whether the CDRC will have to bear the costs of a trader if a case is lost by a consumer. The CRDC could stipulate in its arbitration rules that the costs recoverable by the parties are limited by virtue of section 57 of the Arbitration Ordinance.

In addition, the CDRC may also prescribe its own mediation and arbitration rules to simplify the procedure on (i) the appointment of mediator and arbitrator; (ii) the mediation and arbitration process; (iii) the process and requirements for “documents-only” arbitration and “in-person hearing” arbitration, so that any mediation and arbitration will be conducted in a simple, fast, efficient and effective manner. The award should be subject to appeal only on very limited grounds, mainly on points of law, in line with well-established principles of arbitration law. If a losing trader appeals against an arbitral award, the CDRC would continue its support to the consumer to resist the appeal. On the other hand, a losing consumer intending to appeal with the support of the CDRC would be subject to another merits test. The appealing party's recoverable costs incurred in, or arising out of, such an appeal should be limited to a prescribed amount. It is noted that similar cost-saving measures have been introduced into the Mediation and Arbitration Rules of the FDRC.

#### 7.2.8. Recommendation 8

**There should be in place mechanisms for Consumer Council and the Judiciary to refer suitable consumer disputes to the Consumer Dispute Resolution Centre.**

To fully utilize the CDRC and optimize its functions, mechanisms should be put in place for the Council and the Judiciary to refer, where appropriate, consumer disputes to the CDRC with the parties' consent.

Such referral mechanisms would facilitate an efficient pathway for consumers and traders in dispute. In addition, it may reduce the caseload of the SCT and the District Court and enhance better allocation of resources to other adversarial cases. To

implement this recommendation, the Judiciary may consider amending or adding the Practice Directions to cater for the referral mechanism.

### 7.2.9. Recommendation 9

**Consideration should be given to merging the existing consumer dispute resolution schemes operated in the financial, insurance, telecommunications, and building management sectors into the Consumer Dispute Resolution Centre.**

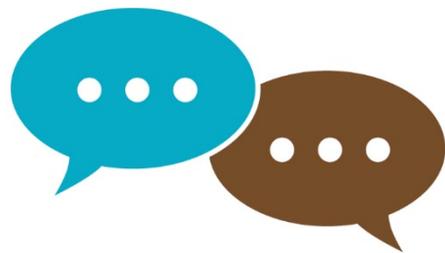
There are already 4 existing sector specific dispute resolution schemes for consumers, namely the FDRC, the ICCB, the CCSS, and the BMS. Merging them into the CDRC may optimize cost-effectiveness through resource sharing. For instance, the cost of operation and administration could be lowered by sharing office premises, administrative staff, and mediators and arbitrators where appropriate.

However, it is accepted that the 4 existing ADR schemes are intrinsically distinct from one another, in terms of operational models, authorities in charge, funding mechanisms, claims limits and criteria and resolution procedures. For instance, the FDRC adopts “Mediation First, Arbitration Next” approach, the CCSS and the BMS engage only in mediation and the ICCB undertakes adjudication. It can be anticipated that consolidation of these ADR schemes would be controversial, and may encounter difficulties due to their current different modes of operation, and costs associated with administrative changes.

Nevertheless, in shaping the future development of the ADR landscape of Hong Kong, some form of consolidation is worth considering as the CDRC model develops.

## 7.3. Closing Remark

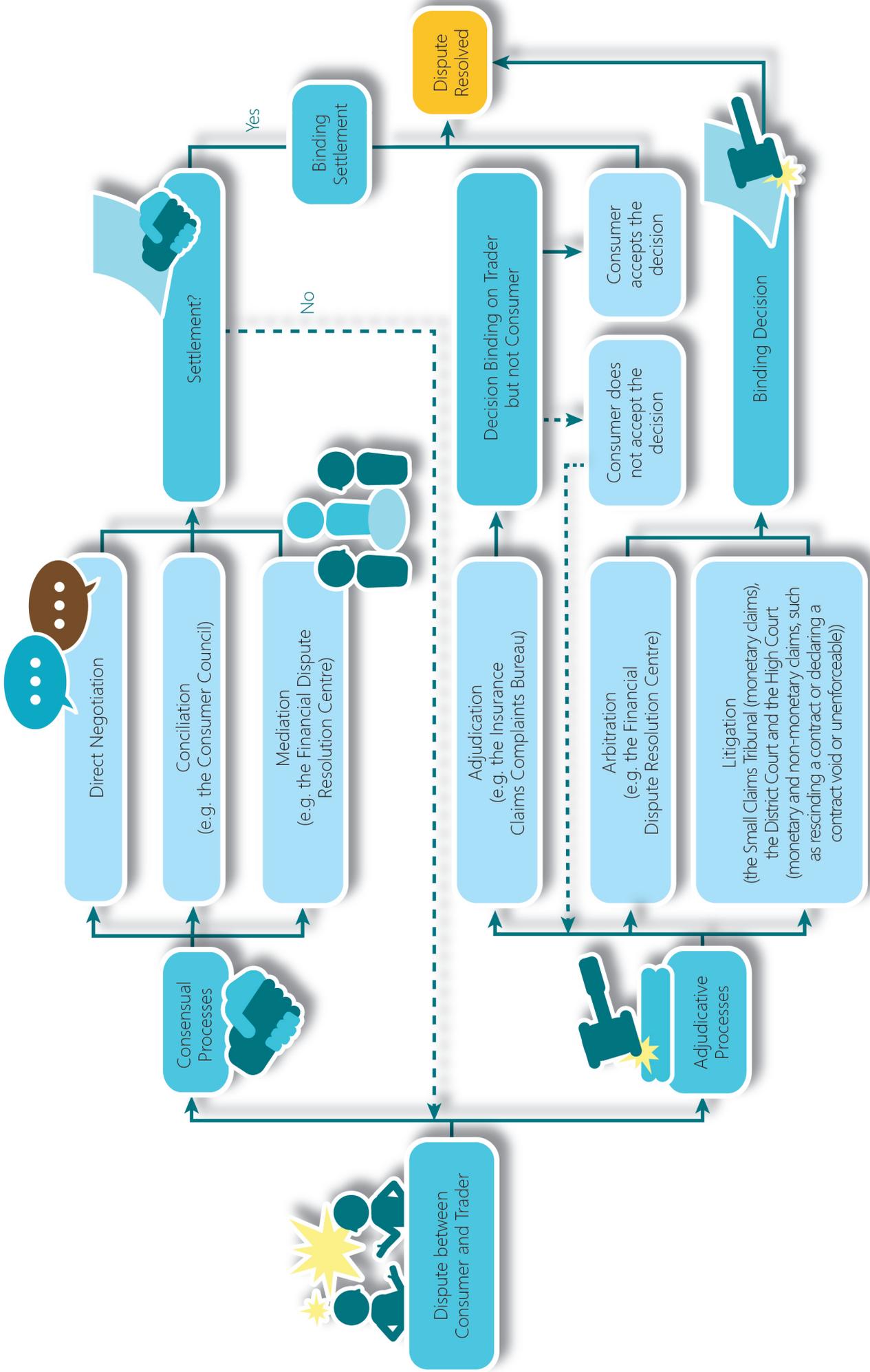
As a closing remark, this Report is intended to mark the beginning of dialogues amongst stakeholders including consumers, traders, the Government, ADR organizations and the Council with a view to achieving a better dispute resolution regime for consumers and traders in Hong Kong. The Council looks forward to exchanging views on the subject and serious consideration by the Government which is expected to play a vital role in the proposed CDRC scheme.



## **Appendix 1**

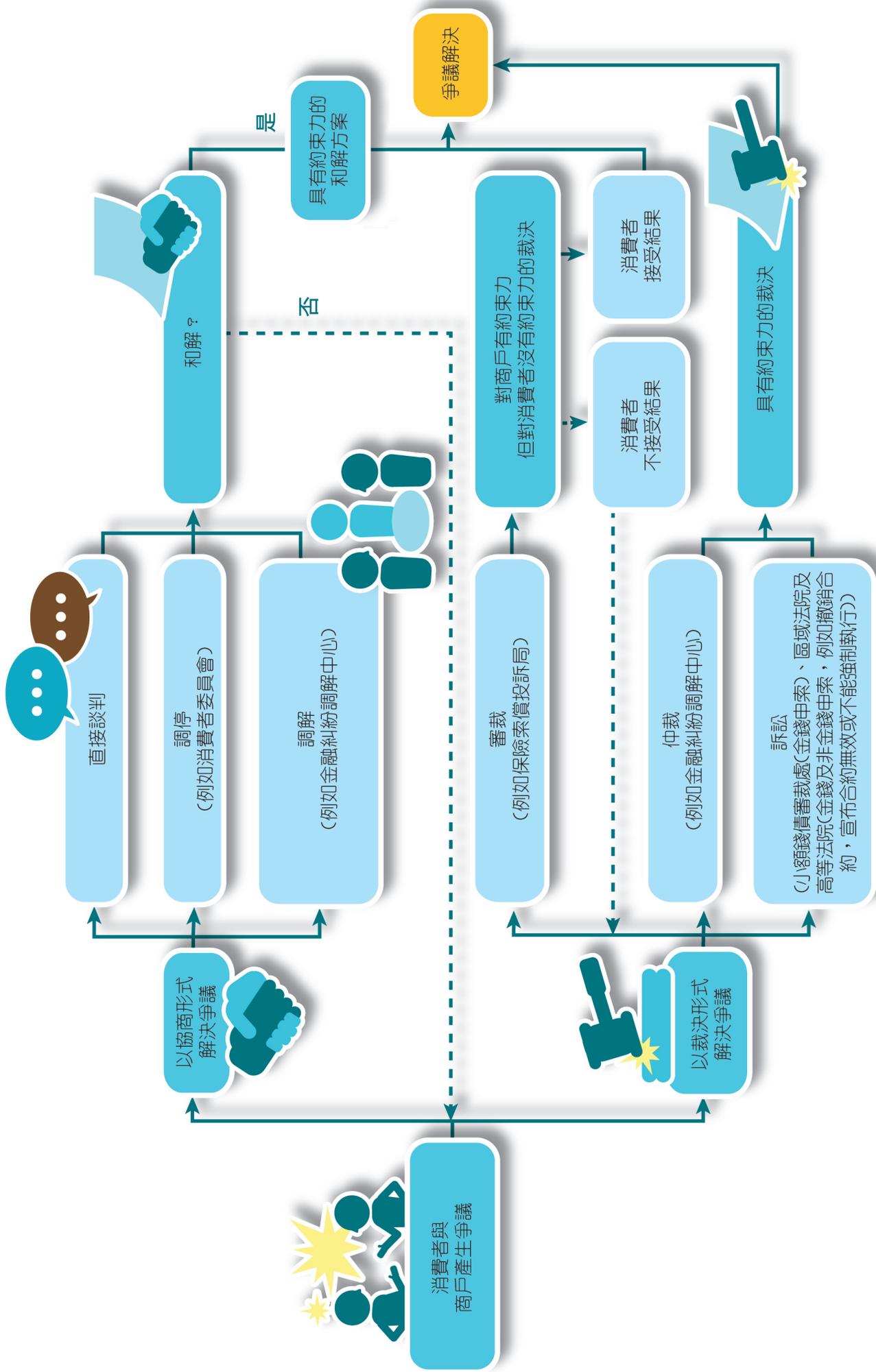
### Consumer Dispute Resolution in Hong Kong

# Consumer Dispute Resolution in Hong Kong

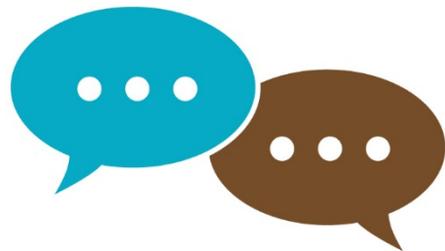


\*Consumers may have different preference on how their disputes with traders should be resolved.

# 在香港處理消費爭議的方法



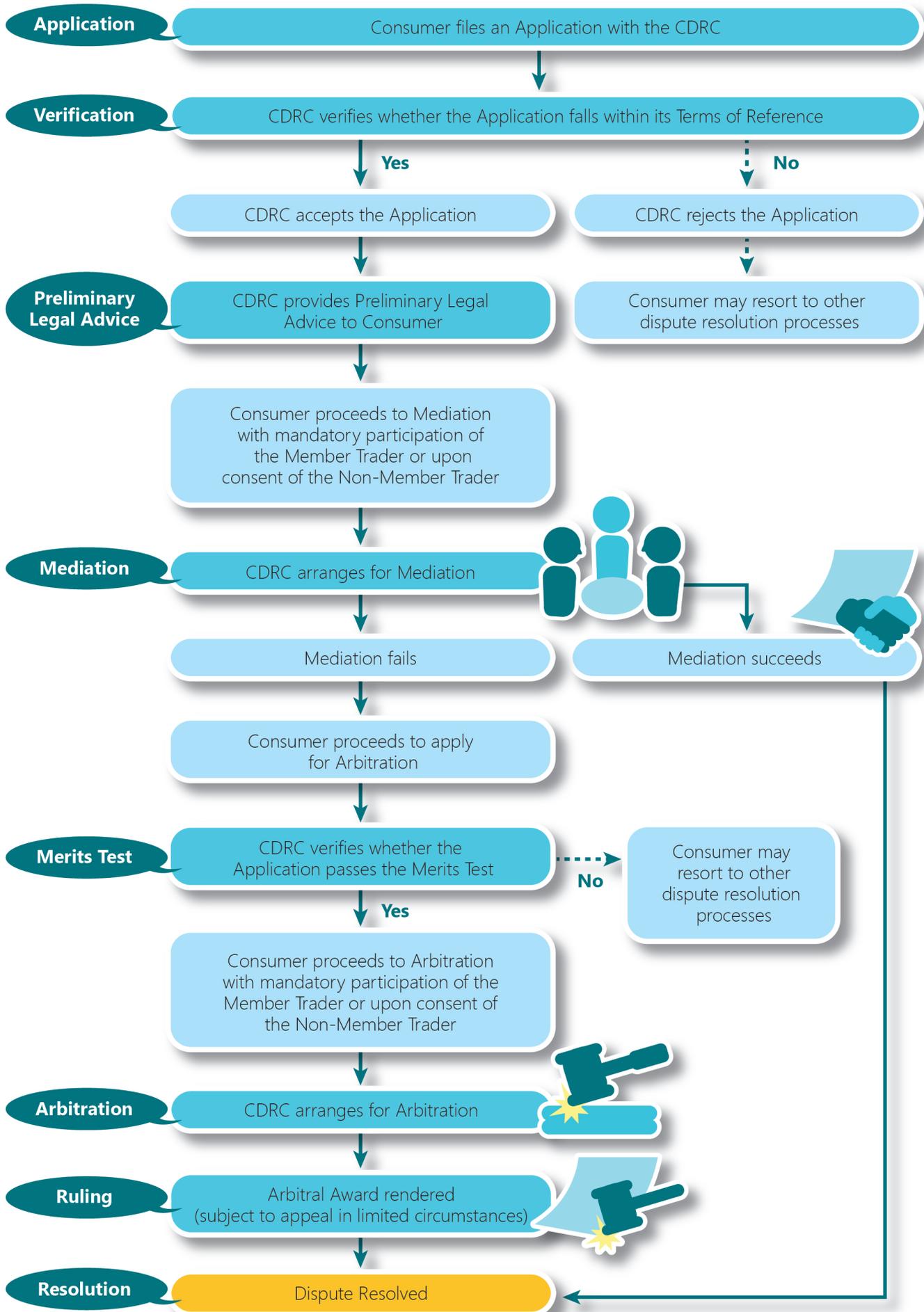
\*消費者就他們如何與商戶解決糾紛可能有不同的取向。



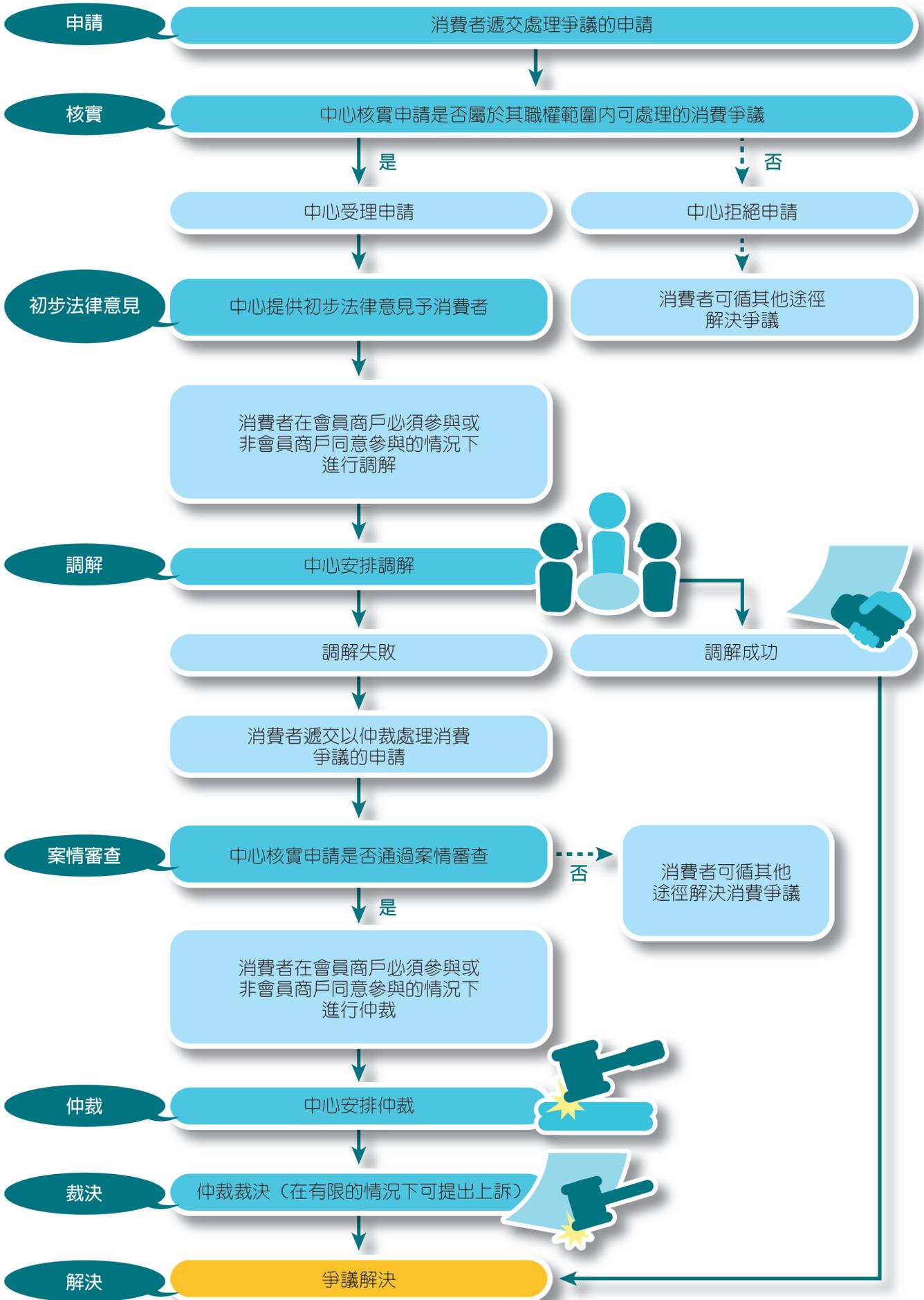
## **Appendix 2**

Flowchart on Consumer Dispute Handling Process by  
the Consumer Dispute Resolution Centre

## Flowchart on Consumer Dispute Handling Process by the Consumer Dispute Resolution Centre ("CDRC")



# 消費爭議解決中心處理消費爭議流程圖





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消費者委員會2016年8月出版 Published by Consumer Council, August 2016

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