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Introduction

The present financial crisis has had significant repercussions throughout the global economy. It has provided an impetus for examining effective avenues for the resolution of financial disputes. As yet, however, there is little consensus worldwide as to how the effects of such crises can best be addressed through effective systems of financial dispute resolution.

This book presents an examination of how governments and self-regulatory organisations in major global financial centres have increasingly employed alternative dispute resolution mechanisms including ombuds models, arbitration, direct settlement negotiation and mediation to address consumer complaints against retail banks and financial institutions as a form of 'responsive banking'. The results of a comparative cross-jurisdictional analysis of consumer financial dispute resolution centres in seven jurisdictions shed light on the underlying structural design, policy orientation, complaint procedures, financing and oversight of financial dispute resolution centres as established in diverse regions. The findings indicate that such centres in general offer a flexible and relatively fast way to resolve financial disputes, but are not without their challenges. Such challenges include the potential for mismatch between regulatory consistency and individualised case handling.[1] Determining how best to overcome such challenges while addressing a growing number of finance-related disputes are pressing questions facing governments, legislatures and aggrieved citizens.

A financial crisis with global proportions

Beginning in early 2007, the indicators of what would soon become the most severe financial crisis since the Great Depression in the 1930s became increasingly evident. In the summer of 2007, investment banks such as Bear Stearns and BNP Paribus warned investors that they would

[1] See Arner, Hsu and Da Roza (2010) 'Financial regulation in Hong Kong: Time for a Change', *As. J.C.L.*, 5, pp. 71–114.

be unable to retrieve money invested in sub-prime mortgages hedge funds. Later in September, there was a bank run on Northern Rock – the biggest run on a British bank for more than a century. By 2008, Northern Rock was nationalised. Banks such as the Union Bank of Switzerland ('UBS'), Merrill Lynch and Citigroup also started announcing losses due to heavy investments in sub-prime mortgages. In response to the growing crisis, central banks in Europe, Canada, the United Kingdom, the United States and Japan intervened to boost liquidity in the financial markets by reducing interest rates and increasing monetary supply.[2]

To prevent a collapse of the US housing market, financial authorities in the United States stepped in with one of the largest bailouts in history of Fannie Mae and Freddie Mac. On 15 September 2008, Lehman Brothers filed for bankruptcy. Ripple effects were immediately felt throughout the world. Countries successively announced details of rescue packages for individual banks as well as the banking system as a whole and emergency interest rates were further cut. The United States initiated a $700 billion Troubled Asset Relief Program to rescue the financial sector and the Federal Reserve also injected a further $800 billion into the economy to stabilise the system and encourage lending. It also extended insurance to money market accounts via a temporary guarantee.[3] By early 2009, the United Kingdom, the European Union and the United States had officially slipped into recession.

Governments across the world implemented economic stimulus packages and promised to guarantee loans. The International Monetary Fund ('IMF') estimated that banks in total lost $2.8 trillion from toxic assets and bad loans between 2007 and 2010.[4] There was also a severe decline in assets as stock indices worldwide fell along with housing prices in the United States and the United Kingdom.[5]

The global reach of the financial crisis calls for renewed investigation of how governments and self-regulatory organisations in major financial centres can effectively employ dispute resolution mechanisms to address citizen complaints arising from financial dislocation. Such an examination is

[2] BBC News (7 August 2009) 'Credit crunch to downturn', available at: http://news.bbc.co.uk/2/hi/business/7521250.stm [accessed 29 December 2010].

[3] D. Gullapalli, and S. Anand (20 September 2008) 'Bailout of money funds seems to stanch outflow', *The Wall Street Journal*, available at: http://online.wsj.com/article/SB122186683086958875.html?mod=article-outset-box [accessed 29 December 2010].

[4] D. Cutler, S. Slater and E. Comlay (5 November 2009) 'US, European Bank writedowns, credit losses', *Reuters*, available at: www.reuters.com/article/idCNL554155620091105?rpc=44 [accessed 29 December 2010].

[5] BBC News, 'Credit crunch to downturn'.

important not only to help us understand the dynamics of resolving complex consumer disputes in times of financial crisis, but also to prepare us to apply lessons learned to the design of more robust, fair and efficient centres for the prevention and resolution of future financial disputes.

Viewing consumer financial dispute resolution in a theoretical context

The question of how systems of consumer financial dispute resolution can be designed in diverse contexts to effectively and fairly administer the resolution of financial disputes, how such centres can draw on emerging global principles of accessibility, efficiency, impartiality and fairness and how such centres might consequently contribute to the health of the broader economic environment touch on three primary bodies of scholarship: work in the law and development field; studies in dispute system design; and work examining the impact of globalisation on international legal practice.

Law and development literature has long puzzled over the relationship between systems of dispute resolution and economic growth. Much of this literature has focused on formal systems of dispute resolution including litigation and arbitration and economic development.[6] Informal structures have traditionally been framed as outside the shadows of formal law,[7] and somewhat antithetical to growth.[8] Work focusing on East Asia has traditionally framed the debate in terms of whether economic growth has occurred in spite of, or because of, the later development of formal legal structures in the region.[9] However, thus far, none of these studies

[6] See for example: M. Weber (1968) *On Charisma And Institution Building*, S. N. Eisenstadt (ed.), (University of Chicago Press); D. M. Trubek (1972) 'Toward a social theory of law: an essay on the study of law & development', *Yale L. J.*, 82, p. 1; D. M. Trubek (1973) 'Max Weber on law and the rise of capitalism', *Wisconsin Law Review*, 3, p. 720; D. North (1990) *Institutions, Institutional Change And Economic Growth* (New York: Cambridge University Press).

[7] See for example: L. Bernstein (2001) 'Private commercial law in the cotton industry: creating cooperation through rules, norms and institutions', *Michigan L. Rev.*, 99, p. 1724; R. Ellickson (1991) *Order Without Law: How Neighbors Settle Disputes* (Harvard University Press).

[8] See for example: M. Weber, *On Charisma and Institution Building*; D. North, *Institutions, Institutional Change and Economic Growth*.

[9] See for example: A. Rosette and L. Cheng (1991) 'Contract with a Chinese face: socially embedded factors in the transformation from hierarchy to market, 1978–1989', *J. Chin. L.*, 5, pp. 219–233; D. C. Clarke (2003) 'Economic development and the rights hypothesis: the China problem', *Am. J. Comp. L.*, 51, p. 89; F. Upham (2002) 'Mythmaking in the rule of law orthodoxy, Carnegie Endowment for international peace', Rule of Law Series, Democracy and Rule of Law Project, Number 30; T. Ginsburg (2000) 'Does law matter for economic development? Evidence from East Asia', *Law and Society Review*, 34(3).

have directly traced the impact of institutional forms of alternative dispute resolution on the health of the broader economy and consumer confidence. This book will contribute to this discussion by examining the contribution of institutional alternative dispute resolution, including mediation and ombuds fact-finding processes to financial stability and development.

This book also speaks to recent work regarding the design of effective and efficient systems of dispute resolution in resolving polycentric disputes. Recent work has offered insights into the design of institutional dispute resolution mechanisms for a variety of public and private settings,[10] as well as complex multi-party disputes.[11] Thus far there has been limited

[10] See for example: William L. Ury, Jeanne M. Brett and Stephen B. Goldberg (1988) *Getting Disputes Resolved: Designing Systems to Cut the Cost of Conflict* (Jossey-Bass) pp. 41–64; Janet Martinez and Stephanie Smith (2009) 'An analytic framework for dispute system design', *Harvard Negotiation Law Review*, 14, p. 123; Cathy A. Costantino and Christina Sickles Merchant (1996), *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations* (Jossey-Bass); Lisa Blomgren Bingham, Cynthia J. Hallberlin, Denise A. Walker and Won-Tae Chung (2009) 'Dispute system design and justice in employment dispute resolution: mediation at the workplace', *Harvard Negotiation Law Review*, 14, pp. 1–50; Lawrence Susskind, Sarah McKearnan and Jennifer Thomas-Larmer (1999) *The Consensus Building Handbook: A Comprehensive Guide To Reaching Agreement* (SAGE), pp. 61–168; Richard C. Reuben (2005) 'Democracy and dispute resolution: systems design and the new workplace', *Harvard Negotiation Law Review*, 10, p. 11; Jill Gross (2006) 'Securities mediation: dispute resolution for the individual investor', *Ohio State Journal on Dispute Resolution*, 21(2), pp. 329–381; John Lande (2002) 'Using dispute system design methods to promote good-faith participation in court-connected mediation programs', *UCLA Law Review*, 50, pp. 69–141; Sharon Press (1992–1993) 'Building and maintaining a statewide mediation program: a view from the field', *Kentucky Law Journal*, 81, pp. 1029–1065; Ellen E. Deason (2004) 'Procedural rules for complementary systems of litigation and mediation – worldwide', *Notre Dame Law Review*, 80, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=583141 [accessed 25 May 2012]; Andrea Kupfer Schneider (2008) 'The Intersection of Dispute Systems Design and Transitional Justice', *Harvard Negotiation Law Review*, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1296183 [accessed 25 May 2012]; Carrie J. Menkel-Meadow (2009) 'Are there systemic ethics issues in dispute system design? And what we should [not] do about it: Lessons from international and domestic fronts', *Harvard Negotiation Law Review*, 14, pp. 195–231; Kagan, Robert A. (2003) *Adversarial Legalism and American Government: The American Way of Life* (Harvard University Press); Malcom M. Feeley (1989) *Court Reform on Trial: Why Simple Solutions Fail* (Basic Books); D. Caron and L. Caplan (2010) *The 2010 UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press); Katherine Lynch (2003) *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration* The Hague, Netherlands: Kluwer Law International).

[11] See for example: S. Sturn and H. Gadlin (2007) 'Conflict resolution and systemic change', *J. Disp. Resol.*, 1, p. 1; S. A. Wiegand (1996) 'A just and lasting peace: supplanting mediation with the ombuds model', *Ohio St. J. on Disp. Resol.*, 12, p. 95.

work focused on the design of institutional alternative dispute resolution mechanisms in addressing consumer financial disputes. Systems design literature has also examined, from a socio-legal perspective, the larger socio-legal dispute processing debate investigating how mechanisms may be developed to limit the effect of the power/knowledge gap of 'repeat players' in institutional dispute resolution settings through appropriate regulations and policies. Previous studies in respect of litigation tend to suggest that 'haves' (i.e. large businesses, high socio-economic status groups) tend to fare better in courts than 'have nots'.[12] Therefore attention to procedural safeguards aimed at addressing structural inequities in the design and development of such systems is necessary if such disputes are to be effectively addressed.

At the global level, literature examining the impact of globalisation on domestic legal practices has relevance to the question of how domestic legislation effectively integrates relevant global standards and principles. This literature provides a helpful grounding in emerging questions of how global norms interact with national law-making processes,[13] the interaction between processes of 'convergence' and 'informed divergence' in the development of public law,[14] and the interplay between principles and systems in commercial dispute resolution design.[15] Such insights are useful in understanding the extent to which emergent global principles may inform the design and structure of newly emerging consumer financial dispute resolution systems.

This book, drawing on comparative cross-jurisdictional analysis, will make practical proposals for reform which will aim to contribute to the development of systems of transparent and equitable dispute resolution capable of responding to financial dislocation.

Overview of methodology

This book will identify and analyse factors and processes that give rise to the development of accessible, efficient and equitable financial dispute

[12] See M. Galanter (1974) 'Why the "haves" come out ahead: speculations on the limits of legal change', *Law & Society Review*, 9(1), pp. 95–160.

[13] T. Halliday and B. Carruthers (2007) 'The recursivity of law: global norm-making and national law-making in the globalization of corporate insolvency regimes', *American Journal of Sociology*, 112 p. 1135.

[14] See A. M. Slaughter (2004) *A New World Order* (Princeton University Press).

[15] See for example: J. Braithwaite and P. Drahos (2000) *Global Business Regulation* (Cambridge University Press).

resolution mechanisms. It will examine comparative institutional dispute resolution structures and results in selected financial centres in East Asia, North America and Europe in order to glean best practices. Given the near global impact of the current financial crisis, a unique opportunity exists to examine and test the efficacy of diverse dispute resolution approaches to addressing a common global challenge.

Two methodological principles characterise the research process used to examine the primary questions under analysis: a comparative framework and a triangulating approach.

A principal orientation of the research process focuses on comparative methodology. Through comparison among corresponding financial dispute resolution centres in seven jurisdictions, the aim of the research is to understand how these jurisdictions address investor complaints through unique structures of financial dispute resolution including ombuds, arbitration and multi-tier processes.

The second methodological principle parallels the process of 'triangulation' used by geological surveyors in cases where direct measurement of physical heights or spaces is impossible. Based on the assumption that any one research method alone can be subject to bias, contemporary researchers have found that multiple research techniques can, to a large extent, compensate for each other's deficiencies and provide a broader foundation for critical analysis (Cook and Fonow, 1990; Eckstein, 1992). Therefore the methodological approach employed here similarly draws on three complementary qualitative and quantitative data collection methods. These include the following:

> *Secondary academic research*: Empirical research by other scholars concerning institutional alternative dispute resolution of financial disputes, including mediation and negotiation is accumulated, reviewed and examined in the conventional fashion.
>
> *On-site data collection*: A variety of data from financial alternative dispute resolution centres in East Asia, North America and Europe is collected in order to conduct comparative content analysis of alternative dispute resolution processes, methods, ground rules and preparation in order to glean best practices.
>
> *Survey*: In order to assess how arbitrators and ombuds view the benefits of their particular method of consumer financial dispute resolution, its benefits, challenges and suggestions for improvement, a survey was conducted between the autumn of 2011 and the summer of 2012. Nearly 100 survey questionnaires were distributed to practitioners throughout the world. A total of 48 arbitrators and ombuds people from East Asia, North America, Europe, the Middle East and Africa responded. The participants represented highly experienced practitioners, members of government regulatory ombuds services and private arbitration commissions. The majority of those surveyed (44 per cent) had worked for institutions involved in consumer financial dispute resolution for more than four years.

The survey results are described in Part II (Ombuds systems), on arbitration and ombuds practices respectively, which in summary are as follows: practitioners of consumer financial dispute resolution view ombuds processes as particularly useful in providing an independent and free review service for financial customers. At the same time the service also helps to identify areas for further improvement by banks and regulatory agencies.[16] Perhaps as a result of such benefits, the use of ombuds processes has been increasing in recent years. The majority of respondents (89 per cent) indicated that they had in fact seen an increase in the use of ombuds processes in consumer financial dispute resolution in recent years. At the same time, practitioners acknowledged areas for continued improvement including the need for greater public education[17] and oversight and quality assurance of ombuds processes.[18]

Arbitration practitioners likewise viewed the benefits of arbitration services in consumer financial disputes as providing disputants with technical expertise 'where the parties are not arguing over the law, but application of financial/accounting principles'.[19] Among the challenges include 'proof issues, imbalance of power and information, lack of full discovery options/rights'.[20] Concerns about such disparities were echoed by other participants who noted the prevalence of perceptions that 'large institutions have "repeat-user" advantage'.[21] Practitioners noted suggestions for improvement including the need for '[g]ood program design [including] exit evaluations [and a] grievance process to allow parties to file complaints against neutrals who do not perform well'. In addition, 'a code of ethics for neutrals' was suggested along with 'anything that supports procedural due process'.[22] These findings are elaborated on in greater depth in Part II.

[16] Survey No. 1 (July 2011–March 2012).
[17] Survey No. 1 (July 2011–March 2012).
[18] Survey No. 4 (July 2011–March 2012).
[19] Survey No. 8 (July 2011–March 2012).
[20] Survey No. 10 (July 2011–March 2012).
[21] Survey No. 14 (July 2011–March 2012).
[22] Survey No. 10 (July 2011–March 2012).

4

Financial dispute resolution in Japan

Introduction

Japan's newly emerging Financial Alternative Dispute Resolution Service aims at providing accessible, free dispute resolution services for consumer complainants. Primary among its operating principles are efficiency and accessibility. While the total number of claims brought to early financial alternative dispute resolution schemes in Japan have been relatively low, given the overall sound expertise of those appointed to serve on the financial dispute resolution committees, they will continue to provide an alternative means of resolving consumer financial disputes in Japan.

Background

Low levels of litigation in Japan

Civil disputes in Japan are taken to court with less frequency than in other comparably developed countries.[1] Japan has a low litigation rate, the reasons for which are debated by academics. On one side, 'institutionalists' argue that Japan's legal system makes litigation undesirable, while 'culturalists' argue that even if the legal obstacles were removed, Japanese people would tend to resolve their disputes by non-confrontational means.[2]

[1] See for example: Glenn P. Hoetker and Tom Ginsburg (8 September 2004) 'The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation', *U Illinois Law & Economics Research Paper No. LE04–009*, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=608582 [accessed 23 May 2012]; Luke R. Nottage (2005), 'Civil Procedure Reforms in Japan: The Latest Round', *Ritsumeikan University Law Review*, 22, pp. 81–86; Eric A. Feldman (2007), 'Legal Reform in Contemporary Japan', *University of Penn Law School, Public Law Research Paper No. 07–17*, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=980762 [accessed 23 May 2012].

[2] Cole (2007) 'Commercial arbitration in Japan: Contributions to the debate on Japanese non-litigiousness', *NYUJ Int'l L & Pol*, 40, p. 29.

However, while there is a low level of litigation, there also appears to be a low level of usage of alternative dispute resolution ('ADR') processes such as arbitration.[3]

Historical use of ADR

As early as 1890, when Japan's Code of Civil Procedure was based on a German model, a system was put in place that allowed for both in-court mediation before trial and mediation during trial. This followed from the historical practice of *kankai*, a conciliation process based on the French *conciliation preliminaire* adopted in 1875.

Following the Second World War, Japan's legal system was overhauled based on an American model, which consolidated civil and commercial mediation into a single system, as well as creating conciliation commissions within the courts as a means of pre-trial mediation. This emphasis on mediation has expanded, with private enterprises taking a central role in the creation of non-confrontational dispute systems. However, this demonstration of a long history of ADR processes cannot by itself account for the low levels of litigation in the country.[4]

Japan's new financial ombuds system

Japan's Financial ADR System, modelled largely on the United Kingdom Financial Ombuds Service, provides for access to a number of independent ADR providers. The primary source of law for Japan's current new Financial ADR System is derived from an amendment to the Financial Instruments and Exchange Act (the 'FIEA') in June 2009. The 2009 amendment applies to the accreditation system under the Law Concerning the Promotion of the Use of Alternative Dispute Resolution Procedures (the 'ADR Promotion Law') to sixteen business related sectors, including banks, insurance companies, non-bank moneylenders and financial instruments business operators.[5] Under the revised FIEA, each business category may establish a dispute resolution organisation within twelve months of the amendment. Entities in each financial sector can apply to the Financial Services Agency (FSA) for accreditation as designated

[3] T. Cole, 'Commercial arbitration in Japan: Contributions to the debate on Japanese non-litigiousness', p. 29.

[4] Ibid.

[5] Financial Instruments and Exchange Act, art. 156.

dispute resolution organisations (*shitei-funso-kaiketsu-kikan*), which are responsible for handling relevant complaints and acting as providers of dispute resolution services for their industries.[6]

In order to initiate the use of the Financial ADR System, a financial institution is required to enter into a master agreement on the implementation of complaint-handling and dispute resolving procedures (*tetsuzuki-jisshi-kihon-keiyaku*) with the designated dispute resolution organisation.[7] The master agreement imposes obligations for mandatory participation by registered financial institutions in the dispute resolution proceedings if it does not have any justifiable grounds for refusing participation when claims are submitted by customers[8] and disclosure of relevant materials for the cases that are raised.[9] The FIEA requires dispute resolution organisations make public announcements of financial institutions that have failed without reasonable justification to participate in proceedings or disclose materials as required.[10] Each financial institution enters into the same agreement with the designated dispute resolution organisation so that there is no discriminatory treatment for any financial institution.[11] If there is more than one designated dispute resolution organisation in the same sector, a financial institution is only obliged to enter into a master agreement with one of them.[12] As the establishment of a designated dispute resolution organisation is not mandatory, some sectors may have no organisation to govern disputes. Financial institutions in such sectors will still have to comply with the relevant laws to provide customers with procedures for dealing with complaints, i.e. providing proper training to employees in charge of handling grievances and providing for the settlement of disputes through a certified ADR organisation.[13]

All general complaints and disputes related to financial instruments or services are covered under the Financial ADR System.[14] As there are

[6] Nagashima Ohno and Tsunematsu (2010) 'Japan: Financial Alternative Dispute Resolution', *International Financial Law Review*, available at: www.iflr.com/Article/2713008/Financial-alternative-dispute-resolution.html [accessed 25 April 2012].

[7] Financial Instruments and Exchange Act, art. 37.

[8] Financial Instruments and Exchange Act, art. 156–44.

[9] Financial Instruments and Exchange Act, art. 156–44.

[10] Financial Instruments and Exchange Act, art. 156–45.

[11] Freshfields Bruckhaus Deringer (June 2011), 'Financial Alternative Dispute Resolution System', available at: www.freshfields.com/publications/pdfs/2011/jun11/30588.pdf [accessed 25 April 2012].

[12] Ibid. [13] Ibid.

[14] Masako Miyatake, T. Andriotis, Nishimura and Asahi. 'Japan's New Financial ADR System' (2010) *Bloomberg Law Reports*, available at: www.hugheshubbard.com/files/Publication/e66266f4-0130-4416-ae75-accafffcde78/Presentation/PublicationAttachment/4792b24e-4239-45b5-a62a-b7b03488f6df/Japan's%20New%20Financial%20ADR%20System%20-%20Andriotis%20Bloomberg%20Article.pdf [accessed 25 April 2012]. Originally published by Bloomberg Finance L.P in the Vol. 1, No. 2 edition of the Bloomberg Law Reports – Alternative Dispute Resolution.

no restrictions on the users entitled to bring a claim, both customers and financial institutions can bring a claim to the designated dispute resolution organisation.[15] Furthermore, foreign entities and individuals are allowed to utilise the system, although a foreign financial institution which has not been registered under the FIEA is not required to submit to the jurisdiction of the designated dispute resolution organisations.[16] Frivolous claims or disguised claims with the mere intent of obtaining confidential corporate information will not be entertained.[17]

Upon receiving a petition for dispute resolution, the designated dispute resolution body will investigate the extent to which obligations determined during the settlement are being fulfilled and make recommendations to the financial institution to fulfil its relevant obligations.[18]

The dispute resolution committees are appointed from lawyers, certified judicial scriveners, and individuals with experience in the financial industry as prescribed by the Cabinet Office Ordinance.[19] This includes persons who have been engaged for an aggregate of no less than five years as a lawyer, professor of law, or similar; persons who have been engaged for at least five years as a customer, counsellor or similar; and persons who have been engaged for an aggregate of no less than ten years in the business of customer protection at corporations that conduct grievance services.[20] The designated dispute resolution organisation must also decide on its own process of appointing its dispute resolution committee, the method of elimination of interested persons and the rules by which a dispute is resolved.[21] As the FIEA does not specify any standard by which a dispute resolution committee must rely in settling a dispute, there are concerns that widely different approaches will be adopted and as a result

[15] Ibid. [16] Ibid.

[17] Financial Instruments and Exchange Act, art. 156–50.

[18] Financial Services Agency, 'Results of public comments on the draft government ordinance and draft cabinet office ordinance, etc. on the 2009 partial revision of the Financial Instruments and Exchange Act etc., results of the public comments on the draft cabinet office ordinances, etc. regarding disclosure system of information of corporations, etc. pertaining to those parts of the 2009 partial revision of the Financial Instruments and Exchange Act, etc.', *FSA Newsletter No.832010*, available at: www.fsa.go.jp/en/newsletter/2010/02b.html [accessed 25 April 2012].

[19] Ibid. [20] Ibid.

[21] Financial Instruments and Exchange Act, art. 156–44.

lead to potentially uneven outcomes.[22] There is also particular concern with the degree of independence of the dispute resolution organisations, which are formed from entities within the business sector.[23]

At the close of an ADR session, a settlement proposal or a special mediation proposal will be offered by the dispute resolution committee. A financial institution is not obliged to accept a settlement proposal but the Ministry of Finance may compel acceptance of a special mediation proposal[24] unless the customer does not accept the special mediation proposal, or a customer or a financial institution files a lawsuit, or a settlement is reached between the customer and financial institution.[25]

The operations of designated dispute resolution organisations are funded by contributions by financial institutions in the industry.[26] Customers are not required to pay for dispute resolution proceedings that they initiate with financial entities.

FINMAC

In April 2009, FINMAC (Financial Instruments Mediation Assistance Center: NPO) was established as a new financial ADR organisation for disputes between customers and financial instruments service providers. FINMAC evolved out of the previous 'Securities Mediation and Consultation Center', which was an internal organ of the Japan Securities Dealers Association ('JSDA').

The previous organisation accepted complaints and consultations from customers about operations performed by JSDA member firms and conducted 'mediation' between member firms and their customers to solve disputes concerning securities businesses operated by the members. After migrating to FINMAC, the above mentioned services are being offered

[22] Ibid.

[23] Yokoi-Arai (2004) 'A comparative analysis of the Financial Ombudsman Systems in the UK and Japan', *Journal of Banking Regulation*, 5, pp. 333–357, at p. 348. See also Herbert Smith (16 November 2009) 'ADR for financial sector retail to start soon, but it is still flawed', available at: www.herbertsmith.com/NR/rdonlyres/EA8A230E-9964-48ED-B3E4-7B5E613BDB15/13439/RegulatoryNewsletterNo16ENovember2009.pdf [accessed 25 April 2012].

[24] See Masako Miyatake, T. Andriotis, Nishimura and Asahi. 'Japan's New Financial ADR System' in note 14, which cited Norio Nakazawa and Yasuo Nakajima. 'The summary of alternative dispute resolution system in the financial field (financial adr system)', *Shoji Homu No. 1876*, p. 48.

[25] Ibid. [26] Ibid.

through contract-based business operators such as members of the Financial Futures Trading Association, Investment Trust Association, JSDA, Japan Commodities Investment Sales Association and to the Specific Business Operators (individually registered Type II financial instruments business operators, etc.).[27]

Lack of involvement of regulators?

While much has been made of alternative dispute resolution in Japan, it bears mention in the context of securities disputes for two reasons. First, the information available belies the conventional wisdom that in resolving private disputes, mediation and conciliation have surpassed or usurped the role of the judiciary. Second, it further illustrates the lack of involvement by regulatory agencies and self-regulatory organisations in the formation of legal standards and remedies.[28]

Low levels of alternative dispute resolution

The Securities and Exchange Surveillance Commission ('SESC') and JSDA both actively refer investor disputes to the JSDA's mediation programme. In doing so, issues related to active investor disputes become not regulatory issues but issues for alternative dispute resolution. In practice, investor disputes generate neither regulatory issues nor ADR cases. Notwithstanding the referrals, investors go elsewhere, and mediation is rare.[29]

Underlying legal mandate

FINMAC was designated the Dispute Settlement Body (for) Financial Instruments under the (Securities) Exchange Law on 1 April 2011.[30] Its jurisdiction appears to apply to financial intermediaries, members of the Japan Securities Dealers Association, the Investment Trusts Association Japan, Japan Securities Investment Advisors Association,

[27] Comparative analysis of Asian securities regulators & SROs and market characteristics (data and information provided by participating organisations in the 6th Asia Securities Forum Tokyo Round Table).

[28] A. M. Pardieck (2001) 'The formation and transformation of securities law in Japan: from the bubble to the big bang', *UCLA PAC. BASIN L.J.*, 19, p. 1.

[29] Ibid.

[30] See www.finmac.or.jp (translated by Google) [accessed 26 April 2012].

the Institute of Financial Futures Association, the Japan Commodities Fund Association, and persons who engage in Type II Financial Instruments Business.[31]

Types of dispute

Range of disputes

FINMAC provides counselling and mediation for disputes in respect of the buying and selling of securities, business asset management and investment advice, financial futures business, investment-related business products, and first-class financial products.[32]

Procedure

Complainants are required to first contact a counsellor at FINMAC, who will provide advice by telephone in respect of a complainant's questions. Where a complaint is made in respect of financial instruments, FINMAC will pass the details of the complaint to the financial service provider and request they carry out an (internal) investigation, the results of which are reported back to the complainant. Where the complainant disagrees with the report, they can contact FINMAC again and submit the matter to mediation. The mediator will then try to assist the parties in reaching a settlement agreement.[33]

Service providers

FINMAC appears to be incorporated as a non-profit corporation.[34] Consultations are free of charge, but mediation costs between 2,000–50,000 yen, depending on the amount of damages in question.[35]

[31] See 'Operating rules for mediation and complaint resolution assistance' (translated by Google), available at: www.finmac.or.jp/html/kujyo/pdf/kisoku02.pdf [accessed 8 February 2012].
[32] Ibid.
[33] See 'Flow of Consultation' (translated by Google), available at: www.finmac.or.jp [accessed 8 February 2012].
[34] See www.finmac.or.jp (translated by Google) [accessed 26 April 2012].
[35] See 'Frequently Asked Questions' (translated by Google), available at: www.finmac.or.jp [accessed 8 February 2012].

Consumer financial dispute resolution in Japanese courts

As noted above, civil litigation has generally been viewed as a last resort among most disputants in Japan.[36] This extends to the financial context where the courts adjudicate far fewer business-related cases than in Germany or in the United States.[37]

Commercial cases at the first instance are generally initiated at the District Courts or Summary Court level.[38] There are fifty District Courts in Japan with territorial jurisdiction over an area which is identical to each prefecture and 438 Summary Courts throughout the country with limited jurisdiction over civil cases involving claims not exceeding 1,400,000 yen.[39] Although there is no specialised commercial court within the Japanese legal system to deal with financial disputes, the District Courts normally are divided into departments to handle different kinds of case. The Tokyo District Court has divisions which deal with disputes related to company law and corporate reorganisation law (8th Civil Division), and interim remedies.[40]

The procedures for commercial litigation are governed by the Civil Procedure Law (Law No. 29 in 1890, as amended). An action is commenced by filing a complaint either with the District Court or Summary Court.[41] Filing fees are measured by the value of the claim under the Law on Civil Litigation Costs.[42] A higher amount of claim attracts a higher court filing fee. The complaint must be served on the defendant who then must give an answer to the complaint.[43] Subsequent court proceedings include

[36] Takeyoshi Kawashima (1963) 'Dispute resolution in contemporary Japan', in A. T. von Mehren (ed.) *Law In Japan: The Legal Order In A Changing Society* (Cambridge: Harvard University Press), pp. 41–72.
[37] Harald Baum (2011) *Debating the Japanese Approach to Dispute Resolution. Max Planck Research* (Max Planck Institute for Comparative and International Private Law), available at: www.mpg.de/4379741/W006_Culture-Society_084-091.pdf [accessed 28 May 2012].
[38] C. Platto (1999) *Economic Consequences of Litigation Worldwide* (Kluwer Law International).
[39] Supreme Court of Japan website, at: www.courts.go.jp/english/system/system.html#04 [accessed 19 January 2012].
[40] C. Celnik, and C. Yakura, 'Dispute Resolution Handbook 2011/12 – Japan', *Practical Law Company*, available at: www.practicallaw.com/9-502-0319 [accessed 26 April 2012].
[41] Supreme Court of Japan website, at: www.courts.go.jp/english/proceedings/civil_suit.html#ii_b_2_a [accessed 19 January 2012].
[42] Articles 3 and 4 of the Law on Civil Proceeding Costs (Minji Soshou Hiyou Tou Ni Kansura Houritsu) (Law No. 40 of 1971, amended through 1996), available at: www.houko.com/00/01/S46/040.HTM#s4 [accessed 26 April 2012].
[43] Ibid.

preparatory proceedings, witness examinations and hearings.[44] Preparatory proceedings are conducted to ascertain material issues. Witness examinations or interrogatories are used to clarify the issues in dispute. While preparatory proceedings are generally closed to the public, the hearing is held in open court.[45] A party can prevent a third party from reading or copying litigation records that contain trade secrets or material if a party presents prima facie evidence that it is entitled to such protection.[46]

The judge can intervene at any stage of the proceedings to mediate a settlement before a judgment is given. The court may even require a party to accept a court proposed settlement subject to an adverse judgment with harsher terms.[47] In 2008, about 16.6 per cent of civil litigation cases (in relation to monetary disputes) were settled in the first instance and 32.6 per cent were settled in the second instance.[48] In addition, the judge can also set a date for conciliation (*wakai*). Approximately 36.0 per cent of cases relating to commercial affairs were successfully disposed of through conciliation.[49]

First appeals (*kouso*) may be made to the High Court as of right. There are eight High Courts located in major cities in Japan. The Tokyo High Court has exclusive original jurisdiction over cases to rescind decisions of quasi-judicial agencies such as the Fair Trade Commission.[50] The Supreme Court is the court of final resort for second appeals (*joukoku*). There is a five-year limitation period for commercial claims from the time when the right holder can exercise his rights.[51]

In recent years, there are signs that financial disputes litigation is on an upward trend due to the implementation of law reforms emphasising consumer protection. For example, according to an analysis published in 2009, misrepresentation claims have been on the rise over the past decade.[52] This has been attributed to the amendment of the Securities and

[44] Ibid. [45] Ibid.
[46] Code of Civil Procedure, art. 92. [47] Code of Civil Procedure, art. 265.
[48] Ministry of Internal Affairs and Communications, Statistics Bureau (2011), '25–11 Cases Newly Receive and Cases Disposed of Litigation Cases and Conciliation Cases by Type (2005–08)', 'Chapter 25 Justice and Police', *Japan Statistical Yearbook 2011*, available at: www.stat.go.jp/english/data/nenkan/back60/1431-25.htm [accessed 26 April 2012].
[49] Ibid.
[50] Supreme Court of Japan website, at: www.courts.go.jp/english/system/system.html#03 [accessed on 19 January 2012].
[51] Commercial Code, art. 522.
[52] M. Ikeya and S. Kishitani (21 July 2009) 'Japan: Trends in Securities Litigation in Japan: 1998–2008 – Damages Litigation Over Misstatements on the Rise', *NERA Economic Consulting*, available at: www.mondaq.com/article.asp?articleid=83300 [accessed 26 April 2012].

Exchange Law in 2004 which provides for estimating damages related to ongoing disclosure, and the implementation of systems of internal control over financial reporting under the Financial Instruments and Exchange Act (FIEA) in 2008 which subject misstatements in such reports to civil liability.[53] The more stringent disclosure environment[54] has brought about high-profile cases such as Livedoor[55] and Seibu Railway.[56]

The most recent statistics published in 2011 show a fall in the number of judgments issued for misstatements. However, at the same time, the number of regulatory actions by the SESC on monetary penalties for misstatement has climbed to a record high of twelve from nine in 2009.[57] As such actions will lower a plaintiff's burden of proving a misstatement, they can develop into potential litigations over misstatements in the future. The number of litigations between financial institutions, including securities companies and their customer investors, was also at its highest level of forty-four in 2010. These litigations include matters such as alleged violation of the suitability of products, failure to provide adequate explanation in soliciting the transaction of bonds, investment trusts and structured bonds.[58]

Lessons learned

The work of the judiciary in fashioning new duties and new rights has instigated new legislation, the Financial Product Sales Act and the Consumer Contract Act. Both pieces of legislation codify positions taken by more conservative courts. The Financial Product Sales Act codifies an objective duty to explain and the Consumer Contract Act limits the basis for rescission. The new legislation, however, breaks with the past in codifying new private rights of action. The role of the judiciary as a central arbiter of

[53] Ibid.
[54] A. Hironaka and J. Katsube (24 June 2010) 'Securities Litigation Picks Up', *International Financial Law Review*, available at: www.iflr.com/Article/2617835/Securities-litigation-picks-up.html [accessed 26 April 2012].
[55] J. Frederick (20 January 2006) 'The Livedoor Scandal: Tribe Versus Tribe', *Time*, available at: www.time.com/time/world/article/0,8599,1151722,00.html [accessed 26 April 2012].
[56] The Japan Times Online (31 March 2005) 'Pension fund group to sue Seibu Railway', available at: www.japantimes.co.jp/text/nn20050331a2.html [accessed 26 April 2012].
[57] M. Ikeya and S. Kishitani (2 August 2011) 'Japan: Trends in Securities Litigation in Japan: 2010 Update', *NERA Economic Consulting*, available at: www.mondaq.com/x/140680/Class+Actions/Trends+in+Securities+Litigation+in+Japan+2010+Update [accessed 26 April 2012].
[58] Ibid.

9

Synthesising lessons learned and policy recommendations

Background

At the end of 2008, the world experienced what is considered to be the worst financial crisis since the Great Depression of the 1930s.

The effects of the crisis manifested in financial centres throughout the world. This crisis gave rise to the search for effective means of resolving financial related disputes. This chapter examines the lessons learned, and based on a comparative cross-jurisdictional analysis, offers recommendations for consumer financial dispute resolution systems design.

The conclusions and policy recommendations contained in this chapter arise from a comparison of dispute resolution schemes for the financial industries of six schemes: the Financial Ombudsman Service of the UK ('FOS (UK)'); the Financial Ombudsman Service of Australia ('FOS (Aus)'); the Japan Financial Ombuds Service; the Financial Industry Dispute Resolution Centre ('FIDReC') of Singapore; the Financial Dispute Resolution Centre ('FDRC') of Hong Kong;[1] and the Financial Industry Regulatory Authority ('FINRA') of the United States respectively.

Several areas of comparison between ombuds and arbitration models are examined in this chapter. These include analysis of jurisdiction, procedure, costs, handling of systemic issues and parallel jurisdiction and mass complaints. Comparisons and recommendations between schemes are made in light of international principles relevant to the adjudication of consumer financial disputes including the need for accessible grievance mechanisms, accountability, efficiency, impartiality and fairness and consideration of the role and function of such schemes in light of regulatory oversight.

[1] See generally: Ali, Shahla F. and Da Roza, A. M. (19 July 2011) 'Alternative Dispute Resolution in Financial Markets – Some More Equal than Others: Hong Kong's Proposed Financial Dispute Resolution Centre in the Context of Experience in the UK, US, Australia and Singapore', *Pacific Rim Law & Policy Journal*, Vol. 21, No. 3, 2012; University of Hong Kong Faculty of Law Research Paper No. 2012/20.

In comparing the key elements of the dispute resolution schemes for financial markets in the context of emerging global standards in the jurisdictions studied, two related issues arise: first, what is the role of dispute resolution in financial markets and their regulation? Second, which alternative dispute resolution techniques are most appropriate for use in financial markets and what is their level of appropriateness, not only in resolving disputes but in light of the role dispute resolution plays in financial markets and their regulation?

The financial crisis has demonstrated the limits of the existing methods of dispute resolution. Calls for the establishment of an affordable and efficient method of financial dispute resolution arising from the crisis thus address themselves towards the first issue: dispute resolution is necessary for financial markets not only in providing assurance that disputes over financial rights and legal obligations can be determined by an independent arbiter, and give rise to enforceable remedies, but beyond that is a greater need for accessibility – particularly for consumers. Financial markets are increasingly characterised by high numbers and high levels of participation by private individual investors at the retail level. It is these private investors at the retail level which the study addresses – disputes between consumers and financial service providers. Improving accessibility to justice or the ease with which investors may protect their own rights in financial markets not only serves to enhance market participation and capitalisation via increased consumer confidence, but also arguably serves to enhance market efficiency by lowering the amount of resources that need to be dedicated to the resolution of disputes. This in turn could potentially lead to a redistribution of those resources back into capitalisation of the financial market.

More specifically, in the context of the regulation of financial markets, the introduction of alternative dispute resolution, i.e. alternative to the judicial system, while clearly furthering market efficiency by lowering the resource-intensiveness of resolving financial disputes, raises the issue of whether or not alternative forms of dispute resolution necessarily play the same role as the courts in standard-setting and norms for consumer protection. In every jurisdiction, the role of alternative dispute resolution in a regulatory context seems to differ, leading to the question of whether or not it is desirable for alternative dispute resolution in financial markets to have an ad hoc regulatory role in trying to achieve consistency of outcomes and awards.

With regards to market efficiency, determining an appropriate method of dispute resolution thus becomes doubly important, as the shortcomings of an ineffective dispute resolution method could well lead to an adverse effect not just on consumer confidence, but market efficiency, as well as an increase in the amount of resources dedicated to and associated with dispute resolution.

As will be seen below, the ombuds and arbitration models of consumer financial dispute resolution implement global principles including accessibility, impartiality, equity, accountability and fairness to varying degrees, based on the unique mandate, regulatory function and objectives of each mechanism. For example, as will be seen in the examination of the ombuds models of consumer financial dispute resolution, the principles of accessibility, accountability and fairness may be given greater importance, while in the arbitration model, principles of efficiency may take precedence.

The findings indicate that the appropriateness of a dispute resolution method may be informed by the extent to which it takes on a regulatory role. Regulatory dispute resolution modes such as the ombudsman model that take on inquisitorial elements may be preferred when displacing the judicial function as they incorporate safeguards for disputants against third party discretion. But even for non-regulatory schemes, inquisitorial elements aimed at addressing the power/knowledge gap including suggesting the provision of information regarding relevant standards and rules, at least as touchstones, may still be incorporated into consensual models of dispute resolution, in order to ensure a de minimis level of fairness and confidence in the process.

Jurisdiction

Not every dispute may be submitted to a particular financial dispute resolution scheme. It is often the case that restrictions are imposed to exclude certain types of complainant or certain types of dispute.[2] Recommendations on proposed jurisdiction including limitations imposed on who may bring disputes, and the types of dispute they may bring, must thus be looked at in light of the principles of access to justice.

[2] Financial Services and the Treasury Bureau, 'Proposed Establishment of an Investor Education Council and a Financial Dispute Resolution Centre: Consultation Paper, para. 3.4 of Part II.

Eligible parties and access to justice

Financial dispute resolution services all have restrictions in some form on eligible complainants. In most cases, eligibility requirements serve as jurisdictional filters to ensure the relevance of complaints and to ensure that resources are not allocated to frivolous complaints. Such concerns must be counterbalanced with the broader principle of access to justice. In comparing eligibility requirements under the ombuds and the arbitration services, a number of distinctions are apparent. Under the ombuds service, eligibility can be viewed from a broad perspective, with the ultimate aim of ensuring that all eligible complainants have access to an appropriate grievance mechanism. In contrast, under the arbitration model, eligibility requirements are more narrow, which to a certain extent, serves as a jurisdictional filter.

A. Ombuds model

In general, when viewing jurisdictional access to ombuds schemes across jurisdictions, one can generally conclude that a claimant's eligibility for service is broader than many arbitration-based schemes, as will be examined below.

In the United Kingdom, the Financial Ombudsman Scheme offers coverage for a person who is a consumer, a micro-enterprise, a charity with an annual income of less than £1 million, or a trustee of a trust with a net asset value of less than £1 million.[3] The complainant must be a customer, payment service user, holder or beneficial owner of a collective investment scheme, beneficiary of a personal pension scheme or stakeholder pension scheme, provided a guarantee or security for a mortgage or loan, a beneficiary of a trust or estate of the establishment complained against.[4]

Similarly, jurisdiction under the Australian Financial Ombudsman Service is extended to 'retail clients' per s. 761G of the Corporations Act 2001, including small businesses as defined under that section[5] – which includes individuals, partnerships comprising of individuals, corporate

[3] Financial Services Authority *FSA Handbook*, available at: http://fsahandbook.info/FSA/html/handbook/DISP/2/7 [accessed 1 September 2011], DISP 2.7.3.

[4] Ibid., DISP 2.7.6.

[5] Australian Securities and Investments Commission (April 2011) *Regulatory Guide 139*, available at: www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg139-published-20-4-2011.pdf/$file/rg139-published-20-4-2011.pdf [accessed 1 September 2011], RG 139.75.

trustees of self-managed superannuation funds or family trust, small businesses, clubs or incorporated associations, policy holders of group life or group general insurance policy.

Finally, under the Japan Financial Ombuds Service, no restrictions exist on the users entitled to bring a claim, as both customers and financial institutions are permitted to bring claims to the designated dispute resolution organisation.[6]

In all schemes examined above, a claimant's eligibility for service is broader than most arbitration-based schemes, as will be examined below.

B. Arbitration model

In general, examining the arbitration schemes under review in this study, the jurisdictional scope of arbitral schemes appears to be somewhat narrower than the ombuds-based schemes.

As can be seen from the example of the United States in Table 9.1, because the FINRA arbitration process is entirely paid for by complainants and securities firms, jurisdictional filters are unnecessary, though the process is confined by mandate to disputes involving member broker-dealers. Under the FINRA arbitration model, few of FINRA's resources are taken up by the dispute resolution process – by contrast, the dispute resolution schemes in other common law jurisdictions are heavily subsidised, giving rise to a need to limit eligible complainants to ensure that subsidies are taken up by those with the greatest need for them.

The FDRC of Hong Kong[7] and FIDReC of Singapore both have similar jurisdictional restrictions. Both services are reserved for most retail consumer complaints in the financial sector, including individual investors and sole-proprietors.[8] However, in general, these services do not currently include jurisdiction for mid-sized businesses. The restriction on eligible complainants is perhaps unsurprising given that both the FIDReC and the FDRC are entirely new schemes. Equally, however, it should come as no surprise that observers have raised the issue of allowing small corporate

[6] M. Miyatake, T. Andriotis (2010). Japan's New Financial ADR System. *Bloomberg Law Reports*. Retrieved from www.hugheshubbard.com/files/Publication/e66266f4-0130-4416-ae75-accafffcde78/Presentation/PublicationAttachment/4792b24e-4239-45b5-a62a-b7b03488f6df/Japan's%20New%20Financial%20ADR%20System%20-%20Andriotis%20Bloomberg%20Article.pdf.

[7] Financial Services and the Treasury Bureau, 'Proposed Establishment of an Investor Education Council and a Financial Dispute Resolution Centre', para. 3.2(a) of Part II.

[8] Ibid.

Table 9.1 *Eligible complainants for consumer financial dispute resolution services*

Type	Service	Eligible parties
Ombuds	FOS (UK)	A person who is a consumer, a micro-enterprise, a charity with an annual income of less than £1 million, or a trustee of a trust with a net asset value of less than £1 million.[a] The complainant must be a customer, payment service user, holder or beneficial owner of a collective investment scheme, beneficiary of a personal pension scheme or stakeholder pension scheme, provided a guarantee or security for a mortgage or loan, a beneficiary of a trust or estate of the establishment complained against.[b] Certain types of complainant are expressly excluded under the Rules.[c]
	FOS (Aus)	'Retail clients' per s. 761G of the Corporations Act 2001, including small businesses as defined under that section[d] – which includes individuals, partnerships comprising of individuals, corporate trustees of self-managed superannuation funds or family trust, small businesses, clubs or incorporated associations, policy holders of group life or group general insurance policy.
	JFOS (Japan)	No restrictions on the users entitled to bring a claim; both customers and financial institutions can bring a claim to the designated dispute resolution organisation.[e]
Arbitration	FIDReC (Singapore)	FIDReC's services are available to all consumers who are individuals or sole-proprietors.[f]
	FDRC (HK)	Available only to individuals and sole proprietors in the initial years of implementation. The government has not ruled out the possibility of extending the scope in the future.[g]
	FINRA (US)	Since FINRA complainants must pay an arbitration fee, a hearing deposit and attorneys' fees, cost-deterrence serves as a filter, and strict jurisdictional prerequisites for arbitration are unnecessary.[h]

[a] Financial Services Authority, *FSA Handbook*, DISP 2.7.3.

[b] Ibid., DISP 2.7.6.

[c] Ibid., DISP 2.7.9.

[d] Australian Securities and Investments Commission, *Regulatory Guide 139*, RG 139.75.

[e] Masako Miyatake, T. Andriotis, Nishimura and Asahi. (2010). Japan's New Financial ADR System. *Bloomberg Law Reports*. Retrieved from www.hugheshubbard.com/files/Publication/e66266f4-0130-4416-ae75-accafffcde78/Presentation/PublicationAttachment/4792b24e-4239-45b5-a62a-b7b03488f6df/Japan's%20New%20Financial%20ADR%20System%20-%20Andriotis%20Bloomberg%20Article.pdf.

[f] Financial Industry Disputes Resolution Centre Ltd, 'The Jurisdiction of FIDReC', available at: www.fidrec.com.sg/website/jurisdiction.html [accessed 1 September 2011].

[g] Financial Services and the Treasury Bureau, 'Consultation Conclusions on Proposed Establishment of an Investor Education Council and a Financial Dispute Resolution Centre', p. 9.

[h] C. Alpert, 'Financial Services in the United States and United Kingdom: Comparative Approaches to Securities Regulation and Dispute Resolution', p. 75.