

**Globalization and Financial Dispute Resolution: Examining Areas of Convergence
and Informed Divergence in Financial ADR**

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Recent financial dislocation indicates that in many respects the world's financial markets are increasingly operating as a single integrated whole. Both the economic fallout of the financial crisis as well as the global response reflects the significant degree of interchange characterizing cross-border exchange. Many global financial centers were directly impacted by the financial crisis, and responded with their own unique regulatory mix that drew on global experience. Part one of this paper examines the theoretical perspectives on the impact of globalization on international legal practice. Part Two provides a global review of financial dispute resolution programs. Part Three examines how jurisdictions such as Hong Kong, Singapore, the UK, the US, and Australia responded to the financial crisis and how such response has demonstrated the patterns of both convergence and informed divergence in its selected financial reforms.

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Introduction: 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 1930's, became increasingly evident. In the summer of 2007, investment banks such as Bear Stearns and BNP Paribas warned investors that they would 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 nationalized. 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 as well as increasing monetary supply.¹

In 2008, Bear Stearns was acquired by JP Morgan Chase for less than 10% of its market value². Other banks such as UBS, the Royal Bank of Scotland ("RBS") and Barclays also announced the issuance of shares in an attempt to raise capital. To prevent a collapse of the United States 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, Lehman Brothers filed for bankruptcy. Immediately ripple effects were 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

¹ "BBC NEWS | Business | Timeline: Credit Crunch to Downturn." *BBC News*. 7 Aug. 2009. Web. 29 Dec. 2010. <<http://news.bbc.co.uk/2/hi/business/7521250.stm>>.

² Onaran, Yalman. "Fed Aided Bear Stearns as Firm Faced Chapter 11, Bernanke Says - Bloomberg." *Bloomberg - Business & Financial News, Breaking News Headlines*. 2 Apr. 2008. Web. 29 Dec. 2010. <<http://www.bloomberg.com/apps/news?pid=newsarchive&refer=worldwide&sid=a7coicThgaEE>>

rates were further cut. The United States initiated a US\$700 billion dollar Troubled Asset Relief Programme to rescue the financial sector and the Fed also injected a further US\$800 billion dollars into the economy to stabilize 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 officially slipped into recession.

Governments across the world implemented economic stimulus packages and promised to guarantee loans. For example, in the United States, a \$787 billion dollar economic stimulus plan was passed. The International Monetary Fund (“IMF”) estimated that banks in total lost \$2.8 trillion from toxic assets and bad loans between 2007-2010.⁴ There was also a severe decline in assets as stock indices worldwide fell along with housing prices in the United States and the United Kingdom⁵.

The global reach of the financial crisis calls for renewed investigation on the impact of globalization on international legal practice. Part one of this paper examines the theoretical perspectives on the impact of globalization on international legal practice. Part Two provides a global review of financial dispute resolution programs developed to address consumer financial dispute complaints which intensified during and after the financial crisis. Part Three examines the regulatory response of selected nations to the financial crisis and how it has demonstrated the patterns of both convergence and informed divergence in its selected financial dispute resolution reforms.

³ Gullapalli, Diya. "Bailout of Money Funds Seems to Stanch Outflow - WSJ.com." *Business News & Financial News - The Wall Street Journal - WSJ.com*. 20 Sept. 2008. Web. 29 Dec. 2010. <<http://online.wsj.com/article/SB122186683086958875.html?mod=article-outset-box>>

⁴ Cutler, David, Steve Slater, and Elinor Comlay. "U.S., European Bank Writedowns, Credit Losses." *Business & Financial News, Breaking US & International News | Reuters.com*. 05 Nov. 2009. Web. 29 Dec. 2010. <<http://www.reuters.com/article/idCNL554155620091105?rpc=44>>

⁵ "BBC NEWS | Business | Timeline: Credit Crunch to Downturn." *BBC News*. 7 Aug. 2009. Web. 29 Dec. 2010. <<http://news.bbc.co.uk/2/hi/business/7521250.stm>>.

Part 1: Theoretical Perspectives on the Impact of Globalization on International Legal Practice through Legal Pluralism and the Internationalization of Legal Practice Literature

In examining the dynamic nature of financial governance in the context of diverse societies, it is helpful to review the impact of globalization on international legal practice.

Addressing the conceptual challenges brought about by globalization,⁶ legal pluralism scholars beginning in the 20th century embarked on an effort to describe the diverse contexts “in which two or more legal systems coexist in the same social field.”⁷ Research focused largely on the interaction between European forms of law and indigenous legal systems of Africa, Asia, and the Pacific.⁸ Legal pluralism advanced the idea of the “semi-autonomous social field” which captures the porosity of the social and normative contexts of legal orders.⁹ These are fields that are not confined to national boundaries, but rather recognize that local, national, transnational, regional, and global orders can all overlap and apply to the same condition or situation.¹⁰

Legal pluralism has contributed to a greater understanding of both the normative and descriptive complexities of multiple legal systems interacting in a global environment. Its descriptive contribution calls attention to the “coexistence and interaction of different forms and sources of law within a more or less unified legal

⁶ See generally, Ali, Shahla, *Resolving Disputes in the Asia Pacific Region: International Arbitration and Mediation in East Asia and the West*, October 2010 (Routledge).

⁷ Griffiths, John (1986) “What is Legal Pluralism?,” 24 *Journal of Legal Pluralism* 1; Moore, Sally Falk (1973) “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study,” 7 *Law and Society Review*. 719.

⁸ Merry, Sally Engle, (1998) “Legal Pluralism,” *Law and Society Review*, Vol. 22, Number 5

⁹ Moore, Sally Falk (1973) “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study,” 7 *Law and Society Review*. 719.

¹⁰ Twining, William, (2000) *Globalization and Legal Theory, Law in Context*, London: Butterworths.

order” and draws focus to the notion that legislatures and courts are only two among the diverse forms of legal order that regulate people’s lives.¹¹ Its normative import lies in the importance it places on institutions that are close to the people. These institutions are said to have a prima facie claim to respect, forbearance, and support because “they are valued as extensions of personhood, as settings within which social participation is most direct and most effective.”¹²

While important insights have been drawn from the legal pluralism literature, the difficulties scholars have recognized regarding legal pluralism include conceptual as well as theoretical problems. Among these challenges, Twining observes, are conceptual problems associated with drawing distinctions between legal and non-legal phenomena and between legal orders, systems, traditions, and cultures.¹³ In addition, many normative orders do not have discrete boundaries and tend to be dynamic rather than static.¹⁴ Many scholars within the field have observed that, as yet, legal pluralism has failed to move beyond a descriptive model to a dynamic theory. Important questions such as what accounts for change within a legal system, how the direction of change can be examined, or the principles by which norm identification and selection occurs remain largely unanswered. This is true both at the domestic and international levels as multiple domestic legal systems increasingly operate within global legal institutions. Twining notes that the main difficulties of legal pluralism are likely not conceptual or semantic,

¹¹ Selznick, Philip. (1992) *The Moral Commonwealth: Social Theory and the Promise of Community*, Berkeley, University of California Press

¹² Id.

¹³ Twining, William, (2000) *Globalization and Legal Theory, Law in Context*, London: Butterworths.

¹⁴ Id.

but rather lie in the “sheer complexity and elusiveness of the phenomena themselves.”¹⁵ These are inherent challenges that researches examining the impact of globalization on law will have to deal with.

Following efforts made by scholars of legal pluralism, individuals within an emerging field examining the internationalization of the practice of law have begun to explore questions such as the impact of globalization on the legal profession, the changing landscape of the international practice of law in various countries, and the impact of globalization on international dispute-resolution mechanisms.¹⁶ This literature provides a helpful grounding in emerging questions of global dispute-resolution procedure, the dynamics of global enforcement of international agreements, and the mechanisms that are best suited to resolving particular types of business disputes. For example, John Braithwaite and Peter Drahos, in their book *Global Business Regulation*, investigate global business regulation through examining underlying principles that constitute the global context.¹⁷ Such principles are not exclusively legal principles, but rather emerge from the values and practices of a given community of actors. Through this lens, Drahos and Braithwaite examine how the regulation of business has shifted from national to global institutions in the areas of contract, intellectual property, and corporations law and the role played by global institutions as well as various NGOs and significant individuals.¹⁸ Braithwaite and Drahos’ contribution to the study of private

¹⁵ Id.

¹⁶ Drolshammer, Jens and Pfeifer, Michael (2001) *The Internationalization of the Practice of Law*. The Hague: Kluwer Law International.

¹⁷ John Braithwaite, Peter Drahos, (2000) *Global Business Regulation*, Cambridge University Press.

¹⁸ Id.

global business regulation offers a helpful framework for examining the development of private international regulation and corresponding implementation at the local level.

As yet, however, both the legal pluralism literature as well as the internationalization of law literature have failed to address the nature of the interaction between globalization on the one hand and diversity of normative systems regarding the purpose and methods of dispute resolution on the other, and how such differing norms are reconciled in the international context.

Recent socio-legal work by Terrence Halliday and Bruce Carruthers (2007) regarding the recursivity of law in global norm making and national lawmaking has made an important contribution to examining the dynamic mechanisms by which global norms interact with national law making processes in the corporate insolvency regime.¹⁹

The importance of a theoretical approach that can both extend its analysis globally while focusing on the diversity of norms that underlie transnational interaction has been identified by scholars such as William Twining and Philip Selznick. Twining, in his article “Have Concepts, will travel: analytical jurisprudence in a global context,” argues that analytical jurisprudence should “broaden its focus not only geographically, but also in respect of the range of concepts, conceptual frameworks, and discourses it considers.”²⁰ He notes that as the discipline of law becomes more cosmopolitan, it needs to be underpinned by theorizing that treats generalizations across legal families,

¹⁹ Terrence Halliday, Bruce Carruthers (2007), “The Recursivity of Law: Global Norm-Making and National Law-Making in the Globalization of Corporate Insolvency Regimes,” 112 *American Journal of Sociology*, 1135 (2007).

²⁰ Twining, William, “Have Concepts, Will Travel: Analytical Jurisprudence in a Global Context,” *International Journal of Law in Context*. Vol. 1. No. 1, March 2005.

traditions, cultures, and orders as problematic.²¹ In addition to a broadening outward, an examination inward of those underlying norms that guide dispute-resolution processes has been called for by scholars such as Philip Selznick. In his book *The Moral Commonwealth*, he notes that the reconciliation of notions of particularity with universal values is the primary challenge of theoretical scholarship and policy. He observes that the capacity of law to deliver justice depends on the range of interests it recognizes and protects.²² The challenge at present, therefore, is to examine how emerging global legal norms respond to national diversity while crossing international borders.

Legal Transplant Literature

The question of transporting legal and regulatory systems in multiple cultural and political contexts raises a number of questions addressed in the legal transplant literature. Scholars in anthropology, sociology, political science, and law have all contributed to this area of inquiry.

Within the field of anthropology, Richard Abel and Laura Nader have examined how differing societies may have affinities toward different processes of dispute-resolution.²³ This literature highlights the extent to which litigation is employed in

²¹ Twining, William, (2000) *Globalization and Legal Theory*, Law in Context, London: Butterworths.

²² Selznick, Philip. (1992) *The Moral Commonwealth: Social Theory and the Promise of Community*, Berkeley, University of California Press

²³ Customary arbitration is a process of dispute-resolution in which parties agree to submit their dispute to a family head or elder in the community and agree to be bound by that decision.

Western cultures, in contrast to the emphasis in traditional Latin American, Asian, and African societies on conciliation, mediation, and customary arbitration.²⁴

From a sociological perspective, Lawrence Friedman traces the impact of legal culture, defined as “the ideas values, knowledge, behavior and attitudes and opinions people in each society hold with regard to their laws and legal systems,” on the development of law. He argues that legal development failures can be attributed to the wholesale export of Western laws and traditions without consideration of the context into which these laws are being introduced.²⁵

The legal transplant and globalization literature has contributed to a fuller awareness of the dynamics involved in the exchange of legal systems from one region to another. However, as yet, the examination of how multiple legal cultures simultaneously interact, or the substantive norms according to which they interact, particularly in East Asia, has received little attention.

Emergence of Norms in Law and Economic Development Literature

A growing body of literature within the field of law and economic development has focused on the question of the emergence of norms and their relationship with legal mechanisms. This body of work includes the examination of the legal construction of

²⁴ Nader, Laura, and Todd, Harry F. (1978) *The Disputing process: Law in Ten Societies*. New York: Columbia University Press.

²⁵ Friedman, Lawrence M. (1969) "Legal Culture and Social Development," 4 *Law and Society Rev.* 29. A number of scholars have examined the reception of foreign laws at the domestic level in multiple-country contexts. Masaji Chiba examines how six Asian cultures interact with the introduction of Western laws. (See: Chiba, Masaji Ed., (1986) *Asian Indigenous Law: An Interaction with Received Law*, London: Kegan Paul). He notes that the reception of such laws first occurs at the highest levels of government where official laws are sanctioned by the government. This sanctioning in turn gradually influences those unofficial laws sanctioned in practice by the general population, and finally legal postulates or systems connected with the official and unofficial laws.

norms and the efficiency of aligning law with morality (Cooter, 2000), the co-evolution of social norms with the development of market institutions and the increasing cooperative behavior of highly networked individuals in a market system (Ensminger, 2004), the theoretical importance of culture in determining institutional structures in leading to their path dependence and impacting successful intersociety adoption of institutions (Grief, 1994), the internalization of cooperative norms in the cotton industry supported by institutional structures of arbitration and clearly articulated rules (Bernstein, 2001) and the effects of globalized legal norms in confrontation with powerful forces of local culture (Potter, 2001). This body of literature is highly informative, and has provided helpful insights into the coexistence of norms and legal rules in informing market behavior; however, as yet this work has not examined the question of how diverse norms employed by regulators in designing consumer financial dispute resolution mechanisms are reconciled in a cross-national context.

ASSESSMENT OF LITERATURE IN LIGHT OF METHODS USED

The bodies of literature described above provide some useful insights into the nature of regulatory practices in a transnational context. In particular, Slaughters findings regarding the dynamic interaction of processes of “convergence” and “informed divergence” in the global legal sphere,²⁶ Selznick’s description of the need for consideration of the dynamics of reconciliation of particularity with universal values,²⁷ and the insight that legal structures themselves are a reflection of the underlying values and attitudes of members of a society²⁸ are particularly helpful in framing the question of how regional diversity interacts with global values in the realm of financial regulation.

²⁶ Anne Marie Slaughter, *A New World Order* (Princeton, Princeton University Press, 2004).

²⁷ Selznick, Philip. (1992) *The Moral Commonwealth: Social Theory and the Promise of Community*, Berkeley, University of California Press.

²⁸ Friedman, Lawrence M. (1969) "Legal Culture and Social Development," 4 *Law and Society Rev.* 29.

Part Two: The Global Reach of ADR to Resolve Financial Disputes

In response to recent financial turmoil worldwide, governments have increasingly employed alternative dispute resolution mechanisms to address citizen complaints resulting from financial dislocation. The United Nations Institute for Training and Research has made special efforts to conduct research and offer training in arbitration and alternative dispute resolution, negotiation for conflict and global financial governance. In developing its own financial dispute resolution mechanisms, existing and emerging financial ADR centers examined lessons learned from a number of countries including the United States, the United Kingdom, Australia and Singapore. What follows is an examination of financial ADR efforts in these regions.

In the United States, the use of alternative dispute resolution in the financial arena has largely been in the area of securities as well as refinancing negotiations.²⁹ The Financial Industry Regulatory Authority (“FINRA”) offers investors the option to resolve disputes via mediation or arbitration of which arbitration is the more popular option. Through August 2010, 3778 arbitration cases were filed and 562 parties agreed to go to

²⁹ In addition, many states have increased their focus on mediation and arbitration in foreclosure filings to cope with a growing caseload. In Florida, foreclosure filings increased 400% over 3 years thus placing an increasing burden on the limited resources of the courts. (Florida Supreme Court Task Force on Residential Mortgage Foreclosure Cases. Rep. Florida Supreme Court, 2009 pg1). Consequently, the Florida Supreme Court created a Task Force on Residential Mortgage Foreclosures which is currently developing a proposed statewide process (particularly mediation and other forms of ADR for foreclosure cases. (Task Force on Residential Mortgage Foreclosure Cases." Task Force on Residential Mortgage Foreclosure Cases. 27 Mar. 2009. Supreme Court of Florida. <<http://www.floridasupremecourt.org/clerk/adminorders/2009/AOSC09-8.pdf>>.) In February, the court also established a foreclosure mediation program. (ibid) Other states such as New Mexico, Connecticut, Oregon, Rhode Island and Missouri are also considering similar legislation that will give homeowners facing foreclosure access to alternative dispute resolution options. (Court ADR Connection. Apr. 2009. Resolution Systems Institution. <<http://aboutrsi.org/newsletters/?id=37#story153>>.)

mediation.³⁰ FINRA deals with a variety of cases such as unauthorized trading, failure to supervise, negligence, breach of contract, misrepresentation and breach of fiduciary duty. The three most popular claims made by investors in FINRA arbitrations in 2009 were: Breach of Fiduciary Duty (2,836), Misrepresentation (2,005), Breach of Contract (1,658), Negligence (1,602) and Failure to Supervise (1,029).³¹

In Singapore, the Monetary Authority of Singapore (MAS) established a Financial Industry Dispute Resolution Centre (FIDReC)³². By October 2008, FIDReC reported that it had received 530 complaints regarding failed investment products linked to the United States financial crisis with 422 regarding the Lehman Brothers Minibond Program³³. By April 2009, the number of claims relating to Lehman Brothers had increased to 581 with 34 claims resolved at the mediation stage, 485 pending mediation, and 42 undergoing adjudication³⁴.

In the United Kingdom, the Financial Ombudsman Service (FOS) which was established by Parliament as an independent public body in 2006 has also received an increase in complaints due to the recent financial turmoil.³⁵ The FOS provides free and independent advice to consumers regarding the resolution of disputes with financial companies.³⁶ If it decides the case has merit, it will attempt to resolve the complaint via

³⁰ "FINRA - Dispute Resolution Statistics." *FINRA - Home Page*. Aug. 2010. Web. 10 Oct. 2010.

<<http://www.finra.org/ArbitrationMediation/AboutFINRADR/Statistics/>>

³¹ Soreide, Leif. "Statistics Reveal Chances of Recovering in a FINRA Arbitration - Finra, Securities, Arbitration." *Free Press Release - Online Press Release Distribution Service*. Feb. 2010. Web. 10 Oct. 2010.

<<http://www.free-press-release.com/news-statistics-reveal-chances-of-recovering-in-a-finra-arbitration-1266711057.html>>

³² Investigation Report on the Sale and Marketing of Structured Notes linked to Lehman Brothers. Rep. 7 July 2009. Monetary Authority of Singapore. <http://www.lioninvestor.com/code/uploads/structured-products-investigation-report.pdf> pg4

³³ Tan, Valerie. "530 complaints filed at FIDReC on failed investment products." *Channel News Asia* 24 Oct. 2008. Channel News Asia. <<http://www.channelnewsasia.com/stories/singaporelocalnews/view/385200/1/.html>>

³⁴ Tan, Lorna. "Sold Lehman Products? Now pay Fidrec." *The Straits Times* [Singapore] 25 Apr. 2009. Asiaone business. <<http://www.asiaone.com/Business/News/My%2BMoney/Story/A1Story20090423-137040.html>>

³⁵ Annual Review Financial Ombudsman Service. Rep. UK: Financial Ombudsman Service, 2009. pg 7

³⁶ "In a Crisis." BBC. <http://www.bbc.co.uk/raw/money/in_a_crisis/?noflash>

mediation. Where informal settlements fail, the FOS may set up more detailed investigations including an ‘appeal’ to one of their panel of ombudsmen for a final decision.³⁷ In 2008/2009 financial year, 51% of complaints were resolved via mediation, 41% via adjudication and only 8% by a formal review carried out by an ombudsman. Complaints regarding investment disputes increased by 30% in 2008 from the previous year while disputes in unsecured loans and mortgages increased by 44% and 11% respectively.³⁸

The Australian Financial Ombudsman Service recorded a 52% increase in disputes between January 2008 and April 2009.³⁹ In light of the recent financial crisis, the Australian Securities and Investment Commission (“ASIC”) has revised its early dispute resolution scheme (“EDR”) and increased the upper limit of compensation to AUS\$500 000.⁴⁰ It has also implemented other changes to improve consumer access such as giving EDR schemes the power to award interest in addition to compensation awards where appropriate.⁴¹

The next section examines how the dynamic of convergence and informed divergence operate in response to the development of financial dispute resolution mechanisms following the financial crisis, drawing on global experience.

³⁷ "Financial Ombudsman Post Mooted." *News.gov.hk*. 23 May 2009. Web.

<<http://news.gov.hk/en/category/businessandfinance/090523/html/090523en03002.htm>>.

³⁸ Ibid

³⁹ Financial Ombudsman Service 2009 National Conference. Proc. of Financial Services - the changing landscape, Australia, Melbourne. 11 June 2009. Australian Securities and Investments Commission.

<[http://www.asic.gov.au/asic/pdf/lib.nsf/lookupByFileName/FOS_speech-11Jun09.pdf/\\$file/FOS_speech-11Jun09.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/lookupByFileName/FOS_speech-11Jun09.pdf/$file/FOS_speech-11Jun09.pdf)>.

⁴⁰ Ibid

⁴¹ Ibid

Part III: Global Response to the Financial Crisis: Demonstrating the Operations of Convergence and Informed Divergence

Shortly after the fall of Lehman Brothers, financial institutions throughout the world began to explore possible regulatory responses to addressing citizen complaints. The experiences of a number of overseas jurisdictions, including the United Kingdom, the United States, Australia, Singapore, the Netherlands and Germany were examined for models and ideas.⁴² Among the existing ADR models and procedures examined were disclosure requirements, supervisory measures, cooling off periods (allowing customers a right to return financial products within a certain timeframe), and dispute resolution mechanisms (including mediation, arbitration and ombuds services). Demonstrating the application of both convergence in global approach to financial disputes as well as informed divergence, a number of global best practices were integrated into emerging institutional financial ADR mechanisms with some distinct modifications as will be explored below.

A. Regulatory Convergence

A number of areas of regulatory convergence can be identified in global financial ADR institutional design. These include the following: the encouragement of direct settlement negotiations, robust development of a preliminary ADR stage, the general exclusion of commercial and pricing decisions, the general exclusion of cases touching on systemic financial regulatory issues and cases already subject to court proceedings.

⁴² http://www.info.gov.hk/hkma/eng/new/lehman/lehman_report.pdf

Direct Settlement Negotiations

Similar to practices developed in many regions, the use of direct settlement negotiations, mediation and arbitration to resolve commercial and financial disputes has been used extensively. The UK FOS for example, encouraged parties to attempt direct negotiations with the involved financial institution first.⁴³ A similar practice is encouraged in Australia⁴⁴, Singapore⁴⁵ and the United States.

Many investors world wide have largely attempted to directly approach banks for settlement negotiations.⁴⁶ In Hong Kong, aggrieved investors of the failed Lehman “mini-bonds” for example, have the option of pursuing mediation or arbitration through the Hong Kong International Arbitration Centre (HKIAC) or direct settlement negotiations. Such alternatives to suing respective banks for misrepresentation are attractive⁴⁷ given that in most cases, claims that exceed the \$50,000 limit set by the Small Claims Tribunal are required to use lengthy and costly court proceedings.⁴⁸ Furthermore, aggrieved

⁴³ On the UK FOS website, it states: “Before we look into your problem, try first to sort it out yourself with the business you're unhappy with. If it's difficult for you to do this, or you're not sure about anything, please contact us. The business has eight weeks to sort out your complaint with you. If after eight weeks you're still not happy, you can ask us to get involved. We will explain what you should do next. (<http://www.financial-ombudsman.org.uk/publications/consumer-leaflet.htm>)

⁴⁴ The Australian FOS similarly encourages parties in step one to do the following: “Step 1: Contact your financial services provider: As a first step, you should contact your financial services provider's consumer complaints area to discuss your issue, tell them what your concerns are and how you would like them to be resolved. In our experience, this is often the quickest way to resolve a dispute.” (http://www.fos.org.au/centric/home_page/resolving_disputes/our_dispute_handling_process.jsp)

⁴⁵ The Singapore FIDReC likewise encourages direct settlement first: “Consumers who have a dispute that they have not been able to resolve with a financial institution can file a complaint free of charge with FIDReC either in person or via fax, post or email.” (<http://www.fidrec.com.sg/website/filingclaim.html>)

⁴⁶ Chan, Bing Woon, and Oscar KS Tan. "How Mediation Can Help Corporations Survive the Recession."

⁴⁷ Hong Kong International Arbitration Centre. "Mediation 100% Success for Lehman Brothers-Related Investment Product Cases." Press release. 19 Feb. 2009. <http://www.hkiac.org/HKIAC/pdf/Announcement/090219_LehmanUpdate_E.pdf>.

⁴⁸ The Standard, supra n.3

investors who take their claims to court face even higher costs given the lack of class action rights or contingency fees in Hong Kong's legal system.⁴⁹

Banks have proactively identified and settled some individual cases to reduce the likelihood of successful suits against them.⁵⁰ Unfortunately, for aggrieved investors who lack the resources to litigate or who have weaker claims, banks have generally refused negotiation. In other words, while direct settlement negotiation may be the most “cost-effective” way to seek compensation, retail banks, without external pressure and influence, are seldom willing to negotiate with investors seeking settlement.

Preliminary stage

In many jurisdictions, a preliminary stage involving the initiation of preparatory meetings has been found to be effective and therefore widely adopted across regions. The purpose of such meetings is to familiarize parties with the ADR process, explore settlement possibilities and exchange information. A large number of cases have been settled at this stage.

This preliminary stage reflects the importance of some form of intake mechanism by which information is gathered before the dispute resolution process begins⁵¹. The experience in Singapore reflects a high success rate with its case management process, introduced in 2007. For the 36 months commencing 1 July 2007 to 30 June 2010, FIDReC's Counselling Service amicably resolved 1,634 cases⁵². This measure was designed to further enhance its dispute resolution processes, and is especially suitable for

⁴⁹ Proposal for Resolution of Minibond Issue. Nov. 2008. Hong Kong Democratic Foundation.
<<http://www.hkdf.org/pr.asp?func=show&pr=178>>

⁵⁰ *Ibid*

⁵¹ Soo, Zhao and Cai, “*Better ways of Resolving Disputes in Hong Kong—Some Insights from the Lehman-Brothers Related Investment Product Dispute Mediation and Arbitration Scheme*”.

⁵² Financial Industry Disputes Resolution Centre Ltd Annual Report 2009/10.

resolving disputes which are simple in scope and issues by helping the consumer better understand the dispute and relevant issues as well as aiding the consumer in considering any settlement offer made by the financial institutions.

One of the challenges the Lehman Scheme in Hong Kong had to overcome⁵³, and has also been mentioned above in respect of the Civil Justice Reform, is the potential abuse of the dispute resolution process, particularly where parties or one party does not approach the dispute resolution process with a real intent to resolve the dispute.

Whilst abuses may have been prevented during the preparatory meeting stage in the Lehman Scheme, the proposal to weed out complaints that lack merit and other abuses that would be a drain on resources at this early stage is not unusual. In common law jurisdictions, it is not unusual for complaints falling outside the jurisdiction of a tribunal to be excluded without a hearing, but in the UK, it is the Ombudsman who is empowered to dismiss a complaint without a hearing on its merits for a number of well-defined reasons⁵⁴. Given the limits of the available resources, a balance must be struck between access to justice and preventing abuses of process.

Exclusion of cases already subject to court proceedings

In the majority of all jurisdictions examined, specifically excluded from jurisdiction are cases that have already been the subject of court proceedings⁵⁵. These exclusions are largely in line with those in Australia and Singapore, and also those excluded in the UK as well.

⁵³ *Ibid.*

⁵⁴ “FSA Handbook” (*Financial Services Authority*) DISP 3.3.4.

⁵⁵ *Ibid.*, para 3.8.

Three Stage Process

In the majority of all jurisdictions studied, the resolution of financial disputes will involve three stages: first, a preliminary stage at which complaints will be assessed for whether or not they fall within the jurisdiction of the center. Where the complaint falls within the jurisdiction, it will be mediated or negotiated. Finally, if mediation fails to resolve the dispute, the dispute will be referred to either an arbitrator or ombudsman⁵⁶.

Summary

Each of these areas of convergence were developed both through analysis of corresponding experience and consideration of what had thus far been considered effective. Next we examine the areas of informed divergence between these systems.

B. Informed Divergence: Unique Development of a Financial Sector Dispute Resolution Schemes

While convergence in global financial ADR approaches can be seen in the increased use of direct settlement negotiations, mediation and arbitration to resolve disputes, unique developments across regions include differences in jurisdiction, cost structure, variation in such centers ability to deal with cases having wide implications, and distinction between arbitration and ombuds models.

⁵⁶ “Consultation Paper on Establishment of an Investor Education Council and a Financial Dispute Resolution Centre” (*Financial Services and the Treasury Bureau*, February 2010), para 3.9 of Part II.

Types of Dispute Subject to Jurisdiction

In all institutions studied, jurisdiction extends to all disputes brought by individuals and sole proprietors against financial institutions who are members of the financial dispute resolution service⁵⁷. For example, the FINRA Code of Arbitration Procedures for Customer Disputes⁵⁸ applies to any dispute between a customer and a member of FINRA that is submitted to arbitration.

However distinction exists between jurisdictions in relation to the inclusion of insurance complaints. The UK and Australian FOS both include insurance complaints since the creation of the FOS in both jurisdictions resulted from the combination of two pre-existing sectoral schemes which included regulation of insurance claims. The activities to which the compulsory jurisdiction of the FOS applies are regulated activities (see s.22 of the Financial Services and Markets Act 2000), payment services, consumer credit activities, lending money secured by a charge on land, lending money, paying money by plastic card, providing ancillary banking services or any ancillary activities including advice⁵⁹. In Australia, the jurisdiction of the FOS includes⁶⁰: complaints against financial service providers from individual or 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

⁵⁷ “Consultation Paper on the Financial Industry Disputes Resolution Centre” (*Monetary Authority of Singapore*, October 2004).

⁵⁸ “Code of Arbitration Procedures for Customer Disputes” (*Financial Industry Regulatory Authority*, 29 July 2011) (<http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbrul/documents/arbmed/p117546.pdf>) accessed 1 September 2011.

⁵⁹ “FSA Handbook” (*Financial Services Authority*) DISP 2.3.1.

⁶⁰ “ASIC-approved Terms of Reference effective from 1 January 2010” (*Financial Ombudsman Service*, amended 1 July 2010) (http://www.fos.org.au/centric/home_page/about_us/terms_of_reference_b.jsp) accessed 1 September 2011, para.4 of section B..

life or group general insurance policy where the dispute relates to the payment of benefits under the policy; disputes that arise from a contract or obligation under Australian law in respect of the provision of a financial service, provision of a guarantee or security for financial accommodation, entitlement or benefits under life insurance or general insurance policies, legal or beneficial interests arising out of financial investment or a financial risk facility, claims under motor vehicle insurance policies.

Eligible Complainants

Among the jurisdictions studied, there is wide variation in the definition of eligible complainants. Complainants are restricted under the FDRC proposal to individual consumers and sole proprietors⁶¹. There may be a number of reasons for restricting eligible complainants. As can be seen from the example of the United States, as the FINRA arbitration process is entirely paid for by complainants and securities firms, it was unnecessary to put in place jurisdictional filters. By contrast, the dispute resolution schemes in the common law jurisdictions are heavily subsidized, giving rise to a need to limit eligible complainants to ensure that the subsidies are taken up by those with the greatest need for them.

The restriction on eligible complainants for the FDRC is the same restriction currently imposed in Singapore in respect of FIDReC. Equally, however, it should come as no surprise that respondents to the consultation would have raised the issue of allowing small corporate bodies to also be included in the scheme—as this group has generally

⁶¹ *Ibid.*, para.3.2(a) of Part II.

been regarded as part of the ‘sandwich’ class by the Judiciary in addressing concerns about access to justice in civil litigation due to high costs⁶².

A unique arrangement was made for eligible complainants in Hong Kong under the pre-existing Lehman Brothers-related Investment Products Disputes Mediation and Arbitration Scheme (“IPDMAS”) when in late October 2008, the Hong Kong International Arbitration Centre (HKIAC) was appointed by the HKMA to be the service provider for the Lehman.⁶³ Under this scheme mediation and arbitration services are provided to aggrieved investors seeking financial redress from banks. With strong support and oversight by the HKMA, the SFC and the Legislative Council, the Scheme was successfully launched in October 2008.⁶⁴ On the basis of lessons learned from this scheme, a dedicated Financial Dispute Resolution Center will be established in Hong Kong in 2012. According to the requirements of the program, only a specified group of investors were eligible for the mediation and arbitration scheme. According to the HKMA,⁶⁵ a qualified candidate is one that has:

1. **Made a complaint to the HKMA** against a bank that has sold him/her a Lehman-Brothers-related product (not exclusive of minibonds), and
2. The HKMA has **completed its review** of the complaint, and
3. **Either**, the HKMA has referred the complaint to the SFC for it to decide whether to take any further action, **Or** a finding (of fault) against a relevant individual or executive officer has been confirmed by either the HKMA or the SFC.

⁶² This has been commented upon by the former Chief Justice, Andrew Li, in his final speech at the Opening of the Legal Year Ceremony in 2010, and has been remarked upon by him in previous speeches also.

⁶³ See: http://www.hkiac.org/documents/Mediation/News/081031_Lehman_E.pdf

⁶⁴ *Ibid.*

⁶⁵ "Investment Products Related to Lehman Brothers." *Lehman-Brothers-Related Products Dispute Mediation and Arbitration Scheme*. Hong Kong Monetary Authority, 31 Oct. 2008. Web. 08 Mar. 2010. <http://www.info.gov.hk/hkma/eng/new/lehman/faq_b.htm>.

Only individuals meeting the above requirements are eligible for the HKMA sponsored mediation arrangements. For eligible disputants, the HKMA pays the relevant mediation fees and banks are required to support the Scheme.⁶⁶ Whether a bank ultimately agrees to mediate depends on the circumstances of the case. The principle of voluntariness applies in all cases. If both parties agrees to settle, they then have the option of signing a legally-binding agreement enforceable by the Court.⁶⁷

According to information provided by the HKIAC,⁶⁸ the HKMA-sponsored mediation settlement amounts have ranged from between HK\$40,000 to over HK\$5 million (US\$5,000 to \$650,000). The parties have included 11 licensed banks in Hong Kong and individual investors. All of the mediation sessions, which have taken place within one week of the appointment of the mediators, were concluded within the time-limit provided under the rules which is not to exceed five hours. While some have questioned the short mediation duration, post-mediation interviews indicate that the parties have largely been satisfied with the usefulness of the mediation process and the professional performance of the mediators.⁶⁹

For unsuccessful mediations, parties have the option of proceeding to binding arbitration conducted by the HKIAC.⁷⁰ Therefore, *if* a bank is willing to arbitrate the matter with an investor after a failed mediation attempt, then the subsequent arbitration decision will be legally binding on both parties. However, because the arbitration

⁶⁶ *Ibid*

⁶⁷ Tan, Oscar, "There's more to mediation than talking", *The Standard*, 22 October, 2008.

⁶⁸ Press Release, "Mediation 100% Success for Lehman Brothers-Related Investment Product Cases." Hong Kong International Arbitration Centre, 19 Feb. 2009. Web.
<http://www.hkiac.org/documents/Mediation/News/090219_LehmanUpdate_E.pdf>.

⁶⁹ *Ibid*

⁷⁰ Darwazeh, Nadia, and Friven Yeoh. "Recognition and Enforcement of Awards under the New York Convention - China and Hong Kong Perspectives." *Journal of International Arbitration* 25.6 (2008): 837-56. Print.

process is optional, and because the sales and purchase agreements concluded between the banks and Lehman Brothers minibond holders often do not include relevant arbitration clauses, only a few banks have been willing to proceed with this option.

In addition to eligibility requirements, several key features of the mediation scheme reflect the operation of “informed divergence” and represent a unique approach to the resolution of financial disputes. These features include the active use of a mediation “hotline,” pre-mediation briefings, and a mediation scheme office.⁷¹ A special hotline was set up to handle all enquiries in relation to the Scheme. The hotline was considered a vital channel for banks and investors to initiate mediation.⁷² Hotline staff members were trained in basic mediation skills and provided with adequate knowledge to discern whether mediation should be made available to the parties concerned. The success of the hotline indicates that mediation schemes must not only be concerned with mediator abilities, but with pre-mediation educational processes as well.

Also, pre-mediation briefings were conducted with individual banks and investors during which a practicing mediator discussed the suitability of mediation with respect to

⁷¹ In November 2009, more than a year since the launch of the Lehman Mediation Scheme, an interim report was conducted which indicated that a total of 334 cases were referred to the SFC by the HKMA, and around 243 cases were handled by the Scheme Mediation Office. Of the 243 cases, 85 mediations were conducted successfully while the remaining cases were settled prior to the mediation sessions. For those who actually engaged in the Mediation Scheme, the settlement rate was 85%.⁷¹ The Lehman Mediation Scheme was successful because of its careful consideration of the unique characteristics and needs of aggrieved investors and the incorporation of such considerations into the mediation procedures. Pre-mediation meetings were held to familiarize investors with mediation procedures. In addition, the HKMA and SFC provided strong support in gathering background information and the HKIAC provided the dispute resolution platform, all of which were critical to the success of the Scheme. (Hong Kong International Arbitration Centre. "Mediation 100% Success for Lehman Brothers-Related Investment Product Cases." Press release. 19 Feb. 2009.)

⁷² *Ibid*

a given case.⁷³ Since only a maximum of five hours were allocated for each mediation, the HKIAC made use of pre-mediation sessions to allow disputants to make informed decisions about their participation in the mediation session.⁷⁴ Since most of the investors did not have prior experience in mediation or formal negotiation, preparation meetings were conducted to familiarize them with the mediation process.⁷⁵

Last but not least, the HKIAC also set up a Scheme Office to collect background information from disputants regarding their goals and objectives. Banks often had concerns regarding risk management, minimizing negative publicity and strengthening client relationships, while investors often had concerns beyond immediate financial losses. With background information collected by the Scheme Office, designated mediators were equipped with a greater understanding of the underlying needs and interests of the parties involved.⁷⁶

Variation in the Third ADR Tier: Arbitration vs. Ombudsmen Process

A key area of informed divergence between jurisdictions lies in the selection of either an arbitration or ombuds process as the third tier. Whilst both arbitrators and ombudsmen serve as independent and impartial umpires in a dispute, their accountability differs significantly. Arbitrators generally are empowered to make awards without explaining their decisions, and awards may be appealed to the courts only on very limited

⁷³ See: Hong Kong International Arbitration Centre. "Mediation 100% Success for Lehman Brothers-Related Investment Product Cases." Press release. 19 Feb. 2009 at: Hong Kong International Arbitration Centre. "Mediation 100% Success for Lehman Brothers-Related Investment Product Cases." Press release. 19 Feb. 2009.

⁷⁴ Press Release, "HKMA announces mediation & arbitration services for Lehman Brothers-related cases", Hong Kong Monetary Authority, 31 October 2008.

⁷⁵ Sin, Jody. "Mediation Tips." *Mediate.com.hk*. Web. 10 Jan. 2010.

<http://www.mediate.com.hk/index.php?option=com_content&task=view&id=260&Itemid=1>.

⁷⁶ *Ibid*

grounds whilst being binding on the parties. Ombudsmen will generally have to provide reasoned decisions, and not only may they be susceptible to the oversight of the courts by way of judicial review, their awards are also not binding unless accepted by the complainant.

In the UK and Australia, an ombudsman was established; in Singapore, ‘adjudicators’ are used—and adjudicators appear to be more similar to ombudsmen than arbitrators given the non-binding nature of their award on complainants. Only in the United States are arbitrators used, for dispute resolution in the securities sector.

A key difference between the two processes can be described as follows: while the arbitration process operates within an adversarial framework, the ombudsman process is inquisitorial in nature.

Variation in Awards

Among the jurisdictions studied, divergence can also be found across jurisdictions in the nature and cap on awards. The maximum award that is proposed to be made under the jurisdiction of the FDRC is HK\$500,000. This is said to cover “over 80% of the monetary disputes handled by the HKMA and about 80% of stock investors”⁷⁷.

The maximum money award the Ombudsman may make is £100,000⁷⁸ (approx. HK\$1,270,000), from which costs, interest on the principal award and interest on costs are excluded⁷⁹. Additional compensation may be given in special cases.⁸⁰

⁷⁷ “Consultation Paper on Establishment of an Investor Education Council and a Financial Dispute Resolution Centre” (*Financial Services and the Treasury Bureau*, February 2010) para.3.18.

⁷⁸ “FSA Handbook” (*Financial Services Authority*) DISP 3.7.4.

⁷⁹ *Ibid.*, DISP 3.7.5..

As of 1 January 2012, ASIC will require compensation caps from external dispute resolution schemes of at least AU\$280,000 (approx. HK\$2,296,000), except in the case of general insurance brokers, where the compensation cap is at least AU\$150,000⁸¹. Additional compensation may be provided depending on the circumstances.⁸²

In Singapore, the maximum monetary awards for compensation are S\$100,000 for claims against insurance companies, and S\$50,000 (approx. HK\$310,000) for all other disputes.⁸³

In the United States, so long as the majority of the arbitrators on the panel agree to a given award and no statutory cap is placed on awards.⁸⁴

The Hong Kong monetary award limit is considerably lower than that of the UK or Australia, but higher than that of Singapore. The FSTB clarified in its Consultation

⁸⁰ If the Ombudsman considers fair compensation requires payment of a larger amount, it may recommend that the complainant be paid the balance. In addition to money awards, interest awards and costs awards, the Ombudsman is also empowered to give directions in respect of steps to be taken by the establishment complained against as the Ombudsman considers just and appropriate, regardless of whether or not a court could have made such an order. Where the ombudsman's decision is accepted by the complainant, it is binding on both parties, but if not, neither party is bound by the decision and the complainant is free to take out court proceedings. "FSA Handbook" (*Financial Services Authority*) DISP 3.7.4.

⁸¹ "Regulatory Guide 139" (*Australian Securities and Investments Commission*, April 2011) RG 139.156.

⁸² The remedies FOS can provide include: payment of monies; forgiveness or variation of debt, or the release of security for debt; repayment, waiver or variation of fees or other amounts paid or owed to a financial service provider; reinstatement or rectification of contract; variation of the terms of a Credit Contract in cases of financial hardship; and remedies dealing with privacy issues of individuals. Provision is also made for financial compensation on various other bases, including costs and non-financial loss. Provision is also made for the award of interest, but punitive, exemplary or aggravated damages are expressly excluded. If a complainant does not accept a Recommendation or Determination in respect of their dispute, they are not bound by it and may bring an action in the courts. "ASIC-approved Terms of Reference effective from 1 January 2010" (*Financial Ombudsman Service*, amended 1 July 2010) para.9.2.

⁸³ Where an award is made by the Adjudicator or Panel, it is binding on the financial institution but not on the complainant. The complainant's rights are thus not prejudiced in any way. He is free to choose whether or not to accept the award. Where the complainant chooses not to accept the award, he is free to pursue his other remedies such as legal action or arbitration. (Financial Industry Disputes Resolution Centre Ltd Annual Report 2005/6.)

⁸⁴ The limited scope for judicially reviewing such awards and not having to provide reasons allow arbitrators to reach awards based on general equitable principles. No statutory cap is imposed on the value of awards, and awards are final and binding, even if new evidence surfaces later. "Decision and Awards" (*Financial Industry Regulatory Authority*)

(<http://www.finra.org/ArbitrationMediation/Parties/Overview/OverviewOfDisputeResolutionProcess/> accessed 1 September 2011.)

Conclusions that the cap applies to individual claims, and thus complainants could bring claims that add up to more than \$500,000 where there is more than one dispute. It was also clarified that claims for over \$500,000 could be brought, but the maximum award would remain at \$500,000⁸⁵. This cap will be reviewed from time to time.

Costs

Informed divergence can also be found between regions in relation to how costs are apportioned to parties. Costs vary from completely subsidized by the State to a sliding scale.

The proposed costs of the FDRC is higher than that associated with ombudsmen in common law jurisdictions, which offer their services for free, or with a nominal case fee charged for adjudication under Singapore’s FIDReC. It is proposed that the Hong Kong FDRC will charge both consumers and financial institutions on a ‘pay as you use’ basis for its services⁸⁶.

⁸⁵ “Consultation Conclusions on Proposed Establishment of an Investor Education Council and a Financial Dispute Resolution Centre” (Financial Services and the Treasury Bureau) para 59.

⁸⁶ *Ibid.*, para 3.19 of Part II. Under the Consultation Conclusions, the fee structure was set out as follows:

	Claimant	Financial Institution
Making enquiries	Nil	Not applicable
Filing a claim form	HK\$200	Not applicable
Mediation	(Case fees)	(Case fees)
Amount of claims:		
- less than HK\$100,000	HK\$1,000	HK\$5,000
- between HK\$100,000 and \$500,000	HK\$2,000	HK\$10,000
Arbitration (regardless of amount of claims)	(Case fees)	(Case fees)
	HK\$5,000	HK\$20,000

Based on regulatory mandate, in the UK and Australia, consumers do not pay to bring a complaint to the FOS.⁸⁷ A similar arrangement has been established in Australia under its FOS.⁸⁸ This has much to do with the consumer protection mandate of both institutions.

In Singapore, under the FIDReC, no fees are charged to consumers so long as the dispute is resolved through mediation or case management. A S\$50 (approx. HK\$300) fee is charged to consumers where the dispute is brought to the adjudication stage. This is largely to deter frivolous complaints, but is kept low in order to ensure FIDReC is affordable for consumers.⁸⁹

As for the US, under FINRA the fees for arbitration are higher. As of 14 April 2011, the arbitration filing charge for a customer of a FINRA member firm for an undisclosed amount and/or other relief (if decided by a panel of three arbitrators per Rule 13900(b)) is US\$1,250 (approx. HK\$9,750) and the estimated hearing fees for 1 day of hearing is US\$3,000 (approx. HK\$23,400)⁹⁰. Some have argued that the FINRA fees serve as a filter and therefore jurisdictional prerequisites for arbitration are not required⁹¹.

Regulatory Involvement

⁸⁷ Businesses do not pay case fees in respect of the first three complaints settled during a year, but there is a fee of £500 for the fourth and each subsequent complaint. The FSA Handbook expressly sets out that complainants do not need to have professional advisers to bring complaints, and thus awards of costs should be uncommon. “FSA Handbook” (*Financial Services Authority*) DISP 3.710.

⁸⁸ Both FOS and COSL are funded by fees from financial service providers who are members of their external dispute resolution schemes, as well as fees from the resolution of disputes. “Member Fees” (*Credit Ombudsman Service*) (<http://www.cosl.com.au/Member-Fees>) accessed 1 September 2011.

⁸⁹ The financial institution pays a flat case fee of S\$500 per claim. Both parties are afforded adequate opportunity to present their case to the Adjudicator or Panel. The complainant is allowed to be accompanied by his nominee, who would assist him/her in the presentation of his/her claim. (Financial Industry Disputes Resolution Centre Ltd Annual Report 2005/6.)

⁹⁰ Calculated using the “Arbitration Filing Fee Calculator” (*Financial Industry Regulatory Authority*) (<http://apps.finra.org/ArbitrationMediation/ArbFeeCalc/1/Default.aspx>) accessed 1 September 2011.

⁹¹ Cory Alpert., “Financial Services in the United States and United Kingdom: Comparative Approaches to Securities Regulation and Dispute Resolution”.

From examining the financial dispute resolution schemes in the selected jurisdictions, one can see a significant range in the degree to which such mechanisms involve themselves in regulatory investigation and determination. While the majority of such systems refer issues of systemic concern out to relevant regulatory bodies, some services are given space to address issues that might otherwise be classified as regulatory in nature.

The UK FOS has been described by some as quasi-regulatory in nature with its unique ability to decide cases on a “fair and reasonable” standard⁹². In the US, as well for example, FINRA plays a regulatory role, given that the regulatory arm of the NYSE predated FINRA⁹³.

However, demonstrating a divergence in approach, the FOS and COSL in Australia⁹⁴ and FIDReC in Singapore do not seem to have taken on regulatory dimensions⁹⁵, and

⁹² Section 228(2) of the Financial Services and Markets Act 2000. It states: 228Determination under the compulsory jurisdiction.

(1)This section applies only in relation to the compulsory jurisdiction [F1and to the consumer credit jurisdiction].

(2)A complaint is to be determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case.

(3)When the ombudsman has determined a complaint he must give a written statement of his determination to the respondent and to the complainant.

(4)The statement must—

(a)give the ombudsman’s reasons for his determination;

(b)be signed by him; and

(c)require the complainant to notify him in writing, before a date specified in the statement, whether he accepts or rejects the determination.

(5)If the complainant notifies the ombudsman that he accepts the determination, it is binding on the respondent and the complainant and final.

(6)If, by the specified date, the complainant has not notified the ombudsman of his acceptance or rejection of the determination he is to be treated as having rejected it.

(7)The ombudsman must notify the respondent of the outcome.

(8)A copy of the determination on which appears a certificate signed by an ombudsman is evidence (or in Scotland sufficient evidence) that the determination was made under the scheme.

(9)Such a certificate purporting to be signed by an ombudsman is to be taken to have been duly signed unless the contrary is shown.

⁹³ Please refer to 1.2.4 above.

⁹⁴ See: 1.1 Purpose of the Service

their work is confined to dispute resolution—without relying on a monetary/regulatory distinction⁹⁶. In addition, the aim for the FDRC in Hong Kong is a non-regulatory role⁹⁷. In this context, the parallel complaints process and the idea of a fact-finding process led by the financial regulators rather than the FDRC lends itself to preventing the FDRC taking on a regulatory role.

Discussion

Financial institutions throughout the world, following the collapse of Lehman Brothers, examined the experiences of a number of overseas jurisdictions, including the United Kingdom, the United States, Australia, Singapore, the Netherlands and Germany

The Service is conducted by FOS and has been established as an independent forum to resolve Disputes between Applicants and Financial Services Providers. The Service is free of charge for Applicants. The costs of the Service are met by the Financial Services Providers.

1.2 Principles that underpin FOS operations and processes

In dealing with Disputes, FOS:

- a) must do what in its opinion is appropriate with a view to resolving Disputes in a cooperative, efficient, timely and fair manner;
- b) shall proceed with the minimum formality and technicality; and
- c) shall be as transparent as possible, whilst also acting in accordance with its confidentiality and privacy obligations. (http://www.fos.org.au/centric/home_page/about_us/terms_of_reference_b.jsp)

⁹⁵ For example: The jurisdiction of FIDReC in adjudicating disputes between consumers and financial institutions is as follows:

(1) For claims between insureds and insurance companies: up to S\$100,000

(2) For disputes between banks and consumers, capital market disputes and all other disputes (including third party claims and market conduct claims): up to S\$50,000

At present, FIDReC's services are available to all consumers who are individuals or sole-proprietors. (see: <http://www.fidrec.com.sg/website/jurisdiction.html>)

⁹⁶ Please refer to 1.2.2 and 1.2.3 above.

⁹⁷ "Consultation Paper on Establishment of an Investor Education Council and a Financial Dispute Resolution Centre" (*Financial Services and the Treasury Bureau*, February 2010) para.4.1 of Part II. The FDRC would not have any investigation or disciplinary powers as the regulators. The regulators deal with regulatory breaches while the FDRC deals with monetary disputes.

for financial ADR models and ideas.⁹⁸ From a review of each jurisdictions programmatic experience, areas of convergence in global financial dispute resolution approach include the growing use of preliminary preparatory stage, a three tier process of dispute resolution and exclusion from jurisdiction cases already subject to court review. At the same time, informed divergence is found in unique developments across regions which include differences in jurisdiction, cost structure, variation in such centers ability to deal with cases having wide regulatory implications, and distinction between arbitration and ombuds models. From an initial review, these unique developments appear to be successful and demonstrate the application of both convergence as well as informed divergence in the creation of domestic mechanisms dedicated to the resolution of financial disputes.

⁹⁸ http://www.info.gov.hk/hkma/eng/new/lehman/lehman_report.pdf