

12-20-2008

Financial Services in the United States and United Kingdom: Comparative Approaches to Securities Regulation and Dispute Resolution

Cory Alpert

Follow this and additional works at: <https://digitalcommons.law.byu.edu/ilmr>

 Part of the [Comparative and Foreign Law Commons](#), [Dispute Resolution and Arbitration Commons](#), and the [Securities Law Commons](#)

Recommended Citation

Cory Alpert, *Financial Services in the United States and United Kingdom: Comparative Approaches to Securities Regulation and Dispute Resolution*, 5 BYU Int'l L. & Mgmt. R. 75 (2008).

Available at: <https://digitalcommons.law.byu.edu/ilmr/vol5/iss1/3>

This Article is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Brigham Young University International Law & Management Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Financial Services in the United States and United Kingdom: Comparative Approaches to Securities Regulation and Dispute Resolution

*Cory Alpert**

I. INTRODUCTION

In global financial markets, the variety of complex financial instruments and investment strategies offered to investors creates the potential for highly technical and sophisticated disputes. Dispute resolution mechanisms in two of the world's major financial centers, New York and London, reflect distinct approaches to handling customer complaints against providers of financial services. In the United States, the dominant forum for dispute resolution between brokers and investors is binding arbitration, which requires customers to arbitrate securities law claims rather than sue in federal courts.¹ In the United Kingdom, customers of regulated financial businesses often submit their claims to a financial ombudsman, an informal scheme that employs procedures quite unlike formal arbitration.² Nevertheless, in both markets alternative dispute resolution options have shifted a large portion of the responsibility for private enforcement of securities law from the courts to the specialized entities that administer them.

This Article describes the regulatory background and dispute resolution schemes for financial services in the United States and the United Kingdom, with emphasis on procedural differences and allocation of forum choice between investors and firms. In its comparison of the United Kingdom's system with recent trends in U.S. dispute resolution, this Article highlights advantages and disadvantages to firms and customers. In conclusion, this Article suggests that modifying the United States' system to emphasize mediation would create a more efficient, inexpensive, and equitable method of resolving customer disputes.

* Associate, Skadden, Arps, Slate, Meagher, & Flom LLP; J.D., Boston University; B.A., University of California, Berkeley.

1. Stefano E. Cirielli, *Arbitration, Financial Markets and Banking Disputes*, 14 AM. REV. INT'L ARB. 243, 274 (2003).

2. See About the Financial Ombudsman Service, <http://www.financial-ombudsman.org.uk/about/index.html> (last visited Jan. 30, 2009).

II. FINANCIAL SERVICES REGULATION IN THE UNITED STATES AND UNITED KINGDOM

A basic knowledge of financial services regulation is necessary to understand the dispute resolution process for securities transactions. This Part provides an overview of financial services regulation in the United States and the United Kingdom.

A. United States

In the United States, the Securities Act of 1933 (Securities Act)³ and the Securities and Exchange Act of 1934 (Exchange Act)⁴ provide the statutory framework governing securities transactions. Congress passed these laws in response to the serious abuses and fraud perpetrated on the financial markets that led to the October 1929 stock market crash and the Great Depression. To boost investor confidence and prevent future market collapses, these Acts created affirmative disclosure requirements aimed at increasing market transparency and policing security issuers and broker-dealers.⁵

The Securities Act regulates the primary market—direct sales from issuers—and requires issuers to register every offer or sale of a security in the United States, except for certain exempted transactions.⁶ The Exchange Act established the Securities and Exchange Commission (SEC).⁷ The SEC regulates the secondary trading of securities between persons generally unaffiliated with the issuer and requires all publicly traded companies to make periodic disclosures. The broad coverage of the Exchange Act also governs securities exchanges, over-the-counter markets, broker-dealers, and securities associations.⁸ Firms, exchanges, associations, and individuals must register with the SEC and, where applicable, a self-regulatory organization (SRO).⁹ According to section 6 of the Exchange Act, the National Association of Securities Dealers

3. 15 U.S.C. § 77a–77aa (2000).

4. 15 U.S.C. § 78a–78mm (2000).

5. *Id.* § 2.

6. *See* Securities Act of 1933 §§ 3–5, 12.

7. *Id.* § 4.

8. JOHN C. COFFEE, JR., JOEL SELIGMAN & HILLARY A. SALE, *SECURITIES REGULATION* 52 (Thompson/West, 10th ed. 2007). *See also* Securities and Exchange Act of 1934 §§ 2, 6.

9. Securities and Exchange Act of 1934 §§ 5, 6 (securities exchanges); § 15 (broker-dealers); § 15A (securities associations), § 19 (SROs).

(NASD), an SRO created to regulate broker-dealers,¹⁰ and the New York Stock Exchange (NYSE), a National Securities Exchange (NSE) must have rules “designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of free trade . . . and in general to protect investors and the public interest.”¹¹

To ensure proper governance and legal compliance, broker-dealers must register with an SRO before transacting in securities¹² or participating in a securities exchange. As a result, large broker-dealers are subject to the duplicative jurisdiction of multiple SROs and the overarching disciplinary authority of the SEC.¹³ After both the NYSE and NASD became publicly held corporations, the move towards creating a single self-regulatory body gained momentum.¹⁴ Consequentially, in July 2007, consolidation of the NASD and the member regulation, enforcement, and arbitration functions of the NYSE resulted in the creation of the Financial Industry Regulatory Authority (FINRA).¹⁵ FINRA is the largest non-government regulator for all securities firms doing business in the United States.¹⁶ Like its predecessors, FINRA is an SRO subject to SEC oversight.¹⁷

A key to achieving transparency in the financial markets is effective enforcement of securities laws. The SEC focuses on anti-fraud enforcement, whereas FINRA deals with matters of negligence and unprofessional conduct falling short of fraud.¹⁸ FINRA Dispute Resolution (FINRADR) investigates complaints against brokerage

10. *Id.* § 15A; COFFEE, JR. ET AL., *supra* note 8, at 640. The label “broker” refers to any person engaged in the business of effecting transactions in securities for the account of others, while the label “dealer” refers to any person engaged in the business of buying and selling securities for such person’s own account through a broker or otherwise. Securities and Exchange Act of 1934 § 3(a)(4)–(5).

11. Securities and Exchange Act of 1934 § 6.

12. COFFEE, JR. ET AL., *supra* note 8, at 58 (“Under § 15(b)(8)–(9) a broker-dealer may not effect securities transaction [sic] unless it is a member of a registered securities association (i.e. NASD), unless it limits its activities to a stock exchange of which it is a member. This effectively ensures that virtually every broker-dealer must join the NASD and comply with its rules; suspension or expulsion by the NASD as a practical matter means disbarment from the industry.”).

13. *Id.*

14. *See id.* at 641–42.

15. About FINRA, <http://www.finra.org/AboutFINRA/index.htm> (last visited Jan. 30, 2009).

16. *Id.*

17. George H. Friedman, *Update on NASD Dispute Resolution Activities*, 1553 *PLI/Corp* 69, 71 (2006).

18. COFFEE, JR. ET AL., *supra* note 8, at 641.

firms and their employees. It conducts enforcement actions against parties and individuals who violate statutory provisions or SEC or FINRA rules.¹⁹ Disciplinary actions can lead to fines, suspensions, expulsion from the securities industry, or referral to the SEC or federal or state enforcement agencies.²⁰ FINRA finances its activities with industry dues, allowing for a large enforcement budget for industry surveillance and monitoring.²¹

B. United Kingdom

The United Kingdom embarked on the modernization and consolidation of its financial services regulatory scheme in 1986, when the London Stock Exchange first welcomed international financial services firms to the marketplace²² and Parliament passed the Financial Services Act (FSA 1986).²³ The new regulations sought to boost investor confidence by broadening disclosure, improving business practices, and efficiently discovering and sanctioning securities law violators.²⁴ FSA 1986 created three levels of authority to regulate the financial services industry.²⁵ The first and highest level of authority is a governmental body called the Department of Trade and Industry (DTI).²⁶ DTI transferred primary regulatory responsibility to the second level, a non-governmental regulatory body called the Securities and Investments Board (SIB).²⁷ The SIB developed a framework of rules and regulations and granted recognition to SROs and certain professional bodies, the third level of regulatory authority,²⁸ which directly monitored the activities of

19. *Id.* at 58.

20. FINRA, *Investor Complaint Program: What to do When Problems Arise* 1 (2007), http://www.finra.org/web/groups/inv_info/documents/investor_information/p011944.pdf [hereinafter FINRA Investor Brochure].

21. COFFEE, JR. ET AL., *supra* note 8, at 57.

22. James J. Fishman, *Enforcement of Securities Laws Violations in the United Kingdom*, 9 INT'L TAX & BUS. LAW. 131, 132 (1991).

23. *Id.* (stating that FSA 1986 came into force on April 29, 1988).

24. *Id.* at 133.

25. *Id.* at 134.

26. In 2007, DTI became the Department for Business, Enterprise and Regulatory Reform. See The Department of Trade and Industry (1983-2007), <http://www.berr.gov.uk/aboutus/corporate/history/outlines/DTI-1983-onwards/page13934.html> (last visited Jan. 30, 2009).

27. Fishman, *supra* note 22, at 134.

28. Robert W. Helm & Kevin K. Babikian, *Creating, Managing and Distributing Offshore Investment Products: A Legal Perspective*, 1529 PLI/CORP. 675, 848 (2006).

their members, the financial services firms.²⁹ In 1997, the Financial Services Authority (FSA) replaced the SIB as Parliament considered further financial services legislation.³⁰

In the period from 2000 to 2001, a newly developed legal framework replaced much of the pre-existing financial services legislation, including FSA 1986. This new framework, known as the Financial Services and Markets Act 2000 (FSMA 2000), now governs the conduct of investment business by firms and individuals.³¹ FSMA 2000 consolidated regulatory power from the existing business regulators into the existing FSA.³² The FSA is responsible for enforcing FSMA 2000 legislation relating to investment business.³³ The FSA's four statutory objectives include: (1) maintaining market confidence, (2) promoting public awareness, (3) protecting consumers, and (4) reducing financial crime.³⁴ Like FSA 1986,³⁵ FSMA 2000 delegates power to the FSA to promulgate secondary legislation regulating many important details.³⁶ The FSA Handbook contains promulgated FSA rules and regulations.³⁷ Although FSMA 2000 outlines the functions and regulatory objectives of the FSA,³⁸ the FSA is "operationally independent of the government and funded entirely by the firms it regulates."³⁹

29. Fishman, *supra* note 22, at 134–35.

30. Helm & Babikian, *supra* note 28, at 849.

31. Heidi Mandanis Schooner & Michael Taylor, *United Kingdom and United States Responses to the Regulatory Challenges of Modern Financial Markets*, 38 TEX. INT'L L.J. 317, 330 (2003).

32. The existing regulators consolidated into FSA under FSMA 2000 were the Building Societies Commission, the Friendly Societies Commission, the Investment Management Regulatory Organization, the Personal Investment Authority, the Register of Friendly Societies, and the Securities and Futures Authority. FSA had also assumed responsibility for banking supervision from the Bank of England and U.K. Listing Authority from the London Stock Exchange. FSA later assumed responsibility for mortgage regulation and general insurance business regulation. FSA History, <http://www.fsa.gov.uk/Pages/About/Who/History/index.shtml> (last visited Jan. 30, 2009).

33. Schooner & Taylor, *supra* note 31, at 331.

34. *Id.* at 332; Press Release, FSA, FSA's New Investment Rules Come Into Force (Nov. 1, 2007), *available at* <http://www.fsa.gov.uk/pages/Library/Communication/PR/2007/111.shtml>.

35. Thomas J. Pack, *International Trade: Regulation of London's Financial Markets—The Financial Services Act, 1986*, 28 HARV. INT'L L.J. 196, 200 (1987).

36. Financial Services and Markets Act 2000, c. 8, Part I, § 1 (U.K.).

37. FSA Handbook, <http://fsahandbook.info/FSA/html/handbook/> (last visited Jan. 30, 2009).

38. Financial Services and Markets Act 2000, c.8, Part I, § 2 (functions), §§ 3–6 (Objectives) (U.K.).

39. FSA, Who Are We, <http://www.fsa.gov.uk/Pages/About/Who/index.shtml> (last

III. COMPARATIVE APPROACHES TO DISPUTE RESOLUTION

The approaches for resolving financial services industry disputes within the United Kingdom and the United States differ greatly. In the wake of the Securities and Exchange Acts of the 1930s, the U.S. dispute resolution mechanism developed from litigation to binding arbitration. Ironically, modern U.S. arbitration—with its increased formalities and legalities—has come to more closely resemble litigation. Conversely, the United Kingdom employs an informal approach, lacking many of the constricting legalities found in the U.S. system.

*A. United States -- Binding Arbitration and the Financial Industry
Regulatory Authority*

Broker-dealers, acting as personal advisors, salespersons and purchasers of securities, engage in significant levels of direct interaction with the investing public and each other. Due to the frequency, highly personal nature, and element of investor risk involved, these interactions tend to give rise to many private complaints. Until the late 1980s, defrauded or otherwise injured investors were able to sue their broker-dealers in U.S. courts for damages.⁴⁰ Following several Supreme Court decisions enforcing arbitration agreements, arbitration clauses are now standard in most customer agreements, compelling parties to arbitrate rather than litigate.

1. History of securities arbitration

Through the late 1980s, U.S. investors could and often did sue their broker-dealers when high-risk investments produced disappointing results. This threat of private enforcement encouraged broker-dealers to self-police their activities. Some statutory provisions and SEC regulations provided explicit or implied private causes of action for investors.⁴¹ Provisions in both the Securities Act⁴²

visited Jan. 30, 2008). The FSA is a company limited by guarantee, an alternative type of corporation used primarily for non-profit organizations that require legal personality. Helm & Babikian, *supra* note 28, at 851; FSA, *supra* note 39.

40. See COFFEE, JR. ET AL., *supra* note 8, at 1139.

41. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 729–30 (1975) (discussing history and overwhelming consensus that an implied private right of action exists under § 10(b) of the Exchange Act and Rule 10b-5).

42. Securities Act of 1933 § 14.

and the Exchange Act⁴³ state “[a]ny condition, stipulation, or provision binding any person . . . to waive compliance with any provision of [this statute or any rule or regulations thereunder] shall be void.”⁴⁴ In 1953, the United States Supreme Court in *Wilko v. Swan*⁴⁵ held that an agreement to arbitrate was a “stipulation” and that “the right to select the judicial forum is the kind of ‘provision’ that cannot be waived” under the Securities Act.⁴⁶ Therefore, an arbitration clause did not bar the security buyer from seeking a judicial remedy.⁴⁷

However, the *Wilko* decision was “not easily reconcilable” with the legislative policy underlying the Federal Arbitration Act (FAA),⁴⁸ which supported the enforcement of arbitration agreements as a means of securing a “prompt, economical and adequate solution of controversies.”⁴⁹ The Supreme Court confronted this policy conflict in 1974 when it held in *Scherk v. Alberto-Culver Co.* that a pre-dispute arbitration agreement was enforceable in a suit alleging a violation of §10(b) of the Exchange Act.⁵⁰ The Court held that the purchaser-seller agreement to arbitrate any dispute arising out of the transaction was valid and enforceable by the federal courts pursuant to the FAA.⁵¹ The Court distinguished *Scherk* from *Wilko* on its facts as *Scherk* dealt with an international contract where an opposing party might utilize foreign courts to “block or hinder access to the American court of the purchaser’s choice.”⁵²

In 1977, the SEC helped establish the Securities Industry Conference on Arbitration (SICA)—composed of various representatives of SROs, the Securities Industry Association (SIA), and the public—in order to suggest and promulgate improvements for investor dispute resolution by means of arbitration.⁵³ SICA

43. Securities and Exchange Act of 1934 § 29(a).

44. Securities Act of 1933 § 14.

45. 346 U.S. 427 (1953).

46. *Id.* at 434–35; *see also* *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 512 (1974) (quoting *Wilko*).

47. *Wilko*, 346 U.S. at 434–38; *see also* *Scherk*, 417 U.S. at 510 (describing the *Wilko* Court’s holding).

48. *Wilko*, 346 U.S. at 438; *see also* The Federal Arbitration Act (FAA) 9 U.S.C. §§ 1–14 (2008).

49. *Wilko*, 346 U.S. at 438.

50. 417 U.S. at 509 (alleging fraudulent representations concerning the status of trademark rights).

51. *Id.* at 519–20.

52. *Id.* at 518.

53. Constantine N. Katsoris, *Roadmap to Securities ADR*, 11 FORDHAM J. CORP. &

developed a uniform code of arbitration procedures adopted by participating SROs in 1979 and 1980.⁵⁴ Following the efforts of SICA and the SROs, courts began to change their perception of arbitration as a fair and efficient option for investor disputes. In the late 1980s, a series of Supreme Court decisions favored the enforcement of arbitration clauses in areas previously considered non-arbitrable because of statutory interpretation.⁵⁵ These decisions interpreted the FAA as a congressional mandate against judicial hostility to arbitration agreements.⁵⁶

In 1987, *Shearson/American Express Inc. et al. v. McMahon et al.* addressed the arbitrability of financial services disputes.⁵⁷ The Supreme Court held that investors who had signed pre-dispute arbitration clauses could be compelled to arbitrate their Exchange Act claims arising from a domestic transaction, and that arbitration provides investors with adequate protection of their rights.⁵⁸ Moreover, in 1989, the Court overturned *Wilko* regarding the arbitrability of securities law disputes,⁵⁹ and enforced an agreement to arbitrate claims arising under the Securities Act in *Rodriguez de Quijas v. Shearson/American Express, Inc.*⁶⁰

Since then, broker-dealer firms have generally included pre-dispute arbitration clauses in their standard customer agreements, binding both sides to arbitrate disputes relating to or arising out of future business activities. The FAA and many similar statutes enacted by the states recognize these agreements as binding and provide for their enforcement.⁶¹ Unless circumstances suggest that the arbitration agreement was procured by fraud or that the firm has waived its right to arbitration, compulsory arbitration is required to resolve investor disputes.⁶² “Arbitrations are conducted in accordance with the Uniform Code of Arbitration as developed by

FIN. L. 413, 420–21 (2006).

54. *Id.* at 422.

55. *Rodriguez de Quijas v. Shearson/Am. Express Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985); *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614 (1985); *Sonatrach v. Distrigas Corp.*, 80 B.R. 606 (Bankr. D. Mass. 1987).

56. *McMahon*, 482 U.S. at 225 (quoting *Scherk*).

57. *Id.* at 220.

58. *See id.* at 233.

59. COFFEE, JR. ET AL., *supra* note 8, at 1139.

60. *Rodriguez de Quijas*, 490 U.S. at 477.

61. Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–14 (2008).

62. *See id.* § 2.

the Securities Industry Conference on Arbitration (SICA) and the rules of the sponsoring organization where the claim is filed.”⁶³

After *MacMahon*, the SEC sought to reform SICA arbitration procedures (and thereby those of the SROs), suggesting and approving rules that mandated evidentiary hearings and discovery processes, and required arbitrators to apply the law in reaching their decisions.⁶⁴ In justifying mandatory arbitration of customer complaints arising under the federal securities laws, the Supreme Court in *MacMahon* referenced the SEC’s “expansive power to ensure adequacy of the arbitration procedures employed by the SROs.”⁶⁵ The SEC, however, currently dedicates few resources to the oversight of securities arbitration, and as a result, self-interested SROs have revised the rules with little regulatory interference.⁶⁶ The most notable SRO revisions come from FINRA, which often proposes and adopts its own arbitration rules and introduces formalized procedures. These procedures are not embraced in the Uniform Rules, which are mainly derived from SEC recommendations and promulgated by the SICA.⁶⁷

2. Current system of securities arbitration

FINRA administers “the largest [U.S.] dispute resolution forum for investors and registered firms.”⁶⁸ FINRA Dispute Resolution (FINRADR) provides both mediation and arbitration, and suggests, but does not require, that an aggrieved investor first attempt to resolve the conflict with the brokerage firm’s management.⁶⁹ The FINRA Code of Arbitration Procedures for Customer Disputes (FINRA Code) applies to any dispute between a customer and a

63. FINRA Arbitration Procedures, <http://www.finra.org/ArbitrationMediation/Parties/Overview/ArbitrationProcedures/index.htm> (last visited Jan. 30, 2009).

64. Barbara Black & Jill I. Gross, *Making It Up As They Go Along: The Role of Law in Securities Arbitration*, 23 CARDOZO L. REV. 991, 1000 (2002).

65. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 233 (1987); see also Jill I. Gross, *Securities Mediation, Dispute Resolution for the Individual Investor*, 21 OH. S. J. D. R. 329, 346 (2006) (quoting *McMahon*).

66. Margaret Jacobs, *SEC Faces Criticism for Role in the Oversight of Arbitration*, WALL ST. J., Nov. 15, 1995, at C1.

67. See Katsoris, *supra* note 53, at 466. An SRO may propose a new rule by sending a § 19(b) (of the Exchange Act) filing to the SEC.

68. FINRA, About the Financial Industry Regulatory Authority, <http://www.finra.org/AboutFINRA/index.htm> (last visited Jan. 30, 2009).

69. FINRA, Tour of the Dispute Resolution Process, <http://www.finra.org/ArbitrationMediation/Parties/Overview/OverviewOfDisputeResolutionProcess/index.htm> (last visited Jan. 30, 2009) [*hereinafter* FINRADR Tour].

“member” that is submitted to arbitration.⁷⁰ Members include any broker, dealer, or associated person admitted to NASD (now FINRA).⁷¹ Under the FINRA Code, customers and members decide whether to arbitrate when a dispute arises.⁷² Brokerage customers are only compelled to arbitrate claims against their financial service providers if they are subject to a pre-dispute arbitration clause.⁷³ Under FINRA rules, members of FINRA are always bound to arbitration if their customer so chooses.⁷⁴

An investor seeking to recover money or securities will most likely be bound to pursue a remedy through FINRADR, as FINRA exercises jurisdiction over the vast majority of brokerage firms.⁷⁵ Likewise, FINRADR handles virtually all securities arbitration claims filed by its customers, including “unsuitable recommendations, breach of fiduciary duty, fraud, churning, and failure to supervise.”⁷⁶ Arbitration claims filed with FINRA are primarily resolved through negotiation or mediation settlements⁷⁷ that compensate the claimant more than seventy percent of the time.⁷⁸ FINRADR charges claimants a non-refundable filing fee for handling the arbitration in addition to a hearing session deposit. It also recommends that investors engage an attorney for mediation and arbitration, since in most cases the brokerage firm will have retained counsel.⁷⁹

Once an investor is compelled to arbitrate a claim, the modern process is akin to litigation with only slight variation. Arbitration, despite being touted as a “quick, fair, and relatively inexpensive” alternative to litigation, employs similarly formal procedures that increase costs and cause delays.⁸⁰ First, the complainant files an initial

70. FINRA Code of Arbitration Procedure for Customer Disputes, R. 12101(a) (2008), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=6077 (last visited Jan. 30, 2009) [hereinafter FINRA Code].

71. *Id.* R. 12100(o).

72. *Id.* R. 12201.

73. *Id.* R. 12200.

74. *Id.* R. 12101(a).

75. FINRA Investor Brochure, *supra* note 20, at 3. However, FINRA does not govern investment advisers, transfer agents, mutual funds, and public companies, which are subject to SEC and state securities regulators.

76. FINRA Dispute Resolution Fact Sheet, <http://www.finra.org/ArbitrationMediation/AboutFINRADR/Overview/FactSheet/index.htm> (last visited Jan. 30, 2009) [hereinafter FINRADR Fact Sheet].

77. FINRADR Tour, *supra* note 69.

78. FINRA Investor Brochure, *supra* note 20, at 11.

79. *Id.*

80. The Arbitrator’s Manual 1 (2007) <http://www.finra.org/web/groups/>

statement of claim with the Director of Dispute Resolution, “specifying the relevant facts and remedies requested.”⁸¹ The respondent then serves an answer including relevant facts, available defenses and any counterclaims.⁸² A panel, usually consisting of three arbitrators, is appointed to consider the initial statement of claim and all responsive pleadings.⁸³ All panel members are chosen from a FINRA-maintained roster comprised of public, non-public, and eligible chairperson arbitrators.⁸⁴ In customer disputes, chairpersons must be public arbitrators with special qualifications.⁸⁵ Similar to litigation, the parties are subject to a discovery process⁸⁶ including depositions,⁸⁷ motion hearings on disputed collateral matters,⁸⁸ and possible sanctions for failure to comply with any of the FINRA Code requirements.⁸⁹ The parties produce witnesses and the arbitrators have the authority to issue subpoenas where necessary to compel production of documents or persons to appear.⁹⁰ Except in certain circumstances, parties present their evidence in the form of testimony and documents in a litigation-like hearing before the arbitral panel.⁹¹ Unlike litigation, however, evidence is admissible notwithstanding state or federal evidence rules,⁹² although witnesses must testify under oath or affirmation.⁹³ If the parties proceed to an award, the FINRA Code requires that a majority of arbitrators agree on rulings and determinations,⁹⁴ but does not require written opinions.⁹⁵ “Awards are subject to judicial review on the merits” only for

ArbitrationMediation/@arbmed/@neutrl/documents/ArbMed/P009668.pdf (last visited Jan. 30, 2009).

81. FINRA Code, *supra* note 70, R. 12302.

82. *Id.* R. 12303.

83. *Id.* R. 123401. The panel for claims of \$25,000 or less consists of one arbitrator. For claims of more than \$50,000 the panel may consist of three arbitrators unless otherwise requested by both parties. For claims between \$25,000 and \$50,000, any party may request three arbitrators instead of one.

84. *Id.* R. 12400(b).

85. *Id.* R. 12400(c).

86. *Id.* R. 12505.

87. *Id.* R. 12510.

88. *Id.* R. 12503.

89. *Id.* R. 8310.

90. *Id.* R. 12512.

91. *See id.* pts. V & VI.

92. *Id.* R. 12604.

93. *Id.* R. 12605.

94. *Id.* R. 12414.

95. *Id.* R.12904(f) (“The award may contain a rationale underlying the award.”).

“manifest disregard” of the law and “do not serve as precedent.”⁹⁶ This limited judicial review and absence of a required reasoned opinion allows arbitrators to base awards in favor of claimants on “general equity grounds.”⁹⁷

B. United Kingdom -- Optional Ombudsman and the Financial Ombudsman Service

In the United Kingdom, the dispute resolution mechanism differs vastly from that of the United States. In addition to creating the newly consolidated authority of the FSA, FSMA 2000 replaced all previous dispute resolution schemes operating in the financial services, banking, and insurance sectors with the Financial Ombudsman Service (FOS). The FOS is a single, compulsory ombudsman scheme for the resolution of disputes between members of the public and “authorized persons.”⁹⁸

Because U.S. courts must consider both the Securities Act and the Exchange Act with respect to arbitration, they encounter issues of conflicting legislative policy. FSMA 2000 sidestepped these issues by providing for its own specially tailored dispute resolution scheme. Established by Part XVI of FSMA 2000, the ombudsman scheme aims to provide quick and informal resolution to financial disputes. It is free to complainants and does not require legal representation.⁹⁹ This scheme is available prior to arbitration or litigation, and thus causes no friction with the U.K.’s Arbitration Act 1996, which provides as a general principle that “parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.”¹⁰⁰

In the instance where a customer brings the claim to the FOS, the ultimate decision is binding to authorized persons or firms subject to compulsory jurisdiction.¹⁰¹ While the FSA established the

96. Black & Gross, *supra* note 64, at 992.

97. Katsoris, *supra* note 53, at 459–60.

98. Part XVI of the Financial Services and Markets Act 2000 describes the Ombudsman Scheme. See Explanatory Notes to FSMA, <http://www.opsi.gov.uk/acts/en2000/2000en08.htm> (last visited Jan. 30, 2008) [hereinafter FSMA Explanatory Notes]. Authorized persons include a person who has permission under Part IV to carry on one or more regulated activities. If a firm has permission, it is authorized to carry on the regulated activities concerned in the name of the firm. Financial Services and Markets Act 2000 §§ 31–32.

99. Financial Services and Markets Act 2000 § 225(1).

100. Arbitration Act 1996, ch. 23, pt. I, § 1.

101. FSMA 2000 § 226 requires authorized firms to submit to the jurisdiction of the scheme. FSMA Explanatory Notes, *supra* note 98.

requirements of FOS compulsory jurisdiction, the FOS specifies voluntary jurisdiction subject to FSA approval.¹⁰² This procedure allows firms to contractually agree to resolve disputes through the ombudsman scheme, even if they are not “authorized firms” or if the disputed activities are beyond the scope of the compulsory jurisdiction.¹⁰³ However, the firm’s activities must be subject, or potentially subject, to the compulsory jurisdiction rules.¹⁰⁴

The FOS dispute resolution system is designed to be free and accessible to complainants.¹⁰⁵ Accordingly, it funds itself through levies and case fees required of member businesses.¹⁰⁶ The levy applies only to regulated businesses and varies with the size of the business. Businesses subject to complaints are obligated to pay an “individual case fee” when a complaint becomes “chargeable.”¹⁰⁷ Because businesses fund the FOS, investors do not pay a fee for the resolution of their claims.

However, investors face several jurisdictional hurdles. The FOS is available only to investors who have been unable to resolve their complaint after exhausting the internal complaint-handling mechanism of their lender, bank, insurer, adviser, or investment firm.¹⁰⁸ To ensure that customers meet this requirement, firms must have complaint-handling procedures that comply with minimum standards specified in the FSA Handbook.¹⁰⁹ These procedures require the firm to issue a “final response” to the investor, either accepting or rejecting the complaint, potentially offering some form

102. FSMA 2000 § 227 sets out voluntary jurisdiction. For further discussion, see also Rhoda James & Phillip Morris, *The New Financial Ombudsman Service in the United Kingdom: Has the Second Generation Got it Right?*, in INTERNATIONAL PERSPECTIVES ON CONSUMERS’ ACCESS TO JUSTICE, 182 (Charles E.F. Rickett & Thomas G.W. Telfer eds., Cambridge University Press 2003).

103. Financial Services and Markets Act 2000 § 227.

104. *Id.* § 227(4).

105. Rhoda James, *The New Dispute Resolution System in the U.K. Financial Services Industry*, J. INT’L FIN MKT L.F.M 2002, 4(6), 191, 191 (2002).

106. Financial Ombudsman Service, *A Quick Guide to... Funding and Case Fees*, http://www.financial-ombudsman.org.uk/publications/technical_notes/QG1.pdf (last visited Jan. 30, 2009) [hereinafter Guide to Funding].

107. *Id.* A case is ‘chargeable’ when it passes the initial stage of complaint review. Currently, businesses are only charged these fees for the third and subsequent complaints in a year. http://www.financial-ombudsman.org.uk/faq/answers/research_a5.html (last visited Jan. 30, 2009). It appears that firms under voluntary jurisdiction also pay individual case fees. *Id.*

108. James & Morris, *supra* note 102, at 177.

109. *Id.* The newly revised dispute handling rules are available online at <http://fsahandbook.info/FSA/html/handbook/DISP> (last visited Jan. 30, 2009).

of settlement or explanation, and notifying the customer of his rights if he is dissatisfied.¹¹⁰ Customers may not bring claims to the FOS unless they have received the “final response”¹¹¹ or, in the absence of a response, until eight weeks pass after filing the complaint.¹¹²

Consumers who receive an early “final response” from a firm or pass the full waiting period may face other “time bar” jurisdictional hurdles that must be satisfied before the FOS may consider the merits of a complaint.¹¹³ Time limits for referral of complaints to the FOS bar the consumer from addressing the ombudsman more than six months after the consumer receives the firm’s final response, or more than six years after the event from which the complaint arises, except in exceptional circumstances.¹¹⁴ For example, if the customer was unaware of the grounds for the complaint, the ombudsman may hear their case within three years after the investor became, or should reasonably have become, aware of those grounds.¹¹⁵

For customers whose complaints are within FOS jurisdiction, the FOS is an inexpensive alternative that is far less formal than litigation or arbitration. Once the FOS accepts a complaint, an investigation ensues. If the ombudsman believes that mediation may be more appropriate for resolving the complaint, he may initiate negotiation of a settlement between the parties at the earliest possible stage.¹¹⁶ If investigation seems necessary, the ombudsman gives both parties the opportunity to make written submissions. The parties then receive a provisional assessment setting out the ombudsman’s reasons and establishing a time limit within which the parties must respond.¹¹⁷ If either party objects to the provisional assessment within the time

110. See FSA Handbook, Glossary Definition of Final Response, <http://fsahandbook.info/FSA/glossary-html/handbook/Glossary/F?definition=G411> (last visited Jan. 30, 2009).

111. “Customers” include certain types of small businesses and charities as well. James, *supra* note 105.

112. FSA Handbook, *supra* note 37, at DISP 2.8.1 R; see also FSMA 2000 § 226 (setting the circumstances in which a complaint can be dealt with: namely, that the complainant meets the relevant eligibility criteria, set by the Authority, and has asked the ombudsman to consider the case). FSMA Explanatory Notes, *supra* note 98.

113. FINANCIAL OMBUDSMAN SERVICE ANNUAL REVIEW 2006/2007, at 44 (2007), available at <http://www.financial-ombudsman.org.uk/publications/ar07/index.html> (follow “annual review 2006/07 - PDF version [opens in new window]” hyperlink) [hereinafter Annual Review 2007].

114. FSA Handbook, *supra* note 37, at DISP 2.8.2 R8.

115. *Id.* at 2.8.2(2)(b).

116. *Id.* at 3.5.1 R.

117. *Id.* at 3.5.4.

limit, the ombudsman proceeds to determination.¹¹⁸ There is no hearing unless the ombudsman finds it necessary to determine the complaint.¹¹⁹ However, based on the requirements of Article 6 of the European Convention on Human Rights,¹²⁰ the FSA rules provide for a hearing in certain circumstances.¹²¹ To obtain a hearing, a party must make a written request expressing the issues it wishes to raise so that the ombudsman may consider whether the issues are material, whether a hearing should be held, and whether any hearing that takes place should be public or private.¹²²

After the final appeal stage, the ombudsman makes a ruling. A distinctive feature of the “ombudsman schemes is that decisions may be made on grounds of substantive fairness, which may in some cases override the legal rules.”¹²³ FSMA requires the FOS to consider complaints in reference to what is “fair and reasonable in all the circumstances of the case.”¹²⁴ In making decisions the FOS must take into account “the relevant law, regulations, regulators’ rules, guidance and standards, relevant codes of practice and, where appropriate, what he considers to have been good industry practice at the relevant time.”¹²⁵ The ombudsman must make a written statement of his reasons for the decision, and must require the claimant to accept or reject the decision by a specified date.¹²⁶

118. *Id.*

119. *Id.* at 3.5.5.

120. European Convention on Human Rights, art. 6, ¶ 1, *opened for signature* Nov. 4, 1950, Europ.T.S. No. 5. (“[I]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced *publicly*. . .”) (emphasis added).

121. See FSA Handbook, *supra* note 37, at DISP 3.5.6 R, 3.5.7 G (“In deciding whether there should be a hearing and, if so, whether it should be in public or private, the *Ombudsman* will have regard to the provisions of the European Convention on Human rights.”).

122. *Id.* at 3.5.6 R.

123. James, *supra* note 105, at 192. The overriding criterion to be used in dispute resolution is for the ombudsman to do “what is, in his opinion, fair and reasonable in all the circumstances of the case.” Financial Services and Markets Act 2000, § 228(2); FSA Handbook, *supra* note 37, at DISP 3.8.1 R., 3.6.1 R.; see also Financial Services and Markets Act 2000, § 228(2); FSA Handbook, *supra* note 37, at DISP 3.6.2 G (“Section 228 of the Act sets the ‘fair and reasonable’ test for the Compulsory Jurisdiction and the Consumer Credit Jurisdiction and DISP 3.6.1 R extends it to the Voluntary Jurisdiction.”).

124. Financial Services and Markets Act 2000 § 228(2).

125. James, *supra* note 105, at 192; DISP. 3.8.1(2), 3.6.4.

126. See FSA Handbook, *supra* note 37, at DISP 3.6.6 R; *Bunney v. Burns Anderson PLC*, [2007] EWHC 1240 (Ch.), ¶ 11 (Eng.), available at <http://www.bailii.org/ew/cases/EWHC/Ch/2007/1240.html>.

Investors may choose not to accept any FOS decisions and may proceed to the courts if not satisfied.¹²⁷ However, if the investor accepts the ombudsman's decision, it is binding on both the customer and the business.¹²⁸ Firms must then abide by the ombudsman's decision and do not have the option of appeal.¹²⁹ Limited judicial review is available, but only with respect to the process leading up to the decision, and not to its substance.

If favorable to the complainant, the decision may be either a monetary award¹³⁰ or a direction.¹³¹ The ombudsman may not only award damages for actual and consequential financial loss, but may also grant compensation for pain and suffering, damage to reputation, distress, or inconvenience.¹³² However, aggregate damages are subject to a maximum limit of £100,000,¹³³ (\$147,643)¹³⁴ including any amount owed under a direction.¹³⁵ If the investor rejects a ruling that the firm treated the complaint fairly, he then must decide whether to drop the complaint, attempt to settle, or proceed with litigation or arbitration. If the customer accepts a favorable decision (that the firm treated the investor's complaint unfairly), the firm must promptly pay the award or comply with the direction.¹³⁶ Monetary awards and directions may be enforced through litigation¹³⁷ to the extent of the £100,000 monetary cap.¹³⁸

The FOS "aim[s] to give clear, jargon-free reasons for [their]

127. Vernon Everitt, Director, Retail Themes, FSA, Remarks at the British and Irish Ombudsman Association Conference: Regulators and the Ombudsman—The Critical Role of the Financial Ombudsman Service (Apr. 27, 2007) (transcript available at <http://www.bioa.org.uk/docs/RegulatorsOmbudsmanVernonEveritt.pdf>).

128. Annual Review 2007, *supra* note 113, at ii.

129. Compulsory Jurisdiction, FSMA Explanatory Notes, *supra* note 98.

130. Financial Services and Markets Act 2000 § 229(2).

131. *Id.* § 229(3). A direction is tantamount to an injunction.

132. FSA Handbook, *supra* note 37, at DISP 3.7.2 R.

133. *Id.* at 3.7.4 R. The Ombudsman may recommend that the firm pays the balance of an award of an amount more than the maximum, but it is not enforceable and therefore firms are unlikely to pay that amount. *See* *Bunney v. Burns Anderson PLC*, [2007] EWHC 1240 (Ch.), ¶ 11 (Eng.), *available at* <http://www.bailii.org/ew/cases/EWHC/Ch/2007/1240.html>.

134. As reported by xe.com on Nov. 21, 2008.

135. *See Bunney*, ¶ 68.

136. FSA Handbook, *supra* note 37, at DISP 3.7.12 R.

137. Financial Services and Markets Act 2000, Schedule 17, ¶ 16 (Money Awards), § 229(9) (Directions).

138. *See Bunney*, ¶ 68.

decisions” that the average customer can understand.¹³⁹ The scheme accumulates informal precedents, which improve consistency and predictability for firms. Decisions are then published in divisional case digests.¹⁴⁰ Because the ombudsman is not required to apply the law, but rather does what he considers fair and reasonable given the circumstances of the case, decisions rarely provide actual precedential value.¹⁴¹ These decisions, while available via the FOS website, do not disclose party identities.¹⁴²

IV. COMPARISON OF INVESTOR DISPUTE RESOLUTION MECHANISMS

Comparing both the framework and forum choices of investor dispute resolution mechanisms reveals some contrast between the United Kingdom’s FOS and the United States’ FINRA Arbitration. Where the framework of the FOS allows for a rather collegial proceeding, FINRA Arbitration amounts to quasi-litigation. Similarly, forum choice in the FOS allows for multiple avenues of relief, whereas FINRA Arbitration allows for only limited grounds of appeal.

A. Framework

Compared to FINRA Arbitration, the FOS seems almost quaint as the scheme is designed to be inquisitorial rather than adversarial. Eschewing strict procedural rules, the FOS embraces a highly informal approach, exemplified by the lack of formal hearings or face-to-face cross-examinations.¹⁴³ The ombudsman makes a decision based only on the prepared documents because in most cases there is no oral argument. The FOS asserts that because the ombudsmen “look at the facts of each complaint—not at how well people present their case . . . no one should need any special expertise or professional help in order to bring their complaint to [the FOS].”¹⁴⁴

139. Financial Ombudsman Service, Our Aims and Values, <http://www.financial-ombudsman.org.uk/about/aims.htm> (last visited Jan. 30, 2009).

140. James, *supra* note 105, at 193.

141. See *Bunney*, ¶ 52.

142. Opinions and case studies are published in the *Ombudsman News*, a regular newsletter published by FOS and available at <http://www.financial-ombudsman.org.uk/publications/ombudsman.htm> (last visited Jan. 30, 2009). Decisions use party names such as “AYZ Association” and “Firm CDE.”

143. Financial Ombudsman Service, *supra* note 139.

144. *Id.*

Conversely, FINRA strongly recommends legal representation for both mediation and arbitration. Brokerage firms in either system likely employ legal counsel to prepare their submissions. As a result, the FOS customer complainant may believe that he would be disadvantaged without professionally prepared documents, and therefore might hire legal counsel. Moreover, parties are responsible for their own costs,¹⁴⁵ unless the ombudsman uses his discretion to award costs to prevailing parties.¹⁴⁶ Thus, for many customers, the FOS is not actually cost-free, although it is less expensive than alternatives.

The difference in cost between the FOS and FINRA directly affects the jurisdictional hurdles that filter filed cases. Under the FOS system, despite potential legal costs, there is still no fee-based cost deterrent for consumers pursuing claims against firms. Therefore, the time-bar and complaint-exhaustion jurisdictional hurdles act as a filter.¹⁴⁷ Since FINRA complainants must pay an arbitration fee, a hearing deposit, and attorneys' fees,¹⁴⁸ cost-deterrence serves as a filter, making strict jurisdictional prerequisites for arbitration unnecessary. Consequently, the arbitration may proceed to consideration on the merits subject only to a six-year time limit and FINRA's general regulatory jurisdiction.¹⁴⁹

With respect to the value of the award, the FOS maximum is £100,000. The rationale is that disputes involving larger sums warrant the cost of legal representation and those claims would proceed to litigation in the absence of the ombudsman.¹⁵⁰ FINRA Arbitration has no statutory cap on the value of awards, but incorporates a small-claims procedure, by which it diverts claims for \$25,000 or less to a Simplified Arbitration Procedure. Unless the customer requests a hearing, such claims are decided solely on the

145. See FSA Handbook, *supra* note 37, at DISP 3.7.10.

146. *Id.* at 3.7.1 R.

147. See Financial Ombudsman Service, Annual Review 1006/2007, How We Dealt with the Complaints, <http://www.financial-ombudsman.org.uk/publications/ar07/dealt.html> (last visited Jan. 30, 2009).

148. FINRA Code, *supra* note 70, R. 12900(a) (Customer Fees when Customer is Claimant), R. 12902(a) (Hearing Session Fees).

149. *Id.* R. 12206 (Time Limits).

150. FSA Handbook, *supra* note 37, at DISP 3.7.4 R; *see id.* at 3.7.6 G. Whether this upper limit is appropriate is an area of dispute between consumers and industry. Lord Hunt's Review, Ch. 8, p. 69, http://www.thehuntreview.org.uk/updates/FOS_Report.pdf (last visited Jan. 30, 2009) (recommending further investigation and review to determine the probable effects of an increased limit).

parties' written submissions, much like the FOS.¹⁵¹

FINRA and FOS also differ in the manner in which they document opinions. While FINRA does not require written opinions, the ombudsman must provide a written statement of reasons.¹⁵² The substance of FINRA decisions is generally confidential. However, FINRADR publishes a summary of all awards and tracks award payments, permitting staff to initiate suspension proceedings against an industry party that fails to comply with an award.¹⁵³ However, because the FOS is not a public authority subject to the U.K Freedom of Information Act, it may publish decisions, but must omit party names.¹⁵⁴ Consequently, the FOS offers guidance to offending companies, but does not name them. Arguably, this may be disincentivize firms from initially settling disputes or from taking remedial measures because a poor record will not affect their reputation.¹⁵⁵ However, statistics indicate that the FOS overcomes this difficulty and is more effective than FINRA Arbitration.¹⁵⁶ Sixty-six percent of the cases submitted to FINRA in 2007, were resolved by mediation or direct settlement,¹⁵⁷ while the FOS resolved ninety-four percent of its cases by informal settlement.¹⁵⁸

151. The arbitrator may request a hearing or require a party to submit additional documentation. When an arbitrator is deciding the case without a hearing, parties may ask to submit additional documents. FINRA, How Is Arbitration Begun? <http://www.finra.org/ArbitrationMediation/Parties/Overview/ArbitrationProcedures/P009536> (last visited Jan. 30, 2009).

152. See FSA Handbook, *supra* note 37, at DISP 3.6.6 R.

153. FINRADR Fact Sheet, *supra* note 76.

154. Financial Ombudsman Service, Freedom Of Information And Data Protection, <http://www.financial-ombudsman.org.uk/about/foi.htm> (last visited Jan. 30, 2009). The U.K. Freedom of Information Act 2000 grants a general right of access to information held by public authorities. Freedom of Information Act 2000 (c. 36) pt. 1, ¶ 1.

155. ADRNOW, Financial Ombudsman Service, http://www.adrnw.org.uk/go/SubPage_33.html (last visited Jan. 30, 2009). In September 2007, the board of the FOS engaged Lord David Hunt to lead an independent review of the FOS and its relationship with external stakeholders. Financial Ombudsman Service, Openness and Accessibility, http://www.financial-ombudsman.org.uk/news/updates/openness_accessibility.html. Among Lord Hunt's potential uses for the results of his review is a company ranking based on complaints received or upheld, or both. Richard Dyson, Mail on Sunday (UK), *Message to Mr. Silk (deceased): A Clumsy Request to a Bereaved Daughter shows Ombudsman's Shortcomings but Change is on the Way*, (Apr. 11, 2007), 2007 WLNR 21848312.

156. FINRA, DISPUTE RESOLUTION STATISTICS, <http://www.finra.org/ArbitrationMediation/AboutFINRADR/Statistics/index.htm> (last visited Jan. 30, 2009).

157. *Id.*

158. Annual Review 2007, *supra* note 113, at 1.

B. Forum Choice -- Fairness

Both U.S. and U.K. customers can compel firms to submit to their respective dispute resolution mechanisms, but firms may preempt customers' choice through pre-dispute arbitration clauses only in the United States. Since brokers use these clauses and U.S. courts enforce them, arbitration is the norm in the United States.¹⁵⁹ In the United Kingdom, the FOS provides customers with an infeasible choice: if a regulated business will not settle the complaint initially, it cannot prevent the customer from invoking FOS jurisdiction through a contractual agreement.¹⁶⁰ Furthermore, U.K. investors have a foolproof option: the FOS decision is binding on the company, but not on the customer.¹⁶¹ Therefore, the customer may pursue litigation or arbitration if he is dissatisfied with the outcome.¹⁶²

Although U.K. firms cannot compel customers to relinquish their statutory right to resolve disputes through the ombudsman, FOS jurisdiction encourages businesses to avoid resorting to its services.¹⁶³ As established by the Complaints-Handling Rules of the FOS, each regulated business must follow a set response to the initial customer complaint geared towards the earliest possible resolution.¹⁶⁴ Many companies opt to include arbitration or exclusive jurisdiction clauses in their contracts, but such agreements only take effect if the customer chooses to not use the ombudsman scheme or rejects an unsatisfactory award, or if the complaint fails on jurisdictional or substantive grounds.¹⁶⁵ Even then, the arbitration clause may be void under the U.K.'s Unfair Contract Terms in Consumer Contracts Regulations.¹⁶⁶ These laws bar enforcement of unfair contract terms that the consumer did not negotiate, including arbitration clauses placed in standard customer agreements by brokerage firms. These clauses are widely upheld in

159. COFFEE, JR. ET AL., *supra* note 8, at 1139.

160. ADRNOW, *supra* note 155.

161. *Id.*

162. *Id.*

163. Firms that are subject to the compulsory or voluntary jurisdiction of the FOS are bound by the consumer's decision to pursue a complaint with the Ombudsman. *See supra* notes 102-03.

164. *See* FSA Handbook, *supra* note 37, at DISP 1.

165. *Id.*

166. *Id.*; *see also* The Unfair Terms in Consumer Contracts Regulations 1999, S.I. 1999, No. 2083 (UK).

the United States, where “a customer-broker arbitration clause is not *per se* unconscionable as a contract of adhesion, nor is an agreement to arbitrate in accordance with SEC approved procedures ‘unconscionable as a matter of law.’”¹⁶⁷

With respect to fairness, the FOS and FINRA Arbitration produce disparate treatment of successful complainants, unsuccessful complainants, absolved firms, and censured firms. The FOS appears to be fair for complainants. Where the complaint is upheld in favor of the complainant (which happens in roughly one-third of the cases considered),¹⁶⁸ the FOS aims to restore the complainant to the position he would have been in had he not been wronged.¹⁶⁹ The FOS may award consequential damages in addition to damages for actual loss, or it may issue a direction. Furthermore, the ombudsman compelled to follow what is “fair and reasonable under all the circumstances,” not the law.¹⁷⁰ This discretionary standard reflects the FSA’s “emphasis on more principles-based regulation” that focuses “on the outcomes that matter, rather than processes and procedures.”¹⁷¹ When a successful FOS complainant accepts a satisfactory award, he receives the benefit of finality because the firm may not appeal. An unsuccessful or unsatisfied complainant may also benefit from favorable treatment under the ombudsman scheme as he may choose to proceed in a judicial or arbitral forum.¹⁷²

The ombudsman scheme does not offer similar benefits for firms. Absolved firms remain subject to the unsuccessful customer’s lawsuit or arbitration, while censured firms face binding awards not necessarily based in law. The £100,000 cap on damages may offer these firms some solace, as will the overall cost savings of the FOS

167. *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 285–86 (9th Cir. 1988) (internal citation omitted); *see also* COFFEE, JR. ET AL., *supra* note 8, at 1143.

168. In 34% of cases, the ombudsman found the business had not treated the customer’s complaint fairly. ANNUAL REVIEW 2007, *supra* note 113.

169. Everitt Speech, *supra* note 127.

170. *See supra* notes 123–25 and accompanying text.

171. Press Release, FSA, FSA’s New Investment Rules Come Into Force, (Nov. 1, 2007), <http://www.fsa.gov.uk/pages/Library/Communication/PR/2007/111.shtml> (quoting FSA Director of Retail Policy Dan Waters) (last visited Jan. 30, 2009).

172. The United Kingdom offers many options for an arbitral forum, including the International Chamber of Commerce and the City Disputes Panel (CDP). The CDP was established in 1994 in London to provide specialist arbitration panels, Cirielli, *supra* note 1, at 254, and provides “alternative dispute resolution services that are tailored to meet the needs of the financial services industry, in the UK and internationally.” CITY DISPUTES PANEL, ALTERNATIVE DISPUTE RESOLUTION, <http://www.citydisputespanel.org/pages/home.asp> (last visited Jan. 30, 2009).

system over alternative forums.

FINRA Arbitration offers complainants and firms a standard of fairness judicially approved in the United States, as discussed in Section IIA. Arbitrators issue decisions, including injunctive orders or damage awards, which are final and binding on both parties with only limited grounds for appeal.¹⁷³ For absolved firms and unsuccessful customers, this is the most important difference between FINRA Arbitration and the FOS. FINRA Arbitration offers finality benefits for either side when successful, permitting absolved firms to shield themselves from looming appeals. Unsuccessful complainants, however, are bound by decisions and may litigate their claims only under limited circumstances.¹⁷⁴ FINRA Arbitration typically generates decisions based on the law chosen by firms to govern their standard customer agreements. Unlike the FOS system, customers using the FINRA system may see a disadvantage in the arbitrator's lack of express authority to decide a dispute based on fairness in the circumstances. Because there is no requirement of a reasoned opinion and decisions are made by consensus, in some cases the arbitrators may issue awards that are motivated by principles of equity.

V. RECOMMENDATIONS FOR IMPROVEMENT

Following the *MacMahon* decision in the United States, changes to securities arbitration procedures have increasingly shifted the dispute resolution process closer to litigation.¹⁷⁵ This shift towards litigation-type techniques has made more accessible alternatives necessary. The development of substitutes for the alternative dispute resolution scheme in the United States may be evidence that the current first-and-only resort mechanism is not the most efficient solution.

Broker-dealers in the United States have long assumed that arbitration is the most attractive alternative to litigation because "it is devised as a prompt and inexpensive means of resolving complicated issues."¹⁷⁶ As that assumption no longer holds true, the United Kingdom's success with the financial ombudsman scheme suggests a

173. COFFEE, JR. ET AL., *supra* note 8, at 1143.

174. FINRA, Arbitration Process, <http://www.finra.org/ArbitrationMediation/Parties/ArbitrationProcess/index.htm> (last visited Jan. 30, 2009).

175. See Katsoris, *supra* note 53, at 423; Black & Gross, *supra* note 64, at 992.

176. FINRA, *supra* note 174.

more cost-effective solution. The FOS covers a much larger spectrum of complaints than FINRA, and does so at a relatively lower cost to firms and at no cost to *pro se* consumers.

The FINRA Mediation Program, which has developed as an extension of FINRA Arbitration,¹⁷⁷ most closely mirrors the FOS scheme and offers an attractive alternative to arbitration in the United States. Parties to FINRA dispute resolution may agree to mediation at any point in the process. FINRA mediation's overall settlement rate of investment disputes exceeds eighty percent.¹⁷⁸ With an emphasis on mediation, the U.S. system may begin to approximate the U.K. ombudsman system, at least with respect to disputes involving lesser sums.

Mediation is a natural first step in dispute resolution, offering an informal, voluntary approach under which a mediator facilitates negotiations between parties.¹⁷⁹ The mediator does not impose the solution, but rather "helps make it possible for the parties to craft and accept the solution themselves, swiftly and inexpensively."¹⁸⁰ The agreement reached is binding on the parties only if both sides accept it. The parties may lose the benefits of finality if they reject an agreement, but if parties accept an agreement, the result will likely be net positive. The mediator's objective is to help the parties arrive at a mutually acceptable resolution, and therefore, a positive, cost-effective result is likely.¹⁸¹

VI. CONCLUSION

The financial dispute resolution schemes available in the United States and United Kingdom provide differing approaches deriving from their distinct statutory, regulatory, and judicial histories. As cross-border securities offerings and global brokerage firms complexify and intertwine international securities markets, customer-

177. FINRA Investor Brochure, *supra* note 20, at 3.

178. *Id.* at 11.

179. *Id.* at 10.

180. *Id.*

181. Of the 111,673 disputes FOS resolved in the April 2006-March 2007 financial year, 104,831 cases were resolved by mediation, recommended settlements and adjudications, while only 6,842 cases were resolved by an ombudsman making a formal decision at the final appeal stage of the dispute resolution process. ANNUAL REVIEW 2007, *supra* note 113. Of the 5,000 cases resolved by FINRADR in 2007, 3,291 were resolved by mediation or direct settlement and only 1,048 were decided by arbitrators. FINRA, Dispute Resolution Statistics, <http://www.finra.org/ArbitrationMediation/FINRADisputeResolution/Statistics/index.htm> (last visited Jan. 30, 2009).

broker disputes will become more frequent. In this environment, an emphasis on mediation-based resolution in the United States would provide a low-cost, less formal alternative to litigation, similar to that enjoyed under the FOS in the United Kingdom.